



## YES to Our 6<sup>th</sup> Amendment Right to Counsel!

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### ACLU of Utah Recommendations for State- & County-Level Reforms to Our Flawed Public Defense System

In August 2011, the ACLU of Utah published “Failing Gideon: Utah’s Flawed County-By-County Public Defense System.” This report revealed the extent to which Utah’s system of providing legal counsel to indigent defendants is failing to fulfill the promises of the 6<sup>th</sup> Amendment to the U.S. Constitution.

**This fall, to acknowledge the fourth anniversary of *Failing Gideon’s* release, the ACLU launched “YES ON SIX,” an integrated-advocacy campaign to further highlight and educate the public about the need to strengthen our 6<sup>th</sup> Amendment protections and finally remedy the problems detailed in the ACLU report.**

We anticipate the release of an additional report authored by the Sixth Amendment Center on Utah’s system of indigent defense, before the end of 2015, further describing the persistent unconstitutionality of Utah’s indigent defense “system”. To complement any specific recommendations for legislative remedies that report may contain, the ACLU of Utah has drafted the attached proposed framework.

The proposal details substantive changes, at the state and county levels, necessary to bring trial-level indigent defense delivery in the state’s 29 counties into compliance with established law, national standards, and the U.S. Constitution.

This proposed framework and its related recommendations are guided by the ABA’s [Ten Principles of a Public Defense Delivery System](#), which articulate current best practices for the provision of legal counsel for indigent defendants. These long-established and accepted principles serve as critical benchmarks nationwide in determining whether a state indigent defense system is likely to pass constitutional muster, and thus should guide any and all reforms undertaken by the state of Utah. The Ten Principles also served as a key reference point for the ACLU of Utah in its investigation of Utah’s indigent defense system and the resulting [August 2011 report](#).

In addition to tracking closely the ABA’s Ten Principles, this proposed framework reflects the ongoing work the ACLU has undertaken – through both litigation and legislation – to remedy broken indigent defense systems across the nation. This proposal draws on the expertise and experience of our affiliate and national colleagues who have participated actively in the reformation of the state-level systems in states from Michigan to Montana, New York to Idaho.

**Utah must resolve its pressing 6<sup>th</sup> Amendment crisis. We look forward to working with state and local policy makers and stakeholders until the promise of the 6<sup>th</sup> Amendment is fully realized.**



This outline provides detail of the substantive changes that are necessary to bring trial-level indigent defense delivery in the state's 29 counties into compliance with established law and national standards. These reforms are steeped in and guided by the ABA's [Ten Principles of a Public Defense Delivery System](#), which articulate current best practices within the field and serve as useful benchmarks in determining whether a particular indigent defense system is likely to pass constitutional muster. The *Ten Principles* also served as a key reference point for the ACLU of Utah in its investigation of Utah's indigent defense system and the resulting [August 2011 report](#). This outline seeks to strike an appropriate balance between the indigent defense responsibilities which must remain at the state level, and those services and needs which are better met out at the county or regional level.

For the sake of clarity, please note the following definitions, as these terms are used herein:

- **Public Defender's Office** – refers to all entities tasked with representing indigent criminal defendants, whether it is an institutional public defender office with salaried employees, or an attorney/law firm that has contracted with the county to provide indigent defense services.
- **Chief Public Defender** – refers to both the head public defender in an institutional public defender office, and/or the primary contractor charged with providing indigent defense services in the county in question.
- **Oversight Board** – refers to the five-person board of criminal justice professionals who would be charged with overseeing the administration of indigent defense services at the county or regional level. The ACLU contemplates either a county or region-based grouping of counties as the preferred indigent defense delivery system vehicles at the local level. Counties may determine that, based on factors such as number and type of criminal cases, distance between courthouses and towns within the county, attorney availability, and other efficiency and fairness concerns, a regional design and Oversight Board may satisfy the community's needs instead of a county-based design and Board.
- **State Public Defense Commission ("PDC")** – refers to a state entity that would be tasked with evaluating, monitoring and enforcing standards and practices related to the indigent defense system in Utah, including as it relates to qualification standards, training, data collection/reporting, and funding, among other things.
- **NOTE:** This proposal contemplates the PDC serving as the conduit for state funding. Any funds appropriated by the legislature would be turned over to the PDC for distribution. Oversight Boards would apply for funds from the PDC based on demonstrated need.

## I. INDEPENDENCE

### ***ABA PRINCIPLE ONE: The public defense function, including the selection, funding, and payment of defense counsel, is independent.***

- Each County, or region if that model would be more appropriate, should be required to establish a non-partisan, five-person oversight board to select a Public Defender (whether for a salaried position within an institutional public defender office, or on a contractual basis) and supervise the delivery of public defense services within the county or region (Oversight Board).
- The Oversight Board would be responsible for developing a strategic plan and budget/cost analysis for the implementation of the reforms necessary to bring the County's or region's system into compliance with the state's constitutional and statutory mandates. The Oversight Board would then be responsible for submitting the proposed plan and accompanying funding requests to the Utah Public Defense Commission (PDC) for approval.
- Further, the Oversight Board would be responsible for, among other things, hiring/contracting with the County's chief public defender; submitting annual reports to the PDC regarding workload data; maintaining appropriate staffing levels; and tracking the number of case investigations carried out over the course of the year, the number of requests for/use of expert testimony, the extent and nature of pre-trial motion practice, and case outcomes (including the number of diversions, guilty pleas, trial convictions, acquittals, and dismissals).
- The various boards of county commissioners should isolate themselves from control (and the appearance of control) of the Oversight Board by allowing the Board's members to be selected by nomination of two people by the applicable District Bar Association and two people by members of the Utah Association of Criminal Defense Lawyers (UACDL) residing in or near the County. The fifth board member should be a member of the general public and should be selected by the four other members. At least three of the five members should have experience in the field of criminal defense. However, no person who is, or has been during the past five years, either a prosecutor or law enforcement agent may have a seat on the Board. Moreover, no person who has been a judge or presided over an indigent defense case in the County in any capacity during the past 12 months may have a seat on the Board.
- Attorneys tasked with representing indigent defendants, whether as an employee of an institutional public defender office or pursuant to a contractual agreement, should be prohibited from practicing law outside of their public defense docket, except under defined and limited circumstances (for example, to wind up a former practice, or to represent oneself or a close family member).

- Flat –fee contracts where attorneys agree to represent a certain number of clients and/or cases, or some other configuration of services, for a set overall fee, are prohibited.

## II. PUBLIC DEFENDER/PRIVATE BAR PARTICIPATION

**ABA PRINCIPLE TWO: Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

- The Oversight board should identify and recommend local private attorneys and firms that would be appropriate for contracting for conflict and overload indigent defense services, as well as determine the terms of those contracts.
- No contract should be let based primarily on cost or cost-related criteria. Rather, the Oversight Board should use the applicant evaluation system (see Principle VI, below) that it develops for assessing Public Defender candidates, or a modified version of that system, for evaluating proposals from prospective conflict or overflow contractors. All contracts with attorneys or firms for conflict or overload indigent defense services should adhere to the [Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services](#) (1984), published by the National Legal Aid and Defender Association.
- Conflict and overflow contracts should include provisions expressly incorporating the requirements for effective representation described in this document, and expressly promising the resources necessary to meet those requirements, to each contractor.

## III. ELIGIBILITY SCREENING AND PROMPT APPOINTMENT OF COUNSEL

**ABA PRINCIPLE THREE: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

- The public defender's office should have enough attorneys available in the hours before and during first appearance calendars to ensure that all indigent defendants<sup>1</sup> have meaningful access to counsel *before* arraignment, bail-setting, and initial plea, as required by Utah law<sup>2</sup> such that they are represented by competent counsel, in person, at their initial appearance before the court.

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<sup>1</sup> To be clear, this refers to all indigent defendants charged with an offense that carries the possibility of confinement, incarceration, imprisonment, or detention, regardless of whether such penalty is actually imposed.

<sup>2</sup> An accused with a lawyer at first appearance is 2.5 times more likely to be released on her own recognizance, 4.5 times more likely to have bail significantly reduced, and likely to feel better treated by the justice system. Colbert, Paternoster, and Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1753 (2002).

- Eligibility screening should be conducted by the court confidentially. To the extent Utah law requires the court to determine eligibility, the screening procedure should be conducted by the court, and the court should enter all orders necessary to prevent the prosecutor from accessing and misusing any of the statements that an accused makes as part of the screening process. An accused should have a right to appeal the initial eligibility decision to the judge.
- The PDC should develop policies and training for court, sheriff, jail, and other law enforcement personnel to notify both a detainee and the public defender immediately upon commencement of detention by the law enforcement officer.

#### **IV. ADEQUATE TIME AND SPACE FOR CLIENT COMMUNICATIONS**

***ABA PRINCIPLE FOUR: Defense counsel is provided sufficient time and confidential space within which to meet with the client.***

- The public defender (whether institutional or by contract) should be provided with a secure physical plant, either inside or adjacent to the county courthouse, which is equivalent to that used by the Prosecuting Attorney's office. In any event, workspaces within the public defender's office should be equivalent to the Prosecuting Attorney's office in size, furnishings, and the hardware, software, and services used for information and communications technology.
- An appropriate number of secure, confidential, and comfortable meeting spaces, adjacent to courtrooms within the county courthouse should be added, if they don't exist already. Attorney-client consultations between indigent accused and their appointed attorneys should not take place in open court or on hallway benches, where conversation is clearly not confidential and privileges are routinely placed in jeopardy.
- Given the volume of electronic records now often available during investigation and discovery, defendants held in detention while awaiting trial must have meaningful opportunities to review such electronic files while in jail. Otherwise, detainees' ability to assist their attorneys will be severely undermined and the public defender will be forced to spend additional time and expense reviewing those records without the benefit of their client's perspective.

#### **V. WORKLOAD STANDARDS**

***ABA PRINCIPLE FIVE: Defense counsel's workload is controlled to permit the rendering of quality representation.***

- As an initial step, the PDC should develop a weighted caseload assessment tool using one of the methodologies described in chapter 6 of the ABA's [Securing Reasonable Caseloads](#) (2011). The PDC should then use the results of the assessment to develop mandatory

workload standards for public defenders within six months of completion of the assessment. The assessment tool itself should be updated every five years. In the interim, the PDC should require public defenders to observe NAC<sup>3</sup> standard 13.12, setting maximum caseloads for public defenders at 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals.<sup>4</sup> These should be considered the absolute maximum allowable caseloads, with preference for substantially lower, until state-specific standards can be determined.

- The workload standards developed by the PDC should be reviewed at least once every 18 months to ensure the appropriateness of the standards in light of any changes in relevant circumstances.
- The PDC should require the Oversight Boards to establish written policies mandating that all public defense attorneys submit a workload report form to their direct supervisors each month, reporting their current workload level and indicating either that they (1) need new cases, (2) could accept new cases, (3) can take on new cases only in an emergency, or (4) cannot take any new assignments.
- The PDC should require the Oversight Boards to establish written policies mandating that all public defense attorneys both (1) refuse new cases and (2) promptly report to their direct supervisor, in writing, if their individual workload has exceeded the maximum set out in the workload standards. The PDC should develop a standard form for public defense attorneys to use in order to refuse new cases and to provide notice to supervisors.
- The Oversight Boards should establish a procedure for identifying the point at which so many public defenders within the county have exceeded their maximum workload that the office as a whole has reached its maximum workload capacity, at which time the chief Public Defender should be required to both (1) file a motion, with the Administrative District Judge for the appropriate Judicial District, requesting the court to stop appointing attorneys from the public defender's office to new cases and (2) alert conflict or overload counsel and the PDC, in writing.
- The Oversight Boards should establish personnel policies for the public defender's office that ensure that all employees are protected from adverse employment action in retaliation for reporting excess workloads or refusing to accept new cases for ethical or excess workload reasons. The PDC also should make clear that such retaliation will not be tolerated.
- Each public defense attorney and paralegal should be required to keep contemporaneous time records, in units no greater than .25 of an hour, describing the work done on each

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<sup>3</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *The Defense* (1973).

<sup>4</sup> Also see note 19 to the official commentary to ABA *Ten Principles*, stating that an indigent defense program should "under no circumstances exceed" the NAC caseload limits.

case the attorney or paralegal handles. The Oversight Board should ensure that the public defender's office has a timekeeping database that is able to make aggregate time-record reports for both pending and closed cases. The PDC should ensure that each county has the resources necessary to provide comprehensive training to all public defenders and paralegals on the use and completion of time records.

## **VI. COMPETENCE AND TRAINING**

### ***ABA PRINCIPLE SIX: Defense counsel's ability, training, and experience match the complexity of the case.***

- The PDC should require all Oversight Boards to develop an applicant evaluation system to use when evaluating candidates for Public Defender. The system would be subject to PDC approval, and should incorporate methods for measuring the management, administrative, litigation, and specialized practice abilities and experience of all applicants.
- The Oversight Board and the Chief Public Defender should cooperate to develop an applicant evaluation system to use when hiring professional and paraprofessional support staff for the public defender's office. The system should include additional modules for use when hiring for supervisory positions and for positions primarily focused on specialized practice areas such as juvenile and capital cases.
- The Oversight Board should establish at least two comprehensive orientation programs each calendar year for all new employees within the county's public defender office—one for recently-admitted attorneys and one for lateral hires. Any attorney who has never handled a criminal case should not be assigned to represent a defendant until they have completed the orientation.
- Each Oversight Board should seek funding from the PDC to ensure that the individual public defense attorneys within the county have the resources to take advantage of national training opportunities, focused on public defense.<sup>5</sup>
- The Oversight Board, in consultation with the PDC and the Chief Public Defender, should develop written performance guidelines and a performance-based evaluation system for all public defender office employees. Supervisors should be formally tasked, as part of their job descriptions, with implementing the evaluation system and should be given a maximum workload reduction to account for their evaluation and supervision duties.
- The Oversight Board, in consultation with the Chief Public Defender, should hire a Training Coordinator for the office (part-time or full-time, depending on the circumstances). With the advice of the Oversight Board and Chief PD, the Training Coordinator should conduct an initial training needs assessment and develop a written training plan for the office,

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<sup>5</sup> Examples include the Southern Public Defender Training Center's 101 and 201 programs for public defenders.

which should be updated annually after the coordinator conducts a training needs re-assessment each year.<sup>6</sup> The training plan should always include additional training for attorneys handling specialized practice areas such as juvenile, capital, civil commitment, and parental termination cases.

## **VII. VERTICAL REPRESENTATION**

***ABA Principle Seven: The same attorney continuously represents the client until completion of the case.***

- The Oversight Board should establish a written vertical representation policy for the public defender's office, which should require that the same attorney continuously represent and personally appear at every court appearance throughout the pendency of each case. The policy should include procedures for transitioning to new counsel in the event of resignation or termination of an attorney, and for emergency circumstances, such as unexpected illness.

## **VIII. FUNDING/RESOURCE PARITY**

***ABA PRINCIPLE EIGHT: There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.***

- In each county, the Chief Public Defender should receive the same compensation as the Prosecuting Attorney. The compensation and benefit structure for public defender staff should mirror the structure for staff in the Prosecuting Attorney's office.
- The state Public Defense Commission should establish procedures for receiving funds from the Legislature for the provision of indigent defense services, and for allocating sufficient funds to individual counties based on demonstrated need. As an initial matter, Oversight Boards would submit to the PDC an estimate of the cost to develop and implement a plan to bring the public defender's office in that county into compliance with federal and state law. Thereafter, the Oversight Board would be responsible for submitting annual budgets and corresponding grant requests to the PDC to ensure continued compliance.
- Within 180 days after receiving funds from the PDC, the County should bring its indigent defense system into compliance with national standards and federal/state law.
- The PDC should develop enforcement mechanisms that will allow the Counties to be held accountable for any funds received, and for any efforts made to bring their system into compliance.

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<sup>6</sup> National Legal Aid and Defender Association, *Defender Training & Development Standards* std. 1.2, 1.4, 2.1 (1997).



- The Oversight Board should conduct an annual review of the overall load on the criminal justice system in their county. To assess this load, the Oversight Board should consider factors, such as: arrest and prosecution rates in all categories; caseloads of magistrate and district court judges; total number of public defender and conflict/overflow contractor appointments; percentage of all criminal cases that result in public defender and conflict/overflow contractor appointments; public defenders' monthly workload reports; caseloads for non-criminal matters; trends observed by law enforcement, if any; and managerial factors. Following this annual assessment, the Oversight Board should recommend appropriate adjustments to the Chief Public Defender that would ensure continued parity with the Prosecuting Attorney's office. The Chief Public Defender should be required to issue a written statement, accessible to the public, explaining the reasons for any modification to or rejection of the Oversight Board's recommendation.
- The Oversight Board should recommend, and the public defender's office should adopt, a policy requiring that the public defender's office be allocated additional funds whenever a new magistrate or district judge position is created in the Judicial District encompassing the county in question. The Oversight Board should apply for such additional funding from the PDC.
- The public defender's office should be allocated enough funds to hire investigators, preferably with law enforcement training and experience, at a level recommended by the Oversight Board. The Oversight Board should apply for such funding from the PDC.
- The public defender's office should be allocated enough funds to hire social workers at a level necessary to provide comprehensive representation to their clients, as recommended by the Oversight Board. The Oversight Board should apply for such funding from the PDC.
- The public defender's office should be allocated enough funds to hire experts at a level necessary to provide comprehensive representation to their clients, as recommended by the Oversight Board. The Oversight Board should apply for such funding from the PDC.
- The Prosecuting Attorney should conduct a review, to be updated annually, of any opportunities to use prosecutorial discretion to prevent overburdening the county's criminal justice system resources (including the jail, the courts, and the public defender's office).
- The Oversight Board, in consultation with the Chief Public Defender, should develop written procedures that the public defender's office may use to request special litigation expenses for complex or difficult cases. Those procedures should not require court approval, and public defenders should be made aware of such procedures through regular training.
- The public defender's office should have adequate funds to ensure access to adequate trial presentation and other litigation software and technology. Upon request by the Chief

Public Defender, the Oversight Board should assess the adequacy of the public defender office's technology access, considering, among other factors, the technology access of other public defender offices in Utah and other states, and whether the office's access is equivalent to that available to the Prosecuting Attorney.

## **IX. CONTINUING LEGAL EDUCATION**

### ***ABA PRINCIPLE NINE: Defense counsel is provided with and required to attend continuing legal education.***

- The public defender Training Coordinator<sup>7</sup> should have adequate resources and experience to arrange for or present monthly in-house CLEs.
- The public defender's office should have adequate funds to ensure access to an adequate number of Utah State Bar and private CLE (and other non-CLE criminal justice training) hours. Adequate access to CLE and criminal justice training should be assessed by considering, among other factors, the access of other public defender offices in Utah and other states, and whether the office's access is equivalent to that available to the Prosecuting Attorney.

## **X. SUPERVISION AND EVALUATION**

### ***ABA PRINCIPLE TEN: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.***

- The Oversight Board, using criteria and guidelines developed by the PDC, along with national standards, should develop a "quality and efficiency evaluation" model, to be employed every three years, which would be used to evaluate the overall performance of the public defender's office over a given three-year period.
- Based on the quality and efficiency evaluation methodology, the Oversight Board should establish mandatory, annual data collection and reporting requirements, subject to PDC approval, for the public defender's office to implement immediately. At a minimum, these reporting provisions should require recording the following for each criminal case handled by the public defender's office: the outcome or resolution (including, by way of example, guilty plea, plea agreement, dismissed by the state, dismissed upon the accused's motion, amended, etc.); the time spent on the case by the attorney, investigator (if any), and social worker (if any), respectively; the amount of bail set and/or reduced; and the amount of litigation expenses.
- The quality and efficiency evaluation methodology also should include: the identity and experience level (in years of criminal defense experience) of each of the attorneys on staff

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<sup>7</sup> For more information about the training coordinator, see the recommendations under Principle VI, "Competence and Training," above.

at the public defender's office; the court case number of each case handled by public defenders; tallies of the total number of cases, both by crime charged and in several descriptive categories; the average time spent per case in each of several descriptive categories; a tally of the total number of cases for each outcome or resolution category; and the total cost and average per-case cost of litigation.

- Every three years, after completing the quality and efficiency evaluation, the Oversight Board should submit a report to the PDC, including any recommendations for additional funding.
- The Oversight Board, using criteria and guidelines developed by the PDC, along with national standards, and in consultation with the Chief Public Defender, should develop a performance evaluation model for the individual public defenders in the county. Such individual evaluations should be carried out by the Chief Public Defender on an annual basis. The results of such evaluations should be provided to the individual attorney, in writing, within two weeks of the evaluation. Such results should remain otherwise confidential.

**For additional information or explanation, please contact the ACLU of Utah.**

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