STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES

Adopted by the
INDIANA PUBLIC DEFENDER COMMISSION
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STANDARD A.

COUNTY PUBLIC DEFENDER BOARD. A county with a population over 12,000 persons shall establish a county public defender board. Counties subject to I.C. 33-40-7-1 shall establish a county public defender board pursuant to this statute. Counties excluded from I.C. 33-40-7-1 shall establish a county public defender board under I.C. 36-1-3 with powers and duties consistent with I.C. 33-40-7-6. A lawyer who provides representation to indigent persons shall not be appointed to a county public defender board.

Commentary

The purpose of the requirement of a county public defender board is to guarantee professional independence of the defense function and the integrity of the relationship between lawyer and client in accordance with the American Bar Association Standards for Criminal Justice, Chapter 5: Providing Defense Services, Standard 5-1.3 (3rd ed. 1990) [hereafter ABA Providing Defense Services].

Since the decision of the United States Supreme Court in Gideon v. Wainwright (1963), 372 U.S. 335, the issue of judicial control of indigent defense counsel has been addressed by a majority of states through the enactment of legislation creating indigent defense delivery systems that are independent of the

judiciary. Indiana, however, continues to rely heavily upon the inherent authority of the courts to provide these constitutionally mandated services and independence of the defense function has not been assured. This state is one of the few states where an accused may be represented by an at-will employee of the judge before whom the accused stands charged.

When counsel is not fully independent to act in the client's behalf, the deficiency is often perceived by the defendant, which fosters suspicion and distrust of the criminal justice system. ABA Providing Defense Services, Standard 5-1.3, provides as follows:

> (a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it 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. 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.
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> (b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of the boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

It is essential that attorneys, however chosen or appointed, be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relationship is fundamentally deficient because it fails to provide

counsel who have the same freedom of action as a lawyer whom the person with sufficient means can afford to retain. In Polk County v. Dodson (1981), 454 U.S. 312, 318-321, the court stated:

> [e]xcept for the source of payment, the relationship [of public defender and client] became identical to that existing between any other lawyer and client.
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> * * *
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> Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.

The importance of independence for lawyers who represent the poor has been stressed in a number of national standards relating to defense services, in addition to those of the ABA. The standards of the National Legal Aid and Defender Association state that "however attorneys are selected to represent qualified clients, they shall be as independent as any other private counsel who undertake the defense of the accused." National Legal Aid and Defender Association, Standards For Defense Services, III. 1. (1976). A similar view is expressed in the standards of the National Advisory Commission: "The method employed to select public defenders should ensure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person." National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.8 (1973).

The Commission believes that the goal of independence as stated in Standard 5-1.3 of ABA Providing Defense Services, can be substantially achieved by a county public defender board established under either I.C. 33-40-7-3 or I.C. 36-1-3. Under Indiana's home rule statutes, I.C. 36-1-3, counties excepted from I.C. 33-40-7-1 may adopt an ordinance identical to or similar to I.C. 33-40-7-3. The adoption of a county public defender board preserves local control, yet removes public defenders from the direct control and supervision of judges.

Counties with a population under 12,000 are not required to have a county public defender board because the Commission believes that the establishment of such a board in the state's least populous counties is unfeasible.

STANDARD B.

<u>COMPREHENSIVE PLAN</u>. The county public defender board shall adopt a comprehensive plan for indigent defense services either pursuant to or consistent with the provisions in I.C. 33-40-7-5 and shall submit the plan to the Indiana Public Defender Commission.

Commentary

This standard requires the board to prepare a document called a "comprehensive plan" that describes the method for providing legal services to indigent persons in all courts in the county. This standard does not require that the board adopt any particular type of delivery system or only one system for all courts in the county. The requirement that the plan be submitted to the Commission is provided by law. See I.C. 33-40-7-5.

In addition to meeting the specific requirements addressed by these standards, the comprehensive plan should include all procedures and policies related to indigent defense services in the county, including the structure and type of system to be used, staffing, compensation, the number and types of cases, and funding. A form for submitting the comprehensive plan was developed by the Commission to assist counties in meeting this requirement.

Indigent criminal defense services in Indiana are currently provided in three basic ways: (1) public defender programs; (2) contracts under I.C. 33-40-7-8 between courts and attorneys or law firms; and (3) assigned counsel systems in which private attorneys are appointed by judges on a case-by-case basis. Because Indiana relies heavily upon the inherent authority of the trials courts for providing indigent defense services at trial and on direct appeal, the majority of counties have a separate and different system for each court rather than a county-wide system for all courts. Nevertheless, most counties have developed a predominant system for providing indigent defense services.

STANDARD C.

<u>ELIGIBILITY FOR APPOINTMENT OF COUNSEL</u>. The comprehensive plan shall include the applicable rules and procedures for the determination of eligibility for the appointment of counsel at public expense, and shall contain the following provisions:

1. **<u>Substantial Hardship</u>. Counsel will be provided to all persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families.**

    a. **<u>Ability to Post Bail</u>. Counsel will not be denied to any person merely because the person is able to obtain pretrial release through a surety bond, property bond, or a cash deposit.**

    b. **<u>Employment</u>. Counsel will not be denied to any person merely because the person is employed.**

2. **<u>Determining Eligibility</u>. The determination of eligibility for the appointment of counsel will include an estimation as to the costs of retaining private counsel and a determination as to whether the person's disposable income and liquid assets are adequate to cover the costs of retaining private counsel.**

    a. **<u>Costs of Private Counsel</u>. The determination of the costs of retaining private counsel shall be based upon the nature of the criminal charge, the anticipated complexity of the defense, the estimated cost of presenting a legal defense, and the fees charged by lawyers in the community for providing defense services in similar cases.**

    b. **<u>Income</u>. Income shall include all salaries and wages after taxes, including interest, dividends, social security, unemployment compensation workers' compensation, pension, annuities, and contributions from other family members.**

    c. **<u>Expenses</u>. Expenses shall include, but are not limited to, all living expenses, business or farm expenses, including food, utilities, housing, child support and alimony obligations, education or employment expenses, child care, medical expenses, and transportation.**

    d. **<u>Disposable Income</u> . Disposable income shall be determined by assessing monthly income and subtracting monthly expenses.**

e. **<u>Liquid Assets</u>. Liquid assets shall include, but are not limited to, cash, savings and checking accounts, stocks, bonds, certificates of deposits, and equity in real and personal property exceeding the statutory allowances in I.C. 34-2-28-1 that can be readily converted to cash.**

3. **<u>Confidentiality</u>. If the accused is questioned about indigency in circumstances where the attorney-client privilege does not apply, the accused shall be advised that any statements made or information given may be used against him or her.**

Commentary

This standard embodies current Indiana law regarding the determination of indigency. The "substantial hardship" test for determining indigency was adopted by the Indiana Supreme Court in <u>Moore v. State</u> (1980), Ind., 401 N.E.2d 676, 678-679, and has been cited with approval in numerous subsequent appellate opinions:

> ... the defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.

In <u>Moore</u>, supra, at 679, the court also stated that " [t] he fact that the defendant was able to post a bond is not determinative of his non-indigency but is only a factor to be considered. " This principle was applied in <u>Graves v. State</u> (lst Dist. 1987), Ind.App., 503 N.E.2d 1258, and resulted in a reversal of the conviction because the defendant waived his right to counsel after the trial court denied a request for appointed counsel "merely because he posted bond".

Standard C. l.b., which prohibits the denial of appointed counsel merely because the person is employed, is based upon the opinion in <u>Redmond v. State</u> (1988), Ind., 518 N.E.2d 1095. The factors to be considered in determining eligibility in C.2 are consistent with <u>Moore v. State</u> (1980), 273 Ind. 3, 401 N.E.2d 676, 678-679:

> The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total

> financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of defendant's disposable income or other resources reasonably available to him after payment of fixed obligations.

Although the majority opinion in Moore v. State did not discuss "liquid assets," this was the subject of the dissenting opinion, which the Commission found persuasive. The dissenting justices pointed out that Moore had an equity in real estate as well as equipment in the well drilling business and opined that Moore should have been required to make use of these assets before the court was required to appoint counsel at public expense.

STANDARD D.

PAYMENT BY ACCUSED OF DEFENSE COSTS. The comprehensive plan shall contain the policies and procedures for ordering indigent persons in criminal cases to pay some or all of the costs of defense services under I.C. 33-40-3-6, and shall specify the procedures for determining the actual costs to the county for defense services provided to the accused.

Commentary

Indiana courts are authorized by I.C. 33-40-3-6 to order the accused to repay the cost of defense services provided at public expense. The use of this statute poses certain problems that should be addressed in the comprehensive plan. For example, I.C. 33-40-6(a) does not require that the accused be advised by the court at the time appointed counsel is requested that the accused may be required to repay the county the cost of defense services. The Commission believes in order to prevent subsequent due process challenges by the accused, such an advisement should be given by the court whenever it is contemplated that a repayment order may be issued.

In addition, I.C. 33-40-3-6(a)(1) does not limit "reasonable attorney's fees" to the amount actually paid to the attorney appointed to provide representation. The Commission believes that it would be inappropriate to assess attorney's fees in excess of those actually paid by the county. Thus, this standard requires that the comprehensive plan specify the procedures for determining the actual cost to the county for defense services provided to the accused.

STANDARD E.

<u>APPOINTMENT OF COUNSEL</u>. The comprehensive plan shall provide for the appointment of trial counsel meeting the following qualifications.

1. **<u>Murder</u>. To be eligible to serve as appointed counsel in a case where the accused is charged with murder, an attorney shall:**

   a. **be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience; and**

   b. **have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials that were Class C or Level 5 felonies or higher which were tried to completion.**

2. **<u>Level 1, 2, 3, or 4 Felony</u>. To be eligible to serve as appointed counsel in a case where the accused is charged with a Level 1, 2, 3, or 4 felony, an attorney shall:**

   a. **be an experienced and active trial practitioner with at least two (2) years of criminal litigation experience; and**

   b. **(1) have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion; or**

      (2) have prior experience as lead or co-counsel in at least one (1) felony jury trial which was tried to completion and have attended a trial practice course that has been approved by the Public Defender Commission for purposes of this Standard.

3. **<u>Level 5 Felony</u>. To be eligible to serve as appointed counsel in a case where the accused is charged with a Level 5 felony, an attorney shall:**

   a. **be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or**

   b. **have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.**

4. <u>Juvenile Delinquency</u>. To be eligible to serve as lead counsel in a case where a juvenile is alleged to be delinquent, counsel shall possess the following qualifications:

a. Where a child is charged with what would be murder if committed by an adult or in any situation where waiver to adult court is sought, an attorney shall be an experienced and active criminal or juvenile law practitioner with at least three (3) years of criminal or juvenile delinquency experience; and have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials that were Class C or Level 5 felonies or higher which were tried to completion, or prior experience as lead or co-counsel in no fewer than three (3) juvenile trials, that would have been Class C or Level 5 felonies or higher if committed by an adult, which were tried to completion.

b. Where a child is charged with what would be a Level 1, 2, 3, or 4 felony if committed by an adult, an attorney shall be an experienced and active criminal or juvenile law practitioner with at least two (2) years of criminal or juvenile delinquency experience; and have prior experience as lead or co-counsel in no fewer than two (2) felony jury trials which were tried to completion, or two (2) juvenile trials, that would have been felonies if committed by an adult, which were tried to completion; or at least one (1) felony jury trial which was tried to completion and have attended a trial practice course that has been approved by the Public Defender Commission for purposes of this Standard.

c. To be eligible to serve as lead counsel in other juvenile delinquency cases (Level 5 felonies and below, all misdemeanors, infractions and status cases), an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion in either adult or juvenile court; or, one (1) year of experience in juvenile delinquency proceedings; or experience in two comparable cases tried to completion in juvenile court under the supervision of an attorney

qualified to litigate such cases.

5. **<u>Children-In-Need Of Services/Termination Of Parental Rights.</u> To be eligible to serve as appointed counsel in CHINS/TPR cases, counsel shall possess the following qualifications:**

   a. **An attorney shall have completed prior to appointment at least six (6) hours of training in CHINS/TPR practice in a course approved by the Indiana Public Defender Commission.**

   b. **Any attorney with less than one (1) year experience in TPR Litigation or has not litigated at least one (1) TPR to completion must have co-counsel in any TPR matter proceeding to trial. Co-counsel shall have the required minimum experience and training.**

Commentary

Except for capital cases, any attorney licensed to practice law in Indiana may be appointed as counsel for the accused in any criminal case. This occasionally results in attorneys being appointed to serious felony cases who have never tried a case or who have no criminal defense experience. This standard sets minimum thresholds for the experience levels of appointed attorneys based upon the seriousness of the offense.

STANDARD F.

<u>APPOINTMENT OF APPELLATE COUNSEL</u>. The comprehensive plan shall provide for the appointment of lead appellate counsel meeting the following qualifications.

1. **<u>Murder and Level 1, 2, 3, or 4 Felony</u>. To be eligible to serve as appointed counsel in a case where the accused is charged with murder or a Level 1, 2, 3, or 4 felony, an attorney shall be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation and have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.**

2. **Other Cases. To be eligible to serve as appointed counsel in other cases, an attorney shall have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.**

Commentary

See Commentary to Standard E. The requirement of six (6) hours of training in appellate practice prior to appointment is effective as of January 1, 1996.

STANDARD G.

COMPENSATION OF SALARIED OR CONTRACTUAL PUBLIC DEFENDERS. The comprehensive plan shall provide that the salaries and compensation of full-time salaried public defenders shall be the same as the salaries and compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney. The compensation of contractual public defenders shall be substantially comparable to the compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney. In counties that have established a county public defender office, the salaries and compensation provided to the chief public defender and deputy chief public defender shall be the same as provided to the elected prosecutor and the chief deputy prosecutor in the county under I.C. 33-39-6-5. Effective 1/1/14.

Commentary

Clearly, the current level of compensation for salaried and contractual public defenders is inadequate. For example, in the fourteen counties with a population over 100,000, the average part-time public defender in felony courts is paid $21,000 and is appointed to an average of 70 new cases per year, which means they are paid $300 per case. Part-time public defenders in these same counties handling misdemeanor cases receive an average of 400 new cases per year, which amounts to $52.50 per case. Brief of the Indiana Public Defender Council, In Re: Request for Rule Making Concerning The Marion County Public Defender System, Cause No. 49SOO-9210MS-822. This level of compensation, inevitably, creates grave concerns about the quality of defense services provided to the

accused. However, rather than set minimum levels of compensation, the Commission believes that it is more consistent with notions of home rule and county autonomy to peg compensation to rates approved by the county for the prosecution function.

STANDARD H.

COMPENSATION OF ASSIGNED COUNSEL. The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

1. **Hourly Rate. Counsel shall be compensated for time actually expended at the hourly rate of not less than seventy dollars ($70.00).**

2. **Incidental Expenses. Counsel shall be reimbursed for reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.**

3. **Periodic Payments. Periodic payment during the course of counsel's representation shall be made monthly upon request of appointed counsel.**

Commentary

The hourly rates currently paid to assigned counsel in Indiana range from $30-$60 per hour, with the majority of counties using a rate of $40 per hour for out-of-court time and $50 per hour for in-court time. For many attorneys, this barely covers the office overhead. This standard sets a minimum rate of $60 per hour and requires reimbursement for incidental out-of-pocket expenses. This standard also requires that counsel, upon request, be paid a monthly payment rather than waiting until the end of the case.

The case for adequate compensation for appointed counsel in criminal cases is well stated in the commentary to Standard 5.2-4 of ABA Providing Defense Services:

> There are a variety of reasons for requiring that reasonable compensation be paid to assigned counsel. First, it is simply unfair to

> ask those lawyers who happen to have skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to do work for compensation that is patently inadequate. Lawyers do, of course, have a public service responsibility, but the dimension of the national need and constitutional importance of counsel is so great that it cannot be discharged by unpaid or inadequately compensated attorneys. Indeed, where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.

More than 25 years ago, the President's Crime Commission recommended that counsel be paid "a fee comparable to that which an average lawyer would receive from a paying client for performing similar services." President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: The Courts 67 (1967). Admittedly, an hourly rate of $60 per hour does not really measure up to the Crime Commission's recommendation and is quite modest when compared to what is commonly paid to attorneys in our society when a person's liberty is not at stake. In federal civil rights cases, for example, the fees are much higher than those paid to appointed lawyers in criminal cases. See, e.g., Von Clark v. Butler (5th Cir. 1990), 916 F.2d 225 (affirming attorneys' fees of $100 per hour for preparation time and $200 per hour for in-court time in civil rights claims of excessive use of force in arrest); Cobb v. Miller (5th Cir. 1987), 818 F.2d 1227 (mandating $90 per hour in civil rights litigation for damages resulting during plaintiffs arrest and conviction); Knight v. Alabama (AD. Ala. 1993), 824 F.Supp. 1022 (attorneys' fees in civil rights action of $275 per hour for lead counsel and rates ranging from $ 100 to $200 per hour for other attorneys held to be reasonable).

Yet, an hourly rate of $60 per hour will provide some improvement for defense counsel in Indiana indigent criminal cases. Moreover, if the Commission is able to reimburse counties 40% of their indigent defense expenses, there ought not to be any significant net increase for counties in their costs for defense services.

STANDARD I.

<u>SUPPORT SERVICES</u>. The comprehensive plan shall provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: Providing Defense Services (3rd ed. 1990).

Commentary

Quality legal representation cannot be rendered unless defense lawyers have adequate support services available. Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.

STANDARD J.

<u>CASELOADS OF COUNSEL</u>. The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

1. **<u>Caseloads for Counsel Without Adequate Support Staff</u>. Salaried, contractual, or assigned counsel that do not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. The categories in Table 1 should be considered in the disjunctive. Thus, if counsel is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.**

TABLE 1

Type of Case	Full Time	Part Time (50%)
TRIAL		
All Felonies (for use in CR 24 compliance only)	120	60
Non-Capital Murder; Level 1, 2, 3, 4, and 5 Felonies	100	50
Level 6 Felonies only	150	75
Misdemeanors only	300	150
JD-Level 5 Felony and above	200	100
JD-Level 6 Felony	250	125
JD-Misd	300	150
JS-Juvenile Status	400	200
JC-Juvenile CHINS	120	60
JT-TPR	120	60
Juvenile Probation Violation	400	200
JM-Juvenile Miscellaneous	400	200
Other (e.g., probation violation, contempt, extradition)	300	150
APPEAL		
Trial Appeal	20	10
Guilty Plea Appeal	40	20

2. **<u>Caseloads for Counsel With Adequate Support Staff</u>. Salaried counsel with support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. The categories in Table 3 should be considered in the disjunctive. Thus, if counsel is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.**

TABLE 2

Trial	
Secretary/Paralegal	1 for every 4 full-time attorneys
Paralegal/Investigator	1 for every 4 full-time attorneys
Other Litigation support (social worker, mitigation investigator, etc.)	1 for every 4 full-time attorneys
Total	.75 support staff for each full-time attorney
Appeal	
Support Staff (secretary, paralegal, law clerk)	1 for every 4 full-time attorneys

TABLE 3

Type of Case	Full Time	Part Time (50%)
TRIAL		
All Felonies (for use in CR 24 compliance only)	150	75
Non-Capital Murder; Level 1, 2, 3, 4, 5 Felonies	120	60
Level 6 Felonies only	200	100
Misdemeanors only	400	200
JD-Level 5 Felony and above	250	125
JD-Level 6 Felony	300	150
JD-Misd	400	200
JS-Juvenile Status	500	250
JC-Juvenile CHINS	150	75
JT-TPR	150	75
Juvenile Probation Violation	500	250
JM- Juvenile Miscellaneous	400	200
Other (e.g., probation violation, contempt, extradition)	400	200
APPEAL		
Trial Appeal	25	12
Guilty Plea Appeal	50	24

3. **<u>Caseloads for Counsel Assigned to Level 6 Felony-Only Courts, Without Adequate Support Staff</u>. Salaried, contractual, or assigned counsel that do not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 4 in a 12-month period.**

TABLE 4

Type of Case	Full Time	Part Time (50%)
Level 6 Felonies only Inadequately staffed	225	110

<u>4. Caseloads for Counsel Assigned to Level 6 Felony-Only Courts, With Adequate Support Staff</u>. Salaried, contractual, or assigned counsel that have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 5 in a 12-month period.

TABLE 5

Type of Case	Full Time	Part Time (50%)
Level 6 Felonies only Adequately staffed	270	135

Commentary

One of the most significant impediments to furnishing quality defense representation is the excessive caseloads imposed on salaried and contractual public defenders. Not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive caseloads, moreover, lead to attorney frustration, disillusionment by clients, and undermine the integrity of the adversary system of criminal justice.

In an attempt to cope with the problem of excessive caseloads, eight states have established maximum caseload standards by statute or court rule. See Appendix A. All but one of these states have adopted caseload standards similar to the national caseload standards first formulated in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC). In Standard 13.12, the NAC recommended the following maximum number of cases per year for a full-time public defender working in an office with support staff:

Felony Cases	not more than 150
Misdemeanor Cases	not more than 400
Juvenile Delinquency Petitions	not more than 200
Mental Health/Civil Commitment Proceedings	not more than 200
Appeals	not more than 25

The NAC caseload standards were subsequently endorsed by the National Legal Aid and Defender Association, and are used extensively throughout the country by evaluators, public defender managers, and funding sources. However, these standards have been criticized for being too high. In the 1988 report of the ABA's Special Committee on Criminal Justice in a Free Society, Criminal Justice in Crisis, the committee emphasized the assumptions underlying these recommended caseload standards:

> Emphasis should be placed on the fact that these guidelines set the maximum conceivable caseload that an attorney could reasonably manage. These numbers are unrealistic in the absence of ideal support conditions or if the attorney is carrying any number of serious or complex cases or death penalty cases. Id., at p. 43, fn. 87.

As a result of these concerns and the reality that few, if any, public defender offices in Indiana currently have adequate support staff, the Commission adopted two caseload standards, one applicable to county public defender offices with adequate support staff and another standard for counties without adequate support staff. Table 3 is consistent with the NAC Standards and is applicable to counties with adequate support staff. However, the caseload standards which will be applicable to nearly all counties in Indiana are contained in Table 1, which reflects a reduction by 20-25 percent of the maximum number of cases that may be assigned in a year to one attorney.

Effective July 1, 2012, Table 2 (Support Staff to Attorney Ratio) was amended to reflect the change in support staff job descriptions that has occurred in law offices since this standard was adopted in 1995. Among the changes in the workplace are the significant increase in the use of computer technology that has made lawyers less dependent on secretarial assistance and the increased use of paralegals for witness interviews and document preparation. The result is that some public defender offices have created a position called “legal assistant” which can include secretarial, paralegal, and investigation duties. The revised Table 2 is designed to create more flexibility in job descriptions without changing the ratio of support staff to attorney. Table 2 retains three types of positions as a recommended guideline for staffing a public defender office. The determination of whether a public defender office has adequate support staff to utilize Table 3 for assessing maximum caseloads will be primarily determined by whether the office has .75 support staff for each full-time equivalent (FTE) attorney.

This standard uses the language "should generally not be assigned" in order to avoid a situation where a county would forfeit eligibility for state reimbursement merely because one of its public defenders was assigned a case or two in excess of the maximum number of caseloads in this standard. However, this language should not be interpreted to mean that the Commission will overlook substantial deviations from the caseload standards.

STANDARD K.

<u>EXCESSIVE CASELOADS</u>. The comprehensive plan shall contain policies and procedures regarding excessive caseloads and shall, at a minimum, contain the following provisions:

1. **<u>Individual Public Defenders</u>. Whenever a salaried or contractual public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the attorney is required to inform the county public defender, if any, or other authorities designated by the plan to secure professional independence for indigent defense services in the county.**

2. **<u>Chief Public Defenders</u>. Whenever the chief public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the chief public defender is required to inform the appropriate judges and refuse to accept the appointment of additional cases.**

Commentary

This standard is derived from <u>ABA Providing Defense Services</u>, Standard 5-5.3, which provides:

> (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
>
> (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

Standard K.1. is consistent with Rule 1.16 of the Indiana Rules of Professional Conduct which provides, in relevant part, as follows:

> (a) except as stated in paragraph (c) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules

of Professional Conduct or other law;

***

(c) when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

The commentary to this rule states that "a lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion." In addition, ABA Providing Defense Services, Standard 4-1.3(e), states that defense counsel "should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation .....”

Standard K.2. reflects the Commission's belief that, rather than rely on collateral attacks in post-conviction proceedings in which ineffective assistance is litigated, the better approach is to prevent excessive caseloads by authorizing the chief public defender to refuse excessive assignments. This standard also reflects the belief that the determination of whether caseloads are excessive must be entrusted to the chief public defender, rather than to the courts or to county officials. Once it is determined that quality representation is impossible due to an inordinate workload, several options are available. If an assigned counsel panel is used for conflict cases, additional cases can be assigned to assigned counsel attorneys until the caseload is reduced to an acceptable level. A county may also contract with one or more attorneys to handle the public defender's excessive cases. Another option would be to rely upon the inherent authority of the court to appoint counsel on a case-by-case basis. This standard does not contain a preference for any one method of dealing with excessive cases. It merely requires that the county anticipate and plan for such a contingency if the county elects to have a public defender office and include it in the comprehensive plan.

STANDARD L.

CONTRACTS. The comprehensive plan shall contain provisions for contracts for defense services under I.C. 33-40-7-8, in the event that such contracts are used. The plan shall provide that contracts not be awarded primarily on the basis of costs and shall otherwise ensure quality legal representation. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award. The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients. Contracts for services should include, but

not be limited to, the following subjects:

1. **the categories of cases in which the contractor is to provide services;**

2. **the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;**

3. **the basis and method for determining eligibility of persons served by the contract;**

4. **identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;**

5. **a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;**

6. **supervision, evaluation, training and professional development;**

7. **provision of or access to an appropriate library;**

8. **a system of case management and reporting; and**

9. **the grounds for termination of the contract by the parties.**

Commentary

Under I.C. 33-40-7-8, courts in counties with a population under 400,000 are authorized to contract with an attorney or group of attorneys to provide indigent defense representation. The majority of counties in Indiana have at least one court that uses a contract under this statute for providing indigent defense services. The National Criminal Defense Systems Study (National Institute of Justice 1986), estimated that 10% of the counties nationwide employed a contract program as the primary means of providing representation. The Bar Information Program of the ABA estimated that in 1992 that figure may be over 20%.

Nearly all contracts under I.C. 33-40-7-8 are fixed price contracts rather than

fixed fee-per-case contracts. The determining characteristic of a fixed price contract is that the contracting lawyer or law firm agrees to accept an undetermined number of cases within an agreed upon contract period for a single, flat fee. The contracting attorney(s) are usually responsible for the cost of support services, investigation, and expert witnesses for all of the cases. Even if the actual caseload in the jurisdiction is higher than projected when the contract was signed, the contractor is responsible for providing representation in all cases without additional compensation.

This type of contract has been criticized because of its failure to assure that quality legal representation will be provided. In State v. Smith (1984), 681 P.2d 1374, 1381, the Arizona Supreme Court concluded that its state's contract defense system was unconstitutional:

> (1) The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants;
>
> (2) The system does not provide for support costs for the attorney, such as investigators, paralegals and law clerks;
>
> (3) The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned ... ; and
>
> (4) The system does not take into account the complexity of each case.

In addition, fixed price contracts have been criticized by both the National Legal Aid and Defender Association and the American Bar Association because they frequently result in, competitive bidding with the award going to the lowest bidder without regard to the quality of representation to be provided. In 1985, the American Bar Association's House of Delegates approved a resolution condemning the awarding of contracts for indigent defense services based solely on cost.

In some states, fixed fee-per-case contracts are used which specify a predetermined number of cases for a fixed fee per case. Frequently, funds for support services such as investigations, secretarial help, and expert witnesses are included in the contract. The contracting attorney typically submits a monthly bill indicating the number of cases handled during the period. Once the predetermined

number of cases is reached, the contract can be re-negotiated or the attorneys can refuse additional appointments.

This standard is designed to prevent excessive caseloads resulting from the use of fixed price contracts and to avoid competitive bidding and the awarding of contracts based solely on cost. The standard reflects the Commission's belief that contracts under I.C. 33-40-7-8 should be consistent with the recommended elements of a contract for services contained in ABA Providing Defense Services, Standard 5-3.3(b), which provides:

Contracts for services should include, but not be limited to, the following subjects:

i. the categories of cases in which the contractor is to provide services;

ii. the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;

iii. the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7. 1;

iv. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

v. allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;

vi. minimum levels of experience and specific qualification standards for contracting attorneys, including, special provisions for complex matters such as capital cases;

vii. a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;

viii. limitations on the practice of law outside of the contract by the contractor;

ix. reasonable compensation levels and a designated method of payment;

x. sufficient support services and reasonable expenses for investigative

services, expert witnesses and other litigation expenses;

xi. supervision, evaluation, training and professional development;

xii. provision of or access to an appropriate library;

xiii. protection of client confidences, attorney-client information and work product related to contract cases;

xiv. a system of case management and reporting;

xv. the grounds for termination of the contract by the parties.

STANDARD M.

<u>TRAINING AND PROFESSIONAL DEVELOPMENT</u>. The comprehensive plan shall provide for effective training, professional development and continuing education of all counsel and staff involved in providing defense services at county expense.

Commentary

Criminal law is a complex and difficult legal area, and the defense of criminal cases requires special knowledge and training. The consequences of mistakes in defense representation can be substantial, including wrongful conviction and the loss of liberty.

Currently, continuing legal education training is provided for judges and prosecutors either at county expense or at no charge to the individuals through the Indiana Judicial Center and the Indiana Prosecuting Attorneys Council. Although specialized training is provided for defense attorneys through the Indiana Public Defender Council, these programs cost an average of $75 per day. The Commission believes that training provided to indigent defense counsel should be at least equal to that provided to judges and prosecutors.

STANDARD N.

<u>COURT AUTHORIZED EXPENDITURES FOR PERSONS REPRESENTED BY RETAINED COUNSEL</u>. The comprehensive plan shall authorize expenditures for investigative, expert, or other services for a person who has retained private counsel for trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense. Such services are eligible for reimbursement from the public defense fund if authorized by the court.

Commentary

This standard deals with the occasional situation where an accused can provide counsel but does not have funds for support services, such as an investigator or expert witness. In most courts, the only way to obtain such necessary services is for counsel to withdraw and petition for the appointment of a public defender. This practice is not necessarily in the best interest of the client or the taxpayer. Thus, this standard specifies that these services should be included in the comprehensive plan and be subject to reimbursement.

The Federal system provides for this situation in the following section:

> **18 U.S.C. § 3006A. Adequate representation of defendants**
>
> (a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.
>
> ***
>
> (e) Services other than counsel.--
>
> (1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other

> services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

Indiana law provides that a criminal defendant is not constitutionally entitled, at public expense, to any type or number of expert witness he desires to support his case. Kennedy v. State, 578 N.E.2d 633, 640 (Ind. 1991), cert. denied 503 U.S. 921, 112 S. Ct. 1299, 117 L.Ed.2d 521 (1992). A defendant who requests funds for an expert witness has the burden of demonstrating the need for that expert. Id. However, a trial court must provide a defendant access to experts where it is clear that prejudice will otherwise result. Id. See also, Harrison v. State, 644 N.E.2d 1243, 1253 (Ind. 1995), cert. denied ___U.S. ___, 117 S.Ct. 307, 136 L.Ed.2d 224 (1996).

A request by retained private counsel for funds for investigation, expert, or other services should be made by motion to the court to declare the defendant indigent. The motion should be made ex parte and include the following information where appropriate:

-the client's affidavit of indigence

-disclosure of the attorney-client fee agreement including the hourly rate and the amount of the fee received by counsel at the time of the motion

-a particularized showing of need for the requested services.