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RELATIONSHIP BETWEEN THE OFFICE OF PUBLIC DEFENDER AND THE ASSIGNED COUNSEL SYSTEM

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INTRODUCTION

The right of a defendant to appointed counsel if he cannot afford to hire an attorney is a clearly established sixth amendment guarantee.[1] However, one of the practical controversies surrounding the appointment of attorneys for indigent defendants is what method should be used to supervise and administer the program. Two distinct types of administration have been used by most local bars. The first is the assigned counsel plan which traditionally consists of random, unplanned appointment of private counsel by the court.[2] Other jurisdictions have implemented a public defender system, where attorneys provide defense services to indigents on a full-time basis, either on contract with the local governmental unit or as public employees.[3] The third system, which will be closely scrutinized here, is a mixture of the assigned counsel and the public defender plans. Under this mixed system, the public defender serves as coordinator of case assignments to staff attorneys and the private bar, as well as administrator of supportive services and the link to the supervisory policy-making board.

As this article will note, it is presently difficult to evaluate which of the three systems gives the best legal services to indigent defendants, since comparative data on the effectiveness of each system are inconclusive.[4] Deficiencies in defender services are not necessarily as traceable to the kind of system utilized as to the degree of enthusiasm or competence of the attorneys who provide representation. However, it is possible to draw some conclusions about the administrative arrangement which assures the most effective delivery of legal services in jurisdictions with both

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1. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

2. *See* notes 14-19 *infra* and accompanying text.

3. *See* note 29 *infra* and accompanying text.

4. ABA STANDARDS, PROVIDING DEFENSE SERVICES, §§ 1.2(c), 1.3(c) (1968) [hereinafter cited as ABA STANDARDS].

a public defender staff and a system for assigning counsel from the private bar. First, appointment of a central administrator, preferably the chief public defender, to supervise both public defender staff attorneys and assigned counsel is advisable. Although administration of both staff attorneys and private counsel may result in conflicts of interest in cases involving multiple defendants or incompetent counsel, the problems can be resolved in the administrative arrangement. The efficiency of the system outweighs other disadvantages. Such an administrator would carry out all executive duties, from attorney supervision to training and plan management, as well as providing for supportive services.

In addition, the central administrator should be responsible to an advisory board which would have general policy-making powers, but not the power to influence decisions on representation in particular cases.[5] Such a board of trustees or committee could select the administrator, function as a tie to the rest of the legal community, and obtain financial resources from the public.

The administrator will have two special areas of concern in balancing caseloads between the staff attorneys and the private bar. The percentage of cases assigned to private attorneys should keep a significant portion of the bar involved and interested in the program, but still allow for a stable central group of full-time staff attorneys. Moreover, the administrator will have to determine which kinds of cases should be assigned to the panel of private attorneys and which should be retained by staff attorneys. In addition to considering expertise and possibilities for training younger lawyers through this system, the administrator will need to decide which cases are most conveniently handled by staff attorneys and which must be assigned for ethical reasons. The objective in calculating the percentage of assignments for each part of the system is, of course, the quality of representation afforded the criminal defendants.

Finally, use of a central administrator will allow for development of integrated, less expensive support systems for attorneys. Both public defenders and private appointed counsel will be able to draw from a common pool of investigators, social workers, expert witnesses, and crime lab resources. Before discussing the proper management of a mixed public defender-assigned counsel system, however, it is important to delineate the distinctions be-

5. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 324 (1970).

6. *See* note 1 *supra*.

tween the choice of a system and the quality of services it delivers, and compare the "pure" forms of the assigned counsel and the public defender systems.

COMPARISON OF ASSIGNED COUNSEL AND PUBLIC DEFENDER SYSTEMS

The right of indigents to appointed counsel in serious criminal cases is today a constitutional right.[6] In interpreting this right, the courts have never required a specific system of implementing appointment of counsel.[7] Consequently, the traditional method of providing counsel to indigents was a system of rotating private attorneys appointed on an ad hoc basis by the courts. However, this method has been discredited both on constitutional and on practical grounds. Several jurisdictions have responded with a coordinated assigned counsel system. Another growing alternative to the ad hoc method of appointment is the public defender office, consisting of attorneys salaried directly or by contract with state or local government, which defends indigents on a full-time basis. Some jurisdictions have chosen to implement a combined system of appointed private attorneys and publicly salaried defenders in order to provide adequate representation while keeping the private bar involved in representing indigents in criminal proceedings. However, it is important to emphasize that factors other than the type of defender system utilized may determine the quality of legal services provided to indigent defendants.

Some administrators are more concerned with the structure of defender agencies than with their main purpose, which is to provide assistance to the recipients. The beneficiaries of these services, however, take a more pragmatic view: they ignore the particular administrative arrangement chosen by the local bar and focus on the quality and availability of legal services. In evaluating the effectiveness of such services, these viewpoints do not necessarily conflict, since the administrative form of the agency furnishing counsel for indigent defendants can frequently indicate its potential for efficient delivery of services.[8]

Identifiable deficiencies in public defense systems, as in other service agencies, are not always the direct result of the

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7. Argersinger v. Hamlin, 407 U.S. 25 (1972). *See also* concurring opinion of Brennan, J., *Id.* at 40.

8. COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N. Y. AND THE NATIONAL LEGAL AID AND DEFENDER ASSN., EQUAL JUSTICE FOR THE ACCUSED (1959 ed.) [hereinafter cited as EQUAL JUSTICE FOR THE ACCUSED].

type of system chosen. Comparing assigned counsel, public defender, and mixed systems, the Commentary on ABA Standards points out, "there is as yet no evidence that any one system is inherently preferable to others."[9] Reviewing studies of existing systems, Professor Arthur LaFrance concludes that the differences between assigned counsel and public defenders are statistically insignificant and may flow from causes other than the type of system involved.[10] Rather, he cites a study which finds that the assigned counsel system delivered excellent services when it was freed from political influence, provided adequate fees, gave adequate time for attorneys to prepare each case, and drew the panel of assigned counsel from the general bar.[11] In contrast, the public defender's performance in one jurisdiction compared unfavorably with that of assigned counsel in a nearby city when dismissals, guilty pleas, trials and sentencing were examined.[12] Professor LaFrance observed that it was not the type of system involved, but how it was applied in particular locales, which determined the efficacy of representation.[13]

While many members of the legal profession perform laudably even where the defender program is inadequate, some programs do promote effective assistance of counsel more than others. Admittedly, a "good" lawyer will represent his client to the best of his ability regardless of how the attorney-client relationship was initiated. There are numerous examples of commendable performances, even where the rate of pay is low, supporting services are lacking, extensive preparation is required, factual odds are against the client, and the prosecution utilizes the full resources of the state.

There are some conditions which encourage the selection of a competent lawyer and thus improve the quality of representation in a particular jurisdiction. These factors, which are more than incidental, will be discussed later in connection with the mixed assigned counsel-public defender system. Their purpose, however, is to insure that a well-chosen system delivers services which the client requires, bringing the lawyer and the indigent

9. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 324 (1970).

10. LaFrance, *Criminal Defense System for the Poor*, 50 NOTRE DAME LAWYER 41, 61 (1974) [hereinafter cited as LaFrance].

11. *See* Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 42 IND. L.J. 90 (1970).

12. *See* Summers, *Defense of the Poor: The Assigned Counsel System in Milwaukee County*, 1969 WIS. L. REV. 525, 536.

13. *Id.*

client together at the earliest possible time under the most favorable conditions which are both fair for the lawyer and obtained at a reasonable cost for the taxpaying public. Before considering how the mixed defense system can best serve these goals, a brief comment should be made about the differences among the traditional ad hoc assigned counsel method, the public defender, and the coordinated assignment systems.

The practice of appointing counsel ad hoc paralleled the development of the constitutional right to counsel[14] from the period in which counsel was only permitted, to the present, when counsel unless waived is required in criminal cases under the sixth[15] and fourteenth[16] amendments. Court appointment of uncompensated counsel in criminal cases is a part of the history of the right to counsel when the life or liberty of an indigent defendant is threatened.[17] Under the ad hoc appointment method, the court appoints attorneys at random, with a minimum of consideration for the qualifications of the attorney or equitable distribution of cases among members of the private bar.[18] Such appointments are usually made too late in the proceedings to be effective, and keeping of records on cases is frequently haphazard.[19]

The informality of the ad hoc appointment plan may have been satisfactory for an agrarian society, but as cities grew and the criminal dockets became correspondingly heavier, assignment from a panel of volunteer lawyers or from the general bar did not provide an adequate defense.[20] In rare instances where such a plan did work, it was because judges organized appointments into a system which stripped the "plan" of its ad hoc character. The ad hoc practice had grave deficiencies: attorneys were appointed too late to be fully useful to their clients, appointees were often un-

14. *See generally* W. BEANY, RIGHT TO COUNSEL IN AMERICAN COURTS (1955); NLADA REPORT TO THE NATIONAL DEFENDER CONFERENCE, May 14-16, 1969, Washington, D.C., a project of the NLADA [hereinafter cited as NLADA REPORT]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

15. Johnson v. Zerbst, 304 U.S. 458 (1938).

16. The fourteenth amendment extended the right to counsel to state criminal proceedings. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

17. BEANEY, *supra* note 14, at 213.

18. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 8.

19. *Id.*

20. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 8; Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 529 (1970).

available, many were inexperienced in trying criminal cases, and there was much opportunity for political patronage, which detracted from full advocacy for the client.[21] The strong points frequently attributed to their traditional plan—ease of administration and wide involvement of the private bar—are not necessarily lost in an organized public defender system or a mixed assigned counsel-public defender form. Yet despite its drawbacks, many indigent defendants even today get representation by random appointment, especially in rural areas.[22]

Attacks on ad hoc appointment from the bar have been on both practical and constitutional grounds. For instance, a 1959 study by the Association of the Bar of the City of New York and the National Legal Aid and Defender Association (NLADA), found that "the assigned counsel system does not afford representation which is uniformly experienced, competent and zealous."[23] Moreover, Emery Brownell stated in 1951:

> Except possibly in a few rural areas, the assigned counsel system fails miserably to afford the equal protection under law which it pretends to give and which the Constitution of the United States contemplates.[24]

Thus, it is clear that ad hoc assignment does not provide effective representation to indigent defendants, and as such it deprives them of the full right to a defense offered to those defendants who can afford counsel. The right to counsel for both indigents and non-indigents is meaningless unless that right includes adequate and zealous advocacy by the attorney.

In many areas, the ad hoc system is being replaced by a public defender, which some consider the most effective plan for competent defense system services, especially in metropolitan

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21. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS, Ch. 2 (1965) [hereinafter cited as SILVERSTEIN].

22. NLADA, THE OTHER FACE OF JUSTICE (1974) [hereinafter cited as THE OTHER FACE OF JUSTICE], indicated that 2,227 counties comprising more than one-third of the nation's population use the appointment system, including almost 50% of the urban counties and 80% of the rural counties. Probably some of these jurisdictions have organized their appointment procedures. In a 1965 survey, it was found that assigned counsel were used in approximately two-thirds of all counties. SILVERSTEIN, *supra* note 21.

23. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 8, at 27.

24. Lawyers Co-Op of Rochester, N.Y., Legal Aid in the United States, at 142.

areas.[25] A recent NLADA study defines a public defender system as a method of

> providing indigent defense services under which an attorney or group of attorneys, through a contractual arrangement or as a public employee, provides legal representation for indigent criminal defendants on a regular basis.[26]

The NLADA report shows the increase in public defenders. In 1961, 75% of all defendants were represented under the assigned counsel system and 25% obtained attorneys from the public defender.[27] By 1973, however, this ratio had almost reversed itself: 36% of criminal defendants had attorneys appointed from the private bar, while 64% were represented by the public defender.[28] The study indicates that approximately 650 defender programs serve more than 880 counties throughout the United States.[29] A majority of public defender offices are of recent origin, with only 21% in existence for more than 10 years.[30] Even in many localities with public defenders, as defined in the NLADA study, the bar has continued to utilize other methods of appointment, thus creating a mixed system of defense for indigents.

Even where full-time defenders handle most criminal cases involving indigents, private attorneys frequently accept appointments which cannot be handled by the public defenders.[31] Some bar associations establish committees of lawyers who agree to represent defendants in certain kinds of cases.[32] They may also

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25. *See* NLADA, HOW TO ORGANIZE A DEFENDER OFFICE (1967).

26. *See* SILVERSTEIN, *supra* note 21, at 13.

27. *Id.*

28. *Id.*

29. *See* THE OTHER FACE OF JUSTICE, *supra* note 22.

30. *Id.*

31. For instance, the Chicago Bar Association maintains a Defense of Indigent Defendants Committee for such purposes. Other bar associations, such as the Denver Bar Association, follow this practice. *See* Battle, *Comparison Between Public Defenders and Private Attorneys*, in CRIMINAL JUSTICE PROJECT 13-14 (1971) [hereinafter cited as BATTLE].

32. For example, in Nashville, Tennessee the Public Defender does not represent clients who are able to make bail. In Hawaii, by statute, the court may appoint counsel other than the Public Defender "in any situation in which the Court determines it advisable." *See* H.B. No. 1985-72. If a private attorney is retained by the Defender General in Oklahoma to represent a "needy person," he is paid from the budget of the Public Defender. By law, the New Jersey Public Defender is required to maintain a pool of competent attorneys to provide special expertise. *See* THE OTHER FACE OF

agree to accept cases involving conflicts of interest or multiple defendants, where ethical problems would preclude the public defender from handling the case.[33] In some jurisdictions, a defendant who indicates that he does not want the public defender to represent him may have a private lawyer appointed.[34] Problems of heavy case loads or procedural rules or statutes may require appointment of an attorney outside the public defender's office.[35] Such instances of private appointment have served to catalyze public criticism of ad hoc appointments, and bring about the mixed defender-assigned counsel system of defense services.

The mixed public defender-assigned counsel system is an outgrowth of efforts to solve the problems connected with public defender and traditional assigned counsel systems. One form of mixed system is the organized or coordinate counsel system:

> [A] small staff of salaried attorneys devote all or part of their time to representing eligible defendants. These attorneys, however, handle only a percentage of the cases, the other cases being assigned to members of the practicing bar. The assignments may be handled and coordinated by staff attorneys or by the court. Compensation for the staff attorneys may be paid either by the state or private organizations.[36]

The more efficient form of mixed public defender-assigned counsel system would place more cases involving indigents in the hands of the public defender, requiring less random assistance from the private bar, and more supervision by a full-time, compensated attorney. The development of the coordinated assignment system provides insight into the advantages of the mixed public defender-assigned counsel plan.

Two events are most responsible for the development of the coordinated assignment system. First, the Criminal Justice Act

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JUSTICE, *supra* note 22, at 35. This NLADA survey revealed that, nationwide, 12% of the public defenders have similar arrangements with private lawyers; 2% of all reporting defenders handled no felony cases and 10% handled no misdemeanors. *Id.* at 22. By statute in Pennsylvania, the Common Pleas Courts may appoint an attorney other than a public defender "for cause." PA. STAT. ANN. tit. 16, § 9960.7 (Supp. 1976).

33. *See Draft Report and Guidelines for Defense of Eligible Persons*, Vol. 1, National Study Commission on Defense Services, National Legal Aid and Defender Association (1975) (unpublished).

34. *Id.*

35. *See* note 31 *supra*.

36. *See* NLADA REPORT, *supra* note 14, Introduction at xi.

of 1964[37] requires that each federal district provide a plan for the appointment of counsel, thus securing the coordinated system for indigents in federal criminal cases. Secondly, through the establishment of NLADA's National Defender Project by the Ford Foundation in 1964,[38] scores of organized services with manpower supplied by the private bar were funded all over the country.

These coordinated assignment systems were encouraged by many leading criminal law bodies in the country. For instance, the President's Commission on Law Enforcement recommended that all jurisdictions move from random assignment by judges to a coordinated assigned counsel or a defender system.[39] NLADA suggested completely discarding the unorganized counsel system, advising that a full-time attorney administrator be responsible for selecting and training assigned counsel panel members, assigning panel members to different cases, and maintaining quality representation.[40] Various studies of other respected national groups also emphasized the necessity of a central administration to coordinate effectively the assignment method.[41] The ABA recommended that the systematic plan be widely publicized.[42] It also stated that "[w]here the assigned counsel system is selected, it should be governed by a board [of trustees]."[43] These statements suggest that selection and appointment of panel members should be under the supervision of a coordinating administrator and a governing policy board.

The development of an assigned private counsel plan, supplementary to the public defender, effectively creates a mixed plan for delivery of defender services. There are many advantages to this mixed method of supplying the needed representation for the poor. First, it is flexible enough to adjust to rural or metropolitan areas. Second, as the President's Commission on Law Enforcement suggested, "[p]rivate counsel may bring to the defense of criminal

37. 18 U.S.C. § 3006A (1964). *See generally Symposium—The Right to Counsel and the Indigent Defendant*, 12 AM. CRIM. L. REV. 587 (1975).

38. *See* NLADA REPORT, *supra* note 14, Preface at vii.

39. *See* THE CHALLENGE OF CRIME, *supra* note 14, at 151.

40. NLADA DEFENSE STANDARDS PROJECT, PROPOSED STANDARDS OF DEFENSE SERVICE, Standard 5.1 Operation of Assigned Counsel (1974).

41. ABA STANDARDS, *supra* note 4, § 2. *See also* ABA, COMPARATIVE ANALYSIS OF STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS WITH THE STANDARDS FOR CRIMINAL JUSTICE OF THE AMERICAN BAR ASSOCIATION (1974).

42. *See* ABA STANDARDS, *supra* note 4, Standard 7.1, "Explaining the Availability of a Lawyer."

43. ABA STANDARDS, *supra* note 4, Standard 1.4.

cases the insight and fresh approaches of those accustomed to established ways."[44] Thus, a well-organized private bar panel which is regulated by an attorney administrator will keep competent lawyers readily available and encourage the whole bar to participate.

A mixed assigned counsel-public defender system can work only if the system is structured to use fully the services which both the public defender and the private bar can muster to serve indigent clients. Such a structure is best represented where a central administrator is appointed to supervise both public defenders and assigned counsel. The administrator is in turn responsible to a board of trustees which makes policy decisions. In the course of assigning counsel and performing managerial tasks, the administrator would need to determine how to balance the percentage and the types of cases assigned between the public defender staff attorneys and private appointed counsel. Moreover, he would be responsible for developing support systems to be utilized by both groups of defenders, in order to make the system efficient and as economical as possible. Thus, an administrative overview of such a combined system is necessary.

STRUCTURE OF COMBINED PUBLIC DEFENDER-ASSIGNED COUNSEL SYSTEM

While it has not been demonstrated whether the public defender, the assigned counsel, or the mixed system provides the most effective legal services,[45] certainly where the mixed system is utilized, basic guidelines for administration can be proposed. There are some disadvantages, of course, to a system in which a central administrator supervises both assigned counsel and staff attorneys. The most serious of these disadvantages are the problems which arise when there are multiple defendants or when incompetency of counsel is raised on appeal.

With a central administrator, the program can be more efficient, less expensive, provide more unified support services, and implement suggestions from the private bar better. The administrator's duties might include selection of staff, managerial duties, maintenance of the panel of appointed counsel and other executive tasks. The policy-making board, where needed, should be drawn from all segments of the community. Its principal duties should

44. TASK FORCE REPORT: THE COURTS 60 (1967) [hereinafter cited as TASK FORCE REPORT].

45. *See* note 4 *supra* and accompanying text.

consist of selecting the defender-administrator, aiding fund drives where applicable, and serving other needs which arise in the operation of the agency.

There are two obvious choices for administering a mixed public defender-assigned counsel plan: the program will consist of one administrative unit or two separate services—one consisting of the defender and the other of private attorneys, each with its own administrator. However, use of one administrative unit, which creates a kind of law firm, will still present ethical questions in cases of multiple defendants where one is represented by the defender staff and other defendants are assigned to the panel. The integrated administrative supervision over both programs may be further complicated by the power of the policy-making board, which would have ultimate responsibility for both the public defender and the panel. Thus, at least on its face, two attorneys representing clients with competing interests will be responsible to the same administrator and board who might appear to be able to interfere with the defense of one of the clients. In response, it can be argued that service on the defender panel is only incidental to the principal interest of the panel attorneys, which is the independent practice of law; hence, their tie to the system would not create interests and loyalties identical to those of the public defender staff. In addition, both files and offices would be separately maintained, thereby providing more confidentiality to each client and allowing each attorney only as much discovery as he might obtain in a regular criminal proceeding. Nevertheless, this is a delicate issue which must be resolved by each service, depending on the degree of program integration elected.

A more serious conflict of interest when one administrator is used involves appeals or post-conviction matters where incompetency of the trial counsel might be charged. Practically speaking, a private attorney who is a member of the panel might feel uncomfortable pressing a complaint against a defender staff lawyer who was trial counsel. In fact, at least two courts have held that one member of a defender's staff should not represent a client where incompetency of counsel is at issue and where another lawyer in the same office was trial counsel.[46] In *Borden v. Borden*, the court explained the rationale for this holding:

> Lawyers who practice their profession side-by-side, literally or figuratively, are subject to subtle influence that

46. Angarano v. United States, 312 A.2d 295 (D.C. App. 1973); Borden v. Borden, 277 A.2d 89 (D.C. App. 1971).

> may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest.[47]

Even though *Borden* involved only a public defender unit, which was considered a private law firm by the court, the assigned counsel in a mixed system might feel similar influences which would affect his ability to represent a client against a member of the public defender staff.

Two solutions to the conflict of interest dilemma have been proposed: one involves an umbrella supervisory group over both the public defender and the appointed counsel program; another requires complete autonomy of the public defender staff from the appointed panel. In the District of Columbia, a Joint Committee of the Judicial Conference of the D. C. Circuit and the D. C. Bar has called for a supervisory group which would oversee both the Public Defender Service (PDS) and the Appointed Counsel Program.[48] Under the proposal, each program will have a director and the PDS will "continue to make its own policy and management decisions, with the approval of the Executive Director and the Board of Directors."[49] However, the umbrella supervisory group does not offer a complete solution to the conflict of interest dilemma.[50] Each service is delegated certain separate functions; but since both operate under an executive director and board of trustees, the possibilities for "subtle influence" complained of by the *Borden* court are still present. The second possibility is independent administration for each of two separate services, the defender staff and the assigned counsel plan. While conflicts of interest would be eliminated, the two independent agencies would not have the advantages of the mixed system demonstrated in many jurisdictions.[51]

Considering the merits of these alternatives, the combined program with one administrator, the salaried defender, seems to offer the best administrative organization. For one thing, the unified program can benefit both clients and the court. Timely appointments with clients will result; particular assignments can be made with more dispatch. Caseloads can be regulated more conveniently and appointments distributed more equitably among

47. 277 A.2d at 91.

48. *Report on Criminal Defense Services in the District of Columbia*, D.C. Bar Association, April, 1975 [hereinafter cited as *D.C. Report*].

49. *Id.*

50. *Id.*

51. *See* NLADA REPORT, *supra* note 14.

assigned and staff counsel. In addition, time and expense can be saved in a combined training program for both units. One accounting process and voucher system will be more manageable and economical. Because suggestions from the court and bar association can be given attention more quickly, there will be less duplication in public relations as a whole and less confusion for clients as to the nature of the services they are receiving. Moreover, provision of support services can be less confusing and unified recordkeeping more effective. The program can be monitored and evaluated more efficiently. Perhaps the best result of a unified program is that the defender-administrative position will have status enough to attract competent individuals to the post, individuals who are available for administrative responsibilities requiring constant attention. Even though the primary responsibility for a unified program that operates smoothly rests with the defender-administrator, he needs the guiding hand of a supervisory board.

THE SUPERVISORY BOARD—SELECTION AND DUTIES

In the mixed public defender-assigned counsel system, an advisory group has the power to establish general policy for operation of the program consistent with standards of professional conduct.[52] The general purposes of such a supervisory body are to provide overall coordination of both parts of the plan, to help with fundraising, and to advise the administrator on how to approach public relations. One of the most important responsibilities of the advisory body is one which the administrator cannot do alone—assuring the independence of the service. As the ABA Standards suggest,

> [o]ne means of assuring . . . independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees.[53]

With such independence, both public defenders and assigned counsel can be assured that neither the general public, the judiciary,[54] nor the board,[55] will interfere in the conduct of individual cases.

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52. *See* note 25 *supra.*

53. *See* note 43 *supra.*

54. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 8, at 83.

55. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 324 (1970).

An advisory board broadly representative of the area server can also be a link to the community, whether the agency is organized as a corporation or as an association. As suggested in *Equal Justice for the Accused*, an advisory board, "[i]f drawn from a cross-section of the Bar and the public . . . provides a connecting link between the system and the general public."[56]

The method of selecting the board and determining its powers will vary, depending on local conditions. The defense agency may be a non-profit corporation, such as the coordinated assigned counsel system in San Diego.[57] In such cases, the charter or bylaws will set out the administrative structure of the defense unit. Where public defenders are considered public employees, the board may be provided for by statute. Under a third plan which might be followed, the board could be a committee appointed by a panel representing the judiciary, the practicing bar and the public, as in the District of Columbia survey recommendation.[58] Such a committee may also be appointed by the local bar association with approval by the judges, or selected by the supreme court of the state, as in Massachusetts[59] and Oregon.[60] Minnesota uses a council of ten judges and one layperson to supervise the statewide public defender.[61]

In federal programs operating under the Criminal Justice Act, each federal district has discretion as to the plan for creating its advisory board. At one extreme, the Northern District of Illinois operates a non-profit corporation. Supervisory control over the program is vested in a Board of Trustees composed of representatives from business, labor, the bar and the community.[62] At the other extreme, in the Eastern District of Pennsylvania, a committee of judges supervises the panel of assigned attorneys. In the middle is the California Central District Program, which consists of five attorneys appointed by the bar.

If the adopted plan includes a supervisory board, one of its principal functions will be the selection of the defender-administrator. Despite the fact that a board selects the chief defender in only

56. NLADA REPORT, *supra* note 14, at 14.

57. *See* NLADA REPORT, *supra* note 14.

58. *See D. C. Report, supra* note 48, Recommendations 1.2 and commentary.

59. MASS. ANN. LAWS ch. 221, § 34D (Supp. 1974).

60. ORE. REV. STAT. § 151.010 (1973).

61. *See* NLADA REPORT, *supra* note 14, at 85.

62. *Id.* at 189.

35 of 218 programs surveyed by the NLADA,[63] the National Advisory Commission recommends that the public defender-administrator be nominated by a selection board and appointed by the governor, or chosen by the judicial nominating committee if one exists.[64] The Commission's recommendation is a recognition of the need to make the chief defender independent.

Without an independent board, the influence of partisan politics might be evidenced in the selection of the defender. Moreover, if the defender is responsible to elected officials, the quality of the defense might be diminished:

> Both popular election and appointment by a governing body or by judges seem likely to discourage some candidates who might otherwise be interested. Moreover, the possible need to be re-elected or reappointed affects the career possibilities of the office and may even affect the manner in which the defender conducts the office. On balance, since the public defender is essentially a legal specialist rather than a policy-making official, a public defender should be neither elected nor appointed by elected officials. Instead, the defender should be chosen by an independent board or by a combination of officials.[65]

In addition to selection of the administrator, other responsibilities may be assigned to the board. These duties, however, will depend on each jurisdiction's decision on the scope of supervision over the public defender.

DUTIES OF THE ADMINISTRATOR

The defender-administrator should be authorized to carry out duties generally assigned to the executive of a non-profit agency, which would include selection and supervision of staff attorneys as well as the customary office managerial tasks. He will, of course, seek the advice and recommendations of the supervisory board on many other responsibilities incident to operating the combined services. A representative but not exhaustive list of such responsibilities includes: screening possible assigned counsel panel members, establishing a training and evaluation program to ensure their competency, promoting a fair assignment plan between staff attorneys and appointed counsel, adopting

63. *See* THE OTHER FACE OF JUSTICE, *supra* note 22, Table 10 at 17.
64. *See* TASK FORCE REPORT, *supra* note 44, Standard 13.8.
65. NLADA, HOW TO ORGANIZE A DEFENDER OFFICE 31-32 (1967).

fiscal and recordkeeping systems, and providing support services both for public defenders and for the panel. Of course, these duties and the degree to which the court and the bar association participate in them will depend on the needs of the locality.

Three main duties of the defender-administrator merit particular attention. The administrator will be required to balance the percentage of cases handled by staff attorneys and those handled by the private attorney panel. A proper ratio is necessary in order to maintain competent representation without losing the interest of the private bar in the program. Another duty will be to consider the types of cases that should be handled by staff attorneys as opposed to panel members. Finally, the administrator must insure that support services are provided to both groups of attorneys who may need the services in defending indigents.

Balancing the Caseload Between Defender Staff and Private Panel

It would be unrealistic to specify a percentage of cases that should be handled by the staff attorneys or the private panel, since internal factors peculiar to the program will dictate different divisions. However, in assigning cases the administrator should be cognizant of the need to keep both units strong and the participants interested. The panel should have enough cases to keep the interest of a significant portion of the bar in the program. The public defender should have a caseload great enought to maintain an able group of full-time staff attorneys. An important consideration, of course, is whether the burden on the public defender is so great as to adversely affect the quality of representation.

"Substantial participation of the private bar" has been recommended by some national studies.[66] This term is interpreted differently according to the circumstances of the locality. In a jurisdiction where resources for the defender unit are extremely limited and the panel is composed of many experienced, enthusiastic lawyers, "substantial" private participation may require up to 60 or 70% assignment of all indigent criminal cases. In areas with few private attorneys who practice in the criminal courts, or where a program is new, the private bar may participate substantially by taking only 20% of all cases requiring free counsel. These extreme examples fix the outer limits of participation by both groups: the public defender will handle at least 20%

66. LEAA NATIONAL ADVISORY COMMISSION, *Standard* 13.8 (1973).

of the caseload and the panel will be utilized in no more than 80% of these cases.

Some committees have attempted to ensure that private attorneys will participate in the program by setting quotas. For instance, in the District of Columbia, assignments to the public defender are limited by statute to only 60% of all cases.[67] Similarly, the Guidelines for the Criminal Justice Act provide that a minimum of 20% of all indigent defendants be represented by the private panel.[68] Of course, assignment to the panel will usually be controlled by the resources available; however, in 1969, the National Defender Conference found that the private bar could handle at least 30% of those defendants qualifying for free counsel.[69]

The problem may not be in finding private counsel for criminal cases, but in persuading the local judge to accept the concept of institutionalizing the defense service for indigent defendants. Sometimes public defender staffs have difficulties getting the court to refer cases to their office. For example, when the Legal Aid and Defender Association of Detroit was established, staff lawyers found it almost impossible for their office to exist, since such a disproportionately small number of cases was assigned to them. To resolve the matter, the Michigan Supreme Court held that the assignments by the Recorder's Court were "irregular" and ordered that the presiding judge assign weekly to the public defender unit at least 25% of all cases in which counsel is appointed.[70]

It should always be emphasized that the quality of representation is the guiding factor in determining the balance of assignments between public defender and assigned counsel. Public defender offices must be kept strong, and widespread interest of the private bar must be maintained; but effective representation is the goal of the mixed system. Some cases, such as conflict of interest cases or specialized matters, will require special con-

67. *See* Bremson, *The Implementation of Argersinger—A Prescriptive Program Package*, NATIONAL CENTER FOR STATE COURTS 46 (1974). This was not included in the 1974 plan, but it remains in the Public Defender Service Enabling Act.

68. *Guidelines for the Administration of the Criminal Justice Act*, Administrative Office of Courts, Washington, D.C. (1970).

69. NLADA REPORT, *supra* note 14, at 43.

70. Administrative Order Pursuant to Section 23, Article VI (Mich.) Constitution of 1963. Entered by the Judges, May 11, 1972, Mich. State Supreme Court.

sideration so that the client will receive competent and loyal counsel. Certainly the administrator should ensure that assignments are made equitably, taking into account the experience of lawyers and their availability.

It is important for the administrator to develop and publicize a fair method of assigning cases to his own staff and to the panel. He must take into consideration the fact that some lawyers in the pool may have more time to devote to representing particular clients. In addition, the administrator should make use of the different skills and experience of private bar attorneys. Moreover, young or inexperienced lawyers should be encouraged to participate in training programs and serve as co-counsel with more experienced lawyers. Also, the geographical area may dictate which kind of plan is equitable for both staff attorneys and private counsel. The administrator should take steps to inform the courts and bar association of any deviation from a strict rotation system in order to maintain good relations between the service and the courts as well as with other members of the legal profession.

Types of Cases Assigned to the Panel

The balance of caseload between the office of public defender and the panel of assigned counsel in mixed systems is not the only concern of the administrator. If a realistic relationship is to exist between the employed defender and the panel of lawyers from private practice, they should share different *kinds* of cases on a professional basis. The role of the public defender should not be denigrated by a system which refers all capital cases to the panel; nor should the private bar be utilized only when the public defender is unable to handle his schedule. However, assignment to either group may be mandated for reasons of convenience or strategy, or because conflicts of interest emerge in multiple defendant or incompetency of counsel cases. The administrator should attempt not only to use the skills of both groups, but also to encourage training of inexperienced members of the bar and staff attorneys.

The difficulty of a particular case should not normally be a factor in assigning counsel or using the public defender. Theoretically, the panel will be made up primarily of skilled, experienced lawyers, and younger attorneys serving an "internship" before they are assigned cases on their own. Thus, the panel will be equipped to handle most cases that come through the public defender's office.

In actual practice, however, some jurisdictions overemphasize the skill of the private bar by requiring that all capital cases must be referred to a member of the panel.[71] Such a requirement is both degrading and presumptive. First, it tends to destroy the credibility of the public defender in the eyes of his clients. Second, it is based on what is probably a false premise: that the defender is not as competent as a private attorney. In like manner, professional cooperation and parity between the defender and the private panel may be negated if the panel is used only for overflow cases. Certainly the defender should not permit his caseload to become so great that it threatens the quality of representation. Moreover, use of the panel only for overflow cases may cause resentment within the private bar.

Some offices assign routine or one-appearance matters to the public defender for economy reasons, because the staff attorneys are readily available and usually have offices in the courthouse. In some jurisdictions, a case requiring a long trial is assigned to a staff lawyer who can spend full time on it. Unless the public defender has a special appellate division, it may be wise to assign a panel member for appellate work so that someone other than the trial counsel handles the appeal. Finally, the expertise of a particular panel member or public defender may mandate that he be assigned to the case.

Another area in which assignments may be made to the private panel rather than the public defender are appeals or post-conviction hearings involving the issue of incompetency of counsel. The avenues open to trial counsel on appeal were delineated by Judge Gallagher in *United States v. Angarano*:

> As an ethical matter, should [trial counsel] simply continue his representation and argue his lack of trial effectiveness on appeal; or seek leave to move for a new trial . . . on the ground of his ineffectiveness; or should he make known the issue to his client and recommend he remain in the case and argue his ineffectiveness at trial; or should he explain the issue to his client and recommend a motion to withdraw as counsel due to the presence, in his own opinion, of the question whether he provided ineffective assistance at trial . . . ?[72]

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71. PA. STAT. ANN. tit. 19, § 784 (1964), *repealed in part only* by PA. STAT. ANN. tit. 16, § 9960.11(1) (Supp. 1976) [originally enacted as Act of Dec. 2, 1968, P.L. 1144, No. 358, § 11(1)].

72. 329 A.2d 453, 456 (D.C. App. 1974) (dissenting opinion).

It seems clear that neither the defender who tried the case nor another member of the staff should be placed in a position of challenging his own competency or that of an associate. Certainly, this is a matter that should be assigned to other counsel. The question might not be resolved by appointing another member of the panel if the defender-assigned counsel system is so closely organized as to resemble a law firm. If this were the case, the court should appoint counsel outside the mixed system.

Another type of case which requires consideration involves co-defendants. If the defender is to represent one, the other should be assigned to a member of the panel. Further, it may be wise to assign all the multiple defendants to lawyers on the panel. Even here, some may feel there is still a conflict of interest if the panel arrangement is integrated into the defender-panel system. This position seems to suggest a too-strict interpretation of the Code of Professional Responsibility. Use of the panel is still use of lawyers in private practice, even though they volunteer to cooperate in a panel where there is an administrator and an advisory board for the over-all service.

Providing Support Services

One of the principal advantages of having the assignment panel attached to the public defender's office is the feasibility of using a common pool of support services. Resources needed in most criminal cases, such as investigators, social workers, approved expert witnesses, and crime laboratories, will be available not only to full-time salaried defenders but also those appointed counsel who may defend only a few cases and may not otherwise have ready access to such aids.

Because the combined system will increase the volume of cases handled by the mixed pool of attorneys, the administrator will be justified in employing investigators on a full-time basis.[73] Panel lawyers will not need to spend time seeking available and competent investigators for their periodic needs, unless they care to use outside help. However, in conflict of interest cases separate, independent investigators will be needed.

In addition to investigatory services, one or more social workers may be employed full or part time in large defender offices.

73. In determining the number of investigators needed, studies indicate there should be one investigator for every three full-time attorneys. *See* THE OTHER FACE OF JUSTICE, *supra* note 22, at 85, *citing* Findings of National Advisory Committee on Criminal Justice Standards and Goals.

Their services will be needed especially in requests for bail, pretrial release, sentencing, and parole or probation revocations, where questions of the education, home life and employment of the defendant have particular significance. They may also aid attorneys working on juvenile or commitment proceedings.

The importance of these services to a defendant has been amply illustrated. One federal circuit court judge recognized the importance of investigation:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.[74]

Moreover, an ABA committee has indicated that defense counsel may be valueless to the defendant if the verdict hinges on a missing witness or unavailable handwriting experts.[75] In view of the fact that 62% of assigned counsel systems and 60% of surveyed public defenders have no full-time staff investigators,[76] the importance of combining these two systems to be able to use staff investigators is apparent. Since the investigators will be centrally located and supported by both the public defender's office and the private bar, they will have access to more resources and will in turn be accessible to all attorneys representing indigents.

CONCLUSION

While it has been impossible to determine whether the public defender office, the assigned counsel system, or a plan which combines the two, is best suited to provide efficient and competent representation for indigent criminal defendants, these guidelines for structuring the public defense system should be helpful if a mixed system is utilized. Certainly the quality of a service is not wholly traceable to the kind of system used, as demonstrated by studies comparing the assigned counsel system with the public defender. Yet, the ad hoc assigned counsel practice, representing an early stage in the developing right to counsel in criminal cases, too often provides late and inexperienced representation to

74. United States v. DeCosta, 487 F.2d 1197, 1204 (D.C. Cir. 1973). *See also* Criminal Justice Act, 18 U.S.C. § 3006A (1964).

75. ABA STANDARDS, *supra* note 4, Standard 1.5.

76. See THE OTHER FACE OF JUSTICE, *supra* note 23, at 68.

indigent defendants. The public defender system on the other hand, may not involve enough participation of the bar to assure good public relations for the defense program. The mixed system encourages a greater number of lawyers in private practice to participate in defense of indigents, and enables more of them to gain experience in criminal trials.

Although the mixed appointed counsel-public defender system may provide the best of both worlds, some recommendations may be made as to specific standards or guidelines for jurisdictions reviewing their systems:

1. In a mixed system, the administrator should be the employed public defender. He should have responsibility, in cooperation with the private bar and under the guidance of a policy-making board, for establishing and maintaining a panel[77] of private lawyers, for training, for evaluation, for fiscal and recordkeeping matters, and for providing support services.

The purpose of this recommendation is to provide for a central administration and to vest in the administration the primary responsibilities for overall operation of the system. It seems reasonable and proper that we look to the defender, as administrator, to select and operate the panel.

2. The percentage of cases handled by each component of the mixed system will depend upon the number of cases which the defender staff can handle effectively, and upon the composition, size and enthusiasm of the panel of private lawyers.

No attempt has been made to prescribe a fixed ratio of cases that should be handled by either component of a mixed system, since local factors will determine the division of services for a particular defense agency. Fiscal resources and professional interest are central indicators of the percentages which might be used. The character of the community and the history of the existing facility may control respective caseloads. For instance, if a public defender plan has been established for some years, the staff probably will be larger and more experienced than a newly created organization. Ultimately a "substantial" share of the assignment should be taken by each division—a ratio that will maintain the

77. The panel arrangement has been found in the federal courts since 1974. The Criminal Justice Act, 18 U.S.C. § 3006A (1964), requires that each district adopt a plan, and all models recommended by the Committee to Implement Judicial Conference of the United States included provisions for panels of attorneys.

active interest of the private lawyers and at the same time justify the existence of a full-time defender staff.

3. Except for cases involving multiple defendants or matters requiring special expertise, there should be no fixed rule distinguishing the type of cases handled by the defender staff or the assignments to the panel of private attorneys.

If a realistic relationship is to exist between the employed defender and the panel of lawyers from private practice, cases should be shared on a professional basis. This objective is not accomplished by assigning only overflow to the panel or refusing to assign capital cases to the public defender. Of course, where there is more than one defendant, the conflict of interest makes it necessary that each client has separate, independent counsel. In a few jurisdictions, the administrator assigns all such defendants to members of the panel in order to prevent possible criticism concerning a particular assignment. Generally the conflict problem can be solved by assigning to the panel all the defendants except the one handled by the defender. This conclusion appears to be sound since the relationship between the defender agency and the panel is not as close as a private "firm." However, if the "firm" concept is applicable in a given arrangement, having two members of the panel represent the conflicting interest might be unethical.[78]

Also, in many cases, the facts or legal issues will require special knowledge and skill of defense counsel. In such instances, the administrator will use his discretion in assigning the case to a particular member of his staff or a certain member of the panel in order to provide competent counsel. Routine appearances, or matters that will necessitate protracted hearings can be handled more conveniently by defender personnel.

4. The method of assigning cases should be in accordance with a fair and well-promulgated plan.

In order to avoid the criticisms that the assignments are not made fairly, the administrator should establish an equitable plan that will prevent arbitrary assignments, taking into account the need to balance the caseloads of each attorney. The administrator must also make certain that no lawyer is assigned a dispropor-

78. *See* Angarano v. United States, 312 A.2d 295 (D.C. App. 1973); Borden v. Borden, 277 A.2d 89 (D.C. App. 1971); People v. Smith, 317 Ill. 2d 622, 230 N.E.2d 169 (1967); ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, Disciplinary Rule 5-10 and Ethical Consideration 5-1.

tionate number of easy or difficult cases. For most assignments, a rotation system will be most convenient and workable. The plan should be specific as to how the special matters, such as conflict of interest cases, are handled.

5. Every mixed system should provide the defender and members of the assignment panel with support services necessary for adequate defense of their clients.

Ideally, each system should have a full panoply of investigators, social workers, research personnel and other necessary resources to aid defense lawyers in their pre-trial, trial, post-conviction and appellate representation. Each system should have a cooperative working relationship with crime lab facilities and experts frequently needed in criminal law practice. In rural areas and small towns, the volume of work may not be great enough to justify full-time support services, and the services provided must be adjusted to the demands of the system and to the available finances.

These recommendations will be valuable check-points in devising or improving systems of counsel for indigents. The type of community to be served, the number of indigent defendants involved, and the nature of the local bar must always be considered. Only a concerted and informed effort by bench and bar can make the sixth amendment guarantee of right to counsel a reality for indigent defendants.