INDIGENT DEFENSE SYSTEMS IN THE UNITED STATES

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I

INTRODUCTION: THE RIGHT TO COUNSEL MANDATE

The Sixth Amendment to the United States Constitution guarantees to all persons accused of a crime the right to counsel in their defense. The United States Supreme Court has interpreted the Sixth Amendment to require each state to provide counsel to any person accused of a crime before he or she can be sentenced to jail or prison, if that person cannot afford to hire an attorney. The states have responded to the Court's mandate in the landmark decisions *Gideon v. Wainwright*,[1] *Argersinger v. Hamlin*,[2] and *In re Gault*,[3] by developing a variety of systems in which indigent defense services are provided.

Some states and localities have created public defender programs, while others rely on the private bar to accept court appointments. In most states, the right to counsel has been expanded by legislation, case law, and state constitutional provisions. This expansion at the state level has contributed to the diversity of systems around the country.

In the two decades following the *Gideon* decision, the demand for indigent defense services grew steadily, but the last five to ten years have seen marked increases in the need for state-funded counsel. Prime factors contributing to the recent explosion in indigent defense caseloads are the "war on crime" and a major increase in drug offenses. It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction. The cost of providing indigent defense services has escalated

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1. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court interpreted the 6th and 14th Amendments as requiring states to provide counsel to all indigents accused of a crime in their jurisdictions.

2. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court extended *Gideon* to include petty offenses that carried a possible sentence of incarceration.

3. In *In re* Gault, 387 U.S. 1 (1967), the Supreme Court extended the right to counsel to include all juveniles involved in delinquency proceedings and facing possible incarceration.

sharply, leaving states to search for ways to contain the costs of indigent defense.

Cost is usually the primary factor determining what type of indigent defense system a state or county adopts. Responding to increased costs, increased caseloads, and litigation challenging the programs in place, many states have refined their indigent defense programs in recent years.

This article is organized into two primary sections. The first section is a general discussion of the methods of providing counsel to indigent defendants in the United States. The second section discusses the delivery and funding systems used by each state at the trial and appellate levels.

II

METHODS FOR PROVIDING COUNSEL TO INDIGENT DEFENDANTS

There are three primary models for providing representation to those accused of crimes and unable to afford counsel: assigned counsel, contract, and public defender programs. The *assigned counsel model* involves the assignment of indigent criminal cases to private attorneys on either a systematic or an ad hoc basis. The *contract model* involves a private bar contract with an attorney, a group of attorneys, a bar association, or a private nonprofit organization that will provide representation in some or all of the indigent cases in the jurisdiction. The *public defender model* involves a public or private nonprofit organization with full- or part-time staff attorneys and support personnel.

From these three models for the appointment of counsel, states have developed indigent defense delivery systems, many of which employ some combination of these types. For example, even in states with a statewide public defender system, private attorneys will be appointed to cases that present a conflict of interest and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county. The most recent comprehensive national review of indigent defense programs, *Criminal Defense for the Poor, 1986*, reported that in 1986, assigned counsel programs operated in 52 percent of the counties, public defender programs in 37 percent, and contract systems in 11 percent.[4]

A. Assigned Counsel Programs

Assigned counsel programs utilize private attorneys to represent indigent defendants. Many private practitioners, including less experienced lawyers, welcome the opportunity to participate in an assigned counsel program because of the courtroom and trial experience they can gain.

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4. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL DEFENSE FOR THE POOR, 1986, at 1 (1988) [hereinafter DOJ STATISTICS].

1. *The Ad Hoc Assigned Counsel Program.* The oldest and most common type of assigned counsel program is the ad hoc program, under which the appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys. Cases are sometimes assigned to attorneys on the basis of who is in the courtroom at a defendant's first appearance or arraignment, the time when appointments are typically made. Attorneys are usually paid on an hourly basis, for example, $30 an hour for work out of court and $40 an hour for work in court. In some states, attorneys are provided a flat fee per case.

In most jurisdictions, private, court-appointed counsel must petition the court for funds for investigative services, expert witnesses, and other necessary costs of litigation. It is common for such an expenditure to require prior approval of the court, and to be subject to a somewhat flexible, but court-controlled maximum amount.

While the ad hoc assigned counsel method remains the predominant indigent defense system used in the country, particularly in smaller, less populated counties, it is frequently criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed attorneys. It is not uncommon for many of the appointments to be taken by recent law school graduates looking for experience, and by more "experienced," but marginally competent attorneys who need the income.

2. *The Coordinated Assigned Counsel Program.* The better type of assigned counsel program is one that has some type of administrative or oversight body. These coordinated programs generally require attorneys to meet minimal qualification standards in order to join the program, and provide a greater degree of supervision, training, and support for the attorneys who are accepted. In the coordinated model, attorneys are usually assigned on a rotational basis according to their respective areas of expertise and the complexity of the cases. The American Bar Association (the "ABA") recommends the use of coordinated assigned counsel programs over ad hoc programs to assure counsel's independence from the judiciary and elected officials. Standard 5-1.3 of ABA Standards for Criminal Justice, Providing Defense Services specifies that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators of the defender, assigned counsel and contract-for-service programs."[5] Like counsel appointed in an ad hoc fashion, counsel appointed in a coordinated program are paid by the hour or by the case.

The coordinated assigned counsel model is recognized by the ABA as superior to the ad hoc assigned counsel model, as it more frequently ensures

5. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 13 (3d. ed. 1992) [hereinafter ABA STANDARDS].

consistent and adequate representation, helps to eliminate patronage by judges in the assignment process, and avoids appointing cases to lawyers merely because they happen to be present in court at the time the assignment is made.

B. Contract Attorney Programs

In a "contract" program, the state, county, or other jurisdictional district enters into contracts with private attorneys, law firms, bar associations, or non-profit organizations to provide representation to indigent defendants. Often the contract is designated for a specific purpose within the indigent defense system, such as all cases where the public defender has a conflict of interest, or a certain category of cases (for example, felonies, misdemeanors, juvenile dependencies).

The structure of these programs varies, but there are essentially two main types of contract programs: *fixed-price contracts* and *fixed-fee-per-case contracts*.

1. *Fixed-Price Contracts.* The defining characteristic of a fixed-price contract program is that the contracting lawyer, law firm, or bar association agrees to accept an undetermined number of cases within an agreed upon contract period, frequently one year, for a single flat fee. The contracting attorneys are usually responsible for the cost of support services, investigation, and expert witnesses for all of the cases. Even if the caseload in the jurisdiction is higher than was projected, the contractor is responsible for providing representation in each of the cases for no additional compensation. This type of contract has been severely criticized by the courts and national organizations. The ABA's House of Delegates approved a resolution in 1985 condemning the awarding of contracts for indigent defense services based on cost alone. In *State v. Smith*,[6] the Arizona Supreme Court found this type of system, which was in use in several Arizona counties, unconstitutional for the following reasons:

> (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.[7]

2. *Fixed-Fee-Per-Case Contracts.* The distinguishing feature of a fixed-fee-per-case contract program is that when a private lawyer, law firm, or organization enters into a contract to provide indigent defense representation, the contract specifies a predetermined number of cases for a fixed fee *per case*. Frequently, funds for support services, investigation, secretarial services, and expert witnesses will be included in the contract. The contracting attorney

6. 681 P.2d 1374 (Ariz. 1984).
7. *Id.* at 1381.

typically submits a monthly bill indicating the number of cases handled during the period. Once the predetermined number of cases has been reached, the option exists to renegotiate or extend the contract. The fixed-fee-per-case system, unfortunately, is far less common than the fixed-price contract system.

Unfortunately, too many jurisdictions have adopted the fixed-price contract model solely as a means to cut costs, often at the expense of the quality of representation. An indigent defense system has a legal and ethical responsibility to guarantee the quality of representation it is providing. If that responsibility is not taken seriously, the jurisdiction makes itself vulnerable to expensive and damaging litigation from claims of ineffective assistance of counsel.

The ABA Standards have addressed the potential for "quality control" in a contract system.[8] Part III of the revisions approved in August 1990 includes a new section addressing, for the first time, contract defense services. Section 5-3.3(b), "Elements of the contract for services," delineates fifteen essential provisions that should be included in any contract with private attorneys or other lawyer groups.[9] Among the elements listed are that the contract "should ensure quality legal representation" and that the contract should not be awarded "primarily on the basis of cost." The standards also stress that the contract include detailed information about how the cases will be handled by the contractor. Specifically, the standards require that contracts include, but not be limited to, the type and number of cases to be included, the fee per case, minimum attorney qualification standards, the attorneys who will be working on the cases, a policy for obtaining representation in the case of a conflict of interest, and other provisions. The key to a successful contract program is to ensure that the attorneys have appropriate experience, training, and monitoring, and that the lawyers have access to the support and resources necessary for litigation.

In the past few years, the number of jurisdictions utilizing contract programs has substantially increased. In most instances, contract programs have been introduced as an alternative to court-appointed attorneys handling conflict cases in jurisdictions that have a public defender office.

The primary appeal of contract systems to funding bodies is the ability to project costs for the upcoming year accurately by limiting the total amount of money that is contracted out. With an assigned counsel system, it is impossible to predict the total cost for the upcoming year. Variables affecting the cost of an assigned counsel system include the total number of cases assigned, whether any death penalty or complicated cases are filed, and whether there are drug sweeps resulting in multiple defendants. Counties and states utilizing fixed-price contracts are not subject to these variables, so they can project with certainty what their indigent defense expenditures will be at the beginning of the year.

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8. ABA STANDARDS, *supra* note 5, at 49.
9. *Id.*

C. Public Defender Programs

A public defender program is a public or private nonprofit organization staffed by full- or part-time attorneys and is designated by a given jurisdiction to provide representation to indigent defendants in criminal cases. While there are many variations among public defender programs, the defining characteristic is the employment of staff attorneys to provide representation.

The public defender concept predates *Gideon* by fifty years. The first such program was established in Los Angeles in 1913. This early model was intended to provide a core group of experienced criminal lawyers who would improve upon the pro bono representation offered by members of the private bar. Besides the occasional local program, such as in Los Angeles or New York, the public defender model did not proliferate around the country until after the landmark Supreme Court decisions and the publication of several important national studies in the 1970s.

Due to the inevitable cases in which the public defender has a conflict of interest resulting from a multidefendant case or some other source, no jurisdiction can operate with a public defender alone. Standard 5-1.2 of the ABA Standards states:

> (a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.
> (b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.
> (c) Conditions may make it preferable to create a statewide system of defense.
> (d) Where capital punishment is permitted in the jurisdiction, the plan should take into account the unique and time-consuming demands of appointed representation in capital cases. The plan should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[10]

As noted above, the most recent comprehensive national study of indigent defense programs shows that in 1986, 37 percent of all counties in the nation had public defender systems. Public defender programs can be found in jurisdictions of all sizes, and exist in virtually every county with a population exceeding 750,000 residents.[11]

Since the 1986 DOJ study, more jurisdictions have elected to adopt the public defender model, recognizing the advantages of making available a reliable professional staff of well-trained and well-supported criminal defense attorneys for the representation of indigent defendants. Too often, however, jurisdictions with public defender programs have not allotted sufficient resources to keep pace with the ever-expanding caseload. The result has been that public

10. *Id.* at 3.
11. DOJ STATISTICS, *supra* note 4, at 1.

defender staff attorneys are often asked to carry caseloads that make it difficult, if not impossible, to provide effective representation. When the result is less effective representation, the fault is not necessarily with the model, but with the lack of adequate resources.

III

SYSTEMS USED BY EACH STATE TO PROVIDE INDIGENT DEFENSE SERVICES

The states have developed a wide range of systems to respond to the Supreme Court's mandate on the right to counsel. Some states organize their systems on a statewide basis, others by county, and still others by region or judicial district. Some states have passed on to the counties their responsibility to select a system from the various options. This section provides an overview of how the various states organize and fund their indigent defense systems.

A. How States Organize Their Systems at the Trial Level

1. *Statewide Systems.* More than half of the states have organized some form of a statewide indigent defense program. These statewide systems have varying degrees of responsibility and oversight, but they share the common element of providing some degree of uniformity to the delivery of indigent defense services statewide.

A statewide agency may operate under the executive or judicial branch of government or as an independent public or private agency. Often, a governing body or commission is created to enact policy and select the state public defender or chief counsel of the agency. In some states, a state public defender is appointed by the governor.

Some statewide systems incorporate a variety of local indigent defense delivery systems throughout the state, including public defender offices, assigned counsel, and/or contract programs. Typically, public defenders serve metropolitan areas, and private bar programs or contract programs serve the less populous regions. Private bar programs are also necessary in all public defender regions to provide representation in conflict and caseload overload situations.

a. Statewide public defender systems. Sixteen states operate indigent defense programs utilizing a state public defender with full authority for the provision of defense services statewide: Alaska, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin, and Wyoming.

Most of these statewide programs provide public defender representation in every county in the state. However, in some states, such as New Hampshire and Vermont, it is not practical to operate staffed public defender offices in rural areas, so assigned counsel or contract programs have been developed for these regions.

Nine of the sixteen states with a statewide public defender have a commission that oversees the program, although the commissions have varying degrees of involvement and responsibility. Massachusetts, for example, has a state public defender and a commission. The commission provides counsel in every indigent defendant case, but the statute mandates representation in particular types of cases between public defenders and the private bar.

b. State commission systems with some responsibility but no state public defender. State commissions are found both in states with statewide public defender systems and in states that organize their indigent defense systems in a way that combines aspects of state oversight with substantial local control. In these systems, a state commission or board often provides overall direction and may develop standards and guidelines for the operation of local programs. The principal feature of these systems is the provision of central, uniform policy across the state to ensure accountability and quality.

Twelve states have indigent defense commissions setting guidelines for the provision of indigent defense services statewide: Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee. The distinction between a "state commission" state and a state with a statewide public defender system can be subtle. Oklahoma, for example, has a state commission and a state public defender program. The Office of Indigent Defense Services ("OIDS") divides case responsibility among four centralized, staffed units: capital trials, capital cases on direct appeal, capital post-conviction cases, and noncapital direct appeals for the entire state. All noncapital trial level indigent defendant cases, including misdemeanors, juvenile cases, mental health commitments, and felonies are handled locally in the county where they originate, primarily by attorneys who have contracted with OIDS. One exception explains Oklahoma's categorization as a "commission state": the state's two largest counties (Tulsa and Oklahoma) operate county-funded public defender offices that are completely separate from the state program.

Frequently in the state commission model, local jurisdictions within the state are authorized by statute to determine the type of program (public defender, assigned counsel, contract) that best suits their needs within the promulgated guidelines. They then operate the program independently at the local level. Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, North Dakota, Ohio, and South Carolina all have such commissions or boards, although their duties and responsibilities vary substantially.

Several state commissions control limited state funds that are distributed to local indigent defense programs to supplement their budgets. These funds are made available only if the local programs demonstrate that they are following the standards and guidelines developed by their commissions. The state money provides the "carrot" for local programs to, among other things, tighten attorney qualification standards, implement better indigency determination procedures,

and limit the caseloads of assistant public defenders: in short, to improve the quality of representation provided to clients.

Georgia was one of the first states to use this model. The Georgia Indigent Defense Council received a small amount of state funds ($1 million) in 1989 for distribution in Fiscal Year 1990 to counties whose indigent defense programs met guidelines developed by the Council and adopted by the Supreme Court of Georgia. The guidelines concern, among other things, timely appointment of counsel, indigency determination, hiring of contract defenders, fees for court-appointed counsel, procedures to assure the independence of court-appointed counsel, and caseload levels. Even the modest amount appropriated in 1990 had a positive impact on the counties: in the first year of the program, ninety of Georgia's 159 counties initiated changes in their local programs to come into compliance with the guidelines and thus qualify for state funds.

In 1994, Louisiana set up through supreme court rule the Louisiana Indigent Defender Board (the "LIDB"), which is responsible for developing standards and guidelines to ensure that district indigent defender programs provide quality services to indigent clients. The district indigent defense boards must demonstrate that they are making strides toward complying with the LIDB's standards in order to receive supplemental state funds for general assistance and for hiring experts.

In Arkansas, local public defender programs that meet the guidelines of the Arkansas Public Defender Commission qualify for assistance from the state Capital, Conflicts and Appellate Office, which accepts capital cases in which a local public defender has a conflict of interest and acts as a resource center for local public defenders, providing court opinions, statutes, and other materials. Private attorneys representing indigent defendants are certified as qualified to accept various types of case assignments under the Commission's Minimum Standards. The Standards also establish maximum allowable caseloads for full-time and part-time contract defenders, and require that contracts specify that a contracting attorney be permitted to decline case assignments if he or she already has been assigned cases requiring an extraordinary amount of time and preparation.

Most recently, Indiana introduced a scheme whereby any county that can show that it has developed a comprehensive plan to provide indigent defense services meeting the standards developed by the Indiana Public Defender Commission will receive state reimbursements totaling 25 percent of the cost of providing representation in noncapital cases.

Prior to the creation of the boards in Georgia, Louisiana, Arkansas, and Indiana, the indigent defense system in each of these states was organized at the county level, with no consistency from county to county and no real accountability. Defense attorneys in these states battled problems with maintaining professional independence and freedom from political pressures or judicial interference. Now the local programs in these states continue to have local

autonomy, but the state oversight from the commission or board guarantees a more consistent and uniform system that can provide better quality service.

2. *County and Regional Systems.* In contrast to statewide systems, other states delegate the responsibility to organize and operate an indigent defense system to the individual county or group of counties comprising a judicial district. The decision of what type of system to use may be made by the County Board, the local bar association, the local judges, or a combination of these groups. Under this system, there is little or no programmatic oversight at the state level; there is no state board, commission, or administrator. Fourteen states follow this pattern: Alabama, Arizona, California, Idaho, Maine, Michigan, Mississippi, Montana, New York, North Carolina, South Dakota, Texas, Utah, and Washington.

Like the statewide defense systems, there are noticeable variations among states with county and regional systems. In Maine, for instance, there are no public defenders. The vast majority of counties use assigned counsel exclusively, but some counties have experimented with contracts.

3. *Other Systems.* Finally, eight states, plus the District of Columbia, have indigent defense systems that do not fit neatly into the above three categories.

In the *District of Columbia*, a private non-profit public defender organization, which is overseen by a Board of Trustees, provides representation in a portion of the cases, while private, court-appointed attorneys provide counsel in all other cases.

In *Florida*, the legislature has created twenty independent publicly elected public defender offices. There is one office for each judicial district. While this structure is mandated by the state, there is no state oversight at the trial level.

In *Illinois*, by statute, every county with a population of 35,000 or more must have a local public defender program. In less populous counties, public defender programs are optional. There is, however, no state oversight at the trial level.

In *Iowa*, a state public defender is responsible for the tasks common to those of an executive director of a statewide indigent defense commission, although Iowa has no such commission. The state public defender oversees the local public defender, contract, and assigned counsel programs adopted and operated by the ninety-nine counties.

In *Nevada*, there are two large county public defender programs in Reno and Las Vegas. The rest of the state is served by the Nevada State Public Defender at the option of each county. If the county opts out of the state public defender system, it must establish its own program and pay for it totally out of county funds.

In *Oregon*, all county programs are established through a contract negotiation process with the Office of the State Court Administrator.

In *Pennsylvania*, by statute, every county must have a local public defender program. The local programs are not subject to any state oversight at the trial level.

In *Virginia*, the legislature can create by statute a public defender program in any area of the state. Areas not designated for public defender programs are served by local assigned counsel programs.

In *West Virginia*, a state public defender services office administers all funds for indigent defense throughout the state to thirteen nonprofit public defender corporations that serve twenty of fifty-five counties and processes assigned counsel vouchers for the remaining thirty-five counties. The state provides 100 percent of the funds for indigent defense.

The chart in Table 1 displays the different organizational systems for providing indigent defense services used by each of the fifty states.

TABLE 1

HOW STATES ORGANIZE DELIVERY OF INDIGENT DEFENSE SERVICES AT THE TRIAL LEVEL

State PD w/Statewide Authority	Commission w/some Responsibility, but no State PD	County or Regional Systems	Other
Alaska	Arkansas	Alabama	District of Columbia
Colorado	Georgia	Arizona	Florida
Connecticut	Indiana	California	Illinois
Delaware	Kentucky*	Idaho	Iowa*
Hawaii	Louisiana*	Maine	Nevada
Maryland	Kansas*	Michigan	Oregon
Massachusetts*	Nebraska	Mississippi	Pennsylvania
Minnesota	North Dakota	Montana	Virginia
Missouri	Ohio*	New York	West Virginia
New Hampshire	Oklahoma*	North Carolina	
New Jersey	South Carolina	South Dakota	
New Mexico	Tennessee	Texas	
Rhode Island		Utah	
Vermont		Washington	
Wisconsin			
Wyoming			

* States with a state public defender that does not provide trial-level representation statewide.

B. How States Fund Their Indigent Defense Systems at the Trial Level

State indigent defense systems may be funded by state funds, county funds, user fees, court costs, or by a combination of those. Table 2 provides data on funding sources for indigent defense at the trial level in each of the fifty states and the District of Columbia.

TABLE 2

STATES' INDIGENT DEFENSE FUNDING SOURCES—TRIAL LEVEL

	State Funds	County Funds	State/County Funds	Other
Alabama			X	X
Alaska	X			
Arizona		X		
Arkansas			X	X
California			X	
Colorado	X			
Connecticut	X			
Delaware	X			
District of Columbia				X
Florida			X	
Georgia			X	
Hawaii	X			
Idaho		X		
Illinois		X		
Indiana			X	
Iowa	X			
Kansas			X	
Kentucky			X	X
Louisiana	X			X
Maine	X			
Maryland	X			
Massachusetts	X			
Michigan		X		
Minnesota	X			
Mississippi		X		
Missouri	X			
Montana		X		X
Nebraska			X	
Nevada			X	
New Hampshire	X			
New Jersey	X			
New Mexico	X			
New York			X	
North Carolina	X			
North Dakota	X			
Ohio			X	
Oklahoma			X	
Oregon	X			
Pennsylvania		X		
Rhode Island	X			
South Carolina			X	X
South Dakota		X		
Tennessee			X	
Texas		X		
Utah		X		
Vermont	X			
Virginia	X			
Washington		X		
West Virginia	X			
Wisconsin	X			
Wyoming			X	
TOTALS	23	11	16	7

Table 2 shows that twenty-three states fund their trial system exclusively through state funds, eleven states exclusively through county funds, and sixteen states through a combination of state and county funds. In addition, a growing number of states rely on filing fees, cost recovery, and/or court costs assessments from civil litigants and criminal defendants to help fund indigent defense.

The following examples illustrate the diversity of how indigent defense systems are funded at the trial level.

In Alabama, a Fair Trial Tax Fund has been created to reimburse counties for expenditures on indigent defense services. The revenue from this fund consists of a $7 filing fee for all civil cases in Alabama courts, a $7 tax on all criminal convictions, and a $10 fee for each civil case in which there is a jury demand. The Fair Trial Tax Fund is intended to cover the cost of indigent defense in the state, but in the past it has fallen short and the state has had to make supplemental appropriations from General Fund revenue as required by statute.

In Arkansas, the majority of funds provided are county funds, but the state contributes some support for the Capital, Conflicts and Appellate Office. In addition, $5 is levied in court costs and fines in all civil cases and criminal matters resulting in conviction. Twenty percent of the revenue from the $5 surcharge goes to the Capital Conflicts and Appellate Office and 80 percent goes to the counties' indigent defense budgets.

In the District of Columbia, all funds are provided by the District of Columbia government.

In Florida, the state provides the largest share of funds, but, by statute, the counties are required to pay the cost of assigned counsel in conflict of interest cases and in cases when private attorneys are appointed to provide caseload relief to the public defender. The counties must also provide funding for certain other expenses, including office space, utilities, telephone, and custodial services.

In Indiana, the Indiana Public Defender Commission has promulgated standards and guidelines to determine eligibility of attorneys interested in accepting court appointments in capital and noncapital cases. Counties that enforce these standards are reimbursed for 25 percent of the costs of providing court-appointed indigent defense representation in noncapital cases and 50 percent of the cost of representing capital defendants. Attorneys accepting court-appointed cases in these qualifying counties receive a higher rate of compensation than that paid to attorneys practicing in counties that do not adhere to the Commission's standards.

In Kansas and Montana, the state funds felony representation in the courts of general trial jurisdiction, and the counties fund representation in the courts of limited jurisdiction.

In Kentucky, the Office of the Public Advocate determines the amount of state funds allocated to each county. The counties are encouraged to provide the balance of the funds they need. In practice, however, with the exceptions of the two largest counties, most counties rely on the state allocation alone.

The General Assembly of the Commonwealth of Kentucky recently created three new sources of funds for the Department of Public Advocacy. First, all persons who receive the services of a public defender are now required to pay a $40 administrative fee, which will go directly to the Department of Public Advocacy. The fee can be waived for individuals who are unable to afford it or who are incarcerated. Second, all persons convicted of drunk driving must pay a service fee of $200, of which $50 will go to the Department of Public Advocacy. Third, each county, except for Jefferson, will contribute 12.5 cents for each resident to a state-administered fund to pay for expert witnesses, medical testing, and other services required in the defense of indigents.

Until recently, in Louisiana, all funds for indigent defense came from a $25 assessment charged on all criminal violations. In 1994, the state committed general fund revenue to fund more adequately the new indigent defender board program created by state supreme court rule.

In Montana, counties provide funds for representation in misdemeanors and non-criminal juvenile matters. Funds for representation in felonies, appeals, and juvenile delinquencies are derived from a portion of the motor vehicle registration fee, which is collected at the county level and forwarded to the state. Seven percent of the fee remains at the county level to fund district court level indigent defense services.

In New York, the counties are required to fund the daily operation of their indigent defense programs. The state provides limited funds for special purposes in certain counties. For example, some counties receive state funds for programs such as the Major Offense Program, State Felony Program, Special Narcotics Program, Emergency Felony Program, and the Major Violent Offense Program.

In Ohio, the state reimburses the counties for up to 50 percent of their annual expenditures on indigent defense. The program is supported in large measure by an $11 assessment on all convictions other than minor traffic offenses. The $11 assessment is added to the bail premium of all defendants who post bond or at the disposition of the case if no bail is posted.

In Wyoming, by statute, the state provides 85 percent of the annual cost and the counties 15 percent.

C. How States Organize Their Appellate Indigent Defense Systems

The following are the predominant methods that have been developed to provide appellate defense services in the various states and counties around the country.

1. *Combined Trial and Appellate State Public Defenders.* Sixteen states have a state public defender system providing trial level representation statewide. (See Table 1.) Each of these also operates an appellate defender division serving the entire state.

2. *State Appellate Defender Program.* Twelve states (Arkansas, California, Illinois, Indiana, Iowa, Kansas, Michigan, Montana, North Carolina, Oklahoma, Oregon, and South Carolina), have no statewide public defender system providing trial level representation, although they do have stand-alone, statewide appellate public defenders funded exclusively by the state. Indiana's public defender office handles state post-conviction proceedings exclusively.

3. *Local Level Delivery.* Fifteen states have no statewide system for providing appellate defender services. Statutes or court rules specify whether local public defender programs or private, court-appointed systems will provide representation in individual appellate cases.

Private attorneys in this delivery model are appointed on an ad hoc, or case-by-case basis. In some states, the state supreme court or intermediate appellate court makes all of the appellate appointments. In others, the trial court appoints members of the private bar. Statutes or court rules specify the rates for compensation of private counsel in some states, while others leave the amount of compensation to the discretion of the appointing authority.

In states where the local public defender provides appellate representation, expenses relating to these services (for example, experts, transcripts) are often built directly into the public defender's budget by the funding source.

4. *Other Methods.* Finally, seven states, Florida, Louisiana, Nebraska, Nevada, Ohio, Pennsylvania, and Washington, plus the District of Columbia, have delivery systems that do not fit neatly into the above three categories. In Florida, five regional appellate defender programs handle direct appeals. There is also a state appellate defender office, the Capital Collateral Representative, charged exclusively with providing post-conviction death penalty representation. In Louisiana, representation in non-capital appeals is provided by attorneys working for local indigent defense boards, subject to state certification. In Nebraska, once the state appellate office opens in 1995, it will handle a limited number of appeals, while the majority will be handled at the county level. In Washington, there is a private, nonprofit appellate public defender for one appellate district and an assigned counsel program in each of the other two districts. The systems for providing appellate services in Nevada and Pennsylvania are the same at the appellate level as at the trial level.

In those states that have an indigent defense commission, the commissions typically oversee both trial and appellate indigent defense services. In Ohio, the appellate defender is a unit of the commission.

While the methods of delivery vary, the trend over the past several years among the states has been to develop and fund appellate services at the state level.

Table 3 sets out the type of indigent defense system at the appellate level used in each state and in the District of Columbia.

TABLE 3

DELIVERY OF APPELLATE INDIGENT DEFENSE SERVICES

Combined Trial and Appellate State Public Defenders	State Appellate Public Defender	Local Level Delivery	Other
Alaska	Arkansas	Alabama	District of Columbia
Colorado	California	Arizona	Florida
Connecticut	Illinois	Georgia	Louisiana
Delaware	Indiana	Idaho	Nebraska
Hawaii	Iowa	Kentucky	Nevada
Maryland	Kansas	Maine	Ohio
Massachusetts	Michigan	Mississippi	Pennsylvania
Minnesota	Montana	New York	Washington
Missouri	North Carolina	North Dakota	
New Hampshire	Oklahoma	South Dakota	
New Jersey	Oregon	Tennessee	
New Mexico	South Carolina	Texas	
Rhode Island		Utah	
Vermont		Virginia	
Wisconsin		West Virginia	
Wyoming			

D. How States Fund Their Appellate Indigent Defense Systems

Funding for appellate representation is provided either by the state, by the county, or by a combination of both. Table 4 provides a summary of the source of funding for each of the fifty states and the District of Columbia.

In twenty nine states, appellate representation is funded entirely by the state. In nine states, the funding is provided exclusively by the counties. In twelve states, the cost of appellate representation is shared by the state and the counties. In Indiana, the state provides funding for post-conviction representation, while the counties pay for direct appeals. In Nevada, the state funds appeals undertaken by the Nevada State Public Defender, and the respective counties provide funding for representation for cases on appeal in the independent jurisdictions of Reno and Las Vegas.

TABLE 4

STATE INDIGENT DEFENSE FUNDING SOURCES—APPELLATE LEVEL

	State Funds	County Funds	State/County Funds	Other
Alabama	X			X
Alaska	X			
Arizona		X		
Arkansas			X	
California	X			
Colorado	X			
Connecticut	X			
Delaware	X			
District of Columbia				X
Florida			X	
Georgia		X		
Hawaii	X			
Idaho		X		
Illinois			X	
Indiana			X	
Iowa	X			
Kansas	X			
Kentucky			X	
Louisiana			X	
Maine	X			
Maryland	X			
Massachusetts	X			
Michigan	X			
Minnesota	X			
Mississippi		X		
Missouri	X			
Montana	X			
Nebraska			X*	
Nevada			X	
New Hampshire	X			
New Jersey	X			
New Mexico	X			
New York		X		
North Carolina	X			
North Dakota	X			
Ohio			X	
Oklahoma			X	
Oregon	X			
Pennsylvania		X		
Rhode Island	X			
South Carolina	X			
South Dakota		X		
Tennessee			X	
Texas		X		
Utah		X		
Vermont	X			
Virginia	X			
Washington	X			
West Virginia	X			
Wisconsin	X			
Wyoming			X	
TOTALS	29	9	12	2

* Pending 1995 creation of statewide appeals unit.

IV

CONCLUSION

The delivery of indigent defense services has undergone important reform in the last decade. The most significant trend is the movement toward some type of state oversight for indigent defense services that relies on statewide standards and often state funds to ensure that uniform, quality representation is provided in every county in the state. Although there are identifiable trends, the push for reform in the delivery of indigent defense services is very much a state-by-state, and even county-by-county, struggle. Improvement requires leadership and support from the bar and the bench.

No one should overlook the progress that has been made in indigent defense services in the last decade, or the very substantial contributions made by dedicated lawyers. Years of advocacy, litigation, and legislation on behalf of indigent defense programs have made it clear that the right to counsel is not going to go away, nor can it be ignored. Still, much remains to be done as new challenges to indigent defense emerge. The primary challenge comes from the increasing costs of indigent defense, resulting in part from changes in crime policies, such as the creation of new mandatory minimum sentences, "three strikes and you're out" measures, and sanctions lowering the minimum age of transfer to adult court for juveniles charged with serious offenses, as well as from an overall increase in criminal filings and a larger percentage of defendants found to be indigent. As new crime policy emerges, more responsibilities are added to indigent defense programs. Meanwhile, the pressures to contain or cut costs of indigent defense services continue.

The tendency to provide representation on the cheap has been significantly curbed through years of successful challenges to low hourly rates and fee caps paid to court-appointed counsel,[12] to the denial of appropriate expert assistance,[13] and to excessive caseloads of part-time, full-time, and contract defenders.[14]

Without guarantees that compensation will at least cover overhead and that there will be no coercion to provide representation in an unlimited number of court-appointed cases, all but the most inexperienced, or least qualified, private attorneys may abandon indigent defense representation altogether. The body of case law concerning the provision of indigent defense services, coupled with the trend of more and more states moving to some type of state oversight for their indigent defense system, would seem to secure the continued improvement

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12. *See, e.g.*, Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); State v. Lynch, 796 P.2d 1150 (Okla. 1990).

13. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985).

14. *See, e.g.*, State v. Peart, 621 So. 2d 780 (La. 1993); State *ex rel.* Stephen v. Smith, 747 P.2d 816 (Kan. 1987); State v. Smith, 681 P.2d 1374 (Ariz. 1984).

of indigent defense delivery in the United States. However, the intense pressure to cut costs could counter these efforts.

States typically are not opposed to the concept of the right to counsel for indigents; what they dislike are the increased costs associated with preserving that right. As a result, many states are now toying with methods to provide a lawyer at a fixed or predictable rate, rather than on an hourly basis. Contracts are viewed by many as the quick fix, and more and more we see contract programs created to replace assigned counsel systems or to handle the conflict cases of public defenders.

There are serious potential dangers with the contract model, such as expecting contract defenders to handle an unlimited caseload or awarding contracts on a low-bid basis only, with no regard to qualifications of the contracting attorneys. However, contracts that are developed to conform with ABA standards, and that are overseen by an independent body, should be viewed as one of several viable delivery options.

Recent efforts around the country point to an awareness of the importance of maximizing both the efficiency and quality of indigent defense services. The task is to build on these efforts, to ensure that all defendants receive the representation they are entitled to by law.