WHAT DO WE MEAN WHEN WE SAY “INDIGENT DEFENSE?”

Phyllis E. Mann

This Article is a basic introduction to the provision of indigent defense services in state courts throughout the country. The Article briefly quantifies what currently exists in our right to counsel systems – what we know, and what we do not know.

It is necessary to first define the term “indigent defense.” Each public defense professional works primarily within a single jurisdiction, and so tends to apply a definition of indigent defense that reflects the makeup of that jurisdiction’s system. Often, public defense professionals mistakenly believe that others assign the same definition to these words. Because of the variations in indigent defense systems and services throughout the country, and from jurisdiction to adjacent jurisdiction, it is highly unlikely that each public defense professional applies the same definition of indigent defense as that applied by every, or any, other professional.

There is no single indigent defense system in our country; the very use of the word system is a misnomer. Instead, each jurisdiction applies its own unique combination of answers to: the administration, funding, and service delivery model by which they provide representation; the individuals who receive that representation; the types of cases in which representation is provided; and, the celerity with which counsel is appointed.

A. How Indigent Defense Representation Is Provided

This Article focuses solely on indigent defense representation provided in state courts and does not address the federal public defense and Criminal Justice Act (CJA) panel system. In the forty-seven years since the Gideon v. Wainwright decision, the federal government and courts have been largely hands-off about the manner in which the states attempt to carry out the Sixth Amendment mandates of the Constitution.

1. Administration and Funding

The administration of public defense services varies by jurisdiction and may be carried out by a state, a county, a city, an individual judge, or by every possible combination of these. Eighteen states have statewide commissions overseeing statewide public defense systems that are theoretically responsible for all public defense services within each state. Two states have elected public defenders for each county or jurisdiction, who are directly accountable to the voters. Eight states have a state public defender operating the public defense system throughout the state, but the chief executive of the state public defender office is appointed by and serves at the pleasure of the governor without any public defense commission to insulate the provision of counsel to the poor from politics. Eleven states fall into a hybrid category. In the remaining eleven states, the individual counties and/or cities control the administration of trial-level indigent defense services, and there is no state oversight.

Just as administration of services varies by jurisdiction, so too does the source of funds to provide those services. Twenty-eight states provide 100% of the funding for trial-level indigent defense (or the amount provided by local jurisdictions is negligible). An additional six states provide the majority of the funding for trial-level representation. In nine states, the counties provide the majority of funding, though the state makes some contribution, even if minimal, toward the cost of trial-level indigent defense. And, in seven states, the counties are left to provide the entirety of funding for trial-level representation with no assistance at all from the state.

2. Service Delivery Model

Each jurisdiction (whether state, county, city, or individual judge) determines the delivery method by which it provides representation. There are three basic forms of delivery: a public defender office; a contract system; or an assigned counsel/appointment system. Yet such simple titles are deceptive because, regardless of the primary delivery system that a jurisdiction claims to use, few systems conform wholly to the structures that these titles appear to dictate.
Public Defender Office Model. Many jurisdictions claim to have a public defender office as their model for delivering public representation services. In one jurisdiction, this may be the private law office of a single attorney who has been designated as the public defender, yet that attorney may carry a full private-pay caseload of clients in addition to her public defense work. In another jurisdiction, all of the public defender attorneys may work part-time, or in their own separate private law offices, or maintain private-pay client caseloads, or all of the above. These are public defender offices in name only, and in fact they are much more like a contract system. In contrast, other jurisdictions may have established a true public defender office as a government agency, with staff working together in a single office and paid as full-time government employees.

Contract Model. Some jurisdictions claim to have contract systems. This may mean that the jurisdiction has an annually renewable contract with a non-profit corporation that employs several full-time attorneys who only represent public defense clients. Such a system looks and behaves much more like a “public defender office” than do many other offices operating under that moniker. Another jurisdiction may have a contract with an attorney for a given sum of money to represent all of the primary conflicts; this arrangement is known as a flat-fee contract.

Assigned Counsel Model. Assigned counsel systems are structured in myriad ways. Some jurisdictions have a single assigned counsel administrator who selects the attorney to be appointed in each case. In others, the chief public defender has responsibility for administering the appointment rotation. In still others, each judge selects an attorney from a pre-approved list. A jurisdiction may claim to have an assigned counsel system, but, if a single lawyer is paid a fee to handle all of a certain type of case and the lawyer does almost exclusively public defense, a contract system actually results.

Most jurisdictions employ a combination of these three methods in delivering indigent defense representation. This is because, in both the public defender office model and the contract model, the jurisdiction must provide unconflicted representation in conflict of interest cases. These conflicts arise in three ways. The most common is in cases of multiple co-defendants, each of whom must have his or her own independent attorney. There are also direct conflicts of interest between particular clients and their attorneys (with those conflicts imputed to every attorney working in the same office). The third type of conflict results from case overload, where a public defender office or contract attorney cannot accept the next case because they would then have too many cases to be able to provide effective assistance of counsel. In all of these conflict situations, some secondary method of delivering representation is necessary to overcome the conflict.

3. Attorneys Providing Indigent Defense Representation

No one knows the identity of all of the attorneys who provide indigent defense representation in America. On November 19, 2009, the Bureau of Justice Statistics (BJS) released its Public Defender Offices, 2007 – Statistical Tables, which examined offices that provide representation “through a salaried staff of full-time or part-time attorneys who are employed as direct government employees or through a public, nonprofit organization.” The information in the tables was derived from the Census of Public Defender Offices conducted by BJS. The Census gathered information from 1,015 offices in forty-nine states and the District of Columbia, but it excluded “[o]ffices that provided primarily contract or assigned counsel [sic] services with private attorneys, were privately-funded or principally funded by tribal or federal government, or provided primarily appellate or juvenile services.” Though this is likely the most comprehensive census of public defense service providers ever conducted by the federal government, it falls well short of being complete. The BJS has indicated an intention to augment this census by gathering data on contract attorneys and assigned counsel. Though there is a dearth of data, the relatively small number of public defender offices sprinkled across all the jurisdictions in the country means that the greatest number of indigent clients is being represented by assigned counsel and attorneys appointed case-by-case, rather than by attorneys employed in public defender offices.

B. Who Is Being Represented?

No one knows the actual number of clients or cases who receive public defense representation each year. Anecdotally, an estimated 80-90% of all defendants prosecuted in criminal cases throughout the country is represented by publicly funded counsel (or could have been, had they not waived that right).
1. Types of Cases

There are several types of cases in which defendants who cannot afford to hire a private attorney are constitutionally entitled to receive appointed counsel. These are: felonies; misdemeanors; suspended/probated sentences; juveniles, in juvenile delinquency cases; direct appeals; appeals of sentence from guilty plea; probation revocation (to some extent); and parole revocation (to some extent).

Yet there remain open questions about entitlement to counsel in many categories, including: parents/guardians facing loss of custody of children; children in cases where the state is temporarily or permanently terminating parental rights; civil loss of liberty based on mental health; treatment court proceedings; civil contempt/collection proceedings; and post-conviction and habeas corpus proceedings, especially in death penalty cases. In addition, some jurisdictions provide publicly funded counsel to at least some of the parties in cases, such as those involving child custody or truancy, where the federal constitution has not been held to require appointed counsel.

There is no common definition for what constitutes a “case” and many jurisdictions do not have any definition. Some jurisdictions use the definition developed by the Conference of State Court Administrators and the National Center for State Courts: “[c]ount each defendant and all the charges involved in a single incident as a single case.” Most jurisdictions, however, tabulate the number of cases according to the prosecuting agency’s charging decisions. As a result, in some jurisdictions, every individual offense with which a defendant is charged is considered a separate case (no matter how many offenses were alleged against a single defendant and no matter whether those offenses were alleged in one or multiple charging instruments). In other jurisdictions, each docket number or charging instrument will be considered as one case (no matter how many offenses are charged therein and without regard to whether those offenses arose out of a single incident or multiple incidents). Other jurisdictions simply count defendants, with each defendant counting as a single case (no matter how many offenses, docket numbers, or charging instruments are pending against a single defendant at the same time).

2. Waiver of Right to Counsel

Even in cases where indigent defendants are entitled to appointment of counsel, many of these defendants waive their right to counsel and proceed to a guilty plea or trial without representation, particularly in misdemeanor cases. Voices as diverse as the Department of Justice and defense advocacy organizations have expressed grave concern as to whether these purported waivers are informed and voluntary or whether they are implicitly coerced. Whatever the situation is for waivers of the right to counsel by adults, it is believed likely to be even worse among children.

3. Indigency Determinations

States and jurisdictions vary in the ways by which they determine who is indigent and thus eligible for publicly funded representation. This inconsistency means that a person who would be entitled to public representation in one county is often denied it in the next county; entitled in one state but denied in a sister state. Each jurisdiction throughout the country (and sometimes each court within a given city or county) makes its own rules about what constitutes indigence. In some jurisdictions, any person who requests appointed counsel will receive an attorney, without officials taking any steps to evaluate the person’s ability to hire an attorney. This is justified by the jurisdictions following this policy on the basis that the cost of verifying financial information for defendants is greater than the cost of providing counsel. In other jurisdictions, defendants are asked to provide information relating to assets, income, and liabilities, and this information is accepted as true. Again, officials justify this practice on the basis that verification would be more expensive than providing counsel to those who facially appear to qualify. Some jurisdictions obtain extensive financial information from defendants seeking counsel and then subject that information to rigorous verification before deeming a defendant indigent. These jurisdictions argue that fiscal responsibility to taxpayers warrants the cost of verification because those who are able to hire their own attorney are not entitled to receive one at taxpayer expense.

Among jurisdictions that obtain any amount of financial information from defendants seeking appointed counsel, there is a wide range in the level of income and/or assets that will render a person not indigent and prevent the appointment of public counsel. Some jurisdictions have a specific income cutoff, such that no one who earns more than a set amount in a given year can receive appointed counsel. Often this income cut-off level is quite low. Other jurisdictions presume that anyone receiving federal benefits, such as low-income housing, food stamps, or Social Security ben-
efits, is unable to hire his or her own attorney. Some systems look at the amount of time it would take a defendant to secure sufficient cash to hire an attorney, and therefore appoint counsel to people who have relatively high income and asset to liability ratios. Other locales design complex matrices that consider income and asset to liability ratios, family size, the type of case with which the defendant is charged, the cost of securing privately paid counsel to defend on the type of charge in the jurisdiction, and other factors. This type of scheme creates a stair-step eligibility for appointed counsel arising out of all of these factors. Finally, it is an unfortunate fact that, in some jurisdictions, whether any given person will receive appointed counsel truly depends on how a judge is feeling that day.

C. When Is Counsel Provided?

Despite relatively clear case law from the United States Supreme Court, the point in a proceeding when a defendant is provided publicly funded counsel varies among jurisdictions so that it is difficult to determine when indigent defendants will actually receive counsel. In the types of cases set out in Part II.B.1, supra, there are defined instances in the course of those cases (beyond the period between arraignment on the charge and dismissal, acquittal, or sentencing) when defendants are entitled to have representation by counsel: custodial interrogation; initiation of adversarial process and without regard to involvement of the prosecutor; critical stages pretrial, including preliminary hearings; lineups and show-ups at or after initiation of adversary judicial criminal proceedings; arraignment; and plea negotiations. Many jurisdictions throughout the country simply do not provide counsel at the times required by the Sixth Amendment and instead rely on their own sense as to when counsel should be appointed, if at all.
APPENDIX A

Trial-Level Public Defense Funding (2010)
APPENDIX B

Administration of Trial-Level Services (2010)
* Director, National Defender Leadership Institute, for the National Legal Aid & Defender Association (NLADA).


2. The Criminal Justice Act, 18 U.S.C. § 3006A (2006), governs the provision of appointed counsel in federal courts. All federal indigent defense representation today is provided through a federal public defender organization, a community defender organization, or a panel of private attorneys who accept assignments in individual cases. See id. For more information about the federal public defense system, see Appointment of Counsel, http://www.uscourts.gov/FederalCourts/Appointment-of-Counsel.aspx (last visited July 19, 2010).


5. See infra App. B.

6. See infra App. B. Those eighteen states are:


Oregon. See OR. REV. STAT. ANN. §§ 151.211–.505 (West 2010).


Wisconsin. See WIS. STAT. ANN. §§ 977.01-.09 (West 2010).

7. See infra App. B. Those two states are:

Florida. FLA. STAT. ANN. § 27.50.

Tennessee (with the exception of Davidson and Shelby counties). In 1989, Tennessee established that the district public defenders in each of the state’s 31 counties (with the exception of Davidson and Shelby counties) are to be elected. TENN. CODE ANN. § 8-14-202(b)(1)(A) (2010). They also established the District Public Defenders Conference. See TENN. CODE ANN. §§ 8-14-301 to -306 (2010). In 1990, the public defenders from Davidson and Shelby counties were added to the conference. H.B. No. 1899, 96th Gen. Assem. (Tenn. 1990).

8. See infra App. B. Those states are:

Alaska (has two statewide chief executives, one for primary representation and one for conflicts representation). See Alaska Stat. §§ 18.85.010-.180(2010) (establishing the Public Defender Agency); id. § 18.85.030 (providing that the governor shall appoint the public defender subject to confirmation by the legislature); id. §§ 44.21.400-470 (establishing the Office of Public Advocacy); id. § 44.21.410(a)(5) (providing that the Office of Public Advocacy shall represent indigents who cannot be represented by the public defender due to conflicts of interest); see also ALASKA PUB. DEFENDER AGENCY & OFFICE OF PUB. ADVOCACY, DPT’O ADMIN., Eligibility Issues and Other Program Aspects 3-5 (1995), available at http://www.legaudit.state.ak.us/pages/audits/1995/pdf/4507.pdf (describing the history and organization of the Office of Public Advocacy and the Public Defender Agency).

Delaware. See Delaware Model Defender Act, 29 Del. C. 1953, Chap 46 § 4601 et seq.

Iowa (state PD does not oversee conflict representation). See IOWA CODE ANN. §§ 13B1.1-11 (West 2010); id. § 815.10; id. § 13B.2 (“The governor shall appoint the state public defender, who shall serve at the pleasure of the governor”).


New Mexico. See N.M. STAT. ANN. § 31-15-1 to 12 (West 2010); id. § 31-15-4(A) (“The governor shall appoint the chief who shall be the administrative head of the department.”).

Rhode Island (state PD does not oversee conflict representation). See R.I. GEN. LAWS § 12-15-1 to -11 (2010); id. § 12-15-2 (providing that the governor shall appoint the public defender).

Vermont. See VT. STAT. ANN. tit. 13 § 5201-5277; id. § 5252(a) (“The defender general shall be appointed by the governor.”).


9. See infra App. B. Kentucky and Oklahoma both have statewide commissions and state public defense systems, though in each there are jurisdictions that remain outside the statewide system. Georgia and Ohio both have statewide commissions and state public defense systems, but counties can opt in or out of the state public defender system. Kansas has both a statewide commission and a state public defender system, but only for felony and appellate representation. Nevada has a state public defense system but allows rural counties to opt in or out of the state system, and there is no statewide commission. Indiana, Nebraska, Texas, Washington, and West Virginia each have agencies that serve as a funding pass-through to provide financial assistance to counties through state funding, but control over service-delivery is maintained locally.

Georgia. Funding of the Georgia system was provided by House Bill 1EX:

In the 2004 legislative session, House Bill 1EX, the funding mechanism for the new state-wide system, was passed. This legislation funded the state’s portion of the funding for the Standards Council through court “user fees” including a $50 waivable application fee, a $15 add on for civil filing fees, a 10% add on for traffic and
criminal fines, and a 10% add on with a $50 cap for bail and bonds. This fund is projected to collect between $37 and $40 million per year.

GA. PUB. DEFENDER STANDARDS COUNCIL, 2005 ANNUAL REPORT 6 (2005), available at http://www.gpdsc.doc/docs/cpdsystem-reports-annual_report_2005.pdf. The counties were left responsible for fully funding the cost of “appropriate offices, utilities, telephone expenses, materials, and supplies as may be necessary” for “the office or offices of the circuit public defender.” GA. CODE ANN. § 17-12-34 (2010). The state funded the salary of the circuit public defender, id. § 17-12-25(a), one assistant public defender for each superior court judge in the circuit, id. § 17-12-27, one investigator, id. § 17-12-28, and two administrative paraprofessional personnel, id. §§ 17-12-29 to -30. Counties were allowed to supplement the salaries and benefits of any of these state employees and to fully fund additional positions. Id. §§ 17-12-25(b), -30(6)-(7), -31, -32. Additionally, single county judicial circuits could opt to continue an alternative delivery system if: (1) the existing system had a full-time director and staff and had been operational for at least two years on July 1, 2003; (2) GPDSC determined the system meets or exceeds standards; (3) the county submits a resolution to the GPDSC by September 30, 2004 requesting to opt out; and (4) the county fully funds the system. Id. § 17-12-36(a).

“The Cobb, Gwinnett, Houston, Douglas, Blue Ridge and Bell-Forsyth Circuits applied and were approved for opt out.” GA. PUB. DEFENDER STANDARDS COUNCIL, supra, at 6.

Indiana. IND. CODE ANN. § 33-40-4-1 to -5 (West 2010) (establishing the Public Defender Council to “assist in the coordination of the duties of the attorneys engaged in the defense of indigents at public expense”). As the website of the Public Defender Council advises, “[t]he Council does not provide legal representation.” Indiana Public Defender Council http://www.in.gov/ipdc/index.html (last visited Aug. 31, 2010). Indiana also has a State Public Defender, but its only duties are in postconviction. IND. CODE ANN. § 33-40-1-1 et seq.

Kansas. See Indigents’ Defense Services Act, KAN. STAT. ANN. §§ 22-4501 to -4529 (2010); id. § 22-4503(a) (“A defendant charged with . . . any felony is entitled to have the assistance of counsel.”); KAN. ADMIN. REGS. § 105-1-1(a). The State Board of Indigents’ Defense Services is required to provide representation “for each indigent person accused of a felony and for such other indigent persons as prescribed by statute.” KAN. STAT. ANN. § 22-4522(a). The Board may provide representation on misdemeanors, but at the expense of the city or county. Id. §§ 22-4523(f), 22-4526.

Legal representation at state expense shall not be provided in the following types of cases: (1) services on behalf of juvenile offenders, unless the juvenile is charged with commission of a felony offense as an adult under the criminal laws of Kansas; (2) services on behalf of a defendant charged with a misdemeanor or a defendant appealing a misdemeanor conviction; (3) any case in which the defendant or other person represented has not been determined to be indigent or partially indigent by a judge, using guidelines developed by the board of indigents’ defense services; and (4) any case in which an attorney has not been appointed by a judge to represent the defendant.

KAN. ADMIN. REGS. § 105-1-1(b).


Nevada. NEV. REV. STAT. ANN. §§ 180.010-.110 (LexisNexis 2010). The statutory creation of the State Public Defender expressly excludes that office from providing trial-level services in counties that have created an office of public defender. Id. § 180.090. Nevada counties with populations of 100,000 or greater – Clark County (Las Vegas) and Washoe County (Reno) – are required to create a county public defender office. Id. § 260.010(1). All other counties may choose to either create their own public defender office or avail themselves of the services of the State Public Defender, but the county public defender office does not have...
to be a full-time staffed governmental office. *Id.* § 260.040(2)-(5). In 1980, Clark, Washoe, and Elk counties all operated county public defender offices, and the remaining thirteen counties and Carson City received services through the State Public Defender. The state initially provided about 80% of the funding of indigent defense, with counties providing the other 20%. But by 2005, the state provided less than 3% of the funding for indigent defense services in the state, with the counties bearing over 97% of the costs. See [The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2005-38 (2006), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf). In 2005, the total statewide expenditure for indigent defense services was estimated at $27,532,286, of which $726,178 (2.6%) was provided by the state and $26,806,108 was provided by the counties. *Id.* By 2007, only five counties used the State Public Defender (Carson City, Storey, Eureka, Lincoln, and White Pine) and nine counties were contracting with local private attorneys to provide public defense services. See [Nebraska State Public Defender, http://dhhs.ne.gov/PublicDefender.htm](http://dhhs.ne.gov/PublicDefender.htm) (last visited Aug. 31, 2010).

Ohio. *Ohio Rev. Code Ann.* § 120.01-.08 (LexisNexis 2010). The statutory creation of the Public Defender Commission and the State Public Defender expressly allowed counties to operate their own county public defender’s office. *Id.* §§ 120.13-.18. Seventy-seven of Ohio’s counties have chosen to operate their own public defender offices. The State Public Defender provides trial level services only in Trumbull County through the Trumbull County Branch Office established in 1984 and in ten additional counties through the Multi-County Branch Office Program established in 1991. See [Ohio Pub. Defender Comm’n, 2008 Annual Report 14-15 (2008), available at http://www.opd.ohio.gov/AboutUS/us_2008.pdf](http://www.opd.ohio.gov/AboutUS/us_2008.pdf). Counties are only required to submit reports to the Public Defender Commission if they desire to receive reimbursement from the state. *Ohio Rev. Code Ann.* § 120.18. Under the statutory scheme, counties were to be reimbursed for fifty percent of their costs in operating their public defender offices. *Id.* §§ 120.18, 28, 33. However, “[i]f the amount appropriated by the general assembly in any fiscal year is insufficient to pay fifty percent of the total . . . the amount of money paid . . . shall be reduced proportionately so that each county is paid an equal percentage . . . .” *Id.* § 120.34. By 2008, “[r]eimbursement from the state to the counties [was] at an all-time low of 25%.” *Ohio Public Defender Commission, supra,* at 2.


10. See infra App. B. Those states are:

Alaska. The presiding circuit judge within each judicial circuit administers the indigent defense system. ALA. CODE § 15-12-3 (LexisNexis 2010). Compensation of counsel is paid by the state. Id. § 15-12-6.


California. Each county’s board of supervisors may, but is not required to, establish a public defender office for the county with either an appointed or elected public defender. Cal. Gov’t Code § 27700 (2010). The courts assign counsel to defend the indigent and determine the amount that is paid to the lawyer where there is no public defender or where the public defender or contract counsel is conflicted. CAL. PENAL. CODE § 987.2. The state may reimburse counties for not more than 10 percent of the funds expended for providing counsel to indigents. Id. § 987.6. The State Public Defender office provides counsel only in post-conviction appellate representation in death sentence cases. CAL. GOV’T CODE §§ 15400-15404, 15420-15425; CAL. PENAL. CODE §§ 1239(b), 1240.1(e)(1).

Idaho. The board of county commissioners in each county provides for representation of indigent defendants and may do so by establishing a public defender office, through a coordinated plan for assignment of attorneys, or through a combination. Idaho Code Ann. § 19-859 (2010). The State Appellate Public Defender Act of 1998 created a statewide office for appeals and for capital post-conviction, but only for those counties participating in the capital crime defense fund. Id. §19-867 to -872.

Illinois. All counties having a population of over 35,000 have a statutorily created Public Defender Office, while in other counties the county board may establish a Public Defender Office if they wish. 55 ILL. COMP. STAT. ANN. 5/3-4001 to -4004.2 (West 2010). The Public Defender is appointed either by the judges of the circuit or by the President of the county board. Id. §§ 5/3-4004 to -4004.1. The courts appoint the Public Defender in counties where the office has been established or appoints a private attorney in conflict situations and where there is not a Public Defender Office. 725 ILL. COMP. STAT. 5/113-3. The State Appellate Defender Act created a statewide office for appellate representation. Id. § 105/1-105/11.

Michigan. The district courts hold the power to appoint attorneys to represent the indigent. MICH. COMP. LAWS ANN. §§ 600.8317, 775.16. The Appellate Defender Act of 1978 created the State Appellate Defender Office to provide statewide representation in felony appeals and post-conviction proceedings. MICH. COMP. LAWS ANN. § 780.711-719.

Mississippi. The court appoints counsel to represent the indigent. MISS. CODE ANN. § 99-15-15 (2010). The board of supervisors of each county may, but are not required to, establish a public defender office as an alternative to court appointed counsel. Miss. Code § 25-32-1. Where a public defender office is established, the circuit judge appoints the public defender. Miss. Code §25-32-3. The Office of Capital Defense Counsel was created in 2000 to provide assistance and some direct representation at trial and on appeal in death penalty cases. MISS. CODE ANN § 99-18-1-19.

New York. In each county, the governing body establishes the plan for providing counsel to indigent defendants, and judges then appoint counsel pursuant to the adopted plan. N.Y. COUNTY LAW § 722 (McKinney 2010).

Pennsylvania. Each county, except Philadelphia, is required to establish a public defender office, with the public defender appointed by the county board of commissioners. Public Defender Act, 16 PA. CONS. STAT. ANN. §§ 9960.1-.13 (West 2010). The court of common pleas may appoint private attorneys in addition to the public defender. Id. § 9960.7.

South Dakota. S.D. Codified Laws §§ 7-16A-1 to -18, 23A-40-7 (West 2010) (“The board of county commissioners of each county and the governing body of any municipality shall provide for the representation of indigent persons . . .”).

Utah. Indigent Defense Act, UTAH CODE ANN. § 77-32-101 to -704 (West 2010); id. § 77-32-306 (making the provision of indigent defense a county or municipal obligation).

11. See infra App. A.

12. See infra App. A. These states are: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming (some counties choose to provide additional funding but are not required to do so). See supra notes 6-10 and sources cited therein.

13. See infra App. A. Two states do not require counties to contribute any local funding: Kentucky (funding for the Louisville system is a combination of both local and state funding, though they could opt in to the state system and would have no funding responsibility) and Louisiana (parishes have no funding responsibilities; however, significant funds are collected locally and remain in the parish where collected rather than being redistributed through the state system). Four states require local governments to contribute funds: Georgia (each county is responsible for funding approximately 40% of their services), Kansas (all services other
than felony and appellate are locally funded), Oklahoma (funding for the Tulsa and Oklahoma City systems are entirely locally funded), and South Carolina (state funding is intended to augment local funding; counties are intended to provide funding, but some counties have discontinued providing funding). See supra notes 6-10 and sources cited therein.

14. See infra App. A. Illinois (state pays only the salary of chief public defender in each county), Indiana (those counties that choose to meet state standards receive some state funding), Nebraska (state agency provides funding to assist counties with capital representation), Nevada (state provides very limited funding for those rural counties that opt in to the state public defense system), New York (state provides limited funding to each county), Ohio (state provides limited funding to each county), South Dakota (state matches county funding only for catastrophic cases), Texas (state provides limited funding to each county and makes short-term grants for specific programs), and Washington (state provides limited funding to counties). See supra notes 6-10 and sources cited therein.

15. See infra App. A. Arizona (state provides less than 1/10% of funding solely for catastrophic cases); California (state provides funding for the capital Habeas Corpus Resource Center and for counsel in juvenile dependency cases); Idaho (state provides funding for the State Appellate Public Defender); Michigan (state provides funding for appeals); Mississippi (state provides funding for capital post-conviction); Pennsylvania; and Utah. See supra notes 6-10 and sources cited therein.


17. Throughout this Article, descriptive examples are given to illustrate differences among jurisdictions in various aspects of public defense provision. The author has elected not to identify specific jurisdictions as examples of each description because the purpose of this Article is to explain the vast and myriad variations of public defense systems and to begin to itemize the specific areas in which data is lacking – the purpose is not to critique the methods or combination of methods employed in any given jurisdiction.


20. These percentages are generally cited and recognized as being accurate in the field of public defense. Because data is not collected, it is not possible to provide support for these numbers.


27. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (“We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . [T]here will remain certain cases in which fundamental fairness – the touchstone of due process – will require that the State provide at its expense counsel for indigent probationers or parolees. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.”).

28. Id.; cf. Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (leaving open the question “whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent”).


31. Often called “child in need of care” (CINC) or “child in need of services” (CHINS) or “family in need of services” (FINS).

Within those varying structures, the role of defense counsel varies to an even greater extent. Courts are only just now beginning to consider and rule on challenges involving the right to counsel of defendants in treatment courts.

34. For example, New York provides a statutory right to counsel for those who cannot afford to hire an attorney for all interested parents and guardians in any case involving custody of a child, including civil actions between parents. N.Y. Fam. Ct. Act § 262 (McKinney 2010); see also In re Ella B., 30 N.Y.2d 352, 356 (1972).


48. See e.g., Justice Denied, supra note 1, at 85-89.