Report of Indigent Defense Task Force

January 2001

Hon. Frederic W. Allen, Chair

Charles A. Bristow, Esq.
James M. Candon
Robert M. Paolini, Esq.

Hon. Alden T. Bryan
Joanne Goodnow
Thomas A. Zonay, Esq.

TABLE OF CONTENTS

Prepared By:
Erik Fitzpatrick, Esq.
Legislative Counsel

Errata Sheet

The following text should be substituted for Recommendation A on pages 8 and 21 of the Report of the Indigent Defense Task Force:

A. **Issue: The Assigned Counsel Contract System Is Structurally Flawed.** Recommendations: Restructuring the Office of Defender General to create three regional serious crimes units that would also handle cases in which the local public defenders have conflicts of interest.

REPORT OF INDIGENT DEFENSE TASK FORCE

I. THE COMMITTEE

The Indigent Defense Task Force was established by Sec. 56b of Act No. 152 (H.842) of the Acts of the 1999 Adjourned Session (2000).

The Task Force consisted of seven members: Hon. Frederic W. Allen, Chair; Charles A. Bristow, Esq.; Hon. Alden T. Bryan; James M. Candon; Joanne Goodnow; Robert M. Paolini, Esq.; and Thomas A. Zonay, Esq. The Committee was staffed by Erik FitzPatrick, Legislative Counsel.

II. THE COMMITTEE'S CHARGE

The Task Force was directed to:

A. Review the structure and funding of public defender services in Vermont and in other states, and alternative models for organizing and delivering public defender services. This review was required to include: the process by which counsel is assigned, including eligibility criteria; the use of assigned counsel contractors and ad hoc counsel; current budget allocation and management of provision of services; oversight of work performed on behalf of clients; processes to measure quality of service; the functions and role of independent public defense commissions in other states; a comparison of salaries among the criminal justice agencies in Vermont and in other states; and training, supervision, and mentoring needs within the Office of Defender General.

B. Report its findings and recommendations to the house and senate committees on judiciary, appropriations, and government operations.

III. MEETINGS AND WITNESSES

The Task Force met eight times in 2000: June 27, July 21, August 21, September 6, October 4, November 1, November 28, and December 18. The Task Force also met once in 2001, on January 8.

The Task Force heard testimony from the following witnesses: Hon. Brian L. Burgess; Robert L. Sand, Esq., Windsor County State's Attorney; Hon. Paul F. Hudson; Matthew F. Valerio, Esq.; Karen Predom, Rutland District Court Clerk; Carolyn Hutchinson, Washington District Court Clerk; Claire Mee and Sandra Holt, Washington Superior Court Clerks; Karen R. Carroll, Esq., Attorney General's Drug Task Force; Robin Orr, Executive Director, State's Attorneys Association; David M. Rocchio, Esq., Governor's Counsel; Lieutenant Bruce Lang, Vermont State Police; Cathy Ruley, Budget Analyst, Department of Finance; Robert J. Appel, Esq., Defender General; Lora Evans, Business Manager, Office of Defender General; and David Carroll, The Spangenberg Group.

IV. SIGNIFICANCE OF PROVIDING LEGAL REPRESENTATION TO INDIGENT CRIMINAL DEFENDANTS

> Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter. I believe that all of us, regardless of our position in the criminal justice system have the responsibility to work to improve the quality of criminal defense for the poor. Our system of justice will only work, and will only inspire complete confidence and trust of the people, if we have strong prosecutors, an impartial judiciary, and a strong system of indigent criminal defense.
>
> United States Attorney General Janet Reno
> Address to First National Symposium on Indigent Defense
> February 1999

The importance in American society of the right to the appointment of criminal defense counsel is reflected by the fact that this right is prominently enshrined in both the United States and Vermont Constitutions. The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense.

Chapter I, Article 10 of the Vermont Constitution similarly provides:

> That in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel. . .

By ratifying these provisions, the framers of our federal and state constitutions made clear that in the American criminal justice system, it is the government's obligation to provide a lawyer for a defendant unable to afford one.

In 1963, in the landmark case of Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court ruled that all defendants in state felony cases who were unable to afford counsel had a constitutional right to be defended by an attorney appointed and paid for by the state. In reaching that conclusion, the Court eloquently explained why such a rule was necessary to uphold the Sixth Amendment and insure that the American criminal justice system produced fair results:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and

> defendants who have the money hire lawyers to defend are the strongest indicators of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:
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> > The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon, 372 U.S. at 344-45 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). Ten years later, the Court adopted the constitutional rule that remains the law today: indigent criminal defendants are entitled to counsel for any criminal charge which could result in a term of imprisonment, whether the charge is a felony or a misdemeanor. Argersinger v. Hamlin, 407 U.S. 25 (1972).

Unlike the majority of other states, Vermont had already pioneered the creation of a state-supported system for providing legal representation to indigent defendants by the time the Supreme Court issued Gideon. In 1872, the Vermont General Assembly passed Act No. 27, which provided:

> When it shall appear to any court in which a criminal cause shall be pending, that the respondent is, from extreme poverty, unable to procure the aid of counsel, the court may in its discretion assign counsel in his behalf at the expense of the state.

As Act 27 demonstrated, the Vermont Legislature has long understood that, in order for our adversarial system of criminal justice process to produce just results, competent counsel must be made available to the accused as well as to the state.

A century later, in 1972, the Vermont Legislature continued its lead role in protecting the right to counsel by creating one of the nation's first statewide public defender systems. The Public Defender Act created the Office of Defender General, which began operating for the first time on July 1, 1972.

V. RESPONSIBILITIES OF THE DEFENDER GENERAL

The state is constitutionally required to provide an attorney for indigent criminal defendants who are charged with any felony or misdemeanor which could result in a term of imprisonment. The constitution also requires the state to appoint an attorney for direct appeals by indigent defendants, to respondents in certain probation and parole revocation proceedings, to children who are the subject of juvenile proceedings as alleged delinquents, and when a parent is the subject of a proceeding to terminate parental rights on the basis of conduct that could be grounds for the basis of a criminal charge resulting in incarceration. [1]

Vermont fulfills its constitutional obligation to provide counsel for the indigent by statutorily requiring the Office of Defender General to provide legal representation for all persons charged with a serious crime who cannot afford an attorney. "Serious crimes" include: (1) all felonies; and (2) any misdemeanor for which the maximum penalty is either a fine of more than $1,000.00 or any period of imprisonment, unless the judge states on the record at the arraignment that the defendant will not be imprisoned or fined more than the $1,000.00 limit. Thus, there is an opportunity for the court to make a pretrial determination of whether the punishment may be significant enough to require the appointment of counsel. 13 V.S.A. § 5201(4).[2]

The Legislature has, however, expanded the legal responsibilities of the Office of Defender General significantly beyond its constitutional duty to represent persons charged with serious crimes. Appointing counsel for persons charged with misdemeanors for which the maximum penalty is a fine of more than $1,000.00, for example, goes further than the constitutional requirement to provide counsel where a period of imprisonment may be imposed. In addition, the Office of Defender General is statutorily required to provide counsel to:

> needy persons who are facing probation and parole revocation proceedings;

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[1] See Douglas v. California, 372 U.S. 353 (1963) (direct appeal); In re Gault, 387 U.S. 1 (1967) (juveniles accused of delinquent acts); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parents subject to proceedings to terminate parental rights). There is no per se right to counsel in probation or parole revocation proceedings; the right only attaches where some degree of complexity is involved. See Morrissey v. Brewer, 408 U.S. 471 (1972) (parole); Gagnon v. Scarpelli, 411 U.S. 778 (1973)(probation).

[2] Several offenses are specifically defined as presumptively not "serious crimes," and therefore do not require the appointment of counsel, unless the judge states on the record that the defendant may either be imprisoned or fined more than $1,000.00 if convicted. These nonserious offenses are: minors misrepresenting age, procuring or possessing alcoholic beverages; big game violations; simple assault by mutual consent; bad checks; petit larceny; theft of services under $500.00; retail theft under $100.00; unlawful mischief; unlawful trespass; disorderly conduct; possession of marijuana (first offense); and municipal ordinance violations. 13 V.S.A. § 5201(5).

parties in juvenile proceedings, including children in need of care and supervision (CHINS), as required by the interests of justice;

children in the custody of the Commissioner of Social and Rehabilitation Services (SRS);

persons in the custody of the Commissioner of Corrections;

needy persons in extradition proceedings;

persons being tested to determine blood alcohol content while operating a motor vehicle, a service for which the Defender General is required to provide "statewide 24-hour coverage seven days a week"; and

state employees charged with crimes, if the action is not a motor vehicle violation and is not brought on account of conduct within the scope of the employee's official duties as a state employee.

See 13 V.S.A. §§ 5232, 5233, 5253; 23 V.S.A. § 1202; 3 V.S.A. § 1104; Vermont Supreme Court Administrative Order No. 4 (A.O. # 4), Section 1.

Although its responsibilities have grown, the over-arching duty of the Office of Defender General remains assuring that persons entitled to appointed counsel receive effective legal advocacy. By discharging this obligation in a conscientious and cost-efficient manner, the Office of Defender General serves not only its clients, but also the entire community of the State of Vermont. The provision of zealous advocacy on behalf of those charged with serious crime is a necessary component of our "tripartite" criminal justice system, which includes the court, the prosecutor, and defense counsel. If appointed counsel fails to make good on the promise of effective representation, there is increased potential for an innocent person to be incarcerated wrongly for an extended period, and the validity of each and every conviction obtained is subject to credible attack by those individuals deprived of their constitutional rights. When post-conviction challenges prove successful, a second trial costs the state additional dollars, and victims must again relive their experiences. Thus, in order for this adversarial judicial process to function effectively and produce fair outcomes, both the state and the individual defendant must receive ardent and competent advocacy. This balance is a necessary ingredient to a just result.

VI. STRUCTURE OF THE OFFICE OF DEFENDER GENERAL

The Office of Defender General has evolved into a complex service delivery system consisting of two separate programs, Public Defense and Assigned Counsel. Public Defense provides primary representation, and handles approximately 75% of the cases in which assignments are made. The Assigned Counsel program provides representation in cases where Public Defense is unable to do so due to a conflict of interest. The programs are summarized below, and illustrated in Attachment 1, "Defender General's Organizational Structure."

A. Public Defense--Primary

The Public Defense program consists of seven countywide staff public defender offices (Grand Isle County is handled by the Franklin County Office); public defense contractors in six other counties; three post-adjudication offices, located in Montpelier, providing representation to appellants and persons in the custody of either SRS or the Department of Corrections; and an administrative staff consisting of the Defender General, a part-time deputy,[3] a business manager (who also serves as the assistant to the Defender General), and a bookkeeper. The program has 21 FTE staff attorneys, 14 FTE contract attorneys, and 6.5 FTE staff attorneys in the post-adjudication offices in Montpelier.

B. Assigned Counsel--Conflict

The Assigned Counsel program represents persons whom public defenders cannot represent due to a conflict of interest. If there is more than one defendant in a case, for example, each defendant often raises conflicting versions of events in an attempt to shift responsibility to the other. When such conflicts are created, public defenders can represent only one of the defendants; any codefendants must be represented by attorneys from the conflict defender system, which is comprised of the Assigned Counsel program and the Ad Hoc program.

Assigned counsel is provided in two tiers. First, a conflict case is referred to an Assigned Counsel contract attorney, a member of the private bar who is under contract to provide this service in a particular county. These Assigned Counsel contractors are compensated at a negotiated rate of $30-35 per hour. The Assigned Counsel contract program consists of: 52 separate contracts with private attorneys (with not less than two in each county, so as to minimize the necessity of ad hoc appointments); two contracts for appellate representation; an administrative assistant and one part-time secretary in Montpelier; and a part-time assigned counsel coordinator. Three-quarters of these contracts are for annual amounts less than $25,000, and only three exceed $40,000 annually (two are in Chittenden County, and the other is the primary appellate contract). Contracts are for fixed amounts based on historical caseloads in the area served; however, if actual cases assigned exceed projections, upward adjustment in compensation is a contract component. Assigned Counsel contractors handle about 90% of the cases in which primary public defenders have conflicts of interest.

When every Assigned Counsel contractor in a particular county is unable to accept an assignment because of a conflict of interest, the court must then look to members of the private bar on an ad hoc basis. These ad hoc attorneys are paid at the court-prescribed rate of $50 per hour. Because these rates are more expensive than any other method of delivering indigent defense representation, the Office of Defender General makes every effort to keep the number of cases assigned to ad hoc counsel to an absolute minimum.

[3] The office was without a deputy from FY 91 through FY 00. As of July 2000, an appellate defender was assigned on a half-time basis to perform the duties of a deputy. No new position was authorized.

VII. CURRENT ISSUES FACING THE PUBLIC DEFENSE SYSTEM

During its study of the indigent criminal defense system in Vermont, the Indigent Defense Task Force heard testimony from witnesses involved in virtually every facet of the criminal justice system. Their testimony consistently made clear that Vermont has made substantial progress in establishing the strong program of indigent defense representation that Attorney General Reno observed is necessary to ensure the constitutionality, fairness, efficiency, and accountability of the criminal defense system. Witnesses uniformly praised the outstanding quality of legal representation delivered by Vermont's frontline public defenders, both those under contract and those employed as full-time attorneys in local public defender offices.

The Spangenberg Group (TSG), a nationally-recognized criminal justice research and consulting firm specializing in the delivery of indigent defense services, confirmed that Vermont has always demonstrated a mindfulness of constitutional due process, unlike many other states' approaches to indigent defense, and that the state has always demonstrated a commitment to both cost-effective and quality representation of its indigent citizens in the criminal justice system. The scope and quality of services provided in the primary public defender system is seen as a national model.[4]

Despite its successes, however, there are systemic weaknesses in Vermont's system of indigent defense representation that the Task Force believes should be remedied. First, the assigned counsel program, which provides representation when frontline public defenders have conflicts of interest, is continuously in a virtual state of crisis: every witness with an opinion on the subject agreed that assigned counsel are all too often inexperienced lawyers providing substandard representation with inadequate supervision, compensated at rates so low they lose money while doing so, and that for these reasons they quit their contract as soon as they can find other employment with consistent benefits and reasonable hours. Second, the public defenders' overwhelming caseload is another serious problem: on average, public defenders are handling almost double the number of cases recommended by national guidelines. Third, the Office of Defender General itself is significantly understaffed; the Defender General is required to perform the same duties delegated to several high level administrators in other states, without comparable administrative or investigative support. The underlying cause of these problems is the fact that the Office of Defender General has not been provided with a sufficient level of funding to keep pace with the demands upon its services.

Having identified the issues, the challenge for the Task Force was to develop strategies for addressing the problems it identified without relying solely on an approach that simply advocated spending more money. The Task Force believes that such an approach would not be successful, given budgetary realities and the fact that the Office of Defender General is far from unique in being an underfunded state agency seeking to increase its budget. By focusing on efficiency, revenue enhancement, cost-saving, and achieving maximum return on dollars spent, the Task

[4] The Spangenberg Group provided assistance to the Task Force under the auspices of a joint program of the U.S. Department of Justice and the American Bar Association.

Force was able to develop what it believes are creative attempts to address the longstanding systemic weaknesses it identified. The problem issues and the Task Force's recommended solutions may be summarized as follows:

A. **Issue: The Assigned Counsel Contract System Is Structurally Flawed.**
Recommendations: Restructuring the Office of Defender General to add a Director position, and to create three regional serious crimes units that would also handle cases in which the local public defenders have conflicts of interest.

B. **Issue: Funding and Revenues for the Office of the Defender General Are Not Sufficient to Meet Demands on its Resources.**
Recommendations: Establish an application fee for public defense services to be paid before the legal services are provided; improve the current system for collecting assignment, co-payment and reimbursement fees; permit indigent defendants to pay fees by credit card; hold parents responsible for fees in some juvenile cases.

C. **Issue: Public Defenders Carry Caseloads Far in Excess of National Standards.**
Recommendations: Limit the Defender General's statutory obligation to provide representation in nonconstitutional cases; budget for the increased defense costs associated with new legislative enactments; expand the use of alternative justice programs; encourage judges to exercise their discretion when appointing counsel for juveniles, instead of routinely making appointments in all cases.

D. **Issue: Counsel for Indigent Defendants Have No Minimum Requirements for Qualifications and Training.**
Recommendations: Establish minimum qualification standards and specialized in-house continuing legal education requirements for public defenders and contract counsel.

E. **Issue: Cooperation Within the Criminal Justice Community Should Be Improved.**
Recommendations: Increase coordination and communication between the bodies involved in the criminal justice system by developing more interagency training and enhancing use of the Governor's Criminal Justice Cabinet.

Each of these issues, and the Task Force's recommendations for addressing them, are discussed in detail in the following sections.

A. The Assigned Counsel Contract System Is Structurally Flawed.

The most troubling aspect of the assigned counsel contract conflict system is its current crisis-level inability to recruit and retain contractors throughout the state. About one-third of the assigned counsel contractors refuse to renew their contracts for the next year. In fact, the average tenure for new assigned counsel contractors is only two years. The failure to recruit and retain attorneys in the state's contract program stems from a combination of inadequate compensation, uncontrolled caseloads, lack of supervision and support, and insufficient funding for

investigative and other related support services.

This difficulty in contracting indigent defense services results in two serious problems. First, the failure to retain assigned counsel contractors means that more cases must be farmed out to ad hoc counsel, the most costly way to provide indigent defense services in the state. For instance, the turnover in contract defenders contributed significantly to a 161% increase in ad hoc appointments on a statewide basis for the five-year period FY 96 to FY 00.

More importantly, in some areas of the state, the failure to retain contractors has resulted in the hiring of newly admitted, inexperienced attorneys to handle already excessive caseloads. In Guideline 4.1 of its *Standards for the Administration of Assigned Counsel Systems*, the National Legal Aid and Defender Association recommends the adoption of experience and training requirements for assigned indigent defense counsel on the basis of the seriousness of each case. The commentary to the rule notes that bar membership in good standing and proof of adequate malpractice insurance, while necessary qualifications, should not alone qualify an attorney for any type of case.

Several states have established comprehensive qualification requirements for all case types which may serve as good models for Vermont. The Ohio Public Defender Commission, for example, requires attorneys in felony or aggravated felony cases to have: served as trial counsel in two cases (including one jury trial) within this category; served as trial counsel in four jury trials, at least one of which involved a case in this category; served as trial counsel in any two criminal trials and co-counsel in at least one criminal jury trial; or served as trial counsel or co-counsel in two jury trials. Similarly, the Indiana Public Defender Commission's standard for appointment in Class C or D felonies requires that attorneys be experienced and active trial practitioners with at least one year of criminal litigation experience, or have prior experience as lead or co-counsel in at least three criminal jury trials which were tried to completion. To highlight the importance of trial experience, Indiana standards state that to be eligible to serve as lead counsel in other criminal cases (less serious felonies and misdemeanors), an attorney shall have prior experience as lead or co-counsel in at least one case of the same class or higher which was tried to completion.

As noted previously, the Vermont criminal justice professionals (including the Defender General) who testified before the Task Force consistently identified the Assigned Counsel program as the "weak link" in the present indigent defense delivery system. The most pressing flaws in the system may be summarized as follows:

- The frequent turnover of assigned counsel contractors because of lack of adequate compensation and benefits, which leads to contractors pursuing state jobs in the criminal justice system as they become available.

- Inexperienced attorneys are often required to handle complex and serious criminal cases beyond their capabilities.

representation to every client with a constitutional right to receive public defense services. In this regard, it is important to recognize that effective law enforcement depends as much upon an adequate system of public defense as it does upon effective policing and prosecution. Increasing funding for the indigent defense system will improve the delivery system as a whole, thereby benefiting prosecutors, law enforcement officers, and judges, as well as those representing indigent defendants. The Task Force, therefore, concluded that it is in the public interest to increase funding for the Office of Defender General so that it can fulfill its constitutionally-mandated responsibilities.

RECOMMENDATIONS

1. Establish an "up front" application fee for public defense services.
Current efforts to hold criminal defendants responsible for some portion of the costs of their legal representation are limited to attempting to recoup: a $25.00 assignment fee; copayments from money the applicant has at the time of assignment; and other reimbursement fees not due until after the representation has been provided. The collection of reimbursement fees is rarely successful. Virtually the only way to have any success collecting fees from indigent defendants is to require that the fees be paid before legal services can be accessed. The Task Force, therefore, recommends the establishment of an application fee to be assessed at the time the client applies for public defense services, with all revenues collected going to the Office of the Defender General. In order to offset constitutional concerns, the fee should be waivable for those truly unable to pay.

Of the several benefits of an application fee, the primary one is, of course, that it should augment the budget for the Office of Defender General. At least 18 other jurisdictions, including 15 statewide jurisdictions, are now charging an application fee that typically ranges from $10.00-$200.00. Anecdotal evidence indicates that 25-40% of the people screened ultimately pay the fee. This rate of payment is a significant increase over Vermont's collection rate for post-service fees, and would result in substantially increased revenues to the Public Defender Special Fund, which could then be appropriated by the legislature to support the indigent defense system.

The evidence also suggests that paying a small fee for public defense services causes the defendant to feel more vested in his or her representation. Cooperation increases, failures to appear decrease, and the attorney/client relationship undergoes general improvement because the defendant's payment of a fee produces a greater sense of entitlement to responsible, quality legal representation. Political goodwill can be generated as well, because the fees demonstrate that indigent defendants are contributing to the cost of their representation, and that indigent defense programs are making concerted efforts to achieve fiscal accountability without relying unnecessarily on taxpayer dollars.

In sum, the Task Force recommends establishing an application fee for indigent defense

services because it will increase revenues for the Office of Defender General, while simultaneously improving indigent defendants' cooperation with and participation in their defense, and building public goodwill for the criminal defense system.

2. Improve the current system for collecting copayments, fines, surcharges, and restitution. The current rates of collection are extremely low for charges and fees that are not paid until after legal services are provided to indigent defendants. The rates might be improved by statutorily providing the courts with contempt power over the collection process, or by allowing revocation of driving, professional, and hunting licenses for failure to pay. In conjunction with establishing an up-front application fee, improving post-service collection could substantially increase revenue for the Public Defender Special Fund.

3. Permit payment of fees by credit card.
Most other states already permit indigent defense fees to be paid with a credit card, and the results indicate that allowing such payment increases collection rates. Although some concern was expressed over potential fraud, the Task Force concluded that any fees the state would have to pay because of fraud would be more than offset by the new revenues generated through credit card payment. Court clerks would benefit from the change as well, since processing a credit card payment up front would take much less time and effort than attempting to collect fees after the case is resolved.

4. Hold parents responsible for fees in some juvenile cases.
Fees and copayments serve to hold the person responsible for his or her conduct. Parents are often held responsible for the conduct of their minor children, and the law reflects this: parents may be held liable for the damages caused by their children's torts, for example.[7] The Task Force, therefore, believes it is inconsistent for parents to avoid paying, as they now can, any portion of the fees when their children receive representation from the Office of Defender General. To correct this situation, the Task Force recommends holding parents responsible for application fees and attorney's fees incurred by their unemancipated minor children in connection with district court criminal proceedings and juvenile delinquency proceedings. Payment would not be required if the parent was the victim of the crime, if the parents were truly unable to pay, or if other good cause was shown.

C. Public Defenders Carry Caseloads Far in Excess of National Standards.

1. Caseload Guidelines: The American Bar Association has developed a set of standards and goals related to indigent defense caseload standards. Standard 4-1.3(e) of the ABA's *Standards Relating to the Administration of Criminal Justice*, which deals with the ethical considerations of the defense lawyer, provides that:

[7] See 15 V.S.A. § 901(holding parents liable for damage to property caused by their children, up to a limit of $5,000.00).

> Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations...

While these statements, guidelines, and standards are extremely important, they do not provide specific guidance as to what constitutes an excessive workload, or what lawyers should do when they have reached the workload limit. More specific detail can be found by examining the work of the National Advisory Commission on Criminal Justice Standards and Goals ("NAC"), which in 1973 published the only set of national standards for maximum annual public defender caseloads. NAC Standard 13.12 on Courts provides:

> The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

The commentary to ABA Administration of Criminal Justice Standard 5-5.3 references the public defender caseload standards developed by NAC, noting that they "have proven resilient over time, and provide a rough measure of caseloads."

The NAC standards form the basis of the Lawyer Equivalency Caseload Guideline (LEC), which the Defender General has utilized since 1973 in an effort to ensure that competent representation is not compromised by excessive caseloads. By way of example, 75 added felony clients and 200 added misdemeanor clients would constitute a full LEC. The standard has been endorsed by state legislatures in Wisconsin and Florida, as well as by the Arizona Supreme Court and the National Legal Aid and Defender Association (NLADA).

Despite the Defender General's attempt to follow LEC guidelines, there has been a growing disparity between the number of attorneys dictated by the national standard and the actual level of attorney staffing. In FY 1980, the percentage of understaffing was 10.6% (18.8 LEC and 16.8 actual attorneys); in FY 1990, the percentage of understaffing had grown to 19.8% (36.7 LEC and 29.5 actual attorneys); and, in FY 2000, the disparity had grown to 31.6% (52 LEC and 35.9 actual attorneys). This data includes both staff and contract public defenders, although the contractors receive extra compensation for added cases beyond initial projections. For staff public defenders alone, the understaffing levels are even higher: 43% in FY 00. This means, for example, that rather than handling 150 added felony clients annually, a staff public defender is required to handle 264 added felony clients.

2. Reasons for Growth: This growing disparity is not fueled by a rising crime rate. In fact, although the rate of prosecutions is increasing, the violent crime rate in Vermont has been in decline over the past decade. This apparent paradox (crime rates are decreasing, but prosecutions are increasing) appears to be the result of a variety of factors which have developed over the past

decade, including:

(a) improved police practices;

(b) increased resources for law enforcement from the federal government; and

(c) shifted cultural and political expectations for punishment and protection, as expressed by the passage of laws making new crimes such as domestic assault, aggravated domestic assault, stalking, hate crimes, violation of abuse prevention orders and conditions of release; increased emphasis on DUI enforcement and underage drinking; heightened penalties for a variety of offenses, including aggravated sexual assault and kidnapping, to life imprisonment; establishing minimum mandatory jail sentences for multiple DUIs; making a third or subsequent DUI a five-year felony; creating presumptive minimum sentences for homicides; and adopting a new habitual offender sentence. In addition, prosecutors are recommending, and judges are imposing, significantly more punitive and longer jail sentences for many crimes, particularly sexual offenses.

These factors, when coupled with pressures to expedite juvenile proceedings in Family Court, have severely taxed the finite resources allocated to indigent defense services.

3. Current Staffing: The understaffing situation is most severe in the Chittenden County Public Defender Office, where, as of September 30, 2000, only 8.2 staff attorneys were handling a caseload, including six pending homicide cases, that LEC guidelines recommended staffing with 17.42 attorneys. This office faced a 35% increase in added clients over the last three fiscal years. The Lamoille County Public Defender Office has been faced with a similarly substantial increase in caseload of 102% over the last five years, a challenge that is particularly daunting because the defendants in that office are all represented by a solo attorney without full-time support staff. The Lamoille office's caseload at the close of FY 2000 called for 1.9 attorneys under national LEC standards. Staff public defenders are in the same dilemma: on average, they handle nearly 150% of the national standard LEC. Such caseloads are simply not sustainable over time.

4. Impact on Budget: The growth in caseload for public defense contracts has a significant impact on the budget of the Office of Defender General. One discrete example of the ramifications of increasing federal funding for only certain elements of the criminal justice system is the Windsor County State's Attorney's Office, which added a federally-funded specialized Domestic Violence (DV) Unit in the spring of 1999.[8] This new DV Unit is comprised of a full-time deputy state's attorney, a full-time investigator, and a full-time victim's

[8] The funding was provided under the Violence Against Women Act, which specifically prohibits providing funding for indigent defense.

advocate. During the first quarter of FY00 (July through September of 1999), Griffin and Associates, the public defender contractor in Windsor County, experienced a 36% increase in the number of clients assigned, a rise in caseload which is a direct result of the prosecutorial resources for the DV Unit.[9] This infusion of federal funds has direct and substantial impact on the budget demands of the Office of Defender General.

RECOMMENDATIONS

1. Focus on the Constitutional Mission. The Office of Defender General is required by statute to provide representation in cases that far exceed its constitutional obligation to represent persons charged with serious crimes. Relieving the Defender General of the duty to represent incarcerated persons or parties to SRS proceedings, for example, would free more resources for public defenders to target for their constitutionally-required representation of indigent criminal defendants.

2. Budget for Increased Costs. Police officers, prosecutors, defense attorneys, courts, and prisons all incur increased costs when new crimes are created or when penalties for existing crimes are made more severe. For that reason, some states mandate that fiscal impact statements be prepared for proposed legislation that would impact state-funded agencies. In Maryland, for example, the Department of Fiscal Services' research arm of the General Assembly is required to collect impact statements from the state court administrator and any other agency that would be affected by a proposed bill concerning the justice system. In a recent fiscal impact statement prepared for Maryland's proposed Sexually Violent Predator Act of 1998, both the Public Defender and the Attorney General reported that enactment of the bill would impose needs for additional personnel. If the financial costs of new criminal legislation were budgeted for, or if it were statutorily required that they at least be taken into account, the impact might be eased substantially.

3. Expand Alternative Justice Programs. Cases processed by community justice programs or diversion boards, which require an admission of responsibility by the perpetrator, do not require the appointment of defense counsel. Increasing the use of such programs, and broadening the types of cases which can be referred to them, should therefore lighten the caseload of the Office of Defender General.

4. Encourage Discretion When Appointing Counsel for Juveniles. Although Vermont law does not require the appointment of counsel for all parties in all abuse and neglect cases, most courts routinely do so. Counsel need only be appointed for parties in these juvenile proceedings when the interests of justice so require. Bringing this fact to the attention of courts, prosecutors, and public defenders could reduce some public defense appointments.

[9] During federal FY 99, the Department of State's Attorneys received over $300,000 in federal funds to hire prosecutors and investigators to support this initiative, in addition to nearly $800,000 to support its Victim Advocates program. This money is but a small portion of the nearly $4 million in federal funds funneled annually into Vermont to support criminal justice initiatives concerning domestic violence.

D. Counsel for Indigent Defendants Have No Minimum Requirements for Qualifications and Training.

The Task Force believes that establishing minimum qualification and training requirements will significantly improve the quality of legal services provided to indigent defendants. There are currently no minimum qualifications for either full-time public defenders or attorneys working under contract with the Office of Defender General. For that reason, recent law school graduates often defend cases, particularly in the assigned counsel program, that should be handled by more experienced attorneys. In addition, ABA Standard 5-5.1 states that a jurisdiction's legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. The standard goes on to recommend that continuing education programs be available, and that public funds be provided to enable all counsel and staff to attend such programs. The public funds available for such programs in Vermont are limited. The training budget for the Office of Defender General is only $3,000.00 per year, an amount which the Spangenberg Group reports is inadequate and well below the national average. With these concerns in mind, the Task Force makes the specific recommendations described below.

RECOMMENDATIONS

1. Qualifications. The Task Force recommends that the following minimum qualifications, subject to waiver by the Defender General on the basis of individual experience, be established for attorneys representing clients of the Office of Defender General:

(a) Misdemeanors:

- Six months of relevant litigation experience (this could include law school clinical practice) or a two-week training program run by the Defender General.
- Mentoring/Shadowing an experienced lawyer. The Task Force suggests at least two hours of supervision per week for the first month.

(b) Felonies:

- Minor (nonviolent) – One year relevant litigation experience or three jury trials.
- Major (violent) – Two years relevant litigation experience and two felony jury trials.
- Life Penalty – Five years relevant litigation experience, two major felony trials, and lead or co-counsel in one capital case.

Mentors should be highly experienced former public defenders, contract counsel and ad hoc attorneys who, in the opinion of the Defender General, would be best able to assist lawyers new to criminal defense. Their role would include introducing less experienced lawyers to the

local practice culture, and assisting in case assessment and management. Mentors should be compensated at the hourly ad hoc rate, and their compensation should be drawn from the ad hoc budget appropriation.

2. Training. The Task Force recommends that the following training requirements be established for attorneys representing clients of the Office of Defender General:

(a) One day of each calendar quarter should be set aside to provide training for prosecutors, attorneys providing indigent defense services, and the judiciary. This quarterly training day would be in addition to the multi-day programs offered during Judicial College Week, and could be utilized to conduct multi-disciplinary programs of interest to all three legs of the adjudication process; that is, prosecution, defense and the courts.

(b) The Task Force believes Vermont defense attorneys would benefit from national training programs such as the National Criminal Defense College, and that the cost of attendance should therefore be included in the Office of Defender General's training budget.

(c) An intensive two-week training session for lawyers new to criminal defense work should be established. This session should cover such topics as:

- arrest, search and seizure
- arraignment and bail
- discovery
- motion practice
- pleas
- interviewing techniques, including use of an investigator
- attorney-client relationships
- ethics
- trial preparation
- trial, including: voir dire, openings, direct exam, cross exam, closings, rules of evidence, trial motions, jury instruction, post-trial motions, etc.
- sentencing
- corrections policy, including programming, alternatives, etc.
- appeals, including preserving the record, perfecting the appeal, differences between criminal and juvenile appeals
- administrative issues affecting assigned counsel
- transfer to juvenile court
- juvenile: emergency detention, petition, CHINS, disposition, appeal, TPR

E. Cooperation Within the Criminal Justice Community Should Be Improved.

On the basis of the testimony it received, it appeared to the Task Force that the delivery of criminal defense services to the indigent could be improved by increasing interaction between the various entities involved in the process. While the Task Force recognizes that tensions between

the branches of government and other bodies connected to the criminal justice system are inherent in the adversarial process, in order to improve cooperation, coordination, and communication the Task Force recommends considering:

--Increased interagency training that includes prosecutors, defense attorneys, and the judiciary;

--Enhance the authority of the Governor's Criminal Justice Cabinet to include coordination on policy matters, and increase its visibility as a leader on criminal justice issues.

VIII. OTHER ISSUES DISCUSSED

In addition to these specific recommendations, the Task Force discussed many familiar and recurring issues relating to public defense, including whether or not a supervisory commission for criminal justice issues is needed, the structural independence of the Defender General, and whether the statutory list of crimes requiring the appointment of counsel should be decreased. These discussions may be summarized as follows:

A. Supervisory Commission.

The Task Force gave serious consideration to whether the provision of indigent defense services would be improved by establishing a supervisory commission with advisory and/or policy-making authority over the Office of Defender General. A number of other states have created such commissions in an effort to assure the public defender's independence, to guarantee financial accountability, and to improve cooperation and coordination between the various branches and bodies of government involved in the criminal justice system.

Because an indigent defense organization does not control its own workload and must provide representation to everyone appointed to it, independence is critical to insulate the public defender organization against government budget authorities who may want to cap expenditures without understanding the constitutional implications. For this reason, state indigent defense commissions are recommended in ABA Standard 5-1.3(b).[10] At the same time, although canons of professional ethics demand independence from political pressures, some degree of oversight is necessary to guarantee that taxpayers' money is being wisely spent. By vesting all three branches of government with a certain number of appointments to the indigent defense commission, elected officials can guarantee that the limited resources are being spent in a cost-effective manner. The indigent defense commission model is based, in part, on successful practices of the business sector, and can be viewed as operating similarly to a board of trustees in a private organization.

[10] ABA Standard 5-1.3(b) states, "an effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees."

After discussing the issue at length, the Task Force concluded that a supervisory commission is not needed in Vermont at this time. The various bodies involved in the Vermont criminal justice system already have the opportunity to cooperate and communicate through the Governor's Criminal Justice Cabinet. Other branches of government currently do not intrude so greatly into the affairs of the Office of Defender General that a commission is required to protect its independence.

B. The Independence of the Defender General Needs to be Protected.

Although the Defender General is not currently prevented from performing his or her constitutionally-required duties by interference from the executive branch, the possibility of this occurring does exist. This is so because the Defender General may arguably be removed without cause at any time, not merely at the conclusion of the statutory four-year term of office specified in 13 V.S.A. § 5252(c).[11] This creates a situation in which policy differences between the Governor and the Defender General may adversely impact the delivery of legal services to criminal defendants. Indeed, one previous Defender General resigned because of intractable differences with the Governor's office, and another refused a Governor's request to resign. To prevent the recurrence of such situations, the Task Force recommends permitting removal of a sitting Defender General only for good cause shown. This would provide the Defender General with an additional measure of independence, and prevent the executive branch from unduly influencing the provision of constitutionally-required legal services.

C. Non-Serious Crimes.

The Task Force considered whether public defenders could better focus their resources on more serious cases if the statutory list of less serious crimes was expanded. See 13 V.S.A. § 5201(5). The legislature attempted this strategy in 1995 by adding more non-serious crimes in an effort to reduce the number of cases which required the appointment of counsel. However, an analysis of the 1995 changes prepared for the Task Force by the Vermont Center for Justice Research indicated that expanding the number of non-serious crimes did not have a substantial effect on the public defense's caseload. Because the approach has not proven successful in practice, the Task Force decided not to pursue it further.

IX. SUMMARY OF RECOMMENDATIONS.

In summary, the issues identified by the Task Force and its recommendations for addressing them are as follows:

[11] There is no clear answer to the question of whether a governor may dismiss an incumbent Defender General. It is noteworthy that, when the position was created in 1972, removal of the Defender General was through impeachment. The original Public Defender Act provided that "[D]uring his term, [the Defender General] may only be removed from office in the same manner and for the reasons for which district judges may be removed from office."

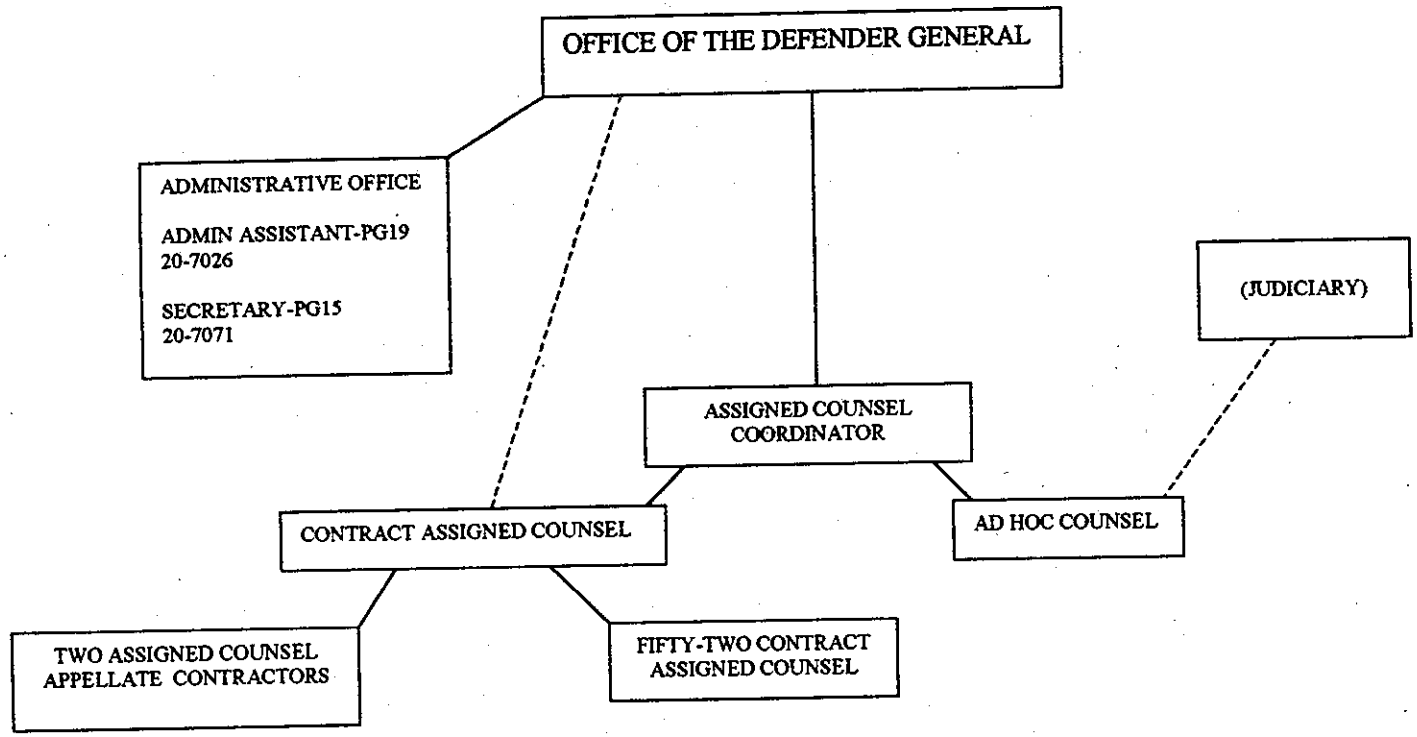
A. **Issue: The Assigned Counsel Contract System Is Structurally Flawed.**
Recommendations: Restructuring the Office of Defender General to add a Director position, and to create three regional serious crimes units that would also handle cases in which the local public defenders have conflicts of interest.

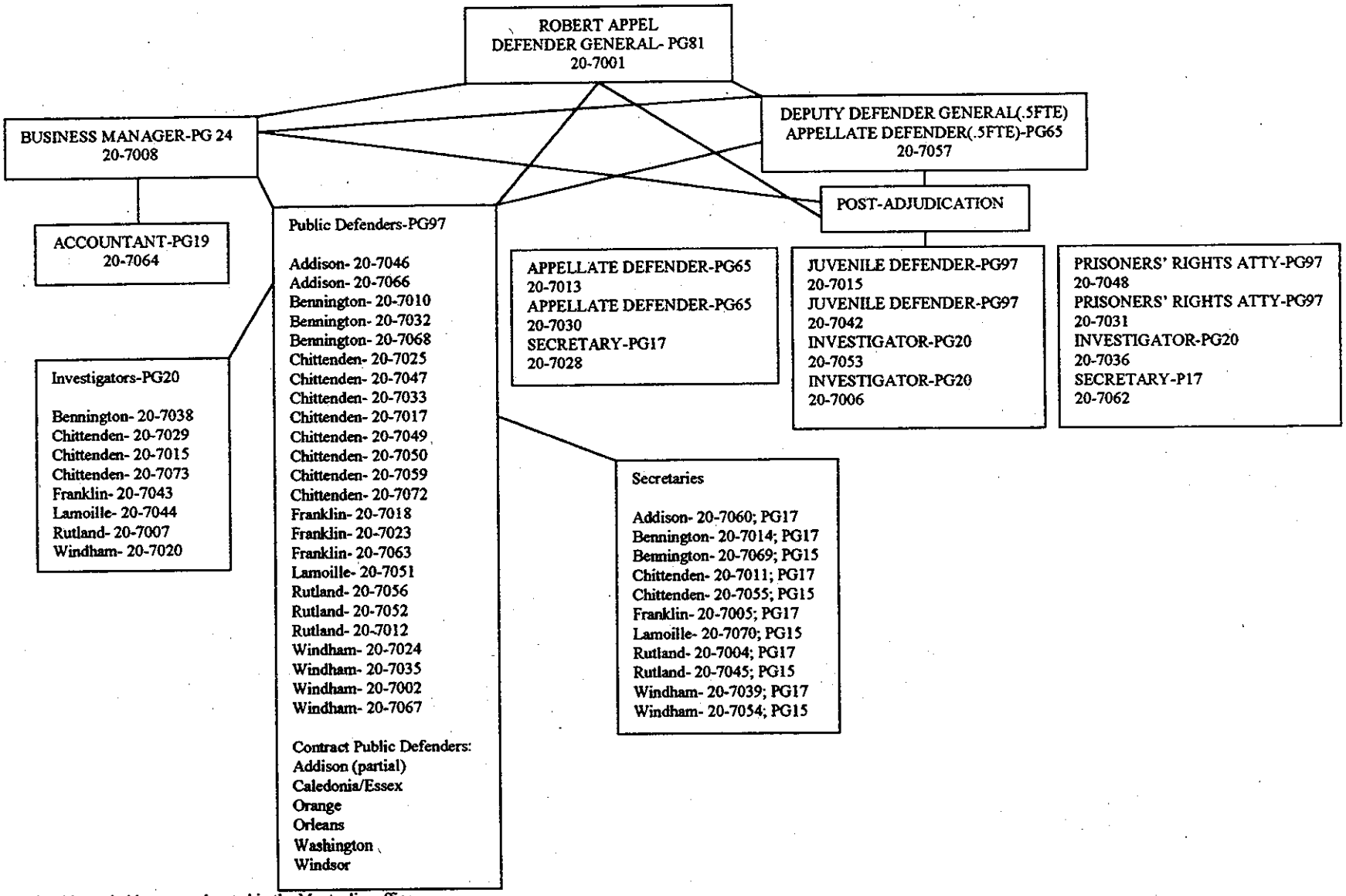
B. **Issue: Funding and Revenues for the Office of Defender General Are Not Sufficient to Meet Demands on its Resources.**
Recommendations: Establish an application fee for public defense services to be paid before the legal services are provided; improve the current system for collecting assignment, copayment and reimbursement fees; permit indigent defendants to pay fees by credit card; hold parents responsible for fees in some juvenile cases.

C. **Issue: Public Defenders Carry Caseloads Far in Excess of National Standards.**
Recommendations: Limit the Defender General's statutory obligation to provide representation in nonconstitutional cases; budget for the increased defense costs associated with new legislative enactments; expand the use of alternative justice programs; encourage judges to use their discretion when appointing counsel for juveniles, instead of routinely making appointments in all cases.

D. **Issue: Counsel for Indigent Defendants Have No Minimum Requirements for Qualifications and Training.**
Recommendations: Establish minimum qualification standards and specialized in-house continuing legal education requirements for public defenders and contract counsel.

E. **Issue: Cooperation within the Criminal Justice Community Should Be Improved.**
Recommendations: Enhance coordination and communication between the bodies involved in the criminal justice system by increasing interagency training, and enhancing use of the Governor's Criminal Justice Cabinet.


OFFICE OF THE DEFENDER GENERAL
ADMINISTRATIVE OFFICE
ADMIN ASSISTANT-PG19
20-7026
SECRETARY-PG15
20-7071
(JUDICIARY)
ASSIGNED COUNSEL
COORDINATOR
CONTRACT ASSIGNED COUNSEL
AD HOC COUNSEL
TWO ASSIGNED COUNSEL
APPELLATE CONTRACTORS
FIFTY-TWO CONTRACT
ASSIGNED COUNSEL



Note: Positions listed in capital letters are located in the Montpelier office

OFFICE OF THE DEFENDER GENERAL

Projected Cost of 3 Serious Felony Units based on historical caseload trends. These units would handle approximately 60-75% of the following types of cases currently assigned to assigned counsel contractors and ad hoc counsel: murder, aggravated murder, kidnapping, aggravated sexual assault, sexual assault, sexual assault on minor, lewd and lascivious and L & L w/child..

1 Level IV attorney	$ 75,000
1 Public Defender Assistant (PG 19, Step 2)	43,000
Operating*	12,000
Total per unit	$130,000
1-time start-up costs per unit	10,000
Total annual cost for 3 units	$390,000
1-time start-up costs for 3 units	$ 30,000

Projected savings from current service provision based on projected caseload:

Assigned Counsel Contractors

During FY 2000 ACC handled 85 of these types of cases. Assuming assignment of approximately 75% to serious felony units:

60 cases = .4 LEC x $54,000/LEC	$ 22,000
Contract homicide and serious felony case payments (FY 2000 $51,250) x .75	38,000
Total savings ACC	$ 60,000

Ad Hoc attorney projected caseload which would be assigned to serious felony units:

			2 hom.	5 hom.
Murder	2-5	$35,000	$ 70,000-	$175,000
ASXA	5	$25,000	125,000	same
Kidnap	3	10,000	30,000	same
L&L	6	1,500	9,000	same
SXA	5	2,000	10,000	same
SXAM	4	1,500	6,000	same
Total savings Ad Hoc			**$250,000**	**$355,000**
Total combined savings			**$310,000**	**$415,000**
Net savings annually**			**($80,000)**	**$ 25,000**

Note: net savings would be expected to increase, with future increases in caseload.

*Operating expenses include rent, utilities, phone, postage, copier, supplies, insurance, Westlaw, books.

**Does not include one-time start-up costs.

Other third party case-related costs are not included above calculations, as they are cost neutral.

Transition Costs of Three Serious Felony Units

In any given year approximately 65% of ad hoc attorney costs are from cases assigned prior to the current year; approximately 15% are for cases 2 years or older; and approximately 3% are for cases 3 years or older. Using the projected savings of $355,000 (assuming 5 homicide cases already assigned to ad hoc counsel), transition costs can be projected as follows:

Year 1 - ad hoc attorney costs of serious felony cases assigned the previous year or earlier ($355,000 x.65)	**$230,000**
Contract homicide and serious felony payments for cases assigned the previous fiscal year	10,000
Year 1 total transition costs	**$240,000**
Year 2 total transition costs (ad hoc $355,000 x.15)	**50,000**
Year 3 total transition costs (ad hoc $355,000 x .03)	**10,000**

Summary by Year

Year 1 starts out with an additional cost of $245,000; by Year 3 the change in structure is starting to produce savings, of $15,000, and by Year 4 there should no longer be any transition costs.

Year 1		
	Cost of 3 Serious Felony Units	$390,000
	First year start-up costs	30,000
	Savings	(415,000)
	Transition Costs	240,000
	Total Cost	**$245,000**
Year 2		
	Cost of 3 Serious Felony Units	$390,000
	Savings	(415,000)
	Transition Costs	50,000
	Total Cost	**$ 25,000**
Year 3		
	Cost of 3 Serious Felony Units	$390,000
	Savings	(415,000)
	Transition Costs	10,000
	Total Savings	**$(15,000)**
Year 4		
	Cost of 3 Serious Felony Units	$390,000
	Savings	(415,000)
	Transition Costs	0
	Total Savings	**$(25,000)**

TABLE OF CONTENTS

TABLE OF CONTENTS (Con't)

TABLE OF CONTENTS (Con't)

PAGE

Indigent Defense Task Force

Hon. Frederic W. Allen, Chair

Charles A. Bristow, Esq.

Hon. Alden T. Bryan

James M. Candon

Joanne Goodnow

Robert M. Paolini, Esq.

Thomas A. Zonay, Esq.