



CORE PRINCIPLES FOR UTAH INDIGENT DEFENSE SYSTEMS

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USER STATEMENT

This document, adopted by the Utah Indigent Defense Commission in August 2017, sets forth core principles for the provision of indigent defense representation in the State of Utah.¹

These principles are intended to encompass the provision of indigent defense services in three defined areas of practice—criminal defense, delinquency defense, and parental defense. Utah law delegates the provision of indigent defense services to its local governments.²

The purpose of these principles is threefold:

1. To provide guidance to government officials, policymakers, and entities charged with providing, overseeing, assessing, and/or funding indigent defense systems;
2. To provide a yardstick for measuring the extent to which an indigent defense system ensures that individual attorneys within that system have the knowledge, ability, resources, and independence necessary to provide effective representation; and
3. To encourage appointed counsel to provide a high standard of representation and promote professionalism in the representation of indigent individuals in Utah.

THE UTAH INDIGENT DEFENSE COMMISSION

The Utah Indigent Defense Commission was created by legislation in 2016 to help the state ensure its indigent defense services are consistent with the United States and Utah Constitutions, and Utah law.

The membership of the Commission includes key leaders in state and local government, criminal defense, and indigent defense services.

The Commission works with the state, local governments, indigent defense providers, and other stakeholders to provide guidance on standards for constitutional representation, gather data and information about indigent defense service provision, award grants to improve indigent defense services, and support the regionalization of indigent defense services throughout the state.

¹The Utah Indigent Defense Commission is mandated to “adopt minimum guidelines for an indigent defense system to ensure the effective representation of indigent individuals consistent with the requirements of the United States Constitution, the Utah Constitution, and the Utah Code.” Indigent Defense Act, Utah Code § 78B-22-404(1)(a).

² “Indigent Defense System” or “system” refers to the local government entity that is responsible for providing indigent defense services in its respective state, county, or city courts; and the term includes counties, cities, towns, and any “interlocal entity . . . responsible for providing indigent defense services according to the terms of an agreement between a county, city, or town.” Indigent Defense Act, § 78B-22-102(7).

PRINCIPLE 1/ ORGANIZATIONAL CAPACITY OF DEFENSE SYSTEM IS SUFFICIENT TO ENSURE COMPLIANCE WITH CORE PRINCIPLES

A system's ability to meet the principles articulated herein requires a threshold structural and resource capacity—for example, an adequate budget, administrative resources, and the ability to monitor attorney and system performance. Critical to this capacity is the collection and regular review of reliable data and information about the services and quality of representation that a system is providing.³

If an indigent defense system lacks such capacity, efforts must be made to improve the system's organization—for example, through adopting a managed assigned counsel (MAC) system, public defender office, and/ or through pursuing interlocal, resource-sharing agreements.

PRINCIPLE 2/ SYSTEM PROVIDES COUNSEL TO ALL ELIGIBLE DEFENDANTS, MINORS, AND RESPONDENTS WHO DO NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE COUNSEL

Rights. The U.S. Constitution, the Utah Constitution, and Utah law guarantee the right to counsel. That right extends under Utah law to all accused persons facing any possibility of incarceration or detention,⁴ and to parents/legal guardians subject to child welfare proceedings and/or petitions to terminate their parental rights,⁵ regardless of financial status.

Responsibilities. Systems must ensure individuals facing these proceedings, who are unable to afford counsel, are provided counsel at government expense.⁶ Systems must also ensure the presence of defense counsel at all court proceedings, to avoid creating practical barriers to appointment or any pressure to waive counsel.

Restrictions. If a system seeks to recover/recoup public defender fees, it must strictly adhere to the statutory limitations and processes, to avoid undermining the right to counsel.⁷ A system

³ Indigent Defense Act, §78B-22-404(1)(c). The commission shall, "identify and collect data from any source, which is necessary for the commission to: (i) aid, oversee, and review compliance by indigent defense systems with the commission's minimum guidelines for the effective representation of indigent individuals; and (ii) provide reports regarding the operation of the commission and the provision of indigent defense services by indigent defense systems in the state."

⁴ Indigent Defense Act, §§ 78B-22-102(8) (defining a minor who is "arrested and admitted into detention" or who is "charged by petition or information in the juvenile or district court" as indigent for the entitlement to court-appointed counsel), 78B-22-201 (explaining the other individuals who are entitled to the right to counsel)

⁵ Indigent Defense Act, § 78B-22-201(1)(b)(parent and legal guardians have the right to counsel in abuse, neglect, or dependency proceedings; termination of parental rights; adult offenses; or proceedings listed in § 78B-6-112).

⁶ Indigent Defense Act, §§ 78B-22-102(7) (requiring cities, towns, and counties to provide indigent defense services), and 78B-22-202(2), 78B-22-203(1) (requiring a court to determine indigency, and upon finding indigency, to appoint an indigent defense service provider under contract with a system to represent indigent individuals).

⁷ Recoupment of public defender fees is permissible with limitations. Such fees cannot be combined with a plea agreement and must only happen post-conviction after a court makes an independent "ability to pay" determination. Utah Code §77-

may not, for example, assess fees without individualized assessments for each convicted individual, as statute requires the court to consider financial resources and the burden any fee will cause before imposing it. Systems reinvest any recouped funding in indigent defense services.

PRINCIPLE 3/ SYSTEM PROVIDES PROPER SCOPE OF REPRESENTATION

- **Principle 3A/ Scope of Representation: Attorney Activity**

Effective representation requires attorney activity that is meaningfully addressing the allegations facing each client. Accordingly, indigent defense systems shall ensure that attorneys are regularly engaged in a scope of practice wherein the attorney will:

- Develop a theory of the case that guides the case strategy;
- Pursue available evidence through discovery and investigation;
- Examine and review all available evidence;
- File appropriate motions;
- Advise the client on the strengths and weaknesses of the state’s case and on all implications of a plea offer, including direct and collateral consequences of accepting the plea offer;
- Litigate or adjudicate the allegations, unless a plea offer is consistent with the client’s expressed wishes and represents a benefit to the client; and
- Use investigative and other defense resources, as appropriate.

- **Principle 3B/ Scope of Representation: Stages of the Proceedings**

Early Appointment. Systems must ensure that as soon as feasible, defense counsel is assigned and notified of appointment, and indigent individuals are notified of the identity of assigned counsel and how to contact counsel.⁸

Continuity. Systems must ensure an indigent individual has access to counsel at all critical stages of criminal proceedings,⁹ and in delinquency and child welfare proceedings that

32a-108 (“The court may not include in the judgment a sentence that a defendant pay costs unless the defendant is or will be able to pay them. In determining the amount of costs, the court shall take into account the financial resources of the defendant, the nature of the burden that payment of costs will impose, and that restitution is the first priority.”); *Fuller v. Oregon*, 417 U.S. 40, 45 (1974).

⁸ Utah R. Prof. Conduct. 1.4 (Communication).

⁹ A critical stage is “every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The right attaches when “formal judicial proceedings have begun.” *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

indigent individuals have counsel to represent them at all stages of the juvenile court proceedings.¹⁰

Consistency. Systems must ensure representation commences in a timely manner, extends for the proper period of representation, and proceeds with reasonable continuity, unless the client's needs dictate otherwise—meaning the same attorney must continuously represent a client, where feasible, until a case concludes.¹¹

PRINCIPLE 4/ SYSTEM PROVIDES REPRESENTATION THAT IS INDEPENDENT AND FREE FROM INTERFERENCE

Indigent defense counsel's primary and most fundamental responsibility is to promote and protect the interests of client. A system must ensure defense counsel is free to defend clients zealously, based on counsel's own judgement, and without fear of termination, reduction in compensation, reduction in staff, or reduction in defense resources.¹² The selection, funding, and payment of defense counsel should be independent of the judiciary and the prosecution.¹³

PRINCIPLE 5/ SYSTEM RECOGNIZES DISTINCT AREAS OF SPECIALIZATION WITHIN INDIGENT DEEFENSE

Indigent defense encompasses distinct areas of practice—criminal defense, delinquency defense, parental defense, and appellate advocacy.¹⁴ Each is its own area of specialization, requiring a skills and knowledge distinct from what is required to practice in any other area.

Indigent defense systems must separately account for criminal defense, delinquency defense, parental defense, and appellate advocacy in their employment and contracting arrangements.¹⁵

¹⁰ Minors are entitled to appointed counsel. Indigent Defense Act, §§ 78B-22-102(8)(a), 78B-22-203(1)(a). Once appointed, providers "shall provide indigent defense services for the indigent individual in all court proceedings in the matter for which the indigent defense service provider is appointed." §§ 78B-22-203(1)(a), 78B-22-202(1)(b).

¹¹ System should ensure defense counsel does not withdraw from representation inappropriately, as defense counsel is required at probation revocation hearings. *Mempha*, 389 U.S. at 137.

¹² Indigent Defense Act, § 78B-22-404(1)(a)(iii)(A) (systems must ensure providers have "the ability to exercise independent judgment without fear of retaliation and [are] free to represent an indigent individual based on the indigent defense service provider's own independent judgment").

¹³ The "independence of counsel" is "constitutionally protected." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹⁴ Indigent Defense Act, § 78B-22-201(1) (outlining the right to counsel in these four practice areas).

¹⁵ Indigent Defense Act, § 78B-22-404(1)(a)(i)(B) (systems must ensure "a separate contract for each type of indigent defense service").

PRINCIPLE 6/ SYSTEM ENSURES THE RIGHT TO APPEAL

Indigent defense systems must provide counsel for any first appeal of right,¹⁶ and must separately account for the provision of appellate services to ensure the right to appeal.

PRINCIPLE 7/ SYSTEM PROVIDES REPRESENTATION THAT IS FREE FROM CONFLICTS OF INTEREST

Effective representation is representation that is zealous, diligent, and free from conflicts of interest—as defined in the Utah Rules of Professional Conduct.¹⁷ Indigent defense systems shall ensure that defense counsel manages conflicts of interest issues as required by the Utah Rules of Professional Conduct.¹⁸ Systems shall provide appropriate employment and separate arrangements to account for conflict cases.¹⁹ Those arrangements shall not create for defense counsel a financial disincentive to declare a conflict.²⁰

PRINCIPLE 8/ SYSTEM PROVIDES EFFECTIVE REPRESENTATION

Effective representation depends upon the zealous advocacy of qualified counsel, who receives training, has appropriate caseloads, access to defense resources, and proper compensation.

- **Principle 8A/ Qualifications and Training**

Indigent defense systems must ensure defense counsel’s ability, training, and experience

¹⁶ Indigent Defense Act, §§ 78B-22-201(1)(c), 78B-22-203(1)(a); *Douglas v. California*, 372 U.S. 353 (1963) (explaining that individuals who are “appealing a first appeal from a conviction or other final court action” have the right to counsel throughout the proceedings, and if such individuals are indigent, counsel will be appointed for them).

¹⁷ Indigent Defense Act, § 78B-22-404(1)(a)(i)(A) (systems must ensure indigent individuals receive zealous and conflict-free indigent defense services); Utah R. Prof. Conduct. 1.1 (Competence), 1.2 (Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.6 (Confidentiality of information), 1.7 & 1.8 (Conflicts of Interest), 1.9 (Duties to Former Clients), 1.10 (Imputation of Conflicts of Interest), 1.14 (Client with Diminished Capacity), 1.15 (Safekeeping property), 1.16 (Declining or terminating representation), 1.18 (Duties to Prospective Client), 6.2 (Accepting Appointments).

¹⁸ Indigent Defense Act, § 78B-22-404(1)(a)(ii)(H) (systems must ensure indigent service providers have “the ability to meet the obligations of the Utah Rules of Professional Conduct, including expectations on client communications and managing conflicts of interest”).

¹⁹ Indigent Defense Act, § 78B-22-404(1)(a)(i)(A) (systems must ensure an indigent individual receives conflict-free indigent defense services), Utah R. Prof. Conduct 1.7 through 1.10.

²⁰ Indigent Defense Act, § 78B-22-404(1)(a)(ii)(E) (systems must provide indigent defense providers with “adequate compensation without financial disincentives”).

match the complexity of the case.²¹ Systems must require counsel to receive continuing legal education in the areas indigent defense representation in which they practice.²²

- **Principle 8B/ Appropriate Caseloads**

Indigent defense systems must control defense counsel’s total workload (including private and indigent caseloads in other jurisdictions) to allow for effective representation of each client. Total caseload must be set at a level that allows defense counsel to undertake the scope of work required to test the state’s evidence in a meaningful way in each case.²³

- **Principle 8C/ Access to Defense Resources**

Indigent defense systems must equip defense counsel with the tools necessary to provide effective representation, by providing access to defense resources, which may include “costs for a competent investigator, expert witness, scientific or medical testing, transcripts, and printing briefs,”²⁴ social workers, interpreters, and forensic services. Systems must avoid conflicts or disincentives for defense counsel—for example, flat rate contracts where counsel pays for services from their compensation, or procedures requiring defense counsel to reveal a request for resources to prosecutors.

- **Principle 8D/ Proper Compensation**

Indigent defense systems must adopt appropriate rates and methodologies of compensation, sufficient to attract qualified applicants and to incentivize effective representation, which take into account the time, work, and complexity required to provide effective representation.

Indigent defense systems must avoid employment or contracting arrangements that create disincentives for effective representation—for example, flat fee contracts that provide no limit on the cases defense counsel will be assigned.²⁵ Systems must provide counsel with the ability to seek additional compensation for extraordinary cases, or additional attorneys when caseloads are too high.

²¹ Indigent Defense Act, § 78B-22-404(1)(a)(ii)(F) (systems must ensure providers have “appropriate experience or training in the area for which the indigent defense service provider is representing indigent individuals”).

²² Indigent Defense Act § 78B-22-404(1)(a)(ii)(G) (systems must ensure compensate providers “for legal training and education in the areas of the law relevant to the types of cases for which the indigent defense service provider is representing indigent individuals”).

²³ Indigent Defense Act, § 78B-22-404(1)(a)(ii)(D) (systems must ensure all providers have “a workload that allows for sufficient time to meet with clients, investigate cases, file appropriate documents with the courts, and otherwise provide effective assistance of counsel to each client”).

²⁴ Indigent Defense Act, §§ 78B-22-102(4) & 78B-22-404(1)(a)(ii)(B).

²⁵ Indigent Defense Act, § 78B-22-404(1)(a)(ii)(E) (systems must provide indigent defense providers with “adequate compensation without financial disincentives”).