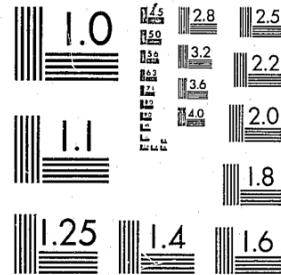


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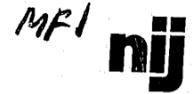
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# Test Design

## Early Representation in Public Defender Programs

U.S. Department of Justice  
National Institute of Justice

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Program Test Designs are developed by design groups composed of representatives of the National Institute of Justice and LEAA. The documents are prepared with contractual assistance, and are reviewed by a panel of experts conversant with the critical research and operational issues in the topic area.

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May, 1981

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TABLE OF CONTENTS

	Page
PREFACE	i
I. INTRODUCTION	1
II. PROGRAM DESIGN AND IMPLEMENTATION ISSUES	6
A. Developing Program Management Policies for Early Representation and the Field Test	7
B. Fostering the Attorney-Client Relationship	8
C. Roles of Other Criminal Justice System Participants	9
III. EVALUATION AND DESIGN ISSUES	12
A. Research Design	12
B. Process Evaluation: To Assess the Extent to Which the Early Representation Field Test Project was Implemented	14
C. Outcome Evaluation Objectives	15
D. Data Requirements	19
IV. IMPLEMENTATION AND NIJ SUPPORT	22
A. Implementation	22
B. NIJ Support	22
V. SITE SELECTION	26
A. The Mandatory Criteria	26
B. Other Desirable Criteria	27
APPENDICES	
Appendix A: Compendium of National Standards Relating to Early Representation	30
Appendix B: Field Research	34

## Preface

The National Institute of Justice is sponsoring a field test of the concept of early representation by a public defender program in felony cases. Early representation means entry by counsel into a felony case as soon as feasible after arrest--at least within 24 hours of arrest. The goals of the early representation field test program are:

- To establish management policies which broaden the range of services provided to the clients of the public defender program, improve the timing of the delivery of those services, and encourage early legal actions in cases accepted for representation by the program;
- To improve the attorney-client relationship by establishing early client contact and early factual investigation, so that counsel may provide the client with competent legal advice in determining appropriate legal actions and remedies;
- To improve the efficiency, effectiveness, and cooperation of the various components of the criminal justice system by speeding the process by which cases are brought to disposition.

The field test is prescribed by a Program Test Design, a document with detailed specifications of selected program elements. The goals of each field test are to determine the effectiveness of these elements or program strategies in multiple settings and to examine their transferability to other jurisdictions.

A number of public defender programs have attempted to develop early representation capabilities, but to date there has been little guidance for defenders in implementing early representation. In order to assess the feasibility of the concept, the National Institute has devised this test design which will involve selected public defender programs in well-defined jurisdictions in three different states. The processes of development and implementation as well as their outcomes will be evaluated by the Institute.

## I. INTRODUCTION

During the past fifty years, beginning with the decision of the United States Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932), it has become universally recognized that an indigent person accused of a crime has the right to be effectively represented by counsel at public expense. Since the decisions of the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972), there has been a significant proliferation of indigent defense services. The caseload has risen dramatically and the annual cost of indigent defense services has risen from \$200,000,000 in 1972<sup>1</sup> to nearly \$400,000,000 nationwide in 1979.<sup>2</sup> Pressure continues to build due to a continually rising caseload and the diminishing dollars available during the inflationary 1970s and 1980s. If indigent defense services are to keep abreast of the caseload, successfully overcome the restrictions of their annual budgets, and satisfactorily provide due process safeguards to indigent clients, new and innovative techniques in handling caseloads and managing programs must be devised.

Traditionally, public defenders and assigned counsel are assigned to cases at the time of the defendant's first appearance in court, or sometime beyond that point. Such appointment, however, often occurs too late to protect many of the defendant's vital rights because:

- The defendant has made a statement to the police admitting guilt in the absence of counsel, or has been asked to participate in a line-up where he was identified as the perpetrator of the crime;
- Witnesses available for the defendant when he is arrested are lost during the time between arrest and appointment of counsel;
- The defendant languishes in jail because he cannot meet the terms of his bail, and as a result, loses his or her job;
- Alternatives to prosecution, like restitution, go unexplored;
- Alternatives to incarceration, such as drug abuse treatment, also go unexplored. In such instances, defendants are often forced to "dry out" in jail and later evaluations do not disclose the significance of the drug problem.

<sup>1</sup>Lawrence A. Benner and Beth Lynch-Neary, "The Other Face of Justice," National Legal Aid and Defender Association, 1973.

<sup>2</sup>Criminal Defense Technical Assistance Project (Abt Associates Inc.), telephone survey, 1980.

Another problem caused by belated representation by defense counsel is that the defendant can be placed in an unequal posture with the prosecution. As a result, the constitutional right to the effective assistance of counsel may be lost, as great damage may be done to the defendant's case before counsel becomes involved.

These problems have extended the gap which exists between services provided to indigent defendants and those obtained by more affluent defendants. For those defendants who are capable of hiring their own lawyer, early representation usually occurs as a matter of course because the lawyer is often retained at the time of arrest or threat of arrest. To provide a similar level of representation for an indigent defendant, however, it is up to the attorney to initiate early contact.

This intervention by defense counsel prior to judicial appointment may be viewed as an effort to solicit business unethically and to thwart the court's control over the cases and lawyers before it. The Code of Professional Responsibility promulgated by the American Bar Association, Disciplinary Rules 2-103(D)(1)-(5) and 2-104 make clear, however, that informing a person of the right to representation through an indigent defense services program is appropriate and to be encouraged.<sup>3</sup> Moreover, as the national standards indicate, appointed counsel should be free from judicial control<sup>4</sup> and should be treated no differently than a privately retained lawyer.

In fact, national standards regarding the delivery of defense services suggest that representation by counsel within the first few critical hours of the case is desirable because it would place the indigent defendant in an equal posture with the prosecution. Standard 5-5.1 of the American Bar Association Standards Relating to Providing Defense Services (1978) states, in pertinent part, that, "Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first."<sup>5</sup> Standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts (1973)<sup>6</sup> and The National Legal Aid and

<sup>3</sup>See also, Comment, "The Right to Counsel: Attachment Before Criminal Judicial Proceedings?", 47 Fordham Law Review 810 (1979).

<sup>4</sup>See Standard 5-1.3, ABA Standards Relating to the Defense Function; Section 5.12, NLADA National Study Commission; Standard 13.9, National Advisory Commission.

<sup>5</sup>See also commentary to Standard 5-5.1.

<sup>6</sup>Standards 13.1, 13.3.

Defender Association, Guidelines for Legal Defense Systems in the United States, Report of the National Study Commission (1976)<sup>7</sup> contain similar provisions. (Appendix A contains a compendium of relevant standards from all three bodies.)

The standards are supported by the available research on early representation, a summary of which is contained in Appendix B. Researchers have found that early representation can increase efficiency in case processing by screening out cases which do not require formal litigation, facilitating more realistic plea negotiation, and reducing charges which may be filed. It may also reduce jail populations because counsel is able to advance better bail arguments, increase the use of diversion alternatives, and negotiate earlier plea agreements. In addition, by increasing collaboration between defense and prosecution, case progression can be more predictable because case decisions occur earlier. For example, those cases which may result in a trial are identified earlier; preparation and investigation, as well as discovery, are accomplished earlier; and informed decisions are reported to the courts more quickly, so that scheduling of case events may be developed sooner.

Finally, it would seem that earlier appointment of defense counsel would increase the effectiveness of the attorney. Counsel would have the opportunity to prepare the case more completely, by initiating better and earlier factual investigation, identifying key legal issues sooner, and having more time to develop strategies and alternatives. The representation would also be enhanced by earlier access to the client, as the lawyer would be available during the client's most critical time of need--those hours after arrest which can be the most threatening and confusing.

In light of the current interest in early representation by defense counsel<sup>7</sup> and the lack of adequate empirical documentation of its impact on both the delivery of defense services and the criminal justice system as a whole, the National Institute of Justice is supporting an experimental test of the provision of early representation. The test would be conducted in three public defender offices in different jurisdictions. Based upon the review of the national standards, the available literature, the practical field research, and the contributions of the Advisory Board members, summarized in the preceding section, NIJ has developed specific program requirements, site selection criteria, and an evaluation design for this test. In addition, three primary goals have been identified. These are:

- The service goal--To establish management policies which broaden the range of services provided the clients of the public defender program, improve the timing of the

<sup>7</sup>Sections 1.2-1.4.

delivery of those services, and encourage early legal actions in cases accepted for representation by the program;

- The attorney-client relationship goal--To improve the attorney-client relationship by establishing early client contact and early factual investigation, so that counsel may provide the client with competent legal advice in determining appropriate legal actions and remedies;
- The criminal justice system goal--To improve the efficiency, effectiveness, and cooperation of the various components of the criminal justice system by speeding the process by which cases are brought to disposition.

NIJ is particularly interested in providing more empirically-based evidence of the potential impact of early representation by addressing such questions as:

- What are the best methods of establishing early client contact?
- How does the question of eligibility determination affect early defense services for the indigent, and what is the best method for early eligibility screening?
- Does early case screening facilitate early assessment of the incoming caseload in terms of determining individual client needs?
- Does early investigation of the facts of a criminal case have an impact on ultimate case disposition?
- Does early representation have an impact on the release of the client from pretrial custody?
- Are early representation cases better prepared for trial?
- Does early representation encourage diversion and/or plea negotiation?
- Does early representation have an impact on the ultimate disposition of the case?

Ultimately, the impact of early representation will be measured in terms of the desirability of replication by other defender programs throughout the

country. For this reason, public defender programs interested in participating in this test must demonstrate a strong commitment to its goals and objectives. In the following sections, the nature and requirements of the field test program will be discussed, along with the criteria for site selection and for evaluation of the projects.

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<sup>8</sup>The programs, for reasons which will be discussed, will be limited to public defender programs, or other programs, such as a contract (private) defender program, which have essentially the same structure.

## II. PROGRAM DESIGN AND IMPLEMENTATION ISSUES

In devising an application for a field test program, applicant defenders will be expected to address the previously identified goals and related issues as specified in this Test Design document. This section specifies those issues which relate to each goal and is intended to provide guidance in tailoring a field test for the applicant's jurisdiction. The applicant programs should develop the structure of the early representation field test within their jurisdictions based upon this Test Design document, particularly Section IV, Implementation and NIJ Support, and Section V, Site Selection Criteria, infra. Applicants should pay close attention to project staffing and case-load issues. Field test staff should be drawn as much as possible from existing defender program staff, so that they will be familiar with local procedures. Also, the test staff should reflect the office's current staffing configuration so as to simulate as closely as possible existing program practices and procedures. The role of the field test project director is crucial to successful implementation of the test; great care should be taken in selecting an experienced attorney for that position. Applicants should define the responsibilities and requisite qualifications of the remaining staff positions as well. In preparing the staffing pattern for this field test, applicants should recognize the importance of the data collection requirements of the evaluator. The applicant should, therefore, show a willingness and capability to meet these data requirements.

Applicant defenders must be prepared to minimize contamination of the test by assuring NIJ that test project staff will only handle those felony cases assigned to the Test Group. (The assignment of felony cases to either the Test Group or Control Group will be fully explained in the "research design" discussion on pages 12-14.) Throughout the period of the field test, non-field test attorneys should handle all felony cases not assigned to the Test Group in the same manner in which they are currently handled. Otherwise, it will be difficult, or impossible, to determine the effects that early representation may have in a selected jurisdiction. It is crucial, therefore, that applicants devise a plan which is consistent with these requirements.

The following subsections discuss issues as they relate to each of the three major goals. In preparing the field test application, the applicant defender should identify how the issues will be addressed within the local jurisdiction and within the organization of the project. While the proposed projects may vary slightly from jurisdiction to jurisdiction due to local criminal procedure and court rules, applicants should exercise care to develop the projects within the scope of the Test Design.

### A. Developing Program Management Policies for Early Representation and the Field Test

The Test Design has been targeted for public defender programs. While early representation techniques are as valuable within assigned counsel systems, defender agencies have been targeted for the test program because of their centralized management and data collection functions. The definition of public defender programs includes, however, private contract defender programs such as a legal aid society or the like, which operate exclusively in the defense of indigents in criminal cases and have a centralized management system.

The applicant is expected to devise an application which responds to the key elements and issues stated below:

- Development of procedures for identification of persons who qualify for and are in need of defender services, including:
  1. daily jail checks, either in person or by telephone;
  2. a means of determining indigency at the time of initial client contact, or devising a method of provisional representation pending court appointment.
- Development of a project structure which insures that cases randomly assigned to either the Test Group or the Control Group are represented by attorneys who work exclusively with one or the other group of cases. The program should explore:

<sup>9</sup>It is suggested that the applicant defender program(s) maintain a management information system, or a similar system, as defined by Sec. 5.2 of the National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, Final Report, 1976, at page 411:

- 5.2 STATISTICS AND RECORD-KEEPING
- (a) Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.
  - (b) Every defender director should receive, on a weekly or monthly basis, detailed caseload and dispositional data, broken down by type of case, type of function, disposition, and by individual attorney workload.

1. whether vertical representation or horizontal representation (or a combination of the two models) will be most feasible;
  2. the development of appropriate program policies which insure that the cases assigned to one group are not mixed with cases of the other group;
  3. the development of a management plan which assures compliance with the Test Design and meets the approval of NIJ.
- A commitment to participate in training programs and technical assistance programs as provided by the National Institute.
  - Development of appropriate written policies and procedures for the early representation program which spell out how early representation is conducted within the local criminal justice system.
  - Development of the ability to conduct early investigation.
  - Development of the ability to assess the seriousness of the alleged offense and character of the defendant (e.g., first offenders, repeat offenders) and assignment of an appropriate lawyer of sufficient skill to represent the defendant.

Applicants should also raise and propose solutions to any issues of concern to them within their jurisdictions which might have an impact on the implementation of the Test Design, e.g., rules or statutes which direct the courts to screen exclusively for indigency.

#### B. Fostering the Attorney-Client Relationship

One of the most crucial elements of the Test Design for early representation is the development of an atmosphere which will provide fertile ground for the attorney-client relationship. Clearly the person who retains a lawyer can anticipate early action in the case. That lawyer will, if requested, be at the stationhouse at the time of arrest and interrogation, and will advise his client on how to proceed at every relevant stage of the proceedings. For the indigent, there is no comparable availability of counsel without early representation. The Test Design will facilitate early development of the attorney-client relationship by causing the legal services program to take the first step of initiating contact with the client. While there is perhaps no accurate measure of client satisfaction with a particular lawyer, the

field test can examine the relationship objectively by determining what happens to a case when a lawyer does become involved for the indigent earlier than the first court appearance. In order to accomplish this task effectively, the applicants should consider these issues which may affect the structure of the field test:

- Development of procedures for early client contact:
  1. to advise the defendants about available options for case disposition;
  2. to advise the defendant about the manner in which the case may progress through the system.
- Identification of methods by which counsel may:
  1. obtain factual background of the defendant and his case;
  2. develop facts and arguments related to bail;
  3. obtain release from jail when possible;
  4. develop, when appropriate, special programs for a particular defendant, e.g., drug or alcohol treatment.
- Development of policies which fulfill the minimum requirements of effective representation, and discuss the:
  1. privacy of the attorney-client relationship;
  2. timing and duration of contacts with the lawyer;
  3. preparation of the defendant's case for trial, plea bargaining, or alternative disposition.

#### C. Roles of Other Criminal Justice System Participants

In order to develop a successful Test Design program, the applicant program will of necessity have to seek the cooperation of law enforcement, the prosecution, the courts, and other service providers. This section will suggest areas where mutual cooperation may be explored for resolution of issues which affect the development of the field test program.

##### 1. Role of Law Enforcement.

For the purposes of this test, the major role played by law enforcement authorities is that of the "keeper." In this sense, the defender must seek the permission of law enforcement to speak with a potential client. Often,

jails have policies which forbid a lawyer from contacting a defendant unless he has been formally retained by the accused or appointed by the court. As a result, there are a few key elements of the Test Design for which the defender must seek the cooperation of law enforcement, which include:

- Making clear the purpose of the Test Design structure to ensure full cooperation for Test Design purposes;
- Establishing jail policies which facilitate early interviews of recent arrestees, e.g., within 24 hours of arrest;
- Establishing a private place within the jail where the defender may interview the client.

#### 2. Role of the Prosecutor.

The applicant program should consider those issues which will have impact on the prosecutor's office. To the extent possible, the applicant should seek the cooperation of the prosecutor's office with regard to at least the following issues:

- Support for defender access to jails for daily jail checks;
- Early case screening;
- Early plea negotiation;
- Potential diversion of defender clients;
- Other issues of mutual concern, such as increased labor requirements of the prosecutor's staff as a result of the Test Design project.

It is very difficult to predict the level of cooperation which the defender may obtain from the prosecutor, but applicant programs should consider how to develop a level of cooperation on these and other issues which will, if not support, at least not inhibit development of the field test program.

#### 3. Role of the Courts.

The courts must play a significant role in the development of any early representation program. In its day-to-day activities, scheduling is perhaps the most important aspect of the court's role. The court is responsible for devising intake schedules and arranging other court dates. The defender should encourage the courts to develop policies which are consistent with the goals of early representation. In addition, the development of indigency

criteria which may be utilized by the defender in determining eligibility for early representation is a crucial issue. The court has traditionally assumed the role of assessing eligibility and appointing counsel, which in and of itself can forestall early representation efforts. As a result, the defender and the courts should explore a mutually agreeable method of delegating authority to the defender to assess eligibility.

#### 4. Role of Other Service Providing Agencies.

Many jurisdictions have developed pretrial service agencies, drug and alcohol abuse programs, and other programs which provide assistance for defendants in making bail, developing alternatives to prosecution, and obtaining drug and alcohol treatment and placements in appropriate programs. Efforts should be made to identify those agencies within the jurisdiction and to catalogue the availability of services for use by defender personnel in assessing the seriousness of a case and the available alternatives.

### III. EVALUATION AND DESIGN ISSUES

The purpose of this section is to present the analytic framework and evaluation objectives of the field test program and to provide a discussion of the evaluation design requirements. An independent organization will be selected by the NIJ to conduct the evaluation. The evaluation grantee will work closely with the project staff in each site and assist the staff in collecting the data required for the evaluation. A full description of the evaluation effort will be set forth in the NIJ solicitation for the evaluation of the field test.

#### A. Research Design

The method selected for evaluation of the Test Design project is based upon comparison of Test Group cases versus Control Group cases. This process

<sup>10</sup> Applicant programs may question whether randomization will unconstitutionally deny equal access to counsel to indigent defendants assigned to the Control Group. The decisions of the United States Supreme Court suggest that this procedure would not be violative of the right to equal access to the constitutionally protected right to counsel and thus would not be a denial of equal protection of the law.

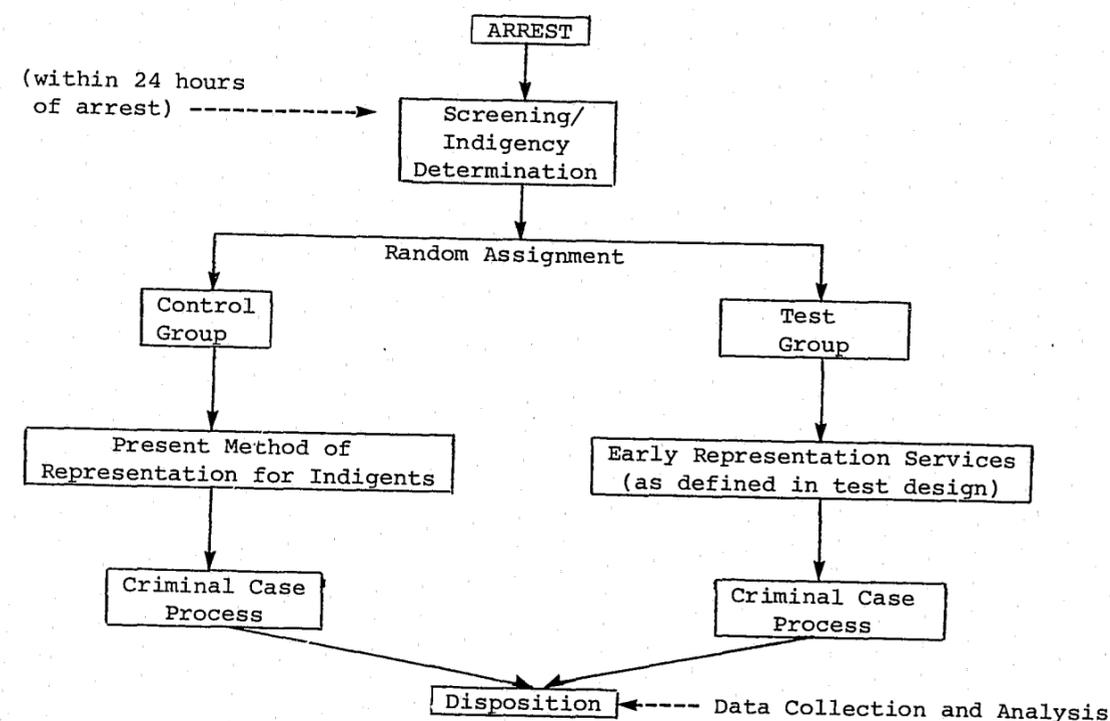
First, the right to counsel in felony cases, as defined in Gideon v. Wainwright, 372 U.S. 355 (1963), requires the appointment of counsel at the time of the defendant's first appearance in court. No decision of the United States Supreme Court or of any State Supreme Court requires the appointment of counsel at any time earlier, with the exception of a defendant's request for the assistance of counsel under Miranda v. Arizona, 384 U.S. 436 (1966), or United States v. Wade, 388 U.S. 218 (1968). What is required is that counsel must be made available to a defendant at any "critical stage" of the proceedings. Coleman v. Alabama, 399 U.S. 1 (1970).

This Test Design project is being implemented to determine whether the provision of counsel earlier than constitutionally mandated has an impact on the quality of representation provided to the indigent. By dividing the incoming cases into two groups--a Test Group and a Control Group--the project is offering a portion of the incoming caseload an advantage not otherwise available. It is also important to note that any defendant exercising the right to request the assistance of counsel during station house interrogation or post-indictment identification procedures would not be affected by this project.

The use of a randomization process, while never tested through litigation, has been successfully undertaken in other contexts. A methodology similar to that proposed herein was instituted in the Manhattan Bail Project in the early 1960s. See, Arnes, Rankin and Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole," 39 N.Y.U. Law Review 67, 74 (1963). In that project, the effects of providing earlier, more detailed information about randomly selected defendants at the initial court appearance demonstrated a greater incidence of pretrial release,

is depicted in Figure 1. In this process, cases will be screened at the point of entry into the criminal justice system and randomly assigned to either group. The Control Group will receive the same treatment currently provided to all indigent defendants in the jurisdiction. The Test Group cases will be those cases which receive early representation services.

FIGURE 1



which in turn showed a reduction in conviction rate and sentence severity for defendants as their cases proceeded to disposition.

In this project, the experiment provides a service which is constitutionally required, but at a time earlier than constitutionally mandated. Under the rationale of Ross v. Moffitt, 417 U.S. 600, 616 (1974), it is clear that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required."

In essence, two levels of evaluation will be produced by the field test project. The first, which we label as the process evaluation, will document the degree to which the early representation program was implemented as planned. It is anticipated that the defender agencies selected to implement the field test will be those best suited to achieve the goals and objectives of the project. Changes in the Test Design are to be discouraged; however, past field test experiences have shown that the process of program implementation sometimes results in changes necessary to accommodate variations in procedure in different jurisdictions; others may result from new developments within the local jurisdiction, such as significant court decisions, modifications in local court rules or procedures, or the promulgation of new criminal codes. Such changes, if they are required, are to be made in collaboration with NIJ. The process evaluation, therefore, is essential for identifying those factors which aid or impede program implementation, and thus will identify those issues which are important for an understanding of the conditions necessary for implementing similar programs in other jurisdictions.

The second level of evaluation, which we label as the outcome evaluation, will, through the experimental design, assess the impact of early representation services, as compared to the present method of providing attorney services for the indigent. At this level of evaluation, as denoted in Subsection C below, the goals and objectives of the field test program can be tested. In other words, through random selection of comparable cases to the Control and Test Groups, the evaluation will develop comparative data demonstrating the impact of early representation services within the parameters of the previously stated goals and objectives of the field test program.

B. Process Evaluation: To Assess the Extent to Which the Early Representation Field Test Project Was Implemented

The first task of the evaluator will be to examine the manner in which the field test program was implemented. The purpose of this segment of the evaluation will be to determine whether the field test was implemented according to the structure proposed by the applicant program, as well as whether there was any deviation from the plan and the reasons therefor. The evaluator will also examine the process of implementation in terms of the cost of replication, the political difficulties and issues revolving about implementation of early representation, and other issues which may be observed. This stage of the evaluation is seen as a necessary step toward evaluation of the outcome measures discussed in the next subsection. The types of questions to be addressed in examining this objective include, but are not limited to:

- Has the program developed procedures and policies which encourage the earliest possible case entry?
  1. Has the program developed early contact through daily jail checks?
  2. Has the staff been adequately trained to conduct early representation?
  3. Has the program devised a method of determining indigency prior to the first court appearance?
- Does the program begin providing representation for its clients in the Test Group within 24 hours of arrest?

C. Outcome Evaluation Objectives

There are three outcome evaluation objectives of the field test program which correspond to the three goals of the program. It should be clear at the outset that project staff will collect and furnish all relevant data as specified and required by the national evaluator.

1. To Assess the Extent to Which Program Management Policies Have Had an Effect on the Range of Services Provided and the Timing of the Delivery of Those Services in Developing Early Representation Capabilities.

The implementation of early representation services will require significant changes in the operations of the public defender agencies and other parts of the criminal justice system. Through the collection of outcome measures, the evaluator will assess the adequacy of the activities undertaken to facilitate the program's capability to provide representation at the earliest point possible and to permit representation of defendants eligible for indigent legal services.

The types of questions to be addressed in examining this objective include, but are not limited to:

- Has early representation increased the amount of time available for case preparation?
- Has the program developed relationships with the courts, law enforcement, the prosecution, and other service providing groups which facilitate early representation?

- Has the program caused a change in the kind of activities which are a part of case preparation?
  1. Is there a greater utilization of expert witnesses?
  2. Have better evidence collection methods been developed?
- Is there a change in the rate of investigation activities?
  1. Have investigations in cases increased?
  2. Have investigations occurred earlier?
- Is there a change in the rate of diversion of cases from prosecution?
  1. Is there a change in the rate of provision of social services to defendants?
  2. Is there a change in the rate of cases dismissed without prosecution?
  3. Is there a change in the rate of post-charging diversion?
- Is there a change in the type and rate of pretrial motions filed?
- Is there a change in the number of cases proceeding to trial?
- Is there a change in the mode of factual presentation in cases proceeding to trial?
  1. Have evidence collection procedures had an impact on the disposition of cases proceeding to trial?
  2. Have there been changes in the rate and frequency of the use of expert witnesses?
- Have there been changes in the dispositions of cases going to trial?
- Is there a change in the rate of convictions?
  1. Has there been an increase or decrease in convictions on lesser included charges?
  2. Has there been an increase or decrease in acquittals?
  3. Has there been an increase or decrease of findings of guilty as charged?

- Are there changes in the type and length of sentences for convicted defendants?
  1. Is there an increase or decrease of probation dispositions?
  2. Is there an increase or decrease in the length of sentences imposed?
- What would the cost of replication of a full scale early representation program be?
  1. Is there a correlation between the cost of such a program and the benefits provided?
  2. Is there an increase or decrease in individual attorney caseloads and the time spent on those caseloads?
  3. What impact would a full scale early representation program have on public defender staffing?

2. To Assess the Impact of Early Representation on the Attorney-Client Relationship.

Implementation of the policies and procedures called for under the service goal of the program will presumably facilitate the provision of a wide range of services to defendants during the pretrial period which may not only affect the pretrial status of defendants but also their post-trial status. Through the collection of outcome measures, the evaluator will assess the impact of these activities on defendants in the program. The types of questions to be addressed include, but are not limited to:

- Is there a change in the rate of cases which receive representation at various points in the process?
  1. Prior to arrest?
  2. At arrest, or within 24 hours of arrest?
  3. At lineup?
  4. During stationhouse interrogation?
  5. At the first court appearance?
- Has the time spent interviewing clients increased or decreased?
- Has the number of attorney-client contacts increased or decreased?

3. To Assess the Impact of Early Representation on the Criminal Justice System.

It is anticipated that implementation of early representation will increase the efficiency and effectiveness of the criminal justice system by facilitating prompt case disposition for defendants participating in the program. However, by the same token, the mere presence of early representation may cause changes (both anticipated and unanticipated) in the criminal justice process which extend to all defendants in the jurisdiction, not only defendants participating in the test. The types of questions to be addressed in examining this objective include, but are not limited to:

- Is there a change in the average length of time a defendant remains in jail pending case disposition?
  1. Is there an increase or decrease in the number of defendants released on bail or ROR?
  2. Has there been more information made available to the courts for determination of bail?
  3. Is there a change in rate of bail reduction motions filed?
  4. Is there an effect upon the average daily jail population?
- Is there a change in the time it takes for the courts to bring cases to conclusion?
  1. Is there a change in the amount of time between initiation of the case and appointment of counsel?
  2. Is there a change in the rate of adjournments requested and granted?
  3. Is there a change in the prosecutor charging practices?
  4. Is there a change in the timing of cases diverted from prosecution and in the timing of other cases dismissed?
  5. Is there a change in the timing of plea agreements and guilty pleas?
  6. Is there a change in the time it takes to bring a case to trial and disposition?
- Is there an identifiable reduction or increase in the cost of court processing?
- Is there a change in the degree of cooperation between the various agencies in the criminal justice system?
- Is there a change in the development of plea agreements reached between prosecution and defense?

1. Has the length of time between charging and plea agreement been affected?
  2. Has the type of plea agreement been affected?
- Are there changes in the type and rate of pretrial motions filed?
  - Is there a change in the number of cases proceeding to trial?
  - Has the length of time between charging and dismissal been affected?

D. Data Requirements

1. Number of Cases to be Studied.

As noted in the site selection criteria (pp. 25-26), the Test Design is directed at public defender type programs which can provide the project a caseload of approximately 1200 felony (criminal) cases per year. A subset of these cases will be required for the Test and Control Groups. The sample size of these groups must be large enough to provide for an adequate level of statistical power--that is, the probability of detecting a significant difference in outcomes. The sample size is a function of the size of the change in the outcomes which the Test Design should measure (e.g., changes in the percent of cases not formally charged, etc.) and the selected level of power (ideally, 80 percent or above).

2. Levels of Information Required.

Site selection will require that information be available on case processing and other aspects of court operation. Several informational requirements are necessary for the evaluation design. Beyond the general information listed below, the specific data requirements for the evaluation of the Test Design project will be supplied by a national evaluator selected by the NIJ. The general information required for evaluation will include at a minimum:

- Case Data: Information on all cases, whether or not they fall within the Test or Control Groups.
- System Data: Information on how cases proceed through the prosecutor's office and generally through the court system, including assignment of counsel.

While this information may be available from existing records, actual collection of the data will be conducted by project staff for the evaluator. The data will be utilized to examine both program process and impact issues. Process issues involve the question of how to make the program function effectively, and how the program will affect the operation of the criminal justice system. Impact issues include the effect that early representation has upon case disposition and case processing by the public defender and the courts. The evaluator will also examine such issues as the potential for early plea bargaining, the investigation of the facts of the case, and alternatives to prosecution.

The types of data required to evaluate these and other issues would, at a minimum, include:

- Case identifiers: For each case within the study, the following would need to be either available or obtainable:
  1. Docket number, or other unique system identifier of the case;
  2. Names of assigned attorney, prosecutor, and the court assigned the case;
  3. Where contact was initiated (jail, courtroom, etc.) with client.
- Offense data:
  1. Date arrested and initial charge;
  2. Charge as determined by prosecutor (if different);
  3. Date of offense;
  4. Seriousness of offense.
- Case Action Data:
  1. When indigency is determined and by whom;
  2. Time of investigation, if relevant, or alternatives to prosecution considered, and dates action occurred;
  3. When bail is considered, and at what amount bail is set;
  4. Timing of plea negotiations;
  5. Motions filed, type, and when filed;
  6. Number, frequency, and timing of case conferences with attorney;
  7. How case proceeded to disposition (dismissal, plea bargain, trial, etc.).

- Disposition Data:

1. Type of disposition, and when rendered;
2. Sentence, if any, imposed.

It must also be emphasized that all of the data collection must respect the guaranteed privacy of the attorney-client privilege. This applies to the attorney, the client, and the attorney's agents, such as investigators and paralegals.

#### IV. IMPLEMENTATION AND NIJ SUPPORT

##### A. Implementation

The proposed test effort has been designed for implementation within one jurisdiction in three different states. The jurisdiction should be metropolitan in nature although other alternatives (i.e., statewide, rural and urban or multi-county mix, etc.) may be explored. It must be served by a public defender program for at least one-half of the indigent criminal caseload, and the public defender must be able to provide a minimum caseload of 1200 felony cases per year.

The test is designed in three stages over an 18-month period for the sites, and 24 months for the evaluator, as depicted in Figures 2 and 3. The initial stage will involve the start-up of the project during the first six months (3 months for the site and 6 months for the evaluator). Included in this phase are the development of early representation techniques, data collection instruments, planning, and the training of program personnel.

The second stage will involve 12 months and will consist of the implementation of the project in the public defender program and the periodic review of the project by the public defender, project staff, and the national evaluator.

The final stage will last 6 months (6 months for the evaluator and 3 months for the site), and will involve the close-out of the project, the collection of data, the preparation of the data by the national evaluator, and completion of the evaluation and the final report.

##### B. NIJ Support

NIJ support will be provided in the form of financial and technical assistance. A separate contractor has been retained by the Institute to provide

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<sup>11</sup> The definition of a felony differs from jurisdiction to jurisdiction. For the purposes of the Test Design, felony includes any case which has the potential for one year or more incarceration as a penalty. Those jurisdictions which include such crimes within the definition of a misdemeanor may apply, but should specify what crimes would be included if they are labeled as misdemeanors with the jurisdiction. In addition, the applicant program should specify, if so desired, which cases would be excluded from the study. It is suggested, for obvious reasons, that capital cases not be included in the experiment.

Figure 2

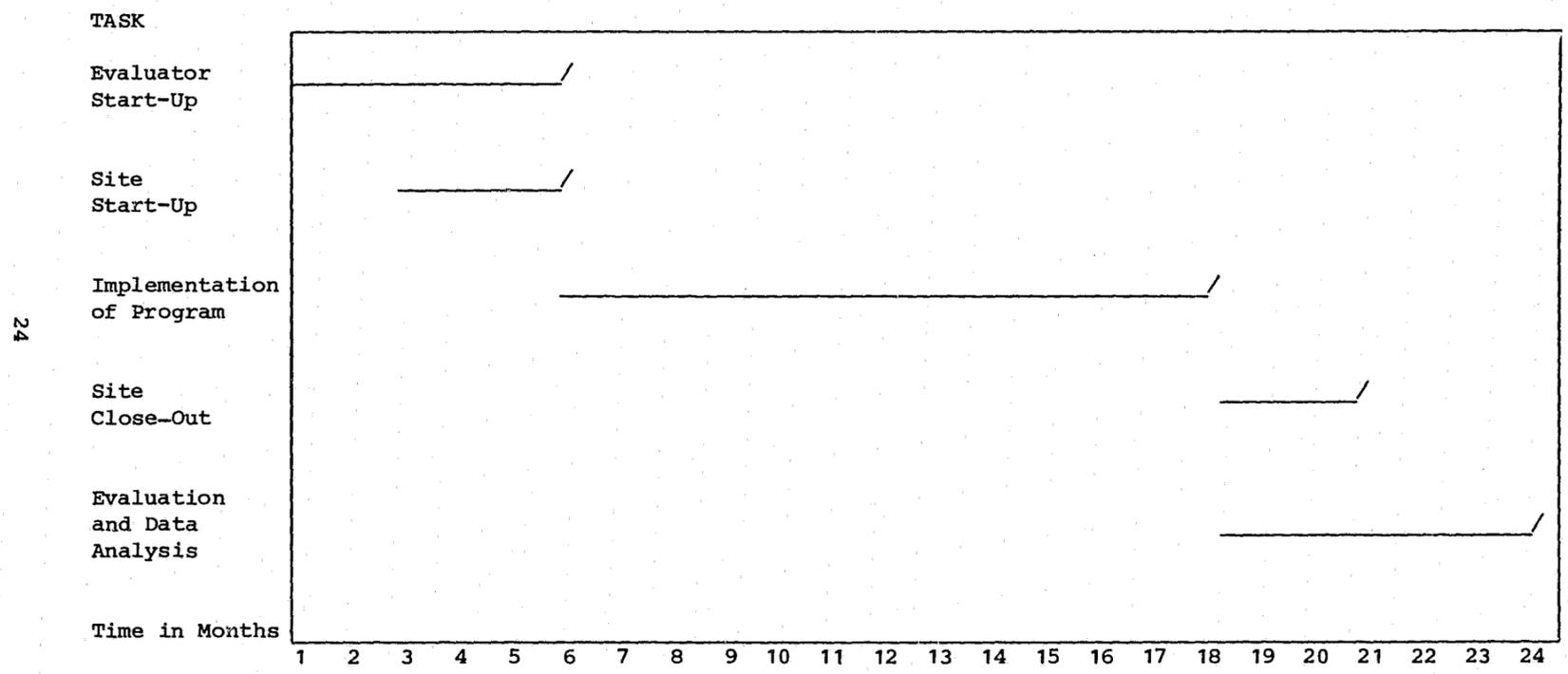
Timetable and Tasks for Implementation\*

Time Frame	Phase I (6 months)		Phase II (12 months)	Phase III (6 months)	
Stage	3 Months Site Start-Up	6 Months Evaluation Start-Up	Early Representation Implementation	3 Months Site Close-Out	6 Months Data Analysis by Evaluator
Tasks	<ul style="list-style-type: none"> <li>● Identify existing staff for project, and hire other required staff</li> <li>● Training and orientation of project staff</li> <li>● Collect and re-view statutes and court rules</li> <li>● Develop and plan operational guidelines</li> <li>● Establish data collection plan</li> <li>● Orientation of court personnel and attorneys</li> <li>● Pre-test all procedures</li> </ul>		<ul style="list-style-type: none"> <li>● Conduct randomization of cases</li> <li>● Implement indigency screening</li> <li>● Conduct early representation for treatment group cases</li> <li>● Data collection</li> <li>● Ongoing provision of project data to evaluator</li> </ul>	<ul style="list-style-type: none"> <li>● Conclude data collection</li> <li>● Provide final project data to evaluator</li> <li>● Assist evaluator in interpretation of data</li> <li>● Conclude project operation</li> <li>● Final project site reports</li> </ul>	

\*The national evaluation contractor will have concurrent responsibilities during phase I through phase III, which will be identified in their work plan.

Figure 3

Timetable



implementation assistance to the participating jurisdictions. Support will include training for key program participants, consultant services to aid program sites in the planning and implementation of the field test elements to be examined, and various workshops and meetings to enable key personnel from each of the participating programs to discuss problems and issues of mutual concern. Funds will also be included to support research utilization efforts such as hosting visiting court, prosecutorial, and public defender officials so they may observe program operations.

NIJ will allocate approximately \$180,000 per site for participation in the program.<sup>12</sup> No local or state funds are required. The funds will cover the cost of a project director, staff attorney(s), and other support and investigative, data collection, and clerical staff as required, as well as associated expenses for data collection, processing, and program operations. The project director should be an attorney who will participate in the casework with the staff attorneys. No funds for computer hardware will be provided by NIJ. Evaluation resources will be provided by NIJ under separate contractual agreement. The recipient of the grant award will be the individual public defender program. The applicant sites should identify and document the size of the caseload for the project and develop a plan and a budget as to how the program will operate and how the funds will be spent.

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<sup>12</sup>The applicant sites should draw no conclusions as to the ultimate cost of implementing or replicating this type of early representation program. The funding level prescribed for these Test Design projects includes the cost of the data collection and supervision of the test projects which are required for implementing these specific projects.

V. SITE SELECTION

The site selection criteria have been discussed generally throughout this Test Design and are listed below in two classes: mandatory criteria and other desirable criteria.

A. The Mandatory Criteria

The mandatory criteria are considered essential to the development and implementation of the early representation field test. These are:

- The prospective public defender program must serve a clearly specified jurisdiction which must produce a minimum of 1200 felony<sup>13</sup> cases per year for the public defender, excluding capital and juvenile cases. These cases must originate with a single court system.
- The public defender must currently provide little or no early representation services for its clients, as defined by the Test Design, e.g., within 24 hours of arrest.
- The public defender should have access to the jails and the ability to deploy such personnel as may be necessary to provide early representation services.
- There must be an indication of interest, cooperation, and a written commitment on the part of all affected parties within the local criminal justice system.
- Court procedures should be flexible enough to facilitate early representation.
- The public defender should provide a procedure for conducting indigency screening, or should develop a provisional method of indigency screening pending court determination of eligibility for defender services.

<sup>13</sup>For the purpose of the Test Design, a felony is defined as any case in which the potential penalty exceeds one year of imprisonment. In addition, because it is often difficult during the early stages of the case to identify whether the prosecutor will charge the defendant with a felony or a misdemeanor, the definition of felony cases for the Test Design includes those cases which are labeled as a felony at the time the defendant is booked into the jail by the police.

- The public defender must be willing to participate in NIJ sponsored training on early representation services, including the use of staff attorneys, investigators, paralegals, and clerical personnel.
- The public defender should develop internal operating procedures which incorporate early representation techniques.
- The sites must agree to participate in the type of evaluation chosen for the Test Design, and should provide a written commitment to fulfill the Test Design goals, objectives, and design criteria.
- The applicants must specify how the necessary reports, such as police reports and discovery, will be obtained, and should identify potential problems which may impede access by the defender and suggest potential solutions for discussion and, if necessary, where assistance from NIJ will be required.
- The public defender should exclude all homicide cases from the Test Design caseload (minimum of 1200 cases), and should also specify and justify any other classes of cases which might be approved by NIJ for exclusion from the Test Design project.
- The public defender plan should propose methods by which attorneys assigned to either the Test Group or the Control Group will be restrained from accepting and handling cases not assigned to their Group, so as to protect against contamination of cases in either Group.
- The public defender staffing for the test project should be similar to the staffing pattern in the office presently in mix of experienced and inexperienced attorneys (senior and junior level staff), attorney/investigator ratios, etc.<sup>14</sup>

B. Other Desirable Criteria

The following criteria, while not considered essential, are looked upon as helpful in facilitating the development and implementation of the early representation field test. These include:

<sup>14</sup>The applicant programs should plan to utilize current public defender staff as much as possible. The applicants should also attempt to deploy experienced attorneys, investigators, and other staff as much as possible to the Test Design project.

- The public defender may utilize vertical representation when assigning cases to staff attorneys.
- Plans may be developed for utilization of all relevant service agencies during early representation.
- If there is a pretrial services agency, or a diversion program in the prosecutor's office, its applicability to early representation services may be specified.

#### APPENDICES

- Appendix A: Compendium of National Standards Relating to Early Representation
- Appendix B: Field Research

## I. AVAILABILITY OF REPRESENTATION

## 1.1 Nature of Cases and Proceedings for Which Counsel Should Be Provided

Effective representation should be provided to all eligible persons:

- In any government fact-finding proceeding, the purpose of which is to establish the culpability or status of such persons, which might result in the loss of liberty or in a legal disability of a criminal or punitive nature; and
- In any proceeding to take affirmative remedial action relative to the scope of services set forth in part (a) of this section.

## 1.2 Time of Entry

Effective representation should be available for every eligible person as soon as:

- The person is arrested or detained, or
- The person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

## 1.3 Procedures for Providing Early Representation: Program Responsibilities

In order to ensure early representation for all eligible persons, the defender office or assigned counsel program should:

- Respond to all inquiries made by, or on behalf of, any eligible persons whether or not that individual is in the custody of law enforcement officials;
- Establish the capability to provide emergency representation on a 24-hour basis;
- Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services;
- Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;
- Prepare, distribute and make available by posting in a conspicuous place in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of any person who may require the services of the defender or assigned counsel and the nature and availability of such services, including the telephone number and address of the local defender office or assigned counsel program; and
- Publicize its services in the media.

Upon initial contact with a prospective client, the defender or assigned counsel should offer specific advice as to all relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pre-trial release, and make a preliminary determination of eligibility for publicly provided defense services.

Where the defender or assigned counsel interviews a prospective client and it is determined that said person is ineligible for publicly provided representation, the attorney should decline and case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, should immediate service be necessary to protect the person's interest, such service should be rendered until the person has the opportunity to retain private counsel.

## 13.1 Availability Publicly-Financed Representation in Criminal Cases

Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect. The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

Defendants should be discouraged from conducting their own defense in criminal prosecutions. No defendant should be permitted to defend himself if there is a basis for believing that:

- The defendant will not be able to deal effectively with the legal or factual issues likely to be raised;
- The defendant's self-representation is likely to impede the reasonable expeditious processing of the case; or
- The defendant's conduct is likely to be disruptive of the trial.

## 13.3 Initial Contact with Client

The first client contact and initial interview by the public defender, his attorney staff, or appointed counsel should be governed by the following:

- The accused, or a relative, close friend, or other responsible person acting for him, may request representation at any stage of any criminal proceedings. Procedures should exist whereby the accused is informed of this right, and of the method for exercising it. Upon such request, the public defender or appointed counsel should contact the interviewee.

2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.

3. Where, pursuant to court order or a request by or on behalf of an accused, a publicly provided attorney interviews an accused and it appears that the accused is financially ineligible for public defender services, the attorney should help the accused obtain competent private counsel in accordance with established bar procedures and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the accused.

## 13.4 Public Representation of Convicted Offenders

Counsel should be available at the penitentiary to advise any inmate desiring to appeal or collaterally attack his conviction. An attorney also should be provided to represent: an indigent inmate of any detention facility at any proceeding affecting his detention or early release; an indigent parolee at any parole revocation hearing; and an indigent probationer at any proceeding affecting his probationary status.

## Standard 5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

## Standard 5-4.1 Criminal Cases

Counsel should be provided in all criminal proceedings for offenses punishable by imprisonment, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is deemed to be punishable by imprisonment if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to imprisonment.

## Standard 5-5.1 Initial Provision of Counsel

Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel. Upon request, counsel should be provided to persons who have not taken into custody but who are in need of legal representation arising from criminal proceeding.

## Standard 5-7.1 Explaining the Availability of a Lawyer

A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer.

## Standard 5-7.2 Waiver

The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors.

## Standard 5-7.3. Acceptance of waiver

No waiver of counsel should be accepted unless it is in writing and of record. If an accused has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided for consultation purposes. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

**1.4 Procedures for Providing Early Representation: Law Enforcement Responsibilities**

In order for defenders and assigned counsel to meet their responsibilities in providing early representation, it is also essential that it be the initial responsibility of the law enforcement authority having custody of any person to:

(a) Determine whether such person is represented by counsel and if said person is so represented to immediately contact his attorney; or

(b) If said person is not represented by counsel, to immediately contact the local defender office or assigned counsel program.

All employees of government who come into contact with any person who is without counsel should inquire into whether the initial responsibility of the custodial authority has been properly discharged. If it has not, this responsibility should extend, but should not be limited to, courts, prosecutors, parole and probation officers, personnel of pre-trial release programs, and their agents.

**1.5 Financial Eligibility Criteria**

Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.

(a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.

(b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

**1.6 Method of Determining Financial Eligibility**

The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney-client relationship.

A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal. The record on appeal should include all evidence presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility.

**13.2 Payment for Public Representation**

An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents, and the cost of subsistence for the defendant and those to whom he owes a legal duty of support. In applying this test, the following criteria and qualifications should govern:

1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.

2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.

3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.

4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

**Standard 5-6.1. Eligibility**

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families. Counsel should not be denied merely because friends or relatives have resources adequate to retain counsel or because bond has been or can be posted. Supporting services necessary to an adequate defense should be available to all persons eligible for representation and to the clients of retained counsel who are financially unable to afford necessary supporting services.

Determination of eligibility should be made by defenders or assigned counsel, subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

**Standard 5-6.2. Ability to pay partial costs; reimbursement**

The ability to pay part of the cost of adequate representation should not preclude eligibility. Reimbursement of counsel or the organization or governmental unit providing counsel should not be required except on the ground of fraud in obtaining the determination of eligibility.

**1.7 Partial Eligibility**

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.

(a) The defender office or assigned counsel program should determine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.

(b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedules, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

**II. STRUCTURE OF SYSTEMS FOR DEFENSE OF ELIGIBLE PERSONS**

**2.1 Administrative Structures for Mixed Systems**

Where a jurisdiction is served by both a defender office and an assigned counsel program, there are two acceptable methods of coordinating these components:

(a) The Defender Director may also serve as the assigned counsel administrator and bear the responsibility, in cooperation with the private bar, and with the guidance of an advisory board, for the establishment, maintenance and training of the panel, and for all other administrative and support functions for the assigned counsel component; or

(b) The defender office and the assigned counsel program may exist as two independent entities, but coordinate their efforts in such matters as training and support services to the extent that it is feasible and in the allocation of caseload. Where necessary to facilitate coordination, an advisory board should be utilized.

**2.2 Allocation of Cases**

In a mixed defender and assigned counsel system, the percentage of cases handled by each component of the system should depend upon the relative sizes, expertise and availability of the defender staff and of the panel of private lawyers.

Cases should be allocated in accordance with a fair and well-promulgated plan. The administrator should be responsible for developing, promulgating and implementing this plan.

The plan should allocate a substantial share of cases to each component of the system and should not *a priori* preclude allocation of any specific type or types of cases from assignment to either component. Provision should be made for cases involving multiple defendants, conflicts of interest, and matters requiring special expertise.

**13.5 Method of Delivering Defense Service**

Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime. Cases should be divided between the public defender and assigned counsel in a manner that will encourage significant participation by the private bar in the criminal justice system.

**13.15 Providing Assigned Counsel**

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

**Standard 5-1-2. Plan for legal representation**

The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization and coordinated assigned-counsel system involving substantial participation of the private bar. Neither defender nor assigned-counsel programs should be precluded from representing any particular type or category of case.

**Standard 5-2.1. Systematic assignment**

The assigned-counsel component of the legal representation plan should provide for a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

APPENDIX B  
FIELD RESEARCH

A. Field Research

In practice, the development of early representation techniques has varied considerably. As noted by Singer,<sup>1</sup> only 21 percent of the defender agencies surveyed in 1975 provided early representation services in felony cases, and only 15 percent in misdemeanor cases. There were a variety of reasons for the lack of early representation services, including:

- Authority to provide such services. The problem of awaiting judicial appointment to the case before beginning to provide the services;
- Internal organization of the program. Programs which relied upon judicial sanction for funding and case activities were reluctant to pursue early representation issues;
- Indigency screening. A clear indication that the ability to provide early representation is coupled with the ability to conduct indigency screening was made obvious by the survey;
- Horizontal representation. Programs not utilizing vertical representation had less incentive to conduct early representation activities;
- Problems posed by geography. Where the defender had several communities in which to provide services, resources made the task of providing early representation more difficult.

Singer comes to the following conclusions with respect to the provision of early representation:

- Defenders must end their reliance upon judicial appointment and judicial eligibility screening, as those two elements inhibit early entry by the defender.
- Legislation in most states calls for appointment of counsel at the first court appearance. Defenders, therefore, have the perception that they must await court appointment before entering the case. Singer recommends that this perception be altered.

<sup>1</sup>Singer, "Indigent Defense Systems Analysis," NIJ, 1976 (unpublished), p. 73.

- Courts should utilize their rule-making authority to allow for early representation.
- The following elements should form the base upon which early representation is developed:
  - (a) Wide publicity should be given to criminal defense services in order to encourage direct contact by the client, his/her family and friends;
  - (b) There should be a daily check of all jails to determine whether or not defender services are necessary;
  - (c) Public defender staff should be maintained on a 24-hour basis for eligibility screening and interviewing upon arrest and detention;
  - (d) Law enforcement authorities should be required to contact criminal defense agencies when the need for representation arises, but in every case prior to commencement of formal charges.

These conclusions are strikingly similar to the recommendations of the National Study Commission on Defense Services.<sup>2</sup>

Prior to developing the Test Design on early representation, Abt Associates conducted a survey of public defenders in jurisdictions with metropolitan populations of 300,000 to 750,000<sup>3</sup> (there are 39 such jurisdictions, of which 32 were successfully contacted). Of the 32 jurisdictions surveyed, 20 provided some form of early representation. These jurisdictions differ significantly on the level of services provided, often because early representation is defined differently from jurisdiction to jurisdiction. For example, in Honolulu, the state public defender attempts to provide early representation but also indicates that because of the two-week delay between arrest and initial appearance, early representation often consists of meeting with the client within that two-week period. On the other hand, the public defender for Oneida County, New York provides early representation which consists of daily jail checks and early interviews, but cannot do so consistently for all the communities within the jurisdiction because of resource restraints. Other surveyed jurisdictions cited judicial or law enforcement opposition to any early representation as a major stumbling block to developing such a capacity.

<sup>2</sup>National Study Commission on Defense Services, Final Report (1976), pp. 48-71.

<sup>3</sup>These metropolitan areas were chosen for the survey because it was anticipated that they would yield programs with caseloads of sufficient size to be considered for early representation techniques. In addition, due to limited resources, the study and this Test Design are confined to jurisdictions which are of medium metropolitan size.

Following the telephone survey, Abt Associates conducted site visits to four jurisdictions identified from the telephone survey which provide differing levels of early representation service. Visits were made to public defender programs in Albuquerque, New Mexico; Newark, New Jersey; Omaha, Nebraska; and West Palm Beach, Florida. The visits confirmed the differing definitions of early representation services from jurisdiction to jurisdiction, as well as the manner in which those services are developed to conform to local jurisdiction rules of criminal procedure and practice. The following observations may be made with respect to each site:

- Albuquerque, New Mexico: Although sections 31-15-10 and 31-15-12 of the New Mexico Statutes require early representation of indigent arrestees by the statewide public defender system, in State v. Rascon, 89 N.M. 254, 550 P. 2d 266 (1976), the New Mexico Supreme Court limited the public defenders' authority to act without court appointment. In Albuquerque, however, the courts have delegated the indigent screening process to its Court Services Agency, which screens the potential clients shortly after arrest and refers the case to the public defenders on a "provisional" appointment. The public defender interviews the new clients prior to the first court appearance (usually on the same day as appointment to the case), assists the defendant in obtaining a bond, and begins preparations for the Grand Jury Proceedings which take place within two weeks of arrest.
- Newark, New Jersey: Also part of a statewide public defender system, the Newark office provides early representation by stationing two lawyers in the arraignment court. The arraignment court sets bail and schedules the case for further proceedings. While the court system reflects the problems of overcrowding and significant delay in the process, early defender involvement does cause the attorney to be better prepared for probable cause hearings (if there is no Grand Jury Proceeding), in investigation of the facts of the case, and in developing cogent bail arguments.
- Omaha, Nebraska: Since 1972, the Douglas County Public Defender has conducted early representation services. Each morning at or before 10:00 a.m., the public defender reviews the police reports of all arrestees (sometimes with the prosecutor) and then interviews each arrestee in the jail. Financial information is obtained so that the potential client's eligibility for defender services can be determined. Following that step, the defender obtains biographical information from the defendant, facts relative to the alleged offense and to the bail question.

After this interview, the defendant is also interviewed by the Pre-Trial Services Agency for the purpose of obtaining background and bail eligibility information. At 2:00 p.m. the same day, the defendant, the defender, and a representative of the Pre-Trial Services Agency appear at the initial appearance (in the Municipal

Court). At that time, bail is set and a date for the probable cause hearing is set, unless it is waived, whereupon the case is bound over to the court of general trial jurisdiction (District Court) for arraignment and further proceedings. Following the initial appearance, further investigation of the case may be undertaken, and strategies for the defense are considered with the defendant. Permanent assignment of an attorney is usually made following these preliminary stages. (Horizontal representation characterizes the early representation stage, and vertical representation thereafter.)

- West Palm Beach, Florida: The Fifteenth Judicial Circuit Public Defender stations two public defenders at the first court appearance when the incoming defendants are interviewed and where bail is determined. Charges are initiated by police complaint and affidavit, and the prosecutor thereafter has 21 days to determine whether or not to pursue the charges. Early representation is extremely limited by this practice because complete police reports are not available until after the prosecutor has determined the viability of the charges.

Ranking the four jurisdictions according to the elements thought to be most desirable for the purposes of the Test Design, Omaha and Albuquerque provide the highest level of early representation. The limitations imposed by the criminal justice system in Newark and West Palm Beach appear to restrict early representation efforts by those public defenders quite significantly.

#### B. Systemic Impact of Early Representation

As demonstrated by the Singer study,<sup>4</sup> there appear to be several systemic advantages to early representation. These include:

- Judiciary--Early representation helps to screen out cases which may not require formal litigation. Early involvement by counsel may also facilitate a more realistic approach to plea negotiation by the defendant.
- Prosecution--Early involvement of counsel may reduce charges which may be filed, reduce the number of cases tried, and encourage earlier plea agreements. The defendant may also have better assessment of convictability of the crime charged.
- Jails--Early representation may decrease the volume of detainees through efforts in diversion and stronger bail argument.

<sup>4</sup>See footnote 1.

In addition, the "predictability" factor cannot be overlooked. Due to early intervention by defense counsel, coupled with early discovery, the defense can be crystallized earlier. As a result, especially in view of more complete communication between the prosecution and defense, decisions about how the case will be handled may be made early in the criminal justice process, such that the defense, the prosecutor, and the courts know which cases will be tried, which ones will be dismissed, and which ones will be disposed of through plea negotiation. Being able to predict which cases will fall into those categories allows all three to utilize their limited resources in a more cost-efficient manner.

The experience of those few jurisdictions providing early representation is positive,<sup>5</sup> but the empirical evidence supporting those conclusions is very limited. In other words, the major problem in determining the success of an early representation program is the lack of measures for its impact. The visceral reactions of the public defenders in the field appear to be strikingly consistent. They uniformly believe that early representation will speed the process by which cases are disposed and improve the overall quality of representation because it will:

- involve the lawyer in the case earlier when memories are the freshest and evidence is more readily available;
- help identify, early on, where a conflict of interest may lie and where appropriate legal challenges to the gathering of evidence may be initiated;
- facilitate exploring alternatives to prosecution of certain charges;
- eliminate cases which do not belong in the criminal justice system; and
- allow the defender to better concentrate on those cases which are in litigation, and thus enable provision of higher quality defense services.

<sup>5</sup>The telephone survey and the site visits demonstrated a varied level of services provided but, generally speaking, most programs delivered the services when convenient to the agency. The Oneida County, New York; Omaha, Nebraska; and Albuquerque, New Mexico programs appear to be the more aggressive and successful efforts. Other jurisdictions have tried early representation on a broader base and found it to be highly beneficial. The Wisconsin State Public Defender built early representation into its program from its inception in July 1978. After two years of experience, the early representation has had an effect upon the size of the caseload, the quality of representation, and how the defender is viewed by others in the criminal justice system. All of these effects are positive, except in Milwaukee County, where the program cannot provide as much early representation as is necessary due to budget restrictions. In Lincoln, Nebraska, a similar program has been in operation for almost a year, with similar results.

If these aspects of early representation can accurately be documented, and if a method of providing the services in a cost-efficient manner can be developed, then more defenders may be able to fund and implement such representation within their jurisdictions.

### About the National Institute of Justice

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Harry M. Bratt  
*Acting Director*

**END**