Alaska Judicial Council

941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

THE ALASKA PUBLIC DEFENDER AGENCY IN PERSPECTIVE

An Analysis of the Law, Finances & Administration, 1969-74.

CONTENTS

INTRODUCTION: SUMMARY OF FINDINGS AND RECOMMENDATIONS

In a mere four years, Alaska's sentiment toward public defender services has run the gamut from enthusiastic support of the legislation, through a "honeymoon period" of compassion for financial frustrations, into a period of "benign neglect," and then to the present period of growing polarization over the philosophy, policies and effectiveness of the Agency. The Alaska Judicial Council determined that a comprehensive study of the Public Defender Agency was warranted, and directed its staff to examine the history, growth and functional weaknesses and strengths of the Agency. The primary purpose of this study is to provide some comprehensive facts and rational analyses of public defender services, with hopes of averting impassioned, irrational disputes about the weaknesses or strengths of the Alaska Public Defender Agency.

This Introduction is a brief overview of the most important findings contained in the report. The Introduction does not discuss assumptions or analysis in detail. The outline follows that of the other chapters and recommendations summarized here are discussed in greater detail in Chapter V.

* * *

In 1963, the landmark case of Gideon v. Wainwright guaranteed counsel for indigents in all felony cases in state courts. However, the decision had little direct impact in Alaska. As a territory, Alaska was served by the federal courts, which were bound to stricter provisions for counsel for many years before the Gideon decision. Following statehood, Alaska courts continued the broader federal policies of providing counsel for indigents in felony cases.

Prior to 1969, counsel for indigents was appointed by the judge from among members of the private bar. During the early 1960's attorneys were paid a flat, nominal fee for the case assigned to them, without regard for complexities which might be involved in the case. Later, the Court System began paying attorneys by the hour, but at a rate less than one quarter the amount an attorney could demand in private practice. Almost no money was available for out-of-pocket costs, travel, investigation, expert witnesses, etc.

Gideon was followed by a series of cases elaborating further the right of indigents to counsel. With time, the new requirements were felt even in Alaska. Much more attorney-time was required, and the low pay meant that more attorneys were donating more of their time. A study conducted by the Anchorage Bar Association in 1968 indicated that attorneys were spending anywhere from 17-1/2 working days to 33-1/2 working days each year at $10 an hour for preparation time and $15 an hour for in-court time. During the same period, the bar fee schedule was set at $1500 minimum for an appeal, and $35 an hour minimum for all attorney time.

By January, 1969, the Alaska Bar Association had endorsed two bills in the legislature: one provided for the establishment of a Public Defender Agency, the other provided for substantial increases in the rate of pay to attorneys representing indigents for the state. The Alaska Judicial Council recommended the creation of a Public Defender Agency in early 1969, after re-evaluating its prior year's recommendation for increased payments to attorneys in the assigned counsel program. The administrative director of the Alaska Court System itemized the cost of a Public Defender Agency at $409,000 for the first year of operation.

In May, 1969, the Alaska Public Defender Act was signed into law by the Governor. The Legislature allocated $260,000 for the first year. The Act provides that the Public Defender shall be appointed by the Governor from nominations submitted by the Judicial Council. A joint session of the Legislature must approve the Governor's appointment.

TABLES

The Public Defender is given full responsibility for representing all "indigents" charged with "serious crimes," facing juvenile proceedings, and appearing for sanity hearings. Constitutional interpretations of the right to counsel now require that the Public Defender Agency represent all persons unable to retain a private attorney for all felonies, most misdemeanors, post conviction proceedings, parole and probation proceedings, juvenile matters of a criminal nature, and commitment proceedings of the mentally ill. While the Act speaks of "indigents" throughout the various provisions, it provides quite clearly in a number of sections that persons of limited means may be represented by the Agency, provided they offset the cost of representation as much as financially possible without depriving themselves or their families of basic amenities.

The Act includes elaborate criteria for the determination of indigency, However, in the final analysis, the decision is based in the simple question of whether a private attorney is willing to accept the defendant's case for whatever assets the defendant is worth. The United States and Alaska Constitutions require counsel in all criminal cases, and the judge has no alternative to appointing the Public Defender whenever private attorneys refuse to take the case. If counsel is not provided, the case either cannot go forward, or will be reversed on appeal.

The Act also provides that the Public Defender client is entitled to representation "to the same extent as a person having his own attorney;" and is entitled to "necessary services and facilities of this representation, including investigation and other preparation."

A substitute defender may be appointed by the court "for cause." This authority is usually exercised when there is a conflict of interest created by such circumstances as the Agency already representing a client involved in the same offense, or representing a witness for the prosecution.

A major problem has developed in the substitute defender program because the Public Defender cannot supervise or control the costs incurred by the substitute defender, despite the fact that the Agency must pay the bills. In one recent, extreme case, the substitute defender successfully defended a client in a murder case and submitted a bill to the Agency for $23,164.51 -- grossly in excess of anything the Agency has ever been able to afford for one client. In that case, attorney fees alone amounted to the cost of hiring a full time attorney for approximately seven months.

The Act also provides for reimbursement responsibilities of indigent clients whose financial positions improve within three years from the termination of representation by the Agency. This provision was included in the Act despite the recommendation of the administrative director of the Court System that such collection procedures have generally been unsuccessful in other defender programs.

The responsibility for collection is a discretionary matter with the Alaska Attorney General. The statutory responsibility of the Public Defender is limited to initial billings and providing financial information the Attorney General may request in his pursuit of collections. In practice, the Attorney General's office spends little time attempting to collect, realizing that the Agency's clients are generally unable to pay. Nominal amounts have been collected through voluntary payments, mostly by Native Americans in remote areas. A suit filed by Alaska Legal Services is presently challenging the legality and constitutionality of collection procedures, alleging that they do not provide for adequate review of the ex-client's finances, or a hearing prior to collection efforts.

The fiscal history of the Agency is best summarized by showing the amounts the Public Defender requested, the amounts the Legislature appropriated, and the total program costs for each year, including grants, transfers and necessary supplements:

Fiscal Year	Agency Request	Appropriation	Program Costs
1970	$409,106	$260,000	$302,547
1971	749,800	500,000	556,198
1972	700,700	600,000	771,438
1973	830,900	808,900	974,782

For at least the two most recent years, neither the budget request by the Agency nor the appropriation by the Legislature has been a realistic prediction of program costs. As the analysis in the report indicates, some of these discrepencies are controlable by the Agency, but other costs are attributable to factors controlled by other components of the justice system, and by LEAA funding to other components.

Administration in the Public Defender Agency appears to be a luxury perennially sacrificed to austerity by an implicit policy of continuing to handle the growing quantity of cases even at the expense of supportive services, personnel management, adequate equipment and space. While administrative controls and expertise may have been dispensible during the early years of the Agency, they are seriously hampering the efficiency of the Agency today. The quality of representation by the Agency is generally high; however, the implicit policy of sacrificing supportive services and other basic amenities in order to continue taking more clients and more cases, represents an attitude which may soon reduce the Agency to mere bureaucratic functionalism, raising serious legal and ethical questions concerning the quality of legal services provided. Chapter III analyzes in some detail the financial and administrative weaknesses of the Public Defender Agency, and should be consulted before reaching conclusions from this brief introduction.

The concept of a "public" defender agency by its nature creates a dilemma between accountability to the public, and a primary legal and ethical responsibility to the best interests of the client. This Janus-like role for the Public Defender is made more difficult when the public or representatives of other components of the criminal justice process fail to comprehend the function of defense counsel in an adversary process.

By statute, Public Defender attorneys are required to provide representation "to the same extent as a person having his own attorney is entitled; and...the necessary services and facilities of this representation, including investigation and other preparation." AS 18.85.100(a)(1)&(2). A growing body of case law throughout the country is beginning to develop on the question of effectiveness of counsel guaranteed by the sixth amendment of the U. S. Constitution. In addition, a standard of quality is contained in the Alaska statutory reference to counsel comparable to what a person retaining a private attorney can expect. Measures of quality and effectiveness are available and discussed in greater detail in Chapter IV.

The recommendations growing from this study and analysis are summarized as follows. Commentary relating to each recommendation is contained in Chapter V.

A. Public Defender Agency.

1. The Public Defender Should Devote His Full Time To Formulation and Implementation Of Policy, Administration, and General Supervisory Needs Of the Agency.

2. The Public Defender Should Hire a Full Time Qualified Administrative Assistant Immediately.

3. The Public Defender Should Determine the Most Efficient Ratio of Attorneys, Supportive Assistance and Equipment, and Should Adjust Staffing and Equipment Budgeting Accordingly.

4. The Public Defender Should Establish Policies For Personnel Management of Attorneys, and For Trail Practices Which Eliminate Unnecessary Delays In the Criminal Justice Process and Unnecessary Investments of Attorney-Time.

5. The Public Defender Should Scrutinize Expenditures Carefully to Ensure (A) That Total Financial Commitments In a Given Fiscal Year Do Not Exceed Total Resources Available, and (B) That Appropriations Allocated to One Budget Category Are Not Shifted to Offset Expenses In Another Category.

6. The Public Defender Should Conduct An Evaulation of Maximum Caseload Capabilities of the Agency, and Minimum Supportive Services Required to Ensure Effective Representation and Fulfillment of the Ethical Responsibility of Each Lawyer to His Clients.

7. The Public Defender Should Develop and Administer in Cooperation with the Alaska Bar Association, a Training and Continuing Education Program for Staff Attorneys.

8. The Public Defender Should Continue to Ensure that Third-Party Criticism of the Agency is Received and Addressed in the Context of Maintaining the Integrity of the Lawyer-Client Relationship.

9. The Public Defender Must Take a More Active Role in Community Relations and Community Education.

B. The Legislature.

1. The Public Defender Act Should be Amended to Provide: (A) That the Determination of Indigency is Made Exclusively by the Court; (B) That Reimbursement for Legal Services Provided is Required Only by Those Clients Who Obtain Representation by Fraudulently Misrepresenting Their Needs; and (C) That Payment of Fees to Substitute Attorneys Shall be Administered by the Court System According to a Schedule of Attorney Fees Promulgated by the Supreme Court.

2. The Legislature should fund the Program of the Public Defender Agency Within the Limits of the Recommendations of this Report.

C. Alaska Bar Association.

1. The Alaska Bar Association Should Examine the Possibility of Taking an Active Part in Ensuring (A) That the Agency is Adequately Insulated from the Extraneous Pressures Deleterious to the Lawyer-Client Relationship, (B) That the Agency is Adequately Funded, (C) That Attorneys are Adequately Trained and Qualified, (D) That the Agency is Administered in a Manner Providing the Most Efficient Defense Counsel and Services, and (E) That Substantive Criminal Law Problems are Made Known and Reformed.

D. The Alaska Court System.

1. The Court System Should Review its Calendaring Procedures to Determine Whether Better Personnel Management of Attorneys' Time in the Public Defender Agency can be Achieved by Changes in Calendaring.

2. Until Such Time as the Public Defender Act is Amended to Reflect Changes in Recommendations B (1) (a) and (c) above, Judges Should Exercise Their Authority Under AS 18.85.120 (a) to Make Initial Determinations and to Review the Agency's Determinations of Indigency; and Judges Should Frame Orders Appointing Substitute Defenders in a Manner Which Safeguards the Fiscal Responsibility of the Agency Budget.

CHAPTER I

HISTORY OF THE PUBLIC DEFENDER AGENCY IN ALASKA

A. Right to Counsel in Territorial Alaska.

During territorial days, indigent defendants in Alaska received a far broader right to counsel than indigent defendants in state courts. Alaska was served exclusively by the federal courts, and hence the right to counsel was governed directly by the Sixth Amendment. State courts were required only to follow the more general guidelines of the due process clause of the Fourteenth Amendment.

As early as 1938, the right to counsel in federal courts insured appointment for indigents in all felony proceedings. 1/ While the right to counsel for misdemeanor charges in federal court can be traced back to 1942, 2/ that right was substantially diluted by the failure of many U.S. Commissioners and inferior federal courts to advise a defendant of his right. 3/ Interviews with attorneys practicing in Alaska during territorial days indicate that most misdemeanants pled guilty at early stages in the proceeding, and that counsel was seldom, if ever, appointed.

During the same years, state courts were only required to furnish indigents with counsel in capital cases where the defendant was "incapable adequately of making his own defense because of ignorance, feeble-mindedness illiteracy, or the like. . . ." 4/ Eventually the U.S. Supreme Court also required state courts to furnish indigents with counsel in non-capital cases where the absence of counsel would result in an "unfair trial." 5/ With the passage of more time, it came to be assumed that appointment of counsel for indigent defendants was necessary in all capital cases, regardless of the defendant's ability to make his own defense. 6/

It was many years, however, before the right to counsel extended to early stages of the criminal proceedings. In federal courts during territorial days, an indigent had no right to appointment of counsel before the arraignment for trial. 7/ The same was true in state courts under Fourteenth Amendment interpretations, unless the absence of counsel at an earlier time so materially prejudiced the defense that the trial was rendered unfair. 8/

Although it was arguable that the Sixth Amendment and relevant case law required the appointment of counsel for non-frivolous appeals, 9/ the right was never widely recognized or exercised in federal courts. This was true to an even greater extent in state courts. 10/

Statehood and the newly organized Alaska Court System did not bring any noticeable changes in policy from the federal right to counsel for indigent defendants. While technically the Alaska Court System was governed by the more limited interpretations of the due process clause of the Fourteenth Amendment from 1959, counsel was readily provided indigent criminally accused under the same criteria that had been established by many years of operating under federal court jurisdiction. Hence, prior to the dramatic changes required of most states with the decision in Gideon v. Wainwright 11/ in 1963, Alaska was already providing substantial defense services to indigent criminal defendants charged with felonies. The coming of Gideon produced little more than a ripple in Alaska criminal procedures. 12/

As fast as most states were gearing up to meet the constitutional requirements of Gideon, new decisions were rendered by the Warren Court expounding on the right to counsel. In Douglas v. California 13/ the court held that indigent defendants have a right to counsel on appeal. In Escobedo v. Illinois 14/ and Miranda v. Arizona, 15/ the court acknowledged the right to counsel during custodial interrogations. In Mempa v. Rhay 15/ the right to counsel was extended to proceedings for revocation of probation and imposition of a deferred sentence. In Holt v. Virginia 17/ right to counsel was afforded defendants in criminal contempt proceedings. In Re Gault 18/ granted the right to counsel in juvenile court proceedings of a quasi-criminal nature.

United States v. Wade 19/ and its companion case, Gilbert v. California 20/ recognized a general right to counsel at all "critical stages" of a criminal proceeding, and more specifically held that defendants must be granted the right to counsel during post-indictment pre-trial lineups. This general statement of the right to counsel at all "critical stages" in cases involving charges of a serious nature meant that prior cases which had been limited to the right to counsel for indigent defendants charged with capital offenses, now served to identify a number of stages where counsel was required, including arraignments, 21/ and preliminary hearings. 22/ In Johnston v. Avery 23/ the Supreme Court seemed to recognize a limited right to counsel for post-conviction relief by holding that inmate "writ writers" may provide services as counsel to other inmates seeking post-conviction relief, at least until states provide some reasonable alternative to assist inmates. Finally, most recently, Argersinger v. Hamlin 24/ confirmed the right to counsel for misdemeanor proceedings.

This dramatic line of pronouncements concerning the constitutional right to counsel inevitably demanded that more attorneys spend more time with more indigent clients. While Alaska's territorial heritage facilitated a more gradual transition into the broadened responsibilities, the system of appointed counsel designed during territorial days nonetheless became continually less suitable to meet the constitutional requirements of the 1960's.

B. The Appointed Counsel System in Alaska.

The practice of assigning "unfee'd lawyers" to represent indigents is not a recent phenomenon of Anglo-American law. As early as the Eighteenth Century the common law courts of England were appointing attorneys to represent indigents in civil as well as criminal cases. 25/ While it is doubtful that indigents were represented in civil cases in the American Colonies, they clearly were represented to some extent in criminal proceedings. The practice of assigning counsel in civil cases was implemented again by federal statute. in 1892. 26/

Local public defender programs emerged as early as 1913, however most state and local governments provided counsel to indigents through an assigned counsel system until the 1960's. 27/ In reality there never was a single "system" of assigned counsel. Programs varied immensely from state to state and indeed from county to county. Some programs left the choice of an attorney entirely to the discretion of the judge while other programs operated through local lawyer referral services, the clerk of courts, or administrators designated with specific responsibility for coordinating an assigned counsel system. In one California county, the bar paid a single attorney to handle all assigned counsel cases. 28/ The programs also offered endless varieties of funding sources. Policies regarding the type of case and the stage of the proceeding when counsel would be assigned showed the same degree of differences from one program to another.

The Alaska system of assigned counsel was remarkably well summarized in 1962 by Lee Silverstein of the American Bar Foundation, conducting a nation-wide study of criminal defense for indigents. 29/ His summary is deserving of lengthy quotation to illustrate how the system operated during the early years of statehood:

> (The) procedure for appointment of counsel is substantially uniform throughout the state. If the defendant appears for arraignment or trial without counsel, the court must advise him of his right to have counsel and must ask if he desires it. If he

states that he desires but is unable to employ counsel, and makes an affidavit to that effect, the court will appoint counsel to represent him. In practice, the judges go further in looking after the best interests of the defendant than would be required by the wording of the statute. The judges usually explain that appointed counsel will be provided at no cost to the defendant, and, where the charge is especially serious, or the defendant either youthful or ignorant, some judges will urge the defendant to accept appointment of counsel, explaining to him that he may be seriously disadvantaged without an attorney. . . .

Typically, when the defendant is brought before the court on the date set for arraignment on the indictment or information, he is informed of his right to counsel and that counsel will be appointed for him if he is indigent. After appointment of counsel, the judges uniformly allow from one to several days or even longer before the defendant is required to plead. The judge determines indigency by questioning the defendant as to salary or wages and the ownership of various kinds of property. The fact that a defendant may be out on bail is not taken into consideration in determining indigency. The defendant is required to sign a pauper's oath.

. . . .

(T)he Superior Court may authorize an appeal or petition for review without payment of fees and costs or giving security therefor, by a person who makes an affidavit that he is unable to pay such fees or costs or give security. An appeal or petition for review may not be taken in forma pauperis if the Superior Court certifies in writing that it is not taken in good faith. Upon the filing of a like affidavit, the Superior Court may direct that the expense of preparation of the record, furnishing a transcript of the evidence or proceedings, and of the cost of duplicating briefs be waived. The Superior Court or the Supreme Court may dismiss an appeal or deny a petition if the allegation of poverty is untrue, or "if satisfied malicious." Attorneys appointed to represent indigent persons on appeal "shall be paid a fee established by the court, commensurate with the time and legal problems involved." All of the above procedure is established by Rule 15, Rule of Administration, and Supreme Court Rule 43. 30/

The selection of attorneys to represent indigents in the early days of statehood was as broadly based as any state in the Union, and as rational as one can expect where no criteria were set forth in statutes, rules, or case law. According to Silverstein,

> The system for selecting attorneys to serve is uniform in the districts surveyed (the Third and Fourth Judicial Districts).
>
> The judges select from a roster of all attorneys admitted to practice, subject to exceptions for age, infirmity, and the fact that one lawyer may have recently finished an unusually difficult appointment. Of the 85 attorneys in private practice in the Third District, 70 served as appointed counsel one or more times in 1962. In the Fourth District, where 24 attorneys were available for appointment, 23 served in 1962. In especially complicated cases or on charges that carry severe penalties, the judges without exception take special care to appoint an attorney more experienced and skillful than average in a trial of criminal cases. In such cases, one of the Fourth District judges appoints one younger attorney and one older, more experienced man. Although this was sometimes put with extreme tact, each judge interviewed, stated, or implied that there were some attorneys whom he would not appoint in most criminal cases, either because they were not considered adequate in criminal trial work or because they do not do any such work. 31/

Two Superior Court judges in the Third Judicial District and two Superior Court judges in the Fourth Judicial District were interviewed concerning problems in getting private attorneys to serve as appointed counsel. Similar inquiries were made in questionnaires sent to the two judges in the First Judicial District, and the judge who presided in the Second Judicial District in 1962 was personally interviewed, using the mail questionnaire as a format.

> Six judges have no problem in getting appointed attorneys to serve; the remaining judge does have a problem with this. The latter judge stated that 60% of appointed attorneys asked to be excused, and his policy is to excuse attorneys not experienced in criminal work. All other judges excuse appointed attorneys only for conflicting time commitments or other very good or compelling reasons. All of these judges experience a very low frequency of requests to be excused. In all cases but one, such requests are made less than 10% of the time. 32/

Silverstein points out in his summary of responses from all states that the problem one Alaska judge experienced with a high percentage of attorneys asking to be excused was only reported "in a few states" including five of twenty-nine judges in Louisiana and three judges in Pennsylvania. 33/

With regard to compensation to appointed counsel in Alaska, Silverstein reported the following policies and practices in 1962:

> Compensation for attorneys is fixed by court rule at $50 for a guilty plea and sentencing and $50 per day or part thereof spent in trial. Three judges remarked that they exercise discretion or apply a liberal interpretation to the court rule on fees in compelling cases. In any event, attorneys are never paid much more than the statutory amount. . . .
>
> Limited funds are available in the court system budget to reimburse counsel for expenses of investigation, preparation, expert witnesses, and travel, but the court must approve the expenditure in advance. Apparently most attorneys do not make such expenditures or do not seek reimbursement, because only $130.50 was devoted to this purpose in 1962. One attorney stated that a "blizzard of paperwork" is required to have expenditures approved in advance.
>
> Of the 48 attorneys responding (to a questionnaire mailed to 70 attorneys in the Third District and 23 attorneys in the Fourth District), 42 were compensated for their services and six were not. Six attorneys were paid their out-of-pocket expenses in full, eight were repaid in part, and the rest were repaid nothing.
>
> Of the 48 attorneys, six had been appointed in 1962 to serve on appeal and one on habeas corpus. The fee paid the attorneys ranged from $150 to $200, although two received no compensation.
>
> . . . .
>
> The respondents reported the amounts they would have charged clients who retained them for services comparable to those rendered in the last cases to which they were appointed in 1962. In the Third District, the average fee would have been $1,415, and in the Fourth District, the average would have been $585. Since there were 143

> appointments in the Third District and 61 appointments in the Fourth District, a very rough approximation of the total value of legal services rendered by appointed counsel in 1962 is $202,345 for the Third District and $35,685 for the Fourth District. In 1962, the compensation actually paid appointed counsel was $9,881 in the Third District and $4,650 in the Fourth District. Perhaps the disparity between the districts and the average fee that would have been charged reflects a greater unwillingness on the part of attorneys in the former to engage in any criminal practice. In any event, it appears that the State of Alaska will never be likely to pay appointed counsel what they themselves would charge for similar services. 35/

An attempt to research more specific information concerning the fees paid appointed counsel and the cost of the system to the State of Alaska has been significantly hampered by the incomplete files remaining from the early years of the Alaska Court System. During the period 1961-65, only the costs of court-appointed counsel on appeal were available. No files were found for Fiscal Year 1962-63.

During Fiscal Year 1961-62, only $757.50 was paid out by the Court System for appointed counsel on what appear to be six appeals. The amount for individual cases varied from $75 to $250. In one case an odd amount of $57.50 was paid to an appellate attorney for "costs and transcribing." No explanation was available for the differences in the amount of the fees from case to case.

During Fiscal Year 1963-64, the files show thirteen appeals costing a total of $3,125. In every case except two, the appellate attorney was paid a flat fee of $250 for his services. (In the two exceptions, the attorneys were paid $175 and $200.)

During Fiscal Year 1964-65, the total amount paid out in attorney fees for appeals was $4,234.90. In four cases, the attorneys were paid the flat $250. In one case the attorney was paid at a rate of $30 per hour for a total of $1,434.90; and in another case the attorney was paid an unitemized $1,800.

The costs of court-appointed counsel at the trial level are available for the later years of the 1960's. Table 1 is a facsimile of a compilation used by the administrative director of the Court System in support of a public defender program in November 1968. Table 2 is also a facsimile of a compilation by the administrative director in early 1969. The figures are self-explanatory, showing dramatic increases in the cost of the court-appointed counsel system.

November 18, 1968

ALASKA COURT SYSTEM
Administrative Director of Courts

Court Appointed Attorneys and Forma Pauperis Costs

July 1, 1966 through October 31, 1968

Fiscal Year	SUPREME COURTS No. Cases	SUPREME COURTS Amount	SUPERIOR COURTS No. Cases	SUPERIOR COURTS Amount	DISTRICT COURTS No. Cases	DISTRICT COURTS Amount	TOTAL No. Cases	TOTAL Amount
1966-1967	11	3,890.62	252	42,302.57	83	3,549.20	346	49,742.39
1967-1968	23	11,769.67	267	50,872.31	121	10,049.82	411	72,691.80
1968-1969 to 10/31/68	6	2,100.19	103	14,584.54	57	4,750.00	166	21,434.73 (33.32% of FY)
Totals to Date	40	17,760.48	622	107,759.42	261	18,349.02	923	143,868.92

[TABLE 1]

COURT-APPOINTED ATTORNEYS COSTS

JANUARY THROUGH DECEMBER

1968

	No. of Cases	Amount
SUPREME COURT	18	$13,679.46
SUPERIOR COURT		
Ketchikan	26	2,832.11
Juneau	57	8,041.78
Nome	8	1,362.50
Anchorage	170	40,897.54
Fairbanks	67	10,969.30
	328	$64,103.23
DISTRICT COURT		
Juneau	17	1,262.00
Ketchikan	13	1,099.75
Nome	11	465.00
Kodiak	1	47.50
Anchorage	14	2,508.84
Fairbanks	16	5,344.50
	72	$10,727.59
GRAND TOTAL	418	$88,510.28

[TABLE 2]

By 1968, attorneys were no longer getting paid a flat $50 for each day or part of a day spent in trial. They were paid at a rate of $10 an hour for preparation time and $15 an hour for in-court time. During the same period, attorneys in private practice in Alaska were charging between $35 and $50 per hour as their minimum fee in criminal cases.

This disparity between the amount the state paid appointed counsel and what counsel could demand from privately retained clients continued to be a cause of friction and "hardship" throughout the 1960's. Silverstein reported instances occurring in the early 1960's which were strikingly similar to reports from attorneys in private practice during the later years of the decade.

> One attorney reported in a careful cost breakdown that a successful appeal to the Supreme Court of Alaska which he handled cost him $1,210 in actual overhead costs, in addition to $2,400 worth of time spent on the case. Two more extreme examples were reported by the Juneau Bar Association, although not in connection with this study . . . . (T)wo solo practitioners spent almost one month away from their regular work on unusually difficult cases. The office expenses of each were in excess of $1,000 per month. One of these attorneys was paid $350 for his services, the other, $250. The latter attorney found it necessary to make a bank loan to meet his office expenses for that month. 35/

The Anchorage Bar Association conducted a study of the estimated number of criminal appointments and the time spent on these appointments by members of the local bar during 1968. They concluded that each attorney was appointed for one probate matter (sanity hearings), one juvenile matter, one case in the U.S. District Court, three or four cases in the district and superior courts, and one appeal. If all matters were uncontested, the attorney spent approximately 105 hours or 17-1/2 working days at the court's rate of compensation. If one criminal case was contested but pled out before trial, the attorney would have spent approximately 125 hours or 21 working days as court-appointed counsel. If one criminal case came to trial, the attorney would have spent 195 hours or 33-1/2 working days at $10 an hour for preparation and $15 an hour for in-court time. During this same period, the minimum bar fee schedule was set at $1,500 minimum for an appeal, and $35 an hour minimum for all attorney time.

Table 3 is a composite of information culled from the files of the Alaska Court System and contained in the Silverstein report. While the information is incomplete, it is safe to observe that the cost of operating the assigned counsel program became increasingly burdensome on the Court budget over the years. By 1969 the right to counsel was constitutionally guaranteed for proceedings and stages of proceedings where it had not been guaranteed by territorial and earlier state court policies. While Gideon and its progeny did not cause traumatic shifts in either the policies or the program of representation for indigents in Alaska, they did place an increasing burden on the program. Neither the Court System nor the attorneys being retained were satisfied. Attorneys felt that their "donations" of time had reached proportions causing disruptions and financial hardships to their practices. The Court System was not in a position to pay attorneys at the rate they could demand as privately retained counsel.

As early as 1963, a bill calling for the creation of a Public Defender Agency was introduced into the Alaska House of Representatives by Messrs. Gravel and Rader. 36/ It was another six years however before the movement would achieve successful momentum. In the meantime, the inadequacies of the assigned counsel system as it was structured during the 1960's was acknowledged by the Alaska Bar Association, the Alaska Judicial Council, the Alaska Court System and the Alaska Legislative Council, not to mention the growing public awareness.

C. History of the Present Public Defender Act.

On September 29, 1967, the Public Defender Committee of the Anchorage Bar Association (comprised of Leroy Barker, Robert Erwin, William Fuld, James Singleton, Dennis Lazarus, Robert Ely, and William Jacobs) submitted to the President, Russ Arnett, a proposed public defender statute. (Appendix I) They recommend that there be five attorneys (three in Anchorage, one in Fairbanks, and the director in Juneau) and one statewide investigator stationed in Anchorage.

The proposed bill was basically designed from the Uniform LawCommissioner's Model Defense of Needy Persons Act. It provided defender services for "needy persons," 37/ defined in a way which included both indigents and persons of limited means who might only be able to afford a part of the costs of representation and preparation of a defense. Determination of need was left to the discretion of the court, with guidelines provided in the proposal.

Counsel was provided under the proposed bill "at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented," including parole and probation

Costs of Assigned Counsel Program in Alaska, 1961-69

	Trial Level	Appeals	Total
FY 1962	$14,531.00 1/	$ 757.50	*
FY 1963	*	*	*
FY 1964	*	3,125.00	*
FY 1965	*	4,234.90	*
FY 1966	*	*	*
FY 1967	45,851.77	3,890.62	$49,742.39
FY 1968	60,922.13	11,769.67	72,691.80
FY 1969	66,023.82	*	*

1/ Represents costs only in Third and Fourth Judicial Districts

* Figures not available

(Table 3)

revocation hearings, appeals, and proceedings for post-conviction relief. The bill placed an affirmative responsibility on the police and again on the court to inform a suspect of his right to counsel at public expense if he could not afford an attorney.

On November 16, 1967, the Legislative Affairs Committee of the Tanana Valley Bar Association met to consider the bill approved by the Anchorage Bar Association. The Committee consisted of Stephen S. DeLisio, chairman, Judge Hugh H. Connelly, Lloyd I. Hoppner (whose attendance is reported as "via telephone") and James Blair, who was unable to attend the meeting.

The Anchorage Bar's proposed bill provided that the Public Defender Agency would operate out of the Governor's office. The Legislative Affairs Committee of the Tanana Valley Bar Association suggested that the new agency should be created under the judicial branch "so there could be no possible conflict of interest between it and the Office of the Attorney General." (Appendix II) 38/ They recommended that instead of the Governor appointing the director from nominations by the Judicial Council, the director should be appointed by a majority of the Supreme Court and either confirmed or rejected by the membership of the Alaska Bar Association at the end of a four-year term.

The committee was doubtful that the new agency would be able to provide the extensive legal services required by the proposed bill. "It is quite conceivable that budgetary problems might arise making it physically impossible for the Agency to provide all of the services outlined under Section 10." The original draft of this provision left open to interpretation the possibility that any needy person detained by a law enforcement officer for almost any reason would be entitled to the services of the Public Defender's office. The Tanana Bar committee suggested limiting this provision to "a person detained for a serious crime." They similarly suggested placing limitations on the right of representation in parole revocation hearings, appeals and post-conviction relief.

The committee also recommended that the Public Defender Agency rather than the Attorney General should be responsible for recovering payment for legal assistance if needy persons become capable of paying at a later date.

> It will be the agency which is expending its budgeted funds for representation of indigents, and the agency could probably very well put to use the supplement they would receive by recovery of such reimbursements (if any). Moreover, the agency would be in a better position to determine whether the needy person had become capable of making reimbursement.

Finally, the committee was concerned to ensure that the proposed bill empowered the courts to appoint the Public Defender in all instances where the court would otherwise be empowered to appoint counsel. They apparently felt that the specified criminal proceedings left some doubt of the authority of the Agency to assume the responsibilities for representing needy persons in such proceedings as sanity hearings and some juvenile matters.

On December 2, 1967, Stephen DeLisio presented the Tanana Valley Bar Association recommendations to the Board of Governors of the Alaska Bar Association.

> Our recommendations were well received. In addition the Board suggested provisions be included to permit the Agency to extend its services to a needy person charged with something less than a "serious crime" in the interest of justice and fundamental fairness; to permit the Agency to hire local private counsel if necessary (e.g., in Nome where travel and maintenance of an Agency staffer would exceed the cost of local counsel; and to give technical training to members of the private bar in criminal defense. 39/

With the blessing of the Alaska Bar Association, DeLisio and Judge Connelly were sent to Anchorage to meet with the Anchorage Bar Association on December 11, 1967 "in an effort to draft a joint bill for adoption and support by the Board and Alaska Bar." 40/

The product of the meeting of the joint Anchorage-Fairbanks bar representatives was a revised version of the original proposal, and an alternative bill providing for increased compensation of private attorneys appointed by the court to defend indigents. "It was the feeling of the committee that a two-pronged approach to the Legislature would be most effective. If the Bar supports both bills in the alternative, the chances of one being enacted should be substantially increased. There is even the possibility that both could be enacted, as they are mutually compatible." 41/ As George Hayes indicated in an earlier communique containing the draft of the alternate bill,

> We should endeavor to have two adequate bills before the legislature so that the legislature can have its choice of passing either one. There may be resistance to passing a bill relating to a public defender's office, since the legislature would have to inquire into the cost and possibilities of staffing, locating office space, acquiring all of the

costly material to run the office, and other related costs. There is also the problem of locating the office of the public defender, and some legislators may be opposed to locating it either in one area of the government or another. Therefore, a bill to compensate attorneys, at less than the bar minimum, but something more akin to just compensation, might be acceptable. At any rate, we ought to have this second bill even if it does nothing more than act as a spur to the first one. 42/

The essence of the alternate bill was that the fee paid private attorneys as assigned counsel would be increased from $10 an hour for preparation time and $15 an hour for in-court time, to $20 and $25, respectively; and that the program would be administered from the Department of Administration rather than from the Court System. (Appendix III) In a letter of January 15, 1968 to Roger G. Connor, then chairman of the Board of Governors of the Alaska Bar Association, Stephen DeLisio explained that "(t)he terms of this bill were based upon a resolution of the Judicial Council in its most recent session to initiate and support such legislative action." 43/ (Discussed in greater detail below)

The revision of the original Public Defender proposal contained only a few significant changes as a result of the meeting of the Joint Anchorage-Fairbanks committee. The Tanana Valley Bar Association abandoned its recommendation that the Public Defender be appointed by the Alaska Court System or alternatively by the Bar Association. The explanation of the joint committee was as follows:

From what we were able to ascertain, the Bar and the Court System will be substantially out of favor at the forthcoming session of the Legislature. If the bill appears too much a lawyer-oriented benefit, it will probably receive a short shift (sic). On the other hand, any increase in the judicial budget or powers of the judiciary will probably fare badly in this Legislature. Moreover, if the Chief Justice has anything to say about the budgeting for the Agency, that phase of the judicial budget would be the first to be chopped.

On the other hand, if we can get the governor to wholeheartedly sponsor this bill, the chances of its adoption will be vastly increased. After weighing all the factors of which we were aware, we concluded the bill would have to provide something of value to the governor in order to warrant his endorsement. 44/

The revision included a provision whereby the Alaska Bar Association would poll its membership on the question of retention or reappointment of the Public Defender by the Governor at the end of a four-year term. However, the polling was only advisory, and the Governor only required to "give due weight to said advisory vote." (Appendix IV)

The revision of the original bill also removed references to specific types of proceedings where Public Defender services would be provided, and removed the provision for services to a person charged with "a misdemeanor or offense any penalty for which includes the possibility of confinement for 6 months or more or a fine of $500 or more." Instead, it provided that needy persons would be afforded services when charged with any "serious crime" which in turn was defined to include "any criminal matter in which a person is entitled to representation by an attorney pursuant to the Alaska Constitution and/or the United State Constitution." The committee reported, "This provides for an expansion of representation with expanded constitutional rulings on the right to counsel." 45/

According to the revision, substitute counsel could be appointed by either the court or the Public Defender. The court could retain a private attorney when, in its discretion, there was "good cause." The private attorney retained under such circumstances would be compensated "pursuant to the provisions of the Alaska Rules of Criminal Procedure." The revised draft did not specify who paid the bill when the court appointed substitute counsel. The Public Defender could retain a private attorney "when the public interest requires," and would specifically pay for these services out of appropriations to his Agency.

Finally, the responsibility to sue for reimbursements where applicable was left with the Attorney General. "(T)he committee felt . . . that the Attorney General's office would be in a better position to act as the collection agency and to provide personnel to undertake any legal actions to obtain reimbursement. That's not to say the Agency wouldn't exhaust every means short of filing suit to obtain reimbursement in an appropriate case." 46/

The Bar Association bill is also interesting for the considered provisions which were not ultimately included. In his report to the chairman of the Board of Governors, DeLisio notes.

> We decided against including any provision in the Act which would permit the Agency not to provide the described services if its staff and facility were inadequate to do so.

> Our reason was that such a provision would offer a good excuse to the Legislature not to expand the budget of the Agency when needed, and would perhaps provide an out for a director who was either lazy or more interested in fostering his political future than in running the affairs of the Agency.
>
> We did not include in the Act provision for the Agency providing continuing legal education on criminal matters for private counsel, or for the Agency to have discretion in handling cases that did not fall within the definition of a serious crime though such might have substantial social or legal impact. Our reasoning was that we felt the Agency would provide these services in any event should the opportunity or need arise. However, mentioning them in the Act would lead to opposition by economy-minded legislators who might figure such provisions would or could substantially expand the costs of running the Agency. 47/

The joint committee was eager for the program to begin as soon as possible, recommending that the agency begin operation with the new fiscal year, "but that the director would be appointed immediately after enactment of the legislation and ready to go to work when the Agency officially commenced operation. This will make for a minimum of delay in getting the Agency into full swing." 48/

With its drafting work completed, the committee set itself to recommending strategies for enactment "in order to insure prompt and effective considerations of these bills by the Legislature." Their recommendations were that "sound, well-thought-out" budgets should be obtained; that "the governor should be persuaded to sponsor the Public Defender Bill"; that the Judicial Council should be contacted to sponsor the alternate bill; and that "the Board of Governors should hire a lobbyist to actively push both bills and to solicit a broad base of support first from the Bar but, more important, from the general public." 49/ As Hayes had noted in earlier correspondence to DeLisio,

> The manner and means of introducing either one or both of these bills is important. We should attempt to obtain administration backing for one or the other of them. It would be better to have the administration introduce one or the other of them. Failing that, however, we ought to get our most influential legislators to introduce both these bills. It would probably be better public

> relations not to have a lawyer member of the legislature introduce either of them, but to have a lay member do so. It certainly would be desirable from our point of view that they not be given the stamp of bar bills. In fact, of course, they are not bar bills. So many legislators, and probably members of the general public, have become so accustomed to lawyers undertaking to foot the bill for indigents that they may conceive of any effort to change that as something that would benefit attorneys only. 50/

While the joint committee was revising the proposal of the Anchorage Bar, a committee of the Juneau Bar Association was also studying the original proposal. On January 30, 1968, James B. Bradley, president of the Juneau Bar, forwarded the recommendations of their committee to the chairman of the Board of Governors. The Juneau committee was comprised of Robert Mahoney, chairman, Donald Craddick, Judge Bruce Monroe, Dick Regan and Joe Henri. The most significant recommendation from this committee was that all references to "needy person" in the bill be changed to "indigent person," and that an indigent person be defined in conformity with Alaska Criminal Rule 39. The committee commented that "(t)he reference to 'needy person' and the definition given for that term generally seemed to provide a much broader scope for representation by the public defender than is presently encompassed by the court appointments. Such increased coverage was not deemed desirable at the present time." 51/

The Juneau committee also suggested that the section relating to financial need be amended by adding a provision requiring the indigent client to sign a release of wage and income information for a period of three years before and after the date of the services. The committee noted that "(t)his information would be of assistance in determining the state of indigency and future ability to reimburse the state." 52/

In the same vein as the suggestion of the Tanana Valley Bar Association, the Juneau committee suggested a more general definition of the types of proceedings where defender services would be provided, and specifically deleting the provision of services for misdemeanors.

While support for a bar-sponsored bill was gaining momentum, concern and deliberations on the question of providing defender services to indigent criminally accused persons was also occurring elsewhere.

On January 29, 1968, the Alaska Judicial Council recommended

> that the Court System be provided sufficient funds to improve the hourly compensation for the court-appointed counsel system. In the alternative, if such funds are not provided, then the Judicial Council recommends that an adequate public defender organization be established by the legislature. 53/

The decision favoring retention of the court-appointed system was based on a cost estimate of approximately $160,000 to "beef up" the court-appointed council program and cost estimates (at that time) between $250,000 and $300,000 to establish a public defender program. (See Appendix V for breakdown of estimated costs.)

> It is the concensus opinion of the Judicial Council members that paying realistic fees and expenses to court-appointed counsel will not only reduce opposition of the Bar to such a system, but should diminish support for the more expensive public defender plan. 54/

By the following January, 1969, the recommendation of the Judicial Council had changed. In its Fifth Report to the Governor, the Council recommended categorically "that the legislature establish a statewide public defender program." The justification in the Report was as follows:

> In 1966, 8,839 criminal cases were filed in the Alaska Court System. In 1967, the figure increased to 10,459. The overall increase amounted to 18.3%. However, the bulk of these cases were misdemeanors filed in district court in which counsel is not normally appointed. Of the aforesaid totals, felony cases filed in the superior court showed a drastic increase. 514 felony cases were filed in superior court in 1966 and 800 such cases were filed in 1967. This represents an increase of 55.6%. The latter percentage of increase does not bear a direct proportional relationship to the number of court appointed counsel, since the district court will on occasion appoint counsel for the purpose of preliminary hearings in felony cases. The actual increase in 1967 over 1966 was from the calendar year 1968, it is estimated that there will be a further increase of approximately 30% in court appointed counsel.

> The present rate of compensation and expenses paid to court appointed counsel works a material hardship on lawyers in general, and the more able and successful in particular. In other instances, the court appointed counsel plan has worked hardships on defendants, inasmuch as in most areas of the state all lawyers are on a rotation system of appointments and their expertise in the field of criminal law is generally recognized to be unequal.
>
> A review of the public defender materials available, including various state public defender acts, reveals that in all probability an adequate public defender system in Alaska will cost in excess of $300,000 annually. As previously stated, counsel is normally appointed only in felony cases. However, the United States Supreme Court is currently considering at least one case which may well require the states to furnish counsel in misdemeanor cases. Should this occur, there is no question but what it would result in a substantial increase over the aforesaid estimate. 55/

At its May 17, 1968, state convention, the Alaska Bar Association passed a resolution "Urging the Governor to Support and the Legislature to Adopt a Comprehensive Public Defender System." The resolution recites an "obvious and immediate need" for such a program. It points out that court-appointed attorneys often have little or no experience in criminal defense work; and that

> an indigent defendant in a criminal proceeding stands on unequal footing with the prosecution by the lack of investigatory assistance (while) the prosecution is aided by the presence of a specialist in criminal prosecution with unlimited staff resources. 56/

Finally, the resolution concludes that the Alaska Bar Association can best serve indigent criminally accused persons by supporting a statewide public defender program.

The Bar Association and the Alaska Legislative Council then asked that the administrative director of the Alaska Court System study the costs of a minimum public defender program. The report with tentative conclusions of Robert H. Reynolds, the author of the earlier estimate for the Judicial Council (see Appendix V), now stated that such a program would minimally require nine lawyers and nine stenographer/typists in Anchorage, Juneau,

Fairbanks and Ketchikan. The cost was estimated at $369,610. (Appendix VI)

On October 28, 1968, the Alaska Bar Association conducted a poll of the legislature to determine support for a public defender agency. Eighteen legislators offered unqualified support, three legislators qualified their support, two legislators were undecided, eight legislators felt they needed more information, and one legislator did not respond. (See Appendix VII for a list of legislators and their positions.)

Two bills with only insignificant differences were introduced in the Senate during the 1969 Session. (S.B. 7 and S.B. 43) On February 6, 1969, Robert H. Reynolds, Administrative Director of the Alaska Court System, provided the legislature with an estimate of the cost of implementing either of these two bills (which included most of the suggestions of the local bar associations). In addition to the nine lawyers and nine steno/typists originally considered essential by Reynolds, the budget provided for three investigators. Reynolds now estimated that the cost of the program provided in the bills would be $409,106. (See Appendix VIII for breakdown.) In a subsequent letter to Chancey Croft, Reynolds indicated a possible overestimate of rental costs by $22,500, but noted that the change was more than absorbed by the failure to include in the estimate the possibility that the right to counsel would be expanded in the near future to include misdemeanors, thereby increasing the cost of the program considerably.

In the same letter to Croft, Reynolds responded to an inquiry concerning the possibility of recovering expenses from indigent persons if their financial position improved at a later date. Reynolds said,

> We can only say that our (the Court System) experience in recovery has been almost nonexistent. The National Legal Aid and Defenders Program has also reported that this feature in public defender acts has been most ineffective.

On May 21, 1969, the Public Defender Act, passed by the legislature as Section 3, ch. 109, SLA 1969, and was approved by the governor to take effect July 1, 1969. While "a fairly close picture of ultimate costs of the minimum program" 57/ were stated to be over $400,000, the legislature appropriated only $268,000 for the first year. According to the minutes of the Alaska Judicial Council for June 20, 1969, that amount was the same amount deducted from the budget of the Court System for court-appointed counsel, plus $40,000 which had been previously earmarked for Alaska Legal Services. As reported in the Council minutes, "The Chairman noted that whoever will be appointed Public

Defender will certainly have troubles as a result of the lack of adequate funds . . . .Mr. Miller stated that since the Public Defender's Office was substantially under-funded that the problem should be advertised in order that the Bar and the general public have compassion for the office, and to bear with the Public Defender during the coming fiscal year." In its 1970 Legislative Program, the Judicial Council recommended "that the Public Defender program be adequately funded."

The new Act provided that applicants for the position of Alaska Public Defender should be screened and nominated by the Judicial Council, and appointed by the Governor subject to the consent of a joint session of the legislature. In a vigorous selection process from a total of ten applicants, the Judicial Council submitted to the Governor the names of Victor D. Carlson, then Greater Anchorage Area Borough Attorney; Marvin S. Frankel, then U.S. Attorney for Alaska; and Harold W. Tobey, then Assistant District Attorney in Anchorage. Carlson was appointed by the Governor and approved by the legislature.

1. Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461 (1938).

2. Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942); Foster v. Illinois, 332 U.S. 134, 136-37 (1947) (dictum).

3. See generally, Comment, "The Right to Counsel in Misdemeanor Cases," 48 Calif. L. Rev. 501 (1960); Comment, "Representation of Indigents," 13 Stanford L. Rev. 522 (1961).

4. Powell v. Alabama, 287 U.S. 45, 71, 77 L. Ed. 158, 172 (1932).

5. Betz v. Brady, 316 U.S. 455, 86 L. Ed. 1595 (1942). This "fair trial" test proved to be extremely vague. There were at least four major considerations: (1) the gravity of the offense, (2) the complexities of the case, (3) the defendant's mental capabilities, and (4) the conduct of the judge and the prosecutor. See, Comment, "Representation of Indigents," 13 Stanford L. Rev. 522 (1961).

6. E.g., Bute v. Illinois, 333 U.S. 640, 676, 92 L. Ed. 986, 1006 (1948); Hawk v. Olson, 326 U.S. 271, 277-78, 90 L.Ed. 61, 66 (1945).

7. Gilmore v. United States, 129 F. 2d 199, 203 (10th Cir. 1942), cert. denied, 317 U.S. 631, 87 L. Ed. 509 (1942). Contra, Wood v. United States, 128 F.2d 265, (D.C. Cir. 1942).

8. Reece v. Georgia, 350 U.S. 85, 100 L. Ed. 77 (1955); Sullivan v. Utah, 227 F.2d 511 (10th Cir. 1955), cert. denied, 350 U.S. 973, 100 L. Ed. 844 (1956); Crooker v. California, 357 U.S. 433, 439, 2 L. Ed. 2d 1448, 1454 (1958) (dictum).

9. See, Comment "Representation of Indigents," 13 Stanford L. Rev. 522 (1961). In Johnson v. United States, 352 U.S. 565, 1 L. Ed. 2d 593 (1957), the Supreme Court held that the Sixth Amendment required appointment of counsel to challenge the trial court's certification that an appeal in forma pauperis was not in good faith. At least one circuit viewed the Johnson case as establishing a right to appointment of counsel for non-frivolous appeals under the Sixth Amendment. Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir. 1958) (dictum), cert. denied, 358 U.S. 889, 3 L. Ed. 2d 116 (1958). However Anderson held that the Sixth Amendment does not apply to such post conviction remedies as habeas corpus and corum nobis, since these remedies are "civil."

10. Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891 (1956) touched the issue without answering the question directly. In that case the Supreme Court held that a defendant in state court could not be denied an appeal because of his inability to afford a transcriptor a record.

11. 372 U.S. 335, 9 L. Ed. 2d 799 (1963).

12. It is worth noting that there were only two Alaska Supreme Court cases which dealt with the question of right to counsel during the three years after Gideon. In Clark v. State, 388 P.2d 816 (1964), the Court held that under the peculiar circumstances of the case (defendant declared incompetent, subsequently returned to trial without formal finding of competence, insisted upon representing himself at trial, demonstrated "extreme ignorance" in conducting his defense, and requested and was granted assistance on the third day of trial), "it was the duty of the court, whether requested or not, to assign counsel" during earlier proceedings of trial. In Merrill v. State, 423 P.2d 686 (1967), the Court held inter alia, that under the circumstances and in light of the facts, the preliminary hearing was not a "critical stage" requiring representation by counsel.

13. 372 U.S. 353, 9 L. Ed. 2d 811 (1963).

14. 378 U.S. 478, 12 L. Ed. 2d 977 (1964).

15. 387 U.S. 436, 16 L. Ed. 2d 694 (1966).

16. 389 U.S. 128, 19 L. Ed. 2d 336 (1967).

17. 381 U.S. 131, 14 L. Ed. 2d 290 (1965).

18. 387 U.S. 1, 18 L. Ed. 2d 527 (1967).

19. 388 U.S. 218, 18 L. Ed. 2d 1149 (1967).

20. 388 U.S. 263, 18 L.Ed 2d 1178 (1967).

21. Hamilton v. Alabama, 368 U.S. 52, 7 L. Ed. 2d 114 (1961).

22. White v. Maryland, 373 U.S. 59, 10 L. Ed. 2d 193 (1963).

23. 393 U.S. 487, 21 L. Ed. 2d 718 (1969).

24. 407 U.S. 25, 32 L. Ed. 2d 530 (1972).

25. Rex v. Wright, 2 Strange 1041 (1795); Richard W. Jennings, "An Historical Argument for the Right to Counsel During Police Interrogation," 73 Yale L. J. 1000 (1964); Special Committee of Association of the Bar of the City of New York and National Legal Aid and Defender Association, Equal Justice for the Accused, ch. 2 (1959); Beaney, The Right to Counsel in American Courts, ch. 2 (1955); Smith, Justice and the Poor, 231 (2d ed. 1919); 1 Chitty, Criminal Law 280 (1819). As early as 1695, counsel was appointed for treason cases -- much more common then -- in both England and the Colonies. Many colonies began appointing counsel for other felonies early in the Eighteenth Century. However, in England at the beginning of the Nineteenth Century, appointed counsel was limited to arguing issues of law and presenting collateral questions.

26. 27 Stat. 252 (1892). See, Whelan v. Manhattan Ry. Co. 86 Fed. 219 (C.C.S.D. N.Y. 1898) (dictum); Smith, supra n. 18 at 230-31.

27. Comment, "Representation of Indigents," 13 Stanford L. Rev. 522, 531 (1961).

28. Id.

29. Silverstein, Defense of the Poor in Criminal Cases in American State Courts, The State Reports, Vol. 2, p. 18 et seq. (1965). Silverstein was assisted in the Alaska section of his study by William H. Jacobs, an Anchorage attorney acting as state reporter.

30. Id. at 18-21.

31. Id. at 22.

32. Id.

33. Silverstein, Defense of the Poor, The National Report, Vol. 1, p. 32 (1965).

34. Silverstein, supra n. 29 at 24-26.

35. Id. at 26.

36. H.B. 72, Feb. 15, 1963.

37. See Appendix I for all quotes from and references to the Public Defender Committee of the Anchorage Bar Association.

38. See Appendix II for all quotes from and references to the Legislative Affairs Committee of the Tanana Valley Bar Association.

39. Appendix II, p. 3.

40. Id.

41. Letter from Stephen S. DeLisio to Roger G. Connor, Chairman, Board of Governors of Alaska Bar Association, January 15, 1968. (Hereinafter "Letter from DeLisio.")

42. Letter from George N. Hayes to Stephen S. DeLisio, December 19, 1967. (Hereinafter "Letter from Hayes.")

43. Letter from DeLisio.

44. Id.

45. Id.

46. Id.

47. Id.

48. Id.

49. Id.

50. Letter from Hayes.

51. Report of the Committee to Review Public Defender Draft Legislation, Juneau Bar Association, January 19, 1968.

52. Id.

53. Alaska Judicial Council Recommendation on Public Defender Legislation, January 29, 1968.

54. Id. at p. 4.

55. Alaska Judicial Council "Fifth Report 1967-1968," January, 1969, pp. 3-4.

56. Alaska Bar Association, Resolution No. 1, Passed in Convention, May, 1968.

57. Letter from Reynolds to Sen. Terry Miller, February 6, 1969, Appendix VIII infra. (Emphasis in original.)

CHAPTER II

DESCRIPTION AND ANALYSIS OF THE PUBLIC DEFENDER ACT

A. Structure and General Authority.

The Judicial Council nominates two or more persons for the position of Public Defender. The Governor's appointment from that list is subject to confirmation by a majority of a joint session of the Legislature. The Public Defender serves a term of four years. If the Governor decides to retain him for another term, further nominations are not required but the retention must be approved again by a majority of a joint session of the Legislature. (AS 18.85.030)

The Public Defender may be removed by the Governor "for good cause." The law requires that if the Governor chooses to remove a Public Defender, he must submit a report to the Legislature stating the reasons for the removal at least ten days after the action has been taken (or within ten days after the convening of the next regular or special session of the Legislature).

In the event of a vacancy, the Governor may appoint an acting Public Defender until a regular appointment is made. However, the Judicial Council and the Governor are compelled to appoint a permanent Public Defender "as soon as possible after the vacancy occurs." (AS 18.85.050)

The only qualification required by the Act is that the Public Defender "is admitted to the practice of law in this state or with the approval of the Board of Governors of the Alaska Bar Association, in another state." It is unclear from the statute whether the Board of Governors must approve the applicant's practice of law in Alaska, or whether the Board of Governors must simply approve his appointment as Public Defender without power to appear in Alaska courts on behalf of clients. The former is the more reasonable interpretation because the section first refers to his ability to "practice" law in Alaska. This interpretation also promotes a policy of ensuring that the Public Defender is familiar with Alaska law and procedures. Moreover, there is

no reason to presume, without more information, that the Alaska Bar Association should pass on the qualifications of a Public Defender in any other regard than his ability to practice law in the state. (AS 18.85.060)

The Public Defender is empowered to assign functions vested in him or the Agency to "subordinate attorneys and employees." Presumably, "subordinate attorneys" are not only those attorneys employed as full time, permanent assistant public defenders, but also private attorneys hired on contract to assist the Public Defender according to Section 18.85.130(b).

Subordinate control over a private practitioner appointed by the court as a "substitute defender" (AS 18.85.130(a)) is not so clearly within the supervisory powers of the Public Defender. The appointment of substitute counsel is referred to as the appointment of "an attorney other than the Public Defender. . . ." (Emphasis added) This language implies that the substitute defender is quite distinct from "subordinate attorneys" mentioned in the delegation-of-functions section of the statute. Moreover, at least in cases where a substitute defender has been appointed because of a conflict of interest in the Agency, strong policy arguments exist for ensuring that the substitute defender is not supervised, controlled or limited by the Public Defender. However, this reasoning would not apply in situations where the court appointed a substitute defender for other than conflict reasons, e.g., a case overload of the Agency.

The present practice is to appoint substitute attorneys only when there is a conflict of interest within the Agency. The Public Defender understandably does not attempt to supervise or control attorneys under these circumstances. But if the day should come when the court determines that a substitute defender is necessary for reasons other than conflicts, the question of supervisory control by the Public Defender should be considered anew in the context of the circumstances.

The Public Defender may hire and remove employees as "he considers necessary to enable him to carry out his responsibilities, subject to existing appropriations." The staff authorization provides for assistant public defenders, clerks, investigators, stenographers and other employees the Public Defender considers necessary.

B. Determination of Client Eligibility.

The "right to representation" by the Public Defender Agency is extended to persons meeting the following qualifications:

(1) The person must be "indigent." AS 18.85.170(4) defines "indigent person" as a person who, at the time of his need, does not have sufficient means to provide for payment of an attorney "and all other necessary expenses of representation" without depriving himself or his dependents of food, clothing or shelter. He must not dispose of any assets "with the intent or for the purpose of making himself eligible."

The reference in this definition to a determination "at the time of his need" is not limited to the moment of arrest, or to the first court proceeding. A person might have sufficient assets to commence his own defense, but deplete those assets before the end of the case. A more likely course of events in fact is that the person of limited means will not be able to find a private attorney to take his case because of his ability to pay only part of the costs. In practice, the Public Defender is sometimes able to find a private attorney who will take a major case for a flat amount which the person can afford, rather than charging at an hourly rate.

As defined in the statute "indigency" does not mean that the person being represented is completely incapable of financing any part of his defense. AS 18.86.120(b) refers to criteria applied "in determining whether a person is indigent and in determining the extent of his inability to pay. . . ." (Emphasis added) AS 18.85.120(c) then provides more specifically,

> (t)o the extent that a person is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to pay for these items, which payments shall be paid into the state general fund.

This language indicating degrees of indigency in the criteria sections of the statute is reinforced by similar language in the section of the statute addressing the right in general.

> The attorney services and facilities and the court costs shall be provided at public expense to the extent that the person, at the time the Agency or court determines indigency, is unable to provide for payment without undue hardship. (AS 18.85.100(b)) (Emphasis added)

Coming finally to the criteria enumerated in AS 18.85.120(b) for application to the determination of indigency, it is important to note that they are only suggestive and not inclusive of all criteria to be applied. The provision says that "the Agency or the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of . . . dependents." (Emphasis added) The statute further provides that "release on bail" does not preclude a finding of indigency. It does not say, however, that the defendants' ability to post bail is to be ignored in the determination; only that ability to post bail does not preclude a determination of indigency. A court or the Agency might conclude that the assets presently committed to bail are enough that the person does not require the services of the Agency. However, it is highly questionable whether many private attorneys would accept the case knowing that their fee is temporarily encumbered in this manner.

Juveniles present a special problem in determining indigency. Courts or the Agency generally inquire into the resources of the parents, but do not always require that parents provide counsel simply because they are capable of paying. In cases where delinquency is related to conflict between parent and child, the judge or the Agency may decide against letting the parents hire an attorny whom they then control with the pursestrings. One practice in Anchorage is to appoint the Public Defender but bill the parents after the case terminates, and demand payment from them. Also, in cases of no substantive conflict, but where parents simply refuse to hire an attorney for the juvenile, the masters of Family Court in Anchorage generally appoint the Public Defender and instruct the Agency to bill the parents.

Another problem arises in the case of the eighteen-year-old "adult" living at home and wholly dependent upon their parents for support. Legally, the parents are not responsible for supporting him, and can refuse to provide him with retained counsel. Hence, despite the fact that both parents work, earn substantial incomes, and indeed, even claim the eighteen-year-old as a dependent, they are not legally liable to pay the cost of counsel or repay the cost of the Public Defender.

In summary, "indigency" is likely to be determined early in the proceeding, but may be determined later as needs change. Different defendants may exhibit varying degrees of indigency which require corresponding degrees of Public Defender representation, or, practically speaking, immediate payment to the Agency of costs the accused can afford. Indigency is generally defined in terms of the deprivation of basic amenities which would otherwise occur, and in terms of "undue hardship."

An initial determination of indigency by the Public Defender is permissible, but "subject to review by the court." (AS 18.85.120(a)) In practice, most judges do not exercise their power of determination or review. Many judges interviewed were not even aware that they had this power. Among those enlightened by the interview, none were interested in assuming the responsibility, primarily because of the additional time demanded of them. One judge noted that even if he were to review a determination of indigency, he had no resources for investigation, and would be limited to whatever information the defendant provided - the same lack-of-resources argument made by the Public Defender when criticized for lack of financial screening.

A few Anchorage judges felt that despite the statutory responsibility for them to review determinations of indigency by the Public Defender, they were precluded from "interfering" with the determination by the Alaska Supreme Court decision in Dimmick v. Watts, 490 P.2d 483 (Alaska 1971). Such a reading of this opinion is patently incorrect. In Dimmick, the Supreme Court simply held that clients of Alaska Legal Services qualify for the Rule 13 exemption from filing fees in civil actions, and that the determination of eligibility is governed by the Articles of Incorporation and federal Office of Economic Opportunity guidelines. The Dimmick court makes no sweeping statements about indigency, and never mentions the Public Defender Agency, the state statute, or indigency for criminal representation and constitutional requirements of the right to counsel.

In the final, practical analysis, indigency is not determined by the elaborate, and elusive criteria set forth in the statute, but rather by the simple question of whether a private attorney is willing to accept the defendant's case for whatever assets the defendant is worth. The Constitution requires counsel in all criminal cases, and the judge will appoint the Public Defender whenever private attorneys refuse to take the case. In questionable cases, the policy of the Agency is to contact three attorneys and attempt to persuade them to take the case. It may happen that the defendant's net assets are theoretically high, but that the time and complications required to liquidate are such that no private attorney is willing to wait or take his chances. The court then will not delay the case, and yet counsel must be provided all defendants unable to retain their own lawyers.

(2) Once a person has been determined "indigent," he still does not qualify for representation by the Public Defender Agency unless he also meets other requirements set forth in AS 18.85.100. This section requires that he either (a) be "detained by a law enforcement officer in connection with a serious crime," (b) be under "formal charge" of having comitted a serious crime, (c) be detained "under conviction of a serious

crime," (d) be on probation or parole, (e) be entitled to representation under the Children's Rules of Procedure, or, (f) be a person "against whom commitment proceedings for mental illness have been initiated."

"Detention" or "detained" under the statute means "to have in custody or otherwise deprive of freedom of action." (AS 18.85.170) It is not necessary that the person be booked, formally charged, or formally arrested. Recently, some police officers and a city attorney attacked the Agency for representing people before they were formally charged with an offense. As the statutory provision indicates, that policy is quite legitimate, provided the person is detained. In every case cited by the critics, further investigation indicated that the Agency was representing the client in another, pending case. One situation involved a man due to be sentenced in a pending case and was under suspicion and being investigated with a search warrant for a second offense. The same judge who criticized the post-search procedure of excluding illegally seized evidence, was also critical of the attempt by the Agency to act sooner and challenge the warrant before the search was conducted. He did however concede that defense counsel should have some procedure for challenging a search warrant.

In another instance, a man charged with an offense and represented by the Public Defender Agency was a witness to a second offense. When police attempted to interrogate him, the assistant public defender advised him to remain silent until the attorney was assured that questioning would not lapse into statements conceming the first offense. A city attorney levelled a public and unsubstantiated attack, claiming that the Agency was representing people who were not charged with any offense.

The detention, formal charge or conviction must be in connection with a "serious crime." Of course, the recent case of Alexander v. City of Anchorage, 490 P.2d 910 (Alaska 1971), significantly alters what constitutes a "serious crime." Alexander affords the constitutional right of counsel to any defendant who is in danger of receiving a direct penalty of incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality. In practice, this includes virtually all misdemeanors except minor traffic offenses. (While even minor traffic offenses could result in incarceration under Alaska's outdated laws, neither the courts nor the Agency recognize the need for counsel in such cases, and hence the court is obliged to never impose a jail sentence.)

In summary, the Public Defender Agency represents all persons unable to retain a private attorney for all felonies, most misdemeanors,

post conviction proceedings, parole and probation proceedings, juvenile matters of a criminal nature, and commitment proceedings of the mentally ill.

C. Extent of Legal Services Provided.

The legal assistance to be given a client of the Public Defender Agency is set forth in AS 18.85.100(a) (1) and (2). Its first subsection provides that the qualifying indigent person is entitled to representation "to the same extent as a person having his own attorney is entitled."

The term "same extent" can be read both quantitatively and qualitatively. The indigent criminally accused has a right to an attorney at each and every stage where a person having his own attorney would be entitled to counsel. The indigent criminally accused also has a right to the professional time, effort and expertise which a person having his own attorney is entitled to expect.

The statute also provides that the indigent person is entitled to the "necessary services and facilities of this representation, including investigation and other preparation." The phrase "necessary services and facilities" finds its modifier in a preceding reference to representation "by an attorney." That is to say, a determination of necessary services and facilities is found again in the standard of representation which a person having his own attorney is entitled to expect.

A distinction should be noted at this point: The statute speaks of representation which a person retaining his own attorney is "entitled" to receive. It does not refer to the extent of representation which a person having his own attorney might actually receive in a given case. One finds the standard of representation by looking more generally to entitlement as it may be embodied in federal and state constitutions, and the lawyers' Code of Professional Responsibility.

The statute also provides specifically that necessary services include "investigation and other preparation." Hence there is a statutory, if not constitutional, mandate for the Agency to ensure adequate investigatory and preparational resources for pretrial proceedings, the actual trial, sentencing proceedings, etc. This unmistakably requires more than simply a staff of attorneys to appear for the defendant at scheduled proceedings, unless one assumes that the attorney himself has the time and skills to supplant the need for supportive personnel.

The statute provides indices for an objective evaluation of the quality of services actually provided by the Agency. If one were to find by analyzing a series of variables discussed in Chapter IV below that defendants represented by private attorneys obtain more favorable treatment and dispositions than defendants represented by the Public Defender Agency, the conclusion is inescapable that the Agency is not meeting its statutory responsibility.

If, however, the statistical analysis results in evidence that the Public Defender Agency is more successful than retained counsel in obtaining dispositions favorable to defendants, one could not necessarily conclude that Public Defender services are "effective" or "adequate." It may happen that both retained attorneys and the Agency are providing services of poorer quality than a defendant is entitled to receive by constitutional, statutory and ethical standards. Chapter IV discusses in greater detail the constitutional question of effective representation and the statistical information necessary to make an evaluation of the Agency generally.

D. Substitute Defenders and Contract Attorneys.

1. Substitute Defenders. On its own motion or upon application by the Public Defender, the court may, "for cause," and "at any stage of the proceedings," appoint a substitute attorney for the Public Defender. Private attorneys must represent persons assigned to them by the court. (AS 18.85.100(e)) The attorney is entitled to receive "reasonable compensation based upon the standard minimum bar fees for the area in which he regularly practices law. . . ." He is also entitled to receive "reimbursement for expenses necessarily incurred." (AS 18.85.130)

The statute does not indicate who makes the determination of whether these expenses are "necessarily incurred," or who certifies the reasonableness of the compensation. It only provides that "(t)his shall be paid by the Agency." Arguably, because the power of appointment is vested in the court, the determination of "reasonable compensation" and "expenses necessarily incurred" should also rest with the court. On the other hand, the fees and expenses must be paid by the Agency, and the statute appears to place all authority and responsibility for fiscal management with the Public Defender.

An example of an exceptionally serious breakdown in fiscal controls arising from such a situation occurred recently. On November 26, 1972, a man died of a gunshot wound in Anchorage. Mr. Wesley Ladd was arrested and charged with first degree murder. Mr. Jack Anderson was arrested and charged as an accessory after the fact.

Ladd was represented by his own attorney. Anderson qualified immediately for Public Defender services. The assistant public defender was contacted by the prosecutor who suggested that Anderson offer testimony against Ladd in exchange for favorable consideration in his own case. An arrangement was made for Anderson to assist the prosecution by giving evidence.

In the meantime, Ladd's $15,000 surety bond was revoked and he was remanded to custody shortly after he was indicted and arraigned. Apparently he was not able to fulfill his financial arrangements with his attorney.

Without consulting the Public Defender, the trial judge accepted the withdrawal of retained counsel, and appointed the Agency to represent Ladd. On January 4, 1973, the Public Defender filed a motion to withdraw, based on the conflict created by the continuing representation of Anderson who had agreed to be a witness against Ladd, and based on the fact that another witness for the State had been a client of the Agency.

The trial judge approved the withdrawal and appointed the same private attorney as a "substitute defender" under the provisions of the Act. The Public Defender was neither present nor consulted at the time of the appointment, yet the bills would come to his office.

The following day, the substitute defender requested and received permission from the judge to hire an investigator at $20.00 per hour, in addition to his own compensation at $42.50 per hour. The Public Defender later replied to inquiries of the Judicial Council, "(T)here would have been little room for exception on our part, even if I had known of the motion and following orders." As the case continued, the defense saw the need for a psychiatric examination, and an appropriate motion was submitted and approved by the trial judge.

As the Public Defender explained in a letter to the Judicial Council,

> The responsibility of the Agency to compensate private attorneys for work done in conflict of interest cases is set forth clearly in the law. Any attempt by the Agency to control the actions or strategy of the defense attorney chosen under the above section would create an additional conflict. However, I assumed that it was my responsibility to monitor the actions of the defense to the extent possible. I kept track of the daily occurrences in Court during this protracted trial. I viewed the graphic displays prepared especially for the trial,

and looked into the manner of construction in order to verify the time charged. I inspected the time records kept by the law firm representing Mr. Ladd. I would establish no irregularities in the billing. Mr. Boyko's time was billed at the regular hourly rate charged by Anchorage lawyers, which is $42.50. The total charge for his time was $8,245.00 and $4,026.00 at $30.00 per hour for the lawyer assisting him. In addition, the investigation, preparation of exhibits and testimony of experts came to $10,893.51.

The total cost to the Agency for this one murder trial was $23,164.51 -- grossly in excess of anything the Agency has ever been able to afford for one client, and yet completely uncontrolled by the person responsible for fiscal management of the Agency. The attorney fees alone in that case amounted to $12,271.00, an amount approximating the cost of hiring a full time assistant public defender for nearly seven months.

The Public Defender has apparently refused to pay part of the investigators charges until he receives an itemized bill. There is also serious question whether the Public Defender should have paid the $4,026,00 charged by the lawyer who assisted. The judge appointed the substitute defender, not his law firm. There is no order from the court authorizing a second attorney in the case.

Generally, the Agency is developing a reputation among substitute attorneys around the state as being a bad credit risk. As detailed in Chapter III, the Agency was more than $68,000 in debt to private attorneys when the Court System agreed to pay the bills in 1972. In Ketchikan a survey was made of private attorneys, which indicated many debts outstanding, some as far back as July, 1972. (See details in Chapter III) As noted above, the Agency has no control over these expenditures, and obviously does not have the ability to pay the amounts charged.

2. Contract Attorneys. While the court is empowered to appoint a substitute defender "for cause," the Public Defender is empowered to contract with a private attorney to assist him "when the public interest requires." (AS 18.85.130(b)) The statute provides no further explanation of "the public interest." In practice, the Public Defender has hired contract attorneys primarily in times of severe case backlogs and when necessary personal services positions are not funded in the annual appropriation. The details of contract attorney services are set forth in Chapter III below.

E. Reimbursement Responsibilities and Procedures.

The applicant for Public Defender services is required to certify under oath, "material factors relative to his ability to pay which the court prescribes." A successful applicant must execute a general waiver authorizing the release of personal income information from any source during the previous three years "and for a period in the future of not less than three years after the last date aid is rendered. . . ." (AS 18.85.120(d))

The statutory responsibilities of the Public Defender are (1) to determine the full value of services rendered, (2) to advise the person receiving assistance, in writing, of his financial responsibilities "as determined by the Public Defender," (3) to obtain from the person a general waiver authorizing the release to the Public Defender of income information for the preceding and future three years, and (4) to "release to the Attorney General all information. . .except information that might incriminate or tend to incriminate the person." The actual administration of collection proceedings is the responsibility of the Attorney General, and the decision to use the information available to the Agency, or initiate proceedings for collection is wholly discretionary with the Attorney General.

The recovery provision of the statute requires that a person receiving assistance must pay the state for this assistance if he was not entitled to it in the first place, or if he is financially able to do so within three years after the conclusion of the proceeding for which he received assistance. The standard of financial ability to repay is the same as that standard applied originally to determine whether the client was eligible for assistance. (AS 18.85.150(2))

However, the statute does not indicate who makes the determination of subsequent ability to pay, and no provision is made for a due process hearing for this determination. Alaska Legal Services is presently challenging the legality and constitutionality of a summary decision by a district court judge who refused to return $150 to an ex-client of the Agency who had lent the money to a friend to post bail. The friend honored the conditions of bail throughout the term, but the judge refused to return the money, finding summarily that the ex-client owed money to the Agency. No determination of his ability to part with the money permanently was made by the judge.

There is a growing body of legal argument and case law claiming that reimbursement contracts demanded before assistance is rendered tend to discourage exercise of the right to counsel. Appendix X contains an affidavit of one person who "upon being informed of her financial

responsibilities under the law she again proclaimed her innocence, stated that she could not and would not say for the services of the Public Defender, that she did not believe it was right to have to pay, that she would defend herself and that the Public Defender was to no longer be or act as her attorney." Charges against her were eventually dismissed.

A court action by the Attorney General for recovery of a debt is limited by statute to six years after the conclusion of the proceeding for which assistance was provided. All collections must be paid into the General Fund.

The practices and effectiveness of the collection process is well summarized in the Department of Administration, Internal Audit report of March 15, 1973.

> The agency maintains a record, with each case file, of each court appearance and all motions filed. Time spent on consultation, research, investigation, travel and clerical work is not accumulated. The agency prepares an invoice at the conclusion of each case and bills the client, also sending a copy to the Attorney General with their estimate of its collectability. The amount billed is not an accurate reflection of the costs incurred by the agency in the defense of the client. It is, rather, an estimate, by the attorney handling the case, of the amount each client can reasonably be expected to repay after taking into account all factors of the client's socio-economic situation. After the invoice is rendered, no further collection effort is made by the agency. Collections from clients who have voluntarily responded to invoices since July 1, 1969, are as follows:

Calendar Year	
1969	- 0 -
1970	$ 105.00
1971	831.70
1972	3,475.79
1/1/73 to 2/1/73	740.83
TOTAL TO DATE	$5,153.32

> The Attorney General's office does not vigorously pursue collections of the invoices because they feel the agency's clients are generally unable to pay.

The amount represented in the Internal Audit Report are incorrect. In 1971 the Agency received $1,723.32; in 1972 they received $3,239.43; and for the first four months of 1973 they received $2,088.83.

Many people have claimed that most of the voluntary payments are coming from native Americans in the villages. In 1973, 38.5% of the voluntary payments came from towns and villages of predominantly native American population. In 1972, 14.3% of the payments came from these areas. And in 1971, fully 85% of voluntary payments were received from native villages and towns. It is impossible to know how many payments from urban areas are also from native American people. It does appear however, that clients from villages have far better voluntary payment records than urban clients, given the fact that by far most of the Public Defender caseload is an urban clientele.

The Internal Audit Report recommends (1) that case files should contain an accumulation of all costs, and (2) an individual either within the Agency or the Attorney General's office should "pursue a program to recover from agency clients (except those exonerated of guilt) the total amount due per the invoice rendered."

An important consideration not addressed either in the findings or the recommendations of the Internal Audit Report is the cost-benefit analysis of hiring such a coordinator and organizing a program. It is important to first understand how much the state will have to spend, and what returns can be expected from the expenditure. If it happens that the increased time of the Agency, the Attorney General's office, and the courts exceeds the amount collected, the program would be financially dysfunctional. An inquiry beforehand could avert the inefficiencies which have evolved in other facets of social services, where the cost of control procedures, hearings, and disciplinary actions have far outstripped the saving they produce for the taxpayer.

CHAPTER III

FINANCE AND ADMINISTRATION

> (P)roblems in the criminal justice system feed upon themselves and are compounded by neglect; the dollar cut from this year's budget is at the heart of next year's five dollar deficit, and so on. 1/

Finances, budgets, and administration are so intricately related that they demand analysis as a unit. Underfinancing inevitably influences such vital decisions in administration as the training and allocations of staff, the division of labor between professional and nonprofessional staff, selection among essential equipment and facilities, and concentration in some substantive areas at the expense of others. Poor administration - perhaps occurring from the financial need to artificially separate content and form - causes operational inefficiencies which in turn compound the financial problems.

The first subsection of this chapter reviews in detail the financial surveys administrative policies and practices as they are manifested in particular occurrences and in the general impressions of prosecutors, judges and police officers in contact with the Agency. The third subsection then is an analysis of the Agency's operating policies and structure, and program needs.

A. Financial History.

1. Fiscal Year 1970.

As noted in Chapter I, the Alaska Public Defender program faced a financial crisis even before it was operational. The studies of the Alaska Court System, based on experiences with the appointed counsel system and an understanding of administrative costs in Alaska, concluded that minimum starting costs of the program as enacted would be $409,106. The Legislature appropriated $260,000. Following enactment in May, 1969, the Administrative Assistant to the Governor, Hubert Lehfeldt, was assigned the task of setting up the first Public Defender program. He was assisted by the Attorney General, G. Kent Edwards,

the Administrative Director of the Court System, Robert H. Reynolds, Commissioner Downes of the Department of Administration, and a representative of the Alaska Bar Association in Juneau, Avrum M. Gross. The program which emerged from this task force session is detailed in Appendix IX and summarized well in the following quote of Avrum M. Gross writing to Warren C. Christianson, president of the Alaska Bar Association:

> Our total efforts were directed toward structuring a program on $260,000.00 which originally had been placed before the Legislature with a $409,000.00 price. We did arrive at the following plan which while certainly not obligatory on the appointed public defender will at least serve as a guide to him as to how we envisioned the monies might cover a reasonable program. The proposed operations of the office would consist of the public defender and two other attorneys in Anchorage, two attorneys in Fairbanks, and two attorneys in Juneau. The salary of the public defender himself would be at $24,000.00 and the salaries of his assistants would range from $22,680.00 to $19,050.00 depending upon their particular experience. I would have liked to have seen the salaries higher and provision made for additional attorneys together with investigators in the various offices but, with the funds available, this simply was not possible. The agency is simply going to have to limp along for one fiscal year until the legislature has a chance to fund it adequately. Now that we have obtained the concept of the public defender, I think we can keep in mind to press hard next session for adequate rather than token funding of that agency. 2/

When Victor Carlson assumed his duties as Public Defender, he made only one major change in the program as it emerged from the meeting in the Governor's office. One of the two attorney positions established in Juneau was transferred to Ketchikan. The Agency had no appellate division but carried full appellate responsibilities. Colin Middleton, an Anchorage staff attorney, handled as many appeals as possible, with many delays being tolerated by the Attorney General and the state Supreme Court.

For the first nine months of the fiscal year there were no investigators anywhere in the state program. By March 1970, the need was critical and one investigator was hired for Anchorage. This severe shortage plagued the Agency from the beginning, despite the fact that one of the original problems of the court appointed counsel system which led the Alaska Bar Association to support Public Defender legislation was that, when matched against the resources of the prosecutor, defense attorneys lacked the investigatory resources to adequately represent their clients.

Funding did not permit establishing an office in Nome during the first year. Consequently, the Public Defender himself travelled to Nome once a month to handle the caseload as best possible under the circumstances.

Finally, the funding shortage required that the Public Defender and his staff attorneys be paid lower salaries than their peers in the district attorney offices. Carlson later commented that this pay difference had a noticeable effect on his ability to effectively work with district attorneys as an equal. 3/

During the first fiscal year, 1969-70, the Agency found it necessary to request a supplemental appropriation from the Legislature. It received another $35,400. It also obtained a transfer of a salary increase appropriation of $7,500 which had erroneously been paid to the Court System. Hence the total funding for FY 1970 was $302,900. During the same year the Agency recorded expenditures of $277,124 and encumbrances of $25,423, for a total program cost of $302,547. 4/

2. Fiscal Year 1971.

For FY 1971, the Public Defender Agency submitted to Governor Miller a budget request of $794,800, an increase of $534,800 from the original appropriation of the first year; and an increase of $491,900 from first year expenditures. A $60,000 increase was considered necessary to maintain the level of personnel approved for FY 1970, and to continue the employee pay raise approved by the Legislature. Because of the delays in starting, personnel costs during the first year were lower than for a full fiscal year.

Another $334,800 was requested for 20 new, full-time positions and 1-1/4 new temporary positions. The request included an Anchorage staff increase of three attorneys, three secretaries, one investigator and one rehabilitation worker. The temporary positions requested were five summer employees as legal interns allocated among the offices.

The Governor's office allowed for Anchorage, one attorney and one secretary; for Fairbanks, one attorney, one secretary and one investigator; for Juneau, one secretary; for Nome, one attorney and one secretary; and no new positions for Ketchikan. The summer interns program was completely deleted from the request. The Governor's allowance totalled eight new positions costing $121,000

Under the travel classification, $10,200 had been authorized in FY 1970. The Agency requested $44,000 for FY 1971. The Governor's office allowed only $27,700. In summary, Governor Miller allowed an additional $1,000 over the previous year's $6,100 for staff travel (administration, investigation, interviewing client); an additional $4,300 over the previous year's $2,700 for per diem; and $10,000 as a new allowance for client-transportation costs. The client-transportation allowance is described in the budget request as a "pilot program to provide transportation for clients to return home in the interim between the charges that have been brought against them and their trial or plea. Often they can be released on bail or on their own recognizance but have not the money to pay their fare home."

In the contractual services category of the budget, the Agency requested $143,700 for FY 1971, an increase of $79,400 over the previous year. The Governor's office allowed a total of $98,700. The request for "Professional Fees and Services" decreased $34,100 from FY 1970 to a total of $17,000 for FY 1971. During FY 1970, much of the money was spent "to pay contracted attorney fees and services which had accrued under the Court System and until the agency was established." Most other items of contractual services were costs arising from program additions which had been requested under "New Positions." Ten thousand dollars was requested and allowed for substitute defenders in cases where conflicts of interest arise within the Agency.

In total figures, the Agency requested $794,800 for FY 1971. The Governor allowed, and the Legislature appropriated $500,000. This amount enabled an increase in the Agency's staff from 7 to 20 attorneys, from 4 to 8 secretaries (including a Juneau position, later transferred

to Anchorage, designated "administrative assistant"), and from one to two investigators. In addition to existing offices in Anchorage, Fairbanks, Juneau and Ketchikan, a new office was opened in Nome. The rehabilitation program was deleted, except for the client-transportation money to enable clients to return to their village or town pending proceedings against them.

Some frustration in writing an accurate first budget request was expressed by Carlson in a memo to the Division of Budget and Management, dated December 9, 1969. He notes the difficulty in compiling meaningful statistics at this early date of the Agency's life. For all practical purposes, the Agency was not operational until late summer of 1969. Yet a budget request for the fiscal year beginning the following July had to be submitted in October 1969. The Governor's budget hearing was held in November, and Carlson had little meaningful data to present to them.

> Taking into account that the Fairbanks office has been in operation with two attorneys since October 1 and the Juneau office has no assigned attorney but is working with the Ketchikan Assistant Public Defender and a contracted local attorney, this information is relayed to your office for any help it may be in reviewing the Public Defender's budget.

What follows this statement in the memo is a less-than-helpful compilation of pending and closed cases in the Juneau and Fairbanks offices.

In addition to the $500,000 appropriation for FY 1971, the Agency received $58,000 transferred from "unexpended salary increase money," and a LEAA grant of $602.62. Total monies for the year were $558,602 of which $556,198 was either expended or encumbered.

3. Fiscal Year 1972.

Following approximately fourteen months of operating experience, the Agency composed a budget request of $700,700 for Fiscal Year 1972. The original budget request was $635,000, but before the document went to the Legislature it was amended to include another $65,400 for three new positions discussed below. The total request as submitted was allowed by Governor Egan.

The largest single program increase was for personal services again. Some reclassification of pay ranges for the maintenance-level staff occurred, at an increased cost of $67,000.

As amended, the budget proposal requested ten new staff positions including three attorneys, two secretaries and one investigator for Anchorage; one secretary and one investigator for Fairbanks; one secretary for Juneau; and an additional attorney for Nome.

The Agency explained the requested increase for Anchorage by noting that the effective trial staff in Anchorage was only 2.5 attorneys because the Public Defender spent half his time on administrative matters and the fourth attorney in the Anchorage office was required to spend his full time on the appellate work of the whole state. At the same time, "(n)ew Supreme Court decisions and rules, as well as legislative enactments, require more trials to be held outside of Anchorage," primarily in the Lower Yukon-Kuskokwim area which was served from Anchorage. The Agency further noted, "The (present) ratio of attorneys to the population and caseload falls far below that of any public defender system in the country."

The Legislature approved the increase in staff, but made such substantial cuts below maintenance level in other classifications, that the total allocation only permitted the Agency to hire two attorneys of the "authorized" ten positions.

With the Governor's approval, the Agency had requested $158,500 for contractual services, an increase of $59,800 over the prior year's authorization. Without any itemization of where the cut occurred within that category, the Legislature authorized a total of $59,800, which amounted to a cut of $38,900 below the maintenance level of the previous year. The major items of the request in this classification had been:

Rents & Utilities	$27,700
Professional Fees (conflict of interest cases)	40,000
Witness Expenses	50,000

The request for conflict-of-interest fees represented an increase of approximately $33,000, and the request for witness expenses represented an increase of approximately $23,000, parenthetically - and perhaps too flippantly -

explained by the Agency as "more judges, more police, more prosecutors, equal more cases."

The Legislature appropriated a total of $600,000. Whatever the rationale for the substantial cut below maintenance level in the category of contractual services, and for a total cut of $100,700 in the request, the Agency proved less resilient to this austerity than to the program limitations of the two previous years. A supplemental appropriation of $129,000 was later requested, and $110,000 was authorized by the Legislature.

The Agency also received LEAA grants of $30,225 to begin the Offender Rehabiliation Program, and $31,214 for a Law Student Intern Program, both of which had been deleted from the previous year's budget request to the Governor's office. The total program budget for Fiscal Year 1972 was $771,439, of which $771,438 was either expended or encumbered.

4. Fiscal Year 1973.

For Fiscal Year 1973, the Agency submitted a budget request of $830,900. It was approved in total by the Governor's office. In the Analytic Statement attached to the request, the Agency details a number of events during the previous year causing increasing demands on defender services.

> The increase in the number of Superior Court Judges (five were added this year), the rule requiring criminal cases to be tried within four months of arrest, the court decision (Alvarado v. State) requiring jury trials to be conducted in bush areas, the increase in police numbers and effectiveness, and the social disorders leading to more crime make it impossible for the Agency to meet its commitments in the area serviced from the Anchorage and Fairbanks offices. A suggested alternative to an increase in the size of the staff is that, pursuant to the Public Defender Act, the courts appoint private attorneys to defend those clients whom the Agency cannot represent because of the overload. The Act already gives the courts the authority to do so and provides for payment to the private attorneys, at the standard hourly rate, out of the Public Defender's budget. It should be noted that approximately 22% of the FY 71 budget went to the payment of private attorneys in conflict of interest cases.

> These were cases where the Agency was legally prohibited from representing clients whose cause was in direct conflict with that of existing clients. At this rate the alternative of using private lawyers, under the compensation plan in the Act, would result in a higher cost the the State than meeting the need by increasing the staff.

Despite the fact that the budget request included three new positions (two attorneys, a secretary, and a second investigator in Anchorage; and an attorney in Kenai), this request is stated as a maintenance need rather than a change. The reasoning is found in the section of the Analytic Statement quoted above. In light of developments uncontrollable by the Agency, the additional five positions were considered necessary to continue operations at the same level of the previous year. It was further noted in the Form P-402A attached to the request for the new positions that "(t)he ratio of attorneys to the population and caseload falls far below that of any public defender system in the country."

The total cost of salaries and benefits for the requested new positions would be $109,000. A substantial portion of the remainder of the increase was for equipment, facilities, and travel required to support the five additional staff positions.

Under "professional fees and services" the Agency requested $50,100, an increase of $39,300 from the previous year. The largest part of this increase, $30,900, was to continue the Law Student Intern program which had been funded by LEAA the year before. Nineteen thousand two hundred dollars were requested for conflict of interest cases, psychiatric evaluations and outside investigator expenses. For witness expenses, the Agency requested $26,100.

The Legislature appropriated $808,900 for FY 1973, $22,000 less than requested. During the fiscal year, the Agency received transfers from within the Office of the Governor totalling $76,500, and a LEAA grant of $41,405 and a Manpower grant of $16,100. The Agency also charged $68,694 of unpaid conflict of interest bills to the Court System which received permission to free that amount from restricted funds.

During FY 1973, the Agency expended $860,826 and encumbered $45,261. That amount added to the bills paid by the Court System indicates total program costs to be $974,782. (The 1973 state annual report

carries an additional, unexpended authorization of $37,719. While that addition results in total appropriations for FY 1973 of $1,012,501, it is somewhat misleading because most of the $37,719 is a LEAA grant continuing into FY 1974.)

Even with an appropriation lowered by $22,000 from the request, the Agency hired all but one (an investigator) of additional staff requested, plus a secretary for the Kenai office. A request for this position had been inadvertently omitted from the FY 1973 request. Also, with LEAA grant money during FY 1973, the Agency hired two attorneys and one secretary in Anchorage. Hence, the staff was increased during the year by five attorneys, and three secretaries for a total of 17 attorneys, 11 secretaries and two investigators. The Agency also continued to receive money from the LEAA grant of FY 1972 for a rehabilitation counselor and his assistant..

5. Fiscal Year 1974.

For Fiscal Year 1974, the Agency submitted a maintenance budget request of $991,400. The major increase requested was for five new staff positions, three of which had been filled during FY 1973. One attorney specializing in juvenile matters, and a rehabilitation counselor were paid during the previous fiscal year from LEAA grants. Another attorney had been hired on contract during FY 1973 to concentrate on an increasing bush caseload (mainly lower Yukon-Kuskowim). In addition to transferring these three to "budgeted positions," the Agency requested a Fairbanks secretary to replace one transferred to the overloaded Anchorage office, and another Anchorage secretary to assist the two new attorneys requested. These "new positions" and their necessary equipment, facilities and travel amounted to approximately $128,500 of the total requested.

Many comparisons with the prior year are made difficult by a change in the format of the FY 1974 budget request forms. For example, there is no longer a sub-category called "professional fees and services" to reflect costs of hiring private attorneys in conflict cases. The FY 1974 budget does itemize the increase required for continued operation at a maintenance level, but the amount from which the increase is requested is not itemized.

Looking back to the FY 1973 request for such information, the Agency requested $19,200 for professional fees and services, including not only conflict costs but also psychiatric evaluations and outside investigators' costs. For FY 1974, the Agency asked for an increase in conflict of interest

funds by $28,100. This substantial increase probably reflects the fact that during the previous year it was necessary to charge an unanticipated $68,694 in conflict fees to the Alaska Court System.

In summary, the budget requested $991,400 and the Legislature cut it back by $141,700 to a total of $849,700. In the First Judicial District, $14,100 was cut from a request of $35,200 for contractual services. The Second Judicial District was allotted the full $64,900 requested. The programs of the Third (Anchorage) and Fourth (Fairbanks) Judicial Districts suffered the most severe cuts.

In the Third Judicial District, the Legislature cut $86,300 from a personal services request of $418,300. In essence, it meant that the attorney hired on contract during the previous year not only was deleted from the personal services request (along with his secretary), but also could not be continued as an item of contractual services. It also meant that the Agency could not continue the juvenile attorney, the Offender Rehabilitation Program, and the Summer Intern program which had been financed during the previous year with LEAA grant money.

In the Fourth Judicial District, the Legislature cut $11,000 from a personal services request of $140,100, and cut $7,500 from a contractual services request of $37,600. This meant that a secretary could not be hired to replace the one transferred to Anchorage during the previous year, and that there would not be sufficient money to pay the costs of private attorney fees in cases of conflicts of interest.

As it happened, the Agency did not suffer the program cutbacks which the budget appropriation and above analysis indicate were necessary. A subsidy from the Court System providing one additional staff position, and a LEAA supplement of grant programs averted the more serious crises.

6. Fiscal Year 1975.

The Fiscal Year 1975 budget request totals $1,369,200. Of this amount, $1,197,800 is stated as a maintenance budget. The largest single maintenance item is personal services, amounting to an additional $148,000 above the previous year's appropriation to transfer positions from grants and contractual classifications, and to hire personnel to relieve some of the present workload of an overburdened staff. The Agency requests 6 new positions under personal services: a rehabilitation counselor, a family court attorney, and an attorney to handle drug cases (all paid from LEAA grants;

an attorney to cover the Bethel caseload handled for awhile on a part time contractual basis by a Bethel attorney and presently covered by various Anchorage attorneys; a secretary for the Kenai office (a position inadvertently omitted from the FY 1973 budget and not funded by the Legislature in the FY 1974 budget); and an accounting clerk to handle the accounting and billing presently being done on a limited basis by the legal secretary who also serves as administrative assistant.

The Agency also requests changes totalling six new staff positions, and two new contract positions. The staff positions include two appellate lawyers to replace the appellate staff diverted to the growing trial work during the previous year, a clerk-typist to assist these two attorneys, a new staff attorney for the Fairbanks office, two Anchorage investigators to achieve a 4:1 ratio with the attorney staff, and a Bethel secretary to assist the attorney assigned to the lower Yukon-Kuskokwim area. The cost of these positions is $145,000. Under contractual services, the Agency requests $24,000 to fund two positions for an interpreter in the Bethel area (Upik) and an interpreter in the Nome area (Inupuit). Recent hearings by the Governor's Commission on the Administration of Justice indicated a language problem for many villagers coming in contact with components of the justice system. The Agency indicates hopes that it can find a bilingual secretary for the Bethel position.

The contractual services request for FY 1975 totals $377,300, of which $26,400 is designated as a change in professional fees and services. Most of this change ($24,000) is for the two bilingual legal assistants discussed above.

The maintenance request for professional fees and services is $200,000. The explanation is as follows:

> The legislature, in the passage of the Public Defender Act, AS 18.85 et. seq. sets the rates for the payment of private attorneys in conflict of interest cases. There are many conflict of interest cases in which private attorneys must be engaged to represent co-defendants of agency clients or criminal defendants who face prosecution based on the testimony of agency clients. The latter type of case has become especially common in view of police practices of (using) narcotics addicts, facing conviction, as informants against other persons. Although the agency did not set the rate of compensation (necessary) to comply with the law, it must pay the bills out of its appropriation. Each year a drastic underfunding

of professional fees has created the need to request supplemental appropriations or seek alternative methods of funding. Last year the amount of private lawyer bills was so high that it was necessary, with legislative approval, to have the Court System pay the final $70,000 in bills. This request is based on actual expenditures of FY 73. It is contemplated that the Court System will assume this obligation in the next budget request.

Psychiatric evaluations are included in this request. The State Division of Mental Health has requested that we not have psychiatric evaluations done by API doctors. This requires private psychiatric contracts on a case by cases basis. Scientific experts, used on occasions are also included in this item.

A summary of Agency requests, requests allowed by the Governor's office, appropriations by the Legislature, supplements and grants, and total program costs from 1969-75 is contained in Table 4.

FISCAL HISTORY, 1969-75

	Agency Request	Original Appropriation	Supplemental	Transfers	Grants	Total Budget	Total Program Cost
FY 70	409,106	260,000	35,000	7,500	400	302,900	302,547
FY 71	749,800 1/ 500,000	500,000	-	58,000	602	558,602	556,198
FY 72	700,700	600,000	110,000	-	61,439	771,439	771,438
FY 73	830,900	808,900	-	145,194 2/	57,606	1,012,500 3/	974,782
FY 74	991,400	849,700					
FY 75	1,369,200						

1/ The Agency requested the higher figure, but the Governor submitted the lower figure to the legislatur.

2/ This amount includes two transfers from the Governor's office of $50,000 and $26,500 respectively, and $68,694 in substitute defender bills ultimately paid by the Court System.

3/ Of $37,719 unexpended, $36,968 is a continuing grant into FY 1974. Only $748 lapsed.

(Table 4)

B. Administrative Policies & Practices.

Administrative policies and practices over the years are not so easy to document as financial data. There are no clearly articulated administrative policies within the Agency, and, as this study indicates, there is in fact very little administration within the Agency. During the past year, the policies and practices of the Agency have come under heavy criticism from various sectors, primarily police, legislators, judges and newspaper editorials. To ensure finding all possible ailments in the Agency, this study included interviews with most of the potential critics throughout the state: representatives of other components of the criminal justice process in contact with the Agency. In Juneau, the writer interviewed three judges, two prosecutors, one local police officer and the Deputy Commissioner of the Department of Public Safety. In Fairbanks, interviews included the district attorney, the chief of police and two judges. In Anchorage, the city attorney, the chief of police, a police detective, five judges, two district attorneys, and a representative of the state troopers were interviewed.

The three most frequent criticisms to arise were, (1) that the Public Defender Agency is quite unorganized and poorly administered, (2) that the Public Defender attorneys pursue tactics of long delay even in the most "open and shut" cases, (3) and that the Agency is representing clients who are not truly indigent.

Some other criticisms were not borne out in further investigation. For example, two critics claimed that the Agency pursues "causes" at cost to its clients. One was unable to cite specific examples, contending primarily that the attorneys were "too liberal"; the other offered an example which even the district attorney agreed was a wholly incorrect interpretation of the situation. Another critic said that the Agency attorneys spent too much of their time as "social workers." When questioned more specifically, he said that Public Defender attorneys come into court asking for bail release, claiming that they will find a job or shelter for the accused. The critic was unaware that LEAA is presently funding a pre-trial diversion program in the Public Defender Agency, whereby two full-time social workers do in fact engage in just such activity on behalf of the client. He was unable to say that attorneys rather than Agency social workers were engaging in such activity, and agreed that perhaps the attorneys were relating in court what their support staff could do for the client.

The first criticism which arose in repeated interviews, and which was supported by numerous examples, was the claim that the Agency is unorganized and inefficiently administered. A number of more specific observations can be made in this context: (1) the Public Defender himself spends too much time on case work and away from the task of administration; (2) there is a sufficiently serious imbalance between attorney-staff and support-staff (secretaries, investigators, social workers and managerial assistance) that much attorney time is either wasted on petty matters or lost to inefficient work allocations; (3) shortages of secretarial equipment, libraries and office space contribute to chaos and inefficient work habits; (4) lack of a definitive professional training program, combined with a relatively inexperienced attorney-staff, causes much time to be lost in the Agency and some delays in the whole justice process; and, (5) lack of proper supervision and definition of policies in handling cases has resulted in totally undiscriminating delays in virtually all cases as a matter of general practice.

Perhaps the most fundamental and serious problem is the fact that the Public Defender himself has never devoted enough time to administration. There was no question but that the Public Defender had to divert his effort from full time administration to assume some of the caseload of the Agency during the early years. The Agency was faced immediately with a budget far lower than the amount anticipated by the Court System, the Judicial Council, and the Alaska Bar Association. In 1969, seven attorneys and four secretaries had full responsibilities for organizing, administering and providing defender services for indigents at four office locations throughout the state.

While it is unclear whether the original planners of the Agency intended that the Public Defender himself would carry <u>any</u> client caseload, even during the first couple of years, it is quite clear they did not anticipate that so much of his time would be spent serving clients rather than organizing and developing the administration of the system. According to Robert H. Reynolds, Administrative Director of the Court System, the Act as it passed the Legislature would require two more attorneys and two more investigators than the Legislature ultimately financed for the first year. Hence the Public Defender was compelled to supplement these shortages with his own time.

Today, after four years and a greatly expanded program, the Public Defender still spends roughly half of his time with cases. For a number of reasons, the caseload of the Agency has grown far faster than

the staff has increased, and the result has been that the Public Defender has always felt compelled to relieve the pressure by personnaly taking some of the clients. The desire of the Public Defender is that the Agency continue to represent every potential client coming through the office. However the need for administrative efficiency has reached a point where continuing to "process" all cases rather than consolidating and organizing for quality representation of a realistic clientele is administratively dysfunctional, and both legally and ethically questionable.

A position designated "administrative assistant" was created during the first year of operation. That position continues to be filled by a person who also acts as the secretary to the Public Defender, and as the Anchorage office manager. The Agency has never hired a full time, trained administrative officer. The legal secretary who fills the position has demonstrated commendable abilities, but is untrained and too busy to adequately administer an Agency with 30 staff members spread throughout the state, and an operating budget approaching one million dollars a year.

The attorney-staff ratio also plays an important role in defining administrative efficiencies. The implicit policy of the Agency seems to have been the same since the first year: given a limited appropriation and a heavy caseload, hiring should favor more attorneys and less secretarial and investigatory assistance. During the first year, three attorneys were assisted by only one secretary in Anchorage, and two attorneys shared one secretary in Fairbanks.

During the second year of operation, the Fairbanks situation temporarily improved to three attorneys assisted by two secretaries. However, that ratio deteriorated to three attorneys with one secretary during FY 1973, when the Agency failed to request a secretary for the new Kenai office, and the Legislature did not appropriate funding for another secretary in Anchorage or Fairbanks. The Fairbanks office presently has only one secretary.

During the second year of operation in Anchorage, the location with the heaviest caseload and least able to afford attorneys spending time on routine labors, the four attorneys had only two secretaries who were also burdened respectively with duties as receptionist and state-wide administrative assistant. This ratio of two attorneys served by one or less secretary has continued to the present, as Table 5 indicates.

The consequence is that the attorneys must utilize secretarial services as conservatively as possible, all at the cost of time for which they are paid professional salaries. A serious misallocation of responsibilities

STAFF GROWTH, 1970-75

		ANCHORAGE			FAIRBANKS			JUNEAU			KETCHIKAN			NOME			KENAI			STATEWIDE		
		Attys	Sec	Invest	Attys	Sec	Invest	Attys	Sec	Invest	Attys	Sec	Invest	Attys	Sec	Invest	Attys	Sec	Invest	Attys	Sec	Invest
FY 70	New Hires	3	1	1	2	1	0	1	1	0	1	1	0	0	0	0				7	4	1
FY 71	Increase Requested[1]	3	3	1	1	2	1	0	1	1	0	0	1	1	1	1				5	7	5
	New Hires	1	1	0	1	1	1	0	1	0	0	0	0	1	1	0				3	4	1
	Total Staff To Date	4	2	1	3	2	1	1	2	0	1	1	0	1	1	0				10	8	2
FY 72	Increase Requested[2]	3	2	1	0	1	1	0	1	0	0	0	0	1	0	0						
	New Hires	2	0	0	0	0	0	0	(1)	0	0	0	0	0	0	0				2	0	0
	Total Staff To Date	6	3	1	3	2	1	1	1	0	1	1	0	1	1	0				12	8	2
FY 73	Increase Requested[3]	2	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	3	1	1
	New Hires	4	2	0	0	(1)	0	0	0	0	0	0	0	0	0	0	1	1	0	5	3	1
	Total Staff To Date	10	5	1	3	1	1	1	1	0	1	1	0	1	1	0	1	1	0	17	11	1
FY 74	Increase Requested[4]	2	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	2	3	0
	New Hires	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0
	Total Staff To Date	10	6	1	3	1	1	1	1	0	1	1	0	1	1	0	1	1	0	17	11	2

1. The word "increase" includes positions requested for a "maintenance level" operation and positions requested as "changes."

2. The loss of a Juneau "secretary" was the position of administrative assistant which was transferred to Anchorage.

3. The two attorney positions in Anchorage which had not been requested but were hired represent a juvenile attorney funded by LEAA, and a contract attorney whom the Agency determined necessary to hire during the fiscal year. The Agency hired a secretary for the Kenai office despite the inadvertent failure to request that position in the budget.

4. All "increases" requested are individuals already employed either with grant money or from contractual services money.

[TABLE 5]

has attorneys paid $20-25,000 salaries spending hours handling such routine matters as contacting secretaries in the police department and district attorney's office to gain access to evidence, running papers to the district attorney's office and the court, and spending valuable time on telephones in search of clients, witnesses, etc.

The provision of effective defense services at every stage of a criminal proceeding presumes not only adequate secretarial assistance for the attorneys, but also investigative support, expert witnesses to advise the attorneys and appear in court to give expert testimony when necessary, and rehabilitation counselors to compile information for the attorney for bail hearings and sentencing proceedings, and to work with the client to begin a program of diversion and rehabilitation immediately following arrest. The Alaska Bar Association noted in its convention resolution of May, 1968, that a serious absence of any investigatory services comparable to that available to the prosecution, was one reason for creating a Public Defender Agency. The original plan and budget estimates of the Court System also anticipated investigators in Anchorage, Fairbanks and Juneau.

But the austerity required for first year operation did not permit employment of any investigators. After approximately nine months of attempting to operate in this fashion, Carlson found it absolutely essential to hire at least one investigator for the Anchorage office. It was still another year before an investigator could be hired for Fairbanks. No other office in the state has ever had an investigator, and the single positions in Anchorage and Fairbanks have never been increased despite dramatic increases in caseload and a five-fold increase in attorneys since that first year.

It is difficult to determine from annual budget requests and appropriations whether the Legislature ever specifically authorized a position for a second investigator in the Anchorage office. Beginning with the FY 1973 budget request, the Agency includes two investigator positions for Anchorage in the maintenance category of the personal services classification. However, that second position has never been filled.

To meet the inflexible need, the Agency has resorted to employing temporary, part-time military personnel from surrounding bases under a special civilian training program intended to prepare the personnel for their impending discharges. The Agency also hires students at a salary of $100 per month. Nonetheless, the absence of professional investigators means that more costly attorney time must be devoted to investigation. The consequences are an even greater misallocation of attorney resources, and exacerbated administrative problems.

One criticism from the office of the Anchorage District Attorney was that an investigator for the Public Defender Agency has, in the past, misrepresented himself by telling people he is an investigator "working for the state," rather than an investigator for the defendant. Another criticism was that an investigator for the Agency once invited three state witnesses to go drinking, and then took statements from them. This unethical conduct might be avoided if there were more direct supervision and if the Agency did not have to rely on amateur investigators for services.

The pre-trial diversion or "Offender Rehabilitation" program is designed primarily to assist accused individuals and their families in adjusting to conditions created by the arrest, or in readjusting conditions which may have been part of the cause of the offense committed. The idea basically is to begin rehabilitation immediately and in the community environment where the offender resides. The Offender Rehabilitation counselors assist clients in finding jobs, retraining programs, shelter, medical or psychological assistance, or whatever other services might benefit the situation.

The idea of such a program was first suggested by the Agency and denied by both the Governor and the Legislature in the FY 1971 request. LEAA funds were then obtained by the Agency in September, 1971, for a one year, embryonic program with one counselor and an assistant in Anchorage. In FY 1973 funding for the program was again denied by the Legislature. A second annual grant was obtained from LEAA. In the FY 1974 budget request, the Agency again asked for funding for the program. The Legislature again denied the request. A limited program has been temporarily salvaged by last minute negotiations for still another LEAA grant.

No Public Defender office in the state has any more extensive a library for the staff attorneys than the Anchorage office which contains only copies of the state statutes, the Alaska Reporters, the Criminal Law Reporter and a few treatises. A few minutes of research requires ten minutes of walking time to the court library. For the time the attorney is engaged in research he must be away from his office and unavailable to answer calls from prosecutors, police, clients, witnesses and others.

Space in the Anchorage facility is deplorably cramped, with makeshift partitions separating "offices," and narrow halls bustling with noisy traffic. While both the space limitations and the library shortage will be improved for the Anchorage office by the impending move of the Agency to the court building, the inefficiencies of facilities in the immediate past cannot be discounted as a significant contributing factor to the difficulties

confronting the administration of the Agency today. The same inefficiencies, especially regarding library facilities, continue to exist in other office locations of the Agency.

In a recent study of the Agency, two experienced public defenders from Contra Costa County, California, and Seattle, Washington, observed that "there has been no formal training program for new attorneys and only occassional training sessions for staff attorneys." 5/ Hiring practices in the Agency have always been highly selective, with an eye to endurance and compatibility as well as legal abilities. However, almost all of the attorneys are young and relatively inexperienced, coming either directly from law school or from a judicial clerkship.

There are no organized training programs, and no attorney is assigned with continuing responsibilities for supervised training. Whenever possible the Agency assigns new attorneys to simpler cases, and misdemeanor practice. A new attorney assigned to a one-man office in some outlying area is brought to Anchorage for a four to six week "training" session, where he usually carries his own caseload and also makes some court appearances escorted by more experienced attorneys. In at least one instance, however, a new attorney only a few months out of law school was assigned to a one-man office, spent only one month "training" in Anchorage. His training consisted largely of carrying a misdemeanor caseload and conferring with the Public Defender and other more experienced attorneys during the evenings. He was sent to his new assignment to face two district attorneys and a heavy case backlog. Assistance was promised from Anchorage, but never arrived. After approximately seven months, the assistant public defender resigned.

Attorneys in the Agency are sent to national seminars in continuing educational programs whenever possible, but seldom more than once a year. Important conferences and schools are missed by many attorneys because of the need to maintain an operational staff at the office. Once each year, all attorneys participate in a short conference in Anchorage, exchanging ideas and hearing expert speakers.

Many critics in Anchorage noted that the Agency suffers severe problems from lack of personnel management. Some specific examples illustrate the problem well. In July, 1973, a staff attorney in one of the single-attorney offices took his first vacation in over a year. It was necessary to temporarily assign an Anchorage attorney to that office to service the ongoing caseload. During the same period of time, an extensive national training program was being held outside Alaska. The Agency was invited to send two attorneys with full expenses paid. Given the inadequate training generally available the Public Defender decided that this was an opportunity he could not

neglect. Two Anchorage attorneys were sent. As it happend, simultaneous staff resignations created two additional vacancies in the Anchorage office which the Public Defender was reluctant to fill immediately because of inadequate funding in the FY 1974 appropriation. The consequence of these events all at once was that the Anchorage office normally staffed by 10 attorneys was reduced to five attorneys for almost two weeks.

The Public Defender knew as early as March that there would be at least two staff resignations during the summer; the vacation for the attorney in the single-attorney office was justifiable, but should have been planned for another time; the opportunity for two attorneys to attend a free conference was something to be given highest priority, but choosing at least one attorney from the Fairbanks office could have avoided some of the shortage in the Anchorage office. In short, some personnel management could have avoided the staff shortage which occurred and caused some unnecessary grumbling among some attorneys left to carry the load.

A strikingly similar situation occurred again in early November, 1973. One Anchorage attorney was on vacation during a week when two attorneys were attending the annual convention of the National Legal Aid and Defenders Association. The convention was important not only for its training programs and seminars, but also because the above-mentioned study by two outside public defenders would be discussed and analyzed in detail. As it happened, the Governor's Budget Review Committee requested that an Agency representative appear in Juneau to review the FY 1975 budget on two of the days when three attorneys were already scheduled to be absent from the Anchorage office. Two attorneys from the Anchorage office travelled to Juneau to testify. Hence, for a Thursday and a Friday, the operating potential of the Anchorage office was reduced to half. While each individual absence may have been independently justifiable, the compounded results brought severe criticism from Anchorage judges in the press.

Almost every Anchorage judge interviewed expressed frustration over the delays and continuances of cases caused by the Public Defender not being prepared. Most were quick to point out that similar delays are caused by the district attorneys. Anchorage judges agreed that there were staff shortages in both offices, but many noted in addition that the Public Defender Agency is poorly administered and made more inefficient by mismanagement.

Recently, there have been a number of instances of assistant public defenders being fined by judges for coming to court late or unprepared. On two occasions in a single month, public defender attorneys did not appear for scheduled omnibus hearings. In each case the excuse was that there had been a breakdown in communications attributable to untrained or harried secretarial help. On repeated occasions, assistant public defenders have asked judges to delay hearings until later in the afternoon, because a fellow public defender was not present. In other instances, the assistant public defender who happens to be in court takes the case of his absent colleague on a moment's notice, raising serious questions of adequacy of preparation.

Recently, the Supreme Court imposed a $50 fine on an assistant public defender who filed an appellate brief late. The court had given the Agency repeated extensions of time, the most recent of which was clearly stated as being the last. The brief was still filed after the deadline.

But not all of the fines imposed are so clearly the result of staff shortages, mismanagement of personnel, or inefficiencies within the Agency. In October, an assistant public defender had two hearings scheduled in two different courtrooms, one immediately following the other. The attorney appeared at the second hearing approximately three minutes late. The trial judge imposed a fine of $25.

In another instance, the cause of the assistant public defender being unprepared was, in large part, attributable to problems in court calendaring and uncontrollable plea bargaining. The assistant public defender had two felony cases set for trial during the same week. The practice of the court is to calendar trials for "the week of. . ." rather than for particular dates. This guards against the possibility that a case may be pled out or dismissed at the last moment and valuable time of judges and juries wasted for lack of another trial scheduled at the same time. Theoretically, if one case is dismissed at the last moment before trial, the court can immediately proceed to the next case.

One of the two cases assigned to the defense attorney was, in his opinion, substantially weaker for the prosecution to sucessfully try. He attempted for some time to negotiate a plea and avoid a trial. When negotiations seemed failing, he began preparing, about a week before the trial, knowing this would be the first case called on the calendar. On a Wednesday afternoon, after two days of preparation, the district attorney's office contacted him to say that they were dismissing the case. On Thursday morning the judge was informed by the assistant public defender that

it was presently too late for him to be prepared for trial in the second case the following Monday morning. There was no formal request for a continuance at that time.

When that Monday morning arrived, the first case was called and promptly dismissed by the prosecution. The second case was then called, and the assistant public defender told the court again that he had not had adequate time to prepare. Without giving the attorney an opportunity to explain further, the judge imposed a $250 fine. It was later reported in the press that he had fined the attorney because a jury had been impanelled, and the judge and prosecutor were prepared for a trial which could not go forward because of defense counsel.

The assistant public defender later met with the trial judge in his chambers, where they mutually arranged a schedule of cases coming to trial during the next 90 day period, to avoid any similar delays in the future. At this time the attorney informed the judge that he felt he had a right to a hearing prior to the imposition of such a fine, and that he would appeal the procedure if necessary. No further action was ever taken, and the judge did not attempt to execute the fine. The only part of the story which reached the public through the press was the fact that a trial judge had fined a public defender $250 for not being prepared on the morning of the trial.

Even some assistant public defenders have confidentially admitted that the Agency suffers from lack of efficient administration and personnel management. However, despite seemingly unfavorable working conditions created by this and other problems, the morale among attorneys is extremely high. Of 19 lawyers who have passed through the Agency during the past four years, only four left before the end of one year (two of whom were on contract for six months and 11 months respectively); another three left after 12 to 17 months; another six left after 18 to 23 months; and six stayed for two years or longer. The average term of employment for attorneys with the Agency is 20.9 months. The median term is 18 months.

Given the nature of the work (if the justice system is working properly, Public Defender attorneys will lose most cases), and the working conditions, these employment figures reflect favorably upon the Agency. However, they do reflect an extremely high turnover of professional help when compared with the district attorney's offices or private law firms. The almost constant search for attorneys is exacerbated by the fact that new hires are almost always inexperienced attorneys requiring extensive training.

Also requiring mention as administrative problems are a number of accounting failures brought to light by an audit and report conducted in March, 1973, by the Internal Audit Division of the Department of Administration. 6/ The report noted that petty cash receipts did not balance; that some transportation requests could not be accounted for; that one contract employee had been paid his monthly salary through a series of field warrants on one occasion by the administrative office of the Governor and on another occasion by the Agency itself; that temporary loans were made to summer interns from the Agency trust account when a computer program breakdown delayed checks from the Department of Administration; that some undeposited checks as much as ten months old were being held in the Agency office; that an unused and expired airlines ticket valued at $57.00 was found in the bottom of a file; and that a number of unpaid invoices and disbursement vouchers were found in a cardboard box.

The responsibility for handling accounting procedures had been delegated by the Public Defender to his administrative assistant whose time was already desperately divided between administration and providing secretarial services. The Public Defender noted that he had previously discovered similar neglect of accounting practices, and thought he had impressed upon his administrative assistant the importance of dealing with such matters more efficiently and carefully. He attributed the continuing neglect to the fact that his administrative assistant is overworked and too often distracted with other equally important responsibilities.

Following this audit report, the administrative assistant to the Governor and the Public Defender met to define and allocate responsibilities and practices which had never been clearly defined or distributed in the past. According to the Office of the Governor and the Public Defender, acceptable accounting procedures have been implemented and are operating smoothly. However a more recent report by the Division of Legislative Audit indicates that some of the discrepancies still existed in the fall of 1973. 7/ In the FY 1975 budget request, the Agency is asking for money for a full-time accountant.

A final criticism common especially among judges was that the Public Defender Agency is representing clients who are not truly indigent. As noted in Chapter II, above, the determination of indigency is reduced to a question of whether private counsel will take the case. The Agency requires defendants to complete a financial statement, but has no assurance that the statement is a true representation of worth. The shortage of investigators for the substantive work of the Agency is no less acute for screening clients.

As also noted in Chapter II, a surprising discovery during interviews of judges was that many were unaware of their own power to review a determination of indigency by the Agency. Some who were aware, expressed the misguided opinion that they were precluded from reviewing indigency by

an Alaska Supreme Court decision. All judges interviewed were frankly uninterested in assuming the responsibility, noting the drain on their time and the lack of investigatory resources within the Court System - the latter reason being the same frustration expressed by the Agency.

In summary, the Public Defender Agency is one of those unique government agencies suffering from too little rather than too much administration and management supervision. As one interviewee commented, "The Public Defender Agency is like the bumble bee: by all theories of aerodynamics it can't fly. But somehow it does." However, especially in Anchorage, the historically unorganized mode of operation is becoming increasingly less suitable for present needs.

C. Analysis of Financial & Administrative Weaknesses.

For purposes of assessing the seriousness of the financial and administrative weaknesses of the Public Defender Agency, the most important questions are (1) how Agency weaknesses effect the efficiencies and capabilities of the whole criminal justice sytstem, and (2) how Agency weaknesses effect the quality of legal representation to clients.

It should be noted that, in Fairbanks and Juneau, representatives of other components of the criminal justice process were almost wholly uncritical of the public defender in their jurisdiction. Apparently, problems with administration are generally limited to the Anchorage office, except to the extent that more equipment and supportive services are needed in other locations.

In Anchorage, virtually all judges and prosecutors interviewed were in agreement that the Public Defender Agency contributes substantially to delays in the criminal justice process. District attorneys said that public defenders are not willing to even begin plea negotiations until after extensive discovery and usually an omnibus hearing. They acknowledged that in many cases of questionable proof, a defense attorney should hold out for longer periods of time and perhaps even go to trial; but they claimed that the assistant public defenders are totally undiscriminating as to which cases are worth extensive discovery and avoidance of early negotiations.

The prosecutors noted also that while Agency attorneys engage in extensive, indiscriminate discovery and motionpractice, they seldom carry a case through to trial, but almost always negotiate a plea during the last days before trial. If that tactic is intended to call the bluff of the district attorneys until the last moment, the practice of ultimately accepting a negotiated plea is so consistent that the effect of the bluff is lost.

This practice of waiting until late in the process to negotiate a plea is tentatively borne out in the data of the Court System's Statistical Research Project. For all 1968-72 felony cases in which a "not guilty" plea was entered at arraignment, the average time to trial was 128 days and the average time to a plea of guilty through negotiations was 117 days. For all 1968-72 misdemeanor cases in which a "not guilty" plea was entered at arraignment, the average time to trial was 83 days and the average time to a plea of guilty through negotiations was 82 days. As the Report concludes, "This indicates a high degree of last minute plea changes, which impacts seriously the scheduling and calendaring process. . . . (and) there is almost no speeding up of the process by pre-trial dispositions." 8/ The major obstacle to a categorical conclusion about the Agency from these statistics is that Agency cases are not separated from cases handled by retained counsel. It could be true that private attorneys engage in the same long delay before negotiating a plea; on the other hand, prosecutors

in Anchorage agree that public defender attorneys utilize delay tactics far more often than private counsel.

A major criticism from judges focused on the fact that attorneys from the Agency too often come to court unprepared, late for proceedings, or are totally absent. Judges provided transcripts of hearing where assistant public defenders argued that cases had been transferred from one attorney to another within the Agency, so that the attorney presently before the judge was not prepared. One transcript established that the attorney assigned to the case did not even recognize his client in the courtroom and told the judge his client was absent. The client jumped up and identified himself, and the assistant public defender embarrassingly explained to the judge that he had just received the case from another attorney in the office, and was unprepared.

In another case, the assistant public defender did not appear for an omnibus hearing. No one, including the defendant, knew where the attorney was. The defendant had been in jail for 90 days. He did not understand what the omnibus hearing was all about, nor why the judge was deeming all pre-trial motions waived in the absence of any filings by the defense attorney. He also did not understand why his trial was being set at such a distant date. The judge could do little more than refer him to his attorney, to which the defendant replied,

> Your Honor, I'm not even sure if I want (the assistant public defender) for an attorney. They've done nothing in my behalf in 90 days and in the past - I don't want them coming and telling me how it's gonna be or what kind of deal they got for me two days before my trial comes up. I want - I want a chance for justice, not just a token lawyer.

It should be noted that the amount of communication an attorney has with his incarcerated client is not necessarily a measure of the quality of advocacy that client will receive in court. One must also note that many convicted criminal defendants are disgruntled with their defense attorney no matter how good the representation was. On the other hand, the appearance of effective representation is essential if the defendant is ever to believe that justice has been done in his case, and a seemingly valid criticism of the Public Defender Agency - coming not only from clients and judges, but also from Alaska Legal Services attorneys - is that the Agency attorneys do not always keep in contact with their clients; that they permit a mystique to surround their plea negotiations; and that they fail to inform clients adequately of the nature of proceedings and developments in their case.

A recent Agency practice which directly effected the quality of representation to clients was the decision to temporarily withhold all appellate work for existing clients and reassign the appellate lawyers to handle trials and new clients. The decision was founded on the fact that the Legislature had not appropriated enough money to permit the Agency to continue handling the growing caseload. In essence speedy justice for existing clients was sacrificed to processing more cases.

Not only did this decision evince the "functionary" mentality which underlies the reservations of many persons to a publiclyoperated defender agency (and previously not characteristic of this Agency), but the decision also raises serious questions of law and professional ethics. Canon 7 of the Code of Professional Responsibility provides that "(a) lawyer should represent a client zealously within the boundaries of the law." One of the ethical considerations stated within this Canon is that "(a) defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken." (EC 77) (Emphasis added) Standard 1.2 of ABA Standards Relating to the Defense Function provides specifically that no lawyer should accept more employment than he can discharge in the best interests of a speedy trial and effective representation.

A public defender attorney cannot refuse a client's wish for spirited or extensive advocacy simply because it takes more time, or results in greater pressures on the Agency program generally.

Canon 5 of the ABA Code of Professional Responsibility provides that "a lawyer should exercise independent professional judgment on behalf of a client." He is duty bound to not let his own interests or the interests of third parties impair his professional judgment. The ethical consideration notes specifically.

> Economic, political, or social problems by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client. (EC 5-22)

To ensure that this does not happen, Disciplinary Rule 5-107 (B) provides that "(a) lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Hence, despite fiscal and administrative responsibilities, the Public Defender cannot compromise representation of any individual client because of broader program considerations, and he cannot permit political or economic pressures to influence his independent judgment of how he should represent the best interests of his client, as determined in most instances by the client.

These responsibilities (along with recommendations) were stated another way by the LEAA team evaluating the Agency in its "Report on the Alaska Public Defender Agency, October, 1973."

> In the final analysis, underbudgeting and understaffing of public defender systems can constitute a denial of due process of law to the clients of such system. No attorney may ethically participate, deliberately and knowlingly, in such a denial of his clients' rights. This issue is addressed in the American Bar Association's "Standards Relating to the Prosecution Function and the Defense Function," which provide as follows:
>
> > A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. (Defense Standard 1.2 (d), in part)
> >
> > Once a lawyer has undertaken the representation of an accused his duties and obligations are the same whether he is privately retained, appointed by the court, or serving in a legal aid or defender system. (Defense Standard 3.9)

Given the inevitable results of a work overload in a defender office, the following citation is worthy of note,

> A lawyer shall not - (3) Neglect a matter entrusted to him. (Disciplinary Rule 6-101, Failing to Act Competently, A.B.A. Code of Professional Responsibility (1970).

Therefore, if the state does not act to prevent a due process breakdown, the public defender ethically is required to do so. Precedence for such action by counsel for the indigent is in fact developing. In California, the right of a public defender to present evidence of a work overload to the courts and be relieved (private counsel then being appointed at public expense) has been recognized (See, Ligda v. Superior Court (1970) 5 Ca. App. 3d 811 827-828) and the National Advisory Commission on Criminal Justice Standards and Goals, in standards, released in January, 1973, recognized the problem (and solution) when it declared that

> As a final safety valve for the situation in which the workload of the public defender's office becomes so great as to threaten the adequacy of the legal representation it provides, the public defender should have the authority to declare that fact to the court, leaving to the court the determination of whether the defender's office should accept or retain additional cases without the resources. In the event that the court determines that the defense office should not be assigned additional cases, use should be made of the assigned counsel system. (The Courts: Standard 13.12, commentary)

Alaska Law appears to authorize this kind of procedure; it provides that

> For cause, the court may, on its own motion or upon the application of the public defender, appoint an attorney other than the public defender to represent the indigent person at any stage of the proceedings or on appeal. The attorney shall be awarded reasonable compensation based upon the standard minimum bar fees for the area in which he regularly practices law and reimbursement for expenses necessarily incurred. This shall be paid by the agency. (Alaska Statutes, Health and Safety, Sec. 18.85.130)

The team perceived an assumption on the part of some that this power of the court is limited by the Public Defender Agency's ability to pay for the private appointed attorneys. It is the opinion of the team that the above section is merely declaratory of an inherent power of the court and such power (and duty), being constitutionally based, cannot be limited by the legislature's failure to appropriate enough money to pay the private lawyers.

It might also be desirable for the Public Defender to press for the adoption of Rules of Court governing defender workload. Such action is not without precedent. (See commentary to ABA Defense Standard 1.2 (d), quoted supra, on page 181 of such standards.)

The federal courts are becoming another important means through which public defenders are seeking relief from work overload. Recently, such relief was sought on behalf of the criminally accused clients of the overburdened New York Legal Aid Society. (See Wallace v. Kern, 13 Crim. Law Reporter 2243-2246, USDC, ENY, 5/10/73) While this litigation, we understand, faired poorly in the U.S. Court of Appeals (2nd Circuit), the reasons may have had nothing to do with either the merits of the case or jurisdictional questions as they would be framed in Alaska. On the contrary, we understand the litigation was ultimately settled through the adoption of safeguards for adequate representation.

The Public Defender's power to act in this manner would appear to exist under Alaska law, which provides that

> (a) An indigent person who is being detained by a law enforcement officer in connection with a serious crime, or is under formal charge of having committed, or is being detained under a conviction of a serious crime or is on probation or parole, or is entitled to representation under the Supreme Court Rules of Children's Procedure, or against whom commitment proceedings for mental illness have been initiated is entitled.

(1) to be represented by an attorney to the same extent as a person having his own attorney is entitled; and

(2) to be provided with the necessary services and facilities of this representation, including an investigation and other preparation.

(b) the attorney services and facilities and the court costs shall be provided at public expenses to the extent that the person, at the time the agency or court determines indigency, is unable to provide for payment without undue hardship. (Sec 1 ch 109 SLA 1969) (Alaska Statutes, Health & Safety, Sec. 18.85.100)

This blanket assignment of jurisdiction not only restates the constitutional right of Alaska's indigent defendants to adequate representation equal to that available to the non-indigent, but appears to empower the Public Defender to act where necessary in order to guarantee same.

The team recognizes that the measures discussed above are indeed drastic, and we mention them here only as illustrations of the urgency of meeting demonstrated funding requirements of the Public Defender Agency. However, as noted, precedent is now developing in this area. We hope that if the situation in Alaska becomes critical, both the Public Defender and the courts will recognize their responsibility and will discharge it. 9/

Except for the recent cutback in appellate practice, the Agency has, during the past four years, consistently maintained an uncompromising policy of providing the highest caliber of attorney-representation humanly possible under the circumstances. To this end, and in the face of unchanging fiscal constraints, the Agency has sought alternative releases for the pressure imposed on the program. As noted earlier, it has sacrificed the supportive services of secretaries. investigators, counselors, experts, facilities and administration. Attorneys have refused to proceed to trial unprepared, despite fines and strong public criticism.

These policies and strategies, while successful in alleviating the immediate symptoms of the problems, have resulted in many program disruptions, and have created much ill-will from some judges, prosecutors,

police, legislators, and attorneys whose fees went unpaid. The price has been high in terms of the limited "band-aid" reform which is accomplished each time. Moreover, the sacrifices of expert administration, libraries and facilities which were necessary efficiencies in 1969, have now become inefficiencies haunting a greatly expanded operation, and threatening the effectiveness of counsel provided by the Agency.

But, while much criticism of the inefficienies of the Agency is warranted, the present predicament is not simply a question of improving personnel management and administrative policies. Many events uncontrollable by the Public Defender have affected the program substantially.

A precipitous increase in the caseload of the Agency occurred in the latter half of 1971 as a result of Alaska Supreme Court decisions, a criminal rule change, and the addition of five new judges to the trial bench. This was the same year that the Legislature not only refused any staff increases but also cut contractual services money below the amount appropriated the previous year.

In July, 1971, the court held in Alvarado v. State 10/ / that the right to trial by an impartial jury of peers required that the jury panel be representative of a cross section of the community in the area where the crime occurred. Administratively, this meant that more trials had to be conducted in less convenient areas of the state than the major cities. For the Public Defender Agency, this meant more travel, more time spent away from the office, and a greater burden on the attorneys remaining behind to pick up the continuing urban caseload. The Agency had no alternative but to respond as best possible to the increased demand which had not been budgeted in the Fiscal Year 1972 appropriation.

In September, 1971, the Supreme Court amended the criminal rules to require that criminal cases be tried within four months of arrest or formal charge in order to guarantee the constitutional right to a speedy trial (Criminal Rule 45). This placed considerable constraints on Agency time, and on the ability to obtain continuances of pending cases. In many instances, the Agency had to assign cases to private attorneys at far greater cost than if the Agency could have kept the case. One apparent result was that bills for contractual services far exceeded the budgeted amount.

In November, 1971, the decision in Alexander v. City of Anchorage 11/ struck an even greater blow to Agency administration and finance. The Alaska Supreme Court (followed shortly by the U.S. Supreme Court) held that the right to counsel extended to "any offense a direct penalty for which may be incarceration. . ., which may result in the loss of a valuable license, or which may result in a heavy enough fine to indicate criminality." 12/ This of course included virtually all misdemeanors except minor traffic offenses.

Finally, during 1971, five new positions for trial judges were created in the Court System, greatly enhancing the trial capabilities of the courts, but not the other components of the process.

The consequence of all these events on the budget and administration of the Agency is reflected beyond words in the statistics of Table 6. In absolute numbers, the caseload was more than doubled from 1971 to 1972. In workload, the Anchorage staff alone had to be increased from four to six attorneys immediately, and from six to ten attorneys during the following fiscal year.

The Agency had partially anticipated the Supreme Court decisions in the budget request for Fiscal Year 1972. However, the Legislature did not appropriate the three additional staff positions requested. Eventually, in May 1972, the Legislature responded to the crisis existing since the previous fall by granting a supplementary appropriation of $110,000. Nonetheless, unpaid appointed counsel fees accumulated until a debt of $68,694 was eventually assumed by the Alaska Court System late the following fiscal year, 1973.

Still another source of difficulty uncontrollable by the Agency is the impact created by non-legislative funding of various programs of other components of the criminal justice process. A major source of such funding in Alaska today is the LEAA grants approved by the Governor's Commission on the Administration of Justice, and administered by the Criminal Justice Planning Agency.

These grants are likely to have two effects on legislative fiscal policies and agency programs. First, if it should happen that LEAA planning does not consider the full impact of each grant on all the components of the justice system, a subsidy and new program to one will only create backlogs and delays in those components not so richly endowed. These other agencies must then appeal to the Legislature to increase the funding of their program to meet the new demands created by the new efficiencies elsewhere.

Table 7 is a breakdown of LEAA Action grants for 1971-73. The Public Defender Agency received all of the money designated "Pre-Trial Diversion" (the Offender Rehabilitation Program), less than half of the money designated "Legal Intern Program" and less than half of the money designated "Prosecutor-Defender Training." During this past year, the Agency has also received money to finance attorneys for juvenile proceedings, and another attorney for drug cases, as part of other LEAA grants. These two positions amount to approximately 4% of the total action money available in 1973.

CASE LOAD BY TYPE, 1969-72*

Cases Closed During Calendar Year:

Type of Case	1969 (6 mos.)	1970	1971	1972	Total By Type
Felony	96	1,396	1,544	1,175	4,211
Juvenile	55	339	397	470	1,261
Misdemeanor	0	0	0	2,340	2,340
Sanity	4	27	40	35	106
Appeals	0	10	7	57	74
Total Cases Closed	155	1,772	1,988	4,077	7,992

* Analysis from Harris "Internal Audit Report of Public Defender Agency, Mar. 15, 1973."

[TABLE 6]

ANNUAL ACTION PROGRAMS

	1971	%	1972	%	1973	%	1974
ALASKA JUSTICE INF. SYSTEM	$150,000	20.0	$300,000	30.0	$200,000	17.4	
POLICE EQUIPMENT	144,011	19.2	148,756	14.9	90,000	7.8	
POLICE TRAINING-EDUCATION	139,803	18.6	142,518	14.3	115,000	10.0	
ANCHORAGE CRIME-SPECIFIC	-0-		-0-		176,000	15.3	
FAIRBANKS CRIME-SPECIFIC	-0-		-0-		40,000	3.5	
COMMUNITY-BASED CORRECTIONS	122,777	16.4	54,654	5.5	93,000	8.1	
COMMUNITY CENTER ASSISTANCE	-0-		30,000	3.0	50,000	4.3	
COURT SYSTEM PROGRAM	41,075	5.5	60,000	6.0	55,000	4.8	
CORRECTIONS TRAINING	32,251	4.3	50,000	5.0	35,000	3.0	
COURT SYSTEM TRAINING	23,863	3.2	24,245	2.4	30,000	2.6	
PROS.-DEFENDER TRAINING*	10,549	1.4	8,773	1.0	10,000	0.9	
LEGAL INTERN PROGRAM*	-0-		9,322	0.9	30,000	2.6	
CORRECTIONS EVALUATION	8,000	1.0	-0-		30,000	2.6	
EDUCATIONAL DEVELOPMENT	-0-		-0-		29,000	2.5	
CJPA TRAINING FUND	-0-		24,995	2.5	25,000	2.2	
COMMUNITY RELATIONS	-0-		10,000	1.0	35,000	3.0	
POLICE-SCHOOL PROGRAM	5,192	0.7	5,650	0.5	5,000	0.4	
ORGANIZED CRIME	-0-		25,000	2.5	25,000	2.2	
PRE-TRIAL DIVERSION*	22,900	3.1	20,089	2.0	35,000	3.0	
SMALL JAIL ASSISTANCE PROGRAM	-0-		32,072	3.2	42,000	3.7	
INSTITUTION-BASED CORRECTIONS	-0-		19,992	2.0	-0-		
ALCOHOL-DRUG TREATMENT	50,000	6.7	24,950	2.5	-0-		
	$750,000		$1,000,000		$1,150,000		$1,300,000 (est.)

*Programs in which the Public Defender Agency participated.

[TABLE 7]

A rough example of the imbalance created is apparent when one compares, for example, the percentage of funds allocated to "Police Training-Education" and "Police Equipment" and that allocated to the Agency in total, keeping in mind the fact that the Agency must represent 60% - 70% of all cases initiated by improved law enforcement activities:

	Percentage of LEAA Action Money		
	1971	1972	1973
Police Equipment Training-Education	37.8%	29.2%	17.8%
Public Defender (Total)	3.8%	3.4%	8.8% *

* Assumes, in addition to classifications with asterisks in Table 7, 4% of total funding to provide juvenile and drug attorneys in conjunction with other programs.

The above analysis is only intended to demonstrate a general imbalance of funding. No criticism of CJPA planning efforts is possible or intended from such a breakdown. Many funding constraints are a product of the federal law and the Governor's commission. Indeed it should be noted that in Alaska, the defense component of the criminal justice process has received far better funding from LEAA money than is the case in most state programs. 13/ Nevertheless, an imbalance exists, and the burden is left on the Alaska legislature to provide funding for the attenuated impact of programs initiated and funded by another source.

A basic tenet of LEAA funding is to provide "seed-money" and permit experimental programs. It is not designed as an indefinite funding source. Hence at some point - usually after one year - the state must begin funding the program initiated with LEAA money. The policy decision of the Legislature generally comes after the program is operational, and the program cannot be denied without the possibility that much money and time during the first year will have been wasted.

Discontinuing the program after the initial funding may also have serious ramifications on the general efficiencies of the justice process. For example, LEAA has funded a drug attorney and a juvenile attorney for the Public Defender Agency. Refusal by the Legislature to continue funding these positions will not change the fact that other agencies are now geared to handling more juvenile and drug problems. It will only compound the shortages presently experienced, and will further clog the process with one less efficient component.

However, LEAA grants comprise a relatively small percentage of the total annual program appropriation for each agency. By far the bulk of financial imbalances are the result of legislative priorities, and are controllable by the Legislature.

With more study time than what is invested in this Report, it would be possible to show in considerable detail that the present level of funding of the Agency is far below the funding level of other components of the criminal justice process. It would also be possible to compile a detailed and definitive analysis of the exact needs of the Public Defender Agency to bring it to a level of operation corresponding to other components of the criminal justice system.

The simplest comparison is between the district attorney's offices and the Public Defender Agency. Both are primarily lawyer-services, and both have responsibilities for the same or similar caseloads. District attorneys are involved in most criminal bookings by a law enforcement agency. (City attorneys handle some) Rough statistics indicate that the Public Defender represents between 60% and 70% of all felony cases in the state where a defense attorney is involved. (The figure appears to be about 60% in Anchorage, something slightly lower in Fairbanks and Juneau, and virtually 100% in bush areas) Percentage figures for misdemeanor cases are unavailable. In addition, the Public Defender Agency appears in many juvenile proceedings where social workers rather than prosecutors appear. Assistant public defenders appear in all commitment proceedings which are seldom the concern of district attorneys. Public Defenders not only have the percentage of the felony and misdemeanor caseload handled by the district attorney, but also prosecutions initiated by city attorneys. These vary from place to place, tending to be higher in a location like Sitka where there is no district attorney. Finally public defenders have full appellate responsibilities while prosecutors have the assistance of the lawyers on the Attorney General's staff.

On the other hand, district attorneys appear on behalf of the state even for minor traffic court proceedings where defendants generally represent themselves, and district attorneys must appear in all grand jury proceedings where there is no public defender attorney.

Given these general comparisons and balances, it would seem plausible to conservatively conclude that the staff and resource requirements of the Public Defender Agency would be at least 70% of the same requirements for the district attorney offfices. Yet funding of the Agency has never reached that percentage.

For FY 1973, the district attorney function of the Department of Law received $1,281,200 plus the investigative and laboratory services of law enforcement agencies, as well as appellate assistance from the Department of Law. That same year, the Public Defender Agency received $808,900

from which it had to pay not only program costs but also investigation expenses, expert services, all appellate costs, etc. Even if the above figure for the prosecution were inclusive of all resources, the appropriation to the Public Defender Agency was only 63% of the appropriation to the prosecution.

For FY 1974, the prosecution received $1,342,100 plus the same support subsidies noted above. The total appropriation to the Public Defender Agency was $849,700, or 63% again.

To engage in further analysis of comparative funding with other components of criminal justice would be futile without considerably more data than is presently available. Suffice it to say at this point, that the Public Defender Agency is considerably underfunded, relative to that component of the justice system where corresponding needs and responsibilities are most easily identifiable.

To summarize, some minimal efficiencies can be accomplished by improving the personnel management and resource administration of the Agency. At this point in the life of the Agency, the needs are such that the Public Defender should drop all client work and concentrate exclusively on reorganization and administration. The administrative responsibilities of the legal secretary, plus the responsibilities for accounting and personnel managment should be assumed by a full-time administrative assistant who is trained in management.

Funding these changes may require cutting the present attorney staff if the Legislature continues to underfund the Agency. However, the move is justified in terms of making the other attorneys more efficient, and in terms of providing adequate representation to whatever number of clients the Agency can represent with present fiscal contraints. Cutting back professional staff to consolidate and improve representation is a better policy than spreading representation too thinly for the short-sighted purpose of simply processing larger numbers of cases.

Secondly, the Agency should spend whatever money is necessary to procure adequate law libraries, adequate secretarial services, adequate investigators and necessary equipment, even if this also requires that the attorney-staff be decreased. The above determinations of "adequate" and "necessary" should be the first priority for study by the new administrative assistant.

Thirdly, the Public Defender must exercise more control over the present undiscriminating policy of delaying negotiations until the last days before trial. An internal study should be conducted to determine the extent to which nonproductive delays actually occur, and Agency attorneys should be assisted in developing a sense of discretion for when discovery demands and other pretrial procedures are truly in the best interests of the clients.

The efficiencies created by these shifts of priorities will probably relieve the Agency of some criticism arising from staff delays and absences, accounting failures, etc. They will however decrease the total caseload capacity unless requested budget increases are approved. (The additional time for administration may permit the Public Defender to devote more time to hustling and negotiating for additional funding elsewhere, but one cannot presume much more success than in the past).

Assuming the present funding level, the only way to increase caseload processing is to lower the standard of representation to individual clients. However this is both impossible given legal and ethical responsibilities incumbent upon the attorneys, and improbably given the high standard of professionalims felt by every staff lawyer who was interviewed in the course of this study. Moreover, such a strategy would meet strong opposition from the bar associations, and would undoubtedly create an even greater backlog while cases were being appealed on the basis of ineffective representation.

The inevitable conclusion is that given present funding and assuming improved administration, the Agency will not be able to handle any greater increase in the caseload.

The statute provides that the Public Defender may hire contract attorneys to assist him when "the public interest" requires. The contractual services classification should be used for this purpose, but only to the amount the Legislature actually appropriated for such purposes.

When the point arrives that the Agency is maintaining the level of cases feasible under personnel services and contractual services restrictions imposed by the Legislature, the Public Defender must simply refuse to accept any more cases. So long as money designated for substitute attorneys is available, the Public Defender should implore the court to appoint a private attorney. But once that funding source is depleted, the Public Defender should <u>not</u> continue to incur debts from substitute attorneys without informing both the court and that attorney that no more money is available to pay the fee.

By attempting to avert one crisis after another by diverting funds, neglecting administration and incurring bills beyond ability to pay, the Agency

has not only brought avoidable criticism upon itself, but also has left itself vulnerable to being the whipping boy for those causes of crisis which should fall on other shoulders. The Agency must avoid a budgetary shell game which sees monies from one classification diverted to another to offset immediate crises. The courts and the Legislature must be presented with the realities of the limitations of attorney staff, supportive services, equipment, facilities, and contractual services as they in fact exist.

To the extent that the Legislature defines the fiscal limits, and other components of the system control the caseload, the Agency can and should do no more than represent as many clients as it can provide with adequate services under an efficiently administered program. When congestion occurs, the limits of the Agency will be recognized by all for what they really are.

1. Higham and Ginsberg, Report on the Alaska Public Defender Agency, October, 1973. Criminal Court Technical Assistance Project, Institute for Studies in Justice & Social Behavior, American University Law School, Wash. D.C. (Cited below as "Higham and Ginsberg")

2. Letter of Avrum M. Gross to Warren C. Christianson, May 28, 1969.

3. Interview with Judge Carlson, October 23, 1973.

4. All financial information is taken from the annual budget requests and the report of William Hogan, Division of Legislative Audit, unless otherwise indicated.

5. Higham and Ginsberg, p. 70.

6. Harris, Report on Examination of Office of the Governor, Public Defender Agency, March, 1973.

7. Hogan, Audit Report, Alaska Public Defender Agency, September, 1973 (draft).

8. Ellis, Alaska Court System Final Report, Statistical Research Project, December, 1973. pp. 16 - 17.

9. Higham and Ginsber, pp. 62 - 65.

10. 486 P.2d 891 (Alaska 1971).

11. 490 P.2d 910 (Alaska 1971).

12. Id. at 915.

13. See, Singer, "LEAA and the Public Defender Movement," 31 N.L.A.D.A. Brief Case 256 (1972).

CHAPTER IV

THE QUALITY OF REPRESENTATION

Thus far, the Agency has been discussed and analyzed in terms of the initial concept of the drafters of the legislation, the legal responsibilities and authorities provided in the statute, and the economies and efficiencies of administration. Now the discussion turns to the quality of representation provided indigent clients, the primary function of the Agency. However this chapter differs from the others by not offering an evaluation. Time and the financial limits of this study require that this discussion be limited to describing the law and methodology for measuring the quality of representation, and that the actual evaluation be accomplished at another time.

There are basically two "levels" of quality to be considered here. The first is a measure of the effectiveness or adequacy of legal service provided any individual client in the context of the constitutional right to counsel in all criminal proceedings. The second is a measure of the quality of public defender services generally, according to the comparative standard with retained counsel prescribed in the Alaska Public Defender Act.

A. The Right to "Effective" Representation.

Until recently, courts have generally side stepped the evaluation of whether a defendant's attorney was effective in his advocacy. Only the most egregious incompetence was corrected in applying the most universal standard, whether the quality of counsel was reduced to "a mockery of justice"; 1/ a standard which Judge Bazelon claims "requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment." 2/ As an experienced trial judge in Washington D.C., he notes,

> The adversary system assumes that each side has adequate counsel. This assumption probably holds true for giant corporations or well-to-do individuals, but what I have seen in 23 years on the bench leads me to believe that a great many - if not most - indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment. 3/

The reasons for this are many and complex. Among those which have been suggested are (1) the "practicalities" of the fact that if every case of inadequate counsel were reversed, half the convictions in the jurisdiction might be sent back, (2) the belief "that it is better to preserve the illusion that nothing is wrong," (3) the belief that there simply is a shortage of competent attorneys to provide effective counsel to all indigent defendants, (4) the fear that conscientious pursuit of defenses would grind the system to a halt, (5) the fact that judges are reluctant to "soil the reputations" of counsel by labelling their their work "ineffective," and, (6) the attitude of the "guilty anyway syndrome" which places efficient judicial administration above the need "to clutter the courts with all sorts of difficult legal and constitutional questions." 4/

The growing body of legal discussion on the issue of effective representation deals with the above arguments in some detail, 5/ and also develops constitutional and legal arguments of growing persuasiveness that the sixth amendment right to counsel is more than a formal, procedural pronouncement. 6/ With consolidation of the procedural right to counsel having been fairly well accomplished during the past ten years, more courts are now reviewing and changing their definitional standard of "effectiveness."

The U.S. Court of Appeals for the District of Columbia has offered the alternative standard of whether "gross incompetence blotted out the essence of a substantial defense," 7/ and the appellate court of Maryland has stated the test in terms of whether the defendant "was afforded genuine and effective representation." 8/ However both alternatives beg the question of "effectiveness" by either restating the term in the test or shifting to more elusive standards like "gross incompetence," "substantial," and "genuine." 9/ Moreover, the "gross incompetence" standard suffers the same defect of the "mockery of justice" standard by requiring, in addition to a showing of inadequacy, a showing of prejudice or loss of substantial defense. To this extent, the tests assume that the defendant was guilty anyway, and hence that the quality of representation was not important. 10/

Perhaps the more helpful group of standards emerging are those which state the problem in terms of malpractice or affirmative checklists of what is minimally required for effective assistance of counsel. The Third Circuit Court of Appeals measures competency by "community standards," and "normal competency"; 11/ the New Jersey Appellate Division speaks of competency "equal to the exercise of normal customary skill and knowledge"; 12/ and a federal court in Ohio set the standard at representation "at least as well as any attorney with ordinary training (and the) usual amount of skill and judgment." 13/ The most comprehensive community standard is articulated in an article reviewing in depth the most recent cases: "whether counsel exhibited the normal and customary degree of skill possesses by

attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar." 14/

The U.S. Court of Appeals for the Fourth circuit has laid down specific, affirmative duties of counsel in criminal actions:

- Confer with the client early, and as often as necessary;
- Advise him of his rights;
- Ascertain all defenses that may be available and develop all appropriate defenses;
- Conduct all necessary investigations;
- Allow time for reflection and preparation. 15/

These affirmative standards are not unlike the ABA Standards for the Defense Function which Wisoncsin has adopted as "partial guidelines to the determination of effective representation." 16/

Still another way of developing guidelines for measuring effective assistance of counsel is to combine standards such as the ABA Standards above, with specifically enunciated circumstances of ineffective counsel which have been recognized by other courts across the country. With a number of variations in each category, courts have catalogued cases in such circumstances as advising a guilty plea with assurances of a more lenient sentence than the client actually receives, counsel's ignorance of the law, the failure of counsel to investigate the facts, and insufficient time for counsel to prepare. 17/ There is also a growing body of case law indicating that failures in supportive services such as investigation, presentence information, psychiatric evaluations, and expert advice and assistance may impede effective representation and hence the substantive right to counsel. 18/

But even in the face of this profound, newly emerging body of law, the Alaska Supreme Court, as recently as May, 1973, refused to acknowledge the right to counsel as more than a procedural right guarded by that extreme incompetence of representation which is "a mockery and a farce." 19/ Justice Connor writing for the court noted that the concept of effective assistance of counsel addresses a "procedural requirement as distinguished from a standard of skill." 20/ Evidencing Bazelon's "guilty anyway syndrome" the court indicated need for a showing of prejudice by noting that the appellant had not "been prejudiced by an actual conflict of interest." 21/ The court found that neither of the two defendants "was forced to share her counsel with a co-defendant," 22/ implicitly presuming that each defendant comprehended beforehand the subtleties of a potential

attorney-conflict, and chose voluntarily the economy of hiring only one attorney. To the argument (made by new counsel on appeal) that the trial lawyer did not have time to consult with his clients before the trial, the Supreme Court responded in the language of a prior opinion that no abuse of discretion of a trial judge's refusal to grant a continuance can be found simply because a trial lawyer did not use his time properly. 23/ The clear implication is that the convicted client must suffer the consequences of his or her attorney's ineffective use of time - a conclusion which evades the very question on appeal: that the trial lawyer was ineffective.

While a review of all Alaska case law on the subject is not fruitful in this report, it should be noted that the above, most recent case is indicative of a whole line of cases wherein the Alaska Supreme Court has evaded review of the adequacy of representation in all but the most egregious and unavoidable cases; has succumbed to the "guilty anyway syndrome" by requiring a showing of actual prejudice; and has candidly, if erroneously, identified the right to counsel as little more than the shell of a constitutionally required procedure. 24/

B. General Quality of the Agency's Service.

As already noted in Chapter III above, the first and foremost responsibility of a criminal lawyer, public or privately retained, is to represent the best interests of his client to the limits of the law and ethical standards. In most cases, this means obtaining the most favorable treatment for his client, and the most favorable disposition of his client's case. The distinctive role, function and responsibility of a public defender was astutely captured in a statement by Chief Sundberg of the Fairbanks Police Department, "The public defenders (in Fairbanks) are doing an excellent job as far as I can tell. But that doesn't mean justice is being done." 25/

Simply stated, the workings of justice in an "adversarial" proceeding assume an orderly conflict with a number of distinctive practitioners serving a number of distinctive functions. Defense counsel's role is to make a contest of the proceeding, and, despite the wishes of many who observe weaknesses and failings in our system, the quality of defense counsel is not measured by the extent to which he sympathetically avoids complicating the process, acts in deference to the weaknesses of judges or prosecutors, or overlooks unlawful albeit technical shortcomings in police practices. That is not to say defense lawyers can unjustifiably obstruct the process, but rather that their first responsibility is to their client, and that the

weaknesses they might legally and ethically exploit for a time must be corrected and strengthened by the judiciary and legislature rather than being treated delicately by adversaries primed to that role. Indeed, the quality of a defense attorney, and the quality of the services by the Public Defender Agency would be highly suspect if counsel succumbed to the weaknesses inherent in the system rather than pursuing the most favorable treatment and disposition for his client.

Hence, it is presumed that when the Public Defender Act guarantees that indigents are "entitled to be represented by an attorney to the same extent as a person having his own attorney is entitled," 26/ that guarantee assures the indigent defendant as vigorous and spirited an advocacy for favorable disposition as the more pecunious defendant purchases and has a right to expect from his retained attorney.

In essence, the above language from the statute demands a quality of representation similar to the various "community standard" tests applied by some courts and discussed in section A of this chapter. Thus, one can measure the general quality of the Public Defender Agency, for purposes of determining whether it is meeting its statutory mandate, by comparing the treatment of clients and the dispositions of cases handled respectively by the Agency and by retained attorneys in the community.

But the comparisons for purposes of evaluation are not so simple as noting only which type of counsel obtained the highest dismissal and acquittal rate for its clientele. A number of variables influence and obfuscate the comparison, and it is important to understand beforehand the relationships among these variables. A comparison between public and private defender services in San Diego, California, indicated in a first analysis that private attorneys had a disposition rate more favorable to clientele than public defenders. However, that difference disappeared when the nature of the offense was introduced to a "multiple dimensional contingency table analysis." 27/

The addition of the "crime type" variable brought to light the fact that public defenders were representing primarily persons charged with crimes against property and crimes against persons, and that private attorneys were representing primarily persons charged with crimes against health and public safety. There were less favorable dispositions among all persons charged with crimes against persons and crimes against property, regardless of whether these defendants were represented by public or

Disposition:

dismissal
guilty plea
conviction at trial
acquittal at trial

Sentence received (to be attributed "weights" according to numerical scale devised by California Bureau of Criminal Statistics)

* "The personnel in the criminal law process in each district comprise a unique and enduring work group largely isolated from like groups in other districts."

Considerably more cost and time than this report can afford are required to retrieve such data and program it into a computer for positive evaluation of the Alaska Public Defender Agency according to the statutory standard of community representation. The project must simply await another day, and perhaps should be done periodically by the Agency itself. The usefulness of such "raw data" as contained in the variables extends far beyond the primary purpose of measuring the quality of representation. It could be used by the Agency to discover areas of weaknesses, e.g., needs for attorney training in particular crime types, need for training in particular judicial districts, identification of variables interacting with time delays, identification of sentencing disparities by location or judge or similar crime types, etc. Once the programing and record-keeping functions were established, the process would be extremely simple to maintain from year to year, and would provide a more informative annual report from the Agency than the present, practically useless information required by statute.

One legal qualifier must be made before concluding this discussion: the Public Defender Act speaks of representation to the extent persons retaining their own lawyers "are entitled to." The method of evaluation discussed above assumes that the quality of services from private, retained attorneys is presently at least as good as the Consititution, laws and ABA Code of Professional Responsibility require. If it should happen that the practice of criminal law by the private bar fell below the level a person has a right to expect, the comparison of treatment and dispositions would no longer be a valid test of whether the Public Defender Agency met its statutory responsiblities.

retained counsel. Hence, it was inherent in the clientele rather than quality of counsel that public defenders did not show such favorable dispositions in the first analysis. When the crime-type variable was introduced, the revised data indicated that public defenders were obtaining dispositions at least as favorable as retained counsel, given a particular type of charge against the defendant.

The list of potentially influential variables given below are a combination of variables used in the San Diego study, and variables added from this writer's impressions of unique factors possibly active in Alaska courts. Various combinations of these variables must be treated in a multiple-dimensional analysis exemplified above, in order to ensure that treatment and disposition data obtained are truly the effect of different types of counsel rather than some other cause.

Type of Defense Counsel:

public defender
retained counsel

Nature of Offense Charged:

crime against person
crime against property
crime against health and public safety

Defendant-related Variables:

race
bail/jail status
criminal status (on parole, probation or imprisoned)
prior record - (1)major (2) minor

System-related Variables:

manner of conviction:
- original plea of guilty
- change of plea to guilty
- result of trial

level of convition:
- felony as charged
- lesser felony
- misdemeanor

continuances
- time to resolution of charges
- name of judge sentencing
- judicial district*

1. E.g., Sullivan v. State, 509 P.2d 832, 835--36 (Alaska 1973); McMillan v New Jersey, 408 F.2d 1375 (3d Cir. 1969); Davis v. Bomar, 344 F.2d 84 (6th Cir.), cert. denied, 382 U.S. 883,15 L.Ed.2d 124 (1965); United States ex rel. Machado v. Wilkins, 351 F.2d 892 (2d Cir.), cert.denied, 383 U.S. 916, 15 L.Ed.2d 670, reh. denied, 383 U.S. 963, 16 L.Ed.2d 306 (1965); Audett v. United States, 265 F.2d 837 (9th Cir.), cert. denied, 361 U.S. 815, 4 L. Ed.2d 62 (1959). For critical views, see Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 28 (1973); Grano, The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn. L. Rev. 1175, 1241 n. 325 (1970); Comment, Effective Representation - An Evasive Substantive Notion Masquerading as Procedure, 39 Wash. L. Rev. 819, 839 (1964).

2. Bazelon, supra note 1 at 28.

3. Id. at 2.

4. Id. at 22 - 27.

5. Id.

6. E.g., Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077 (1973); Grano, The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn. L. Rev. 1175 (1970); Katz, Gideon's Trumpet: Mournful and Muffled, 55 Iowa L. Rev. 523 (1970); Craig, The Right to Adequate Representation in the Criminal Process: Some Observations, 22 SW. L. J. 260 (1968); Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434 (1965); Comment, Effective Representation - An Evasive Substantive Notion Masquerading as Procedure, 39 Wash. L. Rev. 819 (1964); Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289 (1964); Note, Effective Assistance of Counsel. 49 Va. L. Rev. 1531 (1963).

7. Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970); Bruce v. United States, 379 F.2d 113, 117 (D.C. Cir. 1967).

8. State v. Merchant, 271 A.2d 752, 755 (Md. 1970).

9. For further analysis of these standards, see Finer, supra, note 6 at 1078 et seq.

10. For further analysis of "the presumption of regularity," due process notions of fairness, and the abandonment of such language in Gideon, see Bazelon, supra note 1 at 29 - 30.

11. Moore v. United States, 432 F.2d 730 (3rd Cir. 1970).

12. State v. Anderson, 287 A.2d 234, 240 (App. Div. 1971).

13. Kott v. Green, 303 F. Supp. 821, 822 (N.D. Ohio 1968).

14. Finer, supra note 6 at 1080.

15. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

16. State v. Harper, 205 N.W. 2d 1, 9 (Wisc. 1973).

17. Finer, supra note 6 at 1081 - 1116.

18. See generally, Margolin and Wagner, The Indigent Criminal Defendant and Defence Services: A Search for Constitutional Standards, 24 Hastings L. J. 647 (1973); Note, Right to Aid in Addition to Counsel for Indigent Defendants, 47 Minn. L. Rev. 1054 (1963).

19. Sullivan v. State, 509 P.2d 832, 835-36 (Alaska 1973).

20. Id. at 835.

21. Id. at 836.

22. Id.

23. Id. at 835 quoting, Mead v. State, 445 P.2d 229, 232 (Alaska 1968), cert. denied 396 U.S. 855, 24 L. Ed.2d 104 (1969).

24. See generally, Sullivan v. State, supra note 19; Tafoya v. State, 500 P.2d 247 (Alaska 1972); Condon v. State, 498 P.2d 276 (Alaska 1972); Doe v. State, 487 P.2d 47 (Alaska 1971); Lewis v. State, 469 P.2d 689 (Alaska 1970); Dimmick v. State, 473 P.2d 616 (Alaska 1970); White v. State, 457 P.2d 650 (Alaska 1969); Thessen v. State, 454 P.2d 341 (Alaska 1969); Mead v. State, 445 P.2d 229 (Alaska 1968); Anderson v. State, 438 P.2d 228 (Alaska 1968); Nichols v. State, 425 P.2d 247 (Alaska 1967); Bentley v. State, 393 P.2d 225 (1964).

25. Personal interview, December 21, 1973.

26. AS 18.85.100(a)(1).

27. Taylor, An Analysis of Defender Counsel in the Processing of Felony Defendants in San Diego, California, 49 Denver L. J. 233, 249 (1972).

CHAPTER V

RECOMMENDATIONS

A. Public Defender Agency.

1. THE PUBLIC DEFENDER SHOULD DEVOTE HIS FULL TIME TO FORMULATION AND IMPLEMENTATION OF POLICY, ADMINISTRATION, AND GENERAL SUPERVISORY NEEDS OF THE AGENCY.

During the course of this study, there were numerous instances when the Public Defender was unavailable for sometimes as long as a week because he was handling cases and trials in Bethel, Fairbanks, Juneau or Ketchikan. In as many instances, the Public Defender was unavailable because he was in court in Anchorage. According to his own estimate, the Public Defender is spending as much as half his time handling clients and court work. While such a distribution of the routine caseload was important and necessary when the statewide legal staff totalled only seven attorneys, the practice is wholly unsatisfactory and inefficient for an operation of seventeen lawyers and an annual budget of about $1,000,000.

The Agency is desparately in need of concrete policies of operation, administrative supervision, training programs,, internal quality control, personnel management and community relations. It is no longer sufficient for the Public Defender to "run guard" as crises arise: the Agency must be reorganized and administered in a manner which prevents most problems and anticipates others by constant vigilance to developing weaknesses and inefficiencies.

2. THE PUBLIC DEFENDER SHOULD HIRE A FULL TIME QUALIFIED ADMINISTRATIVE ASSISTANT IMMEDIATELY.

Even with the Public Defender devoting full time to managing the Agency, it is necessary to have someone responsible for routine accounting procedures, office management, scheduling, and management of secretarial resources in the Anchorage office.

This position should be filled by a person with proven administrative abilities. Responsibilities should include supervising caseload distributions, identifying organizational and administrative weaknesses, keeping abreast of latest developments in law office management and innovating efficiencies in public defender organizations elsewhere, and exploration of the possibilities for supplemental revenues through government and private foundation grants.

3. THE PUBLIC DEFENDER SHOULD DETERMINE THE MOST EFFICIENT RATIO OF ATTORNEYS, SUPPORTIVE ASSISTANCE AND EQUIPMENT, AND SHOULD ADJUST STAFFING AND EQUIPMENT BUDGETING ACCORDINGLY.

The present activities of the attorney staff suggest strongly that the Agency suffers from an acute shortage of supportive services and equipment, which not only renders legal assistance less effective but also results in less efficient expenditures of funds.

Without further research, it is impossible to know what division of resources is most efficient. Some studies have indicated that a defender agency should be staffed with one professional investigator for every four attorneys. The suggestion has been made that assistant public defenders engaged in active trial practice should minimally have two secretaries for every three attorneys.

The possibility that the Legislature will not authorize the additional appropriation necessary to achieve a better balance of staff and equipment, should not discourage the Public Defender from researching the extent of the problem and making whatever internal adjustments are possible by a simple reallocation of priorities and redistribution of present funds. This may require cutting one or two contract attorney positions in favor of using the contractual services money for more investigators or contracted MTST equipment to assist the remaining attorneys.

The point to be kept in mind is that the first responsibility of the Agency is to provide effective counsel to those clients it actually represents, even at the expense of cutting attorney staff and total caseload processed if necessary. A lawyer working for a public agency is bound by the same ethical responsibilities as a private attorney, to not take more clients than he can effectively serve, and to not truncate services to existing clients in order to take on more clients.

4. THE PUBLIC DEFENDER SHOULD ESTABLISH POLICIES FOR PERSONNEL MANAGEMENT OF ATTORNEYS, AND FOR TRIAL PRACTICES WHICH ELIMINATE UNNECESSARY DELAYS IN THE CRIMINAL JUSTICE PROCESS AND UNNECESSARY INVESTMENTS OF ATTORNEY-TIME.

Prosecutors and judges in Anchorage unanimously criticized delays in the criminal process created by public defender attorneys. In some cases, the delay was caused by assistant public defenders not being prepared, being tardy to hearings, and being completely absent from scheduled hearings. In other cases, the loss of valuable court time was attributed to the lack of experience of public defender attorneys, or an undiscriminating policy of refusing to negotiate a case until the last days before trial.

Tardiness and absences can be eliminated by careful calendaring of each attorney's time by an office manager. Careful management and supervision of workload distribution, vacation time and other extended absences from the office can substantially reduce the lack of preparedness caused by staff members "filling in" for other attorneys at the last minute.

Delays caused by lack of training in effective trial strategies is difficult to distinguish from delays caused by good trial strategy. The assessment should be made in each individual case rather than as a generalization. However a series of observations collected during this study seem to confirm a strong suspicion that public defender attorneys are needlessly dilatory in some cases: (1) most assistant public defenders come to their position with little or no trial experience, (2) it has been recognized repeatedly that "a neophyte will compensate for his inexperience by engaging in unnecessarily vigorous and hostile advocacy," (3) neophyte public defender attorneys receive strikingly little training or guidance before assuming their own caseload, (4) Anchorage judges and prosecutors, unanimously agree that assistant public defenders engage in unnecessary delay tactics, and (5) recent court statistics indicate almost universal long-term delay and few cases actually going to trial in the end.

The Public Defender should review the practices of his attorneys. If delays in negotiation are caused by genuine needs to know more about the case before "copping a plea," the best interest of the client is clearly to wait until all evidence is in. But, if the lack of a completed investigation is caused by procrastination or preoccupation of the defense attorney, the Public Defender should ensure that the process is expedited.

In many cases, it should be quite clear to the experienced attorney that delay tactics are not in the best interests of the client, the Agency, or the system. The Public Defender should exercise his supervisory respon-

sibilities to ensure that these delays are avoided.

5. THE PUBLIC DEFENDER SHOULD SCRUTINIZE EXPENDITURES CAREFULLY TO ENSURE (A) THAT TOTAL FINANCIAL COMMITMENTS IN A GIVEN FISCAL YEAR DO NOT EXCEED TOTAL RESOURCES AVAILABLE, AND (B) THAT APPROPRIATIONS ALLOCATED TO ONE BUDGET CATEGORY ARE NOT SHIFTED TO OFFSET EXPENSES IN ANOTHER CATEGORY.

During FY 1970 the Agency required a supplemental appropriation of $35,000. In FY 1971, $58,000 in additional money was transferred to the Agency. In FY 1972, the Agency received a supplemental appropriation of $110,000. In FY 1973, $50,447 above the original appropriation was transferred to the Agency from the Governor's office, and $68,695 in outstanding invoices was charged to the Court System.

Despite inadequate appropriations each year, the practice of the Public Defender has been to continue taking clients at whatever level of demand exists, and then come back to the Legislature, Governor, or Court System for assistance when funds are depleted. While the practice has been effective in the past, it has created a mood of discontent which the Agency cannot afford.

It has also resulted in criticism of the Agency which the Public Defender could avoid. If it happens that the annual appropriation to the Agency is not enough money to pay the costs of representation for all indigent clients during that year, the Public Defender should simply acknowledge that fact, limit the caseload of the Agency accordingly and leave to other decision-makers the question of how the remaining indigent defendants are to be represented.

Similarly, the Public Defender should not feel obligated to pay the professional fees of substitute attorneys appointed by the judge beyond the amount actually appropriated by the Legislature for that purpose. Other program needs and approved appropriations should not be sacrificed to overruns of costs which the Public Defender cannot control.

In summary, the Public Defender should calculate and adjust the annual program of the Agency according to the appropriation granted rather than the actual number of cases entering the criminal justice process. When budgetary limits on caseload are reached during any given month, the Public Defender should inform the judge that the Agency is incapable of taking more clients without jeopardizing the fiscal program approved by the Legislature. The judge is legally authorized to appoint substitute

defenders "for cause," and such reasoning as fiscal limitations should be adequate cause. If and when the authorized appropriation for professional services is exhausted, the Public Defender should inform the court (and the attorney whom the court appoints) that the Agency is no longer able to pay the costs of substitute defenders, and that the attorney should anticipate looking elsewhere for his fee. Such a procedure will bring the realistic dimensions of legal services costs to the fore, and will facilitate more permanent reforms than the stopgap remedies emerging from the present policy of the Agency to deal with crises only when they are imminent.

6. THE PUBLIC DEFENDER SHOULD CONDUCT AN EVALUATION OF MAXIMUM CASELOAD CAPABILITIES OF THE AGENCY, AND MINIMUM SUPPORTIVE SERVICES REQUIRED TO ENSURE EFFECTIVE REPRESENTATION AND FULFILLMENT OF THE ETHICAL RESPONSIBILITY OF EACH LAWYER TO HIS CLIENTS.

A body of professional standards has developed in recent years to counter the public pressure, general suspicion, and perhaps bureaucratic tendency of some public defender agencies to deal with indigent clients in a manner which emphasizes processing numbers of cases at the expense of quality services. Although no definitive study of workload capabilities exists, some suggestions and recommendations have been made. The Report of the Conference of Legal Manpower Needs of Criminal Law, Airlie House, Virginia, 41 F.R.D. 389 (1966), estimated that an attorney could handle 150 felony cases per year and from 300 to "nearly 1000 misdemeanors per year." A year later, the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) suggested from 150 to 200 felonies per year, or 300 to 400 serious mesdemeanors. Most recently, the National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973) adopted the workload limits of 150 felonies, or 400 misdemeanors, or 200 juvenile cases, or 25 appeals per year per attorney. The Commission was quick to add "the caveat that particular local conditions - such as travel time - may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction."

Workload limitations in Alaska will vary immensely from urban Anchorage to rural Nome. Indeed, the evaluation by the Public Defender may conclude that Anchorage is the only location where workload problems presently exist.

The need for adequate supportive services for criminal attorneys has been endorsed and recommended repeatedly by such authorities as the National Advisory Commission on Criminal Justice Standards and Goals, the ABA House of Delegates and the ABA Project on Standards for Criminal Justice: Standards Relating to Providing Defense Services. In convention in 1968, the Alaska Bar Association noted the lack of adequate investigatory resources as a basic reason for the creation of a public defender program. Some of the most basic needs for adequate support resources were noted in the ABA Standard and excerpt commentary:

> The plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction.
>
> Trial lawyers uniformly stress that adequate investigation and preparation are crucial to an effective defense. . . .The Attorney General's Committee concluded that a system lacking such resources "cannot fairly be characterized as a system of adequate representation," since "one of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense." ATTY'Y GEN. REPORT 47. The quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires the location of a missing witness or the services of a handwriting expert and no such services are available. . . .If the attorney must personally conduct the investigation the cost to the system is likely to be greater. Moreover, if the attorney must always personally interview witnesses he may be placed in the untenable position of either taking the stand to challenge their credibility if their testimony conflicts with statements earlier given to him or withdrawing from the case to avoid such embarrassment. See Canon 19, ABA Canons of Professional Ethics. . . .
>
> The opportunity for the development of fresh approaches to the to the provision of defense services is especially large in the area of supporting services. There is increasing discussion of the need to develop legal technicians (paralegal personnel) trained to perform auxiliary functions for lawyers much as paramedical personnel assist physicians. In addition, the expanding concept of the lawyer's function in a criminal case, which may include a significant role in the development

of a program of rehabilitation for the defendant, necessitates the availability of personnel skilled in social work and other related disciplines. Such personnel have been added to the staff of some defender offices.

The Alaska Public Defender should hire the second full-time permanent investigator authorized for the Anchorage office, should solicit endorsements and active support from the Court System and the Alaska Bar Association for expanded supporting services, and should continue to lobby strongly to the Legislature for necessary appropriations.

7. THE PUBLIC DEFENDER SHOULD DEVELOP AND ADMINISTER, IN COOPERATION WITH THE ALASKA BAR ASSOCIATION, A TRAINING AND CONTINUING EDUCATION PROGRAM FOR STAFF ATTORNEYS.

With the exception of an annual two or three day session, assistant public defenders presently receive no formal training despite the fact that most of them come to the Agency with little or no trial experience. The tracking and supervision of neophytes, especially those assigned to offices outside Anchorage, is almost nonexistent and, in at least one case, destructive to the morale, and development of an attorney's trial skill.

The Public Defender should take charge of training and continuing education and should closely supervise new attorneys for as long as necessary to ensure quality representation to clients. No new, inexperienced attorney should be assigned to a one-man office in Juneau, Ketchikan or Nome until he has obtained months of practical, supervised experience.

The Public Defender should solicit training materials and program ideas from public defender agencies throughout the country; should keep abreast of latest developments of law and disseminate them in condensed form to staff attorneys; should conduct frequent seminars with staff attorneys discussing trial problems and exchanging experiences and ideas; should plan speaker programs and discussions with other experienced trial practitioners whenever possible; should attempt to involve the private trial bar and district attorneys in cooperative efforts to develop continuing education programs; and should explore all possibilities for grants and supplemental revenues to finance training and continuing education.

8. THE PUBLIC DEFENDER SHOULD CONTINUE TO ENSURE THAT THIRD-PARTY CRITICISM OF THE AGENCY IS RECEIVED AND ADDRESSED IN THE CONTEXT OF MAINTAINING THE INTEGRITY OF THE LAWYER-CLIENT RELATIONSHIP.

The National Advisory Commission on Criminal Justice Standards and Goals noted, "The public defender's dilemma is that the more he fulfills his duty to represent the indigent - and usually unpopular - accused with the maximum possible zeal, vigor, and professional skill, the more public irritation (and even wrath) he may engender, and the greater the danger that pressure may mount to curb his effectiveness." Courts, p. 272. The Agency is funded publicly but still must be insulated from public pressures which might compromise the integrity of the lawyer-client relationship and, indeed, the integrity of the adversary process.

> (S)ociety has deliberately chosen the adversary system - a vigorous clash of opposing sides - as the mechanism for trying criminal cases. Since this necessarily involves rules of procedure, rules of evidence and other complexities far beyond the grasp even of intelligent and educated laymen and beyond the ordinary experience of most lawyers, a high degree of skill in advocacy is demanded. Because society - not the defendant - has selected the adversary system as its choice of mechanism, our deliberate choice of that kind of system, rather than some notion of benevolence or gratuity to the poor, requires that both sides have professional spokesmen. . . .

As the same source, the ABA Standards Relating to Providing Defense Services, noted in commentary on the standard recommending professional independence (1.4),

> A system which does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities of this nature are seriously detrimental to the fulfillment of the goals of providing counsel. They are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately,of society itself. Much of the dispute concerning the merits of various

> systems has centered on their capacity to guarantee professional independence. The study made by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association concluded that the necessary independence could be guaranteed under any type of system, from public defender to assigned counsel, if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations.

Disciplinary Rule 5-107(B) of the Code of Professional Responsibility provides, "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

A publicly employed attorney is no less bound to pursue the best interests of his client than a privately retained attorney. The Public Defender has the difficult task of responding to representatives of the public who may feel that Agency attorneys are too zealous or who feel that defense counsel for indigent criminally accused is no more than a public subsidy of criminality, while at the same time insulating his attorneys from those criticisms extraneous and potentially injurious to the lawyer-client relationship.

For example, when the public, the prosectution, the judges, and even this Report accuse public defender attorneys of engaging in unnecessary and nonproductive delay tactics, the Public Defender must assess the criticisms and make changes which effect only the delays which are truly unnecessary and nonproductive. He should not order his attorneys to discontinue a strategy of delay which is advantageous to the disposition of the client's case. In our adversarial processes, the avoidance of these latter delays is the strategic responsibility of the prosecution, or, the institutional responsibility of the Court System. Neither side in the adversarial process should refrain from spirited advocacy to avoid exploiting weaknesses in the system. These weaknesses will never be discovered and reformed unless the need for reform is made manifest in the process.

9. THE PUBLIC DEFENDER MUST TAKE A MORE ACTIVE ROLE IN COMMUNITY RELATIONS AND COMMUNITY EDUCATION.

During the four month period from October 1973 through January 1974, the Public Defender Agency was vigorously attacked on four occasions in an Anchorage newspaper. Despite attempts by a reporter to obtain the Agency's side of the story, the Public Defender refused to comment. The sad fact is that two of the three printed articles provided the public with only half-truths, and the one editorial was both factually inaccurate and highly misleading.

While "taking the higher road" and avoiding petty combat in the press is a commendable stance, a repeated position of refusing to grant press interviews and failing to provide the public with the full story is poor public relations and needlessly damaging to the Agency. When individuals are publicly critical of the Agency, the Public Defender should immediately contact them, investigate the accusations, and publicly respond with accurate information or corrective measures as the case may be.

Similarly, the Public Defender should be soliciting speaking engagements before community groups, appearing before law enforcement committees of such groups and of neighborhood groups, and maintaining close contact with bar associations and organizations associated with other components of the criminal justice process. Even sophisticates in the system sometimes forget the importance of spirited and effective advocacy from the defense if the process is to function properly. The lack of understanding of the role of the Public Defender Agency by laymen and taxpayers is fully understandable; and the Public Defender has a very important responsibility to educate the public and keep them informed of the problems and the function of his Agency.

B. The Legislature.

1. THE PUBLIC DEFENDER ACT SHOULD BE AMENDED TO PROVIDE: (A) THAT THE DETERMINATION OF INDIGENCY IS MADE EXCLUSIVELY BY THE COURT; (B) THAT REIMBURSEMENT FOR LEGAL SERVICES PROVIDED IS REQUIRED ONLY BY THOSE CLIENTS WHO OBTAIN REPRESENTATION BY FRAUDULENTLY MISREPRESENTING THEIR NEEDS: (C) THAT PAYMENT OF FEES TO SUBSTITUTE ATTORNEYS SHALL BE ADMINISTERED BY THE COURT SYSTEM, ACCORDING TO A SCHEDULE OF ATTORNEY FEES PROMULGATED BY THE SUPREME COURT.

(a) The Public Defender Agency has been criticized for representing persons who allegedly could afford retained counsel. The Public Defender concedes that this may be happening in some cases, but that the Agency lacks the necessary resources to conduct an adequate investigation of a client's financial worth. Reliance is placed in the financial statement and sworn truthfulness prepared and signed by the potential client entering the office.

While many judges have been especially critical of indigency determination, few are aware, and fewer still exercise, their legal prerogative to review the financial qualifications of Public Defender clients. One vociferously critical judge noted on further questioning that the Court System does not have the investigatory resources to review indigency. The problem is exactly the same in the Public Defender Agency.

For a number of reasons, the determination of indigency is better placed in the hands of the courts than the Public Defender. A defendant placed on the witness stand, sworn to tell the truth, and questioned in front of the judge (but privately) concerning his claim to indigency, is less likely to falsify his statement than a defendant behind closed doors in the offices of his lawyer and confidant. Also, if any entity will ever receive appropriations for additional staffing for checking the financial statements of a defendant, the Court System has more potential and a better history of success than the Agency. Moreover, placing the responsibility with judges protects already beleaguered public defender attorneys from additional criticisms and pressures which may intrude upon the lawyer-client relation of the attorney serving in a public capacity. Finally, determination of the legal limits of the requirement to provide assistance ultimately rests with the courts and their interpretation of constitutional requirements. The initial determination might more efficiently be placed where the ultime review must exist.

Arguably, the present Act intends that judges should make the determination in most cases. It at least grants the same power to the judge as to

the Agency, and, in addition, provides reviewing power to the judge. AS 18.85.110(d) provides for prompt action "(i)f a court determines that the person is entitled to be represented. . . ." (Emphasis added) AS 18.85.110(f) provides for prompt action "(i)f the agency, before consideration by the court, determines that a person is entitled to be represented. . . ." (Emphasis added) AS 18.85.120(a) then provides explicitly "the determination. . . . shall be made by the agency or by the court. . . . When it is made by the agency it is subject to review by the court.

(b) Just as the administrative director of the Court System advised from his own experience and the recommendations of others in 1969, the reimbursement program provided in the statute has failed to result in repayments even amounting to the cost of the billing and collection effort. More disappointing is the finding that most of the money which is collected comes from native Americans in bush areas, probably intimidated by the techinical threats contained in the bill the Agency mails to them. As also noted, the Attorney General's office has not pursued collection efforts with much enthusiasm, feeling that most Public Defender clients cannot pay anyway. If collection efforts were increased, the costs of billing, investigating later ability to pay, and initiating collection would possibly cost the taxpayer more than would be collected. Certainly this will be true if Alaska Legal Services succeeds in its present suit challenging the denial of a subsequent hearing to determine ability to pay.

From a legal point of view, there is a growing body of theory and cases arguing that reimbursement contracts as conditions of defender assistance tend to discourage exercise of the right to counsel. The affidavit contained in Appendix X is at least one case where this claim is substantial.

Finally, there are strong public policy arguments for not charging a person for defense services, especially if the person is subsequently found innocent or has his case dismissed. The criminal process is not something a person enters voluntarily, or receives any beneficial service from. Where the person is found innocent, the penalty of having to pay heavily to preserve the presumption of innocence is extremely inequitable. Where the person is found guilty, the penalty imposed should come through the sentencing process which is specifically designed for that purpose. The National Advisory Commission on Criminal Justice Standards and Goals pointedly recommended that a defendant should be liable for partial costs if he is able to pay at the time of the prosecution, but that no defendant should be held liable for three years after. "The adverse effects of a criminal prosecution, both financial and otherwise, are so great for both convicted and

acquitted defendants, that there should not be added the deterrent disincentive to gainful employment that the Model Public Defender Act (very similar to the Alaska Act) would provide." Courts p. 258.

Of course, there is an exception. If a person has misrepresented his or her financial abilities, that person should be required to reimburse the Agency to the full extent of the costs to the Agency.

(c) Under the present statute, the court has the power to appoint a substitute defender "for cause," and the Agency has the responsibility for paying the cost of this counsel. Where the "cause" for such an appointment is a conflict of interest between the indigent defendant and the Public Defender Agency, which is true in practically every case, ethical and policy considerations militate against supervision of this substitute defender by the Public Defender. At the same time, the judge who makes the appointment does not have time to monitor and approve all expenses incurred by the substitute attorney. The consequence is the disproportionate costs per client manifested in the extreme by the Ladd case discussed in Chapter II.

If the most efficient, least expensive administration of the substitute defender program is desired, the fiscal responsibility for contractual services funds and the control power over how these funds are expended, must be placed in the same agency or person. Because of the conflict of interest between the client and the Public Defender Agency, it is not possible to place control powers within the Agency. The present Act rightly placed the choice of counsel outside the Agency.

Given the fact that the courts already have appointment power (and arguably should be supervising expenditures), they would have substantially greater motivation to actually control expenditures if the bills were paid from the Court System budget rather than the budget of another agency.

The annual appropriation of the Court System should be increased not only by the amount which is the cost of the substitute defender program, but also by an amount determined necessary to pay the additional cost of hiring an administrator to supervise and manage substitute defender services. While the discretion might be left to judges, they should not be left with the burden of that administration. (One new administrative position in the Court System might manage both the determination of indigency and the substitute defender program)

2. THE LEGISLATURE SHOULD FUND THE PROGRAM OF THE PUBLIC DEFENDER AGENCY WITHIN THE LIMITS OF THE RECOMMENDATIONS OF THIS REPORT.

It is a common observation in virtually all law enforcement and criminal justice studies, that the problems of crime cannot be solved by bolstering the resources of only one or a few components of the process. Criminal justice will only be as effective and efficient as its weakest link. Philosophical opposition to highly efficient defender services creates the same impediment to law and order as philosophical opposition to improvement of police and prosecution functions.

In the same manner that some pundits simplistically dismiss the seriousness of crime problems today, others offer simplistic solutions founded in impressions and efforts to find scapegoats. Emotions and political pressures to "respond," howsoever impulsively, make informed deliberation and rational appropriation a difficult task for the Legislature.

Nonetheless, what is minimally necessary at this point in time is for the Agency to be funded at the level required to achieve the efficiencies and consolidation of resources recommended in this Report.

C. Alaska Bar Association.

1. THE ALASKA BAR ASSOCIATION SHOULD EXAMINE THE POSSIBILITY OF TAKING AN ACTIVE PART IN ENSURING (A) THAT THE AGENCY IS ADEQUATELY INSULATED FROM THE EXTRANEOUS PRESSURES DELETERIOUS TO THE LAWYER-CLIENT RELATIONSHIP, (B) THAT THE AGENCY IS ADEQUATELY FUNDED, (C) THAT ATTORNEYS ARE ADEQUATELY TRAINED AND QUALIFIED, (D) THAT THE AGENCY IS ADMINISTERED IN A MANNER PROVIDING THE MOST EFFICIENT DEFENSE COUNSEL AND SERVICES, AND (E) THAT SUBSTANTIVE CRIMINAL LAW PROBLEMS ARE MADE KNOWN AND REFORMED.

As noted in the ABA Standards Relating to Providing Defense Services, "Counsel should be provided . . . not as a gratuity or form of public welfare, but as an essential part of the legal system that society has chosen as its instrument." (Standard 1.1, p. 14). As early as August 1964, the House of Delegates of the American Bar Association adopted the following recommendation:

> The American Bar Association believes that the legal profession of the United States has no more important or pressing task than to see to it that adequate provision is made everywhere to insure that competent counsel are provided for indigent defendants in serious criminal cases, as required by the Constitution and recent decisions of the Supreme Court, and to that end it urges state and local bar associations to treat this as a matter of first importance and endeavor by legislation, rule of court, or otherwise to see to it that in the courts in their states provisions are made which meet the standards which follow.

The Alaska Bar Association with its admission controls and disciplinary powers has a special responsibility to ensure that the adversary system functions effectively, "that the system providing counsel and facilities for the defense be as good as the system which society provides for the prosecution." (ABA Standards, p. 1) While state and local bar associations were eager and active to promote the creation of a Public Defender Agency in 1969, their involvement since has declined to a relationship most kindly identified as "benign neglect."

(a) It is extremely important that if public defender attorneys are to fulfill their professional responsibility to individual clients, they must be insulated from "considerations extraneous to professional competence." In this day of serious crime problems, the concept of providing defender services is sometimes confused with assisting criminality. The Alaska Bar Association, with its professional reputation and capacity for quality control, must ensure that criticisms against the Public Defender Agency are justified, and that the Agency is not merely victimized as a less politically powerful scapegoat for weaknesses in the Court System, judges, prosecution or police.

(b) The Alaska Bar Association should provide the Legislature with an annual assessment of the Public Defender Agency fiscal needs, and an annual evaluation of the program administration and a report on investigation of criticisms launched against the Agency during the past year.

(c) The Bar should evaluate the qualifications of criminal defense counsel, assist the Agency in identifying training needs, encourage private attorneys to assist in the training of public defender attorneys, and work with the Agency to develop continuing education programs in defense strategy and trial practice for all interested attorneys.

(d) The Bar Association should periodically evaluate the caseload, attorney-support ratio and equipment of the Public Defender Agency to ensure that clients are receiving the level of defense counsel and service extended to them by the Constitution, the statute, and the Canons of Professional Ethics. Where deficiencies are discovered, the Bar should assist the Agency in making necessary improvements, and should lend its support to legislation or financial appropriations where necessary.

(e) Perhaps one of the most serious voids created when criminal defense practice is left to a public agency, is the loss of involvement by private attorneys in the injustices of the criminal process and the loss of an effective political voice in achieving necessary substantive changes in criminal law. A public defender program represents an uninfluential constituency, capable of bringing little pressure to bear on legislators. Private lawyers, on the other hand, usually have considerably more "contact," legislative competency, and political clout. When private attorneys "get their hands dirty" in daily criminal law practice, they are generally more sensitive to the problems of the criminal justice system. More dialogue and greater pressure for reform comes sooner.

But it is not necessary to revert to a more costly, less efficient program of defender representation to continue the advantages of input from the private bar. The Alaska Bar Association, through a committee, can meet periodically with the Public Defender to discuss weaknesses and shortcomings appearing in the criminal justice process and requiring the assistance of the state bar to correct. The Bar Association, then, upon recommendation of its criminal defense committee, can utilize existing lobbying capabilities and other resources to attempt to influence change.

D. The Alaska Court System.

1. THE COURT SYSTEM SHOULD REVIEW ITS CALENDARING PROCEDURES TO DETERMINE WHETHER BETTER PERSONNEL MANAGEMENT OF ATTORNEYS' TIME IN THE PUBLIC DEFENDER AGENCY CAN BE ACHIEVED BY CHANGES IN CALENDARING.

At least a part of the problem the Agency has in meeting times set for hearings and trials arises from calendaring problems created within the Court System. The Administrative Director has already expressed concern to ensure that calendaring does not cause any delays in the criminal justice process. The Court System should take immediate action to ensure the most efficient management of attorney time (both prosecution and defense), not only to serve the economies of the courts but also the efficiencies of district attorney and public defender personnel management.

2. UNTIL SUCH TIME AS THE PUBLIC DEFENDER ACT IS AMENDED TO REFLECT CHANGES IN RECOMMENDATIONS B (1) (a) AND (c) ABOVE, JUDGES SHOULD EXERCISE THEIR AUTHORITY UNDER AS 18.85.120(a) TO MAKE INITIAL DETERMINATIONS AND TO REVIEW THE AGENCY'S DETERMINATIONS OF INDIGENCY; AND JUDGES SHOULD FRAME ORDERS APPOINTING SUBSTITUTE DEFENDERS IN A MANNER WHICH SAFEGUARDS THE FISCAL RESPONSIBILITY OF THE AGENCY BUDGET.

As noted in Chapter II, many judges are not even aware of the fact that they have review powers over the determination of indigency by the Agency. Some erroneously felt they were precluded by the Alaska Supreme Court decision in Dimwick v. Watt (discussed in Chapter II above). No Anchorage judge interviewed was interested in assuming reviewing responsibility. The policy reasons for why judges should make the determination of indigency are discussed in Recommendation B (1) (a) above.

As also noted in Chapter II, some serious imbalances of expenditures are created by lack of proper supervision of costs incurred by substitute defenders. During FY 1973, the average cost per case handled by substitute defenders being paid at prevailing rates was $669.87, while the average cost per case handled by Agency attorneys was $235.51. (Figures obtained from William Hogan, Division of Legislative Audit)

Clearly judges must maintain a neutral position in any trial, and cannot exercise day-by-day supervision of the affairs of counsel. But judges can and should frame their orders for substitute counsel and supportive services in a manner which places broad but reasonable restriction on the costs incurred.

September 29, 1967

Mr. Russ Arnett
President
Anchorage Bar Association

Enclosed is the proposed statute we have prepared and a few notes of explanation. We have not had time to prepare any budget estimate of the cost of this proposed legislation.

We recommend the director be in Juneau, and handle southeastern Alaska. There would be three staff attorneys in Anchorage and two in Fairbanks. There would be one investigator state-wide who would be stationed in Anchorage. There would be two secretaries in Anchorage, one in Juneau, and one in Fairbanks. Office facilities would have to be provided in these three communities.

In Addition, there would be contract arrangements with other areas to handle arraignments, pleas, preliminary hearings, and the less complicated trials.

PUBLIC DEFENDER COMMITTEE

Leroy Barker
Robert Erwin
William Fuld
James Singleton
Dennis Lazarus
Robert Ely
William Jacobs

Section 1. This shall be known as the Public Defender Act.

PUBLIC DEFENDER AGENCY ESTABLISHED.

Section 1a. There is created under the office of the governor a public defender agency.

Section 2. DIRECTOR. The agency is administered by the director of the public defender agency.

Section 3. DIRECTOR--APPOINTMENT--TERM--SALARY. The governor shall appoint the director for a four year term. The director shall be appointed from one of two or more persons nominated by the Judicial Council. The annual salary shall be $19,000 and shall not be decreased during the term of office.

Section 4. DIRECTOR--REMOVAL. The director shall be subject to removal during his term for cause only upon recommendation of the governor and upon concurrence of at least four members of the Judicial Council.

Section 5. DIRECTOR--ELIGIBILITY. A person is not eligible to the director unless he is admitted to the practice of law in this state.

Section 6. PRIVATE PRACTICE PROHIBITED. The director shall devote all his time to the duties of his office and shall not engage in the practice of law except in his capacity as director.

Section 7. PRIVATE CRIMINAL DEFENSE PROHIBITED. The director shall not during his term of office defend or assist in the defense of, or act as counsel for, any person accused of any crime in this state, except as set forth in this Act.

Section 8. DELEGATION OF FUNCTIONS. The director may assign the functions vested in the department to subordinate officers and employees.

Section 9. AGENCY STAFFS. The director may establish necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the principal director is

under the supervision, direction, and control of the director.

Section 10. RIGHT TO REPRESENTATION, SERVICES, AND FACILITIES.

a. A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation).

The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court determines need, is unable to provide for their payment without undue hardship.

b. A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel wouldbe entitled to be represented by an attorney and including revocation of probation or parole;

(2) to be represented in any appeal; and

(3) to be represented in any other post-conviction proceeding.

Section 11. NOTICE AND PROVISION FOR REPRESENTATION.

(a) If a person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled

to be so represented, the law enforcement officers concerned upon commencement of detention, or the court, upon formal charge, as the case may be, shall:

(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the public defender or trial court concerned, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

(b) Upon commencement of any later judicial proceeding relating to the same matter, the judge shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

(c) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney as the case may be.

(d) Upon notification or assignment under this section, the public defender, or assigned attorney, as the case may be shall represent the person with respect to whom the notification or assignment is made.

Section 12. DETERMINATION OF FINANCIAL NEED.

(a) The determination of whether a person is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 15, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

(b) In determining whether a person is a needy person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person, subject to the penalities for perjury, shall certify in writing or by other record such material factors relative to his ability to pay as the court prescribes.

(c) To the extent that a per son is able to provide for an attorney, the other necessary services and facilities of representatinn, and court costs, the court may order him to provide for their payment.

Section 13. SUBSTITUTE DEFENDER. At any stage , including appeal or other post-conviction proceedings, the court concerned may for good cause assign a private attorney to be substituted in place of the p ublic defender in a case.

Section 14. WAIVER. A person who has been appropriately informed under Section 3 may waive in writing, or by other record, any right provided by this Act, if the court conerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with English, and the complexity of the crime involved.

Section 15, RECOVERY FROM DEFENDANT.

(a) The attorney general may, on behalf of the state

recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under this Act:

(1) to which he was not entitled;

(2) with respect to which he was not a needy person when he received it; or

(3) with respect to which he has failed to make the certification required by Section 4(b);

and for which he refuses to pay or reimburse. Suit must be brought within 6 years after the date on which the aid was received.

(b) The Attorney General on behalf of the state, may recover payment or reimbursement, as the case may be, from each person, other than a person covered by subsection (a), who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to pay or reimburse the State for it according to the standards of ability to pay applicable under this Act, but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received.

(c) Amounts recovered under this section shall be paid into the state general fund.

Section 16. RECORDS AND REPORTS

(a) The director shall keep appropriate records respecting each needy person whom he represents under this Act.

(b) The defender shall submit an annual report to the legislature and Supreme Court showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in

carrying out the responsibilities imposed by this Act.

Section 17. DEFINITIONS

(1) "detain" means to have in custody or otherwise deprive of freedom of action;

(2) "expenses," when used with reference to representation under this Act, includes expense of investigation, other preparation, and trial;

(3) "needy person" means a person who at the time his need is determined is unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation;

(4) "serious crime" includes:

(i) a felony;

(ii) a misdemeanor or offense any penalty for which includes the possibility of confinement [for 6 months or more] or a fine of $[500] or more; and

(iii) an act that, but for the age of the person involved, would otherwise be a serious crime.

NOTES:

The basic act is patterned after the Uniform Law Commissioner's Model Defense of Needy Person's Act.

Section 3 is patterned after AS 22.05.080

Section 3 and 4 are in accordance with Sections 8 & 9 Article IV, Constitution of the State of Alaska.

Section 6 is patterned after Section 27705 of the California Government Code.

Section 7 is patterned after Section 27705.1 of the California Government Code.

Section 8 is patterned after AS 44.17.010.

Section 9 is patterned after AS 44.17.040

Section 13. This is designed to give the court the power to appoint a private attorney in place of the public defender. This might be necessary where two defendants are charged jointly and there is a conflict of interest between them. No provision is made for compensation of the appointed counsel because that is already provided for in Rule 15, Rules for the Administration of all courts.

THE LEGISLATIVE AFFAIRS COMMITTEE OF THE TANANA VALLEY BAR ASSOCIATION

The Bar Association's Legislative Affairs Committee was called to order on November 16, 1967, in order to consider a Public Defender Bill earlier approved by the Anchorage Bar Association and report on the same to the Tanana Valley Bar Association. Present at that meeting were Stephen S. DeLisio, Chairman, Judge Hugh H. Connelly and Lloyd I. Hoppner (via telephone). The other member of the Committee, James Blair of the State Attorney's Office, was unable to attend.

After a careful study of the proposed Public Defender Act, a copy of which is attached hereto, the Committee has the following recommendations:

1. The Public Defender Agency should be created under the judicial branch of the Government so there could be no possible conflict of interest between it and the office of the Attorney General (which is charged with prosecution of criminal actions in this State).

2. The director of the Agency should be appointed by a majority of the Supreme Court for a term of four years. At the conclusion of each four-year term, the members of the Alaska Bar Association should vote whether to retain or reject said director for an additional four-year term. If rejected, his successor would be selected once again by a majority of the members of the Supreme Court.

3. Under Section 10 of the Act, provision should be made that the Agency shall provide representation, services and facilities only to the extent its staff and facilities permit. It is quite conceivable that budgetary problems might arise making it physically impossible for the Agency to provide all of the services outlined under Section 10.

4. Section 10(a) should be amended to read:

> "A needy person who is being detained by a law enforcement officer for, or who is under ~~formal~~ charge of having committed, or is being detained under a conviction of, a serious crime,...."

As this provision reads now, a needy person detained by a law enforcement officer for any reason would be entitled to the services of the Public Defender's office. This would certainly put an unbearable strain on the Agency unless limited to a person detained for a serious crime.

[APPENDIX II]

The word "formal" should be stricken since a "formal charge" technically means an indictment or information. Certainly a person under a charge of a serious crime filed in the form of a complaint should be entitled to these services, even though a complaint is not deemed technically a formal charge.

In order to conform Section 10(b)(1) with the provisions of Section 10(a), the right of a needy person to be counseled and defended at all stages of a matter should be modified to show that this means only a matter involving a serious crime; and that representation relating to revocation of probation or parole applies only when the penalty assessable in the event of revocation exceeds six months imprisonment, or $500.00 fine. Section 10(b)(2) should be modified to relate only to appeals from conviction of serious crimes and Section 10(b)(3) should be modified to refer only to post-conviction proceedings relating to a serious crime as defined under the Act. These modifications of Section 10(b) are necessary so that a minimum criterion relating to the type of matter in which a needy person would be represented by the Agency is established.

5. Section 11(a) should be modified in the same manner as recommended for Section 10(a).

6. Section 12 relating to determination of financial need should be amended to provide that the Public Defender Agency can itself initially determine whether a person is a needy person within the meaning of the Act, such a determination being subject to later review by the court. In this way, the Agency can step in without having to wait for a formal court proceeding which may otherwise mean a considerable and harmful delay.

7. Section 15 which provides for recovery from the Defendant of reimbursement for legal assistance or other benefits provided under the Act at such time as the needy person becomes capable of paying the same, should be amended to provide that the Public Defender Agency, rather than the Attorney General, bring the action. It will be the agency which is expending its budgeted funds for representation of indigents, and the Agency could probably very well put to use the supplement they would receive by recovery of such reimbursements (if any). Moreover, the Agency would be in a better position to determine whether the needy person had become capable of making reimbursement.

8. Finally, a provision should be added to the proposed Act to entitle the various courts in Alaska to appoint the Agency or its authorized representative to represent an indigent in any instance where the court is otherwise empowered to appoint private counsel. Without such a provision, the court's right to appoint members of the Public Defender's office to represent needy persons is left in some doubt in view of the specialized character of the Agency. Emphasis

might also be included in this additional provision that wherever possible, again taking into consideration the Agency's capabilities in regard to staff and facilities, the court should appoint an Agency attorney to represent an indigent instead of private counsel.

With the exception of these recommended amendments, the Committee fully supports the Public Defender Act as proposed by the Anchorage Bar Association.

On December 2, 1967, I met with the Board of Governors of the Alaska Bar Association and reported on our Committee's work regarding the Act. Our recommendations were well received. In addition the Board suggested provisions be included: to permit the Agency to extend its services to a needy person charged with something less than a "serious crime" in the interest of justice and fundamental fairness; to permit the Agency to hire local private counsel if necessary (e.g., in Nome where travel and maintenance of an Agency staffer would exceed the cost of local counsel; and to give technical training to members of the private bar in criminal defense.

Moreover, the Board voted to send me and Hugh Connelly to Anchorage to meet with that Bar Association in an effort to draft a joint bill for adoption and support by the Board and Alaska Bar. That meeting is planned for Monday, December 11, 1967.

The Committee respectfully urges all members of the Tanana Valley Bar Association to support in any way possible the enactment of this Public Defender Act as amended in the manners recommended above by the Committee.

Respectfully submitted,

Stephen S. DeLisio

Stephen S. DeLisio, Chairman

Distributed to All Members of the
Tanana Valley Bar Association

B I L L

WHEREAS, the Courts of the United States and the State of Alaska have, in recent decisions, enlarged upon the duty of the Courts to provide counsel to indigent persons in criminal proceedings; and

WHEREAS, the number of indigent persons charged in criminal proceedings has increased considerably in the past several years; and

WHEREAS, private attorneys have heretofore provided, under Court appointment, such representation as has been necessary to protect the rights of such indigent persons; and

WHEREAS, the legal services provided by private attorneys has been without just compensation; and

WHEREAS, it is the duty of the public to sustain the cost of providing such representation; NOW THEREFORE BE IT ENACTED AS FOLLOWS:

Any attorney at law authorized to practice law in Alaska, upon being appointed by a competent State Court, and being required by said Court to represent an indigent person in a criminal proceeding, may apply to the Department of Administration for reimbursement for services rendered such indigent person at the rate of $20 per hour for each hour of service performed while not attending a Court hearing or trial, and at the rate of $25 per hour for each hour of service provided at a hearing or trial.

Provided, however, that the services billed to the Department of Administration have in fact been provided at the time such application is filed and provided further, that the appointing Judge or presiding Judge of the district wherein the

appointment was made certifies to the Commissioner of Administration that, in his opinion, the hours of services recited in the attorney's application were necessary to the proper and sufficient representation of the indigent person. The application by the attorney shall detail the services provided and the time spent thereon. The application shall be submitted to the Judge and shall be transmitted by the Judge together with his certificate to the Commissioner of Administration, or his authorized representative, for payment.

This payment shall be made out of appropriations to the Department of Administration for this purpose and shall be in lieu of any payment heretofore made out of appropriations made to the Court system or any part of the Court system for payment of attorneys fees.

DATED at Juneau, Alaska this____day of_____, 196____.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act creating a Public Defender Agency; and providing for an effective date."

WHEREAS, the United States Supreme Court has ruled that, pursuant to the terms of the United States Constituion, needy persons subject to prosecution for various criminal and quasi-criminal matters are entitled to legal counsel provided by the state in which they are being prosecuted; and

WHEREAS, the Supreme Court of the State of Alaska has held that, pursuant to the provisions of the Constitution of the State of Alaska, needy persons prosecuted in various criminal and quasi-criminal matters in this State are entitled to legal counsel provided by the State of Alaska; and

WHEREAS, the Legislature of the State of Alaska recognizes that justice and fundamental fairness dictate that the attorneys to be so provided by the State should be equally experienced in and knowledgeable of the practice of the criminal law as are members of the District Attorney's offices who prosecute said needy persons:

BE IT THEREFORE ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. There is created under the office of the governor a Public Defender Agency.

Section 2. DIRECTOR. The Agency shall be administered by the director of the Public Defender Agency.

Section 3. DIRECTOR--APPOINTMENT--TERM--SALARY. The governor shall appoint the director from among two or more persons nominated for that position by the Judicial Council. The director shall serve a term of four years, at the conclusion of

which the active and judicial members of the Alaska Bar Association shall be polled for their advice as to whether said director should be retained or replaced. In determining whether to retain or replace the director at the end of said term, the governor shall give due weight to said advisory vote by the Alaska Bar Association. The annual salary of the director shall be $19,000.00 and shall not be decreased during a term of office.

Section 4. DIRECTOR--REMOVAL. The director shall be subject to removal during his term for good cause only upon recommendation of the governor and upon concurrence therein by at least four members of the Judicial Council.

Section 5. DIRECTOR--ELIGIBILITY. A person is not eligible to be director unless he is admitted to the practice of law in this state.

Section 6. PRIVATE PRACTICE PROHIBITED. The director shall devote all of his time to the duties of his office and shall not engage in the practice of law except in his capacity as director.

Section 7. DELEGATION OF FUNCTIONS. The director may assign the functions vested in the Agency to subordinate officers and employees.

Section 8. AGENCY STAFFS. The director may establish necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the director is under the supervision, direction and control of the director.

Section 9. RIGHT TO REPRESENTATION, SERVICES AND FACILITIES. A needy person who is being detained by a law enforcement officer for, or who is under charge of having committed, or is being detained under a conviction of a serious crime is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of said representation (including investigation and other preparation).

The attorney, services and facilities, and the Court costs shall be provided at public expense to the extent that the person, at the time the Agency or the Court determines need, is unable to provide for their payment without undue hardship.

Section 10. NOTICE AND PROVISION FOR REPRESENTATION.

a. If a person how is being detained by a law enforcement officer for, or who is under charge of having committed, or is being detained under a conviction of a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned upon commencement of detention, or the Agency, or the Court, as the case may be, shall:

(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the Public Defender Agency or the Court, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

b. Upon commencement of any later judicial proceeding relating to the same matter, the Court shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

c. If a Court determined that the person is entitled to be represented by an attorney at public expense, it shall

promptly notify the Public Defender or assign an attorney as the case may be.

d. Upon notification or assignment under this section, the Public Defender or assigned attorney, as the case may be, shall represent the person with respect to whom the notification or assignment is made.

e. If the Public Defender Agency, prior to consideration by the Court, determines that the person is entitled to be represented by an attorney at public expense, it shall promptly undertake the representation of said person.

Section 11. DETERMINATION OF FINANCIAL NEED.

a. Initial determination of whether a person is a needy person under this Act may be made by the Agency subject to review by the Court in which action is pending against the person. Otherwise, determination of whether a person is a needy person shall be deferred until his first appearance in Court or in a suit for payment or reimbursement under Section 14 of the Act, whichever occurs earlier. Thereafter, the Court concerned shall determine with respect to each proceeding, whether he is a needy person.

b. In determining whether a person is a needy person and in determining the extent of his inability to pay, the Agency or the Court concerned, as the case may be, may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily preclude a finding that a person is needy. In each case, the person, subject to the penalities for perjury, shall certify under oath, and in writing or by other record, such material factors relative to his ability to pay as the Court prescribes.

c. To the extent that a person is able to provide for an attorney, the other necessary services and facilities of representation, and Court costs, the Court may order him to provide for the payment thereof.

Section 12. SUBSTITUTE DEFENDER. At any stage, including appeal or other post-conviction proceedings, the Court concerned may for good cause assign a private attorney to be substituted in the place of the Public Defender in a case. Said assigned private attorney shall be entitled to compensation for his services rendered pursuant to the provisions of the Alaska Rules of Criminal Procedure.

Furthermore, when the public interest requires, and a person is entitled to representation by the Agency under this Act, the director of the Agency may contract with one or more private attorneys to assist. The director shall pay for these services out of appropriations for the Public Defender Agency.

Section 13. WAIVER. A person who has been appropriately informed under Section 10 may waive in writing, or by other record, any right provided by this Act, if the Court concerned, at the time of or after waiver, finds of record that said person has acted with full awareness of his rights and of the consequences of a waiver, provided the waiver is otherwise according to law. The Court shall consider such factors as the person's age, education, familiarity with the English language, and the complexity of the crime involved in making such finding.

Section 14. RECOVERY FROM DEFENDANT.

a. The Attorney General may, on behalf of the State, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or other benefit under this Act:

(1) to which he was not entitled;

(2) with respect to which he was not a needy person when he received it; or

(3) with respect to which he has failed to make the certification required by Section 11(b); and for which he refused to pay or make reimbursement. Suit must be brought within six years after the date on which the aid or benefit was received.

b. The Attorney General, on behalf of the State, may recover payment or reimbursement, as the case may be, from each person, other than a person covered by subsection (a), who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to pay or reimburse the State for said assistance according to the standards of ability to pay applicable under this Act, but refuses to do so. Suit must be brought within three years after the date on which the benefit was received.

c. Amounts recovered under this section shall be paid into the State general fund.

Section 15. RECORDS AND REPORTS

a. The director shall keep appropriate records respecting each needy person represented by the Agency under this Act.

b. The director shall submit an annual report to the Legislature and Supreme Court showing the number of persons represented under the Act, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed on the Agency by this Act.

Section 16. DEFINITIONS.

(1) "detain" means to have in custody or otherwise deprive of freedom of action;

(2) "expenses", when used with reference to representation under this Act, includes any expense of investigation, other preparation, and trial;

(3) "needy person" means a person who at the time his need is determined is unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation;

(4) "serious crime" includes:

(i) any criminal matter in which a person is entitled to representation by an attorney pursuant to the Alaska Constitution and/or the United States Constitution;

(ii) an act that, but for the age of the person involved, would otherwise be a serious crime.

Section 17. EFFECTIVE DATE. As soon as possible following enactment hereof, a director shall be appointed. However, said appointment and all other provisions of this Act shall not become effective until July 1, 1968.

Section 18. SHORT TITLE. This title shall be cited as the Public Defender Act.

PROPOSED PUBLIC DEFENDER BUDGET

Public Defender (Atty VI Step C)	1 pos.		$24.012	
Asst P.D. (Atty V)	1	at $22,680		
	1	21,048	43,728	
Asst P.D. (Atty IV)	1	19,860	19,860	
Asst P.D. (Atty III)	2	17,676		
	1	19,044	54,396	
Sec I, Range 10	1	7,572		
Clerk Steno III, Range 9	1	7,572		
	2	7,032	21,636	
Clerk Steno II, Range 8	1	6,540	6,540	
			170,172	
	Benefits at 14%		23,824	
Total Personal Services				$193,996

TRAVEL & PER DIEM

Travel (70 trips [10 per atty] at $100)	7,000	
Per diem (150 days at $21)	3,150	
Total travel and perdiem		10,150

CONTRACTUAL SERVICES-RENTS

Facilities:	Anchorage 600 sq. ft at .50	3,600	
	Fairbanks 400 sq. ft at .55	2,640	
	Juneau 400 sq. ft at .40	1,920	
	Total Rents	8,160	
	Utilities-Telephone	+4,080	
			12,240

OFFICE EQUIPMENT

Desks:	7	$250	1,750	
	5	180	900	
Chairs	11	50	550	
	14	40	560	
Typewriters	5	450	2,250	
Dict. Equipment	3	300	900	
File cabinets	6	100	600	
Bookcases	7	60	420	
Total Office Equipment				7,890

SUPPLIES

(Based on 12 man office D. A. Fairbanks)		
Professional and scientific supplies	500	
Law books	900	
Office supplies	1,200	
Postage	1,000	
		3,600
Professional fees and services		32,124
TOTAL PROGRAM		260,000

COST ESTIMATE

ALASKA PUBLIC DEFENDER PROGRAM

At the request of the Alaska Bar Association and the Alaska Legislative Council, the Administrative Office of the Alaska Court System, made a study of the costs of a minimum program for representing indigent defendants under a public defender system. The preliminary figure, based upon previous studies, indicated a minimum program would cost approximately $320,200.00.

Subsequently, after having seen the proposed public defender legislation, it appears that the previous estimate must be revised somewhat upwards.

Under this revised estimate the public defender professional staff salaries are equated with those of the District Attorney's staff's. The salaries of other personnel and other costs are somewhat comparable to those of the court system and certain departments of the executive branch of government.

The amounts representing rent may be considered somewhat high and the figures representing other expenses may in varying degrees be somewhat low. However they should reflect a fairly close picture of ultimate costs.

The figures which roughly estimate travel and per diem contemplate all areas of the state including court appearances and investigations in outlying areas.

The estimate also does not contemplate the purchase of law books or libraries, as it is assumed that the public defender regional offices will have close access to Alaska Court System libraries. Necessary office books such as Alaska Statutes and Rules could probably be paid for from this estimated budget.

Staff:

Professional - Nine Lawyers
Secretarial - Nine Steno-typists

ORGANIZATION AND COSTS BY LOCATION

Director's Office

1 Director (No location specified) Salary		$22,500.00	
1 Executive Secretary I		9,108.00	
Rent		8,500.00	
Office Equipment		3,500.00*	
Supplies and Commodities		1,000.00	
Utilities		2,500.00	
Travel and Per Diem		8,500.00	
	Total		$55,608.00

Anchorage Office

Public Defender Salary		$19,000.00	
2 Asst. Public Defender Salaries	$17,500	35,000.00	
1 Secretary III (Range 12)		8,496.00	
2 Clerk-Steno III (Range 9)	$6,948	13,896.00	
Rent		16,000.00	
Office Equipment		5,000.00*	
Supplies and Commodities		2,500.00	
Utilities		2,500.00	
Travel and Per Diem		12,500.00	
	Total		$114,892.00

Juneau Office

Public Defender Salary		$19,000.00	
Asst. Public Defender Salary		17,500.00	
Secretary II (Range 10)		7,488.00	
Clerk-Steno III (Range 9)		6,948.00	
Rent		9,000.00	
Office Equipment		3,500.00*	
Supplies and Commodities		1,500.00	
Utilities		2,000.00	
Travel and Per Diem		8,500.00	
	Total		$75,436.00

Fairbanks Office

Public Defender Salary		$19,000.00	
Asst. Public Defender Salary		17,500.00	
Secretary II (Range 10)		7,488.00	
Clerk-Steno III (Range 9)		6,948.00	
Rent		10,000.00	
Office Equipment		3,500.00	
Supplies and Commodities		1,500.00	
Utilities		3,000.00**	
Travel and Per Diem		12,000.00**	
	Total		$80,936.00

Ketchikan Office

Public Defender Salary	$19,000.00	
Secretary II (Range 10)	7,488.00	
Rent	6,000.00	
Office Equipment	2,500.00	
Supplies and Commodities	1,000.00	
Utilities	1,750.00	
Travel and Per Diem	5,000.00	
Total		$42,738.00
TOTAL PROGRAM		$369,610.00

* Non-recurring Costs
** Increased Rate Contemplates
Including Second Judicial District

1. DO YOU FAVOR A PUBLIC DEFENDER PLAN?

YES

Barber	Fink [1]	Lake	Moran
Brady	Guess	Lottsfeldt	Rader
Chance	Josephson	McVeigh [3]	Schwam
Cornelius	Kay	Metcalf	Simpson
Dickerson	Koslosky [2]	Moore	Smith
			Wiggins

UNDECIDED

Lewis
J. Harris

NEED MORE INFORMATION

Beirne	Rettig
Dodson	Sheppard
Gay	Sweet
Lesh	Wright

NO ANSWER

Hillstrand ("Thought the Public Defender bit had been taken care of. Frank Harris [according to newspaper ads] is supposed to be it.")

[1] Subject to availability of money.
[2] However, would like more information as to yearly cost.
[3] Subject to condition defendant reimburse state within 5 years if he finds remunerative employment.

February 6, 1969

State Senator Terry Miller, Chairman
Senate Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Dear Senator Miller:

At your request I have analyzed Senate Bills 7 and 43, both of which create a public defender agency. Apparently there will be no differences in the budget impact between the two bills.

Inasmuch as neither bill establishes the exact structure and extent of the public defender offices and locations for same, I am having to use my own judgment in the organization of the public defender staff. Of course, I am using comparable positions and costs similar to those of the court system and the Department of Law.

Based upon your request I am hereby submitting a cost estimate of a public defender program. For the aforesaid reasons, the figures must necessarily be approximations. The amounts representing rent may be considered somewhat high and the figures representing other expenses may be in varying degrees somewhat low. However, they should reflect a fairly close picture of ultimate costs of the minimum program which I have outlined.

We would also point out that we have estimated travel and per diem somewhat higher than that of the court system, inasmuch as they must service larger areas from central locations under this plan.

The estimate also does not contemplate the purchase of law books for libraries, as it is assumed that the public defender regional offices will have close access to Alaska court system libraries which are used by most of the lawyers. Even so, necessary office books such as Alaska Statutes and Rules could probably be paid for from this estimated budget.

We note that in your letter of February 3rd you have specified Monday, February 17, 1969, at 7:00 p.m. as the time for the hearing on the public defender bills by the joint Senate-House Judiciary Committees. Since I must be in Juneau on that evening in preparation for our appearance before the Finance Committee the following day, I will be personally available at your request.

We earnestly hope that this effort will be of some assistance to you and your committee.

Sincerely,

Robert H. Reynolds
Administrative Director

RHR/ld
Enclosure

ORGANIZATION AND COST ESTIMATE

ALASKA PUBLIC DEFENDER PROGRAM
(S.B. 7 and S.B. 43)

Staff:

Professional - Nine (9) lawyers
Secretarial - Nine (9) steno-typists
Investigative - Three (3) investigators

Organization and Costs by Location

Public Defender's Office

1 Public Defender (Attorney VII Range 27) (No location specified) Salary	$20,784.00	
1 Executive Secretary I	9,108.00	
Rent	8,500.00	
Office Equipment	3,500.00*	
Supplies and Commodities	1,000.00	
Utilities	2,500.00	
Travel and Per Diem	8,500.00	
Total		$53,892

Anchorage Office

Asst. Public Defender (Attorney VI Range 26) Salary	$19,620.00	
2 Asst. Public Defender (Attorney V Range 24) Salaries - $17,484.00 each	34,968.00	
Investigator (Range 19)	13,644.00	
1 Secretary III (Range 12)	8,496.00	
2 Clerk-Steno III (Range 9) $6,948	13,896.00	
Rent	16,000.00	
Office Equipment	5,000.00*	
Supplies and Commodities	2,500.00	
Utilities	2,500.00	
Travel and Per Diem	12,500.00	
Total		$129,124

Juneau Office

Asst. Public Defender (Attorney VI Range 26) Salary	$19,620.00	
Asst. Public Defender (Attorney V Range 24) Salary	17,484.00	
Investigator (Range 19)	13,644.00	
Secretary II (Range 10)	7,488.00	
Clerk-Steno III (Range 9)	6,948.00	
Rent	9,000.00	
Office Equipment	3,500.00*	
Supplies and Commodities	1,500.00	
Utilities	2,000.00	
Travel and Per Diem	8,500.00	
Total		$ 89,684.0

Fairbanks Office

Asst. Public Defender (Attorney VI Range 26) Salary	19,620.00	
Asst. Public Defender (Attorney V Range 24) Salary	17,484.00	
Investigator (Range 19)	13,644.00	
Secretary II (Range 10)	7,488.00	
Clerk-Steno III (Range 9)	6,948.00	
Rent	10,000.00	
Office Equipment	3,500.00*	
Supplies and Commodities	1,500.00	
Utilities	3,000.00	
Travel and Per Diem	12,000.00**	
Total		$ 95,184.0

Ketchikan Office

Asst. Public Defender (Attorney V) (Range 24) Salary	17,484.00	
Secretary II (Range 10)	7,488.00	
Rent	6,000.00	
Office Equipment	2,500.00*	
Supplies and Commodities	1,000.00	
Utilities	1,750.00	
Travel and Per Diem	5,000.00	
Total		$ 41,222.0

TOTAL PROGRAM $409,106.0

*Non-recurring Costs
**Increased Rate Contemplates Including Second Judicial District

PROPOSED PUBLIC DEFENDER BUDGET

Public Defender (Atty VI Step C)	1 pos.		$ 24,012	
Asst. P.D. (Atty V)	1	at $22,680		
	1	21,048	43,728	
Asst. P.D. (Atty IV)	1	19,860	19,860	
Asst. P.D. (Atty III)	2	17,676		
	1	19,044	54,396	
Sec. I. Range 10	1	7,572		
Clerk Steno III, Range 9	1	7,572		
	2	7,032	21,636	
Clerk Steno II, Range 8	1	6,540	6,540	
			170,172	
Benefits at 14%			23,824	
Total Personal Services				$193,996

TRAVEL & PER DIEM

Travel (70 trips [10 per atty] at $100)	7,000	
Per diem (150 days at $21)	3,150	
Total travel and per diem		10,150

CONTRACTUAL SERVICES-RENTS

Facilities: Anchorage 600 sq. ft. at .50	3,600	
Fairbanks 400 sq. ft. at .55	2,640	
Juneau 400 sq. ft. at .40	1,920	
Total rents	8,160	
Utilities-Telephone	+4,080	
Total contractual services-rents		12,240

OFFICE EQUIPMENT

Desks	7	$250	1,750	
	5	180	900	
Chairs	11	50	550	
	14	40	560	
Typewriters	5	450	2,250	
Equipment	3	300	900	
File Cabinets	6	100	600	
Bookcases	7	60	420	
Total office equipment				7,890

SUPPLIES

(based on 12-man office D.A. Fairbanks)		
Professional and scientific supplies	500	
Law books	900	
Office supplies	1,200	
Postage	1,000	
		3,600
Professional fees and services		32,124
TOTAL PROGRAM		$260,000

AFFIDAVIT

STATE OF ALASKA)
: SS.
FIRST JUDICIAL DISTRICT)

Pia Liedecke, of lawful age, being first sworn, upon her oath deposes and says as follows:

1. That she was arrested on Friday, September 8, 1972 in Juneau, Alaska, and charged with a violation of A.S. 17-12-010, which, upon conviction, would have subjected her to a penalty under A.S. 17-12-110(a).

2. That at the time of her arrest she was, and to this day remains an indigent person unable to provide for payment of attorney services and facilities and court costs without undue hardship.

3. That on the afternoon of Friday, September 8, 1972 she appeared in the District Court in Juneau, Alaska, at which time she was advised of the charges against her and her rights; due to her indigency she was represented at that hearing by the Public Defender, and at said hearing entered a plea of not guilty.

4. That early the following week she was informed by the Public Defender that he would have to present her with a bill for his services, and that if she had the ability to do so within the next three years she could be compelled to pay the bill.

5. That upon being informed of her financial responsibilities under the law she again proclaimed her innocence, stated that she could not and would not pay for the services of the Public Defender, that she did not believe it was right to have to pay, that she would defend herself and that the Public Defender was to no longer be or act as her attorney.

(Appendix X)

6. That after that she began to prepare her own defense to the accusation.

7. That on September 14, 1972 the Assistant District Attorney for the First Judicial District at Juneau dismissed the charge against her without assistance from the Public Defender.

Further affiant sayeth not.

Pia Liedecke

Pia Liedecke

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 18th day of October, 1972 by Pia Liedecke.

Notary Public For Alaska
My commission expires: 1/12/75