Resolution 107
Adopted by ABA House of Delegates
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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
CRIMINAL JUSTICE SECTION
SECTION OF LITIGATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges that the following steps be taken to fulfill the constitutional guarantee of effective assistance of counsel under the Sixth Amendment as prescribed in decisions of the United State Supreme Court:

1. State and territorial governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should, at a minimum, be substantially comparable with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects;

2. State and territorial governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings;

3. The federal government should provide substantial financial support to the states and territories for the provision of indigent defense services in state criminal and juvenile delinquency proceedings;

4. Attorneys and defense programs should, consistent with ethical obligations, discontinue indigent defense representation, and/or decline to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations;

5. Judges should, consistent with state and territorial rules and canons of professional and judicial ethics:
   a. fully respect the independence of defense lawyers who represent the indigent;

31 b. take appropriate action with regard to defense lawyers who violate ethical
32 duties to their clients;
33 c. take appropriate action with regard to prosecutors who seek to obtain
34 waivers of counsel and guilty pleas from unrepresented accused persons,
35 or who otherwise give legal advice to such persons, other than the advice
36 to secure counsel;
37 d. never attempt to encourage persons to waive their right to counsel, and
38 accept no such waivers unless they are knowing, voluntary, intelligent,
39 and on the record;
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41 6. State, territorial and local bar associations should be actively involved in
42 evaluating and monitoring the system for appointing and compensating counsel in
43 criminal and juvenile delinquency proceedings to ensure that defense counsel is
44 provided in all cases to which the right to counsel attaches and that independent
45 and quality representation is furnished;
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47 7. Community organizations and individual citizens should become involved in
48 efforts to reform indigent defense systems

REPORT

Introduction

In *Gideon v. Wainwright*,[1] the U.S. Supreme Court in 1963 rendered one of its most important criminal justice decisions, holding that the Sixth and Fourteenth Amendments to the Constitution guarantee the provision of counsel to indigent persons accused of crime in state felony proceedings.[2] The rationale for this decision is contained in the following passage:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[3]

In 2003, to commemorate the 40th anniversary of *Gideon v. Wainwright*, the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) undertook to examine whether this country has realized the noble ideal articulated in *Gideon*—that all accused persons, even those who are too poor to hire a lawyer, must receive adequate representation to ensure that "every defendant stands equal before the law." SCLAID convened four public hearings, during which thirty-two witnesses from twenty-two states presented testimony regarding the provision of indigent defense services in their respective state courts.[4]

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1 372 U.S. 335 (1963).
2 *Id.* at 341-345.
3 *Id.* at 344.
4 The states featured in these hearings were: Alabama, California, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Washington. Every effort was made to obtain witnesses with extensive experience and familiarity with the delivery of indigent defense services in their respective jurisdictions. Since time and resource constraints necessitated limiting the number of states and witnesses involved in the hearings, this report does not contain information regarding jurisdictions not specifically addressed by witnesses. It should be noted that witnesses were asked to focus their testimony primarily on indigent defense services in criminal cases generally, as opposed to representation in specific types of cases—such as juvenile delinquency or death penalty cases—that involve unique issues meriting further, comprehensive review beyond the scope of this report. Important improvements in indigent defense have occurred in several states since our hearings (most notably in Georgia, where legislation was enacted establishing a statewide public defender system effective January 2005); thus, some of those states' problems cited in this report may now be addressed.

This recommendation and report to the House of Delegates are based upon testimony at SCLAID's hearings, and draw upon the expertise that the Committee has developed during its many years of advocacy on behalf of effective legal services for both persons in need of civil legal assistance and those accused of criminal and juvenile misconduct. SCLAID has also published a full report of its findings, entitled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*; that document includes a detailed analysis of the problems that remain in our indigent defense system 40 years after the *Gideon* decision.

The hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States; forty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country.[5]

The Right to Counsel: Gideon and Beyond

The *Gideon* decision marked the beginning of the Supreme Court's efforts to define the contours of a defendant's federal constitutional right to counsel in state courts. Subsequent decisions by the Court extended the right to counsel to state juvenile delinquency proceedings,[6] state misdemeanor proceedings in which actual imprisonment is imposed,[7] state misdemeanor proceedings in which a suspended jail sentence is imposed,[8] and the first appeal to an appellate court.[9] Additionally, the Court has recognized that the right to counsel attaches at various critical stages occurring prior to trial, including line-up identifications,[10] arraignment,[11] preliminary hearings,[12] plea negotiations,[13] and the entry of a guilty plea.[14]

Indigent Defense Systems

State and local governments have responded to the constitutional mandate to provide legal representation through the establishment of a variety of indigent defense delivery systems. The primary models for furnishing counsel include: (1) traditional "public defender" programs, in which salaried attorneys provide representation in indigent cases; (2) court assignments of indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) contracts in which private attorneys agree to provide representation in indigent cases.[15] In many

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5 ABA SCLAID's hearings focused solely on state indigent defense systems, as opposed to the federal indigent defense system, because the federal system is considerably better funded and supported than are state systems and it is widely acknowledged that the most serious systemic problems occur in the states.
6 In re Gault, 387 U.S. 1, 41 (1967).
7 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
8 Alabama v. Shelton, 535 U.S. 654, 662, 674 (2002).
9 Douglas v. California, 372 U.S. 353, 355-357 (1963).
10 United States v. Wade, 388 U.S. 218, 224 (1967).
11 Hamilton v. Alabama, 368 U.S. 52, 55 (1961).
12 United States v. Ash, 413 U.S. 300, 311 (1973); Coleman v. Alabama, 399 U.S. 1 (1970).
13 White v. Maryland, 373 U.S. 59, 60 (1961).
14 Iowa v. Tovar, 124 S.Ct. 1379, 1383 (2004); Argersinger v. Hamlin, 407 U.S. 25, 34 (1972); White v. Maryland, 373 U.S. 59 (1963).
15 Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW AND CONTEMP. PROBS. 31, 32 (1995).

states, a mixture of these systems is used to provide counsel to the indigent accused.[16] Systems may be organized at the state, county, judicial district, or other regional level.[17] Further, funds for defense services may derive from the state, counties, cities, court fees or other assessments, or a combination of these sources.[18]

Importance of Providing Adequate Defense Representation

Recent surveys show that the public strongly supports effective defense counsel for people accused of crimes who cannot afford lawyers.[19] A majority of Americans believe that government should guarantee effective indigent defense services.[20] This belief derives from concerns about disparities in the treatment of rich and poor, as well as the potential for innocent persons being sent to jail simply because they cannot afford adequate legal representation.[21]

The mounting evidence of wrongful convictions over the past decade is undeniable proof that the fear voiced in public opinion surveys is indeed a harsh reality.[22] Although there undoubtedly are a variety of causes of wrongful convictions—including police and prosecutorial misconduct, coerced false confessions, eyewitness identification errors, lying informants—inadequate representation often is cited as a significant contributing factor.[23]

The Report of the 2000 National Symposium on Indigent Defense sponsored by the U.S. Department of Justice emphasized the importance of an effective defense: "There are many ways that innocent people may be drawn into the criminal justice system….But there is one overarching way that innocent indigent people can be extricated from the system: by furnishing competent legal representation."[24]

While it is impossible to know the actual number of innocent persons convicted of crimes in this country, studies in recent years have proven that the phenomenon is much more common than once believed.[25] One study estimates that the annual number of wrongful convictions in serious felony cases nationwide may be as high as 10,000,[26] yet that number only accounts for persons found innocent following conviction at trial and does not include innocent persons who plead guilty prior to trial.[27] As of December 2004, the Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University lists profiles of 154 persons, convicted of both capital and non-capital crimes in 31 different states and the District of Columbia, who collectively served more than 1,800 years in prison for crimes they did not commit.[28]

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16 *Id.* at 32.
17 *Id.* at 37.
18 *Id.* at 41.
19 BELDON RUSSONELLO & STEWART, OPEN SOCIETY INSTITUTE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION (20020.
20 *Id.* at 3.
21 *Id.* at 1
22 *See* C. RONALD HUFF & ARYE RATNER, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 858 (2004); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839, 1844 (2000).
23 *See* Lefstein, *supra* note 22, at 868; SCHECK ET AL, *supra* note 22, at 183-192; HUFF & RATNER, *supra* note 22, at 76-77.
24 OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE, at 75 (2000) [hereinafter 2000 NAT'L SYMPOSIUM ON INDIGENT DEFENSE]
25 *See* Lefstein, *supra* note 22, at 858-860.
26 *See* RADELET ET AL., *supra* note 22, at 54-62.
27 *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?,* 49 RUTGERS L. REV. 1317, 1343 (1997).
28 *See* The Innocence Project, at http://www.innocenceproject.org.

Problems in Indigent Defense

The testimony presented by witnesses at SCLAID's hearings clearly revealed that *Gideon's* promise of effective legal representation for indigent defendants is not being kept. Far from ensuring that individuals are afforded a meaningful right to counsel, current indigent defense systems often operate at substandard levels and provide woefully inadequate representation. Witnesses described programs bereft of the funding and resources necessary to afford even the most basic tools essential for an effective defense. As a result, literally thousands of accused poor persons who are unable to afford counsel routinely are denied, either entirely or in part, meaningful legal representation.

Too often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations. To make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment. Further, the structure of indigent defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients. Taken as whole, deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them.

Lack of Adequate Funding

Quality legal representation cannot be rendered unless indigent defense systems are adequately funded.[29] Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept cases, the lawyers who provide services often are saddled with excessive caseloads, further hampering their ability to represent their clients effectively. Additionally, the lack of funding leads to inadequate support services by decreasing the availability of resources for training, research, and basic technology, as well as the indispensable assistance of investigators, experts, and administrative staff.

Throughout the hearings, witnesses from each of the twenty-two states examined reported grave inadequacies in the available funds and resources for indigent defense. One witness illuminated the extent of the problem using international comparison data: "To put this matter in some perspective, I studied this past year what England does in the area of criminal legal aid. The expenditures per capita are $34 per person in England and Wales. In the United States, the comparable figure is about $10 per person, and in 29 states the expenditures are less than $10 per capita. England is outspending the United States by more than three to one."

National standards for the delivery of indigent defense services recognize that governments must be responsible for funding the full cost of quality legal representation.[30] Further, standards recommend that funding be provided by the state, because the financial obligation is most easily borne by the state and central financing avoids inconsistencies in funding levels among counties or other subdivisions.[31]

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[29] *See* Lefstein, *supra* note 22, at 846 nn.53-54.

[30] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 9.1 (2003) [hereinafter ABA, Death Penalty]; ABA Standards for Criminal Justice: Providing Defense Services Standard 5-1.6 (3d ed. 1992) [hereinafter ABA, Providing Defense Services].

[31] ABA Ten Principles of a Public Defense Delivery System Principle 2 (2002) [hereinafter ABA, Ten Principles]; Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 13.6 (1973) [hereinafter Nat'l Advisory Comm'n.]; Nat'l

In eight of the states examined during the hearings, states furnish all of the funding for indigent defense. In the other fourteen states, counties provide most or all of the funding. Numerous witnesses testified to the chronic inability of budget-stretched counties in their states to provide adequate funding for indigent defense. Varying levels of local funding for indigent defense means that the measure of justice received by an indigent defendant may depend more upon location than the actual merits of a case. According to a witness from Louisiana, local funding in that state derives from court costs assessed against defendants for criminal violations and varies dramatically depending upon factors as unpredictable as the number of traffic tickets issued by local police each month. In states where some or all of the funding is provided by the state, the amount of state funding is grossly insufficient.

Inadequate Attorney Compensation

National standards recognize the importance of providing reasonable compensation to defense attorneys, both for reasons of fairness and to encourage vigorous representation.[32] Public defenders should be paid at a rate sufficient to attract qualified, career personnel;[33] assigned counsel should be paid a reasonable hourly fee in addition to actual overhead and expenses;[34] and contracts for indigent defense services should include reasonable compensation levels and a designated method of payment.[35]

However, witnesses confirmed that inadequate compensation for private "assigned counsel" defense attorneys is a national problem, which makes the recruitment and retention of experienced attorneys extraordinarily difficult. A witness from Illinois described the situation in that state as follows: "Our statute provides that for a misdemeanor case, assigned counsel can be paid a fee of $150, and for a felony case, $1,250. That statute has not been changed for twenty-five years. In Rhode Island, until recently, hourly fees ranged from $30-$40 for assigned counsel and were too low to attract qualified, competent attorneys. In Massachusetts, similarly low hourly rates have led to a shortage of private attorneys willing to take cases.

In addition, starting salaries for public defenders in Massachusetts are $35,000 and rise to only $50,000 after ten years. Low salaries have led to serious recruitment problems for that state's public defender program, as well as for the statewide program in New Mexico.

Attorneys providing indigent defense services through contracts do not appear to fare any better than public defenders or assigned counsel. For example, contract defenders in one Louisiana parish provide for their own office out of the $34,000 per year they receive in funding. Further, as witnesses from Illinois and Washington noted, the problem of inadequate attorney

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STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SERVICES Guidelines 2.17, 2.18 (1976) [hereinafter NAT'L STUDY COMM'N].

32 ABA, DEATH PENALTY, *supra* note 30, Guideline 9.1; ABA, TEN PRINCIPLES, *supra* note 31, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standards 5-2.4, 5-3.3(b)(ix), 5-4.1; NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.3 (1989) [hereinafter NLADA, ASSIGNED COUNSEL]; NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOV'TAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Guideline III-10 (1984) [hereinafter NLADA, CONTRACTS]; NAT'L STUDY COMM'N, *supra* note 42, Guideline 3.2.

33 ABA, TEN PRINCIPLES, *supra* note 31, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-4.1.

34 ABA, TEN PRINCIPLES, *supra* note 31, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-2.4; NLADA, ASSIGNED COUNSEL, *supra* note 38, Standard 4.7.3.

35 ABA, TEN PRINCIPLES, *supra* note 31, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-3.3(b)(ix); NLADA, CONTRACTS, *supra* note 32, Guideline III-10.

compensation often is compounded because many attorneys providing indigent defense services have enormous law school debts, yet are unable to obtain loan forgiveness.[36]

Lack of Essential Resources Including Expert, Investigative, and Support Services

The U.S. Supreme Court has recognized that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[37] National standards also have long recognized that indigent defense counsel must be provided with necessary resources such as office equipment, technology, legal research, support staff, paralegals, investigators, forensic services, and experts.[38] However, witnesses testified that attorneys are denied access to these basic tools essential to mounting an adequate defense. For example, witnesses from Washington and Pennsylvania reported that public defenders historically have operated with grossly inadequate office equipment and technology as well as insufficient support staff and expert witness funding.

Lack of Training

The practice of criminal law is a complex field necessitating continuous and comprehensive training for all indigent defense service providers. Toward that end, national standards recommend that public funds be used to provide effective training, professional development, and continuing education to all counsel and staff involved in the delivery of indigent defense services.[39] Witnesses emphasized a complete lack of compliance with these standards in states including Louisiana, Montana, Nevada, New Mexico, New York, Pennsylvania, and Texas.

Short-Sighted Cost–Cutting Measures

- Use of Contracts Awarded Primarily on the Basis of Cost

To comply with national standards, contracts for indigent defense services should not be awarded primarily on the basis of cost, but should include certain essential elements, including attorney performance requirements; minimum attorney qualification and experience requirements; types of cases covered and allowable workloads for attorneys; measures to address excessive workloads; policies for addressing cases with conflicts of interest; restrictions on the private practice of law; reasonable compensation levels and a mechanism for obtaining extraordinary compensation in unusually complex cases; funding for sufficient support, expert,

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[36] *See* COMM'N ON LOAN REPAYMENT AND FORGIVENESS, ABA, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE, 10-11, 14, 27-28 (2003) (finding that low salaries and educational debt lead to serious recruitment and retention problems in government and public service agencies, including public defender offices).

[37] Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (defendant in capital trial must be provided with funds to hire expert psychiatrist where sanity is only material issue). *See also* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("defendants facing felony charges are entitled to the effective assistance of competent counsel").

[38] ABA, DEATH PENALTY, *supra* note 30, Guideline 4.1; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-1.4; NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 4.6; NLADA, CONTRACTS, *supra* note 32, Guideline III-8; NAT'L STUDY COMM'N, *supra* note 31, Guideline 3.4; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.14.

[39] ABA, DEATH PENALTY, *supra* note 30, Guideline 8.1; ABA, TEN PRINCIPLES, *supra* note 31, Principle 9; NAT'L LEGAL AID AND DEFENDER ASS'N, DEFENDER TRAINING AND DEV. STANDARDS (1997); ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-1.5; NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 4.3; NLADA, CONTRACTS, *supra* note 32, Guideline III-17; NAT'L STUDY COMM'N, *supra* note 31, Guidelines 5.7, 5.8; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.16.

and investigative services; the provision of or access to an appropriate library; a system for case management and reporting; and grounds for termination of the contract by the parties.[40]

Nevertheless, witnesses testified that indigent defense contracts in some states continue to be awarded on a flat fee basis to the lowest bidder without regard to qualifications or any other considerations. A witness from Washington remarked, "simply awarding defender contracts to the lowest bidder can often serve to remind us of the old adage that 'you get what you pay for.' There can be no doubt that the cost of prosecuting a case again several years later is more expensive in many ways: to the defendant, to the alleged victim, and to the justice system as a whole, in terms of money and, perhaps even more significantly, in terms of public confidence."

- Unduly Restricting Eligibility for Indigent Defense Services

To guide determinations of eligibility for indigent defense services, national standards generally recommend that "counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship."[41]

Several witnesses testified that outdated eligibility requirements, as well as concerted efforts to restrict eligibility for defense services, result in the routine denial of counsel to the indigent accused. In South Dakota, for example, the availability of services differs widely among counties because magistrates determine eligibility, not a central, statewide authority. A witness from New York testified that eligibility for defense services often is restricted unconstitutionally in that state for the sole purpose of containing the costs of local systems.

- Requiring Payment of Fines or Costs from Indigent Defendants

The U.S. Supreme Court has held that a person may not be imprisoned for inability to pay a fine imposed as punishment for a criminal offense.[42] Yet, a witness testified that in most places in Georgia indigent defendants plead guilty without counsel and are fined substantially at sentencing without any inquiry as to whether they can afford to pay. The fines usually are required to be paid in installments as a condition of probation, and if a defendant misses a payment, imprisonment for violation of probation can result.

In *Fuller v. Orgeon*,[43] the Supreme Court upheld a state statute requiring repayment of counsel costs from convicted indigent defendants because the statute provided adequate procedural safeguards to ensure that the imposition of costs did not chill the exercise of an indigent defendant's right to counsel.[44] Despite the Court's decision, ABA standards recommend against requiring reimbursement of counsel costs at the termination of court proceedings, except where defendants have made fraudulent representations for the purposes of being found eligible for counsel.[45] Further, ABA standards recommend against requiring persons to contribute to the costs of counsel at the time counsel is appointed or during the course of trial proceedings unless there are "satisfactory procedural safeguards."[46]

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[40] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standards 5-3.1, 5-3.2, 5-3.3. *See also* ABA, TEN PRINCIPLES, *supra* note 31, Principle 8; NLADA, CONTRACTS, *supra* note 32, Guidelines III-2 through III-23; NAT'L STUDY COMM'N, *supra* note 31, Guideline 2.6.

[41] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-7.1. *See also* NLADA, CONTRACTS, *supra* note 32, Guideline III-3; NAT'L STUDY COMM'N, *supra* note 31, Guideline 1.5; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.2.

[42] Bearden v. Georgia, 461 U.S. 660, 672-673 (1983).

[43] 417 U.S. 40 (1974).

[44] *Id.* at 53.

[45] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-7.2(a).

[46] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-7.2(b)-(c). ABA policy clarifies that procedural safeguards should be in place when requiring contributions for the costs of counsel to ensure that such fees do not impose

According to a witness from New York, indigent defendants in that state "are mined for their money through partial payment scenarios, illegal co-pay scenarios, and all kinds of intrusive mechanisms that interfere with the right to counsel." Additionally, a witness from South Dakota indicated that in some locales, indigent defendants are incarcerated for not paying their court-appointed lawyer bill.

Resource Disparity Between Prosecution and Indigent Defense

Fairness dictates that there should be a balance in the resources available to both sides in our adversary system of criminal justice.[47] In an effort to ensure this balance, national standards specify that the government should provide equivalent funding and other resources to both the indigent defense and prosecution functions of state criminal justice systems.[48] As former U.S. Attorney General Janet Reno stated, "Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter."[49]

The disparities are not limited to the direct funding of services. State and local prosecutors are eligible for loan forgiveness in the federal Perkins student loan program, whereas public defenders are not.[50] Further, since the mid-1990s, Congress has appropriated some $5 million annually to train state and local prosecutors at the National Advocacy Center in Columbia, South Carolina, but federally-funded training opportunities for state and local indigent defense attorneys are not provided. [51]

In a majority of the states from which witnesses testified, the compensation and support for indigent defense attorneys lag far behind their prosecution counterparts. Often the salaries of district attorneys are substantially greater than the salaries of public defenders. Further, state funds are often provided to train prosecutors, whereas defense lawyers do not receive comparable financial support from the state. For example, in California, for every $100 the prosecution receives in funding, indigent defense receives an average of $60.90.

Inadequate Legal Representation

In defining the right to counsel, the U.S. Supreme Court has said that "defendants facing felony charges are entitled to the effective assistance of competent counsel," [52] which requires subjecting "the prosecution's case to...meaningful adversarial testing."[53] In *Strickland v.*

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substantial financial hardships or chill exercise of the right to counsel. *See* STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 110, (Aug. 2004)

[47] *See* SCOTT WALLACE, *Parity, the Fail-Safe Standard*, in Bureau of Justice Assistance, U.S. Dep't of Justice, Compendium of Standards for Indigent Defense Systems (2000), *at* http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm#Parity (on file with ABA SCLAID); LOS ANGELES COUNTY BAR ASSOCIATION, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 10I (Aug. 1991) (urging balanced funding to all components of the justice system), *available at* http://www.abanet.org/legalservices/downloads/sclaid/101.pdf (on file with ABA SCLAID).

[48] ABA, DEATH PENALTY, *supra* note 30, Guideline 9.1; ABA, TEN PRINCIPLES, *supra* note 31, Principle 8 (2002); ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-4.1 (3d ed. 1992); NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 4.7.1; NLADA, CONTRACTS, *supra* note 32, Guideline III-10; INSTITUTE FOR JUDICIAL ADMINISTRATION/ABA, JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES Standard 2.1(B)(iv) (1979) [hereinafter IJA/ABA, JUVENILE JUSTICE]; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 3.2, 3.4.

[49] OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, 1999 NAT'L SYMPOSIUM ON INDIGENT DEFENSE: IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, at xiii-xiv (2000) [hereinafter 1999 NAT'L SYMPOSIUM ON INDIGENT DEFENSE].

[50] *See* 34 CFR § 674.51 (2005). *See also* WALLACE, *supra* note 47.

[51] WALLACE, *supra* note 47.

[52] McMann v. Richardson, 397 U.S. 759, 771 (1970).

[53] United States v. Chronic, 466 U.S. 648, 656 (1984).

Washington,[54] the Court acknowledged that the obligation of counsel to provide effective assistance imposes "certain basic duties," including: advocating for the defendant's cause; demonstrating loyalty to the client; avoiding conflicts of interest; consulting with the defendant on important decisions; keeping the defendant informed of important developments; conducting reasonable factual and legal investigations or making "a reasonable decision that makes particular investigations unnecessary;" and bringing to bear the necessary skills and knowledge.[55] The Court further indicated that "prevailing norms of practice, as reflected in American Bar Association Standards and the like, e.g. ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable" with respect to the assistance of counsel.[56]

National standards have been developed to recognize that the objective in providing counsel is to ensure quality representation for persons unable to afford an attorney, and to define requirements regarding all aspects of defense practice.[57]

Witnesses confirmed, however, that chronic under-funding and a lack of essential resources, coupled with crushing attorney workloads and other factors, result in many indigent defense systems failing to provide even constitutionally adequate representation, much less the type of quality representation recommended by national standards. The most serious implication of the widespread failure to deliver adequate defense services to the poor is the constant risk and reality of wrongful convictions.

"Meet 'em and Plead 'em" Lawyers

Witnesses recounted numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing. One witness reported that in 83% of the cases in Calcasieu Parish, Louisiana, "there is nothing to suggest that a public defender ever met his indigent client out of court. What happens, therefore, is that on the morning of the trial, the public defender will introduce himself to his client, tell him the 'deal' that has been negotiated, and ask him to 'sign here.'"[58] Another witness stated that a study of all felony cases over a five-year period in rural Quitman County, Mississippi revealed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment - the first day the part-time contract defender met the client. A witness from Alabama testified that contract defenders basically do nothing but process defendants to a guilty plea in as expeditious a manner as possible. According to another witness, "this sort of meet 'em and plead 'em is a pretty prevalent practice throughout the state of Georgia."

Incompetent and Inexperienced Lawyers

According to several witnesses, indigent defense representation frequently is provided by attorneys who are inexperienced in the practice of criminal law or straight out of law school. For example, in Georgia, some counties have required all attorneys (except those with conflicts of interest) to participate on a panel from which the court appoints counsel to represent indigent defendants, regardless of the attorneys' prior experience, training, or interest in criminal

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[54] *Id.* at 668.
[55] Strickland v. Washington, 466 U.S. at 688-91.
[56] *Id.* at 688.
[57] ABA, DEATH PENALTY, *supra* note 30, Guideline 1.1; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(b) (3d ed. 1993) [hereinafter ABA, DEFENSE FUNCTION]; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-1.1; NAT'L STUDY COMM'N, *supra* note 31, Guideline 1.1; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.13(3).
[58] *See* MICHAEL M. KURTH AND DARYL V. BURCKEL, DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA 32-33 (2003).

matters.[59] When a real estate lawyer with no criminal law experience sued to be removed from the mandatory panel in one county, the judge reacted by saying: "Well, if you didn't handle criminal cases like everybody else, you would have a financial advantage over the other lawyers here in town."

Excessive Caseloads

According to national standards, defense attorneys "should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."[60] Affirmative steps, including the refusal of further appointments, should be taken to reduce pending or projected caseloads where necessary, and courts should not require individuals or indigent defense programs to accept caseloads under these circumstances.[61] ABA Model Rules of Professional Conduct also require lawyers to withdraw from the representation of a client if continued representation will violate any professional duties, such as the duty to render competent legal representation.[62] In recognition of the unique and rigorous demands of capital litigation, national standards state that "special consideration" should be given to the workload in cases involving the death penalty.[63]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that defense caseloads should not exceed the following numerical limits: 150 felonies per attorney per year; or 400 misdemeanors (excluding traffic) per attorney per year; or 200 juvenile court cases per attorney per year; or 200 mental commitment cases per attorney per year; or 25 appeals per attorney per year.[64] Other national organizations, including the ABA, have recognized the value of these limits as a benchmark for determining excessive caseloads.[65]

However, testimony during the hearings revealed that oftentimes caseloads far exceed national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases. In Rhode Island, public defender felony caseloads surpass national standards by 35-40% and misdemeanor caseloads exceed national standards by 150%. A witness from Pennsylvania indicated that rapidly increasing caseloads over the years have not been accompanied by a corresponding increase in staff or resources. In one county, for example, the caseload of the public defender's office was 4,172 cases in 1980, while the same number of attorneys handled an estimated 8,000 cases in 2000.

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[59] Under Georgia's new public defender system, this may change, since the Georgia Public Defender Standards Council is required by statute to establish procedures for the appointment of counsel in cases where the circuit public defender has a conflict of interest as well as qualification standards for appointed counsel. *See* GA. CODE ANN. § 17-12-22 (West, WESTLAW through 2004 First Special Session).

[60] ABA, DEATH PENALTY, *supra* note 30, Guidelines 6.1, 10.3; ABA, TEN PRINCIPLES, *supra* note 31, Principle 5; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 4-1.3(e), 5-5.3; NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 4.1; NLADA, CONTRACTS, *supra* note 32, Guidelines III-6, III-12; IJA/ABA, JUVENILE JUSTICE, *supra* note 48, Standard 2.2(B)(iv); NAT'L STUDY COMM'N, *supra* note 31, Guideline 5.1; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.12.

[61] ABA, DEATH PENALTY, *supra* note 30, Guidelines 6.1, 10.3; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-5.3; NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 4.1.2; NLADA, CONTRACTS, *supra* note 32, Guideline III-12; IJA/ABA, JUVENILE JUSTICE, *supra* note 48, Standard 2.2(B)(iv); NAT'L STUDY COMM'N, *supra* note 31, Guideline 5.3; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.12.

[62] *See* MODEL RULES OF PROF'L CONDUCT RR. 1.1, 1.16(a), 6.2 (2004). *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981); Nat'l Legal Aid and Defender Ass'n, Am. Council of Chief Defenders, Ethics Op. 03-01 (2001).

[63] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-5.3 and cmt. at 72. *See also* ABA, DEATH PENALTY, *supra* note 30, Guideline 6.1 and cmt.; ABA, TEN PRINCIPLES, *supra* note 31, Principle 5, n.19; NLADA, CONTRACTS, *supra* note 32, Guideline III-6; NAT'L STUDY COMM'N, *supra* note 31, Guideline 5.1.

[64] NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.12. ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-5.3 cmt.

[65] *See* ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-5.3 and cmt. at 72.

According to a witness from Maryland, during 2002 public defenders in Baltimore were handling 80-100 pending serious felony cases at any given time, leading the state's chief public defender to announce that attorneys in that office would not accept any new cases. A witness from Nebraska described a similar situation in a county where the elected chief public defender and deputy public defender handled 1,200 cases during the year, including felonies, misdemeanors, child support contempt cases, and juvenile cases of all types.

Lack of Investigation, Research, and Zealous Advocacy

Witnesses from a number of states indicated that, in many cases, indigent defense attorneys fail to fully conduct investigations, prepare their cases, or advocate vigorously for their clients at trial and sentencing. To illustrate, a witness from Virginia testified that high caseloads discourage both assigned counsel and public defenders from spending sufficient time investigating and preparing cases and meeting with their clients. Witness testimony also revealed that the public defender office in Clark County, Nevada, the largest county in the state, employs seventy attorneys, thirty-three support staff, and fourteen investigators, yet maintains a trial rate of less than 0.6%. And a recent survey of 1,867 felony case files from contract defenders in four Alabama judicial circuits revealed that no motions were filed for funds for experts or investigators in 99.4% of the cases.

Ethical Violations of Defense Lawyers

As one witness noted, in addition to violations of constitutional rights and possible wrongful convictions, the provision of inadequate representation also results in frequent violations of professional rules of ethics. Yet, courts and disciplinary authorities routinely overlook this inevitable consequence of an over-burdened and under-funded system.

State rules of professional conduct, in conformity with ABA Model Rules of Professional Conduct, normally require lawyers to be "competent," defined as employing "the legal knowledge, skill, thoroughness, and preparation that is reasonably necessary for the representation."[66] Additionally, lawyers must "act with reasonable diligence and promptness in representing a client"[67] and must reasonably communicate with clients on matters relating to representation.[68] Further, lawyers must refrain from providing representation in cases involving conflicts of interest.[69] Yet, as shown above, defense lawyers throughout the country are violating these ethical rules by failing to provide competent, diligent, and conflict-free representation.

Judges are in the best position to remedy these problems. While judges should naturally be concerned about the fair administration of justice in their courtrooms, they also must respect the attorney-client relationship. Accordingly, the ABA has recommended for many years that defense attorneys not be removed from cases in which they are providing representation over the objection of the attorney and client.[70] But if an attorney clearly fails to provide adequate representation in violation of ethical obligations, a judge should report the matter to the appropriate disciplinary authority. Such action would be in complete accord with a judge's obligation under the Model Code of Judicial Conduct.[71] Similarly, judges should not hesitate to

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66 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). For a sample of state rules echoing the ABA model rule, see FLA. RULES OF PROF'L CONDUCT R. 4-1.1; ILL. RULES OF PROF'L CONDUCT R. 1.1(a); OKLA. RULES OF PROF'L CONDUCT R. 1.1; OR. RULES OF PROF'L CONDUCT R. 1.1; N. C. RULES OF PROF'L CONDUCT R. 1.1(a).

67 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004).

68 MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004).

69 MODEL RULES OF PROF'L CONDUCT RR. 1.7, 1.8, 1.10, 1.11 (2004).

70 ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-6.3.

71 MODEL CODE OF JUDICIAL CONDUCT § 2.18 and cmt. (1999).

report prosecutors who violate ethics rules by communicating with unrepresented indigent defendants to obtain waivers of counsel and guilty pleas.

Structural Defects in Indigent Defense Systems

No Independence

National standards recognize that the defense function must be independent from undue political and judicial influence to ensure the delivery of quality legal representation.[72] Specifically, counsel should be subject to judicial supervision only in the same manner and to the same extent as are attorneys in private practice and should be assigned to specific cases by administrators of indigent defense programs, not by judges or elected officials.[73] Further, an independent board of trustees, not including prosecutors or judges, should be established to oversee defender, assigned counsel, or contract programs.[74] Indigent defense should be funded at a level designed to ensure independent, quality legal representation, and the funding power should not interfere with or retaliate against professional judgments made in rendering defense services.[75] Chief public defenders and staff should not be selected by judges, but should be selected on the basis of merit and without regard to political party affiliations or contributions.[76]

Nevertheless, witnesses described indigent defense systems that fall far short of these national standards. For example, one witness reported that almost none of the indigent defense systems in Texas use an independent authority or agency to qualify, appoint, and compensate counsel. Although recent reform legislation has required counties to adopt neutral rotation systems for appointing counsel, several judges have retained unregulated discretion to appoint any attorney they choose, and some judges depart regularly from the rotation system without good cause. As in much of the United States, defense counsel is normally dependent upon the judge who heard the case to approve the services of expert witnesses and investigators, as well as approve attorney compensation, and the judge's discretion is not subject to effective review.

Absence of Oversight to Ensure Uniform, Quality Services

National standards have long acknowledged the need for a statewide structure to oversee indigent defense services, ensure uniformity in the quality of services, and provide system accountability.[77] Yet, a number of witnesses testified that a lack of statewide oversight and structure results in a hodgepodge of local indigent defense systems that are unsupervised and vary greatly in their effectiveness. The result is a system in which justice for the poor is unpredictable and subject to local political and budget pressures.

- Detention in Jail Without a Lawyer

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[72] *See, e.g.,* ABA, TEN PRINCIPLES, *supra* note 31, Principle 1; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standards 5-1.3, 5-1.6, 5-4.1 (3d ed. 1992); NLADA, ASSIGNED COUNSEL, *supra* note 32, Standard 2.2; NLADA, CONTRACTS, *supra* note 32, Guidelines II-1, II-2 (1984); IJA/ABA, JUVENILE JUSTICE, *supra* note 48, Standard 2.1(D); NAT'L STUDY COMM'N, *supra* note 31, Guidelines 2.8, 2.18, 5.13; NAT'L ADVISORY COMM'N, *supra* note 31, Standards 13.8, 13.9; MODEL PUBLIC DEFENDER ACT § 10(d) (1970).

[73] ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-1.3(a).

[74] *Id.* Standard 5-1.3(b).

[75] *Id.* Standard 5-1.6.

[76] *Id.* Standard 5-4.1.

[77] ABA, TEN PRINCIPLES, *supra* note 31, Principle 2; ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-1.2(c); NAT'L STUDY COMM'N, *supra* note 31, Guideline 2.4; MODEL PUBLIC DEFENDER ACT § 10 (1970).

Several witnesses reported that, in some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer.

According to a witness from Georgia, indigent defendants in that state often languish in jail without representation. As an example, the witness cited a defendant who was arrested for loitering and spent thirteen months in jail without seeing a lawyer or judge—or even being formally charged—before local civil rights advocates ultimately secured his release. In Mississippi, a woman arrested for stealing $200 from a casino slot machine spent eight months in jail because she was unable to afford bail. Eventually, without receiving any effective legal representation, the woman pled guilty to time served simply to get out of jail.

- Encouraging Waivers of Right to Counsel and Subsequent Pleas of Guilty

The U.S. Supreme Court has held that, although an accused has a constitutional right to proceed without legal representation,[78] a waiver of the right to counsel must not be accepted unless the trial judge first determines that the waiver is entered knowingly, voluntarily, and intelligently.[79] According to the Court, "[t]he information a defendant must possess in order to make an intelligent election...will depend upon a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings."[80] For instance, before accepting a waiver from a defendant who wishes to proceed *pro se* to trial, the judge must inform the defendant of "the dangers and disadvantages of self-representation."[81] However, "at earlier stages of the criminal process, a less searching or formal colloquy may suffice."[82]

National standards expand upon the requirement of an intelligent, voluntary, and knowing waiver of the right to counsel, urging that persons taken into custody or otherwise deprived of their liberty be informed, in easily understandable language, of the right to an attorney.[83] Further, waivers of counsel should not be accepted until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer has been made.[84] A failure to request counsel or an announced intention to plead guilty should not alone be construed to constitute a waiver of counsel.[85] A court should not accept a waiver of counsel unless it is in writing and of record.[86] In proceedings involving the possibility of incarceration, whenever an accused who has not seen a lawyer indicates an intention to waive the assistance of counsel, a lawyer should be provided, and the accused should confer at least once with the lawyer, before any in-court waiver is accepted.[87]

Also, state ethics rules, based upon the ABA Model Rules of Professional Conduct, typically prohibit any lawyer who is acting on behalf of a client from giving legal advice to an

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78 Faretta v. California, 422 U.S. 806, 835 (1975).
79 *See* Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938).
80 Iowa v. Tovar, 124 S.Ct. 1379, 1387 (2004).
81 Faretta, 422 U.S. at 835. *See also* Tovar, 124 S.Ct. at 1388.
82 Tovar, 124 S.Ct. at 1388.
83 ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-8.1. *See also* ABA, DEFENSE FUNCTION, *supra* note 57, Standards 4-2.1, 4-2.2, 4-2.3; NAT'L STUDY COMM'N, *supra* note 31, Guidelines 1.2, 1.3, 1.4; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.3.
84 ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-8.2(a). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.6 (3d ed. 2000); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.3 (3d ed. 1999) [hereinafter ABA, PLEAS OF GUILTY]; NAT'L ADVISORY COMM'N, *supra* note 31, Standard 13.3.
85 ABA, PROVIDING DEFENSE SERVICES, *supra* note 30, Standard 5-8.2(a).
86 *Id.*
87 *Id.* Standard 5-8.2(b).

unrepresented person whose interests may be adverse to those of the client, apart from the advice to obtain counsel.[88] The rules require prosecutors in particular to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[89] Further, the rules prohibit prosecutors from seeking to obtain waivers of important pretrial rights from unrepresented accused persons.[90] In addition, ABA criminal justice standards preclude prosecutors from communicating with accused persons at first judicial appearances unless a waiver of counsel already has been entered or the prosecutor is aiding in obtaining counsel for the accused or arranging for pretrial release.[91] Finally, national standards provide that indigent defendants should not be called upon to plead guilty until counsel has been appointed or properly waived.[92]

Despite the foregoing rules and recommendations, witnesses testified that prosecutors sometimes improperly seek waivers of counsel, and subsequent pleas of guilty, from unrepresented indigent defendants, while judges either ignore or openly encourage such practices. Some judges make no attempt to determine whether an accused's waiver is knowing, voluntary, and intelligent before accepting it, as required by Supreme Court decisions,[93] and many judges do not follow the additional guidance contained in national standards.

The problem is especially acute with respect to juveniles, according to several witnesses.[94] For example, one witness reported that a recent study found that judges in Maryland habitually suggest to juveniles that they waive their right to an attorney.

- Counsel Provided Too Late or Not at All

Witnesses reported that counsel frequently is not provided to indigent defendants in violation of federal constitutional rights, state law, or national standards. According to one witness, there are at least 150,000 misdemeanor cases per year in Washington courts of limited jurisdiction. Despite court rules that establish the right to counsel in these types of cases "as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest," the witness reported that counsel is not appointed for first appearance hearings in most courts, and in some cases, counsel is never appointed; this occurs either because counsel is not offered or waivers of counsel that take less than one minute of court time and do not meet constitutional standards are accepted. A New Mexico witness reported that, in certain magistrate courts, lawyers are not provided at initial appearances and waivers of counsel are accepted from some indigents accused of offenses carrying mandatory jail sentences who were not first afforded the opportunity to confer with a lawyer.

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88 MODEL RULES OF PROF'L CONDUCT R. 4.3 (2004).
89 *Id.* R. 3.8(b) (2004).
90 *Id.* R. 3.8(c) (2004).
91 ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARD 3-3.10(A) (3D ED. 1993) [HEREINAFTER ABA, PROSECUTION FUNCTION] ("A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused.").
92 ABA, PLEAS OF GUILTY, *supra* note 82, Standard 14-1.3(a); NAT'L ADVISORY COMM'N, *supra* note 31, Standard 3.5.
93 Faretta v. California, 422 U.S. 806, 835 (1975). *See also* Iowa v. Tovar, 422 U.S. 806 (2004); Patterson v. Illinois, 487 U.S. 285 (1988).
94 *See generally* ABA JUVENILE JUSTICE CENTER & MID-ATLANTIC JUVENILE DEFENDER CENTER, MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, ALBIN LAW FIRM, AND CASCADE COUNTY LAW CLINIC, MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER AND JUVENILE LAW CENTER, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, AND NORTHWEST JUVENILE DEFENDER CENTER, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003).

Findings

Based on the foregoing, SCLAID arrived at the following key findings:

- Forty years after Gideon v. Wainwright, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.
- Funding for indigent defense services is shamefully inadequate.
- Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.
- Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.
- Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.
- Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.
- Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.
- The organized bar too often has failed to provide the requisite leadership in the indigent defense area.
- Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.

Conclusion

The right to counsel is one of the most sacred principles enshrined in our nation's constitution, yet experience has shown that this celebrated right is by no means implemented fully in practice. The many problems in indigent defense have been documented in countless reports since *Gideon* was decided. However, prior to our hearings, no comprehensive examination of the national picture had been undertaken in recent years. Clearly, America has a long way to go to deliver on *Gideon's* promise of effective legal representation for the poor. We are confident, however, that the recommendations contained in this report, if implemented, will serve as important steps in the continuing quest to achieve true equality in our system of justice.

Respectfully submitted,

Bill Whitehurst, Chairperson
Standing Committee on Legal Aid and
Indigent Defendants

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