

NACDL Talking Points: Indigent Defense

General:

- The U.S. has an adversarial justice system. In criminal cases, this means that the system works when both sides – prosecution and defense – are represented by effective and prepared attorneys.
- The right to counsel, embodied in the Sixth Amendment to the United States Constitution, is the primary safeguard of an individual's rights within this system. Adequate representation ensures that all other rights – right to be free from unlawful search & seizure, right against self-incrimination, right to confront witnesses, right to a jury trial, etc. – are protected.
- The Supreme Court's 1963 decision in *Gideon v. Wainwright* made it clear that the right to counsel applies to every citizen, regardless of whether he/she can afford to hire an attorney.
- In the United States today, the right to counsel is not being enforced. Many states have failed to ensure that those who cannot afford an attorney are provided with a prepared and effective lawyer.
- The quality of justice a person receives should not depend on the amount of money they have.
- The right to competent representation is one of the most fundamental rights in America – it is a cornerstone of our democratic system.

Structure of indigent defense systems:

- There are three primary systems used to provide indigent defense services:
 - Public defender offices – Institutional offices with salaried staff attorneys and support staff.
 - Assigned counsel – Private attorneys are assigned to represent individual defendants on a case-by-case basis. Usually paid on an hourly or per-case fee.
 - Contract defenders – An attorney or group of attorneys who contract to defend some or all of the cases in a particular jurisdiction. Contract usually provides for a fixed total payment to the attorney(s), regardless of the actual number of cases taken, or a fixed fee-per-case.
- There is no one-size-fits-all system; however, the best delivery system usually consists of both a defender office and the active participation of the private bar.
- Contract systems can work, but they must be set up to ensure that the contracting attorney(s) has a reasonable caseload and the resources necessary to provide an effective defense in each case. Contract systems are dangerous when the contracting attorney(s) agrees to handle all the cases in a jurisdiction for a set amount. Not only does this risk an unmanageable caseload, but also it provides a disincentive for the

lawyer(s) to put in more than a minimal amount of time on each case (because a lawyer will receive the same total amount regardless of how much time is spent on any one case).

- Regardless of the type of system, a public defense delivery system must be independent. “The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.” American Bar Association, *The Ten Principles of a Public Defense Delivery System* (Feb. 2002). In some jurisdictions, court-appointments sometimes get made based on the attorney’s contribution to the judge’s reelection campaign.
- Oversight of the system is also critical. An independent body should set monitor attorney qualifications and performance, budgetary needs, and availability of resources to ensure compliance with national and state standards. If local standards do not exist, an independent body should promulgate standards and devise a mechanism for enforcement.
- An indigent defense system must have sufficient funding. There should be balance between resources available to the defense and the prosecution. Most states provide at least some level of funding for indigent defense. Twenty-two states fund all of trial-level indigent defense; another nine states fund at least half of trial-level indigent defense costs. But some states, like Pennsylvania and South Dakota, provide no funding for indigent defense services, placing the entire burden on cash-strapped counties.

Caseloads:

- Even the most dedicated and capable attorney cannot provide constitutionally adequate representation to every client if he/she has too many cases.
- The National Advisory Commission on Criminal Justice Standards and Goals established numerical caseload limits in 1973. These standards state that an attorney should handle no more than 150 felonies *or* 400 misdemeanors *or* 200 juvenile cases *or* 200 mental health cases *or* 25 appeals *per year*.
- In reality, public defenders, assigned counsel, and contracting attorneys are regularly required to exceed these caseload limits in the majority of jurisdictions nationwide. In Venango County, Pennsylvania, two public defenders handle all the indigent cases for the entire county – more than 1200 a year. In Lake Charles, Louisiana, it is not unusual for a public defender to have 200-300 *open felonies at any one time*. A contracting attorney in Georgia devoted 40 percent of his practice to handling more than 500 indigent adult cases.

Resources:

- A reasonable caseload alone is not enough to ensure constitutionally adequate representation. Attorneys must also have the resources necessary to provide minimally effective representation.
- Adequate compensation is crucial. In many jurisdictions, assigned counsel fees are less per hour than an attorney's hourly office overhead costs. In other words, a lawyer may actually lose money on any court-appointed case requiring more than a couple hours of work. In New York, court-appointed attorneys are paid \$40 per hour for in-court work and \$25 per hour for out-of-court work – these rates apply even in New York City, where office overhead alone can be more than \$40 per hour. In Virginia, nonwaivable fee caps are set at approximately \$1000 for a case punishable by 20 years to life in prison, \$400 for felonies punishable by up to 20 years imprisonment, and \$150 for misdemeanors. Assigned counsel should be paid a reasonable fee in addition to office overhead and expenses. Similarly, public defenders must be paid salaries commensurate with their counterparts in the prosecutors' office to minimize staff turnover and ensure balance in the justice system. Where a contract system is employed, the compensation structure must incorporate caseload limits and not be determined on a low-bid basis. Overall, there must be parity between the prosecution and defense. In Wayne County (Detroit), Michigan, \$30 million is appropriated to the prosecution, whereas defense services receive only \$15 million.
- Attorneys must also have access to and funds for investigators and experts. These are the tools that enable defense lawyers to thoroughly evaluate the facts and evidence in a case. Denial of these essential resources is like sending a doctor into surgery without a scalpel. In Lake Charles, Louisiana, the Public Defender Office is able to produce only one investigative memo per 200 cases, and an independent expert was used in only 0.5% of all cases. In states like Michigan and Virginia, where court-appointed fees may not even cover overhead expenses, lawyers assigned to represent indigent defendants often pay for experts and investigators out-of-pocket, without guaranteed reimbursement from the courts.

Attorney qualification and performance:

- A defense lawyer should only be assigned to a case that matches his/her experience. In some states, like Maine, there are no qualification standards for assigned counsel. New or inexperienced lawyers can be assigned to serious felonies.
- Attorneys should also be periodically reviewed to ensure competent performance. In Texas, it was revealed that more than 100 prisoners awaiting execution were represented by court-appointed lawyers with state bar disciplinary problems.

- Only lawyers trained in and knowledgeable about criminal defense law and procedure should be appointed to represent accused persons. Real estate lawyers are not competent to handle complex criminal cases.

Consequences for the client:

- In jurisdictions with inadequate public defense systems, clients may languish in jail for months before ever meeting their attorney. Some clients are not introduced to their attorney until the day they enter a guilty plea in court. Although the law in Georgia requires that an attorney be appointed within 72 hours of arrest, 40 poor defendants in Coweta County, Georgia were found to have been in jail for more than a month without seeing an attorney. More than half of the indigent defendants found guilty of offenses in the same county over a two-and-a-half year period were not represented by a lawyer at all.
- Low fees paid to assigned counsel and fixed-fee contracts provide an incentive for lawyers to encourage guilty pleas.
- Without the necessary resources for investigation, in many cases, no one interviews witnesses, visits the crime scene, or considers a defendant's background.
- When funds are not available for experts, defendants cannot challenge the prosecutor's analysis of physical evidence or present evidence of mental illness or conduct forensic tests that may conclusively prove innocence.
- Without oversight of the system, incompetent or inexperienced lawyers may be appointed to cases; clients may sit in jail for long periods without representation; attorneys may have too many cases, such that every client receives ineffective representation; and the system may become nothing more than a "plea mill."
- Ultimately, the consequence of poor representation is that people are convicted of crimes they did not commit. The innocent are locked up while the real criminals continue to walk the streets. But even when innocence is not at stake, thousands of poor people get longer sentences than they deserve, are not given preventative options like drug treatment or counseling, or are subject to violations of their constitutional rights without anyone bringing this to the court's attention.