

A Discussion on Indigent Defense in Arizona
NACDL Midwinter Meeting
Las Vegas, Nevada
February 23, 2001
2:00-5:00 p.m.

REPORT

On February 23, 2001, the Indigent Defense Committee of the National Association of Criminal Defense Lawyers (NACDL) sponsored a three-hour program to discuss the state of indigent defense services in Arizona. Two panels of speakers identified key problem areas and potential strategies for reform. Speakers included public defenders, private assigned counsel, and civil litigators from the state of Arizona, as well as a representative from The Spangenberg Group, a Massachusetts-based research and consulting firm that specializes in the improvement of indigent defense systems.¹ In attendance were public and private defense attorneys from Arizona; staff members of the National Legal Aid and Defender Association (NLADA), the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID), and NACDL; and members of the NACDL Board of Directors and Indigent Defense Committee.²

¹ See Appendix A, agenda for the program.

² Attendees included: James Belanger, Phoenix, AZ; Steve Benjamin, Richmond, VA; John Canby, Phoenix, AZ; David Carroll, Newton, MA; Paula Cook, Florence, AZ; Dan Cooper, Tucson, AZ; Shubi Deoras, Chicago, IL; David Derickson, Phoenix, AZ; Daniel DeRienzo, Prescott, AZ; Sally Duncan, Phoenix, AZ; Ken Everett, Phoenix, AZ; Priscilla Forsyth, Spirit Lake, IA; Frances Gray, Phoenix, AZ; Jim Haas, Phoenix, AZ; Bret Huggins, Florence, AZ; Kate Jones, Washington, D.C.; Stan Lehman, Bisbee, AZ; Marty Lieberman, Phoenix, AZ; John Mays, Decatur, AL; Natman

This meeting was convened by NACDL to support and encourage efforts to improve the quality of indigent defense services in Arizona. NACDL has long been aware of existing problems throughout the diverse counties in Arizona. Recognizing that its 2001 Midwinter Meeting would take place in a neighboring state, the Indigent Defense Committee endeavored to bring together both defense attorneys from Arizona and representatives of national organizations that work on indigent defense issues. More than 30 participants gathered for the discussion. This meeting was the first step in what will hopefully be an ongoing, coordinated movement among attorneys and activists from Arizona and national organizations to address the shortcomings in Arizona indigent defense. This brief report will not address every detail that was presented at the meeting, but rather attempts to capture some of the key areas of concern and potential strategies for reform.

Schaye, Tucson, Arizona; Marvin Schechter, New York, NY; Elgin Simpson, Las Vegas, NV; Raag Singhal, Fort Lauderdale, FL; Kelly Smith, Bisbee, AZ; John Stookey, Phoenix, AZ; Mike Stuhff, Las Vegas, NV; Mike Terribile, Phoenix, AZ; Saji Vehiyil, Nogales, AZ; Scott Wallace, Washington, D.C.; Lisa Wayne, Denver, CO; Richard Willstatter, White Plains, NY.

1. Funding³

Arizona indigent defense is funded almost entirely at the county level. In 1999, the state allocated \$5 million over two years for the prosecution, indigent defense services, and the court system. Rough estimates suggest that of this \$5 million, at most \$1 million goes to indigent defense. Thus, state funds account for a very small portion of expenditures on indigent defense in Arizona.

Compared with other states that provide any state funds, Arizona ranks at the bottom. Twenty-three states fund indigent defense entirely at the state level. In about half of the remaining twenty-seven states, state funds account for at least 50% of the money spent on indigent defense. Only two states, Pennsylvania and South Dakota, provide no state funding. Assuming that Arizona spends \$1 million annually on indigent defense, it ranks last among the 48 states which provide some state funding, based on a per capita comparison of state expenditures.

In a county-based system like Arizona's, the heaviest stress is placed on rural counties, which do not have the tax base to generate sufficient revenues to cover the costs of indigent defense. Moreover, studies suggest that crime increases when unemployment increases, and thus at times when there is the greatest need for indigent defense services, county budgets are the most strained.

II. Overview of County Systems⁴

As mentioned, indigent defense services in Arizona are administered at the county level. Each county has responsibility for establishing and managing its own system. There are two urban counties in Arizona: Maricopa County, which includes the city of Phoenix, and Pima County, which includes Tucson.

Pima County was described as having one of the better systems in the state. It has two public

³ The following information and analysis on county, state, and national funding was provided by David Carroll of The Spangenberg Group in his oral presentation in Las Vegas and his accompanying written statement.

⁴ The following paragraphs contain information provided by many of the panel speakers and attendees; presenters Marty Lieberman, Jim Haas, John Canby, and Ken Everett supplied the bulk of the information.

defenders offices. Salaries in those offices range from approximately \$37,500 to \$90,000. Pima County also has a contract attorney program, which administers 160 contracts with individual attorneys. Pursuant to these contracts, an attorney is paid \$3000 for providing representation in a serious felony case, and \$800 for other felonies. In first-degree murder cases, lead defense counsel is paid \$75 per hour up to a maximum of \$15,000, and co-counsel receives \$60 per hour up to a limit of \$7,500. These limits may be exceeded in special circumstances. Representation on appeal or in post-conviction cases is compensated at \$50 per hour.

In Maricopa County, four agencies provide indigent defense services. The Office of the Public Defender is the first agency appointed. Conflict and overflow cases are sent to the Office of the Legal Defender and then to the Office of the Legal Advocate. Maricopa County also has an agency which administers contracts with private counsel. The starting salary for public defenders in Maricopa County is \$42,453. Contracts are written as flat fee contracts. A regular felony contract provides for representation in 40 cases per year at an average of \$700 per case (although the contract pays a lump sum and does not designate a per case amount). A major felony contract pays an average of \$8000 per case.

The most significant problems in the Maricopa County public defender offices are heavy workloads and high turnover. Maricopa County is about the same geographic size as New Jersey, and public defenders cover 23 courts. Although caseload standards were set by court decision in *Arizona v. Joe U. Smith*, those standards are consistently exceeded by 40%. Public defenders have no mechanism to relieve their workloads; motions to withdraw are considered to be political suicide. Consequently, the annual turnover rate among public defenders is between 25 and 40%. With so many experienced lawyers leaving, there are not enough attorneys to handle serious cases.

Furthermore, the courts in Maricopa County have signaled that their main concern in criminal cases is speed, not justice. Recently, the Superior Court created a new Continuance panel designed to move criminal cases more quickly. The system requires that attorneys requesting a motion to continue must appear before a designated judge (not the trial judge) to argue the motion. Continuance panel judges have refused to grant reasonable requests for continuances and often aggressively interrogate attorneys about whether a continuance is necessary. The new process has angered lawyers, who perceive that continuance panel judges think they are not working hard. And trial judges have expressed unhappiness with losing control over their cases. Continuance panel hearings also create tension between the prosecutor and defense counsel at an early stage of the case when plea negotiations may be ongoing. Finally, the procedure adds to a system already rushed by a time limit on accepting plea offers and strained by the inadequate pool of interpreters available to public defenders.

In rural counties, the salaries in public defender offices range from a starting salary of \$35-40,000, with experienced attorneys earning up to \$90,000. Although public defenders are paid on the same scale as prosecutors, the prosecutors' offices are better funded overall and therefore have more lawyers making salaries at the high end of the pay scale. Private assigned counsel are paid, on average,

\$50 per hour for their services. In Yavapai County, some defense counsel enter into a contract which pays a flat fee for representation in a set number of cases (contracts are usually for \$70,000 total). Graham County also uses contract attorneys who are paid \$80,000 to provide representation in 100 cases.

Anecdotally, it was reported that some judges admit they appoint particular lawyers because they like the bills submitted by those lawyers. The need for standards to determine indigency was noted, as some clients receiving services are said not to be indigent. Attempts to speed up criminal case processing was raised as a serious strain on the system. Public defender offices, especially in rural counties, have to beg for more money for experts and investigators. And in Santa Cruz County, there are no lawyers qualified to take a first degree murder case. In capital cases, observation reveals that those who get the death penalty are individuals with no political stake. In comparing the fact situations of those who are sentenced to death and those who are not, there is no discernible rhyme or reason. Significantly, in some Arizona counties where judges are elected, the death penalty has become a barometer for reelection.

III. Strategies for Reform⁵

Reform can be achieved through very different kinds of strategies or a multi-faceted effort that combines more than one strategy. The success of any one particular strategy depends on the political climate of the state and the availability of procedural channels. In Arizona, for example, a generally conservative political environment may hamper legislative initiatives. Litigation, on the other hand, has met with some success. A number of presenters also noted that the defense community in Arizona has not been well organized to address indigent defense. And there is a huge need for information about indigent defense services in the state so that the problems can be documented and disseminated in the context of whatever strategies are employed.

A legislative approach, either on the state or county level, offers the advantage of forming broad coalitions, including with unlikely partners. On the continuance panel issue, for example, public defenders and assigned counsel can align with prosecutors, and perhaps even trial judges, in trying to change the current process.

Litigation, either as a class-action civil lawsuit or in the context of an individual criminal case, can challenge systemic problems. The recent decision in *State v. Rivas*, for example, ordered that contract

⁵ Presentations on different strategies for reform were given by David Derickson, Mike Terribile, Sally Duncan, Jim Belanger, and John Stookey. The following discussion summarizes those presentations.

defender Mike Terribile be awarded additional fees in a capital case, despite the terms of his original contract to provide representation for a set amount. In *Rivas*, Mr. Terribile filed a request for additional compensation, which was denied by the original trial judge. After being threatened with contempt, Mr. Terribile sought reconsideration of his request for additional compensation, which was heard by a second judge after the trial judge recused herself. The second judge ordered a hearing, and Mr. Terribile was represented in those proceedings by Mark Harrison and Sally Duncan, lawyers from the Phoenix law firm Bryan Cave. In order to protect Mr. Rivas' interests, and prevent him from being coerced into taking another appointed counsel, the Phoenix law firm Osborn Maledon represented the client. John Stookey and Larry Hammond handled the litigation for Osborn Maledon. Mr. Terribile's case highlighted the problems with the Maricopa County contract system. Contracts provide for a flat fee in exchange for representation in a certain number of cases. Essentially, the contract provides for a one-year salary and does not designate a certain amount for each case. Thus, the lawyer is placed in a situation where he must decide how to allocate the total fee to each defendant's case, which ultimately may result in a conflict of interest between the interests of the defendant (speedy trial, sixth amendment right to effective counsel) and the lawyer's interests (monetary, workload allocation among clients).

Bryan Cave spent approximately \$142,000 briefing and arguing the case, and an additional \$14,000 in costs. In a three-day hearing, esteemed capital defense lawyers testified about the number of hours and the resources needed to do the mitigation phase of a capital case (the fee challenge was raised after trial but before sentencing). The legal arguments presented to the court were: 1) unconstitutional taking of property (Mr. Terribile subsidizing the state's responsibility to provide for the representation of indigent defendants); 2) judiciary improperly delegated responsibility for indigent defense to the executive branch; 3) due process (no hearing on Mr. Terribile's fee issue); 4) flat fee contract placed lawyer in ethical conflict; and 5) sixth amendment consequences for the client. The result was a decision in which the judge stated that a flat fee contract would be unconstitutional, but interpreted Mr. Terribile's contract to allow for review and increases. The judge ordered negotiation with the agency which administers the contract. At the time of the Las Vegas meeting, that negotiation had reached an impasse, and the parties had scheduled a status conference with the judge. With the decisions in *Rivas* and *Joe U. Smith*, Arizona has some good law related to indigent defense which could be relied upon in any future litigation. It was noted that lawsuits brought by counties in Mississippi, alleging that the state's failure to fund indigent defense had resulted in an unfunded mandate, might be a useful model in Arizona.

A third approach which has proven successful in other states is a statewide commission or task force. Such a group can be a vehicle for formal study of problems across the state and can be responsible for making recommendations for reform to the legislature or executive branch. In some cases, a task force can initially develop from an *ad hoc* group of interested parties, such as defense attorneys, community groups, or the bar. Ultimately, if such a group is formalized through a legislatively-established commission, it can have a profound influence on reform and may be responsible for administering a new statewide system.

The commission approach is being employed to address problems in Arizona death penalty cases. (Attorneys assigned to represent defendants in capital cases make only \$40-50 per hour.) The Arizona Attorney General created a Capital Case Commission, which has proposed a statewide office and funding for death penalty cases, including a post-conviction review office and a statewide capital trial office to help rural counties provide defense services in capital cases.

These strategies can be combined with other mechanisms to drive reform. The media has been a significant player in the reform movement in Texas. A coordinated media campaign in Arizona could provide the impetus to begin and sustain a reform initiative. Arizona also has a progressive referenda process that could be part of a multi-faceted strategy (study the Proposition 200 campaign). In terms of message development, one could point to other states in the region as models for Arizona. Colorado, for example, has a good statewide system. Or one could argue that *Even Texas* is moving toward a statewide system. @

IV. Moving Forward

The presentations on problems in the Arizona system and potential strategies for reform raised a number of questions. First, what strategies work the best and how do you choose when to use one strategy versus another? Second, how can reform address the disparate needs of urban and rural counties? Third, does Arizona need a statewide public defender office or just better funding? Fourth, what is the role of the private defense bar and how can private lawyers be employed to advance indigent defense reform? Fifth, in developing a long-range plan and ultimate goals, are reformers willing to accept possible negative consequences in order to gain desired positive outcomes? Sixth, to what extent should defense lawyers participate in a civil disobedience approach? And finally, in moving forward, how can the lack of communication and collective consciousness among those doing indigent defense work be overcome so that a powerful coalition can be mobilized?

Some recommendations for moving forward:

1. The discussion in Las Vegas produced consensus on a number of problems that exist in the current provision of indigent defense services in Arizona. These problems must be systematically documented to convince legislators, judges, and journalists that reform is needed. Public defender and administrative offices should be called upon to compile data on workload, salaries and fees, funds available for expert and investigative services, and costs.
2. Public defenders, assigned counsel, and contract defenders must be involved in the political process in order to affect change.
3. The private bar must be called upon to play a central role.
4. Attorneys should reach out to community groups with interest in a fair system.
5. National organizations should be asked to support local efforts through providing resources, conducting studies, organizing future meetings, locating experts outside the state, developing media campaigns, and helping to coordinate legislative and litigation initiatives.

6. A group of committed defense attorneys must develop a comprehensive strategy and lead the effort.