JUSTICE DENIED

AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (ABRIDGED VERSION)

Report of the National Right to Counsel Committee

The Constitution Project

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April 2009

This is an abridged version of the Report since it contains only the list of the Members of the Committee and Reporters, the Table of Contents, Preface, Executive Summary, and Chapter 5 (Recommendations and Commentary). Chapters 1 through 4 are omitted.

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National Right to Counsel Committee

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United States Senator (D-MN), 1964–1977;
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United States Attorney, Western District of Texas, 1971–1974

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Judge, United States Court of Appeals for the Third Circuit, 1992–1999;
Judge, United States District Court for the Western District of Pennsylvania, 1991–1992;
former Assistant United States Attorney, Western District of Pennsylvania;
former Assistant District Attorney, Allegheny County, Pennsylvania

Members

Shawn Armbrust
Executive Director, Mid-Atlantic Innocence Project; as a member of the Northwestern University Medill School of Journalism was instrumental in achieving the 1999 death row exoneration of Illinois inmate Anthony Porter

Jay W. Burnett
Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986–1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999–2000

Alan J. Crotzer
Probation and Community Intervention Officer, Florida Department of Juvenile Justice; wrongfully convicted and sentenced to 130 years in prison; served 24.5 years in prison; exonerated based on DNA evidence in 2006

Tony Fabelo
Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council, 1991–2003

Norman S. Fletcher
Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis LLP; Justice, Supreme Court of Georgia, 1989–2005, Chief Justice, 2001–2005

Monroe H. Freedman
Professor of Law and former Dean, Hofstra University School of Law; nationally-acclaimed scholar of lawyers' ethics

Susan Herman
Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime

Bruce R. Jacob
Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*

Abe Krash
Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, Georgetown University Law Center; represented Clarence Earl Gideon in *Gideon v. Wainwright*

Norman Lefstein
Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis (served as one of the Committee's Reporters)

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law; Executive Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School

Bryan A. Stevenson
Director, Equal Justice Initiative of Alabama; Professor of Clinical Law, New York University School of Law

Larry D. Thompson
Senior Vice President, Government Affairs, General Counsel and Secretary, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001–2003; former United States Attorney, Northern District of Georgia

Hubert Williams
President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

Reporters

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis;
LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

Professor Lefstein's prior positions include service as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. His professional activities include serving as Chair, American Bar Association (ABA) Section of Criminal Justice in 1986–1987; and as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function, The Defense Function, Providing Defense Services,* and *Pleas of Guilty.* During 1997–1998, Professor Lefstein served as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States, directing preparation of a report on the cost and quality of defense representation in federal death penalty prosecutions. His publications include *Criminal Defense Services for the Poor,* published by the ABA in 1982, and co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* published by the ABA in 2004. He also has served as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants and for nine years chaired its Indigent Defense Advisory Group. In 2007, Professor Lefstein concluded seventeen years as Chairman of the Indiana Public Defender Commission.

Robert L. Spangenberg

Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University;
B.S., 1955, Boston University; J.D., 1961, Boston University School of Law.

Professor Spangenberg specialized in civil legal services early in his career, developing the Boston Legal Assistance Project, a neighborhood civil legal services program, which he headed for nine years. After a two-year foundation study of civil legal services in Boston and a statewide study of indigent defense in Massachusetts, Professor Spangenberg joined Abt Associates in Cambridge, Massachusetts, where for nine years he conducted national and local studies of indigent defense systems across the country. In 1985, he founded The Spangenberg Group to continue the study of indigent defense nationwide. During his 23 years as President of the organization, he visited all 50 states, testified before legislative bodies about the justice system, and served as an expert witness in court proceedings. The Spangenberg Group published hundreds of reports and studies pertaining to the country's system of justice in criminal and juvenile proceedings, and for more than 20 years, Professor Spangenberg has served as a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. In February 2009, Professor Spangenberg joined George Mason University, where he will continue his work on indigent defense matters.

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Preface

The National Right to Counsel Committee was created in 2004 to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers. Decades after the United States Supreme Court ruling in *Gideon v. Wainwright* and other landmark Supreme Court decisions, which recognized the right to lawyers for those who cannot afford them, there was disturbing evidence that states and localities were not providing competent counsel, despite the constitutional requirement that they do so.

The Committee's charge was to assess the extent of the problem, the various ways that states and localities provide legal representation to those who cannot hire their own lawyers, and to formulate recommendations about how to improve systems of indigent defense to ensure fairness for all Americans. The result is *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel.*

In the years since the Committee began its work, there have been both measurable improvements in systems of legal representation, as well as notable failures, and these are documented in this report. In examining the nation as a whole, the accompanying report and recommendations cover a good deal of familiar ground. It is no longer news that *Gideon's* constitutional promise has not been fulfilled in many states and counties around the country. But the extent and persistence of the problems are greater than we realized. And the reasons for them are explained and analyzed in *Justice Denied* to a far greater degree than has been done at any time recently.

As *Justice Denied* convincingly demonstrates, despite the fact that funding for indigent defense has increased during the past 45 years since the *Gideon* decision, there is uncontroverted evidence that funding still remains woefully inadequate and is deteriorating in the current economic difficulties that confront the nation. Because of insufficient funding, in much of the country, training, salaries, supervision, and staffing of public defender programs are unacceptable for a country that values the rule of law. Every day, the caseloads that defenders are asked to carry force lawyers to violate their oaths as members of the bar and their duties to clients as set forth in rules of professional conduct. In addition, private contract lawyers and attorneys assigned to cases for fees receive compensation that is usually not even sufficient to cover their overhead and that discourages their participation in defense systems. Equally disturbing, in most places across the country there is no oversight at all of the representation that these lawyers provide, and the quality of the work they provide suffers as a result.

In addition, defendants throughout the country, especially in the lower criminal courts, are still convicted and imprisoned each year without any legal representation at all, or are "represented" by lawyers who have hundreds of other cases (thus violating rules of professional conduct), and lack the requisite expertise and sufficient support staff, including persons who can investigate their clients' cases. Sometimes people who cannot afford an attorney sit in jail for weeks or months before being assigned an attorney; others do not meet or speak with their lawyers until the day of a court appearance. Too often the representation is perfunctory and so deficient as not to amount to representation at all.

But there also are structural problems in the delivery of indigent defense services, such as a lack of independence for defenders and the management of their responsibilities. And there are policies respecting criminal prosecutions and rules of criminal procedure that exacerbate the difficulty of providing effective defense services.

All of these problems, and more, are discussed in *Justice Denied.* And, unlike any other recent report dealing with indigent defense, *Justice Denied* contains an in-depth contemporary analysis of the various ways in which the 50 states have structured their indigent defense delivery systems.

Additionally, *Justice Denied* breaks new ground in setting out a road map for those seeking to improve their indigent defense systems. Besides a comprehensive discussion of the approaches that have been successful in achieving improvements, the report contains a number of recommendations for achieving reform.

There is no doubt that Americans strongly support the right to counsel that *Gideon* and subsequent cases established. Americans believe that the amount of money a person has should not determine the quality of justice he or she receives. They understand that governments must play a fundamental role in securing a fair justice system by providing independent lawyers to those unable to afford their own.

The problems detailed in *Justice Denied* are the responsibility not just of states and localities. The federal government also has an obligation to ensure that the Sixth Amendment to the United States Constitution is enforced. It should be a full partner with states through federal funding, as recommended in this report.

The Constitution Project, which coordinated publication of this report, has over the years sponsored numerous committees of independent experts on a wide array of issues. Like the National Right to Counsel Committee, these experts have issued consensus reports and recommendations under the auspices of the Constitution Project. However, from the outset, this undertaking has differed from our sponsorship of other committees because we partnered with the National Legal Aid & Defender Association (NLADA), one of the nation's leading expert organizations on issues of

public defense in the United States. The Committee's report is posted on the websites of both NLADA and the Constitution Project. However, the findings, conclusions, and recommendations contained in the report are solely those of the Committee.

The National Right to Counsel Committee includes an extraordinary group of individuals, with a diversity of viewpoints shaped by their service at the highest levels of every part of federal and state justice systems. Committee members have experience as judges, prosecutors, defense lawyers, and as law enforcement officials; members also include nationally-known law school academics, bar leaders, a victims' advocate, and a court researcher.

The Committee's honorary co-chairs are Walter F. Mondale, a former vice president of the United States who, as the then-attorney general of Minnesota, organized a remarkable amicus curiae brief joined by 23 states on behalf of Clarence Earl Gideon. The other is William S. Sessions, a former Director of the FBI and former United States District Court Judge. The Committee's co-chairs are Timothy K. Lewis, a former United States Circuit Court Judge; Rhoda Billings, a former Chief Justice of the North Carolina Supreme Court; and Robert M. A. Johnson, chief prosecutor of Anoka County, Minnesota, and a former President of the National District Attorneys Association. Among the Committee members are Professor Bruce R. Jacob, who as an Assistant Attorney General for the State of Florida opposed Mr. Gideon's request for counsel in his case before the Supreme Court. Another, Abe Krash, was on the legal team that successfully represented Mr. Gideon before that Court. Another member, Shawn Armbrust, then a journalism student and now a lawyer, played a leading role in successfully establishing the innocence of Anthony Porter, who came within 48 hours of being executed in Illinois. Yet another member, Alan J. Crotzer, was wrongfully convicted of a whole host of offenses in Florida, including sexual battery, kidnapping, burglary, and robbery, and sentenced to 130 years in prison; he was exonerated when DNA proved his innocence.

The Committee owes a great debt of gratitude to many people who contributed to their deliberations and to the report and its recommendations. First and foremost are its reporters: Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis, and Robert L. Spangenberg, Research Professor of the Center for Justice, Law, and Society at George Mason University. Professors Lefstein and Spangenberg are two of the nation's most highly regarded experts on issues of indigent defense. Together they drafted the Committee's report and assisted the Committee in crafting its recommendations. I also want to acknowledge the efforts of Rebecca Jacobstein and Jennifer Riggs, two members of the Massachusetts bar and former staff members of The Spangenberg Group. Both devoted extensive time to the report and made extremely important contributions in preparing drafts of several chapters of the report.

Last, but by no means least, I want to recognize the valuable contributions to the Committee's work by its first team of reporters: Paul Marcus, Haynes Professor of Law and Kelly Professor of Teaching Excellence, William & Mary Law School, and Mary Sue Backus, Associate Professor of Law, University of Oklahoma College of Law. The early work of Professors Marcus and Backus for the Committee provided a firm foundation for development of the Committee's report. The materials they prepared were transmitted to Professors Lefstein and Spangenberg and were used by them in constructing their final report. Although Professors Backus and Marcus were unable to put aside other demands on their time in order to continue as the Committee's reporters, their assistance deserves special mention and appreciation. Much of their investigation of indigent defense is captured in their excellent law review article on the subject. *See* Paul Marcus and Mary Sue Backus, *The Right to Counsel in Criminal Cases, A National Crisis,* 57 Hastings L. J. 1031 (2006).

Finally, it is important for me to say a word about the intended audience for this report. *Justice Denied* is not just for those who provide indigent defense services, although everyone in the business of providing such services will surely find it of interest. Instead, the report should be required reading for legislators, executive branch officials, judges, researchers, bar leaders, and everyone else who possesses the power to remedy or influence the problems that this report vividly documents. *Justice Denied* is the handbook that lights the way toward genuine and lasting improvement in the delivery of indigent defense services in America, thus enhancing the quality of justice for all. Its findings and recommendations must—at long last—be heeded.

Virginia E. Sloan
President and Founder
The Constitution Project
April 2009

EXECUTIVE SUMMARY

Introduction

More than 45 years ago, the United States Supreme Court rendered one of its best known and most important decisions—*Gideon v. Wainwright*. In memorable language, the Court explained that "[i]n 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." Observing that "lawyers in criminal courts are necessities, not luxuries," the Court concluded that governments have an obligation under the United States Constitution to provide lawyers for people charged with a felony who cannot afford to hire their own.

Soon afterwards, the Court extended *Gideon*, applying the right to a lawyer to juvenile delinquency cases and to misdemeanor cases where imprisonment results. The right to counsel is now accepted as a fundamental precept of American justice. It helps to define who we are as a free people and distinguishes this country from totalitarian regimes, where lawyers are not always independent of the state and individuals can be imprisoned by an all powerful and repressive state.

Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideon decision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems. In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.

The National Right to Counsel Committee

For the first time since the *Gideon* decision, an independent, diverse group, whose members include the relevant constituencies of the justice system, has examined the nation's ways of providing defense services for the poor and is sounding the alarm about the grave problems that exist today nationwide. The National Right to Counsel Committee was established to address the full dimension of the difficulties in indigent defense from a national perspective. The Committee's members include persons with judicial, law enforcement, prosecution, and defense experience, as well as policymakers, victim advocates, and scholars. The membership also includes a person who

was convicted of a crime that he did not commit, sent to prison, and later exonerated due to DNA evidence. (A list of Committee members and brief biographies of our Reporters precede this Executive Summary.)

Mission and Scope

The Committee's two-fold mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with decisions of the Supreme Court and rules of the legal profession, *and* to develop consensus recommendations for achieving lasting reforms.

In approaching these subjects, the Committee was mindful that there have been numerous studies that have cataloged the problems with indigent defense, but these reports have not had significant impact in bringing about improvements. For this reason, the Committee was determined that its Report focus not simply on all that ails indigent defense—although Chapter 2 of this Report clearly does that—but that it also present detailed information on successful strategies for change. Chapter 3, therefore, is an in-depth, first-of-its-kind analysis of indigent defense litigation instituted to achieve reforms, including approaches that have been successful; Chapter 4 describes the various statewide structures used in the delivery of indigent defense services and suggests the kinds of oversight bodies most likely to succeed in promoting positive change.

Making a case for needed reform in the United States is not especially difficult because the subject has often been examined and the difficulties in delivering defense services are constantly in the news. In conducting its work, the Committee, through its Reporters, had access to literally hundreds of national, state, and local reports of indigent defense, as well as several thousand newspaper articles spanning even beyond the past decade. This Report cites many of the most recent studies conducted in state and local jurisdictions, a national report of the American Bar Association published in 2004, and numerous newspaper articles. In addition, some site visits were conducted by independent researchers (other than our Reporters), retained on behalf of the Committee, and the reports of these persons are referenced in Chapter 2. Because the Committee desired a study that would withstand the scrutiny of any persons who would doubt its findings, the statements in the five chapters of this Report are fully supported, with numerous sources contained in more than 900 footnotes.

The Committee's focus purposely has not included the myriad of problems involved in providing defense representation in death penalty cases. The Committee was aware that The Constitution Project had issued several reports related to the death penalty. *See* Mandatory Justice: Eighteen Reforms to the Death Penalty (2001); and Mandatory Justice: The Death Penalty Revisited (2006), both of which are available on The Constitution Project's website (http://www.constitutionproject.org/). There also are the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (*available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf). Moreover, by excluding death penalty prosecutions, the Committee believed that it could better concentrate its attention on defense representation in non-capital cases. Also, while juvenile delinquency proceedings are discussed in this Report, the Committee recognizes that its primary focus has been on defense services in criminal cases. For further specific information about juvenile defense representation, the Committee commends the materials available on the website of the National Juvenile Defender Center (http://www.njdc.info/index.php), some of which also are cited in Chapter 2.

Before summarizing each of the chapters in this Report, we want to emphasize that our overriding focus has been on the many *current* difficulties throughout the country in providing indigent defense representation. Obviously, there has been considerable progress since *Gideon* was decided in 1963. The sums spent by state governments and local jurisdictions in defending accused persons have increased significantly during the past four decades, and there are some places in which defense services are being delivered by talented professionals who have the time, training, and resources to do first-rate legal work for their clients. However, even in these places the progress that has been made is at considerable risk given the fiscal problems that now afflict state and local governments. Just as this Report was being completed, on December 10, 2008, the Center on Budget and Policy Priorities, a non-partisan research and policy organization, reported that "[a]t least 43 states faced or are facing shortfalls in their budgets for this and/or next year."

Moreover, the evidence is overwhelming that jurisdictions that have done reasonably well in the indigent defense area are in a distinct minority. In most of the country, notwithstanding the dedication of lawyers and other committed staff, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources. In addition, as our summary below of Chapter 2 points out, these are by no means the only problems.

Chapter Summaries

Chapter 1—The Right to Counsel: What is the Legal Foundation, What Is Required of Counsel, and Why Does It Matter?

Our first chapter provides a primer on the right to counsel in America, which derives from the Sixth Amendment to the United States Constitution and is applicable to the states. We explain the kinds of cases to which the right applies, which are the vast majority of criminal cases at trial and on appeal as well as juvenile delinquency proceedings at trial and on appeal. Moreover, the Supreme Court of the United States has continued to extend and to elaborate upon the right to counsel. In 2002, the Court declared that a defendant who receives a suspended sentence in a misdemeanor case may not later be imprisoned for a probation violation unless counsel was afforded when the defendant was initially prosecuted. And, in 2008, the Court held that the right to counsel attaches at initial court appearances at which defendants learn of the charges brought by the state.

But an accused is entitled to more than just a lawyer. The right to counsel also encompasses the right to experts and transcripts to assist in a person's defense, and, like counsel, those must be paid for by governments. While the Court has not held that defendants *must* be represented by lawyers, it has declared that lawyers *must* be provided *unless* defendants knowingly, voluntarily, and intelligently decide to forego the assistance of counsel. On the other hand, the Court has said virtually nothing about how governments are to provide lawyers and, even more importantly, who must pay for the experts, transcripts, and thousands of attorneys across the country who must be provided to assist accused persons in criminal and juvenile cases. What we do know is that these expenses entail substantial costs, and the financial burden, as a result of the Court's decisions designed to fulfill a requirement of the federal Constitution, has fallen exclusively on state and local governments, who are called upon to translate the right to counsel into meaningful indigent defense programs. As we observe in Chapter 1, the Court's decisions "are a significant high-cost, unfunded mandate imposed upon state and/or local governments."

One of the reasons that the right to counsel is expensive is because the lawyers providing the representation must be trained and have offices, computers, and the assistance of investigators and other paralegals. If they are private attorneys, they must receive adequate compensation for their services. If they are employed as public defenders, they must have reasonable salaries and benefits. In addition, the rules of the legal profession require that all attorneys who represent clients, including indigent clients, must be "competent" and "diligent" in doing so. Consequently, they

cannot be allowed to have an unreasonable number of clients, lest they violate their duties as members of the bar and deprive their clients of the kind of representation that a private lawyer could be expected to provide. In addition, all states require that legal representation be made available in situations where the right to counsel is not constitutionally required, thus further straining the resources of public defense programs.

Chapter 1 also addresses why the right to counsel matters. The most compelling answer is that, in our adversary system of justice, fairness is served if both sides are represented by lawyers who are evenly matched in areas such as available time to devote to the case, training, experience, and resources. When the defense does not measure up to the prosecution, there is a heightened risk of the adversary system of justice making egregious mistakes. We have learned all too well during the past decade, with the advent of DNA evidence, that an unknowable number of genuinely innocent persons in the United States have been wrongfully convicted and sent to prisons. Usually this has happened due to police and prosecution errors or because of mistaken eyewitness identifications, though on occasion it has been due to clear abuses of law enforcement powers. Wrongful convictions also have occurred as a result of inadequate representation by defense lawyers. Whatever the reasons, for innocent persons to lose their liberty is a travesty. Equally troubling, it means that the guilty are free to roam without restraint, victimizing others, while the state pays to incarcerate those who have not transgressed against society. Well-trained lawyers and adequately funded systems of defense are essential to prevent this from happening.

Finally, effective programs of public defense are crucial to the public's trust in the legitimacy of its justice systems and confidence in its results. While politicians frequently fail to support adequate funding of indigent defense, fearing a lack of public support for such action, the evidence suggests that the public understands the issue better than the politicians may appreciate. Several years ago, a national, independent public opinion research organization polled 1,500 Americans and requested their views respecting indigent criminal defense. The results revealed overwhelming support for appointing and paying for lawyers on behalf of persons who could not afford one. The survey results are *available at* http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent.

Chapter 2—Indigent Defense Today: A Dire Need for Reform

Over a period of many years, there have been numerous national reports that have exposed the countless problems in indigent defense and urged reforms, but the problems have persisted. Although the funding of indigent defense among state and local governments has increased considerably since the 1960's, inadequate financial

support continues to be the single greatest obstacle to delivering "competent" and "diligent" defense representation, as required by the rules of the legal profession, and "effective assistance," as required by the Sixth Amendment. Moreover, the country's current fiscal crisis, which afflicts state and local governments everywhere, is having severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement.

Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise. Finally, to complete the picture, we discuss in Chapter 2 a variety of factors that exacerbate caseload problems for indigent defense systems, such as "tough on crime" policies translated by legislatures into additional criminal laws, the need for defendants to be aware of the collateral consequences of conviction, the criminalization of minor offenses, the ever-increasing complexity of the law with which defense attorneys must be familiar, a lack of open file discovery practices by prosecutors, and specialty courts that impose additional time demands on defense attorneys.

Beyond excessive caseloads, there are other impediments to having successful indigent defense programs. Too often the problems stem from a lack of independence from the authorities that provide funding for the defense program. We tell stories in Chapter 2 of county officials, responsible for providing funds for indigent defense, subjecting chief public defenders to political pressures because their lawyers challenged the prosecution and did exactly what they were required to do in representing their clients. We also point out that a lack of independence from the judiciary sometimes impacts the selection, appointment, and payment of counsel. Lawyers deemed to be too aggressive may be excluded from appointments, or favoritism may be shown to certain lawyers, who are appointed to a disproportionate share of the cases.

Other difficulties encountered in efforts to provide effective defense services include a lack of experts, investigators, and interpreters; insufficient client contact; and inadequate access to technology and data. Usually, there are no enforceable standards governing the performance of defense counsel, little or no training of defense lawyers, and a lack of meaningful supervision and oversight of their performance. Another problem is that defense lawyers are not always appointed to clients' cases in a timely manner, causing defendants to remain in custody far longer than they would otherwise and counties to incur jail costs that could have been avoided had counsel been appointed earlier in the process.

So far, we have focused on situations when lawyers are provided for the accused, although sometimes later than they should be. But there is another dimension to the problem, namely, the total absence of counsel because defendants either are not advised or not adequately advised of their right to counsel. When a defendant is not adequately advised of the right to counsel, the waiver almost certainly would not withstand scrutiny as a valid waiver of the right to legal representation. The invalidity of the waiver, however, typically fails to come to light, as the waiver process is of low visibility and defects rarely surface in the appellate courts. There are still some lower courts, moreover, that do not maintain a record of proceedings, so there is no way to be sure exactly how counsel was offered to the accused and if the waiver of legal representation was valid. There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.

Many of the Committee's findings reported in Chapter 2 are virtually identical to a recently completed study of indigent defense services in misdemeanor cases in the United States conducted by the National Association of Criminal Defense Lawyers (NACDL). Publication of this study is expected to be released early in 2009. Among the problems identified in the forthcoming NACDL report are the following: (1) defendants unrepresented in misdemeanor courts because they have not properly waived the right to counsel; (2) excessive caseloads of public defenders and assigned counsel that undermine effective representation and lead lawyers to violate their ethical obligations; (3) defendants pleading guilty to misdemeanor offenses without an understanding of the applicable and potentially severe collateral consequences; (4) a lack of investigators, experts, and mental health professionals; and (5) the over-criminalization and prosecution of minor infractions and offenses, which drains resources that would otherwise be available for more serious offenses.

Chapter 3—How to Achieve Reform: The Use of Litigation to Promote Systemic Change in Indigent Defense

There is no better evidence of the problems in implementing the Supreme Court's right to counsel decisions than the enormous number of lawsuits that have been brought over a period of many years and the litigation currently pending, in which indigent defense representation has been challenged in the courts. Many times, as reflected in Chapter 3 (and in other chapters), these challenges have been successful and have led to improvements.

The lawsuits that we discuss were brought in federal and state courts in the following jurisdictions: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, and West Virginia. In addition, as this Report was completed, litigation respecting indigent defense was pending in at least seven states, five of which are reviewed in Chapter 3. In Michigan and New York, lawsuits have been brought challenging entire systems for the delivery of indigent defense services. In Florida, Kentucky, and Tennessee, litigation is pending in which defense lawyers have challenged the actions of trial courts in seeking to require public defense programs to handle caseloads alleged to be excessive.

In concluding Chapter 3, we sum up lessons learned in seeking indigent defense reforms through litigation. We suggest that actions should be instituted pretrial on behalf of all, or a large class of indigent defendants, in order to secure a favorable remedy with broad impact. We also stress the importance of involving pro bono counsel from large law firms or the involvement of lawyers from public interest legal organizations, since systemic reform litigation is time consuming and requires an expertise not typically possessed by public defense practitioners. We also stress the importance of strong factual support on behalf of the claims asserted and discuss the role of the media and public support in fostering a climate likely to lead to a successful outcome.

Chapter 4—How to Achieve Reform: The Use of Legislation and Commissions to Produce Meaningful Change

In this chapter, we set forth the organizational structures for delivering indigent defense services in the 50 states and devote particular attention to developments since the year 2000. We note that 11 states have enacted legislative changes during the past

eight years and describe the kinds of changes that have occurred. In addition, we review the impetus for legislative reforms and the obstacles to achieving change.

Currently, there are 27 states that have organized their defense services either entirely or substantially on a statewide basis. Of these, there are 19 states that have a state commission with supervisory authority over the state's defense program headed by either a state public defender or state director; in the other eight states, there is a state public defender but not a state commission to provide oversight. In the remaining 23 states, there is either a state commission with partial authority over indigent defense (nine states); a state appellate commission or agency (six states); or no state commission of any kind (eight states).

Based upon our study of defense programs, we offer a number of suggestions about what is necessary in order to have a successful statewide oversight body. We urge that the state's commission be an independent agency of state government and that its placement within any branch of government be for administrative purposes only. We also suggest that the members of the commission be appointed by a diverse group of persons so that the members are not responsible to just one or two appointing authorities to whom they feel a sense of obligation. A range of other specific matters are explored as well, including the duties that should be given to commissions so that they will be able to improve the quality of representation in the state. Finally, we consider the role of study commissions in achieving indigent defense reforms, pointing out the contributions that they have made in the past and noting the several current commissions that are focused on indigent defense reforms.

Chapter 5—Recommendations and Commentary

This chapter contains the Committee's 22 Recommendations. Each of the recommendations is accompanied by Commentary with cross-references to other parts of the Report that explain and support our positions. All of the black-letter Recommendations, without the Commentary, are reproduced below.

One of our most important recommendations is that indigent defense should be independent, non-partisan, organized at the state level, adequately funded by the state from general revenues, and overseen by a board or commission. *See* Recommendation 2. Of equal significance is our recommendation that the federal government assist the states in the delivery of indigent defense services. For more than 45 years, the states and/or counties have struggled—and continue to struggle—to implement the *Gideon* decision and its progeny. The right to counsel is a federal guarantee based upon the Sixth Amendment to the United States Constitution, and it is entirely fitting that the federal government assist in its implementation. *See* Recommendations 12 and 13.

Finally, we emphasize that, in order to achieve reform at the state level, it is vital that a coalition of partners be engaged as part of a comprehensive strategy. The judiciary, bar officials, community leaders, public interest organizations, national associations of lawyers, and others need to be enlisted as partners to persuade the legislature of the importance of an adequate statewide program of indigent defense. To succeed, empirical documentation of the problems, as well as favorable media coverage, will be needed in order to generate a positive climate of public support. All of these efforts are essential investments in America's future because, as Judge Learned Hand said many years ago:

If we are to keep democracy, there must be a commandment:

Thou shalt not ration justice.

CHAPTER 5

Recommendations and Commentary

A. Introduction

Based upon the foregoing report on indigent defense and after due deliberation, the Committee has concluded that a number of important reforms of indigent defense services are urgently needed. We are by no means the first group to offer recommendations, and ours are not nearly as lengthy as those urged by the American Bar Association (ABA)[1] and the National Legal Aid and Defender Association.[2] Instead, the Committee has limited itself to those matters that we deem absolutely critical to achieving lasting improvements in defense representation. The first four chapters of this report provide ample support for the 22 recommendations that follow.

We begin, in Recommendation 1, with a plea to legislators, judges, and prosecutors—persons entrusted with primary responsibility for implementing the right to counsel—to do what is necessary to assure compliance with the Constitution. In Recommendations 2 through 11, we call for each state to establish an independent, statewide organization to oversee all aspects of providing defense services, and we address the duties of such an organization. Absent such an approach, we are convinced that states will not succeed in meeting their obligations to provide effective legal representation of the indigent. But full implementation of the promise of the Sixth Amendment will still likely remain elusive even if each state establishes a statewide oversight organization. For this reason, in Recommendations 12 and 13, we call upon the *federal* government to assist the states in discharging their duty to provide effective representation, as required by the nation's *federal* Constitution.

Recommendations 17 and 18 reflect our recognition that reform in the indigent defense area is exceedingly difficult and typically cannot be achieved without a coalition of partners dedicated to achieving improvements. Accordingly, we call upon state and local bar associations, as well as a wide variety of other groups and persons, to work together to seek indigent defense reforms. Finally, if other efforts do not succeed or appear unlikely to do so, we conclude with Recommendations pertaining to indigent defense litigation based upon our analysis of prior litigation contained in Chapters 1 and 3.

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1 *See* ABA Providing Defense Services, *supra* note 58, Chapter 1.

2 *See* NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2.

B. Recommendations and Commentary

What States Should Do

Compliance with the Constitution

Recommendation 1—States should adhere to their obligation to guarantee fair criminal and juvenile proceedings in compliance with constitutional requirements. Accordingly, legislators should appropriate adequate funds so that quality indigent defense services can be provided. Judges should ensure that all waivers of counsel are voluntary, knowing, intelligent, and on the record, and that guilty pleas are not accepted from accused persons absent valid waivers of counsel. Prosecutors should not negotiate plea agreements with accused persons absent valid waivers of counsel and should adhere to their duty to assure that accused persons are advised of their right to a lawyer.

Commentary—First and foremost, this report is about implementing the right to counsel guaranteed to accused persons under the Sixth Amendment to the United States Constitution.[3] For this Constitutional requirement to be implemented effectively, adequate funding of defense services is indispensable.[4] Our recommendations begin, therefore, with the fervent request that those responsible for assuring that defense services are provided do what is necessary to make sure that the right to counsel is honored. This means that legislators must appropriate sufficient funds for indigent defense and that judges and prosecutors must discharge their duties in compliance with decisions of the United States Supreme Court and their ethical responsibilities.

A recent opinion column published in a Portland, Maine, newspaper succinctly summarized the problem of indigent defense funding in state legislatures. Noting that Maine's Legislature was not providing sufficient financial support for indigent defense, the writer explained: "This issue is not going to get the attention it deserves from the Legislature because it has come up at a time when budgets are being cut, not increased…. [A]nd there is not political muscle behind indigent defense." Then, comparing indigent defense with health care for senior citizens and education, the writer concluded: "But the difference is, none of those programs is required by the U.S. Constitution. According to the Supreme Court, indigent defense is, so failing to meet that responsibility is against the law."[5]

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3 The duty of governments under the Constitution to provide defense services for the indigent is explained in detail in this report. *See infra* notes 6–55 and accompanying text, Chapter 1,.

4 The wide range of problems in indigent defense due to inadequate financial resources is set forth in Chapter 2.

5 Greg Kesich, *Criminal Defense Costs Could Be the State's Next Crisis,* Portland Press herald, December 17, 2008.

The ABA's Model Code of Judicial Conduct requires that judges "uphold and apply the law, and … perform all duties of judicial office fairly and impartially."[6] Among the many responsibilities of judges is the duty to make certain that no waiver of counsel is accepted unless it is "voluntary, knowing, intelligent, and on the record." Moreover, no guilty plea should be accepted from an accused unless there has been a valid waiver of the right to counsel. Not only are these requirements of U.S. Supreme Court decisions,[7] but also the duty is often spelled out in court rules or in statutes.[8] Yet, this report and other studies point to evidence that judges do not always take the necessary steps, especially in misdemeanor cases, to assure that all waivers of counsel are in fact valid.[9] Because of concerns about waiver of counsel, the ABA has long recommended steps that go well beyond this Recommendation and constitutional requirements. The ABA urges that judges not accept waivers of counsel unless the accused has spoken to a lawyer and that judges renew the offer of counsel at each new stage of the proceedings when the accused appears without counsel.[10]

In discussing the role of the United States Attorney, the U.S. Supreme Court in 1935 spelled out basic precepts to guide prosecutors that are as important today as when they were written. The prosecutor's responsibility in a criminal case, the Supreme Court noted, "is not that it shall win a case, but that justice shall be done…. But while he may strike hard blows, he is not at liberty to strike foul ones."[11] The Supreme Court's admonition is expressed today in the ABA Model Rules of Professional Conduct, which have been adopted in states throughout the country.[12] In explaining the Special Responsibilities of a Prosecutor, the Comment section notes that prosecutors have "the responsibility of a minister of justice and not simply of an advocate."[13] This means that prosecutors must take steps to assure that "the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[14]

In addition, the black-letter provisions of the Model Rules prohibit prosecutors from "seeking waivers of … important pretrial rights from unrepresented accused

6 ABA Model Code of Judicial Conduct R. 2.2 (2007), *available at* http://www.abanet.org/judicialethics/ ABA_MCJC_approved.pdf.

7 *See supra* notes 47–52 and accompanying text, Chapter 1.

8 *See, e.g.,* Fla. R. Crim. P. 3.111(d); Md. Rule 4-215(b); Pa. R. Crim. P. 121. For a statute that deals with waiver of the right to counsel, *see* Or. Rev. Stat. § 135.045(c) (2007).

9 *See supra* notes 207–08, 226–35, and accompanying text, Chapter 2. *See also* ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 24–26.

10 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-8.2.

11 Berger v. United States, 295 U.S. 78, 88 (1935).

12 *See supra* notes 80–85, Chapter 1.

13 ABA Model Rules, *supra* note 67, Chapter 1, at R. 3.8 cmt. 1.

14 *Id.*

persons,"[15] which obviously includes the right to counsel. Specifically, respecting the right to an attorney, the Model Rules require that prosecutors "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."[16] Yet, evidence is cited in this report[17] and in other studies[18] that prosecutors sometimes seek waivers of counsel from and negotiate plea agreements with unrepresented indigent persons. When unrepresented defendants plead guilty pursuant to negotiations with prosecutors, the prosecutors likely have violated their duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel," as required by the Model Rules.[19] Accordingly, the Committee recommends that prosecutors neither engage in securing waivers of counsel nor negotiate plea agreements with persons who have not validly waived their rights to legal representation.

Independence

Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation.

Commentary—This recommendation embodies fundamental cornerstones for establishing a successful program of public defense. Thus, the Committee recommends that public defense programs be "independent," organized at the state level, and that members of the program's governing Board or Commission, with authority "for all components of indigent defense," be appointed by a diverse group of officials and organizations.

The need for independence has been repeatedly stressed in national reports and standards dealing with public defense. The first of the ABA's Ten Principles of a Public Defense Delivery System, approved in 2002, calls for "the selection, funding, and

15 ABA Model Rules at R. 3.8 (c).

16 ABA Model Rules at R. 3.8 (b). ABA Standards provide that, at an initial court appearance, a prosecutor "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." ABA Prosecution Function, *supra* note 228, Chapter 2, at 3-3.10 (a).

17 *See* discussion at *supra* notes 227–235 and accompanying text, Chapter 2.

18 ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 24.

19 ABA Model Rules, *supra* note 67, Chapter 1, at R. 4.3.

payment of defense counsel … [to be] independent."[20] In fact, the call for independence was embodied in the first edition of standards dealing with Providing Defense Services, approved by the ABA in 1968.[21] Independence also was stressed by the National Study Commission on Defense Services, organized by the National Legal Aid and Defender Association, which in 1976 issued a lengthy report and numerous recommendations dealing with all aspects of indigent defense.[22]

It is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their appointment, compensation, resources, and continued employment depend primarily upon satisfying judges or other elected officials. In contrast, prosecutors and retained counsel discharge their duties with virtually complete independence, subject only to the will of the electorate in the case of prosecutors and to rules of the legal profession. Judges, moreover, do not select or authorize compensation for prosecutors or for lawyers retained by persons able to afford an attorney's fee. At a minimum, judicial oversight of the defense function creates serious problems of perception and opportunities for abuse.

What is needed are defense systems in which the integrity of the attorney-client relationship is safeguarded and defense lawyers for the indigent are just as independent as retained counsel, judges, and prosecutors. The system most frequently recommended to achieve this goal includes an independent Board or Commission vested with responsibility for indigent defense.[23] In a number of states, this recommendation has been effectively implemented, as noted earlier in this report.[24] The reason for having a number of different officials appoint the Board or Commission is to reduce the

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20 ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 1. *See also* ABA Providing Defense Services, 5-1.3, *supra* note 58, Chapter 1, at 5-1.3. NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10.

21 "The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice." ABA Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, 1.4 (1st ed. 1968).

22 "Whether organized at the state, regional, or local level, the goal of any system for providing defense services should be to provide uniformly high quality legal assistance through an *independent advocate.*" NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 145 (emphasis added).

23 "An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 1, 5-1.3(b); ABA Ten Principles, *supra* note 1, Chapter 1, at Principle 1 cmt: "To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." *See also* NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10.

24 *See supra* Table II, Chapter 4, p. 151 of the full Report.

likelihood that members of the governing board may feel in some way beholden to the persons or organizations responsible for their appointment. To guard against this possibility, the Committee recommends that "Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments." It is also preferable if no single person or organization is authorized to appoint a majority of the Board or Commission members.[25] In some states, for example, the governor appoints a majority of the commission or board members,[26] but this approach is not recommended.

The kinds of persons to be appointed to the statewide Board or Commission are not specified, except for providing that "all [appointees] should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation."[27] The recommendation, therefore, does not preclude service on Boards or Commissions by judges and active indigent criminal defense practitioners. But while such persons may, in fact, make important contributions to the work of the governing body, including advocating effectively on behalf of adequate indigent defense appropriations and explaining to the public the importance of defense counsel in our adversary system of justice, it is important that they remain vigilant, respecting possible conflicts of interest, and that they not intrude upon the independence of the defense function.[28]

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25 Consistent with this approach, the NLADA National Study Commission on Defense Services urged that "[n]o single branch of government should have a majority of votes on the commission." NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10(c).

26 This approach is followed, for example, in Missouri and Oklahoma. Montana's governor also appoints commission members but must follow certain requirements, such as selecting from among candidates submitted by the state supreme court, the president of the state bar, and the houses of the legislature. Kentucky's governor appoints five of the nine members, two with no restrictions, two appointed from a list submitted by the Kentucky Bar Association, and one appointed from a list supplied by the Kentucky Protection and Advocacy Advisory Board. *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, Chapter 4, at Appendix A.

27 The Committee's recommendation can be contrasted with those of the NLADA National Study Commission on Defense Services: "A majority of the Commission should consist of practicing attorneys." NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10(e). Similarly, ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3(b) provides that "[a] majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction."

28 The ABA recommends that "[b]oards of trustees … not include prosecutors or judges." ABA Providing Defense Services, 5-1.3(b). The commentary to this black-letter provision explains: "This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar." *See also* NLADA Guidelines for Legal Defense Systems, at 2.10(f): "The commission should not include judges, prosecutors, or law enforcement officials." *See also* the discussion of prosecutors serving on statewide commissions at *supra* Chapter 4, p. 175 of the full Report.

The recommendation also calls for defense services in each state to be organized on a statewide basis.[29] Only in this way is it possible to assure that the quality of defense services throughout the state is substantially the same. Experience demonstrates that there is virtually certain to be wide variations in the quality of services if each county or other jurisdictional subdivision is able to structure defense services in a way that it deems best. On the other hand, organizing defense services at the state level enables management of the defense function to be centralized, promotes the equitable distribution of resources, and provides improved cost effectiveness. The agency should also be "responsible for all components of indigent defense," which should include not only those kinds of cases in which counsel is extended as a matter of constitutional right, but also to cases where the state requires counsel to be provided, even though not constitutionally required.[30]

Finally, a statewide agency with responsibility for all components of indigent defense establishes a permanent mechanism for achieving many of the vital objectives of an effective public defense delivery system, including:

- Establishing qualification standards for appointment of counsel;
- Assisting in the development of eligibility standards for the appointment of counsel and ensuring that persons are screened to ensure their eligibility for counsel;
- Matching attorney qualifications with the complexity of cases;
- Tracking caseloads, as well as monitoring and evaluating attorney performance;
- Developing and providing training for all in persons in the state who provide indigent defense services, including both entry-level attorneys and advanced practitioners;
- Offering access to technology and vital resources and support services; and
- Providing an important voice in the political sphere by serving as an advocate in support of indigent defense.

29 Currently, 27 states have a centralized state agency for administering either entirely or substantially trial-level indigent defense services. *See supra* notes 2–10, Table II, and accompanying text, Chapter 2.

30 *See supra* note 31 and accompanying text, Chapter 1.

Recommendation 3—The Board or Commission should hire the agency's Executive Director or State Public Defender, who should then be responsible for hiring the staff of the agency. The agency should act as an advocate on behalf of improvements in indigent criminal and juvenile defense representation and have the authority to represent the interests of the agency before the legislature pertaining to all such matters. Substantial funding for the agency should be provided by the state from general fund revenues.

Commentary—One of the most important responsibilities of the Board or Commission is to retain the Executive Director or State Public Defender, who should have broad responsibilities for the administration of indigent defense services in the state pursuant to policies established by the agency's governing authority. Although not specifically mentioned in the recommendation, consistent with other standards in this area, the Executive Director or State Public Defender should be appointed for a fixed term and not be subject to removal except for good cause.[31] Among the chief duties of the agency's head should be hiring the agency's staff.[32] This person, however, will likely want to consult with the Board or Commission respecting hiring procedures, as well as many other critical administrative matters.

In every state, the cause of indigent defense requires persistent and articulate advocates to speak both in support of reforms to enhance the fairness of the justice system and address the need for adequate funding of the defense function. The latter is especially important because the indispensable role of defense counsel in the adversary system of criminal and juvenile justice is not always appreciated or fully understood by the public and legislators. While the head of the statewide agency should be a leading spokesperson on behalf of indigent defense and systemic reform, members of the agency's governing body should also be involved in such efforts.

As noted earlier, there are now 28 states in which all, or almost all, of the funding for indigent defense is provided by the state's central government.[33] Moreover, statewide programs generally tend to be better financed than indigent defense systems funded through a combination of state and county funds.[34] But in recent years, in a number of states, special fines, taxes, and assessments have been imposed frequently either

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31 *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-4.1; National Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.11(f).

32 This is the approach most commonly used among the states. For example, Montana's new statute authorizes the state director for defense services to hire or contract for the necessary personnel. *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, Chapter 4, Appendix A. *But see* LA. Rev. Stat. Ann § 15:150(A), which gives the Public Defender Board the authority to hire not only the director of the office but also the senior management team. *See also supra* notes 86–87 and accompanying text, Chapter 4.

33 *See supra* notes 29–30, Table I, and accompanying text, Chapter 2.

34 *Compare* Table I at *supra* note 28, Chapter 2, *with* ABA/TSG FY 2005 State and County Expenditures, *supra* note 44, Chapter 2.

against indigent defendants, who are the least able to afford the expense, or others as a means of covering the state's indigent defense budget.[35] Because such charges can sometimes chill the exercise of the right to counsel and serve as an excuse for the legislature not to appropriate sufficient funds for indigent defense, the recommendation provides that "[s]ubstantial funding for … [indigent defense] should be provided by the state from general fund revenues."

States Without a Board or Commission

Recommendation 4—In states that do not have a statewide, independent, non-partisan agency responsible for all components of indigent defense services, a statewide task force or study commission should be formed to gather relevant data, assess its quality as measured by recognized national standards for the delivery of such services, and make recommendations for systemic improvements. The members of the task force or study commission should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and task force or study commission members should bear no obligations to the persons, departments of government, or bar associations responsible for their appointments.

Commentary—The second recommendation of this report expresses the Committee's strong preference for "a statewide, non-partisan agency, headed by a Board or Commission … responsible for all components of indigent defense services." Although this approach has been embraced by a number of states, the movement toward centralized state control of indigent defense overseen by a board or commission is by no means complete, as structures of this kind do not exist in a majority of states.[36] Accordingly, the Committee recommends that in states without such statewide programs, there should be "a statewide task force or study commission" for gathering data and assessing the quality of the state's indigent defense system against national standards for the delivery of indigent defense services. This approach often has served as the forerunner to establishment of a statewide indigent defense agency headed by an independent board or commission, as discussed earlier in this report.[37]

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35 *See* The Spangenberg Group Report, Public Defender Application Fees: 2001 Update (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf. For examples of state statutes imposing public defender application fees, *see* Colo. Rev. Stat. § 21-1-103 (3); N.M. Stat. § 31-15-12 (c) (2001). A constitutional problem is present, however, if such fees cannot be waived. *See* State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004) (statute requiring a $50 co-payment for public defender assistance that could not be waived violated indigent defendant's right to counsel and was, therefore, unconstitutional). *See also supra* note 50, Chapter 1.

36 *See supra* notes 2–21, 100–02, Table II, and accompanying text, Chapter 4. As reflected in Table II, there are only 19 states that have a state public defender or a state director, as well as an oversight board or commission with responsibility for indigent defense throughout the state.

37 *See supra* note 119 and accompanying text, Chapter 4.

To assure independence of the undertaking, the Committee recommends the same procedure for selecting members of the task force or commission as specified in Recommendation 2, for the selection of members of a permanent statewide indigent defense board or commission.

Qualifications, Performance, and Supervision of Counsel

Recommendation 5—The Board or Commission should establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel. The Board or Commission should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services.

Commentary—No system of public defense representation for indigent persons can be successful unless the lawyers who provide the representation are capable of rendering quality representation. Regardless of whether assigned counsel, contract attorneys, or public defenders provide the defense services, states should require that the attorneys be well qualified to do so. A tiered system of qualifications for appointment to different levels of cases, depending on the training and experience of the lawyers, will help to ensure that the defender has the requisite knowledge and skills to deliver high quality legal services, whether the charge is juvenile delinquency, a simple misdemeanor, or a complex felony.[38]

A meaningful assessment of attorney qualifications, however, should go beyond objective quantitative measures, such as years of experience and completed training. States should also implement other more substantive screening tools, including audits of prior performance, in-court observations, inspection of motions and other written work, and peer assessments.[39] In assessing attorney qualifications, the use of performance standards such as those developed by the National Legal Aid and Defender Association can be quite useful.[40]

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38 The same concept has been embraced by the ABA: "Defense counsel's ability, training, and experience should match the complexity of the case." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 6, n.21.

39 Recommendations of the American Bar Association (ABA) pertaining to death penalty representation contain provisions related to attorney qualifications and monitoring of attorney performance. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) [hereinafter ABA Death Penalty Guidelines] Guidelines 5.1 and 7.1. England also has developed extensive procedures for monitoring the performance of private lawyers who provide representation in criminal legal aid. *See* Lefstein, *Lessons from England, supra* note 57, Chapter 1, at 899–900.

40 *See* NLADA Performance Guidelines, *supra* note 72, Chapter 1.

It is not sufficient, however, just to make sure that attorneys who provide defense services are qualified when they begin to provide representation. It is also essential that they be supervised during the early years of their careers as indigent defense counsel, whether they serve in a public defender agency or other program for indigent defense. The oversight called for in this recommendation should not be undertaken by members of the Board or Commission, but rather by experienced staff of the agency or members of the bar with whom there are special arrangements to provide supervision or assessments.[41]

In addition, there should be procedures for removal from the list of lawyers who may serve as assigned counsel or contract attorneys.[42] The ABA has long called for procedures to remove from the roster of lawyers who provide legal services "those who have not provided quality representation."[43] More recently, the ABA specifically endorsed procedures for removal of unqualified lawyers from the list of defense lawyers who provide representation in capital cases.[44]

Workload

Recommendation 6—The Board or Commission should establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated.

Commentary—The most well trained and highly qualified lawyers cannot provide "quality defense services" when they have too many clients to represent, i.e., when their "caseload" is excessively high. It is critical, moreover, that in addition to caseload, an attorney's other responsibilities (e.g., attendance at training programs,

41 This is consistent with recommendations of the ABA, which urge that Boards overseeing the defense function be responsible for establishing policy of the agency but "precluded from interfering in the conduct of particular cases." *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3.

42 Removal from a list of lawyers eligible to receive appointments is different than the situation when a defense lawyer seeks to withdraw from a case. Normally, court approval to withdraw from an assigned case is required. *See infra* notes 92–93 and accompanying text.

43 "The roster of lawyers should periodically be revised to remove those who have not provided quality legal representation or who have refused to accept appointments on enough occasions to evidence lack of interest. Specific criteria for removal should be adopted in conjunction with qualification standards." *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-2.3(b).

44 "Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments." ABA Death Penalty Guidelines, *supra* note 39, 7.1 (c).

administrative matters, etc.) be considered in assessing an attorney's overall "workload." Accordingly, the Committee urges that workload limits, which take caseload into account, be established and enforced for all attorneys furnishing indigent defense representation.

Similarly, the ABA Ten Principles call for the workload of defense counsel to be "controlled to permit the rendering of quality representation."[45] This objective is among the most important in this report, since excessive caseloads in public defense is a pervasive national problem.[46] As a result, indigent defense counsel are frequently unable to render "competent" representation to their clients as required by rules of professional conduct,[47] let alone provide "quality" services as recommended in ABA standards[48] and in this report.

Although national annual caseload standards have been cited for many years and both the ABA and the American Council of Chief Defenders have indicated that the numbers of cases in these standards should not be exceeded,[49] the determination of the numbers of cases that a lawyer should undertake during the course of a year must necessarily be a matter of assessment. This point was emphasized in an ethics opinion in 2006 issued by the ABA Standing Committee on Ethics and Professional Responsibility, which made clear that there could be no "mathematically set number of cases a lawyer may handle as an ethical norm."[50] Ultimately, responsibility for a lawyer's ethical conduct rests with the independent professional judgment of the individual attorney and cannot be determined by policies regarding caseloads, by a

45 "Defense counsel's workload is controlled to permit the rendering of quality representation." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 5. The commentary distinguishes workload from caseload in that workload is "caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties." *Id.* at cmt.

46 *See supra* notes 105–24 and accompanying text, Chapter 2.

47 "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1. The requirement of "competent representation" has been accepted by state rules of professional conduct throughout the country. The ABA's rules are the model for ethics rules for almost all states. *See* http://www.abanet.org/cpr/mrpc/model_rules.html

48 "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public on the importance of this objective." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.1.

49 "National caseload standards should in no event be exceeded…." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 5 cmt. The same position has been adopted by the American Council of Chief Defenders. *See also supra* notes 81–90, Chapter 1; and *supra* notes 96–107, Chapter 2.

50 ABA Formal Op. 06-441, *supra* note 86, Chapter 1.

contract with a governmental body, or by the directions of a supervisor.[51] Obviously, a lawyer's annual caseload must take into account a wide variety of factors, such as the extent of support services, especially including investigators and paralegals, complexity of the cases, the extent of the lawyer's experience, the speed at which cases proceed through the courts, and the lawyer's other duties as a professional.

The issue of workload is important not only to public defenders but also to assigned counsel and to private attorneys who provide services pursuant to contracts. In the case of private attorneys, this should include oversight of the extent of their private practice in order to ensure that they have adequate time to devote to their indigent cases.[52] The goal should be to make sure that all attorneys who provide defense services have adequate time to devote to their cases and are thus able to meet established performance standards for each client's case, including fulfilling basic responsibilities related to interviewing the client, conducting investigations, discovery and motions practice, trial preparation, sentencing, and post-conviction matters.

This Recommendation should be read in conjunction with Recommendation 14, which deals with the duties of defense lawyers and defender programs faced with excessive numbers of cases. Also, Recommendation 15 addresses the duties of judges, prosecutors, and defense lawyers to report to disciplinary agencies knowledge of serious ethical violations.

Compensation

Recommendation 7—Fair compensation should be provided, as well as reasonable fees and overhead expenses, to all publicly funded defenders and for attorneys who provide representation pursuant to contracts and on a case-by-case basis. Public defenders should be employed full time whenever practicable and salary parity should be provided for defenders with equivalent prosecution attorneys when prosecutors are fairly compensated. Law student loan forgiveness programs should be established for both prosecutors and public defenders.

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51 However, if an attorney and supervisor disagree about whether competent representation has been or can be provided to the client, and the matter is "arguable" as a matter of professional duty, the attorney does not violate his or her professional duty in complying with a supervisor's "reasonable resolution" of the matter. *See* ABA Model Rules, *supra* note 67, Chapter 1, at R. 5.2 (b).

52 Although the work of most private defense lawyers who serve as assigned counsel is not monitored, there are a few notable exceptions in which there is some oversight. For example, in Massachusetts, the Committee on Public Counsel Services (CPCS), which is the state's agency for providing indigent defense services, makes an effort to evaluate the services of assigned counsel. Also, the CPCS imposes strict limitations on the numbers of cases for which assigned counsel can be compensated during the year. Also, assigned counsel may only be compensated for 1800 billable hours of service per year. *See* Lefstein, *Lessons from England, supra* note 57, Chapter 1, at 909–10.

Commentary—The compensation paid to defenders, as well as the fees provided through contracts and to assigned counsel on a case-by-case basis, often discourages well qualified lawyers from representing the indigent and adversely impact the quality of services provided by those who do. In defender offices, low salaries contribute to high turnover and difficulty in recruiting experienced and skilled attorneys. Inadequate compensation of court-appointed lawyers and contract attorneys contributes to lawyers accepting a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation. To avoid these kinds of problems, the ABA urges "reasonable" compensation for defense counsel and, similar to the above standard, "parity between defense counsel and the prosecution in resources…."[53]

This recommendation also calls for all salaried public defenders to be employed full time "whenever practicable." The Committee's recommendation is largely consistent with the approach of the ABA[54] and the National Study Commission,[55] while recognizing that, in some jurisdictions. there may be especially rural areas in which full-time defenders may not make sense. Overall, however, the Committee believes that full-time defenders are more likely to have sufficient time to develop the requisite knowledge and skills necessary to provide quality legal services while avoiding the temptation to devote a disproportionate amount of time to paying clients. Also, funding sources cannot use the prospect of defenders acquiring retained clients as a justification for keeping defender salaries unreasonably low.

Because of high student loan indebtedness, recent law school graduates are sometimes discouraged from applying for positions in public interest law, including serving as prosecutors and defenders.[56] Recently, Congress enacted legislation that includes "loan forgiveness," pursuant to which law graduates who work as public defenders and prosecutors may have a portion of their student loans forgiven.[57] This legislation is much needed and will assist the states in attracting recent law graduates to serve as defense attorneys and prosecutors.[58] But the need for loan forgiveness is enormous,

53 ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 8.

54 "Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-4.2.

55 NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.9.

56 *See* ABA Commission on Loan Repayment and Forgiveness, Lifting the Burden: Law Student Debt as a Barrier to Public Service (2003), *available at* http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf.

57 The College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401 (2007).

58 *See generally* Philip G. Schrag, *Federal Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations,* 36 Hofstra L. Rev. 27 (2007).

and thus, the Committee recommends that states also adopt and fund loan forgiveness legislation for the benefit of prosecutors and defense lawyers.

Adequate Support and Resources

Recommendation 8—Sufficient support services and resources should be provided to enable all defense attorneys to deliver quality indigent defense representation, including access to independent experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training.

Commentary—"Support services and resources," as well as "training," are indispensable if attorneys are to provide quality defense representation. In their absence, criminal and juvenile proceedings become fundamentally unfair. Yet, an enormous disparity exists between the resources available to prosecutors, who can draw upon police and state law enforcement agencies, and those furnished to public defenders, assigned counsel, and contract attorneys. Providing defense lawyers with resources such as "independent experts,[59] investigators, social workers, paralegals, secretaries, technology, [and] research capabilities" not only creates a more level playing field between prosecution and defense, but also is substantially more efficient than asking overburdened defenders to somehow compensate for their absence. Professionally trained and experienced investigators, for instance, can conduct factual investigations at lower expense than attorneys, while freeing attorneys to devote their time to other important tasks, such as filing motions, communicating with their clients, and preparing for court appearances.[60]

Training is another of those requirements essential for providing quality service as defense attorneys.[61] Not only must those serving as defense counsel possess the requisite knowledge, especially in countless and sometimes complex subject areas of criminal and juvenile law that are not covered in law schools, but they also need to hone their advocacy skills in order to be effective in representing their clients. Training is especially important when lawyers begin their service as counsel for the indigent, just as new policemen and firemen must undergo training before they begin serving

59 The constitutional basis for furnishing experts on behalf of the indigent is discussed at *supra* notes 33–36, Chapter 1, and accompanying text.

60 The importance of support services is emphasized in prior standards related to defense services. *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.4; NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 3.1.

61 Training has been emphasized in prior standards related to indigent defense. "Counsel and staff providing defense services should have systemic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 9, cmt. *See also* ABA Providing Defense Services, 5-1.5; NLADA Guidelines for Legal Defense Systems, 5.7–5.8.

to protect the public. As in other areas of law practice, training of defense lawyers should continue throughout their careers, whether they are serving as public defenders, assigned counsel, or contract attorneys.[62]

Eligibility and Prompt Assignment

Recommendation 9—Prompt eligibility screening should be undertaken by individuals who are independent of any defense agency, and defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel.

Commentary—Consistent with this recommendation, the ABA has long recommended that lawyers "be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest."[63] As discussed earlier in this report, the U.S. Supreme Court recently reaffirmed the proposition that the Sixth Amendment right to counsel "attaches" when the accused is brought to court for an initial judicial hearing regardless of whether the prosecutor is aware of the proceeding.[64] In the vast majority of states, in the District of Columbia, and in the federal courts, counsel is made available for the indigent accused before, at, or just after the initial court appearance.[65]

In order to provide defense counsel as soon as feasible in accordance with this Recommendation, "prompt eligibility screening" is essential. It is also highly desirable that screening be undertaken pursuant to uniform written standards used throughout the jurisdiction.[66] An agency with authority to administer indigent defense services statewide, as urged in Recommendation 2, is in a position to adopt uniform

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62 Forty-two states currently require some form of mandatory continuing legal education for all attorneys, not just for lawyers practicing in the area of criminal defense. *See* Summary of MCLE Jurisdiction Requirements, *available at* http://www.abanet.org/cle/mcleview.html.

63 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-6.1.

64 *See supra* notes 39–40 and accompanying text, Chapter 1.

65 Rothgery v. Gillespie County, 128 Sup. Ct. 2578, 2586 (2008).

66 *See* Brennan Center for Justice, Eligible for Justice: Guidelines for Appointing Defense Counsel at 6–8 (2008) *available at* http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf. This report recommends that "screening for eligibility must compare the individual's available income and resources to the actual price of retaining a private attorney. Non-liquid assets, income needed for living expenses, and income and assets of family and friends should not be considered available for purposes of this determination…. [P]eople who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of the federal poverty guidelines should be presumed eligible for state-appointed counsel." *Id.* at 2. The ABA recommends, and the great majority of states provide, that the test to qualify for appointed counsel is whether the person is financially capable, without substantial financial hardship, of retaining a private attorney. *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-7.1 and accompanying Commentary.

eligibility standards for the state. Uniformity also helps states predict future costs of the state's indigent defense program while enhancing the public trust of the state's justice system.

It is also important to focus on the persons who conduct eligibility screening. This Recommendation urges that all such screening be conducted by persons "who are independent of any defense agency." A recent national report on eligibility screening in indigent defense sums the matter up this way: "Conflict of interest concerns, confidentiality rules, and harm to the attorney-client relationship all caution against screening by either the defender or the public defender program that represents a particular client. As a practical matter, many public defender programs do screen their own clients, but as an ethical matter, they should not."[67] The report then provides illustrations of defenders inappropriately limiting their caseloads through the use of strict eligibility standards and notes the risk that defenders and defender programs are sometimes tempted to reject cases because they appear to be time-consuming or unpopular, or for other reasons. Instead of screening by defenders, it makes far better sense for screening to be conducted by court personnel or by individuals employed by a pretrial services agency.

Reclassification

Recommendation 10—In order to promote the fair administration of justice, certain non-serious misdemeanors should be reclassified, thereby reducing financial and other pressures on a state's indigent defense system.

Commentary—A significant way in which the need to provide defense counsel can be reduced is by reclassifying certain non-serious misdemeanors as civil infractions, for which defendants are subject only to fines. If the potential for incarceration of the accused is eliminated, counsel need not be furnished under the Sixth Amendment.[68] There are a number of examples in which states have reclassified offenses, typically involving violations where incarceration was rarely sought or imposed,[69] but there are

67 Brennan Center for Justice, Eligible for Justice, *supra* note 66, at 10.

68 *See supra* notes 22–26 and accompanying text, Chapter 1.

69 For example, between 1971 and 2001, 25 states decriminalized sodomy and the state supreme courts in 10 other states ruled that their statutes were unconstitutional. In 2003, the U.S. Supreme Court effectively ruled that sodomy statutes in 15 states were unconstitutional. Starting with the passage of the 21st Amendment in 1933, which left decisions to criminalize alcohol to state and local control, there has been a steady decriminalization of alcohol sales and use. Many aspects of gambling also have been decriminalized over the years, as states now often operate lotteries or allow casinos and off-track betting. Darryl Brown, *Democracy and Decriminalization,* 86 Tex. L. Rev. 223, 235 (2007). *See also* Kara Godbehere Goodwin, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States War on Drugs,* 22 Buff. Pub. Int. L. J. 199 (2004). *See also supra* notes 140–50 and accompanying text, Chapter 2.

undoubtedly other situations in which the approach is feasible. Not only does such action reduce crowded court dockets, freeing up the time of judges and prosecutors to devote to more serious matters, but it also decreases jail costs. Moreover, it lightens defender caseloads, permitting savings to be used to fund other defense expenses. Additional civil fines collected in lieu of jail time are also a revenue source.

Data Collection

Recommendation 11—Uniform definitions of a case and a consistent uniform case reporting system should be established for all criminal and juvenile delinquency cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases.

Commentary—Among the most vexing problems in indigent defense are predicting the number of lawyers needed to provide quality representation in all cases eligible for the appointment of counsel, as well as the costs of additional personnel such as investigators, paralegals, and expert witnesses. If a public defense system is organized on a statewide basis, as urged in Recommendation 2, the state agency is able to gather uniform data throughout the state, thereby enabling annual budget projections to be based upon "the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases" that typically remain open at the end of a fiscal year. For instance, Louisiana's legislation enacted in 2007, which established a statewide public defense system, provides that the agency's governing board shall ensure that "data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs."[70] But even a "uniform case reporting system," as the Committee recommends, will not be successful unless there also are "uniform definitions of a case," which will ensure that the reported data is consistent throughout the state. To remedy this kind of deficiency, at least one state has required, by statute, uniform case standards for reporting purposes.[71] If possible, the definition of a case adopted for the defense should be consistent with the definition used by prosecutors

70 La. Rev. Stat. Ann. § 15-148 (B) (f) (11) (Supp. 2009).

71 A Tennessee statute provides as follows: "District attorneys general shall treat multiple incidents as a single incident for purposes of this statute when the charges are of a related nature and it is the district attorney general's intention that all of the charges be handled in the same court proceeding. If a case has more than one charge or count, then the administrative office of the courts shall count the case according to the highest class of charge or count at the time of filing or disposition…." T.C.A. 16-1-117 (a) (1) (2008).

within the state, thereby facilitating comparisons between prosecution and defense caseloads.[72] .

What the Federal Government Should Do

A National Center for Defense Services

Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.

Commentary—As discussed earlier in this report, the duty of providing defense representation in criminal and juvenile cases derives from decisions of the U.S. Supreme Court and is based upon interpretations of the *federal* Constitution's Sixth Amendment.[73] Taken together, the Court's decisions are an expensive unfunded mandate with which state and/or local governments have been struggling for more than 45 years.[74] Although the federal government established the Legal Services Corporation in 1974 to assist states in providing legal services in civil cases, in which there is not a constitutional right to counsel,[75] the federal government has not enacted comparable legislation to assist states in cases where there is a constitutional right to counsel or where states require that counsel be appointed, even though it is not constitutionally mandated. The Committee applauds the establishment of the Legal Services Corporation but believes there should also be a federal program to help the states defray the costs of defense services in criminal and juvenile cases.

Thirty years ago, the ABA endorsed the establishment of a federally funded "Center for Defense Services," and the Association reiterated its support for such a program in 2005.[76] The Center's mission would be to strengthen the services of publicly

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72 Standardized definitions for felony and misdemeanor cases have been recommended. *See* State Court Guide to Statistical Reporting, National Center for State Courts 67–68 (n.d.), *available at* http://www.ncsconline.org/D_Research/csp/StCtGuide_StatReporting_Complete_color10-26-05.pdf.

73 *See supra* notes 1–26 and accompanying text, Chapter 1.

74 The Supreme Court has made relatively few comments about the cost to the states in providing indigent defense services. *See supra* notes 58–65 and accompanying text, Chapter 1.

75 *See* The Legal Services Corporation Act, 42 U.S.C. 2996 (1974).

76 ABA Standing Committee on Legal Aid and Indigent Defendants, Recommendation for Establishment of a Center for Defense Services (1979), *available at* http://www.abanet.org/legalservices/downloads/sclaid/121.pdf; ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 41 (Recommendation 2).

funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data. The original report submitted to the Association's House of Delegates in 1979 explained the proposal's importance: "If adequately funded by the Congress, the Center could have far-reaching impact in eliminating excessive caseloads…, providing adequate training and support services … and in facilitating representation as well as ensuring that quality defense services are available in all cases where counsel is constitutionally required."[77]

Federal Research and Grant Parity

Recommendation 13—Until a National Center for Defense Services is established, as called for in Recommendation 12, the United States Department of Justice should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense. Federal financial assistance through grants or other programs as provided in support of state and local prosecutors should also be provided in support of indigent defense, and the level of federal funding for prosecution and defense should be substantially equal.

Commentary—As noted in the Commentary to Recommendation 12, the call for a National Center for Defense Services is not new. Although Congress has not been persuaded to enact such a program, the Committee is convinced that the proposal still makes excellent sense. However, in the absence of such a program, there are valuable steps that the federal government can take through existing agencies of the U.S. Department of Justice (DOJ) to enhance indigent defense.

The Office of Justice Programs (OJP) of the DOJ, for example, develops and disseminates data about crime, administers federal grants, provides training and technical assistance, and supports technology development and research. The OJP's bureaus include, among others, the Bureau of Justice Assistance (BJA), which gives assistance to local communities to improve their criminal justice systems, and the Bureau of Justice Statistics (BJS), which provides timely and objective data about crime and the administration of justice at all levels of government.[78] Also, the National Institute of Justice (NIJ), the research and evaluation agency of DOJ, offers independent, evidence-based knowledge and tools designed to meet the challenges of criminal justice, particularly at state and local levels.[79]

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77 ABA Standing Committee on Legal Aid and Indigent Defendants, Recommendation for Establishment of a Center for Defense Services, *supra* note 76, at 4.

78 *See* Bureau of Justice Assistance (BJA) website, *available at* http://www.ojp.usdoj.gov/BJA/about/aboutbja.html.

79 *See* National Institute of Justice website, *available at* http://www.ojp.usdoj.gov/nij/.

Although the overwhelming majority of expenditures by these agencies have been devoted to enhance law enforcement, crime control, prosecution, and corrections,[80] a few successful defense-oriented projects have been funded, which suggest that increased federal attention to indigent defense could have significant positive impact. For instance, in both 1999 and 2000, BJA hosted two symposia that brought together from all 50 states criminal justice professionals, including judges and leaders in indigent defense, to explore strategies to improve the delivery of defense services.[81] The National Defender Leadership Project, supported by a grant from BJA, offered training and produced a series of publications to assist defender managers in becoming more effective leaders.[82] Grant awards by the Office of Juvenile Justice and Delinquency Prevention, another bureau of OJP, have supported a national assessment of indigent defense services in delinquency proceedings as well as numerous individual state assessments of access to counsel and of the quality of representation in such proceedings.[83]

While the foregoing projects and programs are commendable, the financial support of DOJ devoted to indigent defense is substantially less than the sum spent on the improvement of prosecution services at the state and local level. For this reason, the Committee calls for the financial support of "prosecution and defense … [to] be substantially equal."

What Individuals, Criminal Justice Agencies, and Bar Associations Should Do

Adherence to Ethical Standards

Recommendation 14—Defense attorneys and defender programs should refuse to compromise their ethical duties in the face of political and systemic pressures that undermine the competence of their representation provided to defendants and juveniles unable to afford counsel. Defense attorneys and defender programs should, therefore, refuse to continue representation or accept new cases for

80 Examples of such programs include the Targeting Violent Crime Initiative, The Bulletproof Vest Partnership Program, Counter-Terrorism Training and Recourses for Law Enforcement, and Project Safe Neighborhoods. *See* website for list of current BJA projects, *available at* http://www.ojp.usdoj.gov/BJA/programs/index.html.

81 *See, e.g.,* National Symposium on Indigent Defense 2000, Final Report (Office of Justice Programs 2000).

82 *See* The National Defender Leadership Institute webpage, *available at* http://www.nasams.org/Defender_NDLI/Defender_NDLI_About.

83 For an example of such reports, *see* Office of Juvenile Justice and Delinquency Prevention, Juvenile Delinquency Guidelines: Improving Court Practices in Juvenile Delinquency Cases (2005), *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juvenile delinquencyguidelinescompressed.pdf.

representation when faced with excessive workloads that will lead to a breach of their professional obligations.

Commentary—This recommendation is based squarely on the rules of professional conduct that govern lawyers throughout the United States in representing their clients. It is also a recommendation that has long been endorsed in standards of the ABA,[84] in the ABA's 2004 national report on indigent defense,[85] and, finally, in a 2006 ethics opinion issued by the ABA's Standing Committee on Ethics and Professional Responsibility.[86] In this opinion, the most prestigious ethics committee in the country summed up the duty of defense counsel:

> If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyers should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation…. Lawyer supervisors, including heads of defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct.[87]

While the discussion that follows is based on the ABA Model Rules of Professional Conduct (Model Rules), the key provisions cited here have been adopted almost verbatim by states virtually everywhere. Lawyers who fail to comply with the rules of the legal profession are subject to disciplinary sanction, which can include a reprimand, suspension from the practice of law, and even disbarment.[88]

Rules 1.1 and 1.3 of the Model Rules require lawyers to furnish competent and diligent representation, which means that they possess "the legal knowledge, skill,

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84 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-5.3.

85 ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 43 (Recommendation 4).

86 *See* ABA Formal Op. 06-441, *supra* note 86, Chapter 1.

87 *Id.* at 1.

88 *See, e.g.,* Martin v. State Bar, 20 Cal. 3d 717, 144 Cal. Rptr. 214 (1978) (suspension from practice of law justified because of failure to perform legal services for clients and not excused by attorney having accepted too many retained cases); Disciplinary Bd. v. Amundson, 297 N.W.2d (N.D. 1980) (public reprimand justified for failure to communicate sufficiently with beneficiaries of estate and not excused by attorney's heavy workload); and Matter of Whitlock, 441 A.2d 989 (D.C. 1982) (suspension from practice justified for failure to file briefs in two criminal appeals and attorney's conduct not excused by reason of caseload and other factors). Notwithstanding these few decisions, defense attorneys who represent the indigent are rarely disciplined even when their caseloads are excessive, and they fail to provide competent representation. *See* discussion *supra* note 91, Chapter 1, and accompanying text.

thoroughness and preparation reasonably necessary for the representation"[89] and that they are able to "act with reasonable diligence and promptness in representing a client."[90] If a lawyer cannot provide competent and diligent representation, whether attributable to excessive workload, inadequate supervision, training, or other reasons, the lawyer cannot discharge his or her duty as required by the rules of the legal profession. In addition, if the lawyer's difficulty in complying with Model Rules 1.1 and 1.3 is attributable to an excessive number of cases, the lawyer is faced with a conflict of interest, pursuant to Model Rule 1.7, since "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client…."[91]

But what is the lawyer to do if confronted with continued defense representation that will violate the rules of professional conduct? Pursuant to Model Rule 1.16, the lawyer has a mandatory duty to "withdraw from the representation …"[92] and must resist appointments to additional cases. When the lawyer's cases are obtained by court appointment, applicable court rules typically require that judicial approval be obtained in order to withdraw from representation and to avoid additional case assignments.[93] In moving to withdraw and in resisting additional appointments, the lawyer should make a detailed statement on the record of the reasons for the request, thus preserving the issue for appeal. Also, in the event a client is currently being represented, the lawyer should inform the client that competent, conflict-free representation cannot be provided.[94] Similarly, if a plea offer is extended by the prosecution and the lawyer has not had adequate time to investigate the client's case or otherwise formulate a recommendation about the plea offer, the client should be advised that counsel is unable to provide competent advice about whether the offer should be accepted. Such direct communication with the client is required by Model Rules, which state that a "lawyer shall keep the client reasonably informed about the status of the matter."[95] If a defendant nevertheless decides to enter a plea of guilty, counsel should state on the record that he or she has been unable to competently advise the defendant with regard to the plea and that defendant has not had effective assistance of counsel in agreeing to the plea. Similarly, if forced to trial in circumstances when counsel has not had adequate time to prepare, counsel should state on the record that he or she

89 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1.

90 *Id.* at R. 1.3 (2008).

91 *Id.* at R. 1.7(b).

92 *Id.* at R. 1.16(a).

93 *Id.* at R. 1.16(c). As stated in comment 2 to Model Rule 1.16: "When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority."

94 ABA Formal Op. 06-441, *supra* note 86, Chapter 1, at 3, n.8.

95 ABA Model Rules, at R. 1.4.

is unable to furnish competent representation or the effective assistance of counsel at the ensuing trial.

Supervisors and heads of defender programs must also be concerned when their lawyers are struggling with excessive caseloads, because these persons have a duty to make sure that lawyers for whom they have either supervisory or overall responsibility do not violate rules of the profession. If supervisors and heads of defender programs fail to make reasonable efforts to prevent lawyers under their control from violating ethical rules, they, too, will have violated the rules of the legal profession and are subject to disciplinary sanction.[96] (The duty of judges, prosecutors, and defense lawyers to report ethical violations in conjunction with excessive workloads of defense attorneys is discussed in the Commentary below to Recommendation 15).

Recommendation 15—Judges, prosecutors, and defense lawyers should abide by their professional obligation to report to disciplinary agencies knowledge of serious ethical violations that impact indigent defense representation when the information they possess is not confidential. Appropriate remedial action should be taken by persons with responsibility over those who commit such ethical violations.

Commentary—Pursuant to the ABA's Model Rules, members of the bar have a duty to report to "appropriate professional authority" another lawyer when they know that the "lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer…."[97] This duty also extends to reporting judges when "a lawyer knows that a judge has committed a violation of applicable rules of judicial conduct" that raise a similar kind of "substantial question as to the judge's fitness for office…."[98] Although a lawyer is not authorized to disclose information protected pursuant to principles of confidentiality (i.e., "information relating to the representation of the client"), such information may be disclosed with client consent or if disclosure is impliedly authorized.[99] In addition, the ABA's Code of Judicial Conduct requires judges to report to "the appropriate authority" if they have "knowledge that a lawyer has committed a violation of … the Rules of Professional Conduct that raises a substantial question of the lawyer's honesty, trustworthiness, or fitness as a lawyer…."[100] Consistent with the foregoing provisions, this recommendation relates specifically to

96 *Id.* at R. 5.1(c).

97 *Id.* at R. 8.3(a).

98 *Id.* at R. 8.3(b).

99 *Id.* at R. 1.6, cmt.5, R. 8.3(c).

100 ABA Model Code of Judicial Conduct 2.15 (B) (2007). *See also* Section 2.15 (D), which imposes a duty on judges to "take appropriate action" when "information" is received that suggests "a substantial likelihood" that a lawyer has violated a rule of professional conduct.

reporting non-confidential "serious ethical violations that impact indigent defense representation…."

This report discusses instances in which both lawyers and judges have violated their professional responsibilities in relation to the administration of justice. We have noted, for example, that judges do not always properly advise the accused of their right to counsel and that prosecutors sometimes improperly encourage waivers of the right to counsel.[101] Also, defense lawyers sometimes proceed to represent clients when they have inordinately high caseloads that prevent their providing competent representation, but the lawyers do not seek to withdraw or otherwise take steps to protect the rights of their clients.[102] In addition, when defenders represent excessive numbers of clients with the knowledge of supervisors and directors of defender programs, these supervisors and agency heads commit professional misconduct.[103]

When the conduct of lawyers and judges raises a "substantial question" about their "fitness" for the practice of law, the Committee recommends that such instances of professional misconduct be reported. It has been forcefully argued, for example, that if a public defender is ordered by a supervisor or agency head to undertake representation in an excessive number of cases, thereby preventing the lawyer from competently representing his or her clients, the defender should report these persons to the appropriate disciplinary authority.[104] Similarly, if a judge forces a defender to provide representation in circumstances where the defender cannot provide competent service, the defender's duty is to report the judge to the appropriate authority.[105]

While the Committee appreciates that such actions by lawyers require substantial fortitude, it also believes that the profession's rules about reporting misconduct are clear and that compliance with the rules could lead to significant positive reform. The Committee's call for action, moreover, is not unprecedented. In 2005, for example, the ABA House of Delegates passed a resolution calling on judges, in accord with "canons of professional and judicial ethics … [to] take appropriate action with regard to defense lawyers who violate ethical duties to their clients … [and] take appropriate action with regard to prosecutors who seek to obtain waivers of counsel and guilty

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101 *See supra* notes 207–35 and accompanying text, Chapter 2. *See also supra* notes 7–19 and accompanying text, which contains Recommendation 1 and addresses such practices.

102 *See supra* notes 96–108 and accompanying text, Chapter 2.

103 ABA Model Rules, *supra* note 67, Chapter 1, at R. 5.1.

104 *See* Monroe Freedman, *An Ethical Manifesto for Public Defenders,* 39 Val. U. L. Rev. 911, 921 (2005).

105 "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as the judge's fitness for office shall inform the appropriate authorities." ABA Model Rules, at 8.3(b). Judges have a duty to "comply with the law" and to accord all persons "the right to be heard according to law." *See* ABA Model Code of Judicial Conduct 1.1, 2.6 (a) (2007).

pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel."[106]

Open File Discovery

Recommendation 16—Prosecutors should adopt open file discovery policies in order to promote the fair administration of criminal and juvenile justice.

Commentary—As discussed in Chapter 2, adherence to broad open file discovery policies by prosecutors promotes just results while reducing the workload burden on indigent defense providers.[107] Such policies also promote the early resolution of cases while ameliorating a lack of investigative resources available to the defense. A similar recommendation was adopted by the ABA many years ago in its criminal justice standards, which urge that documentary evidence, tangible objects, and witness lists, among numerous other matters, be made available to the defense "within a specified and reasonable time" prior to trial.[108] In the absence of open file discovery, criminal and juvenile proceedings remain a form of trial by ambush, in which far less information is available to the defense prior to disposition than is typically available in ordinary civil proceedings.[109]

Education, Advocacy and Media Attention

Recommendation 17—State and local bar associations should provide education about the professional obligations and standards governing the conduct of defense attorneys, prosecutors, and judges in order to promote compliance with applicable rules. State and local bar associations, defense attorneys, prosecutors, judges, and their professional associations should support and advocate for reform of indigent defense services in compliance with the recommendations contained in this report.

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106 ABA House of Delegates, Resolution 107 (adopted August 9, 2005) § 5(b), (c), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf. However, underreporting of lawyer misconduct by judges is a problem, as noted by the California Commission on the Fair Administration of Justice. Under California law, judges are required to report to the State Bar whenever a judgment in a judicial proceeding is reversed or modified due to "misconduct, incompetent representation, or willful misrepresentation of an attorney." Based upon its research over a 10-year period, the Commission concluded in 2007 that "reliance on the State Bar as the primary disciplinary authority is hampered by underreporting." *See* http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

107 *See supra* notes 168–77 and accompanying text, Chapter 2.

108 ABA *Standards for Criminal Justice: Discovery and Trial by Jury,* 11-2.1 (3d ed., 1996).

109 There is an "expansive—and intrusive—approach to pre-trial discovery followed in most American civil cases … discovery is much more limited in criminal cases than it is under civil rules." Joseph Glannon, Civil Procedure: Examples and Explanations, 363 (Aspen Publishers, 5th ed. 2006).

Commentary—Among national bar associations, the ABA for many years has been at the forefront of educating the legal profession, the public, and policymakers about the criminal and juvenile justice systems; developing standards,[110] principles,[111] and guidelines for its improvement;[112] advocating on behalf of indigent defense; and providing technical assistance to indigent defense programs across the country.[113] In recent years, the National Association of Criminal Defense Lawyers (NACDL) also has been an important voice for indigent defense reform.[114] And, while not a bar association, the National Legal Aid and Defender Association (NLADA) has constantly developed informational materials, promulgated guidelines and standards, offered technical assistance, and lobbied for improvements.[115] Despite these vigorous national efforts, the adversary system of justice and especially the function of defense lawyers are still not always well understood or readily accepted by the public and legislators. This lack of understanding and acceptance contributes to inadequate funding of defense services, especially in comparison to the prosecution function.[116] In order to inform the public and legislators about the adversary system, including the role of defense counsel and the importance of sufficient funding, state and local bar associations need to add their voice to those of national bar associations and other organizations.

In its most recent report on indigent defense, the ABA Standing Committee on Legal Aid and Indigent Defendants urged greater involvement of state and local bar associations, as well as others, in indigent defense reform.[117] While a number of state and local bar associations have demonstrated their commitment to improving indigent defense, the Committee believes there is still much more to be done. Bar associations,

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110 *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1.

111 *See, e.g.,* ABA Ten Principles, *supra* note 67, Chapter 1.

112 *See, e.g.,* ABA Death Penalty Guidelines, *supra* note 39.

113 For more than 25 years, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) contracted with The Spangenberg Group to provide technical assistance to defense programs across the United States. Studies and other reports prepared by The Spangenberg Group are on SCLAID's website. *See* http://www.indigentdefense.org.

114 *See* National Association of Criminal Defense Lawyers website dealing with indigent defense matters, *available at* http://www.nacdl.org/public.nsf/DefenseUpdates/Index?OpenDocument.

115 *See* NLADA website dealing with indigent defense matters, *available at* http://www.nlada.org/Defender/Defender_NIDC/Defender_NIDC_Home.

116 *See supra* notes 70–95 and accompanying text, Chapter 2.

117 "State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases in which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services." ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 44 (Recommendation 6). "In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems." *Id.* at 45 (Recommendation 7).

for example, can evaluate, monitor, and assess their respective systems of criminal and juvenile justice, issue reports, and thereby educate lawyers and the public about their jurisdiction's justice systems. If, for example, accused persons are being represented by defenders who are routinely overwhelmed with cases, this should be a matter of enormous concern to state and local bar associations. If persons are not being offered the right to counsel in compliance with constitutional requirements, state and local bar associations should speak out on behalf of those who lack legal representation. In order to do so, however, state and local bar associations need to make indigent defense a priority, devote resources to the activity, and at the very least, establish a permanent committee with responsibility for oversight of the adversary system and indigent defense.

Although it is essential that bar associations and those who provide defense services participate in efforts to achieve reform, they also may be regarded with suspicion by some persons since they are virtually certain to emphasize, among other matters, financial support for fellow lawyers. On the other hand, because judges and prosecutors have very different roles from defense counsel in the adversary system, their advocacy on behalf of indigent defense services is apt to be especially persuasive.

Recommendation 18—Criminal justice professionals, state and local bar associations, and other organizations should encourage and facilitate sustained media attention on the injustices and societal costs entailed by inadequate systems of indigent defense, as well as those systems that function effectively.

Commentary—Since media attention about the shortcomings of indigent defense can play a vital role in educating the public and promoting public support for reform, it should be encouraged and facilitated. In recent years, many compelling news articles have highlighted deficiencies in the justice system, such as those dealing with defendants wrongfully convicted, excessive caseloads of public defenders, and the routine failure of jurisdictions to implement effectively the right to counsel. As noted earlier in this report, in addition to educating the public, the media can help to pave the way for improvements.[118] Although public opinion polling suggests that the public generally supports the right to counsel,[119] history demonstrates that this is not normally enough to persuade elected officials to act. But when favorable public opinion is combined with news articles that pull back the curtain on a host of problems in the delivery of defense services, it is considerably easier for legislators to support reform measures because the public is more likely to understand the reasons for action.

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118 *See supra* notes 29–31 and accompanying text, Chapter 4.

119 *See Public Opinion Research Finds Fairness Key to Support for Indigent Defense,* Indigent Defense, Vol. 4, No. 2 (October/November 2000), *available at* http://www.nlada.org/Publications/Indigent_Defense/OctNovArticle5.

Litigation

Recommendation 19—When indigent defense systems require defense attorneys to represent more clients than they can competently represent or otherwise fail to assure legal representation in compliance with the Sixth Amendment, litigation to remedy such deficiencies should be instituted.

Commentary—Chapter 3 of this report contains a detailed analysis of the various litigation approaches to improving indigent defense that have been pursued. While there have been notable successes[120] that have brought about reforms, some lawsuits have failed completely[121] or have otherwise been unsuccessful in achieving systemic change.[122] Litigation, moreover, is time consuming, expensive (especially if pro bono counsel is unavailable), and the results are uncertain. Yet, when other options have failed to achieve necessary improvements, there may be no alternative except to institute a lawsuit since the rights of accused persons are not being protected and/or defense lawyers are unable to furnish competent representation.

In Recommendation 14, the Committee urges that "[d]efense attorneys and defender programs should … refuse to continue representation or to accept new cases for representation when faced with excessive workloads that will lead to a breach of their professional obligations." In order to implement this admonition, defenders have sometimes filed motions to withdraw from cases and/or to stop the assignment of additional cases.[123] Moreover, as noted earlier, litigation has on occasion prompted reforms, which would not have occurred except for the pressure of a lawsuit that challenged the jurisdiction's indigent defense system.[124] When the goal is broad systemic reform, Recommendation 20 addresses the timing of such litigation and the persons for whom lawsuits should be filed.

Recommendation 20—When seeking to achieve remedies that will favorably impact current and future indigent defendants, litigation should be instituted pretrial on behalf of all or a large class of indigent defendants.

Commentary—This recommendation is based upon lessons learned from the analysis of indigent defense litigation set forth in Chapter 3. If the goal is broad systemic reform, it is important that litigation "be instituted pretrial" and that it be "on behalf of all or a large class of indigent defendants." As noted earlier, a lawsuit that is brought post-conviction requires that prejudice be demonstrated, which is invariably

120 *See, e.g., supra* notes 42–58 and accompanying text, Chapter 3.
121 *See, e.g., supra* notes 64–66, 109–112 and accompanying text, Chapter 3.
122 *See, e.g., supra* notes 76–79 and accompanying text, Chapter 3.
123 *See, e.g., supra* notes 81–101 and accompanying text, Chapter 3.
124 *See, e.g., supra* note 6 and accompanying text, Chapter 3; and *supra* note 22 and accompanying text, Chapter 4.

a significant hurdle to overcome.[125] Litigation consistent with this recommendation takes considerable time to prepare and, to be successful, should be supported with ample empirical and anecdotal evidence.[126] Moreover, unless the action is on behalf of a class of indigent defendants, a court's relief is unlikely to reach many defendants.[127] Similarly, litigation that challenges the extent of attorney compensation, while it may be entirely justified, is less likely to impact other significant areas of indigent defense reform, even if it succeeds.[128]

Recommendation 21—Whenever possible, litigation should be brought by disinterested third parties, such as private law firms or public interest legal organizations willing to serve as pro bono counsel, who are experienced in litigating major, complex lawsuits and accustomed to gathering and presenting detailed factual information. Bar associations and other organizations should encourage law firms and public interest legal organizations to undertake indigent defense litigation and should recognize in appropriate ways the contributions of private counsel in seeking to improve the delivery of indigent defense services.

Commentary—Litigation dealing with issues in public defense requires expertise in civil litigation, as well as resources that public defense programs typically lack. Fortunately, some public interest organizations and private law firms have been willing to litigate a variety of indigent defense issues, such as challenges to defense delivery systems, the adequacy of compensation paid to assigned counsel, and the size of public defender caseloads.[129] Moreover, even if defender programs had the resources and expertise to pursue these kinds of lawsuits, they invariably lack sufficient time to prepare and conduct them due to their indigent defense commitments, not the least of which are their caseloads, which often is one of the main reasons that litigation is undertaken.

The Committee commends the commitment of public interest organizations and law firms to engage in pro bono indigent defense lawsuits, believing that their service is in the highest traditions of the legal profession.[130] While public recognition is undoubtedly not the motivation for private lawyers and their law firms to seek public defense improvements through litigation, it is nonetheless appropriate that their contributions be recognized by bar associations and other organizations, which may in turn, encourage others to become involved in the struggle for reform.

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125 *See supra* notes 176–77 and accompanying text, Chapter 3.

126 *See supra* notes 181–86 and accompanying text, Chapter 3.

127 *See supra* notes 173–75 and accompanying text, Chapter 3.

128 *See supra* note 174 and accompanying text, Chapter 3.

129 *See, e.g., supra* note 100, Chapter 3, which mentions private law firms that have made significant contributions in litigating indigent defense issues.

130 The ABA Model Rules recognize that the pro bono responsibility of lawyers may be discharged through "participation in activities for improving the law [and] the legal system…." ABA Model Rules, *supra* note 67, at R. 6.1(b) (3).

Recommendation 22—Defense lawyers who provide representation in appellate and post-conviction cases and organizations that advocate as amicus curiae should urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation.

Commentary—In Chapter 1 of this report, we noted that the accused in our adversary system of justice is entitled under the Sixth Amendment to the effective assistance of counsel. And we also observed that, after a person has been convicted, the test for determining whether the accused was provided effective assistance is embodied in the Supreme Court's decision in *Strickland v. Washington*,[131] decided in 1984. Pursuant to *Strickland*, the question is whether counsel's representation was "within the wide range of professional assistance"[132] to be expected of a lawyer; and, if it was not, whether counsel's conduct was prejudicial to the defendant, i.e., did it lead to a result that was different than would otherwise have occurred?[133] Finally, we pointed out that, while *Strickland* is the standard for determining ineffective assistance under the Sixth Amendment, it has been widely accepted by state supreme courts in determining ineffective assistance of counsel under right-to-counsel provisions in state constitutions.[134]

Further, as we noted earlier, the *Strickland* two-pronged test for determining ineffective assistance of counsel has been harshly criticized, proven to be difficult to apply, and has led to appellate courts affirming convictions that should be unacceptable in a society that genuinely values due process of law. In addition, the *Strickland* standard has made it possible during more than three decades for states and local jurisdictions to underfund indigent defense services, as this report and many others have amply demonstrated. The Committee, therefore, calls for the *Strickland* standard to be replaced by a straightforward test: has the accused received "competent" and "diligent" representation, as required by the rules of professional conduct adopted by the legal profession?[135] When defense counsel has failed to meet this requirement, thereby

131 Strickland v. Washington, 466 U.S. 668 (1984).

132 *Strickland*, 466 U.S. at 687.

133 *See supra* notes 101–11 and accompanying text, Chapter 1.

134 *See supra* notes 126–28 and accompanying text, Chapter 1.

135 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1, 1.3. The Constitution Project's report on death penalty representation contains a recommendation concerning use of the *Strickland* standard at capital sentencing proceedings. "Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence." Mandatory Justice: The Death Penalty Revisited, The Constitution Project, Rec. 3, at 7 (2005), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

justifying discipline under professional conduct rules, surely defendants have not received the effective assistance of counsel under the Sixth Amendment.

A requirement that defense counsel's conduct conform to the disciplinary rules of the profession is seemingly no different than what the Supreme Court called for in *Strickland*. The Court in *Strickland* asked whether counsel's performance was "within the range of professional assistance" expected of attorneys and whether "attorney performance" … was "reasonable … under prevailing professional norms."[136] At the same time, the Court cited with approval one of its prior decisions in which it held that a guilty plea could not "be attacked as based on inadequate legal advice unless counsel was not 'a reasonably *competent* attorney' and the advice was not 'within the range of *competence* demanded of attorneys in criminal cases.'"[137] The Court also spoke of the need for counsel "to bring to bear such *skill and knowledge* as will render the trial a reliable adversarial testing process."[138] "Competence" and "skill and knowledge" is the language of the rules of professional conduct.[139] However, we do propose that the prejudice prong of the *Strickland* standard be eliminated. We agree with Justice Marshall's dissent in *Strickland,* who argued that you cannot determine prejudice to the defendant because "the evidence of injury to the defendant may be missing from the record because of the incompetence of defense counsel."[140]

While the Committee appreciates that courts may be reluctant to alter the *Strickland* standard, especially since it has endured for a number of years, it is nevertheless convinced that the standard should be changed. For this reason, we call upon defense lawyers and organizations that advocate as amicus curiae to seek a new test for determining ineffective assistance of counsel. Moreover, if the *Strickland* standard were replaced with a less stringent test, there would be significant positive impact, whether the decision was rendered by the U.S. Supreme Court or by a state supreme court interpreting its state constitution. If, for example, the new test adopted by a state supreme court was consistent with this Recommendation, it would become readily apparent to the state's legislature and to others in authority that, once and for all, indigent defense must receive the essential resources in order to implement a defense system consistent with the promise of *Gideon* and the Supreme Court's other right-to-counsel decisions.

136 *Strickland,* 466 U.S. at 688.
137 *Strickland,* 466 U.S. at 687 (emphasis added).
138 *Id.* (emphasis added).
139 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1.
140 *Strickland,* 466 U.S. at 710 (Marshall, J., dissenting).

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The National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system. The Committee was established in 2004 to examine the ability of state courts to provide adequate counsel, as required by the United States Constitution, to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers.

The Constitution Project

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project creates coalitions of respected leaders from across the political spectrum who issue consensus recommendations for policy reforms, and conducts strategic public education campaigns to transform this consensus into sound public policy.

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