

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

REPORT TO THE HOUSE OF DELEGATES

**RESOLVED**, That the American Bar Association calls upon each state, territorial and local jurisdiction to adopt minimum standards for the creation and operation of its indigent defense delivery systems based on:

- (i) American Bar Association. "ABA Standards for Criminal Justice: Providing Defense Services," Third Edition (1992);
- (ii) "American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," (adopted February 1989) and ABA policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);
- (iii) National Legal Aid and Defender Association. "Guidelines for Negotiating and Awarding Indigent Defense Contracts," December 1984; and
- (iv) National Legal Aid and Defender Association. "Standards for the Administration of Assigned Counsel Systems," November 1989.

**FURTHER RESOLVED**, That the courts and state, territorial and local bar associations, are urged to encourage and support the adoption of minimum standards for the creation and operation of indigent defense systems in their jurisdictions.

**FURTHER RESOLVED**, That state and territorial commissions and other government bodies that provide fields for public defense should require substantial compliance with such minimum standards for the creation and operation of indigent defense systems as a condition for receiving funds.

## REPORT

### Introduction

In recent years, the quality of many indigent defense systems has been greatly improved through enforcement of locally adopted and adapted minimum standards and guidelines for operation of state and local indigent defense providers and/or system administrators. Standards and guidelines pertaining to attorney eligibility, caseloads, conflict of interest, indigency screening, attorney performance and administration of indigent defense systems have been adopted by state and local legislation; state supreme court rule; national, state and local public defender organizations; indigent defense commissions and other entities. These standards and guidelines were adapted to local conditions but were greatly influenced by standards and guidelines developed over the past quarter century -- mainly by the American Bar Association (ABA).

Standards help to assure that defendants' constitutional rights are respected, reduce the likelihood of error in proceedings, diminish the number of appeals and ultimately enhance the efficiency and effectiveness of the criminal justice process.

This recommendation and report urges that each jurisdiction that provides funding for indigent defense services adopt minimum expectations, in the form of standards, for the provision of indigent defense services. This will assure that such services meet constitutional requirements and are a cost-effective use of funds. Adoption of such standards is analogous to standards set for providers of other products, services and capital improvements purchased by a jurisdiction.

### **History of Efforts to Improve Indigent Defense**

In 1971 the ABA House of Delegates adopted a comprehensive set of standards for criminal justice, which included standards for the prosecution and defense functions. This was followed by 15 years of further national standards development for the criminal defense function, both by the ABA and by the National Legal Aid and Defender Association (NLADA). A concerted ABA effort to assist state and local justice systems to improve their indigent defense systems began in 1981 with the House of Delegates' adoption of Resolution 117, urging the states to provide adequate funding for indigent defense services. That resolution led to a meeting of the Criminal Justice Section's Economics of Criminal Law Practice Committee in Chicago in January 1982. The meeting was attended by representatives of the Standing Committee on Legal Aid and Indigent Defendants (SCLAID), the Criminal Justice and General Practice Sections, the NLADA and the National Defender Institute. During the meeting, a proposal was made to create "The Bar Information Program on Criminal Defense Services to ... motivate state and local bar associations to develop programs in response to inadequate funding of criminal defense services."

The Bar Information Program's first activity was to commission Professor Norman Lefstein, then at the University of North Carolina, to prepare a study of indigent defense systems in each of the states. That study published in May 1982, found that:

Criminal defense for the poor must be adequately funded in order for comprehensive and effective representation to be provided. Experience teaches that when funding is insufficient, some defendants are not represented at all, despite having a constitutional right to counsel. (Footnote omitted.) If representation is by public defenders, their numbers must be adequate to avoid excessive caseloads, and they must be paid salaries that are competitive with those earned by prosecutors and

by lawyers in private practice. Private attorneys assigned to criminal cases must be reasonably compensated for their time and efforts, lest they be unwilling to accept appointments to do everything required to defend their clients. Both defenders and assigned counsel must be supported by secretaries, investigators, social workers, and paralegals. Expert witnesses must be available to assist in preparing the client's defense. Supervision of legal work must be provided, particularly for new attorneys and for those inexperienced in criminal defense. Training in criminal law, criminal procedure, and in advocacy skills must be furnished for both public defenders and assigned counsel. (Footnote omitted.)<sup>1</sup>

The report also addressed the importance of *quality* representation, and the important role standards play in assuring quality of representation:

National organizations have also developed standards dealing with the adequacy of legal representation for criminal defendants. [Citing ABA Standards for Criminal Justice, Providing Defense Services (1980); the National Advisory Committee on Criminal Justice Standards and Goals, Task Force on Courts (1973); the National Legal Aid and Defender Association, Standards for Defender Services (1976); and the National Study Commission on Defender Systems in the United States (1976).]<sup>2</sup>

For the past 15 years, the Bar Information Program, under the sponsorship of SCLAID and assisted by an Advisory Group composed of representatives from the Criminal Justice, General Practice and Litigation Sections, the Young Lawyers Division, and the NLADA has sought to address the problems identified by Professor Lefstein by providing information and on-site technical assistance to bar associations, the courts, legislatures and others to assist them to improve systems providing indigent defense services to the poor.

As a result of its work in all 50 states, the Bar Information Program has found that a combination of the following three approaches can significantly improve systems that provide criminal defense services to indigent persons.

- Creation of state level commissions to manage the delivery of indigent defense services. This is a particularly effective step in situations in which the state pays for indigent defense, but counties choose the method that will be used to provide counsel for indigent persons.<sup>3</sup>
- Substantially improved system funding. For example, increasing fees for appointed counsel to fair and reasonable levels, and ensuring that public defenders and contract delivery systems are funded at levels that permit reasonable caseloads and adequate support and investigative services.
- Adoption and enforcement of standards for the delivery system.<sup>4</sup> In the Bar Information Program's experience, standards have the greatest impact when the state or other funding entity reimburses a jurisdiction's indigent defense program for some or all of the cost of delivering services, but reimbursement is made only if the jurisdictions adopt and enforce standards for the delivery of indigent defense services.

#### **Model Standards Exist Which Jurisdictions May Use to Develop Their Own Appropriate Standards**

At the national level, the clear leader in promoting use of standards as a tool to improve the justice system has been the American Bar Association. In 1992 the ABA published the third edition of its criminal justice standards relating to the provision of indigent defense services which for the first time addressed issues unique to the contract model of providing indigent defense services.<sup>5</sup> The ABA has also taken the lead in promulgating standards which

address the processing of death penalty,<sup>6</sup> juvenile delinquency<sup>7</sup> and juvenile abuse and neglect cases.<sup>8</sup> Another national leader in promulgating well thought-out, thorough standards has been the National Legal Aid and Defender Association, which has published guidelines for awarding contracts to contract defenders,<sup>9</sup> standards for the administration of assigned counsel systems<sup>10</sup> and, most recently, a comprehensive set of performance standards that sets out minimum requirements of practice for lawyers representing indigent defendants.<sup>11</sup> Additionally, at its August 1995 Annual Meeting, the Conference of Chief Justices (CCJ) adopted Resolution XVII "Competence of Counsel in Capital Cases" which urges the judicial leadership in each state to "[i]nitiating a broad-based interdisciplinary planning program to establish standards and a process that will assure the timely appointment of competent counsel, with adequate resources, to represent defendants in capital cases at each stage of such proceedings."

National standards and guidelines serve a number of important purposes. While neither the ABA's nor the NLADA's standards are binding on state or local programs, they have served as models for many state and local programs which have either used the standards as a reference or adopted some of the standards in their entirety. Additionally, national standards have been cited numerous times by courts considering challenges to a jurisdiction's indigent defense program.<sup>12</sup>

#### **Standards Provide an Important Tool in a Number of Jurisdictions for Assuring the Quality of Indigent Defense Systems**

A number of jurisdictions have adopted standards governing various aspects of their indigent defense systems. Most recently, for example, after many years work by the Bar Information Program and others in Mississippi, on April 21, 1998, the Governor signed into law the Mississippi Public Defender Act of 1998, which calls for the creation of a statewide commission on indigent defense, the position of Executive Director, and the office of the District Defender in all circuit districts to provide Mississippi with a statewide, state-funded system which provides representation to indigent defendants in all proceedings of felony cases.<sup>13</sup> By statute, among the new commission's responsibilities is to establish standards for: determining who qualifies as an indigent person; attorney, paralegal, investigator and other support personnel qualifications and performance; and caseloads. The statute also specifies that in meeting its responsibilities, the Commission is to work with SCLAIDs Bar Information Program.

In Tennessee, the Indigent Defense Commission of the Supreme Court of Tennessee, which was created by Tennessee Supreme Court Rule 13 in August 1993, is responsible for determining a reasonable caseload for each district defender, establishing a schedule of reasonable compensation to be paid to appointed counsel, and promulgating standards and guidelines for counsel appointed to represent indigent defendants.

The Committee for Public Counsel Services (CPCS), Massachusetts' state-funded indigent defense services provider, oversees delivery of indigent defense services using two models. CPCS' public defender division handles only the most serious felony trials and appeals, approximately 15% of the state's indigent defense total caseload. The balance of felony cases, appeals and state post-conviction matters; misdemeanor cases; juvenile delinquency cases; mental health cases; civil commitment cases and other cases are handled by a statewide assigned counsel program overseen and administered by CPCS.

These private attorneys must comply with CPCS' extensive qualification standards, which include attendance at a four-day training seminar, as well as its comprehensive performance standards. These latter standards address the following areas of attorney performance: general principles of representation;

preliminary hearing proceedings and preparation; probable cause hearing; pretrial preparation; dispositions by plea or admission; trial proceedings; sentencing and post-trial proceedings. Additionally, CPCS has promulgated performance standards which specifically govern many specialized areas.<sup>14</sup> By diligent oversight, CPCS assigned counsel administrators, who also oversee payment of compensation vouchers, have succeeded in enforcing CPCS' qualification and performance standards.

Oregon's state-funded indigent defense system is administered by the Indigent Defense Services Division of the State Court Administrator's Office of the Supreme Court of Oregon.

Using a set of policies and procedures it has developed (and periodically updates), the Indigent Defense Services Division contracts with private lawyers and law firms to provide indigent defense services on a county by county basis. The Indigent Defense Services Division's policies and procedures, which are modeled upon and reference ABA and NLADA standards, include qualification standards, which contain initial and on-going training requirements; expense reimbursement policies and billing procedures.

### **An Approach Linking Funding to Compliance With Standards Shows Particular Promise in Fostering Improvements in Indigent Defense Systems**

The Bar Information Program has worked with a number of jurisdictions which have awarded funding contingent upon compliance with standards, thereby fostering improvements in indigent defense systems. For example, the Louisiana Indigent Defender Board<sup>15</sup> in 1995 adopted standards closely modeled on both ABA and NLADA standards, which address the following areas: performance of indigent defense systems; determination and verification of indigency and the recovery and recoupment of costs expended in the defense of indigents; performance of counsel; provision of counsel to indigents accused of a capital crime; provision of counsel to indigents in non-capital cases on appeal; and conflicts of interest in the representation of indigents. Through its District Assistance Fund, the LIDB provides supplemental financial assistance for felony case representation to local indigent defender boards which comply with these standards.

Perhaps most notably, over the past 10 years Indiana has made great strides in promulgating effective capital and non-capital standards. The opt-in nature of Indiana's standards provides the flexibility for Indiana's counties to take advantage of this new funding source in ways that meet their unique needs.

In 1989, the Indiana Public Defender Commission was created by statute. Among other responsibilities, the Commission is charged with 1) making recommendations concerning standards for indigent defense services provided for defendants against whom the state has sought the death penalty (including indigency and eligibility standards, attorney qualification standards, conflict of interest; and standards for support services) and 2) adopting guidelines and salary and fee schedules under which counties will be eligible for reimbursement from the statefunded public defense fund (including indigency determination cost recovery, attorney cost qualification, attorney compensation, and caseload guidelines).

Following through on its mandate, the Commission first tackled the area of representation in death penalty cases, drafting standards which were ultimately adopted by the Indiana Supreme Court in Indiana Criminal Rule 24, which went into effect in January 1990. Under Rule 24, for the first time in the history of indigent defense in Indiana, state funds became available for counties which complied with the requirements of the rule in providing representation to indigent defendants charged with crimes where the state asked that the death penalty be imposed. Rule 24 includes qualification standards for both lead

counsel and co-counsel, maximum caseload standards (outside of the capital case) for counsel, requirements for sufficient support staff and compensation at \$70.00 per hour. Any county that is able to substantially meet these standards is reimbursed by the state for one half the cost of representation.

The positive effect of Rule 24 on the quality of representation in capital cases has been documented by both Norman Lefstein, now Dean and Professor of Law at the Indiana University School of Law -Indianapolis and a former chair of the Indiana Public Defender Commission,<sup>16</sup> and by the Honorable Randall T. Shepard, Chief Justice of the Indiana Supreme Court. In a May 2, 1996 speech addressed to a workshop for the judges of the U.S. Circuit Court of Appeals for the Seventh Circuit entitled "Capital Litigation from State Court Perspective or Rushing to Judgment in Fifteen Years," Justice Shepard stated: "The net result of our rule [Rule 24] and [state] appropriations is some very thorough, high quality, and effective representation." Justice Shepard went on to point out that Indiana's Rule 24 has been widely praised in ABA publications, *The New York Times* and elsewhere, and that the Conference of Chief Justices had passed Resolution XVII "Competence of Counsel in Capital Cases" with Rule 24 in mind.

In 1995, additional state funds for indigent defense became available to Indiana's counties, again through the efforts of the Indiana Public Defender Commission- Since January 1, 1995, counties which substantially comply with the Indiana Public Defender Commission standards for indigent defense services in non-capital cases, which are closely modeled on ABA and NLADA standards, are eligible for 25% reimbursement for indigent defense expenditures from the Commission.

The Commission's non-capital standards require that any county with a population over 12,000 must adopt a comprehensive plan for indigent defense services either pursuant to or consistent with statutory provisions, and must submit the plan to the Commission. (By statute, most counties have the option of developing a public defender program, a private bar contract program, or an assigned counsel system in which private attorneys are appointed by judges on a case by case basis.) The standards also contain requirements relating to the eligibility of counsel, payment by the accused of defense costs, and a set of qualification standards for attorneys in felony, juvenile, misdemeanor, appeal and other cases. As with Rule 24 reimbursements, the public defense fund which the Commission oversees is the source of the monies used to make the reimbursements.

## **Conclusion**

Few jurisdictions would let contracts for the construction of roads or buildings without first articulating standards for the performance of the contractors involved and the quality of the resulting work. Similarly, jurisdictions that provide funding for indigent defense services can best assure that the funding will be used most effectively by requiring that the system for providing indigent defense services meet previously adopted standards. A number of models exist for such standards. The American Bar Association, through this resolution, urges each jurisdiction to use the available models to construct indigent defense system standards that are appropriate for that jurisdiction, and to require that those standards are met before allocating funding. Because courts and bar associations are often sources of experience and knowledge about the benefits of standards, those organizations are specifically urged to encourage and support the adoption of such standards.

Respectfully submitted,

Doreen D. Dodson, Chair  
August 1998

## END NOTES

1. *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Funding* (May 1982), p.11. Prepared by Norman Lefstein the American Bar Association Standing Committee on Legal Aid and Indigent Defendants.

2. *Id.*, pp.6-7.

3. There are three primary models for providing representation to individuals who are accused of crimes and are unable to afford counsel: assigned counsel, public defender, and contract programs. In the assigned counsel model, private attorneys are assigned on either an ad hoc or systematic fashion by the court or other administrative body to represent indigent defendants. Counsel are paid for their work performed on individual cases according to compensation schedules, typically specific hourly rates for work performed in and out of court. In the public defender model, a public or private non-profit organization with full- or part-time staff attorneys and support staff provide the services. In the contract model, a state, county or other jurisdictional district enters into a contract with private attorneys, law firms, bar associations or non-profit organizations to provide representation of indigent defendants. There are two common types of contract programs: fixed-price contracts and fixed-fee-per-case contracts.

4. As mentioned above, indigent defense standards encompass a broad range of practice considerations, including: 1) systems administration (e.g., rules for appointing counsel, awarding defense counsel contracts and reimbursing defense expenses); 2) attorney eligibility and qualifications; 3) maximum caseloads; 4) conflicts of interest; 5) indigency screening; 6) training; and 7) attorney performance.

5. Standards 5-3.1 through 5-3.2 of the *ABA Standards for Criminal Justice, Chapter 5: Providing Defense Services*, 3rd Edition (1992) specifically address the use of contracts for service, contracting parties and procedures, and the elements of the contract for services. At the Annual Meeting in 1985, the ABA House of Delegates recommended that contracts not be awarded on the basis of cost alone, and the jurisdictions choosing to use contracts do so in accordance with both NLADA's *Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services*, and Chapter 5 of the second edition of *ABA Standards for Criminal Justice*.

6. *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February 1989).

7. Robert B. Shepherd, Jr., Editor, *Juvenile Justice Standards Annotated. A Balanced Approach*, Institute of Judicial Administration/American Bar Association (1996).

8. American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996).

9. National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984), referenced with approval in a 1985 ABA House of Delegates Resolution opposing low-bid indigent defense contracts.

10. National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989).

11. National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

12. e.g., *Hill v. Butterworth*, 60 CrL 1453, in which the U.S. District Court for the Northern District of Florida, in finding that Florida does not meet the opt-in requirements of the 1996 Antiterrorism and Effective Death Penalty Act, referenced the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, writing: "[t]he deficiencies suffered by Florida's present competency standards become particularly evident when compared to the American Bar Association's guidelines for postconviction counsel;" *State v. Peart*, 621 So.2d 780 (La. 1993), in which the Louisiana Supreme Court, relying on Chapter 5 of the ABA's Criminal Justice Standards pertaining to defense services, held that "(1) it was a constitutional requirement that the legislature provide a uniform system for securing and compensating qualified counsel for indigents" and that the trial court was allowed to look at the effective assistance of counsel before trial when the prima facie case was made that the defense lawyer was so overworked as not to be able to provide effective assistance of counsel; and *State v. Joe U. Smith*, 681 P.2d 1374 (Ariz. 1984) in which the Arizona Supreme Court, relied upon the 1973 NAC caseload standards, which were adopted in the commentary to ABA Criminal Justice Standard 5-5.3, to reach its conclusion that Mohave County's low-bid, competitive contract program for providing indigent defense services was so pervasively flawed that any defendant convicted under the system was presumptively denied the right to effective assistance of counsel.

13. Until April 1998, Mississippi was one of just four states (in addition to Idaho, Pennsylvania and South Dakota) where no state funds were provided for indigent defense services. Previously all indigent defense funds were provided by the counties, which were able to select their own type of indigent defense delivery system.

14. Including performance standards pertaining to representation of indigent juveniles in delinquency and juvenile cases; representation of clients by an appellate defender, representation of clients in civil commitment cases; representation of clients in guardianship; and representation of children and children in state intervention and parental rights termination cases.

15. The Louisiana Supreme Court on July 1, 1994, promulgated Rule 31 which created, under the judicial branch of government, the 15-member Louisiana Indigent Defender Board (LIDB). The LIDB develops policy and oversees distribution of funds in connection with the Capital Litigation Program, the Appellate Program, the Expert Witness/Testing Fund, and the District Assistance Fund established pursuant to Rule 3 1. The LIDB was appropriated \$7.5 million for FY 1998 and employs a chief executive officer and other support staff. (On January 1, 1998, the LIDB became an independent state agency under the executive branch.)

16. See Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 INDIANA LAW REVIEW 495 (1996).