

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 11, 2013

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings, and to appropriate sufficient funds for the Center to successfully carry out its mission.

REPORT

Summary of the Resolution

On the eve of the 50th anniversary of *Gideon v Wainwright*, this Resolution calls for the creation of an independent federally funded Center to assist state, local and territorial governments to comply with their constitutional obligation to provide effective defense services to the indigent accused: 1) by establishing a Center for Indigent Defense Improvement in each State and territory requesting such assistance to determine appropriate staffing levels for local indigent defense delivery systems, 2) by certifying compliance when appropriate staffing levels have been met, 3) by providing funding through a grant-in-aid program to provide incentives to make such improvements, 4) by providing technical assistance to public defense programs and local governments to facilitate the regulation and monitoring of any contractual arrangements to provide indigent defense services, and 5) by providing training and other assistance to ensure defense counsel have adequate supporting resources and services to conduct an effective defense.

The Current Crisis in Indigent Defense

The obligation to provide effective assistance of counsel and the resources necessary to prepare an adequate defense are not mere entitlements. They are constitutionally mandated obligations essential to protect the fundamental rights of any person who is accused of crime or facing loss of liberty but lacks the financial capacity to hire a lawyer. Yet today the failure of state and local governments to adequately fund indigent defense is a national scandal. Resources allocated to indigent defense systems vary dramatically from state to state and across counties within a state, resulting in crushing caseloads being forced upon public defender offices and assigned counsel in many areas. The type of representation an indigent accused receives should not depend upon the state or county in which he or she is arrested.¹

In recent years, numerous national studies have explained at length and in substantial detail the myriad of problems that afflict the provision of indigent defense representation throughout the United States. The most significant of these reports have been prepared by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (*see* GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004)); the National Association of Criminal Defense Lawyers (*see* MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009)); and a study of the

¹ The failure of local government to uniformly provide resources necessary to an adequate defense in each county across the state arguably violates the Equal Protection Clause of the Fourteenth Amendment. The right to the effective assistance of counsel is of course a fundamental right. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Where the enjoyment of a fundamental right is endangered by the failure to employ uniform standards, a state is required to take reasonable steps to ensure equal treatment in the enjoyment of that right. *See Griffin v. Illinois*, 351 U.S. 12 (1956); *Bush v. Gore*, 531 U.S. 98 (2000). As the U.S. Supreme Court recognized in *Rompilla v. Beard*, 545 U.S. 374 (2005), ABA Standards for Criminal Justice provide a benchmark for assessing uniformly the effectiveness of representation. Thus, unequal treatment in providing indigent defense services could be shown where there are significant disparities in the resources allocated to indigent defense systems in different counties and these disparities result in measurable differences in compliance with ABA and state bar standards. Significant disparity in the adequacy of resources would thus give rise to an Equal Protection claim in counties where, for example, a defense investigator is not provided or where attorney caseloads are so excessive that an attorney cannot give adequate attention to a client to properly research and investigate the merits of their case.

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National Right to Counsel Committee organized by the Constitution Project and the National Legal Aid and Defender Association (*see* JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009)).

Moreover, the scales of justice in our adversary system are badly out of balance. Chief Justice Warren Burger declared in *Argersinger v. Hamlin* that “the system for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution.”² The ABA *Ten Principles of a Public Defense Delivery System*,³ also specifically recognizes that our criminal justice system should ensure that there is substantial parity between the resources allocated to indigent defense providers and the district attorney's office in terms of workload, salaries, technology, legal research, support staff, investigators, and access to forensic services and experts.

The reality is, however, that there is a dramatic disparity in the resources allocated to the prosecution and defense functions. A recent study, for example, showed that while more than eight out of ten criminal defendants prosecuted in the Superior Courts of California require appointment of counsel, for every dollar spent on prosecution, California counties spent on average only fifty-three cents for indigent defense.⁴ But normally, because the relevant information is unavailable, such direct comparisons are impossible. For this reason, it is important that state and/or local jurisdictions throughout the country develop, maintain, and make available reliable data in order to determine whether resource disparities exist between prosecutors and indigent defense service providers.

Significant disparities between staffing and resources allocated to the prosecution and the defense have resulted in excessive workloads in public defender offices, which in turn have led to delays in justice for both victims and defendants. In some places, accused persons go to court with no lawyers at all, often pleading guilty and being sentenced to jail in hearings that last only a few minutes. Such an imbalanced criminal justice system also leads to the provision of ineffective assistance of counsel, which gives rise to more appeals, retrials, and unnecessary expense to undo the wrongful convictions of innocent persons.⁵

The practice in criminal and juvenile courts has become increasingly more complicated, sentencing has become more complex, and more time is required to provide effective representation. In addition, the practice of law in general has relied increasingly on technology

² *Argersinger v. Hamlin*, 407 U.S. 25 (1972) at 43 (Burger, C.J., concurring).

³ ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter ABA, TEN PRINCIPLES], available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

⁴ See *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 California Western Law Review 263, 311-315(2009).

⁵ In California alone over 200 wrongfully convicted inmates were released from prison during a 15 year period. See Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE, November 2004, available at <http://www.deathpenalty.org/downloads/SFMAG.pdf>. Although DNA evidence is only available in a fraction of crimes there have been 289 DNA postconviction exonerations reported nation-wide by the Innocence Project to date. See *Facts on Post-Conviction DNA Exonerations*. Available at: http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php. According to the Death Penalty Information Center 140 defendants sentenced to death in 26 states have been exonerated since 1973. See *Innocence and the Death Penalty*, available at: <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

and electronic research.⁶ Budget cuts denying such resources and increased workloads thus threaten the integrity of our criminal justice system.

The failure to have a broad base of political support for indigent defense has been the root cause of the difficulty in securing adequate resources.⁷ Yet the Public Defender in many jurisdictions represents more than 85% of the defendants accused of serious crime. While the average citizen probably never thinks about whether he or she could afford competent criminal defense representation, a staff attorney from the Public Defender's office or a contract defender or assigned counsel is in fact the attorney upon whom an innocent citizen most likely will have to rely if wrongfully accused of a serious crime.

Funding decisions for the indigent defense system, moreover, have been left in the hands of local or state officials who, chafing under an "unfunded mandate" imposed by the Federal Constitution desire to spend only the bare minimum necessary to keep the system functioning. In some situations, local and state officials have sought to curb public defense expenditures by cutting staff and increasing workloads and Chief Defenders resisting these cuts have been fired or replaced.⁸ In other jurisdictions counties have contracted indigent defense work to the lowest bidder without complying with ABA and other nationally recognized standards.⁹

This has resulted in indigent defense services being provided by attorneys who are not properly trained or supervised or provided with adequate investigative and other support services. Where the contract is for a flat fee per case, there are built in incentives to rationalize the failure to spend the money that should be used to conduct an adequate investigation or obtain competent experts to challenge forensic evidence which may be unreliable.¹⁰

As a result, we see a disturbing trend as many Public Defender offices operate under crushing caseloads while an increasing number of counties are cutting costs by providing indigent defense services through unregulated low bid contracts. The dangers existing under both approaches are clear. So are the consequences. During a fifteen year period, according to a recent study, courts released more than 200 inmates from California prisons because they had been

⁶ See generally, American Council of Chief Defenders Statement on Caseloads and Workloads (2007), available at http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD_CASELOADSTATEMENTsept6.pdf

⁷ There are many reasons for the lack of political support, including misunderstanding of the role of defense counsel, bias against the poor, racial bias and the disproportionate number of defendants who are racial minorities. There is also a perception that juvenile and misdemeanor cases are not important. In a series of focus groups held in for the National Legal Aid and Defender Association, the participants actually supported increasing funding for public defense when they were presented options with information and time to consider them.

⁸ *Portman v County of Santa Clara*, 995 F2d 898 (1993).

⁹ Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 California Legal History 173, 188-89, 215 (2010).

¹⁰ See Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies of Science, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). See also H.T. Edwards, *The NAS Report on Forensic Science – What it Means for the Bench and Bar*, Paper presented at the Conference on The Role of the Court in an Age of Developing Science and Technology, Superior Court of the District of Columbia, May 6, 2010, available at: [http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/\\$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf).

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wrongfully convicted.¹¹ Although DNA evidence is available in only a small percentage of criminal cases, 289 DNA postconviction exonerations have been reported nation-wide by the Innocence Project to date.¹² According to the Death Penalty Information Center 140 defendants sentenced to death in 26 states have been exonerated since 1973.¹³ This does not mean that the concept of the Public Defender has been a failure. Nor does it mean that contract defenders cannot provide competent representation. It does, however, mean that reforms are necessary to fulfill the potential of either system to provide the effective assistance of counsel guaranteed by the Constitution.

A National Center for Indigent Defense Services

In 1979, at the urging of the ABA's Standing Committee on Legal Aid and Indigent Defendants, and with the support of the National Legal Aid & Defender Association, the ABA endorsed the call for a federally funded "Center for Defense Services."¹⁴ The basic concept underlying this proposal was an independent federally-funded entity constructed upon the following principles:

- (1) federal funding for the improvement of defense services structured so as to provide continuity and stability over a significant number of years,
- (2) financial support instituted through a grant in aid program;
- (3) funding incentives for local communities to maintain and augment current efforts; and
- (4) an entity to administer defense program that was independent of any of the three branches of the federal government.

Based upon these principles it would be possible for federal assistance grants to fund a Center for Indigent Defense Improvement ("Center") in each state requesting such assistance. The first task of the Center in each state would be to conduct an audit of the indigent defense delivery system of each county. The audit would determine the need for additional attorneys, investigators, and other support personnel by conducting a Workload Assessment. Using methodology similar to that designed by the National Center for State Courts to determine when additional judges are needed, time studies would be employed to create objective data upon which to make evidence-based decisions.¹⁵ After determining appropriate staffing levels, the

¹¹ Nina Martin, *Innocence Lost*, San Francisco Magazine, November 2004. Executive Summary available at: <http://www.deathpenalty.org/downloads/SFMag.pdf>.

¹² See *Facts on Post-Conviction DNA Exonerations*, available at:

http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

¹³ See *Innocence and the Death Penalty*, available at: <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

¹⁴ Senator Edward Kennedy subsequently sponsored a Senate bill to establish a Center for Defense Services and similar legislation sponsored by Rep. Peter Rodino was introduced in the House of Representatives. *Defense Services Bill Still in the Works*, 65 ABA Journal 1629, November, 1979. Also, in 2009, the report of the National Right to Counsel Committee, mentioned earlier, endorsed the establishment of a "National Center for Defense Services" and favorably cited the ABA's 1979 resolution.

¹⁵ By converting raw caseload filings into actual workload by measuring real events in the criminal justice system, time studies would accurately reflect the unique practice environment in that particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation such as prosecutorial charging policies and judicial sentencing practices. By learning how much time it actually takes on

Center would then certify that a county is in compliance when those staffing levels are met.¹⁶ To assist local governments in meeting these requirements, the Center would provide federal funding through a grant procedure designed to provide incentives for local governments to develop and meet standards to improve their public defense systems.

To comply with ABA Standards, certification could also be conditioned upon assuring the professional independence of the Public Defender. One option would be to create a nonpartisan Board of Trustees independent from any of the branches of local government to monitor and oversee the office.¹⁷ The Board would also be authorized to approve regulations for contracting to provide indigent defense services which would be governed by the same standards created for institutional Public Defender offices.

The Center would also assist in providing training for new attorneys, investigators, and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty and other appropriate cases.

The argument for federal assistance is compelling especially since it is the federal Constitution that requires the provision of effective assistance of counsel. Until we reduce the glaring disparity in resources both between counties and between the prosecution and defense functions, we cannot pretend that we administer criminal justice equally to all.

Previous ABA Resolutions

Thirty-three years ago the House adopted a previous resolution supporting the concept of a similar center “in principle” (February, 1979). Also, in 2005, the ABA approved a resolution calling upon the federal government to provide substantial financial support to states and territories for the provision of indigent defense services in state criminal and juvenile delinquency proceedings. Both of these policy statements are *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/policies_guidelines.html.

average to handle different types of cases, given their various levels of complexity, it can be mathematically determined how many attorneys will be needed to handle a given mix of cases. *See* Norman Lefstein, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, Chapter 5 (ABA 2011); and *Eliminating Excessive Public Defender Workloads*, 26 ABA Criminal Justice 24, 29 (Summer 2011). Such time studies, of course, must be supplemented by expert analysis of whether the existing practices inaccurately reflect what is needed because of excessive caseloads or other systemic barriers to effective representation.

¹⁶ Marshall J. Hartman, former National Director of Defender Services for NLADA originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction.

¹⁷ See ABA Standards for Criminal Justice, Chapter 5: Providing Defense Services, Standard 5-1.3 (3rd ed. 1990). See also National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, Final Report III, I (1976) and National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.8 (1973).

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Respectfully submitted,

William Shepherd, Chair
Criminal Justice Section
February 2013

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: William Shepard, Chair

1. Summary of Resolution(s).

This resolution urges Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its October 28, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

A previous resolution passed in February 1979, called for the creation of a similar center “in principal”.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This resolution would promote ABA policy embodied in the ABA Ten Principles of a Public Defense Delivery System and help ensure compliance with ABA Defense Function Standards.

5. What urgency exists which requires action at this meeting of the House?

The urgency of this action exists because of the current national “crisis in indigent defense” created by budget cuts and resulting excessive caseloads. Public defender offices across the country are seriously overburdened by such caseloads which threaten their ability to provide competent and diligent representation.

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will be distributed to various criminal justice stakeholders in order to encourage and facilitate center funding. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association is anticipated.

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9. Disclosure of Interest. (If applicable)
None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2013 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Legal Aid and Indigent Defendants

Professionalism

Special Committees and Commissions

Center on Children and the Law

Death Penalty Representation Project

Commission on Youth at Risk

Sections, Divisions

Government and Public Sector Division

Individual Rights and Responsibilities

Litigation

Judicial Division

Senior Lawyers Division

State and Local Government Law

Tort Trial & Insurance Practice

Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings.
2. Summary of the Issue that the Resolution Addresses
Public defender services are constitutionally mandated obligations essential to protecting the fundamental rights of any person who is accused of a crime, however, many of these services are severely underfunded. This results in excessive caseloads which threaten the right to effective assistance of counsel.
3. Please Explain How the Proposed Policy Position will address the issue
This resolution would help ensure effective defense services to the indigent accused: 1) by urging Congress to establish a Center for Indigent Defense Improvement in each State and territory requesting such assistance to determine appropriate staffing levels for local indigent defense delivery systems, 2) by certifying compliance when appropriate staffing levels have been met, 3) by providing funding through a grant-in-aid program to provide incentives to make such improvements, 4) by providing technical assistance to public defense programs and local governments to facilitate the regulation and monitoring of any contractual arrangements to provide indigent defense services, and 5) by providing training and other assistance to ensure defense counsel have adequate supporting resources and services to conduct an effective defense.
4. Summary of Minority Views
None are known.