



Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Subcommittee on Crime, Terrorism, and Homeland Security
House Committee on the Judiciary

Re: "Representation of Indigent Defendants in Criminal Cases:
A Constitutional Crisis in Michigan and Other States?"
March 26, 2009

I. Introduction

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I would like to thank you for holding this hearing. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.

NACDL has long worked to improve this country's public defense systems. Through public education, advocacy and litigation, we have sought to ensure that those without financial means are afforded the zealous, competent counsel necessary to guarantee a fair trial in our adversarial system. NACDL has been at the forefront of many indigent defense reform efforts, for example:

- Research and Education. NACDL is constantly trying to raise awareness of the right to counsel and its violation throughout the United States. Our comprehensive report, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor System, will be released in the next few weeks. This report documents an extensive research effort on misdemeanor indigent defense throughout the nation and sets forth reform recommendations. In this area, some judges actually acknowledge the widespread violation of Sixth Amendment rights. For example, Chief Justice Jean Hofer Toal of the Supreme Court of South Carolina told a group of attorneys at a state bar meeting, "*Alabama v. Shelton* is one of the more misguided decisions of the United States Supreme Court . . . so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."
- Advocacy. NACDL is actively engaged in encouraging states to fulfill their constitutional obligations to provide competent, well-resourced counsel for all indigent defendants within their state. NACDL provides technical support and expert testimony whenever policymakers are entertaining new laws or rules regarding indigent defense.
- Litigation. When necessary, NACDL supports litigation to achieve indigent defense reform. NACDL has helped challenge certain practices, such as the failure to fund investigators or experts and caseloads that greatly exceed national standards. Additionally, NACDL has helped coordinate class actions on behalf of indigent defendants to challenge, on a larger level, the constitutionality of particularly defective indigent defense systems.

NACDL's written statement will focus on two of the most prevalent and pernicious problems within the arena of indigent defense today: the increased use of low-bid, flat-fee contracts as a means of providing public defense services and the overwhelming caseloads public defenders and assigned counsel face. These problems have the same effect – they hamstring the defense, thus unbalancing the scales of justice.

When the defense cannot do its job fully, money is wasted on appeals, retrials, and unwarranted prison sentences. Alternatives to incarceration are not explored. In the worst case scenario, the wrong people go to jail, while actual guilty parties remain free.

These problems have been greatly exacerbated by the current economic crisis. With states across the country struggling to meet budget shortfalls, indigent defense frequently gets short shrift. Because of stark nationwide defender budget cuts, defender offices hiring freezes, and loss of seasoned staff due to astronomical rates of attrition, the criminal justice systems in many jurisdictions are at the breaking point. But when states fail to provide even the most basic resources for the justice system to work effectively, the result is massive inefficiencies that squander money. The answer to the question posed by this hearing is clear: the representation of indigent defendants in Michigan and other states is part of a worsening constitutional crisis.

II. Low-bid Contracts for Public Defense Work

In a “Low-bid” or “Fixed Rate” or “Flat Fee” contract public defense system, lawyers compete for criminal court appointments by submitting a proposal to represent all or a portion of a jurisdiction’s caseload for a fixed price. Many jurisdictions in Michigan, and other states, have used this type of contract. In most cases, there is no numeric limit on the number of cases the attorney will receive and no mechanism for the price of the contract to change if the cases are unduly complex, numerous, or require experts or investigators. Generally, the jurisdiction accepts whichever bid is the lowest. Few contract systems consider the qualifications and experience of bidding attorneys.

Virtually unknown prior to the 1980s, the use of low-bid contracts for public defense services has proliferated in the past two decades. In the past year alone, many states that have switched to low-bid, flat-fee contracts as their means of providing public defense services in criminal cases.

The primary goal of fixed-price contracting is not quality representation but cost limitation. Fixed-price contracts inevitably result in case overload and inadequate representation, as the incentive for the attorney is to process cases quickly. The system thus discourages investigation, consultation of experts, motions practice and trials. Instead, it encourages quick plea bargaining, regardless of whether it is appropriate or right for the client. Accordingly, these systems create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions.

Low-bid, fixed price contracting for public defense services also violates the American Bar Association’s Ten Principles of a Public Defense Delivery System, which are “the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict free representation to accused persons who cannot afford to hire an attorney.”¹ The eighth principle directs, “Contracts

¹ The ABA Ten Principles are available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

In 1984, the National Legal Aid and Defender Association adopted Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,² which explicitly forbid the use of low-bid, flat-fee contracts. Instead, these standards require compensation to be determined by work, strictly enforced workload limits for contract attorneys, and separate pools of money to pay third-party service providers, such as investigators and experts, whenever their assistance is required. Despite widespread condemnation of the practice, contracting in this manner for public defense services persists. It is time to take steps to compel counties to consider quality above cost-savings in their criminal justice systems.

Counties are generally forbidden from awarding a construction contract to a bidder – lowest or otherwise – without requiring them to abide by certain standards. A public defense contract should be no different. Failing to require quality, in both instances, puts the citizens of the county in jeopardy and leaves the county open to potentially enormous liability.

III. Addressing Overwhelming Caseloads for Indigent Defense Lawyers

No matter how brilliant and dedicated the attorney, if she is given too large a workload, she will not be able to provide clients with appropriate assistance. Defense counsel will not be providing the “guiding hand of counsel” as required by the Sixth Amendment to the U.S. Constitution.³ With this in mind, the National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, or 400 misdemeanors, or 200 juvenile, or 200 mental health, or 25 appeals. In no event should caseloads surpass the maximum listed in the NAC standards.⁴ Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time public defender caseloads should be judged. Tragically, almost no jurisdiction in the country abides by

² The NLADA Contracting Guidelines are available online at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threeonezero.

³ *Powell v. Alabama*, 287 U.S. 45, 49 (1932) (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1964)); *Argersinger v. Hamlin*, 407 U.S. 25, (1972) (quoted in *Alabama v. Shelton*, 535 U.S. 654, 665 (2002)).

⁴ There are a variety of reasons, however, that caseloads should, in reality, be lower than the standards propose. For example, the standards assume that the defender is full-time and works exclusively on cases. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. The caseload standards also assume appropriate support staffing in the office. If the number of assistants or investigators are insufficient, requiring the attorney to take on this work as well, the attorney’s caseload should be reduced accordingly.

these caseload standards. Full workload assessments⁵ to determine the number of cases that is reasonable in the particular jurisdiction are even less common.

When caseloads become overwhelming, public defense attorneys are forced to cut corners. They cannot take the time to investigate cases, consult experts or investigators, request and review discovery, file pre-trial motions, and they cannot prepare adequately for trial. Additionally, staggering caseloads often prevent the attorney from taking time to explore diversion or treatment alternatives, which can result in reduced recidivism and therefore significant cost savings when appropriately utilized. So what is a public defense attorney to do if her caseload becomes such that she is incapable of providing a full and vigorous defense for her clients?

Arguably, the current ethical rules provide a full answer. However, it is a common view that this rule has limited applicability to those who have no-control over their caseload, *i.e.* public defenders and prosecutors. For this reason, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued an ethics opinion last year that specifically requires public defenders to keep their caseloads under control or seek relief in court. That opinion, ABA Ethical Opinion No. 06-441,⁶ states, "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."⁷ In other words, if the caseloads become too high, individual public defenders are ethically compelled to seek a reduction.

The ethics opinion first requires a line defender to go to his or her supervisor for that reduction, and then up the chain of command to the head of the office. If, however, the office does not address the caseload problem, the opinion requires the defender to seek relief in court. "[T]he lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients." As defender caseloads

⁵ Precise workload targets are best established through an individualized study that allows a locality to take into account its unique geographic issues, the administrative and other responsibilities of the attorney, as well as the format of its judicial system and the make-up of its criminal docket, the baseline national caseload standards allow us to evaluate systems where an individualized workload study has not been done. Colorado is an example of a system that used a case-weighting study to establish appropriate workloads for its public defenders. The study was completed in 1996 and the legislature has accepted the formula from that study for purposes of both budgeting and analyzing the fiscal impact of proposed legislation. A number of other states also have established caseload standards. For a slightly outdated overview, see Bureau of Justice Assistance, Keeping Defender Workloads Manageable, available at <http://www.ncjrs.org/pdffiles1/bja/185632.pdf>.

⁶ The full opinion can be read at http://www.abanet.org/cpr/06_441.pdf.

⁷ The American Council of Chief Defenders has similarly published an ethical opinion stating that defenders are "ethically required to refuse to accept additional casework" if that casework would cause them to exceed the capacity of the agency's attorneys. *See* ACCD Ethics Opinion 03-01 (April 2003), available at http://www.nlada.org/Defender/Defender_ACCD/Defender_ACCD_Home.

swell in response to state budget cuts, such requests have become a more frequent occurrence.

IV. Conclusion

There can be no doubt that indigent defense services are at a crisis point. Once again, we want to thank this Committee for shining a light on this complicated but critical issue. The National Association of Criminal Defense Lawyers looks forward to working with you to ensure quality representation for all indigent individuals in the criminal justice system.