

# **IN DEFENSE OF PUBLIC ACCESS TO JUSTICE**

## **AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON***

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## Executive Summary

A commitment to justice for all is the cornerstone of the American social contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law -- assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that the right to counsel for those unable to afford one is a fundamental part of due process and determined that state government is responsible for providing an appropriate public defense system that honors this basic right. In accordance with its obligations under *Gideon*, the 1974 Louisiana Constitution directs the legislature to “provide for a uniform system for securing and compensating qualified counsel for indigents.”

In direct violation of the state and federal constitutions, Louisiana government (both state and local) has constructed a disparate system that fosters systemic ineffective assistance of counsel due primarily to inadequate funding and a lack of independence from undue political interference. These two main systemic deficiencies produce numerous ancillary problems including a lack of oversight, training and supervision of those entrusted with the defense of the poor. When combined with the crushing caseloads public defenders are forced to carry, these factors prevent the state from securing justice for all, protecting the peace, and promoting the general welfare of its people.

The evidence to support this conclusion is detailed in this National Legal Aid & Defender Association (NLADA) report commissioned for the National Association of Criminal Defense Lawyers (NACDL). The introduction (Chapter I, pages 1-9) looks at Louisiana’s long history of systemic deficiencies in guaranteeing the right to counsel to the poor and details current opportunities to correct those problems, including the creation of a legislatively mandated Blue Ribbon Task Force on Indigent Defense (Task Force). In anticipation of the convening of the Task Force, NLADA conducted site work after preliminary research revealed major failures on the part of government to ensure equal access to justice to the poor. In developing the standards-based assessment methodology employed in this report, NLADA looked at the macro-level – i.e. the general problems facing all Judicial Districts – as well as the specific problems manifested at the micro-level in one rural jurisdiction [The 12<sup>th</sup> Judicial District (Avoyelles Parish)]. Chapter II (pages 10-18) serves as an overview of how the indigent defense system in the state is intended to function.

In 2002, The American Bar Association adopted the *Ten Principles of a Public Defense Delivery System*, a set of standards which constitute 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. The substantial failing of the system to meet these standards, as documented in Chapters III (pages 19-29) and Chapters IV (pages 30-56), calls into question the ability of the entire criminal court system to dispense justice accurately and fairly, as detailed in the reports main findings:

<b>Finding:</b>		<b>Supporting Documentation:</b>
1.	<i>In direct violation of its constitutional obligations under <u>Gideon</u> and ABA Principle #2, the State of Louisiana fails to adequately fund indigent defense services. This results in a disparate funding system that fosters ineffective assistance of counsel in the parishes.</i>	Louisiana is the only state to attempt to fund the majority of indigent defense services through court surcharges. Funding indigent defense through such court costs has proven to be unreliable because there is no correlation between the ability of a jurisdiction to raise revenues and the resources required to provide adequate defense services to those unable to hire an attorney. Additionally, the policies and practices of other policy-makers can have a deleterious effect on the primary revenue stream for public defense services.
2.	<i>In violation of ABA Principle 1, Louisiana's indigent defense system lacks independence from undue political interference.</i>	By vesting the District Court judiciary with the authority to appoint the members of the local indigent defense boards (IDB), Louisiana Revised Statutes, Title 15 §144 is in direct violation of this ABA principle. In Avoyelles Parish, the judiciary has appointed an IDB that has not allowed for qualified continuity of administration of the system.
3.	<i>In violation of ABA Principle 8, the failure to ensure adequate funding and independence of the indigent defense system has led to the prevalence of flat fee contract systems in those districts with poor revenue streams in an attempt to save money. Flat-fee contracts are universally rejected by all national standards because they create a monetary conflict between the defense provider and the client.</i>	An IDB in a judicial district in which the need for public defense services is greater than can be afforded through court costs must look for cost savings to stay afloat. There are only two ways to cut costs related to indigent defense: either reduce the number of cases coming into the system or cut spending on salaries and case-related expenses. Since public defenders do not control their own caseload (it is dictated by the prosecution and courts), IDBs across the state have turned to low-bid, flat fee contract systems in which an attorney takes all of the indigent defense cases in a jurisdiction for a fixed fee. Flat-fee contracts create a financial disincentive for the attorneys to provide adequate representation since the attorney must pay for all case-related services (investigation, expert witnesses, etc.).
4.	<i>In violation of ABA Principle 5, the failure to adequately fund and ensure the independence of the indigent defense system results in attorneys handling caseloads far in excess of national standards. The crushing caseloads exist despite the fact that indigent defendants in misdemeanor cases are being denied attorneys without a proper waiver of their right to counsel.</i>	One Avoyelles Parish contract attorney handles the workload equivalency of 6.3 full-time attorneys while only working part-time. Assuming a 1,387 hour work year, clients facing felony charges are afforded, on average, approximately two hours a piece of this attorney's time <i>including those charged with capital offenses</i> . First hand courtroom observations showed that clients were not afford counsel in some misdemeanor cases without an informed waiver of counsel.
5.	<i>In violation of ABA Principle 6, the failure to adequately fund and ensure independence of the indigent defense system results in attorneys being assigned cases that they are not qualified to handle.</i>	The Avoyelles Parish IDB recently hired an attorney with no trial-level experience to handle all juvenile and misdemeanor cases. In doing so, the lives of poor people have become a "practice" forum for the recent law school graduate to learn through the process of "sink or swim." At-risk juveniles require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems that increase the risk that they will eventually be brought into the adult criminal justice system in later years.
6.	<i>In violation of ABA Principles 3 and 7, the failure to ensure adequate funding and independence of the indigent defense system undermines the timeliness of appointment of attorney and results in a lack of continuity of representation. Both erode clients' right to a speedy trial.</i>	In Avoyelles Parish, the first attorney assigned to a felony case does nothing substantial prior to arraignment and has no responsibility for the case post-arraignment. Thus, nothing that would help the client (investigation, psychiatric exams, drug-treatment placement) occurs until his second attorney receives the case. This is usually on the eve of preliminary hearings or pre-trial settlement conferences – several months later. Louisiana's speedy trial rules have proven ineffective to overcome this dynamic. Under Louisiana Statutes, a defense lawyer must stipulate on the record that he or she is prepared to go to trial when filing a speedy trial motion. Since they are effectively just beginning the case, the lawyer cannot do so and often waives the right to a speedy trial.

<b>Finding:</b>		<b>Supporting Documentation:</b>
7.	<i>In violation of ABA Principle 9, the failure to ensure adequate funding and independence of the indigent defense system results in a systemic failure to provide comprehensive training.</i>	Training should be a continual facet of a public defender agency. Skills need to be refined and expanded, and knowledge needs to be updated as laws change and practices in related fields, such as forensics, evolve. Thus, on-going training is always critical, but even more so where, as in Avoyelles Parish, experienced attorneys never received any initial “New Attorney” training and may need to re-learn skills or unlearn bad practices. There simply is no training.
8.	<i>In violation of ABA Principle 10, the failure to ensure adequate funding and independence of the indigent defense system results in a lack of accountability for attorney performance and systemic ineffective assistance of counsel.</i>	Because the IDB members in Avoyelles Parish do not have the knowledge or training to enable them to oversee any aspect of the delivery of indigent defense services in the Parish, the method of delivery, caseloads, quality of representation, etc., is left to the discretion of the contract public defenders. The NLADA site team noticed many troublesome practices of the defense attorneys, including one attorney’s practice of standing 15 feet away from the defendant during guilty pleas. This attorney was at times laughing with court staff during the proceeding in which his clients were forced to advocate on their own behalf.
9.	<i>In violation of ABA Principle 4, the failure to ensure adequate funding and independence of the indigent defense system results in the continual abridgement of indigent defense clients’ right to confidentiality.</i>	Substantive conversations on felony cases between clients and attorneys in Avoyelles Parish were conducted in the open courtroom audible to the courtroom audience and staff. The Avoyelles Parish Sheriff owns and operates the jail phone system and we were told that it cost \$5.00 to place a collect call from the jail plus long distance rates for the entirety of the conversation. This policy has forced the contract lawyers to set a policy that no collect calls from the jail be accepted due to the financial limitations of their contracts..
10.	<i>In violation of ABA Principle 8, the failure to ensure adequate funding and independence of the indigent defense system results in the lack of resource parity between the prosecution and defense in Louisiana.</i>	On average, Louisiana prosecutors outspent their indigent defense counterparts by nearly 3 to 1. This does not take into account the amount of investigative resources provided at no cost to the prosecution by police, sheriffs, or FBI but which the indigent defense system must pay for directly. At the close of 2002, Louisiana district attorneys collectively had over \$38 million in unused revenue in reserve accounts.

In 1993, the Louisiana Supreme Court found in *State v. Peart*, 621 So.2d 780 (La. 1993), that there was a "general pattern...of chronic underfunding of indigent defense programs in most areas of the state." The Court subsequently ordered the creation of a state assistance board to help improve the quality of indigent defense. As demonstrated in Chapters III and IV, that reform effort has failed. Chapter V (pages 57-63) analyzes what went wrong with the post-*Peart* reform. The chapter concludes that the Louisiana Indigent Defense Assistance Board (LIDAB) has failed to improve the quality of trial-level indigent defense services for four main reasons: since its inception it has been essentially flat-funded despite increased responsibilities; participation in the District Assistance Fund (DAF) program is not dependent on compliance with state standards; LIDAB is not a regulatory commission empowered to verify the uniformity and accuracy of reported statistics; and, the DAF funding matrix is fundamentally flawed in assessing need. Moreover, NLADA and NACDL conclude that the district assistance fund model can never work in a funding system that is reliant on court costs as the primary revenue stream.

Nationally, public defenders not only serve the general population by providing representation services in specific criminal cases, but also by challenging the questionable practices of the other governmental agencies that do not serve the interests of justice. Chapter VI (pages 64-66) underscores the need for an adequate indigent

defense system in relation to Louisiana's correctional practices. In the 1970's the state began housing state prisoners in local jails. The extremely low wages paid to most local jail workers allows the parish jails to realize profits by housing state inmates. At the close of 2002, over \$310 million was sitting unspent in Sheriff reserve accounts, or enough money to fully fund indigent defense services at its current low rate for 10 years.

In an effort to spur economic development through increased corrections jobs, the Avoyelles Parish Sheriff used the state-sponsored windfall as justification to expand the number of local jail beds. A problem now exists because the Sheriff enforces a work release program in which prison labor is offered to non-profit organizations (churches, hospitals, graveyards) and governmental agencies at costs well below minimum wage. Considering the relatively small size of the Parish and the relatively large numbers of prisoners, the expansion of the prison work force perversely reduces opportunities for people of little or no economic resources who are then led to consider crime as a means of supporting themselves. There should be an adequate indigent defense system looking out for the interest of the public, challenging the premise that the economic fortunes of Avoyelles Parish is tied to keeping the parish jails at maximum capacity.

The right to counsel is one of the only checks afforded to those of modest means against an unjust intrusion by the state upon their life and liberty. Without adequate defense services ensuring a fair day in court, the social fabric of our democratic way of life begins to erode. The report concludes (Chapter VII, page 67) that Louisiana fails to meet its federal obligations under *Gideon*. In violation of Louisiana's own Constitution, the indigent defense system is not "uniform" among the parishes, does not "secure qualified counsel," and does not provide counsel to the poor "at each stage of the proceeding."