

Q & A

**Q: Is Juvenile Delinquency Representation an Appropriate Training Ground for Unseasoned Attorneys?**

**A: No.** The United States Supreme Court recognized in *In Re Gault*, 387 U.S. 1 (1967), that a child’s loss of liberty “is comparable in seriousness to a felony prosecution,” despite the civil nature of the delinquency proceeding. Accordingly, the right to assistance of counsel was made law in all instances in which the child or their parent could not afford private counsel in delinquency cases. Gault acknowledged that juvenile delinquency cases are very complex and a specialized and uniform force of advocates is needed. Over the past 40 years, the specialized nature of juvenile procedures has only grown in scope. Juvenile defenders need not only be aware of the procedural rules and constitutional criminal procedures of the adult court system, but also must be aware of the developmental and mental abilities of their young clients, collateral consequences of conviction (including immigration, access to housing and jobs, admission into armed services, among

others), and the enhanced protections for children under federal and state law.

Juvenile justice representation is considered in many ways as an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse. Juvenile justice attorneys generally earn less than their colleagues representing adults. This is unfortunate – juvenile justice attorneys handle serious felony acts that may result in several years’ incarceration. The impact of mandatory and

discretionary bindover litigation for juveniles whose acts and background meet the statutory requirements is as serious as the poten-

tial case outcome for any adult charged with a felony offense. The application of the federal Adam Walsh Child Protection Act, which contains severe retroactivity applications for juvenile sex offenders, for example, raises the consequence significance of juvenile delinquency practice, placing it on a par with adult felony litigation. Kids deserve attorneys specially trained in these matters.

*“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”*  
**In Re Gault, 387 U.S. 1 (1967)**

**Best Practices: The Youth Advocacy Project (Boston, MA)**

The Youth Advocacy Project (YAP) provides services under the theory that alleged delinquent behavior is usually closely linked to a host of related problems and risk factors in the child’s life, such as family problems, poor health, mental illness, community violence, and inadequate schooling. The Youth Development Approach to Zealous Advocacy (YDA), first developed and fostered at YAP, presumes that adults and institutions can help young people to navigate the risky influences and factors that may have contributed to alleged delinquency and to avoid further problematic behavior by promoting their development into

happy, healthy, and economically self-sufficient adults. For example, recognizing that an individual child’s delinquency may be due to having too much time on her hands because of high truancy from school, and that avoiding school is rooted in poor educational performance, and that poor performance may be tied to feelings of low self-esteem, and that low self-esteem could be tied to a whole range of issues - from inappropriate school placement, or a lack of safety in the home, or poor oral hygiene, or no appropriate adult role models, or, most likely, some combination of all of the above plus others, YAP attorneys

screen each child in five core competencies: Physical & Mental Health, Positive Adult and Peer Relationships, Community Engagement, Education, and Safety in the Home & Community. As underlying risk factors are identified, YAP’s team of criminal defense and education attorneys, social workers, and psychologists work to get clients the desired help, be it health insurance, appropriate school services, and/or involvement in a productive or enriching activity (including but not limited to after school programs, school clubs, volunteer work or community services, job or job training, or other hobbies/activities.)

## The Failure to Ensure Independence of the Defense Function: The Jackson County Story

The ABA *Ten Principles* are a set of standards that are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance in each of the ten criteria and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions does not make the delivery of indigent defense services any better from a client's perspective if the appointment of counsel comes so late in the process, or if the attorney has too many cases, or if the attorney lacks the training, as to render those conversations ineffective at serving a client's individualized needs.

To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of each *Principle* and to demonstrate how Michigan counties fail to uphold them. Jackson County was chosen for this in-depth analysis for a specific reason. NLADA site team members were invited to attend a meeting of county stakeholders regarding indigent defense services that included representatives of the judiciary, prosecution, court administration, and the defense bar, among others, in which the adequacy of services were discussed and debated along with the desire for more stringent cost containment efforts. NLADA applauds the inclusive, pro-active approach to problem-solving that the county employed, not in small part because the inclusion of the defense bar acknowledges the importance of public defense in the overall health of the criminal justice system. This inclusive approach to problem-solving makes Jackson County the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, *but because they fail to provide constitutionally adequate services despite their desire to do so.*

### ***The Overarching Standard: ABA Principle 1 (Independence)***

By statute, Michigan's elected judges are authorized to pass out assignments and have discretion to set fee schedules in their jurisdiction.<sup>57</sup> Having judges maintain a role in the supervision of indigent defense services can create the appearance of partiality – thereby undermining confidence in the bedrock principle that every judge be a scrupulously fair arbitrator. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are

## *The ABC's of Jackson County*

All indigent defense services in Jackson County are performed by a small number of local private lawyers pursuant to a single joint annual contract awarded by the local judges. In circuit court, eight law firms are approved for felony assignments on a predetermined percentage basis. Attorneys to whom the judges award portions of the contract receive a monthly draw of funds against their anticipated contract earnings. Attorneys submit a monthly bill for their work. When the approved billing shows that the attorney fees exceed the advances, the county pays the additional amount.

At the time of our site visit, the circuit court fee structure was one in which a flat fee is paid for each case-type: murder (\$1,890); non-murder capital case (\$1,536); non-capital felony (\$482); case arising out of the Department of Corrections (\$422); and, probation violation (\$220). The only payment derivations above these set fees are: a) cases that go to trial (additional \$325 per half day for murder cases; additional \$260 per half day for other capital and non-capital felonies); b) cases dismissed upon a successful defense motion (\$265); and c) cases requiring travel outside of Jackson County to interview witnesses or the defendant (\$158 per day). Attorneys can also bill for actual out-of-pocket costs for transcripts, witness fees, and service of process. Costs for experts as well as any unusual expenses above \$100 (such as medical records and investigators) must be pre-approved by the assigned judge. The per-case-fee can also be reduced if a defendant retains private counsel prior to the disposition of the case or if a conflict of interest is determined. In addition to monetary compensation, attorneys are contractually allotted parking spaces at the court.

The attorneys are obliged under their contract to maintain professional malpractice insurance and a fax machine for the receipt of communications from the court, an e-mail address, Internet access to check the court schedule, and, for those attorneys who do not have

full-time secretarial staffing, a cell phone. The attorney is responsible for all overhead expenses. Finally, unlike most Michigan county indigent defense systems, the indigent defense felony attorneys are contractually bound by the proposed minimum standards for court-appointed criminal trial counsel, as set forth in the August 1993 Michigan Bar Journal. The standards are a set of 45 performance standards detailing the obligation of counsel in regard to lawyer-client relationship, pre-trial proceedings, trial practice, and sentencing. Among the most critical performance standards are: a) the prohibition on accepting excessive caseloads; b) early client interview; c) the requirement of counsel at felony arraignments; d) timely investigations; e) keeping the client informed; f) seeking to obtain experts; and g) consideration of pre-trial motions.

In Jackson County's district court, four individual attorneys are approved for misdemeanor assignments on a predetermined percentage basis. Unlike circuit court, there is no upfront monthly draw of funds against a lawyer's anticipated contract earnings. Instead, defense attorneys are paid a single flat-fee per case. The current two-year contract stipulates that cases assigned in 2006 are paid at a rate of \$245 per case, with an increase to \$250 per case in 2007. Also differing from the circuit court, there are no additional payments for successful motions or for cases that proceed to trial. Contractually, misdemeanor defense attorneys may bill for out-of-pocket expenses, though any anticipated cost above \$25 must be pre-approved by the judge presiding on the case. Attorneys under contract to provide misdemeanor representation must have an office in the county and be in good standing with the bar. There are no standards of representation in the contract.

The representation of children in delinquency proceedings is even less formal than for district court misdemeanors. All juvenile delinquency cases are handled

by two defense attorneys who do not have a formal contract. There is an oral agreement to simply pay these two attorneys at the rate of \$60 per hour, with no other stipulations regarding performance or maintenance of local offices.

The process for obtaining a portion of the indigent defense contracts is to send a letter of application to the chief judge of the appropriate court, who discusses the application with the other judges. Likewise, judges hold the discretion to terminate a contract for just cause or to opt not to retain a lawyer in a subsequent contract period. It is rare for an attorney who is not currently under contract to be awarded a portion of the indigent defense work.

<sup>a</sup> Though the term “law firm” is used, six of the contractors are sole practitioners. The court assigns cases on the following percentage basis: Jacobs & Engle, P.C. (7/32); Brandt & Dehncke, P.L.L.C. (7/32); Michael Dungan (4/32); Paul R. Adams (4/32); Steven Haney (3/32); David Lady (3/32); George D. Lyons (2/32); and Robert Gaecke (2/32). In February 2006, Mr. Haney terminated his contract to go to work for the local prosecutor’s office. His share of the contract was assumed by the law firm of Wilson & Brown.

<sup>b</sup> The county advances the following monthly sums: Jacobs & Engle, P.C. (\$7,000); Brandt & Dehncke, P.L.L.C. (\$7,000); Michael Dungan (\$4,000); Paul R. Adams (\$4,000); Wilson & Brown (\$3,000); David Lady (\$3,000); George D. Lyons (\$2,000); and Robert Gaecke (\$2,000).

<sup>c</sup> Likewise, if the approved billings are less than the advances paid out to the firm at the end of the contract agreement, then the attorneys must reimburse the difference within 28 days.

<sup>d</sup> These flat fee rates have increased annually on par with the raises bargained for by city employees. Other flat fee payments include: Interlocutory Appeal filed by Prosecutor (\$742); Interlocutory Appeal filed by defendant (\$444); Oral Argument on Interlocutory Appeal (\$280); Juvenile Review Hearing (\$220).

<sup>e</sup> This last category is subject to the approval of the assigned judge in the case and is in addition to mileage paid at current county rates.

<sup>f</sup> If indigent defense counsel is replaced before the preliminary examination, the attorney receives \$152. He receives \$310 if replaced after the preliminary examination.

<sup>g</sup> The number of parking spaces allotted per firm is based on the percentage of workload handled: Jacobs & Engle, P.C. (2 spaces); Brandt & Dehncke, P.L.L.C. (2 spaces); Michael Dungan (2 spaces); Paul R. Adams (2 spaces); Steven Haney (1 space); David Lady (1 space); George D. Lyons (1 space); and Robert Gaecke (1 space).

<sup>h</sup> These minimum proposed standards were not adopted by the Representative Assembly of the State Bar and are non-binding on defense counsel throughout the state, except, as in Jackson County, where they govern through inclusion in a contract.

<sup>i</sup> The court assigns cases on the following percentage basis: Bruce Clark (1/3); Terry Gillette (1/3); Michael Baughman (1/6); and Anthony Raduazo (1/6).

<sup>j</sup> Judges cannot reduce fees, which are set by the funding authority.

<sup>k</sup> The district court administrator reported that in misdemeanor cases there is no expectation of payment for travel costs and pretrial motions to hire experts or investigators are very rare.

<sup>l</sup> Patricia Worth and Ivan Brown.

<sup>m</sup> Chief Judge Chad Schmucker informed NLADA site team members that removing attorneys from the panel is very rare and he uses the power to terminate only in the most egregious circumstances. For example, he twice took a big political hit when he terminated the contracts of two popular attorneys. The first one was especially difficult for him because he was the sole African American defense attorney in the county, but had a chemical dependency problem that was interfering with his work. He on two separate occasions left a trial during a recess and never returned. The judge tried getting him into a rehabilitation center, but finally had to terminate the attorney when he did return to a trial after a recess disheveled and intoxicated on drugs. The more recent termination of a panel attorney was strictly on quality concerns. The judge had received a growing number of complaints from clients that the attorney was not visiting them, keeping them informed on their case, or telling them where and when they needed to show up. Toward the end, it was obvious that the attorney did not know his clients and was not preparing for cases at all. It turned out that the attorney had health issues – but Judge Schmucker could not sacrifice the court’s integrity simply because the attorney needed his job. Again, he stressed that most people are still upset with him for this decision.

<sup>n</sup> For example, though this is an annual process, the same four attorneys have been chosen to handle district court cases for the past 17 years. There are often some new applicants in the yearly selection process, but they are not chosen. Last year there were two new applicants, but they were not chosen.

*“[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”*

*Powell v. Alabama, 287 U.S. 45 (1932)*

based solely on the factual merits of the case and *not* on a public defender’s desire to please the judge in order to maintain his job.

For these reasons and others, all national standards call for the removal of all undue judicial influence in a right to counsel delivery system. As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: “[t]he ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks.”<sup>58</sup> Courts should have no greater oversight role over lawyers representing indigent defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of indigent defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that “[t]he mediator between two adversaries cannot be permitted to make policy for one of the adversaries.”<sup>59</sup>

The first of the ABA’s *Ten Principles* addresses the importance of independence in in-

### ABA 1st Principle

**The public defense function, including the selection, funding, and payment of defense counsel, is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

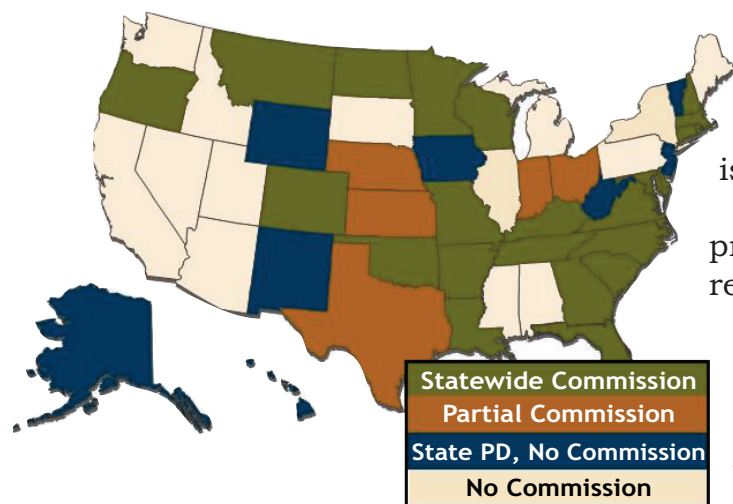
digent defense representation and acknowledges that political interference can be just as deleterious to a public defender system in calling for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.

Many states have met the ABA’s call for independence by placing the authority for oversight of the state’s indigent defense system with a statewide indigent defense commission.<sup>60</sup> NLADA guidelines recommend that the duties of the independent commission include selecting the chief administrator, monitoring of quality of services rendered, serving as a liaison between the legislature and the defender service, and ensuring the independence of the defender system.<sup>61</sup> Even in states without statewide oversight at the trial level – as here in Michigan – the same standards call for an independent commission on the local level to

insulate the office from the power of the bench.

None of the counties the NLADA site team studied had such a board insulating the public defense function. Accordingly the Jackson County judiciary maintains complete control over the indigent defense system. The judges control who receives an indigent defense

### Statewide Oversight in Trial-Level Services



contract and have complete discretion – fettered only by the financial outlook of the county and their own abilities to impact the normal political processes needed to persuade county commissioners to invest in public defender services – to give a contract to an attorney or to terminate an existing contract with an attorney.

Giving judges such wide discretion compromises the integrity of the attorney-client relationship and works to the detriment of indigent defendants by providing them with counsel whose professional judgment may be influenced by concerns that do not affect counsel for clients with financial means. Wielding such authority, it is not necessary for a judge to draft an administrative order

saying “do not file pre-trial motions.” Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to “keeping the judge happy.” In jurisdictions like Jackson County that place such a high emphasis on celerity of case processing, the defense attorneys simply understand not to do anything that will slow down the pace of disposing of cases or risk the reasonable compensation that the circuit court presiding judge has been able to secure for them.

### ***The First Impact of Undue Judicial Interference: The Failure to Adhere to ABA Principle 5 (Attorney Workload)***

An adequate indigent defense program must have binding caseload standards for the system to function, because public defenders do not generate their own work. Public defender workloads rise or fall due to a convergence of societal trends and decisions made by legislatures, police departments and prosecutors which are completely beyond the control of indigent defense providers. The legislature may approve new crimes or increase funding for new police positions that lead to increased arrests. As opposed to prosecutors, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients.

Restricting the number of cases an attorney is expected to handle has benefits beyond the impact on an individual client’s life. For example, the overwhelming percentage of criminal cases in this country requires public defenders.<sup>62</sup> The failure to adequately con-

trol workload will result in too few lawyers handling too many cases in almost every criminal court action – leading to a burgeoning backlog of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers’ expense.

### ABA 5th Principle

**Defense counsel’s workload is controlled to permit the rendering of quality representation.** Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

Conversely, forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time may lead to endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and puts public safety in jeopardy.

For all these reasons, ABA’s *Principle 5* states unequivocally that defense counsel’s workload must be “controlled to permit the rendering of quality representation” and that “counsel is obligated to decline appointments” when caseload limitations are

breached. In May 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441*. The ABA ethics opinion observes that “[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”<sup>63</sup> Both the trial advocate and the supervising attorney with managerial control over an advocate’s workload are equally bound by the ethical responsibility to refuse any new clients if the trial advocate’s ability to provide competent and diligent representation to each and every one of her clients would be compromised by the additional work. However, should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move “to withdraw as counsel *in existing cases* to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn” (emphasis added).<sup>64</sup>

The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.<sup>65</sup> NAC Standard 13.12 on Courts states: “The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.”<sup>66</sup> What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. The ABA’s *Ten Principles* support these national standards with their in-

## EVALUATION OF MICHIGAN’S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

struction that caseloads should “under no circumstances exceed” these numerical limits.<sup>66</sup>

Jackson County has no binding caseload standards for public defense attorneys and no workload prohibitions other than the circuit court defenders’ contractual obligation to follow the dictates of the *Proposed Minimum Standards for Court Appointed Criminal Trial Counsel*<sup>68</sup> which states that “counsel shall decline an appointment from the court to represent an indigent client if the nature or extent of the counsel’s existing caseload is likely to prevent effective representation of that client.” Table I (below) shows the number of felony assignments per attorney or firm for 2006.<sup>69</sup>

Assuming that the law firms with two associates divide the work evenly amongst the attorneys, then all but three of the defense attorneys are in breach of the nationally recommended caseload standards (See Chart A, next page). Seven attorneys are in excess of the national standards by significant percentages: Adams (+46 percent); Dungan (+45); Brandt (+27 percent); Dehncke (+26 percent); Engle (+26 percent); Jacobs (+26 percent); and, Lady (+12 percent).<sup>70</sup>

The national caseload breaches are more serious than even these numbers suggest. The national caseload standards were constructed assuming that an attorney works on indigent defense cases *and nothing else*. Each of the attorneys we interviewed estimated to varying degrees that their public cases were only part of a larger private caseload. For example, Al Brandt estimated that his public cases represented about 50 percent of his work. David Lady thought his indigent defense clients constituted 60 percent of his work. Adjusting the national caseload standard by these workload estimations suggests that Mr. Brandt should only be carrying 75 felony cases per year; and Mr. Lady 90 such cases. This means that Mr. Brandt is carrying a felony caseload that is 153 percent above standards promulgated under the United States Department of Justice and supported by the American Bar Association. Likewise, Mr. Lady is 87 percent above those same standards.

Even attorneys who appear in Chart A to be under national standards for workload are significantly over when accounting for the percentage of time they spend on indigent defense cases. Mr. Gaecke, for example, noted that he “is not dependent on the assignments to keep [his] practice going.” As he described it, “the bulk” of his work is private cases. Conservatively estimating that public cases compose only 40 percent of his workload, Mr. Gaecke has a workload that is 95 percent above national recommendations [40 percent of

**Table 1: Jackson County Felony Assignments**

Attorney	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	Total
Adams	20	26	17	14	19	16	18	25	18	15	15	16	219
Brandt & Dehncke	33	47	29	23	36	24	31	41	36	26	25	28	379
Dungan	18	29	18	14	20	10	19	20	19	19	14	18	218
Gaecke	13	17	5	12	10	8	9	12	9	8	7	7	117
Haney	15	4	-	-	-	-	-	-	-	-	-	-	19
Jacobs & Engle	35	45	30	21	36	25	30	44	34	25	27	26	378
Lady	15	21	12	14	15	11	15	15	14	11	12	13	168
Lyons	13	12	10	11	10	9	6	14	12	7	7	8	119
Wilson & Assc.	-	-	-	8	14	11	14	16	15	14	12	11	115
<b>Total</b>	<b>162</b>	<b>201</b>	<b>121</b>	<b>117</b>	<b>160</b>	<b>114</b>	<b>142</b>	<b>187</b>	<b>157</b>	<b>125</b>	<b>119</b>	<b>127</b>	<b>1,732</b>

## NATIONAL LEGAL AID & DEFENDER ASSOCIATION

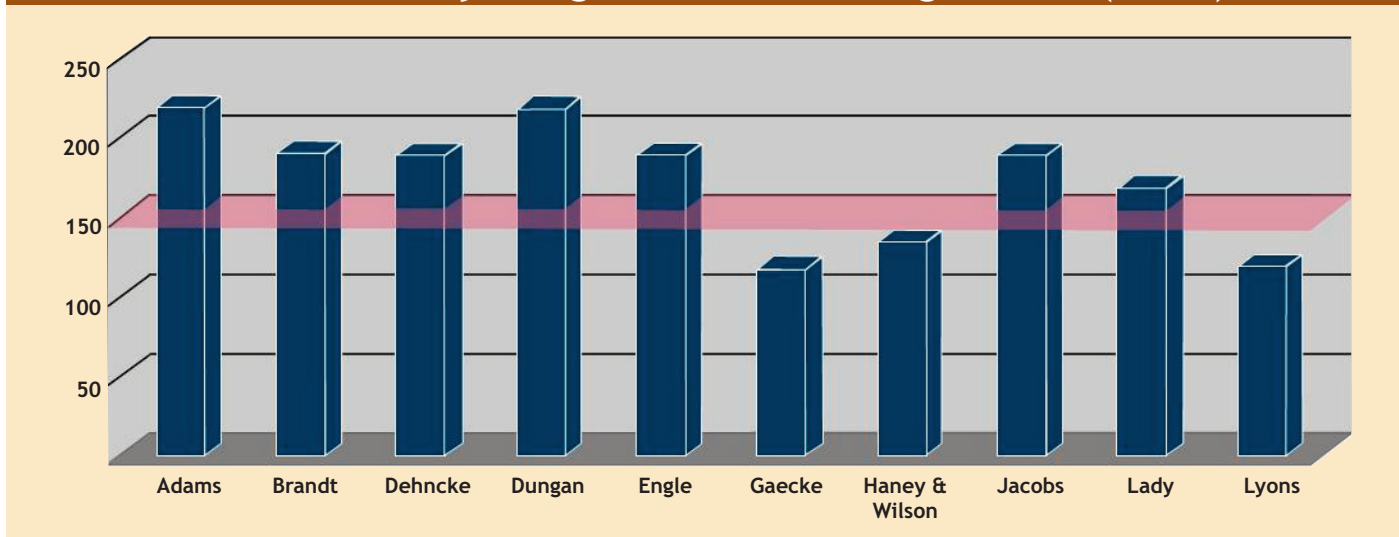
150 equals an annual caseload standard of 60 cases; Mr. Gaecke handled nearly twice that amount (117) in 2006].

Another factor to take into account when judging the workload of private attorneys handling publicly-financed criminal cases is the extent to which they have access to adequate support staff (investigators, social workers, paralegals, legal secretaries, and office managers). Investigators, for example, have specialized experience and training to make them more effective than attorneys at critical case-preparation tasks such as finding and interviewing witnesses, assessing crimes scenes, and gathering and evaluating evidence – tasks that would otherwise have to be conducted, at greater cost, by an attorney. Similarly, social workers have the training and experience to assist attorneys in fulfilling their ethical obligations with respect to sentencing, by assessing the client’s deficiencies and needs (e.g., mental illness, substance abuse, domestic problems, educational or job-skills deficits), relating them to available community-based services and resources, and preparing a dispositional plan meeting the requirements and expectations of the court, the prosecutor, and the law.<sup>71</sup>

Because of this, some states impose further restrictions on their indigent defense caseload standards. For example, public defenders in neighboring Indiana who do not maintain state-sponsored attorney to support staff ratios cannot carry more than 120 felony cases per year (down from the standard of 150 felonies per year for full-time public defenders with appropriate support staff). To the extent that any investigation or social work is being done on behalf of indigent clients in Jackson County, it is being handled by the attorneys. For example, Paul Adams stated that the overwhelming majority of his workload is his indigent defense assignments, yet he has no paralegal staff and conducts all his own investigations. Using the Indiana standard of 120 felony case per year, Mr. Adams is in breach of that standard by 83 percent.

Of note in this discussion is that the circuit court is on record of knowing the actual indigent defense felony caseload for the county for calendar year 2005 (1,794).<sup>72</sup> By entering into a contract with only eight firms at the prescribed percentages, the court was essentially asking all attorneys with at least 3/32 of the contract (or a projected 168 felony cases a year) to agree to break nationally recognized caseload limits – even before taking

**Chart A: Felony Indigent Defense Assignments (2006)**



## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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into account that most of the attorneys carried private cases in the circuit court as well. Moreover, by contractually acknowledging that some of the attorneys do not even have secretarial support (in the stipulation that these attorneys must have cell phones), the court was further compounding the caseload issues.

For those readers unfamiliar with criminal defense practice, below is a partial list of duties ethically required of an attorney to complete on the average case:

### On cases that are disposed by a plea bargain well in advance of trial:<sup>73</sup>

- Meeting and interviewing the client;
- Preparing and filing necessary initial motions (e.g. bail reduction motions; motion for preliminary examination; motion for discovery; motion for bill of particulars; motion for initial investigative report; etc.)
- Receiving and reviewing the state's response to initial motions;
- Conducting any necessary factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence, investigating possible defenses, among others;
- Performing any necessary legal research;
- Preparing and filing case-specific motions (e.g. motions to quash; motions to suppress; etc.);
- Conducting any necessary motion hearings;
- Engaging in plea negotiations with the state;
- Conducting any necessary status conferences with the judge and state;
- Preparing for trial (e.g., develop a theory of the case, prepare for examination of witnesses, including any expert witnesses, conduct jury screening, draft opening and closing statements, requested jury instructions, etc.);
- Meeting with client to prepare for trial;
- Preparing to examine and cross-examine witnesses

### Additional duties for cases that actually go to trial:

- Analyzing potential and final jury instructions;
- Conducting the trial

### Duties for sentencing after pleas and trials:

- Gathering favorable information;
- Preparing sentencing witnesses and documents for presentation to court;
- Reviewing the presentence report and interviewing probation officer;
- Drafting and submitting sentencing memorandum or letter;
- Advocating for the client's best interests at sentencing.

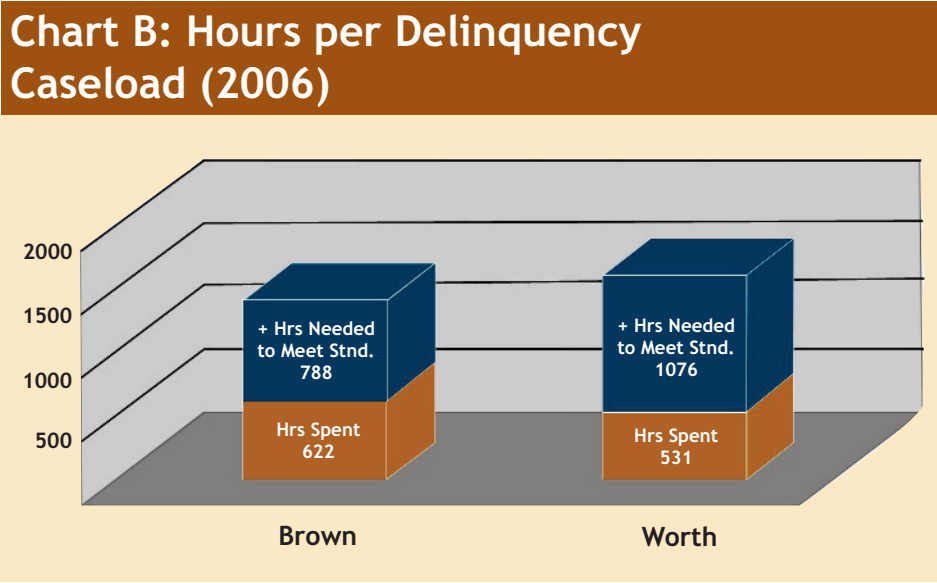
As this list makes evident, no attorney can even think about performing all of these tasks while struggling under the burden of the current workload.

The caseload situation for juvenile delinquency cases is just as troubling in Jackson County. Though a database of caseload assignments was not available for this type of case, NLADA was able to obtain enough information to make reasonable estimates. A staff member of the circuit court administrator stated that Patty Worth was appointed on 171 delinquency cases<sup>74</sup> and that Ivan Brown received 150 such cases in 2006. The court ad-

ministrative staff person also indicated that Ms. Worth received \$31,858 in that year and that Mr. Brown was paid \$37,354. Calculated at the agreed upon rate of \$60/hour, Ms. Worth worked 531 hours on behalf of indigent juveniles in 2006. Mr. Brown worked 622 hours. This means that Ms. Worth spent on average 3.1 hours per juvenile delinquency case. Comparatively, Mr. Brown spent 4.1 hours per case.

National workload standards state that an attorney handling juvenile delinquency cases should handle no more than 200 cases per year *and nothing else*.<sup>75</sup> To convert the national caseload standards to an hour-based workload standard it is necessary to establish some baseline for a “work year.” For non-exempt employees who are compensated for each hour worked, the establishment of a baseline work year is fairly simple. If an employee is paid to work a 35-hour workweek, the baseline work year is 1,820 hours (or 35 hours times 52 weeks). For exempt employees who are paid to fulfill the parameters of their job regardless of hours worked, the establishment of a work year is more problematic. An exempt employee may work 35 hours one week and 55 hours the next. NLADA uses a 40-hour workweek for exempt employees because a 40-hour work week has become the *maximum* workweek standard used by other national agencies for determining workload capacities of criminal justice exempt employees.<sup>76</sup>

Thus a comparative work year assumes a 40-hour work week for 47 weeks (adjusting for holidays and three weeks vacation), or 1,880 hours per year. If the maximum number of cases that a full-time juvenile delinquency attorney should handle in a year is 200 cases, then the average number of hours per case should be 9.4. At that rate, Ms. Worth and Mr. Brown should have worked 1,607 hours and 1,410 hours respectively.<sup>77</sup> Juvenile defense attorneys in Jackson County significantly deprive children of an effective representation by spending only a third of the time required on these cases under national caseload standards.



And, this calculation presumes that an attorney spends every single working hour on case-related task without any time for administrative duties, professional development, mentoring or supervision. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems increasing the risk that they will eventually be brought into the adult criminal justice system in later years. These are commonly children who have been neglected by parents and the range of other support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and valuelessness continues, and the risk of

not only recidivism, but of escalation of misconduct, increases.<sup>78</sup>

As related in the previous chapter, inappropriate misdemeanor convictions or sentences may not generally result in lengthy incarceration, but the life consequences of wrongful convictions can be severe, including job loss, family breakup, substance abuse, and deportation – all factors that tend to foster recidivism. By investing state money in defender services for clients, even when facing misdemeanor charges, jurisdictions may be able to retard the rate of more serious crimes, and the consequent costs for indigent defense and the rest of the system. With this in mind, the NLADA site team found that similar caseload issues arise in the district court of Jackson County as well. National caseload standards suggest that a full-time attorney handle no more than 400 misdemeanor cases per year *and nothing else*.<sup>79</sup> In Jackson County, the district court indigent defense attorneys estimated that they dedicate 25 percent of their time to their public cases. Accordingly, each attorney should handle no more than 100 cases per year. Based on data from 2006, each attorney is in serious breach of those standards: Clark (240, or 140 percent); Gillette (232, or 132 percent); Raduazo (134, or 34 percent); and Baughman (123, or 23 percent).

### ***The Second Impact of Undue Judicial Interference: Failure to Adhere to ABA Principles 3, 4 & 7 (Prompt Appointment of Counsel, Client Confidentiality & Continuous Representation)***

Requirements for prompt appointment of counsel are based on the constitutional imperative that the right to counsel attaches at “critical stages” occurring before trial, such as custodial interrogations,<sup>80</sup> lineups,<sup>81</sup> and preliminary hearings.<sup>82</sup> In 1991, the U.S. Supreme Court ruled that one critical stage – the probable cause determination, often conducted at arraignment – is constitutionally required to be conducted within 48 hours of arrest.<sup>83</sup> Such promptness is equally important elsewhere in Michigan's statutory scheme; valid legal challenges that could result in dismissal of a case should not be delayed for lack of counsel to identify and raise them at the first opportunity.

The third of the ABA's *Ten Principles* addresses the obligation of public defense systems to provide for prompt financial eligibility screening of defendants, toward the goal of early appointment of counsel. Most standards take requirements regarding early assignment of counsel beyond the constitutional minimum requirement, to be triggered by detention or request even where formal charges may not have been filed, in order to encourage early interviews, investigation, and resolution of cases, and to avoid discrimination between the outcomes of cases involving public defense clients and those clients who pay for their attorneys.<sup>84</sup>

Once a client has been deemed eligible for services and an attorney is appointed, *Principle 4* demands that the attorney be provided sufficient time and a confidential space to meet with the client.<sup>85</sup> As the *Principle* itself states, the purpose is “to ensure confidential

### ***ABA 3rd Principle***

**Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.**

communications” between attorney and client. This effectuates the individual attorney’s professional ethical obligation to preserve attorney-client confidences,<sup>86</sup> the breach of which is punishable by disciplinary action. It also fulfills the responsibility of the jurisdiction and the public defense system to provide a structure in which confidentiality may be preserved<sup>87</sup> – an ethical duty that is perhaps nowhere more important than in public defense of persons charged with crimes, where liberty and even life are at stake and client mistrust of public defenders as paid agents of the state is high.<sup>88</sup>

The trust that is fostered in those early stages would not mean much if the client never saw the same attorney again. For this reason, ABA *Principle 7* demands that the same attorney continue to represent the client – whenever possible – throughout the life of the case.<sup>89</sup> Though it may seem intuitive to have an attorney work a case from beginning to end, many jurisdictions employ an assembly-line approach to justice in which a different attorney handles each separate part of a client’s case (i.e., arraignment, pre-trial conferences, trial, etc.). Standards on this subject note that the reasons for public defender offices to employ the assembly line model are usually related to saving money and time. Lawyers need only sit in one place all day long, receiving a stream of clients and files and

then passing them on to another lawyer for the next stage, in the manner of an “assembly line.”<sup>90</sup> But standards uniformly and explicitly reject this approach to representation,<sup>91</sup> for very clear reasons: it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective, and is demoralizing to clients as they are re-interviewed by a parade of staff starting from scratch.<sup>92</sup>

In Jackson County, Magistrate Fred Bishop signs the warrant and the person is arrested on the basis of that warrant. A Grand Jury is never required to institute

prosecution, but prosecutors may convene one for that purpose if they believe there is some need (apparently this occurs rarely in Jackson County). Once arrested, a person will have an initial appearance and a bond setting (generally within not more than 48 hours of arrest). As throughout Michigan, all criminal cases in Jackson County for persons 17 years or older begin in the district court. If the person is in jail, this initial appearance and bond setting will occur by video from the jail. One defense attorney advised the NLADA site team that no one is typically held on bond for a misdemeanor arrest unless they have some other problem like a probation violation. If the defendant has not been bailed, arraignment is done by video daily at 12:45 p.m. The district court explains to the defendant the charges, his or her rights, and the possible consequences if convicted of the charge. The court also determines the bail amount and collects bail. There is no defense counsel or assistant prosecutor present. Bail is set by a judge without argument or any

### ABA 4th Principle

**Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

hearing.

As we have seen in the previous chapter, Jackson County's district court eliminates a significant number of defendants from even seeking the right to counsel in violation of *ABA Principle 3*. Defendants are forced to appear in court without counsel at the initial arraignment and bail hearing. Interestingly, in asking many of the defense attorneys whether they would allow a privately-retained defendant to appear at such hearings without counsel, they uniformly answered that they would not. For those defendants who manage to hold strong in their determination to receive appointed counsel, the Jackson County criminal justice system still fails to promptly appoint counsel to them.

For those defendants who qualify for appointment of counsel, attorney assignments are made by staff in the court administrator's office in circuit court and in district court by a court officer. In both instances assignments are made on a rotational basis, though in circuit court there is a more complex matrix to account for the appropriate percentages of the caseload originally contracted with each law firm at the start of the contract period. Lawyers are notified by fax of their appointments as well as by hard copy delivered to their mailbox in the courthouse. The matter is then continued for a pre-examination hearing, if a felony, and a pretrial conference if a misdemeanor.

If the defendant is charged with a misdemeanor that is punishable by not more than one year in jail, the district court will conduct the trial and sentence the defendant if found guilty. In felony cases (generally, cases that are punishable by more than one year in prison) the district court will set the bail amount and hold a preliminary examination to determine if a crime was committed and if there is probable cause to believe the defendant committed the crime. If so, the case is transferred to the circuit court for trial. In both instances, it is unlikely that a defense attorney will do any work on a case or even meet the clients before the next court date (whether for a misdemeanor or felony)

On the Thursday afternoon following arrest, circuit court defense counsel will receive the police reports for the arrests of their appointed defendants. Every Friday, the circuit court holds a "preliminary examination conference" – an informal meeting between the prosecutor and the appointed defense attorney.<sup>93</sup> All of the indigent defense attorneys advised that they did not see much point in meeting with their clients before they received the police report. Because they get the report on Thursday and have the preliminary examination conference on Friday, this results in appointed counsel most often meeting with their client for the first time after the Friday session. At the preliminary examination conference, the attorneys review the police report and discuss whether: (1) a felony charge will be reduced to a misdemeanor for a plea; (2) whether an agreement will be worked out on a felony plea; and (3) if the charge will remain a felony and cannot be worked out, whether it is necessary to actually have a preliminary examination or whether it will be waived.

For those clients who are in jail on the date of the preliminary examination conference, the appointed attorneys will have the conference with the prosecutor and then go back to the two holding cells to talk with their clients. The defendants are brought from the jail to

### *ABA 7th Principle*

**The same attorney continuously represents the client until completion of the case.** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

the courthouse in groups. The attorneys meet with their clients all together in a single room. One defense attorney said this presents problems in having frank and privileged conversations with clients because often co-defendants or witnesses are present in the same room. His solution to this problem is often to adjourn the preliminary examination conference to the next week so that he can go see the client in the jail and have a private conversation.

If a charge is being reduced to a misdemeanor and the defendant wishes to plead, the defendant will go directly to district court on the same day and enter the misdemeanor plea, with sentencing set within a few weeks. An informal study conducted by Judge Schmucker of 200 sample felony court-appointed cases suggests that 50 percent of all felony indigent defense cases are resolved in the district court.<sup>94</sup>

If a plea agreement is worked out to a felony, the defendant will be set for arraignment and plea before the circuit court judge to whom they are already allotted. This normally occurs the following Tuesday, with sentencing set a few weeks hence after receipt of a presentence report. Until the past year or so, if a plea was worked out to a felony the defendant would go the same day and enter the plea before the district court judge with sentencing set in a few weeks in front of a circuit court judge.<sup>95</sup>

If the charge remains a felony and there is no plea agreement, then a preliminary examination will either be held the following week in district court or it can be waived. The defense attorneys all indicated that most of the time the preliminary examination is waived and the client is set for arraignment in circuit court. They did say, however, that the district court preliminary examination is sometimes useful for convincing the client to plead, because once the defendant realizes that the witnesses are actually going to show up and testify then the defendant becomes “more reasonable.” If probable cause is found at the preliminary examination or if the preliminary examination is waived, then the defendant will be set for another arraignment in circuit court, which will commence the actual felony prosecution. There will not be a defense attorney (or a prosecutor) present at the circuit court arraignment.

Jackson County tries to adhere to *Principle 7*'s demand for continuity of defense representation in most circumstances once a case reaches circuit court. However, given that no attorney is appointed in the critical stages at the start of the case in district court, Jackson County does not meet the basic parameters of the *Principle*. Moreover, there is a serious problem with continuous representation for juveniles tried as adults. When first detained, the child will be represented by one of the juvenile contract attorneys. If the child is designated by either the prosecutor or the court to be tried as an adult, the juvenile defender just closes the file; the child then receives a circuit court contract attorney in the new court. And the two attorneys do not talk nor does the juvenile defender transfer her file to the circuit court defender.

Because of the civil nature of juvenile delinquency proceedings, the process in cases involving children not tried as adults follows a different course than adult criminal procedures. For instance, petitions are formally filed in the probate section of circuit court and presided over by a juvenile court “referee.” When children are detained, they are taken to the Youth Center. By statute, a preliminary hearing must be held within 24 hours. This hearing can be held by anyone and is typically held at the Youth Center and presided over by some Youth Center employee, without any attorney present. If the charge against the child is going to be “lodged,” then the hearing is adjourned until the following Monday, be-

cause “lodging” can only occur before the referee or an actual judge. Children are represented at the Monday hearings by one of two lawyers under contract with the court regardless of whether the juvenile is indigent (as long as they have not waived their right to counsel or retained private counsel).<sup>96</sup> The referee and one of the juvenile indigent attorneys agreed that approximately 80 percent of juveniles request and receive appointment of counsel.

All juveniles are always entitled to a jury trial, but virtually no juvenile jury trials ever occur. The referee (who has held that position for 17 years) could not recall a single juvenile jury trial during her tenure. Importantly, juvenile proceedings and records in Michigan are not sealed, and juvenile convictions are considered in imposing sentence in adult courts. Finally, prompt appointment of counsel and the demand for a preliminary hearing in juvenile delinquency cases is skirted as well. The 24-hour hearing is waived in any instance in which charges will be lodged since such actions can only occur in front of a referee – who is not in attendance at the hearing. The 24-hour requirement for the preliminary hearing is literally circumvented by having the hearing commence within 24 hours but not conclude until the child is brought before the referee on the following Monday.

Jackson County should be commended for adhering to the first part of ABA *Principle 4* requiring that defense counsel is provided a “confidential work space” in which to meet clients. The courthouse has a number of attorney-client meeting rooms at attorneys’ ready disposal. Unfortunately, the rooms are not frequently used. This is especially true in misdemeanor cases where most lawyers meet their clients for the first time in the courtroom or when they are having plea negotiation discussions with them in the en masse holding cells or in the hallways. For many defendants this is the only time or place they ever meet with their attorneys. The fact that some attorneys choose not to interview clients in these areas reflects more on the pace at which the court house is expected to function than to the physical lay-out of the court space.

### ***The Third Impact of Undue Judicial Interference: A Failure to Adhere to ABA Principles 6, 9 & 10 (Attorney Qualification, Training, & Performance Supervision)***

All national standards, including ABA *Principle 6*, require attorneys representing indigent clients in criminal proceedings to have the appropriate experience to handle a case competently.<sup>97</sup> That is, policy-makers should not assume that an attorney who is newly admitted to the bar is skilled to handle any type of case or that even an experienced real estate lawyer would have the requisite skill to adequately defend a person accused of a serious sexual assault. ABA *Principle 6* acknowledges that attorneys with basic skills can effectively handle less complicated cases and those with less serious potential consequences. However, significant training, mentoring, and supervision are needed to foster the budding skills of even the most promising young attorney before allowing her to handle more complex cases.<sup>98</sup>

The systemic need to foster attorneys is the thrust of the call for on-going training encapsulated in ABA *Principle 9*. For example, new-attorney training is essential to cover

## ABA 6th Principle

**Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training includes a thorough introduction to the workings of the indigent defense system, the prosecutor's office, the court system, and the probation and sheriff's departments, as well as any other corrections components. It makes use of role playing and other mock

exercises and videotapes to record student work on required skills such as direct and cross-examination and interviews (or mock interviews) of clients, which are then played back and critiqued by a more experienced attorney or supervisor.

As *Principle 9* indicates, training should be an on-going 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 evolve. As the practice of law grows more complex each day, even the most skilled attorney practicing criminal law must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client.<sup>99</sup>

Such training should not be limited to theoretical knowledge. Defense practitioners also must gain practical trial experience by serving as co-counsel in a mentoring situation on a number of serious crimes, and/or having competently completed a number of trials on less serious cases, before accepting appointments on serious felonies. Moreover, the authority to decide whether or not an attorney has garnered the requisite experience and training to begin handling serious cases as first chair should be given to an experienced criminal defense lawyer who can review past case files and continue to supervise, or serve as co-counsel, as the newly qualified attorney begins defending her initial serious felony cases – as demanded by *ABA Principle 10*.

Without supervision, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed – one that is much more than an evaluation form or process for monitoring compliance with standards – and should include: a) clear plan objectives;<sup>100</sup> b) specific performance guidelines;<sup>101</sup> c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations;<sup>102</sup> and d) specific processes for providing training, supervision, and other resources that are necessary to support performance success.

To be fair, the circuit court defense contract in Jackson County does contain some performance standards. But for performance standards to be effective there must be some

## ABA 9th Principle

**Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

mechanism to monitor, evaluate, and enforce these standards on the defense practitioners – as encapsulated in the tenth of the ABA's *Ten Principles*' demand to ensure that attorneys are monitored for compliance with such standards. Circuit Court Presiding Judge Schmucker acknowledged that there is no formal supervision of the contract attorneys to ensure that they meet the performance guidelines of the contract. And, as has already been detailed, at least three major contract performance measures – those regarding case-load, appearance at arraignments, and early client contact – regularly remain unmet.

Moreover, the NLADA site team found issues with attorney performance against other of the existing circuit court contract performance standards. For example, local performance standard #23 requires counsel to consider the merits of filing pre-trial motions for each defendant. All indications from our research suggest that almost no motions are ever filed in Jackson County. One defense attorney said that motions were usually unnecessary because the prosecutors “will give us everything they have; sometimes they will even show us their file.” Judge Grant estimated that only about 10 percent of all felony cases ever have any motion hearing litigation, such as a motion to quash or a motion to suppress. Either the defense or the prosecutor can take interlocutory appeals from adverse rulings, but this is very rarely done, and Judge Grant indicated that in his 14 years on the bench he could not think of a single time that he had been reversed on interlocutory appeal.

The defense attorneys seem to believe that written motions are just unnecessary almost anytime. With regard to motions to reduce bail, one defense attorney said “sure they could file a motion if they needed to, but if a person could not make the bail that was set it probably wasn't going to help them any.” With regard to local performance standard #18 requiring defense attorneys to obtain investigators or experts in appropriate cases, defense attorneys and the judges uniformly stated that defense attorneys could file a motion asking for funds if they needed to, but were more likely to just show up in court and ask for a hearing to explain to the judge why they needed funds. Yet, we were told, even this more informal practice rarely ever occurs. When asked whether the prosecutor would participate in a hearing on a defense request for funding (should one take place), defense counsel said they would talk to the prosecutor about it ahead of time and tell them what they needed and therefore the prosecutor would not object. There was no indication that any defense attorney ever considered filing an ex parte or under seal motion for funding. With regard to discovery, the defense attorneys repeatedly assured NLADA site team members that the prosecutors would share with them pretty much everything in the prosecutor's file. One defense attorney even went so far as to sum it up by saying, “we just won't stand for” filing all those motions in Jackson County. Judge Grant assured an NLADA site team member that indigent defendants receive a free copy of the transcript of the preliminary examination, if one was held, which serves to provide extensive discovery in his opinion.

The NLADA site team was able to conduct court observations of some indigent defense hearings and one trial. The performance of counsel, for the most part, was very good. For

### ABA 10th Principle

**Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

example, NLADA site team members observed a case of a 40-something adult male charged with intent to distribute. The case posed an interesting question about the legality of the search of the defendant and the car in which he was riding as a passenger, after it had been stopped for speeding. The indigent defense attorney led the arresting officer through the entire stop and search procedure, questioning at every turn the apparent absence of adequate suspicion to legally warrant his actions. It was clearly zealous advocacy at work. Similarly, a NLADA site team member observed the final stages and closing arguments of a felony trial of a young man who had been charged with conspiracy and armed robbery. The indigent defense attorney appeared to be consulting with his client throughout the trial, making sensible objections, and presenting a closing argument that led the jury to conclude a reasonable doubt and acquit the young man of all charges.

However, we also observed a case of a woman who was charged with physical abuse of her 11-year old son (he had been placed in foster care). The defendant, who was serving 120 days in the county jail on a circuit court violation of probation, was handcuffed and manacled and wore an orange jumpsuit with “COUNTY JAIL” prominently displayed. The prosecutor was requesting a continuance of the preliminary examination, on the ground that no summons had gone out to procure the boy’s appearance. The defendant’s lawyer told the court he would normally object and move for dismissal, but since his client was serving her sentence, he would not object to a brief continuance “under the normal stipulation that the case will be dismissed if the prosecutor cannot proceed on the next court date.”

A few minutes later, an NLADA representative saw the prosecutor going back into the courtroom. She told us that they had found another case pending against the defendant, a misdemeanor charge of driving under the influence with a minor passenger in the car, which had occurred in December 2006. Reentering the courtroom, we observed the defendant already in the middle of pleading guilty to the charge, without counsel present. When the judge asked her if she had any comment upon the facts contained in the police report, she explained that she and her 11-year old son had argued, at which point he had run out into the cold winter night without proper clothing. Feeling that she had to find him, she took her five-year old child with her, got into her car, and drove through the projects looking for him. The judge asked if she had driven on a public street, and she said no, she had never left the project grounds. Then the judge asked her a leading question about the location at which she was arrested (a dirt road) and whether someone could drive onto that road from a nearby public road. Thus the necessary “public way” element of the crime was verified, at least for purposes of the plea.

Had her indigent defense attorney continued to be present at that point in time, the lawyer might well have raised a reasonable doubt on the point. The judge, having confirmed that her release date on the probation violation sentence was May 21, imposed a sentence of 90 days in the county jail “starting today” (i.e., concurrent), which should give her a release date on or about May 23. She seemed satisfied, once she understood that her sentence would run concurrently; but whether she truly drove on a way to which the public has a right of access was never tested, as it surely would have been by competent counsel.

Despite this one observation, NLADA believes that the defense attorneys handling indigent defense cases in Jackson County are – for the most part - qualified to be doing the work that they are doing as required under the sixth of the ABA’s *Ten Principles*. This re-

quirement derives from all attorneys' ethical obligations to accept only those cases for which they know they have the knowledge and experience to offer zealous and quality representation.<sup>103</sup> This *Principle* integrates this duty together with various systemic interests – such as efficiency and the avoidance of attorney errors, reversals and retrials, findings of ineffective assistance of counsel, wrongful convictions and/or executions, and attendant malpractice liability – and restates it as an obligation of the indigent defense system within which the attorney is engaged to provide legal representation services.

However, there is simply no required attorney training in Jackson County. This is particularly problematic because there seems to be a consensus concern regarding where the next generation of indigent defense attorneys will come from after the current attorneys retire. Both the judges and the lawyers said Jackson County is just not a place that young lawyers want to live and practice. Many interviewees indicated that with attractive cities like Detroit and Ann Arbor being so nearby, attorneys would much rather live and work in those cities than in Jackson. Yet it is not hard to imagine that part of the desire of young criminal defense attorneys to leave Jackson County is because they see a system that does not allow for them to get appointed to lesser criminal cases and develop the skills needed under the tutelage of older, wiser attorneys to become great felony trial attorneys.

If it so desired, Jackson County could expand the pool of attorneys and offer training that covers matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training could include a thorough introduction to the workings of the indigent defense system, the prosecutor's office, the court system, and the probation and sheriff's departments, as well as any other corrections components. And it could tap the expertise of the current defense bar through mentoring younger less experienced attorneys. At least one bar member who is not on the indigent defense panel expressed an interest in acquiring such experience, before noting that it was all but impossible to crack the insular "old boys network" that is currently the indigent defense bar in Jackson County.

### ***The On-Going Devolution of Jackson County's Right to Counsel System***

During our site visit, members of NLADA's site team were permitted to attend the meeting of county stakeholders referenced at the start of this chapter. In preparation for that meeting, Judge Schmucker detailed a number of areas of cost containment that merit review, including: 1) more rigorous eligibility standards and screening procedures; 2) prosecution charging practices; 3) feasibility of creating a staffed public defender agency; and 4) putting the indigent defense contracts out for competitive bid. In our opinion, Judge Schmucker correctly identified that stricter screening of defendants will necessarily require increased staffing in the court system – an investment that would probably cost more than the savings that would be produced. Similarly, though we do not take a position on the charging practices of the county prosecutor, we note that Judge Schmucker conducted an informal study that found that 50 percent of all felony cases are resolved in district court. Judge Schmucker argued that if those cases had been originally charged as misdemeanors, there would have been a cost savings of \$222 per case for an overall indigent defense savings of \$150,000.

Such a potential cost savings was the onus for debating the merits of simply reducing

the flat fee paid to circuit court defense attorneys for any cases that are resolved at district court. However, there was a prevailing view amongst defense practitioners that, should the county government implement a plan to reduce fees for felonies bargained down to misdemeanors in district court, it would result in many fewer district court dispositions and many more cases clogging the circuit court. This is troublesome, to say the least, since the defense bar was essentially saying they would elevate their own personal need for a full fee over their client's opportunity to downgrade a felony to a misdemeanor or to dispose of their case with expediency. That is to say, the one respect in which indigent clients currently gain some relative advantage – the chance to downgrade their felony charge and minimize their punishment – was subject to fall victim to the cost-cutting proposal and the defense attorneys' financial interests. The whole conversation in Jackson County regarding cost containment seemed to the NLADA representatives to reflect the strains that the county is feeling for the state's abdication of their responsibility to provide right to counsel services.

A number of things have occurred that has resulted in a reduction in indigent defense funding from the high experienced during our site visit. In April 2007, Judge Schmucker issued a request for proposals to move to a flat fee contracting system. This caused some resistance from the defense bar, who, at first, submitted a joint single bid that was rejected by the judge and county because it did not comply with their hopes of a competitive bid process. When the bid was re-let a second time, the court received a number of proposals from attorneys who had not previously been appointed to public counsel cases – though most of the attorneys that signed on to the previous joint proposal submitted individual bids albeit with the same cost per case bid. Judge Schmucker assured an NLADA representative that low bid was not the only condition for selecting the winning bids but also acknowledged that there has been a reduction in quality of services related to the reliance – in some cases – on less experienced attorneys. Jackson County is about to re-bid the flat fee contracts again, this time for a two and a half year period – again in an attempt to hold costs steady over a longer period of time. It should be noted that the current Jackson County juvenile delinquency contract has devolved beyond the flat fee per case format to one that offers a single flat fee to take 50 percent of the cases that come through the court no matter how many that might be.

### ***Final Thoughts on Jackson County***

In closing this section, NLADA notes our site team members were impressed with Presiding Court Judge Chad Schmucker, both with his courtroom demeanor toward indigent defendants and his openness to discuss options to improve both the cost-efficiencies and the effectiveness of the indigent defense system under his purview. NLADA's critique of the indigent defense system in Jackson County – and the subsequent and myriad effects on poor people facing the potential loss of liberty in criminal procedures – is not a complaint about Judge Schmucker himself. Rather, it is a cautionary tale of what can – and does – go wrong when a state cedes its constitutional obligations to its counties, and in particular the county judiciary, in even the best of circumstances. If Jackson County cannot provide adequate constitutional representation to people of insufficient means and meet the ABA *Ten Principles* under the stewardship of Judge Schmucker, the impact on clients' lives can only be worse in other jurisdictions, as we will see.

## Q & A

### Q: Can Assigned Counsel Systems or Contract Programs Function Independently from the Judiciary?

**A: Yes.** Several states have statewide assigned counsel systems, contract programs, or hybrids from which policy-makers can learn positive lessons. For example, Massachusetts provides indigent defense services through the Committee on Public Counsel Services (CPCS). CPCS has statutory oversight of the delivery of services in each of Massachusetts's counties and is required to monitor and enforce standards. Private attorneys, compensated at prevailing hourly rates, provide the majority of defender services.

At the local level, attorneys accepting cases must first be certified by CPCS to take cases. To accept district court cases (misdemeanors and concurrent felonies), attorneys must apply, be deemed qualified, and attend a five-day state-administered continuing legal education seminar offered several times throughout the year. Attorneys seeking assignment to felony cases must be individually approved by the Chief Counsel of CPCS, whose decision is informed by the recommendation of a Certified Advisory Board composed of eminent private attorneys from each geographical region. To be certified for these more serious cases, attorneys must have tried at least six criminal jury trials within the last five years or have other comparable experience. Proof of qualification, including names of cases, indictment numbers and charges, names of judges and prosecutors, dates, and a description of the services provided must be included in the application. Recommendations from three criminal defense practitioners familiar with the applicant's work are also required. Certification is only valid for a term of four to five years, after which all attorneys must be reevaluated.

All newly certified attorneys in Massachusetts must participate in a mandatory program of mentoring and supervision overseen by regional advocacy centers. For attorneys seeking appointments to children and family law matters, for example, counsel must meet with their mentor prior to any new assignments and bring writing samples to help the mentor develop a skills profile. The mentor and mentee are required to meet at least four times per year. The mentor is instructed to follow CPCS' performance guidelines in assessing the attorney's ability. Participation in the program is mandatory for an attorney's first 18 months, and may continue longer at the discretion of the mentor.

By being certified, an attorney agrees to abide by the set of rigorous performance guidelines that set out attorney responsibilities at every stage of the case, for each specific type of case the attorney is qualified to handle. Assigned counsel attorneys are also bound by numerical caseload limits: an attorney may handle no more than 200 Superior Court criminal cases per year, 400 district court criminal cases, 300 delinquency cases, 200 Children and family law cases, or 200 mental health cases. An attorney may bill no more than 10 billable hours in a day (unless this limit is specifically waived by CPCS) nor more than 1,800 hours annually. CPCS assesses "quality" through a formal evaluation program based on the written performance guidelines and overseen on a regional level by compliance officers. These supervisors are given training in how to evaluate staff, and their ability to assess performance fairly is a subject of their own performance review by CPCS.

The Oregon Public Defender Services Commission has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency, and accountability of defense services consistent with national standards, including adopting rules regulating professional qualification standards for appointed counsel and procedures for the contracting of public defense services. All indigent defense services at the trial level are decentralized, with 100 percent of the funding provided by the state through a series of contracts with private attorneys, consortia of private attorneys, or private non-profit defender agencies.

The Commission oversees the Office of Public Defense Service, which contracts with ten non-profit organizations to provide primary indigent defense services in 11 of the state's 36 counties. Twenty-four counties are served through either consortium contractors or individual law firm/private attorney contracts.

In one county, indigent defense services are provided through an assigned counsel plan. In this county, and for conflict representation in other counties, the Office pays attorneys an hourly rate. All individual private attorneys must apply to the Office and receive certification in order to receive appointments.

The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contract obligations. If a defender agency cannot meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

Oregon also enforces strict workload standards in their contracts. For instance, a typical contract with a 501c3 non-profit public defender sets a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally require different amounts of work. Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Oregon system reflects overall numerical caseload limits for all staff in the office combined. And, instead of pure caseload limits, the allocation of case numbers among different categories of cases according to the number of hours commonly required for each type of case essentially constitutes a case "weighting" system, i.e., measuring "workload" rather than caseload and allowing more sophisticated planning for the office's actual work and staffing needs.

Every six months, there is a budget review process with state funding officials, in which extra funding may be negotiated for extra work performed – for example, for cases which required more than the usual amount of time of type of services (e.g. "three-strikes" cases). In effect, the contract public defender office monitors its intake and can project the degree of compliance with its estimated workload on a week-by-week basis. It notifies the court promptly if workloads are being exceeded and additional appointments must be declined. If, for example, the office meets its workload level on Wednesday, the balance of all new assignments for that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows the office to consistently maintain a uniform quality of service and manageable workloads even during periods of lower-than-normal staff levels due to turnover, sickness, or other authorized leave.

### Breaking News!

CARSON CITY, NV, January 2008 — The Nevada Supreme Court removes the judiciary from the administration of local indigent defense systems by Administrative Order. Model assigned counsel plans are being developed while state and local policy-makers weigh creating a statewide system. The Administrative order also sets attorney performance standards and creates uniform indigency standards.

## Success in Louisiana

Louisiana — a state with a struggling economy like Michigan — had endeavored to reform its broken system of justice for years. Pre-Katrina, the public defense system in Louisiana was not obligated to adhere to any standards, resulting in public defenders handling too many cases with practically no training or supervision and while experiencing undue interference from the judiciary. And all of this was before hurricanes Katrina and Rita made landfall in August 2005.

Yet, in the midst of having to contend with extreme financial and emotional devastation, Louisiana has reformed its entire system for providing counsel to the poor — today funding 100 percent of its statewide defender system. In June 2007, Governor Blanco signed into law the Louisiana Public Defender Act, thereby creating a comprehensive statewide public defender system that abolished the local judiciary controlled public defender boards in favor of a statewide independent

board with regulatory authority to set and enforce a wide array of standards based on the ABA 10 Principles. Services are still delivered locally through a hybrid of contract and assigned counsel, but oversight is administered at the state level.

