

# National Indigent Defense Reform: *The Solution is Multifaceted*



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# National Indigent Defense Reform: The Solution is Multifaceted

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# ABOUT THE AMERICAN BAR ASSOCIATION AND THE STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

**T**he **American Bar Association (ABA)** is the world's largest voluntary professional organization, with nearly 400,000 members and more than 3,500 entities. It is committed to doing what only a national association of attorneys can do: serving our members, improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world. Founded in 1878, the ABA is committed to supporting the legal profession with practical resources for legal professionals while improving the administration of justice, accrediting law schools, establishing model ethical codes, and more. Membership is open to lawyers, law students, and others interested in the law and the legal profession.

The **Standing Committee on Legal Aid and Indigent Defendants (SCLAID)** was established in 1920 to examine issues relating to the delivery of legal services to the poor. SCLAID has provided expert support and technical assistance to individuals and organizations seeking to improve indigent defense systems in states throughout the nation. The Committee convenes chief defenders, state supreme court justices, state legislators, bar and other leaders to engage in regional and national dialogue concerning improvements in indigent defense delivery. It collaborates with other organizations to host trainings for attorneys who lack access to defender training. The Committee has published numerous studies of state and local defense systems and research papers on indigent defense issues, and has developed indigent defense policy proposals and standards that have been adopted by the ABA House of Delegates. SCLAID maintains a comprehensive indigent defense resource center online at [www.indigentdefense.org](http://www.indigentdefense.org).

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# ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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The **National Association of Criminal Defense Lawyers (NACDL)** is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 10,000 direct members in 28 countries — and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys — include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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**G***ideon v. Wainwright* forever altered the notion of fundamental fairness in the American legal system. No longer was the Sixth Amendment right to counsel available only for those with the means to afford it: it was there for everyone charged with a felony in this country. Later decisions expanded the right to counsel to mandate representation for those accused of many misdemeanors or faced with situations where liberty and important rights are at stake. And the right has been defined to encompass not just a right to *any* counsel, but to *effective* counsel.

As the 50th anniversary of *Gideon* approaches, defense of the indigent accused in the United States still fails to provide the counsel promised by the Supreme Court. Overreliance upon the criminal justice system as an instrument of social and regulatory control, absence of administrative support structures, and insufficient funding streams have left the assurance of *Gideon* fundamentally unfulfilled. As Attorney General Eric Holder stated on February 4, 2012, when he addressed the 2012 National Summit on Indigent Defense convened by the American Bar Association’s Standing Committee on Legal Aid and Indigent Defense:

Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. ... Yet, as we come together this afternoon — the basic rights guaranteed under *Gideon* have yet to be fully realized. Millions of Americans still struggle to access the legal services that they need and deserve — and to which they are constitutionally entitled.

With invaluable funding provided by the Department of Justice’s Bureau of Justice Assistance, ABA SCLAID turned to us with a request that we convene a focus group to explore potential solutions to the perpetual crisis in indigent defense. There is no doubt that money — lots of it — wisely disbursed and properly used among the states, would go a long way toward solving the problem. But no such largesse is imminent. Budget priorities on both the federal and state levels make it unlikely that any imminent influx of new resources will be available for public defense, although in some places they are desperately needed.

Thus, when we undertook the mission to convene this focus group, we set a unique goal. We sought to convene a group of innovators who have employed thoughtful and exemplary ingenuity to alleviate pressure on indigent defense systems and to elevate standards of practice. And we sought to identify those who define reforms primarily through new thinking, rather than in reliance upon new money. The result of our efforts was an extraordinary conversation among 18 remarkably dedicated pro-

professionals from within and outside of government, including representatives of all branches and levels of government, prosecutors, defense attorneys, law professors and non-governmental reformers. They brought stories of unique insight and demonstrated success.

This report documents that daylong conversation. It provides a blueprint for others who share a passion for improving America's indigent defense systems. It is intended for all those who see the 50th anniversary of *Gideon* as an occasion to renew the commitment to the principle that every accused person in the United States must have access to effective counsel.

***Adele Bernhard***    ***Robert C. Boruchowitz***    ***Norman L. Reimer***  
**Project Co-Chairs**



# ACKNOWLEDGEMENTS

This project was immeasurably aided by the support of many dedicated individuals. The report was authored by Joel M. Schumm, Clinical Professor of Law and Director, Judicial Externship Program at Robert H. McKinney School of Law at Indiana University. The co-chairs were Adele Bernhard, Associate Professor, Pace Law School, and Supervising Attorney, Pace Post-Conviction Project; Robert C. Boruchowitz, Professor from Practice, Seattle University School of Law; and Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers.

First and foremost, the author and co-chairs thank the many innovators who shared their knowledge, expertise and experience as members of the focus group. The names and biographies of the 18 participants (in addition to the moderator, co-chairs and project manager) can be found on pages 29-32 of this report.

The entire project was made possible through the generous support of the Bureau of Justice Assistance. We specifically thank the following: Laurie O. Robinson, Former Assistant Attorney General, U.S. Department of Justice, Office of Justice Programs; Denise O'Donnell, Director, Bureau of Justice Assistance, U.S. Department of Justice; Kim Ball, Senior Policy Advisor for Adjudication, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice; Pam Cammarata, Associate Deputy Director for Policy, Bureau of Justice Assistance, Office of Justice Programs; Melanca D. Clark, Senior Counsel for Access to Justice, U.S. Department of Justice; Veronica Munson, State Policy Advisor, Bureau of Justice Assistance, U.S. Department of Justice; and Danica Szarvas-Kidd, Policy Advisor, Bureau of Justice Assistance, U.S. Department of Justice.

In addition, Christopher Stone, who was at the time the Daniel and Florence Guggenheim Professor of the Practice of Criminal Justice at Harvard University's John F. Kennedy School of Government and currently the president of the Open Society Foundations, contributed immeasurably to the success of the project by helping to shape the concept for the project and by facilitating an insightful discussion.

Finally, the staff support for the project was first rate. The project co-chairs thank the ABA and NACDL staff who contributed to the success of the focus group and subsequent report. ABA staff involved include Terry Brooks, Director, Division for Legal Services & Committee Counsel, ABA SCLAID; LaVernis Hall, Administrative Assistant; Georgia Vagenas, Assistant Counsel & Defender Training Project Manager, ABA SCLAID; and Sara Walsh, Project Manager. NACDL staff who contributed include Vanessa Antoun, Resource Counsel; Akvile Athanason, Education Manager; John Gross, Indigent Defense Counsel; Tamara Kalacevic, Meetings Manager; Gerald Lippert, Associate Executive Director for Programs; Viviana Sejas, Senior Membership and Administrative Assistant; and Daniel Weir, Foundation Manager and Executive Assistant. Quintin Chatman, Editor, *The Champion*, and Daniel Weir generously gave of their time to provide careful editing. Lastly, thanks to Art Director Catherine Zlomek for the design of the report.

## EXECUTIVE SUMMARY

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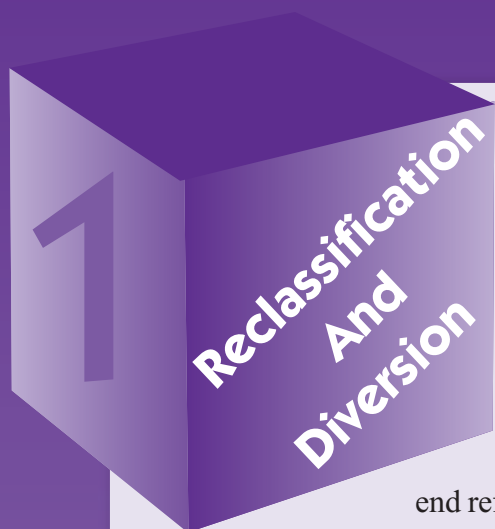
Pursuant to a Bureau of Justice Assistance (BJA) grant, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) and the National Association of Criminal Defense Lawyers (NACDL) convened a focus group to explore cost-effective innovations to improve the overall caliber of the nation's public defense. The focus group was part of a larger grant-funded project that allowed the ABA and NACDL to provide national defender training sessions in Atlanta, Austin, Indianapolis, and Las Vegas on topics that included forensic science and client-centered representation. Further information about the grant, training, and focus group is available at [www.indigentdefense.org](http://www.indigentdefense.org).

Although public defense in the United States faces enormous pressures and challenges, individuals from around the nation in all branches of state government, as well as prosecutors, defenders and leaders of NGOs, are pursuing innovative and promising initiatives to help relieve those pressures and address those challenges in meaningful ways. Eighteen of these trailblazers were chosen to participate in the focus group to present their active involvement in promising programs with an eye toward broader replication.

This report summarizes the highlights of the wide-ranging discussion and innovative proposals for reform discussed during the Focus Group, divided into three broad topics. First, the report discusses front-end reforms such as **reclassification and diversion**, which help reduce the number of cases entering the system. Next, the report turns to the **delivery of services**, including the

importance of standards and commissions, the central role of the private bar, and development of training. Third, the report considers the need for **collaboration and cooperation** with others within and outside the criminal justice system in order to achieve significant and sustainable reform. Finally, the report concludes with Moderator Christopher Stone's summary of the Focus Group's discussion.





## **Reclassification and diversion must be expanded to reduce pressure on the overburdened criminal justice system.**

Current policing strategy floods the criminal justice system with arrests and contributes to countless prosecutions for myriad petty, non-violent infractions. Reclassification and diversion are front-end reforms that save significant money for police, courts, corrections systems, prosecutors, defenders, and ultimately the county or state budget by moving minor infractions out of the criminal justice system. Reclassification is the process of reconfiguring criminal statutes that otherwise result in stigmatizing criminal convictions and possible jail sentences into civil infractions that carry a fine. Diversion programs provide opportunities for selected groups of individuals charged with low-level criminal offenses to engage in community service, mediation, or to enter substance abuse treatment (among other possible options) in exchange for dismissal of the criminal charges.

For example, Vanita Gupta of the ACLU highlighted reclassification efforts. The organization is working through its state affiliates to encourage state legislatures to lower costs without a negative effect on public safety by reclassifying non-violent drug possession charges as civil infractions. Anthony Benedetti from the Massachusetts Committee for Public Service Counsel described the significant savings realized in Massachusetts from the reclassification of various criminal offenses to civil infractions, including first-time disturbing the peace, operating a vehicle with a suspended license or registration, and operating a vehicle while uninsured. A November 2008 referendum in Massachusetts reclassified the crime of criminal possession of small amounts of marijuana as a civil infraction carrying a \$100 fine. Whatever the means, reclassification efforts pay large dividends by helping to reduce the high volume of cases in the criminal justice system. Efforts must continue, however, to ensure that defendants too poor to pay fees are not saddled with additional financial obligations they can never handle and that none face the prospect of a contempt finding for failing to pay.

On the diversion front, Bob Johnson, a retired elected County Attorney in Minnesota, and public defender Bill Ward discussed a detailed, pre-charge plan that allows diversion for eight misdemeanor and 12 felony offenses when specific criteria are met. Spokane City Prosecutor Mary Muramatsu discussed a highly successful diversion program for suspended drivers that allows relicensing while aggregating all prior judgments into a single payment. This effort reduced defender caseloads by one-third and saved considerable prosecutorial and court resources, all while providing a conviction-free path for many defendants.

### **Performance standards and guidelines must be implemented and monitored.**

Unfortunately, not every defendant who is appointed free counsel receives the high quality representation he or she deserves. Participants offered a variety of thoughtful suggestions for the creation of indigent defense commissions and the creation and monitoring of performance standards and guidelines to help ensure quality representation.

Chief Justice Michael Cherry of the Nevada Supreme Court explained how the Court created an indigent defense commission to study and establish the Office of Appointed Counsel, which makes independent and trained counsel available for appointment, and created performance standards that provide specific and detailed guidance for counsel in all facets of representation. Texas State Senator Rodney Ellis spoke about the Texas Fair Defense Act, which not only raised the quality and independence of defense counsel but also allocated significant new state funding. Every indigent defense plan must meet minimum standards for the prompt appointment of counsel and follow established methods for selection and compensation.

Seattle University Law Professor Bob Boruchowitz explained a number of innovative ways that Washington state and Seattle have used both performance standards and guidelines. Defender standards, including caseload limits and experience requirements, were created in the 1980s and have been recently adopted by the Washington Supreme Court by court rule. In a 2010 opinion the Court considered the Standards in assessing ineffective assistance of counsel. The standards require defense contracts or government budgets to specify a maximum number of cases and include guidelines for case weighting.

Participants described ways to provide necessary oversight and assistance to defender programs. Fern Laethem of the Sacramento County Conflict Criminal Defenders spoke about defense standards in California that apply to all types of indigent defense delivery systems. These standards are crucial for ensuring high quality representation. Bill Leahy of the recently created Office of Indigent Legal Services in New York spoke about new state funding that allows his office to provide grants to address specific needs of underfunded counties throughout the state and the creation of regional resource centers that provide much needed assistance to defenders, such as immigration law resources. Jim Neuhard, the longtime director of the Michigan State Appellate Defender Office, described ways in which his office reaches out to lawyers across the state through a lawyer hotline and creation of one of the nation's largest legal resource websites providing easy access to a wealth of motions, briefs, manuals, and prior training materials.



## **The private bar must maintain a robust role.**

The private bar has a critical role as an active and engaged partner in advocating for reforms and additional funding and in ensuring quality representation by taking cases when public defenders become overburdened. Indiana University School of Law Dean Emeritus Norman Lefstein discussed the idea of allowing indigent defendants to choose their own lawyers similar to the English system of appointed counsel and our national Medicare system, which permits patients to select their doctors. Lawyers would be required to compete and would need to meet the client's expectations to secure referrals in the future.

## **Training programs must be carefully developed and widely available.**

Several speakers discussed the importance of training on many levels. Professor Tamar Meekins, the lead trainer of the defender training program sponsored by the BJA grant, emphasized the importance of an experiential approach that combines training on both substantive law and litigation skills. Jim Neuhard discussed the possibilities of web-based training to reach lawyers in geographically remote areas and provide necessary instruction when most useful to lawyers. Professor Michael Pinard emphasized the importance of instruction regarding collateral consequences both for new and experienced lawyers in advising clients and negotiating plea agreements. Other participants spoke about widening training opportunities to include judges and prosecutors and broadening topics beyond trial tactics to essential subjects that arise more frequently, such as plea negotiations and sentencing.

## **Successful and sustained reforms require collaboration and cooperation.**

Although defenders certainly can and do improve the criminal justice system acting within their own organizations or individually, significant and lasting reforms often require collaboration and cooperation. The previous sections highlight some of those areas, such as training and diversion programs, and participants also discussed others. Amy Bach's "Justice Index" establishes measurable indicators of how well or poorly courts are performing in the areas of public safety, fairness and accuracy, and fiscal responsibility—information that can flag problems where reform and improvement are necessary. Cait Clarke discussed NLADA's Gideon Fellowship program, which will provide opportunities for defenders in managerial positions to focus on building coalitions, advancing data collection and analysis, and engaging in policy reform. As a solution to the slow pace and cost of systemic litigation, Corey Stoughton of the



**Collaboration  
And  
Cooperation**

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## EXECUTIVE SUMMARY

New York Civil Liberties Union advocated (1) congressional removal of the abstention barrier to filing systemic Sixth Amendment actions in federal court; and (2) granting statutory authority to the Department of Justice to sue for state violations of similar rights. Finally, San Francisco Public Defender Jeff Adachi discussed innovative community outreach programs such as a program that assists in expunging more than 1,400 criminal records each year in San Francisco and another program that uses social workers to assist children of incarcerated parents.

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### Moderator's Concluding Remarks

At the end of the afternoon, Moderator Christopher Stone summarized the Focus Group's extensive and thoughtful discussion in four broad categories where modest BJA help could pay hefty dividends to the criminal justice system: (1) front-end technical assistance, which includes assistance in documenting and providing information about state accomplishments with reclassification and diversion; (2) technical assistance in standards enforcement to ensure that every state not only has an indigent defense commission but that commissions function effectively through defense leadership, judicial education, and systems for data collection; (3) broader systemic reform, including collaboration and conversations among all stakeholders in the criminal justice system and initiatives with evidence-based support; and (4) training both the public and private bar to build a new generation of defender leaders who will foster the types of innovations discussed throughout this report.



**Reclassification And Diversion**  
**Delivery Of Services**  
**Collaboration And Cooperation**

# REPORT

**O**n January 9, 2012, the Focus Group entitled *National Indigent Defense Reform: The Solution is Multifaceted* brought together 18 successful and courageous reformers from across the nation, representing all branches of state government, prosecutors, defenders and leaders of NGOs dedicated to improving indigent defense systems. A roster of participants and brief biography of each appear at the end of this report on pages 29-32. These innovators were chosen because they are actively involved in bringing meaningful changes to the criminal justice system in their jurisdictions. The preliminary report conclusions were drafted by the project co-chairs with input from ABA staff and were transmitted in letters to Attorney General Holder and Assistant Attorney General Robinson on January 31, 2012. Those letters and preliminary findings are appended to this report as Appendix B and Appendix C.

The Focus Group drew on the experience of an array of innovative national reformers to compile a comprehensive menu of successful programs that may be undertaken by the Office of Justice Programs Bureau of Justice Assistance (BJA). Each of the 18 participants was invited to discuss an innovative and promising initiative that would help relieve some of the enormous pressure in the criminal justice system. In recognition that funds are scarce, the Focus Group deliberately sought to identify cost-effective programs. Source materials from the participants span more than 2,000 pages and are available on the Focus Group's webpage: <http://ambar.org/focusgroup>.

Norman L. Reimer, Executive Director of NACDL and project co-chair, remarked at the beginning of the session, "Solutions must be multi-faceted and multi-dimensional." The participants' stories need to be told more broadly, and their models need to be replicated with financial or other support from the Department of Justice.

This report has been divided into three broad topics. First, front-end reforms such as **reclassification and diversion**, which help reduce the number of cases entering the system, are discussed. Next, the report turns to the **delivery of services**, including the importance of standards and commissions, a role for the private bar, and training. Third, the report considers the need for **collaboration and cooperation** with others within and outside the criminal justice system in order to achieve significant and sustainable reform. Finally, the report concludes with Moderator Christopher Stone's summary of the Focus Group's wide-ranging discussion.

# RECLASSIFICATION/DIVERSION

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A persistent theme throughout the day was the need to remove entire categories of cases from the judicial system. Speakers discussed successful efforts for reclassification of minor criminal offenses to civil infractions and the implementation of diversion programs. Reclassification transforms criminal statutes that lead to convictions and possible jail sentences into civil infractions. Diversion programs provide an alternative route for a person charged or eligible to be charged with a criminal offense, often by completing a treatment regimen or mediation and avoiding further arrests, to avoid filing of the charge or secure dismissal.<sup>1</sup> Both reclassification and diversion save significant resources for police, courts, corrections systems, prosecutors, defenders, and ultimately the county or state budget.



**Vanita Gupta** discussed reclassification of offenses out of the criminal justice system. Because state-by-state litigation has been costly, the ACLU has been urging legislative reform to advance reclassification through its network of state affili-

ates. Reclassification is a front-end reform that saves money. Political will and potential exists.<sup>2</sup>

A recent ACLU report highlights some states that are pursuing a “smart on crime” approach instead of the long-standing and failed “tough on crime” approach.<sup>3</sup> This includes a focus on “evidence-based” policies such as diverting people charged with lower-level drug offenses into treatment instead of incarcerating them and imposing non-prison sanctions on those who violate the technical terms of their probation and parole instead of simply returning them to prison.<sup>4</sup>

An evidence-based, “smart on crime” approach will not take a toll on public safety. States like New York, which depopulated its prisons by 20 percent from 1999 to 2009, and Texas, which has stabilized its prison population growth since 2007, are presently experiencing the lowest state crime rates in decades.<sup>5</sup> The ACLU report describes major legislative and administrative reforms that lowered costs with no detrimental effect on public safety.



**Vanita Gupta:**  
**“Sixty percent of arrests in a lot of places around the country are for misdemeanor offenses.”**  
*(discussing potential savings from reclassification or decriminalization)*

A fairly easy front-end reform would involve non-violent drug possession. In 2009 nearly 1.7 million people were arrested in the U.S. for non-violent drug charges, nearly half of these for marijuana possession.<sup>6</sup> The ACLU report suggests decriminalization or, at a minimum, conversion of drug pos-



session crimes to misdemeanors or civil penalties, which carry non-prison sanctions as in California and Kentucky.<sup>7</sup> Southern states that are traditionally viewed as conservative have been on the forefront of reforms, including the following legislative efforts:

◆ House Bill 2668 (2003) in Texas mandated probation for low-level possession of many drugs.<sup>8</sup> With a cost per individual of \$40 per day in prison and only \$2 on probation, this program alone saved Texas \$51 million between 2003 and 2005.<sup>9</sup>

◆ Senate Bill 1154 (2010) in South Carolina included reforms such as the elimination of mandatory minimum sentences for simple drug possession; restoring discretion to judges; granting judges discretion to impose non-prison alternatives for first or second non-trafficking drug offenses like probation, suspended sentencing, work release, and good conduct; restricting enhanced penalties for prior marijuana possession convictions when sentencing for a subsequent possession conviction; and adding intent elements for drug crimes near schools.<sup>10</sup>

◆ House Bill 463 (2011) in Kentucky reduced simple possession of marijuana to a low misdemeanor with a maximum jail term of 45 days and granted individuals automatic presumptive probation for the simple possession of many drugs.<sup>11</sup> Related pretrial reforms included requiring police officers to use citations instead of arrests for most misdemeanors committed in the officer's presence and

mandating that judges release individuals without bail for drug crimes that could result in probation.<sup>12</sup>

◆ Although worthwhile and crucial to long-term successful reform, reclassification is not necessarily a panacea. Ms. Gupta emphasized the danger of creating “debtor prisons,” where individuals are too poor to pay all the fees and costs that come with admission to a civil infraction. Individuals unable to pay fees have been found in contempt of court in some states.<sup>13</sup>



**Anthony Benedetti** spoke about Massachusetts' efforts to reclassify possession of marijuana and the defenders' experience with that and other decriminalization efforts. Massachusetts criminalizes more conduct than any other state.<sup>14</sup>

The Massachusetts Legislature created the Rogers Commission in 2004 to study the provision of counsel to indigent persons in Massachusetts. The

**Anthony Benedetti:**  
**“Since that time we’ve seen an estimated savings about 7.5 million bucks.”**  
*(discussing the savings on cost of counsel alone as the result of decriminalization of three low-level offenses in 2009)*



commission found that although “district attorneys have had the discretion to treat a misdemeanor offense as a civil infraction since 1995,” they have so far been unwilling to exercise this discretion to charge fine-only offenses.<sup>15</sup> When a massive budget bill included an amendment to the statute

to remove the discretion of prosecutors in 2002, a newspaper headline read, “Pols Ease Rap on Pot, Sex”<sup>16</sup> and the governor vetoed it. Nevertheless, the statute was broadened in 2006 to include operating after license/registration suspended, disorderly persons/disturbing the peace, shoplifting, illegal possession of Class “C” marijuana, prostitution, larceny by check, trespass on land, dwelling, etc., and operating an uninsured motor vehicle.<sup>17</sup> Only when misdemeanor offenses are reclassified into civil infractions are courts no longer required to appoint counsel. Moreover, offenses reclassified as civil infractions cannot “be used as sentence enhancers for future charges or result in any collateral consequences normally associated with a criminal conviction or plea.”<sup>18</sup>

More significantly, beyond the realm of prosecutor discretion, three offenses, only when committed for the first time, have been reclassified as civil infractions: disturbing the peace, operating a vehicle with a suspended license or registration, and operating a vehicle while uninsured. A November 2008 referendum reclassified the possession of one ounce or less of marijuana from a misdemeanor to a civil infraction with a \$100 fine.<sup>19</sup> Finally, a commission with broad-based representation from the criminal justice system was created in 2005 and began work in 2011 to consider further reclassification of offenses.

**Bob Boruchowitz:**

**“When we talk to civil lawyers about 800 cases per year, which is not uncommon around the country for misdemeanor lawyers . . . they fall down on the floor.”**

*(explaining the Washington state bar’s support of public defense reforms)*



**Bob Johnson and Bill Ward**

discussed a pre-charge diversion program in Anoka County, Minnesota. Mr. Johnson was the elected county attorney from 1972 to



2010. The diversion plan was created under Minnesota Statute 401.065, which requires the County Attorney of any county participating in the Community Corrections Act to develop a Pretrial Diversion Program for first-time offenders charged with a misdemeanor, gross misdemeanor or felony offense, other than a crime against the person. The expressed goals are “to provide an alternative to criminal prosecution as an incentive to change behavior and thus reduce recidivism, while at the same time promoting payment of restitution to crime victims and reducing court-related costs.”<sup>20</sup> The plan vests the prosecutor with the sole discretion for offering diversion and lists the following criteria:

The nature and circumstances of the offense and the sanction or punishment to be imposed if a person is convicted; the probability of the conviction; the characteristics of the offender; the willingness of offender to cooperate and succeed in diversion; the interests of the victim; the recommendations of law enforcement; the age of the offense; undue hardship on the offender; undue hardship upon or reluctance of witnesses to testify; and any mitigating or aggravating circumstances.<sup>21</sup>

Eight misdemeanor offenses and 12 felony offenses are eligible for the diversion plan. The plan provides explicit proce-

dures, which include a requirement that sufficient evidence exists for the charge, consideration of the accused’s criminal history, and consideration of “reasonable objections” from the victim. Eligible individuals receive a letter that provides an overview of the program and outlines their constitutional rights. The letter also advises that criminal charges will be filed if they fail to appear at a scheduled pre-charge diversion meeting.<sup>22</sup>



**Mary Muramatsu** from the Spokane City Prosecutor’s Office discussed its diversion program for suspended drivers’ license cases.<sup>23</sup> The program has reduced the defender caseload in the city court by one-third, allowing defense counsel to move toward compliance with state bar caseload standards.

The diversion program was an initiative of the prosecutor—not a state commission. The impetus behind the program was three-fold: (1) the Washington Supreme Court’s concern about caseloads, (2) a reduction in force for the prosecutor’s office, where each prosecutor was handling 1,800 cases, and (3) concern about jail costs. By diverting the cases from criminal prosecution, the prosecutor and public defender caseloads are reduced and the defendant can never be sentenced to jail.

The relicensing program allows suspended drivers to become licensed again. All of their prior cases and judgments are lumped into one payment, which is usually about \$25/month. Judges do not jail defendants for non-payment.

**Mary Muramatsu:**

**“We were handling probably 1,800 cases per prosecutor . . . .**

**The Mayor’s office expected us to prosecute all levels of misdemeanors within the city . . . .”**

*(discussing impetus for the Spokane diversion program for suspended drivers)*



Overall, in the reclassification and diversion realm, concern remains about excessive fines and costs as well as effects on later enhancements of offenses. The most prosecuted minor offenses, which are the most likely candidates for reclassification, are disorderly conduct, marijuana possession, and driving while suspended. Further study would be helpful to catalog jurisdictions where reclassification has worked well by continuing to protect public safety, saving money, and improving lives by ensuring individuals are not burdened with excessive fees and never face incarceration for non-payment. Training and technical support for lobbying for necessary legislative change are also essential.

# DELIVERY OF DEFENSE SERVICES

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Participants discussed several different ways to improve the delivery of defense services. These included the adoption of aspirational performance standards and caseload limits, the creation of indigent defense commissions to oversee each, the importance of the active involvement of the private bar, and training for both institutional defenders and assigned counsel.

## A. Performance Standards And Guidelines

Although the importance of performance standards was discussed throughout the day, state approaches to enforcing the standards vary widely from little oversight by the indigent defense commission in Nevada to required performance guidelines and caseload limits tied to funding in King County, Washington. Participants agreed that standards are only as valid as the enforcement mechanism and leadership behind them.

Before turning to the specific initiatives discussed by the participants, a brief discussion of terminology is warranted. Standards and guidelines are sometimes used interchangeably to refer both to objective measures of performance (such as a limitation of accepting a specific number of cases) or an aspirational standard of what defense counsel should do in certain circumstances. Unlike professional conduct rules that can lead to disciplinary action when violated, performance standards adopted by groups like the ABA, the National Legal Aid & Defender Association (NLADA), or various state

entities offer only recommendations for conduct.<sup>24</sup> Rather than prescribing specific limits for such things as public defense caseloads, an NLADA standard calls for lawyers to “abide by ethical norms” and notes that “counsel has an obligation to make sure that counsel has sufficient time . . . to offer quality representation to a defendant in a particular manner.”<sup>25</sup> Similarly, standards such as the ABA Criminal Justice Standards for the Defense Function “are intended to be used as a guide to professional conduct and performance.”<sup>26</sup> In contrast, the ABA’s Eight Guidelines of Public Defense Related to Excessive Workloads establish a “detailed action plan . . . to which those providing public defense should adhere as they seek to comply with their professional responsibilities.”<sup>27</sup> As explained below, some jurisdictions have had more success than others in requiring compliance with standards through strong indigent defense commissions or the adoption of court rules.



**Chief Justice Michael Cherry** spoke about the establishment of an indigent defense commission and statewide system of standards and performance measures in Nevada. Chief Justice Cherry explained that most state supreme court justices do not have a background in criminal law or an understanding of indigent defense, and indigent defense commissions — whether created legislatively and wholly independent from the court or created by and an arm of the state supreme court — fill a crucial void by creating a state entity with the expertise and commitment to understanding and improving the delivery of indigent defense services. Specially, the

Nevada Indigent Defense Commission<sup>28</sup> was created by the Nevada Supreme Court in 2007 to “conduct hearings and study the issues and concerns arising from the various methods used across Nevada to appoint counsel to represent those who

counties and through the courts in rural counties. The independent Office of Appointed Counsel ensures that district court judges have contract attorneys available who undergo training and are not working for the judge, although the standard does not apply in rural counties because of the paucity of available attorneys.



**Chief Justice  
Michael Cherry:**

**“You can’t have a public defender handling 300 cases. It just doesn’t work. You’re not being fair to people.”**

cannot afford a lawyer, to select counsel, to compensate counsel, to establish qualifications and experience of the attorneys appointed, and other related issues, and, in light of those considerations, recommend to this court appropriate changes to the current processes.”<sup>29</sup>

The commission attempted to develop caseload guidelines. Although the Spangenberg Group issued a report,<sup>32</sup> the report did not produce the sort of “conclusive proof” expected by many of the justices. Chief Justice Cherry explained that caseload standards remain unfinished and would be difficult to adopt in the current economic climate in Nevada, which is first in the nation in foreclosures, bankruptcies, and unemployment. Although the Nevada commission is under the state supreme court, Chief Justice Cherry, like many other participants, would prefer an independent commission.

The impetus for the commission included concerns with trial judges appointing their friends to represent indigent defendants and the poor quality of representation in some cases, including a high profile wrongful conviction case in Las Vegas.<sup>30</sup> The commission facilitated the creation of the Office of Appointed Counsel and adoption of performance standards.



**Texas State Senator Rodney Ellis** discussed the Texas Fair Defense Act (FDA), which was passed in 2001 and has both raised the quality and independence of the defense and allocated significant state funding from court fees to provide funding.<sup>33</sup> In proposing and advocating for the legislation, proponents focused on inherent ethical conflict with judges appointing lawyers.

In October 2008, the Nevada Supreme Court entered an order adopting performance standards for indigent defense in Nevada. The performance standards became effective April 1, 2009, and provide specific and detailed guidance for all aspects and facets of representation in criminal cases.<sup>31</sup> Indigent defense services in Nevada are delivered by county public defense agencies in larger

**Texas State Sen. Rodney Ellis:**  
**“Whatever you do has to be a collaborative model. . . . You can pass something that encourages a discussion and then you need to get buy-in.”**



The Act requires courts in Texas to adopt formal procedures for providing appointed lawyers to indigent defendants. These procedures must be consistent in all courts of the same jurisdiction within any particular county. Although the Act grants local officials significant flexibility in establishing indigent defense plans, every plan must meet minimum statewide standards and/or specify local procedures in the areas of prompt appointment of defense counsel, methods for selecting defense lawyers eligible to receive court appointments, indigence standards, fee schedules for payment of appointed defense lawyers, and compensation procedures for experts and investigators.

The Act also created a new state indigent defense commission, the Task Force on Indigent Defense (now called the Texas Indigent Defense Commission), to oversee the implementation of the FDA and administer a new state program for awarding indigent defense grants to counties.<sup>34</sup>

Senator Ellis emphasized the importance of achieving reform through an effective message and messengers. For example, the exonerations of death row inmates provide a powerful message with broad public appeal.



**Bob Boruchowitz** discussed both statewide performance standards and county-specific and state bar-endorsed caseload guidelines in Washington state. Some counties have implemented caseload guidelines and tied funding for defense services to caseload limits, resulting in increased funding for defenders when total cases increase.

The creation of standards began in the early 1980s when the problems were highlighted by media stories and the local bar grew interested.

Convincing defenders and local government to build the standards into budgeting was essential and is explicit in the Standards: “The contract or other employment agreement or government budget shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.”<sup>35</sup> Standard 3, “Caseload Limits and Types of Cases,” provides:

The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.<sup>36</sup>

The Standard defines “quality representation” as “the minimum level of attention, care and skill that Washington citizens would expect of their state’s criminal justice system.”<sup>37</sup> The Washington Supreme Court has accepted the standards as a guide to determine ineffective assistance of counsel.<sup>38</sup> Appointed counsel must also certify their compliance with certain standards under a court rule implemented after the Focus Group meeting.<sup>39</sup>

The Washington standards include caseload limits (e.g., 150 felonies or 300 misdemeanors), and a recently adopted amendment established guidelines for case weighting.<sup>40</sup> The city of Seattle in 2004 passed an ordinance limiting defender caseloads to 380 per lawyer per year, citing the ABA’s Ten Principles of a Public Defender Delivery System as standards for the city.<sup>41</sup>



**Fern Laethem**, the Executive Director of Sacramento County Conflict Criminal Defenders, discussed the importance of excellence in assigned counsel programs. Most of the representation of indigent defendants nationally is non-institutionalized, but some type of oversight is necessary to ensure quality. Realizing the variety of different methods for providing counsel to indigent defendants, the 2006 California Bar Guidelines on Indigent Defense Services articulate “universal standards, which apply to all indigent delivery systems.”<sup>42</sup> The guidelines cover a wide variety of topics including: independence, standards of representation, quality of indigent defense providers, quality control, training, juvenile practice, resources, compensation, ethics, demographics/diversity, culture, and management/leadership.<sup>43</sup> The standards are a necessary starting point, but the high quality of representation they envision requires careful oversight of lawyers and the discharge of those who are not doing the job.<sup>44</sup>

As moderator Christopher Stone put it, standards are not enough without a leader or organization in place to implement and enforce them, and a strong leader or organization is not enough without standards as guidance.



**Bill Leahy** discussed the creation of regional resource centers, and the vital role played by the judiciary. Mr. Leahy heads the recently created Office of Indigent Legal Services in New York. The office

is charged with monitoring, studying, and improving the quality of services provided by the county defense organizations.<sup>45</sup> The county-operated and largely county-financed system for providing indigent defense leads to vast disparities in the level of representation provided across the state. New state funding has allowed his office to provide grants to address specific needs of underfunded counties. The emphasis on innovative and cost-effective solutions in the statute could include regional resource centers that help level the field and provide essential resources to underfunded counties. For example, the office recently created 18 new positions for immigration law experts in New York City.



**Jim Neuhard** discussed democratizing delivery methods to maximize available support resources, especially through web-based support. Mr. Neuhard cited examples in which his office has reached out

to lawyers around the state of Michigan first through a lawyer hotline, next by making their internal case summaries available to other defenders, and finally through one of the largest legal resource websites short of Westlaw or Lexis, which includes motions, briefs, manuals, and prior training materials.<sup>46</sup> The website was initially available free of charge but now requires a modest subscription fee. The



**Jim Neuhard:**

**“It’s the everyday work of our office being made available to everyone and converting it into a useful format. I think that is technology at its best.”**

*(describing Michigan’s vast online legal resource center for defenders)*



### **Norm Lefstein:**

**“You simply don’t have any place for the overload of cases to go and that happens over and over again in this country.”**

*(explaining the vital role of the private bar in indigent defense)*

website currently gets about 250,000 hits each month. Although bad lawyers cannot be forced to use them, these resources are very helpful to those who take advantage of them.

## **B. Role for the Private Bar**



**Norm Lefstein**, Dean Emeritus of Indiana University School of Law, discussed the critical role of the private bar as partners in and support for the indigent defense community.<sup>47</sup> The

private bar can often serve as a partner in reform efforts and can be critical in advocating for additional resources for indigent defense.<sup>48</sup> In addition, although the creation of institutional public defense organizations has many advantages, their existence often leaves the system without a release valve when excessive caseloads develop. Trial courts expect public defenders to do all the cases; there is no place for overloaded cases to go and no role for the private bar. Dean Lefstein identified good statutes in North Carolina, Wisconsin, and Maryland, which allow the public defender to assign cases to private lawyers when overloaded.<sup>49</sup>

Dean Lefstein also discussed an innovative approach to assignment of indigent counsel. In the medical realm, the government does not choose the doctors for each person receiving Medicare benefits. Dean Lefstein suggested allowing indigent defendants a similar

ability to select their own lawyers. As a recent paper from the Cato Institute put it, “the person who has the most at stake is allowed no say in choosing the professional who will provide him one of the most important services he will ever need.”<sup>50</sup> Unlike choosing a doctor, “the situation of the indigent defendant is far worse, because the

government’s refusal to honor the defendant’s own preferences is compounded by an acute conflict of interest: the official who selects his defense attorney is tied, directly or indirectly, to the same authority that is seeking to convict the defendant.”<sup>51</sup> This method of attorney selection would require lawyers to compete and do a good job; they must rely on clients to lead to future referrals.<sup>52</sup> Any change would need to occur at the state level, which requires bringing together key actors in each state to discuss ideas.

Dean Lefstein’s comments were echoed by NACDL Immediate Past President Lisa Wayne, who emphasized the importance of the private bar. She cited the federal system, in which more than half of indigent defendants are appointed outside counsel. The lawyers who take federal court appointments are paid a sufficient amount of money. If a state pays only \$45 or \$50 hourly, defendants will not secure the same high quality representation found in the federal system. An investment on the front-end will avoid later post-conviction problems.

## **C. Training**



**Tamar Meekins**, the lead trainer of the defender training program that was also part of this grant project, discussed the importance of training, specifically its form. The grant allowed for regional training that brings defenders to one central location to learn more about timely topics. Professor Meekins advocated



for an innovative and experiential approach, which will pay dividends in the long-term. She acknowledged that defenders cannot be trained on all topics at one time. People will learn and retain information better if they are “doing” at the same time, such as a focus on a hypothetical case throughout a training session. Professor Adele Bernhard, project co-chair, further explained that the training programs had been interactive, often dividing into small groups to offer opportunities for practice and feedback, which empowered those who attended.



**Michael Pinard** discussed the importance of ensuring that defense counsel inform clients of all of the consequences of criminal convictions. Although many reports have been written about these consequences,<sup>53</sup> not enough is being

done “on the ground” to ensure that defendants are informed of the consequences of a conviction. Other participants discussed resources within state defender offices or resource centers to provide expert advice to lawyers. The Washington Defender Association has immigration experts on staff to advise defenders and assigned counsel on issues for their non-citizen clients. Professor Pinard emphasized the need to ensure that training of both new and experienced lawyers included how to negotiate plea agreements to mitigate or avoid harmful consequences.



**Jim Neuhard** emphasized the option of distance learning, through which defenders in geographically remote areas could receive training via the web. This would require some refinement to make sure it is being done ef-

fectively. Mr. Neuhard expressed concern about overwhelming lawyers with information. Someone needs to sift through the information and make it easy to access and valuable. Training does not always line up with needs of lawyers. For example, all lawyers may not benefit from required DNA training, but a lawyer who was just assigned a case with DNA evidence will. Moreover, little study has been done about what works: *who* should present training and *how* should it be presented?

**Michael Pinard:**  
“Individuals are not informed of the vast network of collateral consequences that are attached to their convictions.”



Finally, throughout the day participants discussed the importance of training and the different approaches to broadening and improving training not only for defense counsel but also for

prosecutors, judges, and others in the criminal justice system. Mr. Neuhard emphasized the importance of training about sentencing, noting that one-third of cases raising sentencing issues were reversed. This is emblematic of the need to go beyond trial tactics to



**Tamar Meekins:**  
“When we look at better trained lawyers, what we can get is real results, right away.”

topics where defense lawyers spend most of their time, such as plea negotiations. Mr. Johnson spoke in favor of joint training for both prosecutors and defense lawyers, which could also provide opportunities for break-out sessions for each group on specific topic areas. Another participant pointed out that wrongful convictions are a failure of all and asked why training to avoid them should not be made available equally to judges,

prosecutors, and defense counsel. Mr. Boruchowitz raised the concern that national conferences largely draw the same audience of those from well-funded defense organizations. In contrast, the training offered through this grant instead focused on those defenders without a training budget and required them to commit to train and share what they learned with others in their offices.

## THE NEED FOR COLLABORATION AND COOPERATION

Many meaningful reforms can only be accomplished by reaching outside the defense bar for assistance from others within or outside of the criminal justice system. The preceding sections detail some examples of successful collaboration, including the significant front-end reforms in state legislatures discussed in the ACLU report as well as the creation of an indigent defense commission in Nevada. Mr. Boruchowitz emphasized the importance of the private bar in passing the Standards in Washington state. These alliances can cross traditional ideolog-

ical lines as conservatives and liberals share the belief that people should be protected by counsel when liberty is taken away. Collaboration may sometimes be as simple as a prosecutor and defense lawyer having a conversation with a judge, as Bob Johnson and Bill Ward did in Minnesota, where the court agreed to restructure its docket to reduce the number of days counsel were required to appear in court on their cases, thereby allowing lawyers more time to do crucial work on their cases. Meaningful collaboration also occurs between prosecutors and defense lawyers, such as the creation of diversion and licensing programs in both Spokane and King County, Washington.

### **Bob Johnson:**

**“The challenge we face in the states is that [the criminal justice system] is so adversarial and is so decentralized.”**

***(calling for collaboration to change case calendaring in ways that can produce significant efficiencies)***

Beyond these subjects, many participants discussed the need for more and better data, which is discussed below. Other topics included the need for DOJ involvement in litigation and the innovative opportunities available through community outreach.



**Amy Bach** discussed the importance of good data to expose patterns and problems that are otherwise invisible to the casual observer. A data set showing a pattern of abuse—not appellate review—will sometimes make the difference for criminal defendants. However, the federal data that is currently collected is often not what is needed to assess procedural justice. Bach discussed the importance of creating federal incentives for counties to collect court data that could be used to assess delivery of basic legal services to the citizenry.

Bach also discussed her work to create a “Criminal Justice Index” to measure and improve the nation’s criminal courts in the following three areas: public safety, fairness and accuracy, and fiscal responsibility.<sup>54</sup> Her organization, Measures For Justice, seeks to design, create and deploy a broad-based index to objectively assess the performance of local adult criminal trial courts throughout the United States and enable continuous improvement in the ways fundamental legal services are delivered nationally. Alerting legal professionals to patterns of problems based on credible metrics and providing them with proven “best practices” will allow everyone to do their best work and receive the benefits afforded by the U.S. Constitution.



**Cait Clarke** discussed creating new fellowship opportunities, particularly an aspirational one. Gideon’s Fellows are one way that NLADA members and staff would like to commemorate the 50th anniversary of *Gideon*.

Ms. Clarke lamented the slow headway made at a

national policymaking level because state and local defenders have limited time to gather data and create effective messaging for different audiences (from policymakers to funders) to strengthen the right to counsel. “Gideon’s Fellowships could provide a unique opportunity at a ‘higher altitude’ from individual case representation to support leaders committed to improving indigent defense representation so that they can focus on building community coalitions, advance data collection and analysis and engage in policy reform work.”<sup>55</sup> Although some data is already being collected, fellows would be invaluable at the national level to collect data and build networks to advocate change. Experience has demonstrated that lawyers working in fellowship programs have implemented creative programs that promote holistic advocacy and policy reforms that directly assist clients, addresses community concerns, and advance public safety.

#### **Cait Clarke:**



**“We need fellows who will advance that cause, change the culture inside defender programs and others about data collection, and then use that for policy reform.”**


*(explaining the rationale for the Gideon Fellows Program)*

Other participants spoke more broadly about the need for courts and others in the criminal justice system to collect data. **Corey Stoughton** suggested using incentives to help court systems build better systems for data collection and reporting, lamenting the difficulty in the *Hurrell-Harring* litigation caused by the absence of data in New



York.<sup>56</sup> Ms. Bach asked what was being measured with some of the data collected by the New York Office of Court Administration and suggested BJS support a meeting of groups to help facilitate more meaningful data collection.<sup>57</sup> Mr. Neuhard suggested the ease with which better data collection might occur in light of current technology. For example, in Michigan a case weighting system counts every document filed and every letter sent in appellate cases.

Better data collection, though, requires a change in culture among many defenders. Ms. Clarke pointed to the use of Equal Justice Works funding for Bronx defenders to go to other offices to collect data and explain the advantages. Dean Lefstein's book includes an entire chapter on weighted caseload studies and alternatives.<sup>58</sup>



**Corey Stoughton:**  
High bail is “the end of the game [for many defendants charged with misdemeanors] because they plead guilty so they do not lose their kids and their homes and their jobs.”

Related to, but also transcending, data collection, Ms. Stoughton discussed the challenges of systemic litigation in the criminal justice realm. Some justice courts in New York are presided over by non-lawyer judges, and bail can sometimes be set very high. Defendants incarcerated pretrial with no chance of posting bail will sometimes plead guilty to get out of jail and avoid losing their children or jobs. The county-based system of indigent defense led to wide disparities in practice. The New York Court of Appeals held in *Hurrell-Harring* that lawyers

are required at arraignments, as arraignment is indisputably a critical stage.<sup>59</sup>

The litigation also helped to create the state-wide office of indigent defense in New York, which was a legislative response to the lawsuit. Ms. Stoughton explained the difficulties, which include the enormous expense and slow pace of such litigation. Moreover, litigation may mean little in the absence of political support, which was largely lacking in New York.

Vindicating systemic Sixth Amendment violations is extremely costly and time consuming, and Ms. Stoughton suggested two ways that Congress or the Department of Justice could assist.<sup>60</sup> First, Congress could remove the abstention barrier to filing a systemic Sixth Amendment action like the

*Hurrell-Harring* case in federal court, which would allow private parties with standing to sue. Second, statutory authorization could expressly allow DOJ to sue, like the Civil Rights of Institutionalized Persons Act (CRIPA) currently does for jails. Senator Ellis echoed that sentiment, observing that even the mention of the federal government becoming involved in litigation over an issue is powerful in striking fear and leading to necessary action in states.



Finally, **Jeff Adachi** discussed some of the creative community outreach he has done as the elected public defender in San Francisco, even in the face of a difficult budget climate and caseload pressures. For example, the “Clean Slate” program conducts regular community outreach at community-based sites, and with a staff of one attorney, one paralegal, and one clerk serves over 3,000 clients and expunges more than 1,400 criminal records each year.<sup>61</sup> Before the program was

created, expungements usually took a year and a half, and his office did only about 80 each year. In the past decade, the program has helped more than 20,000 in a variety of misdemeanor and felony cases. Services include dismissal of certain convictions not resulting in a state prison commitment, the sealing and destruction of arrests records when a conviction was not entered, early termination of probation, and reduction of felony to misdemeanor convictions, as authorized by California statute.

Mr. Adachi also discussed the use of social workers in programs including the Children of Incarcerated Parents (CIP) program. His office created and distributes an eight-item “Children of Incarcerated Parents Bill of Rights” and offers assistance to children in such areas as family visits, emergency housing, government assistance, family court hearings, counseling, and child support payments.<sup>62</sup>

## IV. MODERATOR'S SUMMARY: 'BETTER KNOWLEDGE, TRAINING AND COLLABORATION'

At the end of the afternoon, Moderator Christopher Stone summarized the Focus Group's wide-ranging and thoughtful discussion in four broad categories where modest BJA help could pay hefty dividends to the criminal justice system: (1) front-end technical assistance, (2) technical assistance in standards enforcement, (3) broader systemic reform, and (4) training to build a new generation of public defender leaders.

First, technical assistance from BJA on the front-end could help achieve the dual objectives of saving money and improving the quality of justice. This front-end focus could include assistance in documenting and providing information about state accomplishments with reclassification and diversion, such as those in Massachusetts as well as Spokane and King County in Washington state. A special focus should be on three classes of cases: disorderly

conduct, motor vehicle offenses related to suspended or unlicensed driving, and low-level marijuana possession. Assistance would also be helpful with regard to the right to counsel at arraignment and bail hearings.

Second, technical assistance is needed to ensure that the standards discussed above are enforced. As an initial matter, every state should have a commission that is either independent or under the state supreme court. In addition, regardless of the system used for appointed counsel, each jurisdiction should have a defender responsible for ensuring standards are in place and monitored. The Department of Justice can assist in the realm of judicial leadership by supporting judicial education with a focus on the chief justices and supporting efforts to build standards into court rules or state laws. Finally, commissions should be a conduit for data collection, which is an area of potential support from BJS.

Third, Mr. Stone referred to wider system reforms and the ways better data might help assist in fostering conversations between all stakeholders, including unlikely allies, especially on the local level. These conversations should include public and private defense bar, prosecutors, and community groups. Although some defenders may resist collaborating with prosecutors, minds will likely be changed once they see the difference it can make. Examples of areas for further cooperation could include expungement projects, such as the one in San Francisco, which explicitly respond to community needs, and training on collateral consequences, which must look beyond immigration consequences and even legal consequences, such as the impact of present policies on children of offenders. Randomized controls should be implemented to assess the effectiveness of models that strive to address collateral consequences and issues related to the underlying criminal charge, which will allow the development of evidence-based support for successful strategies.

Finally, the summary ended with the chronic and immediate need for training to build the next generation of defenders and leaders of the defense bar. This training must include both the public and private bar and should include programs like the Gideon's Fellows, which will help foster more of the types of innovations discussed in this report.

Laurie Robinson, Assistant Attorney General for the Office of Justice Programs, attended this final segment of the Focus Group and emphasized the commitment of Attorney General Holder to indigent defense issues and the importance of continuing to push the Department's strong and capable career staff for assistance. She also discussed the importance of working with unlikely allies, such as law enforcement, who could assist in the reclassification and diversion realms through the shared understanding that keeping individuals out of the criminal justice system is one way to help them become law-abiding citizens.

# BIOGRAPHIES

**JEFF ADACHI** has been the Public Defender of the City and County of San Francisco since he was elected in March 2002. He oversees 93 lawyers and 60 support staff. His office represents over 23,000 people each year who are charged with misdemeanor and felony offenses.

**AMY BACH** is an attorney and author of *Ordinary Injustice: How America Holds Court*. She is the founder of Measures for Justice, an organization that acts on the book's conclusion to create better ways to measure hard-to-see problems in the adult criminal justice system. The organization's goal is to flag and fix systemic problems by creating a Criminal Justice Index that will allow counties to see how well or poorly their courts are providing the public with basic legal services.

**ANTHONY BENEDETTI** is the Chief Counsel for the Committee for Public Counsel Services (CPCS), the Massachusetts agency responsible for providing legal services to the indigent.

**ROBERT BORUCHOWITZ** is Professor from Practice and Director of the Defender Initiative at Seattle University School of Law. Previously, for 28 years he was the Director of the Defender Association in King County, Washington. Mr. Boruchowitz is the co-author of "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts."

**CHIEF JUSTICE MICHAEL A. CHERRY** is the Chief Justice of the Nevada Supreme Court. Prior to being elected to the bench, the Chief Justice had a long career in private practice, where he was a partner at the firms of Manos & Cherry and later Cherry, Bailus & Kelesis. In 1997, he was named to lead the newly created Clark County Special Public Defender's Office to handle major homicide cases and conflict cases from the county public defender's office.

**CAIT CLARKE** is the Director of Strategic Initiatives at the National Legal Aid & Defender Association (NLADA) in Washington, D.C. Previously, she directed fellowships and Federal Programs at Equal Justice Works from 2007-2011, which supported 80 AmeriCorps Legal Fellows and around 700 law students in the Summer Corps program. In partnership with the Southern Public Defender Training Center, Ms. Clarke was the co-director, with Jon Rapping, in the 2011 launch of Public Defender Corps, a federally-funded initiative placing outstanding lawyers inside public defender offices to provide client-centered advocacy.

**SENATOR RODNEY ELLIS** has held his seat in the Texas Senate since 1990. During his tenure, Senator Ellis has become nationally renowned as a leader on Texas criminal justice reform. Recognizing that a number of factors contributed to an all too often unjust system, Senator Ellis has taken on the challenge of addressing each factor to ensure that the guilty are punished, the innocent are free, and that every person, regardless of income, stands equal before the law.

**VANITA GUPTA** is Deputy Legal Director of the American Civil Liberties Union. She is also Director of the organization's newly-formed Center for Justice, which addresses systemic problems in the U.S. criminal justice system, including the treatment of prisoners, the death penalty, and the policies of over-incarceration that have led the United States to imprison more people than any other country in the world. In addition, Ms. Gupta is an adjunct clinical professor at NYU School of Law, where she teaches and oversees a racial justice litigation clinic.

**ROBERT M.A. JOHNSON** began work as a prosecutor in 1968 and was the elected Anoka County Attorney from 1983 through 2010 in Minnesota.

**FERN LAETHEM** began her legal career as a Deputy District Attorney in Sacramento, California, and was later appointed as an Assistant U.S. Attorney for the Eastern District of California. She maintained a private criminal defense practice from 1981 until 1989 when she was appointed by Governor Deukmejian as the State Public Defender of California. She retired as State Public Defender in 1999 and accepted the position of Executive Director of the Sacramento County Conflict Criminal Defenders.

**WILLIAM J. LEAHY** is the Director of the Office of Indigent Legal Services for New York State, where he has undertaken the responsibility of improving the quality of representation for poor people in the criminal and family courts throughout the state. Previously, he was the Chief Counsel of the Massachusetts Committee for Public Counsel Services (CPCS) until his retirement in 2010.

**NORMAN LEFSTEIN** is Professor of Law and Dean Emeritus of the Indiana University Robert H. McKinney School of Law in Indianapolis. He was the dean of the law school from 1988 until 2002. Professor Lefstein has served as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney in D.C., and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice.



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Many of the items cited in this report, including those indicated below, are available for reference at the Focus Group's website <http://ambar.org/focusgroup> under "Focus Group Resources."

## Endnotes

1. Diversion in this context offers the individual a path to resolve the case entirely without any criminal adjudication. This is significantly different from other diversion programs, often associated with drug or other problem-solving courts, that offer alternative treatment regimens solely to avoid incarceration, but which require a guilty plea to a criminal charge.

2. In recent months conservative evangelical spokesperson Pat Robertson has spoken publicly in favor of decriminalizing possession of marijuana. Jessi McKinley, *Pat Robertson Says Marijuana Use Should Be Legal*, N.Y. Times, Mar. 7, 2012 ("I really believe we should treat marijuana the way we treat beverage alcohol"). The issue has long generated support from individuals on all points of the political spectrum. See, e.g., National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* 20-21 (2009). As one focus group participant pointed out, though, some individuals within the criminal justice system do not oppose the high caseloads that allow them to hire more people.

3. American Civil Liberties Union, *Smart Reform is Possible* (Aug. 2011).

4. *Id.* at 6.

5. *Id.*

6. *Id.* at 11.

7. *Id.*

8. *Id.* at 17.

9. *Id.* at 22.

10. *Id.* at 38.

11. *Id.* at 45.

12. *Id.* at 44.

13. J.W. Thomey, Annotation, *Indigency of Offender as Affecting Validity of Imprisonment as Alternative to Payment of Fine*, 31 A.L.R.3d 926, § 3 (1970 & Supp. 2011) (collecting cases "holding imprisonment valid").

14. *Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts* (Apr. 2005).

15. Spangenberg Project, *An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing* 12 (Sept. 2010).

16. Elisabeth J. Beardsley, *Pols Ease Rap on Pot, Sex*, Boston Herald, July 25, 2002, at 1.

17. Spangenberg, *supra* note 15, at 4.

18. *Id.*

19. *Marijuana Decriminalization Law Goes Into Effect*, boston.com, Jan. 2, 2009, 8:00 a.m., available at [http://www.boston.com/news/local/breaking\\_news/2009/01/marijuana\\_decri\\_1.html](http://www.boston.com/news/local/breaking_news/2009/01/marijuana_decri_1.html).

20. The Anoka County Adult Criminal Diversion Plan (last revised 9/11/08) is available on the Focus Group's website.

21. *Id.* at 3.

22. *Id.*

23. Ms. Muramatsu's PowerPoint slides are available on the Focus Group website.

24. Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* 31 (2011).

25. *Id.* at 32.

26. The Standards are available on the Focus Group website.

27. The Guidelines are available on the Focus Group website.

28. The Commission's website may be accessed at <http://www.nevadajudiciary.us/index.php/idccommission-news>.

29. Order Establishing Study Committee on Representation of Indigent Defendants, Apr. 26, 2007, available on the Focus Group website.

30. *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2002).

31. The Nevada Supreme Court's October 16, 2008, order is available beginning on page 365 of the Nevada materials on the Focus Group's website.

32. Alan Maimon, *State Panel Debates Limits*, Las Vegas Review Journal, Sept. 9, 2009, available at <http://www.lvrj.com/news/58001197.html>.

33. A summary entitled, "Ten Years Beyond the Texas Fair Defense Act," is available on the Focus Group's website. The Act appropriated the first-ever state funding for indigent defense — at that time, approximately \$12 million per year — to supplement county spending, which then totaled approximately \$94 million per year.

34. A June 21, 2012, press release, which is available on the Focus Group's website, summarizes the recent award of \$12,000,000

in grants to Texas counties to offset defense costs or for specific programs.

35. The Standards were developed initially by the Washington Defender Association and have been endorsed on several occasions by the Washington State Bar Association. In King County, the largest in the state, the local government has included standards in its contracts with the non-profit defender associations.

36. The Standard is available on the Focus Group's website.

37. *Id.*

38. *State v. A.N.J.*, 225 P.3d 956 (Wash. 2010). In reversing an adjudication entered against a 12-year-old who was not advised that the conviction would follow him into adulthood and could require him to register as a sex offender for life, the court declined to adopt the Washington Defender Association *Standards for Public Defense Services* or the Washington State Bar Association Standards, but held the standards "may be considered with other evidence concerning the effective assistance of counsel." *Id.* at 966.

39. Wash. Crim. R. 3.1 (adopted and effective as of October 1, 2012), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.adopted](http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted).

40. Specifically, Standard 3.5 provides:

Attorneys may not engage in a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A weighting system must:

- A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;
- B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;
- C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;
- D. be periodically reviewed and updated to reflect current workloads; and
- E. be filed with the State of Washington Office of Public Defense.

41. Seattle, Wash. Ordinance 121501 is available on the Focus Group's website.

42. The California Guidelines are available on the Focus Group's website. The quoted material is on page 2.

43. *Id.* at iv.

44. Examples of effective systems that follow this model include the Massachusetts Committee for Public Counsel Services (CPCS) and the Private Defender Program (PDP) of San Mateo County, California, each of which is profiled in Chapter 8 of Lefstein, *supra* note 24.

45. N.Y. Executive Law Art. 30, §§ 832(1) & 833(1). A *New York Law Journal* interview of Mr. Leahy is available on the Focus Group's website.

46. Jeff Adachi similarly discussed use of a Public Defender Wiki on which all of the office's manuals, motions, resumes and transcripts of expert testimony, etc. may be stored and easily accessed.

47. Principle 2 of the ABA Ten Principles of a Public Defense Delivery System emphasizes "the active participation of the private bar" in systems with high caseloads.

48. For example, Bob Boruchowitz explained the critical role of the private bar in passing performance standards in Washington state.

49. Lefstein, *supra* note 24, at 239-40.

50. Stephen J. Schulhofer & David Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, Policy Analysis, Sept. 1, 2010, at 1.

51. *Id.*

52. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 *Hastings L. J.* 835 (2004).

53. For example, a recent issue of the *Fordham Urban Law Journal* (Nov. 2011) is devoted entirely to the topic of *Padilla* and the Future of the Defense Function.

54. <http://measuresforjustice.org/know-more/the-justice-index/>.

55. A description of the proposed program is available on the Focus Group's website.

56. *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

57. Chief Justice Cherry pointed to prior BJS studies of the 75 largest counties, one of which is posted on the Focus Group's website.

58. Lefstein, *supra* note 24, at 140-51.

59. *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

60. See generally Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, American Constitution Society Issue Brief (Sept. 2010).

61. San Francisco Public Defender, *Specialty Courts & Reentry Programs* brochure, which is available on the Focus Group's website.

62. Office of the Public Defender, *Children of Incarcerated Parents* brochure, which is available on the Focus Group's website.

## Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense

New Orleans ~ Saturday, February 4, 2012 ~ *As prepared for delivery*

Thank you, Laurel [Bellows], for those kind words — and for your commitment to the important work of the American Bar Association. As you assume your new role as ABA President, I look forward to working with you to build on the progress that's been made in recent years — through the support of so many of the people in this room, and under the leadership of my friend, Bill Robinson. Although I'm sorry that President [Bill] Robinson couldn't be with us today, I want to thank him for his engagement on — and dedication to — the issues we've gathered to discuss. I'd also like to thank Bob Stein, Chair of the ABA's Standing Committee on Indigent Defense and Legal Aid; and Executive Director [Norman] Reimer, of the National Association of Criminal Defense Lawyers — along with everyone who worked so hard to bring us together this weekend — for your efforts in planning and preparing for today's important Summit.

It's a pleasure to be back in New Orleans, and a privilege to join with so many distinguished leaders and essential partners — from members of the bench, such as Judge [Andre] Davis and Judge [Vanessa] Ruiz; to leaders of legal defense associations like NLADA; to key members of the private bar, the academic community, and nonprofit and legal advocacy organizations — in discussing how we can, and why we must, take our indigent defense efforts to the next level.

In this conversation, every person here provides valuable expertise and — perhaps most importantly — a commitment to progress. That's why this Summit is so critical — and why I'm so grateful to be part of it. Over the years, through gatherings like this one, the ABA and NACDL have helped not only to raise awareness about the indigent defense issues that impact the bar — but to remind every member of our nation's legal community of the sacred responsibilities we share, as well as the challenges that we must address.

Especially in this time of economic difficulty — when government budgets are on the chopping block, and so many of us have been asked to meet growing demands with increasingly limited resources — the obstacles we face have been brought into stark focus. And the need to take action has never been more clear — or more urgent. And that's true nationwide.

Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight.

As a result, too many defendants are left to languish in jail for weeks, or even months, before counsel is appointed. Too many children and adults enter the criminal justice system with nowhere to turn for guidance — and little understanding of their rights, the charges against them, or the potential sentences — and collateral consequences — that they face. Some are even encouraged to waive their right to counsel altogether.

Now, I know you're here today because you've heard these stories. You've seen the alarming statistics. And some of you have experienced this harsh reality firsthand, in the communities where you live and practice. So I don't need to tell you that this represents a crisis — one that the ABA and other organizations have been working for decades to overcome.

Ever since the Supreme Court's landmark decision in *Gideon v. Wainwright* — handed down fifty years ago next March — it has been settled law that the Constitution requires defendants in criminal cases to be provided with legal counsel, even if they cannot afford an attorney. Yet, as we come together this afternoon — in jurisdictions here in Louisiana and across this country — the basic rights guaranteed under *Gideon* have yet to be fully realized. Millions of Americans still struggle to access the legal services that they need and deserve — and to which they are constitutionally entitled. And far too many public defender systems lack the basic tools they need to function properly.

Fortunately, the American Bar Association has responded to this crisis not with despair, but with dedication, optimism, and a plan of action. For years, ABA members have taken a leadership role in advocating for quality indigent defense systems. You've laid out important guidelines and policies for improving legal representation for disadvantaged populations. In many cases, you've lent your time and expertise to help make these policies a reality. And — through the Ten Principles of a Public Defense Delivery System that the ABA released exactly a decade ago — you've not only given shape to our aspirations, but quite literally set the standard, and developed a framework for progress.

Alongside key partners like the National Association of Criminal Defense Lawyers — which has made meaningful, measurable strides in engaging the private bar — you've also led the way in rallying others to this cause. Just last month, with the support of a grant from the Justice Department's Bureau of Justice Assistance, the ABA and NACDL convened a Focus Group comprised of 18 successful reformers from across the legal community — from prosecutors and defense attorneys; to leaders from state governments and NGOs; and of course federal partners like our very own Assistant Attorney General Laurie Robinson, Director Denise O'Donnell, and representatives from the Department's Access to Justice Initiative.

Together, this diverse group worked to develop concrete strategies for reforming our nation's indigent defense systems, and to identify actions that the Justice Department can take to help facilitate this work. Their findings — which I had the chance to review earlier this week — will undoubtedly guide reform efforts long into the future. And their recommendations will reinforce the robust commitment that the Department has already demonstrated.

Nowhere is this commitment more clear than in the work of our Access to Justice Initiative — a landmark office that was launched nearly two years ago to help ensure that basic legal serv-

Continued on next page

ices are available, affordable, and accessible to everyone in this country — regardless of status or income. Under excellent leadership — first, from the legendary Professor and constitutional scholar, Larry Tribe; and, today, from Senior Counselor Mark Childress — the Access to Justice staff has collaborated with state, local, tribal, and federal officials — as well as a variety of nonprofit and private sector partners — to broaden access to quality legal representation, to highlight best practices, and to bring new allies into this work. Although Mark will soon be departing to become a White House Deputy Chief of Staff — and although we will miss him — I can assure you that this work remains as strong as ever, and will continue to be a key area of focus for the Department, and for me.

In fact, as we speak — through Access to Justice, the Office of Justice Programs, and a number of other components — the Department is moving to develop and implement a series of concrete steps to help us better understand and address the indigent defense crisis. And I am proud to announce two of these important steps today.

In a few weeks, OJP's National Institute of Justice will begin officially soliciting applications for grants to support research on the fundamental issues surrounding access to legal services — and the need for quality representation — at the state and local level. Although we currently have a basic knowledge of some of the concerns at play, OJP's track record indicates that — with rigorous, scientific study, our understanding of the barriers that defendants commonly face in securing effective representation will grow — and our ability to address and remove these obstacles will significantly improve. Of course, in light of recent budgetary challenges, funding for this type of research — however critical — has been particularly difficult to secure. That's why I am especially pleased to announce that NIJ has made this forthcoming grant solicitation a top priority — and that we are prepared to invest up to \$1 million in research projects focused on indigent defense.

This represents the largest single commitment that the Department has ever made for this purpose — and it presents an exciting opportunity to take a close look at an under-studied set of issues. Although this is an historic move — and although enhancing our understanding of this crisis is essential — it's only the first part of the equation.

I mentioned ABA's "Ten Principles" just a moment ago. Like many of you, I consider them to be an essential guidepost for ensuring that our indigent defense efforts are as effective — and as efficient — as possible. This afternoon, I am pleased to announce another new grant program — administered by the Bureau of Justice Assistance — that will help to make these Principles a reality.

This spring, BJA will release a solicitation to award grants to jurisdictions — and their partners — to use in directly supporting oversight of public defender and assigned counsel systems; to help ensure access to counsel for defendants at the earliest stage of criminal proceedings; to provide the structure and support necessary for members of the private bar to get involved in this work; and to reduce caseloads and help ease burdens on all elements of the criminal justice system.

Here in Louisiana, I know your legislature has adopted a resolution creating a task force to help implement the Ten Principles in advancing your reform efforts. In other states like Pennsylvania — where a commission recently issued a report highlighting the importance of the ABA Principles — similar efforts are also underway. And this afternoon, I am proud to announce that the Justice Department stands ready to support this kind of work — and the

advancements that are taking place in countless jurisdictions across the country — by dedicating as much as \$1.4 million to this new grant program.

These initiatives represent an unprecedented level of support — from this Justice Department, and from the Administration as a whole — for reforming America's legal system, and improving its ability to serve those who find quality representation to be out of reach. But these two grant solicitations are only the tip of the iceberg — and it's important to note that they build on a wide array of efforts that are already in progress.

I am also pleased to announce a series of additional measures to strengthen indigent defense. The Department will keep working to bring stakeholders together — including law enforcement, court officials, prosecutors, indigent defense providers, and corrections officers — to refine and strengthen existing programs, such as Byrne-JAG, and to ensure that their impact is considered across the criminal justice system. In fact, we will soon be issuing new guidelines for Byrne-JAG recipients, designed to encourage stakeholders to come together in a comprehensive criminal justice planning process.

At the same time, we're developing a national-level "Census of Public Defender Offices" to provide a snapshot of the work that's taking place across the country, and to help identify best practices and assess the training and resource needs in the field. We're partnering with the Bureau of Indian Affairs and the Office of Defender Services to offer free training sessions to defenders, prosecutors, and judges who serve Indian Country — the first time such an effort has ever been undertaken. And we're working closely with the ABA to examine the collateral consequences that often accompany certain convictions — and to determine whether those consequences which create barriers to work and civic opportunities should be eliminated.

In this study; in the critical discussions you're hosting here in New Orleans; and in the ten defining principles you've been advancing for the last ten years — at every turn, the ABA and NACDL have stepped up, and spoken out, for indigent defense. As Attorney General of the United States, I am proud to do so as well.

Your efforts have expanded and improved this work through events like this Summit. They've helped the Justice Department and other partners come together to move the ball forward. And they have inspired generations of lawyers — and even law students — to serve as sound stewards of America's legal system.

This afternoon, we can all be encouraged by the progress that you and so many others have helped to achieve in recent decades — not to mention the advancements that lie ahead, thanks to the resources that our new grant programs will soon be bringing to this fight.

But, as we approach the 50<sup>th</sup> anniversary of the *Gideon* decision — and move to confront the challenges that remain before us — we must also recognize that this is no time to become complacent.

As we build on this work, let us seize the opportunity to ensure that it becomes not just our shared priority, but our common cause. Let us redouble our efforts not merely to win cases, but to do justice. And let us come together — in the spirit of fidelity to the law, and in service of those it protects and empowers — to realize the promise of our justice system for all Americans.

Thank you.

*The above remarks are available on the U.S. Department of Justice website at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.*

## National Focus Group on Indigent Defense Reform

### *National Indigent Defense Reform: The Solution is Multifaceted*

#### Preliminary Report on Focus Group Findings Presented to the Department of Justice

January 9, 2012

Pursuant to a grant from the Bureau of Justice Assistance, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID), as the principal grantee, and the National Association of Criminal Defense Lawyers (NACDL), as the sub-grantee, have completed an 18-month indigent defense improvement project. As a major component of the project, a focus group was convened this month to identify concrete strategies for reforming and strengthening indigent defense services throughout the United States.

The focus group, which was entitled *National Indigent Defense Reform: The Solution is Multifaceted*, brought together 18 seasoned and accomplished reformers from across the nation, representing all branches of state government, prosecutors, defenders and leaders of NGOs dedicated to improving indigent defense systems. The focus group was convened by and report conclusions were made by the three project Co-Chairs along with ABA staff. The Co-Chairs include: Norman Reimer, Executive Director of NACDL; Adele Bernhard, Professor at Pace Law; and Bob Boruchowitz, Professor at Seattle University Law. Harvard Professor Christopher Stone facilitated the discussion, and Indiana University Law Professor Joel Schumm will produce a comprehensive report. Additionally, four DOJ staff people joined the meeting for all or part of the day.

The object was to draw on the experience of an array of innovative national reformers to produce a comprehensive menu of steps that may be undertaken by the Department of Justice. In recognition that funds are scarce, we deliberately sought to identify strategies that do not necessarily rely upon funding. And where reform strategies do require funding, those projects that can produce maximum impact through the targeted application of limited funds were identified.

Some of the specific proposals that emerged from the discussion will be submitted to the Assistant Attorney General for Justice Programs, as they are projects that will require support from agencies within the purview of that office. The Focus Group agreed, however, that more far reaching reform will only be possible with the leadership from the Attorney General and the Department of Justice as a whole.

The Focus Group identified five core principles that with swift and visible support by the Department of Justice will demonstrably improve the prospects for indigent defense reform. Set forth below are the key findings of that

group and suggested measures that the Department of Justice (DOJ) can take that will have an immediate and beneficial impact on indigent defense. A full report of the Focus Group's conclusions will follow at a later date. The key findings of the Focus Group are:

**1.** Any solution to the indigent defense crisis in America must focus on the front end of the system, as much as the back end. There are simply too many cases coming into the indigent defense system. Overreliance upon criminal prosecution for petty, non-violent offenses, for which people seldom receive jail sentences, drives defender caseloads to unmanageable extremes, to the detriment of all accused persons and at enormous costs to the public. Many jurisdictions have begun to experiment with reclassification of offenses to relieve the pressure.<sup>1</sup> The Focus Group believes that the Attorney General can support this movement by highlighting those success stories and by leading a national effort to stem the tide of over-criminalization. Leadership from the DOJ can help to reverse America's reliance upon the criminal justice system as the tool of first choice to influence social behavior that is not inherently criminal. No system of indigent defense can provide quality representation with ever burgeoning caseloads.

**2.** There is an urgent need for the Department of Justice to support programs that assure that counsel is provided at the initial appearance in every situation where a person is criminally charged and their liberty is at stake.<sup>2</sup> It is especially crucial that counsel be provided in any proceedings when release decisions are made. The costs to communities for detaining unrepresented persons charged with minor offenses are better invested in providing for the early appearance of counsel, whose representation can facilitate better, quicker and less costly outcomes. The Department of Justice can exert leadership for adoption of policies and positions, supporting early intervention of counsel in all jurisdictions and for all criminal charges.

**3.** The Department of Justice should act and/or seek the tools necessary to assertively support full realization of the Sixth Amendment right to counsel. Access to effective assistance of counsel is a fundamental right. As the Attorney General has on several occasions eloquently stated, nearly 50 years after the landmark *Gideon* decision, its promise remains unfulfilled. The Department can take several important steps that can significantly alter this reality; as one participant at the focus group observed, even a hint of federal interest will prompt states and localities to act. Where there is clear evidence of systemic denial of the right to counsel, the Department can, through filing of amicus briefs, support systemic litigation that seeks to reform state or local indigent defense systems. This kind of reform litigation is undertaken only in the direst circumstances.

Additionally, the Department could seek the enactment of legislation conferring upon it federal jurisdiction to bring actions to remedy systemic violations of the Sixth Amendment. While litigation instituted by private and organizational entities can be a catalyst for reform, this litigation is extremely costly and time consuming. Further, the abstention doctrine and other legal hurdles generally foreclose federal relief. With proper enabling legislation, the federal government would be far better situated to bring these cases, and can provide the necessary catalyst for reform. The ABA House of Delegates has not yet considered this issue, but ABA policy proposals to this effect are in development.

**4.** When new law enforcement initiatives are launched, the impact upon the defense bar, especially upon indigent defense providers, is seldom considered. However, when a particular kind of offense or a particular region is targeted for increased prosecution, or when a new strategy such as a specialty court, is implemented, that change inevitably imposes increased demand upon the indigent defense system. The Department of Justice could exert leadership through policies and ongoing communications to ensure that the defense bar is consulted prior to the adoption of any new law enforcement strategies that will impact case processing or caseloads.<sup>3</sup>

**5.** The Department of Justice should fully recognize that public defense requires the active involvement of the private bar as well as public

defenders. It is still the case that much of the representation of the indigent is shouldered by small firm and solo practitioners who represent the poor via contracts or court assignment. Additionally, for the many accused who do not quite qualify for government-appointed counsel, small firm and solo practitioners represent them for the most minimal fees. These private defenders are truly the backbone of the nation's indigent defense system, but they seldom operate with the structure and support necessary to provide robust and effective representation. Indeed, even where public defender systems have been established, the active participation and support of the private bar is essential in order to maintain manageable caseloads and broad support for indigent defense services.<sup>4</sup>

Many participants at the focus group spoke to this issue, and some have launched innovative public-private partnerships that help expand access to the resources essential to a high quality indigent defense system. The Focus Group concluded that the Department can significantly contribute to reform efforts by publicly recognizing the role of the private bar and urging collaboration throughout the bar. The Department can also provide critical support by funding programs that bring training and resources to regions that are most in need. Targeting funding of established training entities and resource centers can bring immediate relief to the public and private defenders who are on the front lines of defending the nation's indigent accused.

The Focus Group concluded that swift and visible support by the Department of Justice for these five core principles will demonstrably improve the prospects for indigent defense reform. Members of the Group expressed strong gratitude to the Attorney General and the Department of Justice for the opportunity to convene and discuss these issues, and all involved indicated their willingness to assist in any way possible in achieving these important changes.

## Notes

1 ABA Policy MY10-102C supports reclassification of low-level offenses.

2 ABA Policy AM98-112D supports providing counsel at initial appearance.

3. ABA policy AM05-107 supports whole system collaboration to achieve reform and federal government support of indigent defense services.

4. ABA policy MY02-107 supports the active participation of the private bar in the indigent defense delivery system.



## National Focus Group on Indigent Defense Reform

### *National Indigent Defense Reform: The Solution is Multifaceted*

Report on Key Findings of Focus Group  
Submitted to Department of Justice, Office of Justice Programs

January 9, 2012

The Focus Group, which was entitled *National Indigent Defense Reform: The Solution is Multifaceted*, brought together 18 successful and courageous reformers from across the nation, representing all branches of state government, prosecutors, defenders and leaders of NGOs dedicated to improving indigent defense systems. The focus group was convened by and the preliminary report conclusions were made by the three project Co-Chairs along with ABA staff. The Co-Chairs include: Norman L. Reimer, Executive Director of NACDL; Adele Bernhard, Professor at Pace Law; and Bob Boruchowitz, Professor at Seattle University Law.

The object of the Focus Group was to draw on the experience of an array of innovative national reformers to produce a comprehensive menu of steps that may be undertaken by the Office of Justice Programs Bureau of Justice Assistance. In recognition that funds are scarce, we deliberately sought to identify strategies that do not necessarily rely upon funding. And where reform strategies do require funding, we sought to identify those projects that can produce maximum impact through the targeted application of limited funds.

The Focus Group identified four areas that with BJA support will demonstrably improve the prospects for indigent defense reform. This report sets forth those key findings and suggests measures that the Bureau of Justice Assistance can take that will have an immediate and beneficial impact on indigent defense. Some of the specific proposals that emerged from the discussion are being submitted to the Attorney General and the Department of Justice as a whole. A full report of the Focus Group's conclusions will follow at a later date.

Several key concepts that emerged will require action by the Attorney General and will implicate fundamental policy choices. ABA President William T. Robinson is separately transmitting those suggestions to Attorney General Holder. A number of other ideas, however, may be implemented without any fundamental policy change through agencies under the purview of the Office of Justice Programs. Accordingly, in order to expedite reform and in recognition of the importance of providing prompt information to the Department of Justice about the Focus Group, in this report of the key findings, the focus group concluded that there are four areas where the Department could this year and early next year provide support for technical assistance to public defense services. A more detailed report describing the focus group will be forthcoming.

#### 1. TECHNICAL ASSISTANCE IN CASELOAD MANAGEMENT

Nationally, enormous numbers of people are arrested and processed through the criminal justice system to answer for minor offenses that could easily and effectively be adjudicated through alternate mechanisms. Many of these offenders are not represented by counsel, and are not properly advised of their rights or options. Arrest and adjudication in the criminal justice system is an expensive and heavy-handed approach to reducing the number of “quality-of-life offenses.”<sup>1</sup>

The Department of Justice could assist jurisdictions to both save money and improve the quality of justice by assisting local criminal justice systems to reduce the numbers of criminal matters being adjudicated and by ensuring counsel at the initiation of a criminal case. Specifically, the Department could assist jurisdictions to:

A. Document what jurisdictions that are experimenting with reducing the number of minor cases in their criminal justice systems have accomplished through Reclassification and Diversion.

It might be wise to focus on three typical classes of offenses: Disorderly Conduct; Motor Vehicle Offenses related to suspended or unlicensed driving; Low Level Marijuana Possession.<sup>2</sup>

B. Ensure provision of counsel at arraignment and bail hearings.<sup>3</sup>

C. Support projects sponsored by defender organizations that respond to community needs — such as projects that assist people, who have completed criminal sanctions, to have their criminal records expunged, or projects that study the collateral impact of convictions on the community.<sup>4</sup>

D. Support and encourage conversations among and between public and private defense bar, prosecutors, and community groups.<sup>5</sup>

#### 2. TECHNICAL ASSISTANCE IN DATA COLLECTION

Without accurate detailed information about the criminal justice system, it is hard to imagine creative improvements. Often information regarding ethnicity, trial rates, and per attorney caseload levels are not collected by prosecutorial agencies,

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court administration or defender organizations. Collecting such data can help to effectively allocate resources to defenders.<sup>6</sup>

The Department could facilitate positive change by issuing grants to:

- A. Study the data that is currently collected by BJS and identify gaps in the data; and
- B. Establish incentives for all participants in the criminal justice system to collect data on caseloads, results of adjudication and expenditure of time; and
- C. Encourage conversation about collection of data.

### 3. TECHNICAL ASSISTANCE TO ESTABLISH AND ENFORCE STANDARDS

Performance standards are a useful tool to ensure that criminal defense services provided to the poor are professional and effective. Standards should be enacted in every jurisdiction. Quality of services should be measured against those standards. To achieve that goal, all jurisdictions should create a statewide commission or other entity with the authority to promulgate and enforce standards for provision of indigent defense services (independent of the executive branch of the government).<sup>7</sup>

- A. To assist in the establishment of such statewide commissions, the Department could award:
  1. Grants to collect information about existing commissions and a report about those commissions to assist states in developing new commissions; and .
  2. Grants to support existing commissions, by encouraging dialogue between state commissions and commission administrators.
- B. Assigned counsel systems which still provide criminal defense services through the involvement of the private bar to a great number of poor people charged with crime must be administered in an organized way.<sup>8</sup> Standards are an important part of that administration. To assist in the improvement of assigned counsel systems, the Department could issue:
  1. Grants to facilitate dialogue between existing assigned counsel plans, such as might occur through regional meetings of assigned counsel administrators and private bar leaders, would be helpful in exchanging information about best practices.
- C. The judiciary is an essential part of the criminal justice system. Administrative judges, especially chief judges, need access to education.<sup>9</sup> They need assistance in the creation of systems to capture information. They need sup-

port in their efforts to build standards into court rules or state laws. To assist in the improvement of the criminal justice system, the Department could assist the judiciary in its efforts by issuing grants to:

1. Support judicial training;
2. Support collection of court processing data; and
3. Support the creation and implementation of data.

In particular, the Department could support the provision of training for chief justices regarding successful efforts in states to develop and implement defender standards.

### 4. TECHNICAL ASSISTANCE SUPPORTING TRAINING

There is a chronic and immediate need to educate the next generation of defenders and leaders, and such training must include both the public and private bar.<sup>10</sup> Such training could effectively be done on a regional basis with the participation of key law schools.<sup>11</sup>

#### Notes

1. ABA policy AM09-119 supports avoiding excessive workloads by urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution.
2. ABA policy MY10-102C supports reclassification of low-level offenses.
3. ABA policy AM98-112D supports the provision of counsel at initial appearance.
4. ABA policy MY10-111B supports efforts that promote and study the impact on collateral convictions on the community and expungement alternatives.
5. ABA policy AM05-107 supports whole system collaboration to achieve reform; ABA policy MY02-107 supports the active participation of the private bar in the indigent defense delivery system.
6. ABA policy AM05-107 supports monitoring and data collection to evaluate indigent defense systems.
7. ABA policy AM05-107 supports the establishment of statewide commissions or oversight bodies.
8. ABA policy AM05-107 supports whole system collaboration to achieve reform; ABA policy MY02-107 supports the active participation of the private bar in the indigent defense delivery system.
9. ABA policy AM05-107 recommends that judges possess the knowledge to properly administer justice.
10. ABA policy AM05-107 encourages the federal government to provide financial support for training for providers of indigent defense services.
11. NACDL, ABA-SCLAID and other defender organizations have conferred over the past several months and will shortly submit a comprehensive training proposal outlining a plan to efficiently and effectively address the dire need for defense training throughout the nation.

This publication is available online at: [www.indigentdefense.org](http://www.indigentdefense.org)  
[www.nacdl.org/reports/indigentdefensereform](http://www.nacdl.org/reports/indigentdefensereform)



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