



NACDL Indigent Defense

Indigent Defense Policies

Standards, Contracts & Professional Responsibility

At the request of the Indigent Defense Committee, the Board of Directors approved amendments to the NACDL Assigned Counsel Policies at the Spring Meeting in Boston on May 3, 1997. New provisions were added, addressing the need for "vertical" representation, and establishing proper conditions for indigent defense contracting.

"Vertical" representation -- by the same lawyer throughout the trial level proceedings -- is also endorsed by the ABA's Standards for Providing Defense Services, 5-6.2 (3d ed. 1992). The ABA's Commentary explains that the "horizontal" alternative -- different defenders representing the accused at different stages of the proceedings -- has many disadvantages, including the negative perception, by the client, of being processed through an assembly line; and inherent inefficiency where each successive attorney must start from scratch at becoming familiar with the case and the client. "Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased." *Id.* at 83. Especially when inadequate funding -- virtually universal -- results in caseloads several times larger than the most capable counsel can competently manage.

Indigent defense contracting, as a low-cost alternative to assigning individual lawyers to individual cases, has grown enormously over the past decade, and should be subject to strict quality controls, as outlined by NACDL's new paragraph 8. Reference is also made to Rules of Professional Conduct that are routinely negated by indigent defense systems designed to maximize the forfeiture of liberty -- and even life itself -- at the lowest cost to the government. The state supreme courts and the organized bar, responsible for enforcing ethics rules in most jurisdictions, have long been blind to the reality of underfunded indigent defenses systems manifested by ongoing, wholesale violation of rules demanding competent representation -- including the legal knowledge, skill, thoroughness and preparation necessary for competent representation (ABA Model Rule 1.1); diligence and promptness (Model Rule 1.3); and adequate client communication (Model Rule 1.4); and forbidding conflicts of interest, including conflicts with duties owed to other clients (Model Rule 1.7).

In order to reverse the ethical degeneration of decades of neglect, it is now incumbent upon the organized bar to apply to indigent defense systems the Rules of Professional Conduct applicable to all attorneys. One small step was taken recently by the Disciplinary Board of the Louisiana Bar Association in case No. 96-PDB-012. Upon concluding that inmate Vincent Singleton's right to appeal had been neglected by the appellate public defender for over two years, the Board directed the Office of Disciplinary Counsel to "investigate the matter further to ascertain if the system is as [lawyer's name deleted] describes it and if the system . . . needs to be altered to meet the requirements of the Rules of Professional Conduct." Disciplinary Counsel did so, and wrote to the Director of the Orleans Indigent Defender Program, with a copy to the Chief Justice of the Louisiana Supreme Court, about incompetent representation. Some excerpts:

I am cognizant of the financial and time constraints which are placed upon your program. Within the resources available to you, however, it is imperative that this dilemma be addressed. Clearly, the failure to designate responsible counsel when files are accepted by the O.I.D.P. fosters a system which fails to meet the standards of diligent representation as required by the Rules of Professional Conduct.

We call this matter to your attention in an effort to aid and assist you in not only rectifying the problems of the complainant in this matter, but as further demonstration of your need for commitment from those parties responsible for insuring proper and sufficient funding and support which will allow your attorneys and staff to provide legal services as are envisioned by the Supreme Court Rules of Professional Conduct.

Those "parties responsible for insuring proper and sufficient funding" are usually elected members of the legislative and executive branches of state and local government. If they happen also to be members of the bar, are they not exposed to disciplinary action if systemic ethical violations are the inevitable result of underfunding? And as for low-bid indigent defense contracts, does not the organized bar (and every individual member thereof) have an affirmative responsibility to monitor the terms and performance of those contracts -- signed by one or more members of the bar -- for compliance with the Rules of Professional Responsibility? And to declare such contracts void as against public policy if they fail to measure up? The professionally responsible answer, yes to all the above, is also the key to improving the dismal public image of the bar in general, and criminal defense in particular.

NACDL Assigned Counsel Policies

(as amended -- new language in bold -- May 3, 1997)

On November 5, 1994, and May 3, 1997, the NACDL Board of Directors adopted general policies on Assigned Counsel Systems, to provide aspirational context and direction to NACDL endeavors and to explicitly endorse standards promulgated by the American Bar Association, the National Legal Aid & Defender Association, and other groups.

1. The goal of systems providing assigned counsel must be to provide *quality, vertical⁽¹⁾ representation* equivalent to that provided by skilled, knowledgeable and conscientious counsel hired by paying clients, rather than the lower "reasonably effective assistance" standard of *Strickland v. Washington*.⁽²⁾
2. Assigned counsel systems must include *substantial participation by the private bar*, in order to assure the continued interest of the bar in the welfare of the criminal justice system.⁽³⁾
3. Assigned counsel systems should be administered by and funded through an agency *independent* from the judiciary.⁽⁴⁾
4. Compensation: Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services.⁽⁵⁾
5. Eligibility to serve: Private bar participation must be voluntary; counsel must meet specific

qualification standards.⁽⁶⁾

6. Rotation of assignments and revision of roster. Ordinarily, assignments should be made in an orderly, sequential way to avoid patronage and its appearance. The roster should be periodically revised to recertify assigned counsel and ensure quality representation. Specific criteria for removal should be adopted in conjunction with qualification standards.⁽⁷⁾

7. Should an attorney be removed, the attorney shall have the opportunity to be heard by a removal committee, to be represented by counsel, and an opportunity to appeal to the administrator, whose decision shall be final. Procedures shall be established for consideration of a removed attorney's application for reinstatement, including an opportunity to demonstrate that the deficiencies which led to removal will not be repeated.⁽⁸⁾

8. If contracts for services of defense counsel are a component of a jurisdiction's legal representation plan, such contracts should ensure quality legal representation. Contracts should not be awarded primarily on the basis of cost, and should include terms requiring contractors to maintain standards necessary to deliver quality vertical representation and to comply with standards of professional responsibility,⁽⁹⁾ including: maximum caseloads; minimum levels of experience and ongoing training; reasonable compensation, including provision for additional compensation in the event of unforeseen extraordinary circumstances; and sufficient support services and expenses for investigative services, expert witnesses and other litigation expenses.⁽¹⁰⁾

These goals pursue basic constitutional principles: the right of indigents to **quality representation from** counsel appointed by the court and paid by the government; the right to fair compensation when property, including services, is taken for public use; and the right to procedural due process (notice, hearing, review) when property and liberty interests are at stake.

1. Vertical representation means the same lawyer will represent a client from arraignment through trial, and, if necessary, sentencing.

2. ABA Standards for Criminal Justice Providing Defense Services (ABA Standard), 5-1.1 (3d Ed. 1992); National Legal Aid & Defender Association, Standards for the Administration of Assigned Counsel Systems (NLADA Standard), 2.1(b) (Nov. 14, 1989).

3. ABA Standard 5-1.2 (Systems for legal representation).

4. ABA Standard 5-1.3 (Professional independence); NLADA Standard 2.2 (Independence from Judiciary and Funding Source).

5. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 61 (1967). "[I]t is simply unfair to ask those lawyers who happen to have skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to do work for compensation that is patently inadequate." ABA Standard 5-2.4 (Commentary). "Reasonable compensation shall be provided to assigned counsel, at a rate commensurate with that paid for other contracted government legal work (*e.g.*, work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the

jurisdiction." NLADA Standard 4.7.1.

6. ABA Standard 5-2.2; NLADA Standard 2.9, 4.1.1.

7. ABA Standard 5-2.3; NLADA Standard 4.1 *et seq.*

8. NLADA Standard 4.5 *et seq.* The NLADA's detailed guidelines recommend due process procedures, including sanctions less onerous than suspension, prior to discipline. NLADA Standard 4.5.2.

9. Most jurisdictions have adopted some form of the ABA Model Rules of Professional Conduct requiring Competent Representation -- including the legal knowledge, skill, thoroughness and preparation necessary for competent representation (Rule 1.1); Diligence and Promptness (Rule 1.3); and adequate Client Communication (Rule 1.4); and forbidding Conflicts of Interest, including conflicts with duties owed to other clients (Rule 1.7).

10. See ABA Standard 5-3.1, 5-3.3; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for criminal Defense (1984).

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