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## Indigent defense services blasted

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Scores of indigent defense services across the country have one thing in common: They are failing their clients.

Excessive caseloads and a lack of quality controls are all too common, assert attorneys and equal-justice advocates. Defense services are often contracted out with flat-fee contracts, which, critics charge, create an economic disincentive to defend clients energetically.

Regardless of the particular failing, the constitutional mandate to provide effective representation for indigent clients is dangerously haphazard, even in many of the 22 states that directly fund indigent defense services.

"The incompetent representation of the criminally accused—particularly indigents—is truly a scandal," asserted Monroe Freedman, a legal ethics scholar at Hofstra University School of Law.

The problem has become alarming enough to launch a national review of indigent defense services by the National Committee on the Right to Counsel, a bipartisan group of prosecutors, defense attorneys, law enforcement officials, academics, policy wonks, former judges and the head of a victim rights group. Freedman is a committee member.

Mary Sue Backus, one of two committee reporters whose job is to boil down the committee's discussions and recommendations, said that this examination of the system will differ from any that have come before it.

"One of the most important dynamics we're seeking is a broader consensus than we've seen before," Backus said. "And a more national focus, as opposed to that old state piecemeal approach."

The committee was formed by the Constitution Project, a bipartisan nonprofit organization whose aim is to seek consensus on controversial legal and constitutional issues, and the National Legal Aid & Defender Association (NLADA), an equal-justice advocacy organization.

### A prosecutor's view

Robert Johnson, the district attorney of Anoka County, Minn., a past president of the National District Attorneys Association and the co-chairman of the right to counsel committee, asserted that the system needs balance to work.

"Prosecutors have an interest in having capable criminal defense attorneys," Johnson said. "No worthy prosecutor wants to convict someone who's innocent. When prosecutors take in cases, they hear from police and victims and they're making a judgment that has to be tested for accuracy. Defense attorneys are important to ensure that we're not making a mistake. You need balance to make an adversarial system work."

The committee is now in the midst of a comprehensive 18-month study of indigent defense systems and the impact they have on the people they are meant to serve, said Faye Taxman, a social scientist at the University of Maryland's department of criminology and criminal justice who directs the university's bureau of government research.

Seven jurisdictions will then be chosen for on-site reviews.

"As a partner, the defender should be looking out for the client's best

#### THE MAIN PROBLEMS

Criminal law attorneys who have had experience with indigent client funds across the country have reported several shortcomings, including:

- Inexperienced lawyers handling complex cases.

interests—short- and long-term goals—and punishment should be as effective as possible," Taxman said. "In my book, that means changing people's behavior. For me, it's how do you provide services so that people aren't getting short-shrifted . . . . In most factory-driven systems, people aren't treated fairly."

### **An unregulated system**

The *Seattle Times* recently exposed a contract public defender system gone awry in Washington state. But California and other states have similar, barely monitored contract public defenders in localities in which there are no government agencies doing the work, said Michael Cantrall, executive director of the California Public Defender Association.

Lake County, Calif., with a population of about 60,000, is an example of this. The county went from monthly flat-fee contracts with individual attorneys to contracting with a single entity for ease of accountability, according to Jeffrey Rein, Lake County deputy administrative officer.

That entity, the Indigent Representation Administration (IRA), receives a flat fee. While many governments favor these kinds of contracts because of their inherent budgetary predictability, criminal justice scholars frown on them. That's because an attorney is paid the same per case, no matter how many motions are filed or whether the client pleads out or goes to trial.

"Flat fees create an economic disincentive to vigorously represent clients," asserted Kern County, Calif., public defender Mark Arnold.

Rein had no idea what the caseload is for the IRA or its individual attorneys, nor does he know how many cases are adjudicated in Lake County each year. The county pays the IRA \$720,661 annually; the district attorney's budget is \$1.69 million.

The IRA, which sees itself as a management company, subcontracts with 12 individual attorneys who are allowed to take outside cases, both civil and criminal, said Erik Bruce, one of IRA's two partners.

"Quite a few of them have large civil practices," he said. He and his partner also have extensive outside practices. Bruce said he had no idea what his contractors' public defender caseloads are.

"Funny you should ask, we're just compiling those numbers now," Bruce said. After the NLJ's inquiry, he had been asked by Rein to provide the county with those numbers. Almost a week later, he still didn't have them. He said that it would take some time to compile.

But Bruce is not completely in the dark, he said. When he's in court, he'll sometimes take a look at the trial calendar to get an idea about the number of cases his people have, paying particular attention to felonies. Still, he concedes that that doesn't tell him much, because attorneys have different ways of approaching their cases, which can't be divined by looking at a court calendar.

"I have an attorney who doesn't like to do a lot of preliminary hearings, so he has a lot of cases set for trial," Bruce said. "It's a matter of style. I like to settle mine early . . . ."

"We pay monthly flat fees to our subcontractors, which varies from attorney to attorney," Bruce said. Those amounts are confidential, as is the amount he and his partner—both former Lake County district attorneys—pay each other. "I can't comment on the financial side," Bruce said.

In 1971, the Law Enforcement Assistance Administration, a now-defunct office within the U.S. Department of Justice, funded the National Advisory Commission on Criminal Justice Standards and Goals. In 1973, among the commission's recommendations were per-year caseload standards for a public defender that should not exceed 200 juvenile cases; or 150 felonies or 400 misdemeanors; or 200 mental health cases; or 25 appeals. These recommendations have been incorporated by reference in the American Bar Association's 10 Principles of a Public Defense Delivery System.

The Lake County DA's office reported to Rein late last week that in 2003 it filed 698 felonies, 2,990 misdemeanors and about 350 juvenile cases. An unknown number went to trial. Bruce had said that one could assume that IRA would have handled about 95% of any number the DA's office came up with. That would mean that IRA lawyers, who all have outside practices, would have full-time public defender caseloads under the ABA's guidelines, if the cases were equally divided.

### **A national problem**

Loosely regulated systems are only one complication, critics charge. Disparity in budgets is a national problem, said David Carroll, director of research and evaluations for NLADA. But contracting for services is fine, as long as the

- Excessive caseloads that don't allow for competent representation.
- An alarming disparity in budgeting for indigent services from state to state and county to county.
- Lack of oversight.
- Varied definitions of indigency.

contracts don't call for flat fees.

"Oregon is a state we point to that is a structurally sound model," said Carroll. Written into every contract, he noted, are caseload caps, experience levels, continuing legal education and a requirement of an interview with a client in custody within 24 hours. But there's "always a battle come budget time. Indigent defendants have no political clout."

In Oregon, for the last three months of 2003, the budget was dry for indigent defense. Only the most serious and violent crimes were prosecuted. The remaining cases awaited the next fiscal year, raising speedy trial issues, Carroll said.

Joshua Marquis, a member of the board of the National District Attorneys Association and the Clatsop County, Ore., DA, said his office and the association support the adequate funding of indigent defense.

But he said that funding is also a problem for district attorney offices throughout Oregon. Prosecutors can't afford to prosecute all the cases they should, irrespective of the availability of defense attorneys, he said.

But Oregon is an exception to this rule, too.

### **The growing gap**

Joseph Kownacki, the supervisor of the downtown felony team for the San Diego County, Calif., public defender's office, looked at that county's budgets for district attorneys and public defenders for the past 17 years and saw the growing disparities.

"In 1987, there was a \$1 million separation," Kownacki said. [\$20 million for the DA office to \$19 million for the public defenders.] "In 2004, the DA's budget is \$100 million and ours is \$37 million."

While the county's contributions were roughly equal, Kownacki said the rest of the district attorney's budget came from state funds.

"This year is the first time we ever had a threat of layoffs," he added, noting that layoff notices have been sent to 17 lawyers and 31 support staff. Twenty other lawyers face demotions, Kownacki said.

Paul Levikow, a spokesman for the San Diego County district attorney's office, said that his office was expecting a budget increase of between 4.3% and 8.6%.

NLADA's Carroll said using terms like "best" and "worst" examples don't do justice to indigent representation.

"Wisconsin has a solid state-funded public defender system, but has an indigency threshold so low that you could be eligible for food stamps yet be deemed by the state to be able to mount your own defense," Carroll said. The Wisconsin threshold can be as low as \$3,000 of annual income. "Thousands go unrepresented in Wisconsin—no different than if you're in Louisiana, where the vast majority of indigent defense is funded by traffic tickets and an indigent gets 11 minutes of a lawyer's time," he said.

"People think of these problems as Southern," Carroll asserted. "They're not. Utah and Pennsylvania provide no state funding at any level—trial or post-conviction. Philadelphia has a good public defender system, but in western Pennsylvania, where the revenue sources are depleted, the system is terrible."

In Massachusetts, which, like Oregon, has a highly regarded, state-funded indigent criminal defense system, there comes a cry of chronic underfunding and a lawsuit that asks the state's highest court to order the Legislature to meet its indigent-funding obligations.

Staff attorneys, who have left in droves, start at \$35,000 a year, said William Leahy, chief counsel of the Committee for Public Counsel Services, an independent entity that administers the state's indigent defense system.

"Private appointed counsel get \$35 an hour, up to \$54 an hour for a murder case," Leahy said, noting that he'd lost hundreds of experienced lawyers over the past four years. "We have a great structure—real oversight of performance, real training requirements, an independent appointing agency, but inadequate compensation.

"Like the rest of the nation, we haven't lived up to *Gideon* [*v. Wainwright*, 372 U.S. 355 (1963)], which stands for the proposition that a poor person should get as good a lawyer as a person of means. It's a disgrace," he said. "Maybe this committee's recommendations will do some good."