

Recommendation #110
Adopted by ABA House of Delegates August 9, 2004

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
SECTION OF CRIMINAL JUSTICE
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COUNCIL ON RACIAL AND ETHNIC JUSTICE
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association adopts the black letter *ABA Guidelines*
2 *on Contribution Fees for Costs of Counsel in Criminal Cases*, dated August 2004.

3
4 **FURTHER RESOLVED**, That the American Bar Association urges compliance with
5 *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases* to ensure
6 satisfactory procedural safeguards when accused persons are ordered to make a payment for
7 representation furnished to them at government expense.

ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases

August 2004

Guideline 1. Provision of Satisfactory Procedural Safeguards

Contribution fees to reimburse governments for the cost of defense counsel in criminal cases should not be assessed against accused persons unless procedural safeguards are provided to assure that assessments do not impose substantial financial hardships and do not chill exercise of the right to counsel.

Guideline 2. Determination of Ability to Afford a Contribution Fee

An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford. Whenever an order for a contribution fee is under consideration, the accused person or counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded. If a contribution fee is ordered prior to providing counsel for the accused person, the decision to require a contribution fee should be subject to review at the request of counsel and counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded.

Guideline 3. Collection of the Fee

The court or its designee, not counsel, should be responsible for collecting payment of any contribution fee.

Guideline 4. Enforcement of Payment

Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.

Guideline 5. Rights Upon Imposition of Contribution Fee

An accused person ordered to contribute to the cost of defense counsel should retain the right to petition the court to waive the fee in the event of future inability to pay. The court

should waive a fee previously ordered if the court determines that payment will result in substantial financial hardship to the person or to the person's dependents.

Guideline 6. Notice of Potential Obligation of a Contribution Fee

Prior to an offer of counsel or upon request for counsel in the event counsel is not offered, an accused person should be informed, both orally and in writing, that a contribution fee may be required. This notice of a potential obligation of a contribution fee should specify that if counsel is provided:

- the person may be required to pay a fee for the cost of counsel if the person has the ability to do so without substantial financial hardship;
- that counsel will be provided at all stages of proceedings regardless of whether the person actually pays the fee;
- that failure to pay the fee will not result in imprisonment;
- that the person's attorney can challenge the imposition of the contribution fee; and
- that in the event of future inability to pay the fee, the person will have the right to petition the court to waive the required fee.

REPORT

I. BACKGROUND

Right to Counsel and Costs of Providing Counsel

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.”¹ In the 1963 case of *Gideon v. Wainwright*,² the United States Supreme Court recognized that the Sixth and Fourteenth Amendments require counsel to be provided to indigent defendants in state felony proceedings. Subsequent decisions by the Court extended the right to counsel to indigent defendants in state juvenile delinquency proceedings³ as well as state misdemeanor proceedings in which actual imprisonment is imposed.⁴ Further, the Court has held that the right to counsel first attaches at various pre-trial stages, including line-up identifications⁵ and preliminary hearings.⁶

State and local governments provide legal representation for poor persons accused of crime through a variety of systems, including: (1) traditional “public defender” programs, in which salaried attorneys provide representation in indigent cases;⁷ (2) court assignments of indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) contracts in which private attorneys agree to provide representation in indigent cases. Funding for defense services may come from the state, the counties, or a combination of both. Given the Supreme Court’s broad expansion of the right to counsel since the 1960s, as well as a proliferation of state laws requiring the provision of counsel in additional types of cases, the cost of providing indigent defense has grown substantially over the past four decades. Current estimates indicate that nearly eighty percent of criminal defendants receive the services of counsel at government expense.⁸ According to a survey commissioned by the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defendants (SCLAID), combined state and county expenditures on indigent defense in fiscal year 2002 totaled approximately \$2.8 billion nationwide.⁹ And yet, this figure is nowhere near sufficient. As

¹ U.S. CONST. amend. VI.

² 372 U.S. 335 (1963).

³ See *In re Gault*, 387 U.S. 1 (1967).

⁴ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In *Alabama v. Shelton*, 535 U.S. 654 (2002), the Court extended *Argersinger* by holding that a suspended sentence may not be imposed in misdemeanor cases unless the defendant was offered an attorney at trial.

⁵ *United States v. Wade*, 388 U.S. 218 (1967).

⁶ *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁷ In addition to government agencies, public defender services are sometimes provided by non-profit organizations that receive public funding and are governed by an independent board of trustees, consistent with Standard 5-1.3 of the ABA Standards for Criminal Justice, Providing Defense Services. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-1.3(b) (3d ed. 1992) (“An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees.”).

⁸ William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 452 (1997).

⁹ ABA BAR INFORMATION PROGRAM (PREPARED BY THE SPANGENBERG GROUP), STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002 2 (Sept. 2003), available at

numerous reports and articles have documented, government funding for indigent defense in this country is woefully inadequate and remains mired in a state of crisis,¹⁰ a predicament that will likely worsen in the future given current state budget deficits.

Indigent Defense Cost Recovery Measures

In response to rising costs and diminishing funds, jurisdictions have adopted various indigent defense cost-recovery measures, whereby a defendant is required to pay to the government all or a portion of the expense of providing counsel. Such measures can, however, have a deterrent effect on the exercise of a defendant's constitutional right to counsel. Cost-recovery schemes generally can be classified as requiring one of two types of payments: either "reimbursement" (also called "recoupment") or "contribution." The primary distinguishing factor between the two concepts is the point in time at which payment is required from a defendant. In the "reimbursement" situation, a convicted defendant is ordered by the court to make payments at the termination of proceedings; the amount of such charges usually reflects a portion of the cost of the representation already provided.¹¹ Although the Supreme Court has sustained the constitutionality of one state statute authorizing reimbursement,¹² current ABA policy recommends against requiring reimbursement, except where defendants have made fraudulent representations regarding their financial status in order to be found eligible for counsel.¹³

The sole ABA policy dealing with the issue of contribution is contained within Standard 5-7.2 of the ABA Standards for Criminal Justice, Providing Defense Services (Standard 5-7.2). The relevant portions of the black-letter standard state:

....

(b) Persons required to contribute to the costs of counsel should

<http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (last visited Mar. 17, 2004).

¹⁰ See, e.g., Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. (forthcoming 2004) (manuscript at 11-24, on file with ABA Division for Legal Services); U.S. DEPARTMENT OF JUSTICE, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: FINAL REPORT 3-5 (2000); U.S. DEPARTMENT OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS 5 (2000); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816-821 (1999); ABA SECTION OF CRIMINAL JUSTICE AD HOC COMMITTEE ON THE INDIGENT DEFENSE CRISIS, THE INDIGENT DEFENSE CRISIS 25 (1993); ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-1.6 and commentary (3d ed. 1992) at 27; ABA SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 9 (1988); Richard Klein, *The Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 675-676 (1986); NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 14, 56-58 (1982).

¹¹ ABA BAR INFORMATION PROGRAM (PREPARED BY THE SPANGENBERG GROUP), PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 2 (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf> (last visited Mar. 17, 2004).

¹² See *Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974).

¹³ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2(a) (3d ed. 1992) ("Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.")

be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.¹⁴

Neither the black letter nor the commentary of Standard 5-7.2 provides further detail regarding the specific “procedural safeguards” referenced in subsection (c) of the standard as necessary for the proper imposition of contribution.

Need for Additional Policy on Contribution Fees

For over two decades, SCLAID has provided information and technical assistance to public defender programs, bar leaders, government task forces, and other parties interested in improving indigent defense systems in their jurisdictions. Since the early 1990s, SCLAID has monitored the emergence and growing popularity of state and local laws requiring a particular form of contribution often referred to as a “public defender application fee,” which is uniformly imposed on all indigent defendants without regard to a person’s financial means.¹⁵ The amounts of such application fees are established by statute or other authority and generally range from \$10 to \$200 (sometimes the amount is dependent upon the criminal charge).¹⁶ Application fee assessments occur at the outset of criminal proceedings before any representation is provided; various state statutes provide for fees either when the initial request or application for representation is made,¹⁷ when financial eligibility for counsel is determined,¹⁸ at the time counsel is appointed,¹⁹ or at the first court appearance by counsel.²⁰ Depending upon statutory requirements, the fee is assessed by the court²¹ or the public defender office or other entity that

¹⁴ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2(b)-(c) (3d ed. 1992).

¹⁵ It appears that commentary to Standard 5-7.2 envisions an alternate form of contribution order that takes into account a person’s financial ability to pay and does not involve payment of a fixed fee uniformly applied to all defendants. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2 and commentary (3d ed. 1992) at 93 (“[C]ontribution orders...normally are not entered unless there is a realistic prospect that the defendants can make reasonably prompt payments.”).

¹⁶ ABA BAR INFORMATION PROGRAM, *supra* note 11, at 2.

¹⁷ See, e.g., COLO. REV. STAT. ANN. § 21-1-103(3) (West, WESTLAW through 2003 First Regular Legis. Session); FLA. STAT. ANN. § 27.52(2)(a) (West, WESTLAW, through 2003 First Regular Legis. Session and 2003 Special A, B, C, D, and E Legis. Sessions); N.M. STAT. ANN. § 13-15-12(C) (West, WESTLAW through First Legis. Session); N.D. CENT. CODE § 29-07-01.1(1) (West, WESTLAW through 2003 General and Special Legis. Sessions).

¹⁸ See, e.g., OR. REV. STAT. § 151.487(1) (West, WESTLAW through 2001 Regular Legis. Session).

¹⁹ See, e.g., ARK. CODE ANN. §16-87-213(a)(2)(B)(i)(a) (West, WESTLAW through 2003 Regular Legis. Session); IND. CODE § 35-33-7-6 (West, WESTLAW through 2003 First Regular Legis. Session); MASS. GEN. LAWS ANN. § 2A (West, WESTLAW through ch. 168 of 2003 First Annual Legis. Session); MINN. STAT. §611.17(c) (West, WESTLAW through 2003 First Special Legis. Session); S.C. CODE ANN. § 17-3-30 (B) (West, WESTLAW through 2003 Regular Legis. Session); TENN. CODE ANN. § 40-14-103(b)(1) (West, WESTLAW through 2003 First Regular Legis. Session).

²⁰ See, e.g., DEL. CODE ANN. § 4607(a) (West, WESTLAW through June 12, 2003 of 2003 First Regular Legis. Session).

²¹ See, e.g., ARK. CODE ANN. §16-87-213(a)(2)(B)(i)(a) (West, WESTLAW through 2003 Regular Legis. Session); DEL. CODE ANN. § 4607(a) (West, WESTLAW through June 12, 2003 of 2003 First Regular Legis. Session); FLA. STAT. ANN. § 27.52(2)(a) (West, WESTLAW, through 2003 First Regular Legis. Session and 2003 Special A, B, C, D, and E Legis. Sessions); IND. CODE § 35-33-7-6 (West, WESTLAW through 2003 First Regular Legis. Session); MASS. GEN. LAWS ANN. § 2A (West, WESTLAW through ch. 168 of 2003 First Annual Legis. Session); MINN. STAT. §611.17(c) (West, WESTLAW through 2003 First Special Legis. Session); N.D. CENT. CODE § 29-07-01.1(1)

screens for eligibility for indigent defense representation.²² Some statutes require that fees be imposed regardless of whether the representation is provided by a private court-appointed attorney or a public defender.²³ Most statutes provide that, after a fee is imposed, the court may waive or reduce the fee if it finds the defendant is unable to pay.²⁴

A series of reports commissioned by SCLAID on the use of public defender application fees demonstrate the rapid rise of these programs. A 1994 report examined application fees programs in only seven jurisdictions; the number of programs examined grew to twelve in 1997 and twenty-eight (18 states and 10 counties) in 2001.²⁵

The use of application fees carries an unacceptable risk of chilling the exercise of the right to counsel. To a defendant of limited means, a fixed fee as high as \$200 may represent a substantial financial burden. Because the fee is usually assessed before any representation is provided, indigent defendants may choose to waive their right to counsel as soon as they learn of the fee to avoid the obligation of payment. Even where there is opportunity for judicial waiver or reduction of the fee, there is always considerable risk that a defendant will not be notified properly of this opportunity and consequently will decide to forgo the assistance of counsel, thereby increasing the possibility of wrongful conviction.²⁶

West, WESTLAW through 2003 General and Special Legis. Sessions); OR. REV. STAT. § 151.487(1) (West, WESTLAW through 2001 Regular Legis. Session); S.C. CODE ANN. § 17-3-30 (B) (West, WESTLAW through 2003 Regular Legis. Session); TENN. CODE ANN. § 40-14-103(b)(1) (West, WESTLAW through 2003 First Regular Legis. Session).

²² See, e.g., COLO. REV. STAT. ANN. § 21-1-103(3) (West, WESTLAW through 2003 First Regular Legis. Session); N.M. STAT. ANN. § 13-15-12(C) (West, WESTLAW through First Legis. Session).

²³ See, e.g., DEL. CODE ANN. § 4607(a) (West, WESTLAW through June 12, 2003 of 2003 First Regular Legis. Session); FLA. STAT. ANN. § 27.52(2)(a) (West, WESTLAW, through 2003 First Regular Legis. Session and 2003 Special A, B, C, D, and E Legis. Sessions); TENN. CODE ANN. § 40-14-103(b)(1) (West, WESTLAW through 2003 First Regular Legis. Session).

²⁴ See, e.g., ARK. CODE ANN. §16-87-213(a)(2)(B)(i)(b) (West, WESTLAW through 2003 Regular Legis. Session); COLO. REV. STAT. ANN. § 21-1-103(3) (West, WESTLAW through 2003 First Regular Legis. Session); MASS. GEN. LAWS ANN. § 2A (West, WESTLAW through ch. 168 of 2003 First Annual Legis. Session); N.M. STAT. ANN. § 13-15-12(C) (West, WESTLAW through First Legis. Session); N.D. CENT. CODE § 29-07-01.1(1) (West, WESTLAW through 2003 General and Special Legis. Sessions); S.C. CODE ANN. § 17-3-30 (B) (West, WESTLAW through 2003 Regular Legis. Session); TENN. CODE ANN. § 40-14-103(b)(1) (West, WESTLAW through 2003 First Regular Legis. Session). However, some state statutes do not provide for a waiver of the fee. See, e.g., FLA. STAT. ANN. § 27.52 (West, WESTLAW, through 2003 First Regular Legis. Session and 2003 Special A, B, C, D, and E Legis. Sessions); MINN. STAT. §611.17 (West, WESTLAW through 2003 First Special Legis. Session).

²⁵ ABA BAR INFORMATION PROGRAM, *supra* note 11, at 4.

²⁶ As the Supreme Court stated in *Powell v. Alabama*, 287 U.S. 45 (1932):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

The potential chilling effect of application fees is particularly troubling given recent reports of judges accepting and even encouraging invalid waivers of counsel and guilty pleas from un-represented indigent defendants charged with misdemeanors, in efforts to move cases through their overburdened dockets as quickly as possible.²⁷ In this current environment of “assembly-line justice,” the assistance of counsel becomes more crucial than ever, and any potential for interference with the right to counsel resulting from the imposition of application fees must be assiduously guarded against. Thus, the widespread prevalence of application fee statutes highlights a critical and timely need for national guidance on how contribution programs properly should be structured and administered.

The ABA has long taken a leadership role in providing national guidance regarding the provision of indigent defense services.²⁸ Current ABA policy on the issue of contribution, in the form of Standard 5-7.2, was adopted before application fee programs became as prevalent as they are today. As previously mentioned, Standard 5-7.2 merely states that “satisfactory procedural safeguards” should be available in the event contribution is imposed, but does not describe the content of these safeguards or explain how they should be provided.

The proposed *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases* (Guidelines) that accompany this report will respond to the need for additional guidance in this area, a need that has taken on an even greater urgency in the wake of recent events. In 2003, a public defender from Hennepin County, Minnesota filed a well-publicized lawsuit challenging the constitutionality of a Minnesota application fee statute requiring payment upon appointment of a public defender of a fixed, non-waiveable fee (\$200 for a felony, \$100 for a gross

²⁷ In recognition of the dangers of self-representation, the U.S. Supreme Court has indicated that judges must “indulge in every reasonable presumption against waiver” of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). According to the Court, a waiver is not valid unless it is entered voluntarily, knowingly, and intelligently. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Carnley v. Cochran*, 389 U.S. 506, 513-17 (1962). This can only be established “from a penetrating and comprehensive examination of all the circumstances” under which the waiver is tendered. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (plurality opinion of Black, J.) (1948). Specifically judges must determine through a full inquiry that the accused apprehends “the nature of the charges, the statutory offense included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” *Id.* There are numerous reports of judges failing to engage in the required colloquy before accepting waivers of counsel from misdemeanor defendants, even in situations where defendants had not yet been informed of the right to counsel. *See, e.g.*, Robert C. Boruchowitz, *The Right to Counsel: Every Accused Person's Right*, WASH. STATE BAR NEWS (January 2004), available at <http://www.wsba.org/media/publications/barnews/2004/jan-04-default.htm> (last visited Mar. 17, 2004) (documenting problems associated with growing number of misdemeanor defendants denied assistance of counsel in Washington courts); THE SOUTHERN CENTER FOR HUMAN RIGHTS, “IF YOU CAN’T AFFORD A LAWYER...” A REPORT ON GEORGIA’S FAILED INDIGENT DEFENSE SYSTEM 27 (2003) (documenting routine practices in Georgia counties of judges and prosecutors encouraging waivers of counsel and guilty pleas from defendants without informing them of right to counsel).

²⁸ *See, e.g.*, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Revised ed. 2003); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002); ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d ed. 1992); INSTITUTE FOR JUDICIAL ADMINISTRATION/ AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, (1979); INSTITUTE FOR JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS RELATING TO MONITORING (1979).

misdemeanor, and \$50 for a misdemeanor).²⁹ On February 12, 2004, in what appears to be the first ruling by a state supreme court relating to the constitutionality of an application fee program, the Minnesota Supreme Court held that state's statute violated the federal and state constitutional right to counsel.³⁰ By providing the criteria for implementing contribution programs in accordance with constitutional requirements and ABA standards, the proposed Guidelines could be exceedingly helpful in jurisdictions throughout the country where similar legal challenges may be brought or efforts may be undertaken to adopt or rewrite application fee statutes.

Goal of Proposed ABA Guidelines On Contribution Fees For Costs Of Counsel In Criminal Cases

The proposed Guidelines affirm the need for and elaborate upon the "satisfactory procedural safeguards" alluded to in Standard 5-7.2. Accordingly, the proposed Guidelines are not offered to modify Standard 5-7.2 or any other portion of the Third Edition of the ABA Standards for Criminal Justice, Providing Defense Services. Rather, the goal is to provide additional, specific guidance that is both consistent with existing ABA policy and urgently needed at this time. Eventually, we believe that the Guidelines will be appropriate to incorporate into a future revision of the standards.

Consistent with Standard 5-7.2, these Guidelines do not recommend the imposition of contribution fees. Rather, the Guidelines provide detailed recommendations, in accordance with relevant case law and standards, regarding the procedures that should be taken to ensure against the violation of constitutional rights in the event a jurisdiction requires defendants to contribute to their defense. Further, the Guidelines are designed to apply in situations where a series of significant payments (sometimes referred to as "partial eligibility payments") are assessed against a defendant throughout the course of proceedings, as well as the more common circumstance where contribution is required as a one-time, lump sum payment.³¹ Moreover, the Guidelines reject the practice of assessing across-the-board fixed "public defender application fees" that are pre-set by statute or other authority, by requiring that, before a decision to impose a contribution fee upon an individual is made, the individual's financial circumstances will be taken into account to determine what amount, if any, the individual has the ability to pay. The Guidelines should not be construed as endorsing the use of revenue recovered through contribution orders as a substitute for adequate government funding of indigent defense. Indeed, such an approach could have a disastrous impact on the provision of indigent defense services, as research shows that contribution fees typically do not generate much revenue. The 2001 report commissioned by SCLAID and examining various public defender application fee programs found that those programs that maintained data on fee collection rates reported only a 6-20% rate of collection.³² For this reason, the 2001 report recommends structuring all cost-recovery

²⁹ See Robert E. Pierre, *Right to an Attorney Comes at a Price: Minnesota Law Requiring Fees for Public Defenders is Challenged*, WASH. POST, October 20, 2003, at A01.

³⁰ See *State v. Tennin*, 674 N.W.2d 403 (Minn. 2004).

³¹ See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2(c) and commentary (3d ed. 1992) at 92 (noting how several state statutes authorize contribution in the form of "payment, usually of a nominal fixed sum, for the representation provided either at the time counsel is first appointed or during the course of the trial proceedings").

³² ABA BAR INFORMATION PROGRAM, *supra* note 11, at 29.

procedures to ensure that revenue generated from these measures supplements, rather than supplants, general fund appropriations for indigent defense.³³

Each of the proposed Guidelines is explained fully in the section that follows.

II. PROPOSED ABA GUIDELINES ON CONTRIBUTION FEES FOR COSTS OF COUNSEL IN CRIMINAL CASES

Guideline 1: Provision of Satisfactory Procedural Safeguards

Guideline 1 reaffirms Standard 5-7.2(c)³⁴ by stating in part that contribution fees should not be assessed unless procedural safeguards are provided. Further, Guideline 1 supplements Standard 5-7.2(c) by indicating that the purpose of such procedural safeguards is “to assure that assessments do not impose substantial financial hardships and do not chill exercise of the right to counsel.” This purpose is consistent with the ruling of the U.S. Supreme Court in *Fuller v. Oregon*³⁵ regarding the constitutionality of an Oregon statute requiring reimbursement of counsel costs from convicted defendants.³⁶ In *Fuller*, the Court held that Oregon’s statute did not chill the exercise of the Sixth Amendment right to counsel because it contained certain procedural safeguards that ensured a repayment obligation would never be imposed against those convicted defendants “who remain indigent or for whom repayment would work ‘manifest hardship.’”³⁷ The Minnesota Supreme Court’s recent decision in *State v. Tennin*³⁸ recognized the *Fuller* decision as applicable to contribution programs. Specifically, the court held that a Minnesota application fee statute requiring indigent defendants to pay amounts ranging from \$50-200 violated the federal and state constitutional right to counsel because it did not contain the same procedural safeguards that were noted with approval in *Fuller*.³⁹

The remaining Guidelines describe fully the necessary procedural safeguards that are referenced within Guideline 1.

³³ *Id.* at 27. For example, the report states that “[a]fter reimbursing court personnel, funds generated by administrative fees should go to a dedicated fund for indigent defense and not the county’s or state’s general fund.”

³⁴ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2(c) (3d ed. 1992) (“Contribution should not be imposed unless satisfactory procedural safeguards are provided.”).

³⁵ 417 U.S. 40 (1974).

³⁶ See *supra* text accompanying notes 11-14 for a discussion of the difference between reimbursement versus contribution as a cost-recovery method.

³⁷ *Fuller*, 417 U.S. at 53. The particular statutory provisions that were noted with approval by the Court stated that: (1) “a requirement of repayment may be imposed only upon a convicted defendant;” (2) “a court may not order a convicted person to pay these expenses unless he ‘is or will be able to pay them;” (3) in determining the amount and method of payment, the “court must ‘take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose;” (4) “a convicted person under an obligation to repay ‘may at any time petition the court which sentenced him for remission of the payment of costs or any unpaid portion thereof;” (5) “the court is empowered to remit if payment ‘will impose manifest hardship on the defendant or his immediate family;” and (6) “no convicted person may be held in contempt for failure to repay if he shows that ‘his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort” to pay. *Id.* at 45-46.

³⁸ 674 N.W.2d 403 (Minn. 2004).

³⁹ *Id.* at 410-411.

Guideline 2: Determination of Ability to Afford a Contribution Fee

Guideline 2 provides that, before any fee is ordered, the accused person or counsel should be given the opportunity to be heard and to present information, including witnesses, concerning whether a fee can be afforded. In the event a contribution fee is ordered prior to providing counsel for an accused person, the Guideline states that the order should be subject to review at the request of counsel and counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded.

Guideline 2 aims to provide two of the procedural safeguards recognized by the U.S. Supreme Court in *Fuller v. Oregon*: (1) the prohibition against requiring repayment of counsel costs from defendants who are unable to pay; and (2) the requirement that a court take into account the defendant's financial resources and the burden that will be imposed in determining the amount and method of payment.⁴⁰ Further, the Guideline recognizes the importance of the opportunity for judicial review of a contribution order, given the potential for error in the initial determination of ability to pay to lead to an unduly burdensome contribution fee that could chill the exercise of the right to counsel.⁴¹

Guideline 3: Collection of the Fee

In accordance with commentary to Standard 5-7.2, Guideline 3 provides that the court or its designee, and not counsel, should be responsible for collecting payment of any contribution fee. The commentary recommends exempting counsel from this responsibility “to avoid interference with the attorney-client relationship.”⁴²

Guideline 4: Enforcement of Payment

Guideline 4 provides in part that failure to pay a contribution fee should not result in imprisonment. This provision is similar to one of the procedural safeguards noted with approval in *Fuller* concerning reimbursement, which provided that a convicted defendant should not be held in contempt for failure to repay costs of counsel unless the failure was attributable to an intentional refusal to pay or to a failure to make a good faith effort to pay.⁴³ However, Guideline 4 provides additional protection with respect to contribution fees—by essentially providing that imprisonment should never result under any circumstances—in recognition of the unsuitability of imprisonment as an enforcement mechanism given the substantial cost in terms of liberty deprivation compared to the minimal benefit of extracting a nominal sum.⁴⁴

⁴⁰ See *Fuller*, 417 U.S. at 45-46.

⁴¹ A few state statutes expressly provide for judicial review of an order to pay a public defender application fee. See, e.g., N.M. STAT. ANN. § 13-15-12(C) (West, WESTLAW through First Legis. Session); OR. REV. STAT. § 151.487(5) (West, WESTLAW through 2001 Regular Legis. Session).

⁴² ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2 and commentary (3d ed. 1992) at 93-94.

⁴³ See *Fuller*, 417 U.S. 40, 46 (1974).

⁴⁴ A few state statutes expressly provide that failure to pay a public defender application fee may not result in grounds for contempt. See, e.g., CAL. PENAL CODE § 987.5(c) (West, WESTLAW through 2002 Reg. Sess., 1st and 2nd Ex. Sess., ch. 1 of 3rd Ex. Sess., and Oct. 7, 2003 election); OR. REV. STAT. § 151.487(2) (West, WESTLAW through 2001 Regular Legis. Session).

Guideline 4 also provides that failure to pay a contribution fee should not result in the denial of counsel at any stage of proceedings. This provision is based upon the decision of the U.S. Court of Appeals for the Eighth Circuit in *Hanson v. Passer*.⁴⁵ In *Hanson*, the Eight Circuit held that, if a defendant is determined to be incapable of retaining an attorney and the court appoints counsel, “the court cannot then withhold the constitutionally-mandated appointment until a sum of money is paid.”⁴⁶ The Guideline is also consistent with Standard 5-7.1 of the ABA Standards for Criminal Justice, Providing Defense Services, which provides in part that “[c]ounsel should not be denied because of a person’s ability to pay part of the cost of representation.”⁴⁷

Guideline 5: Rights Upon Imposition of Contribution Fee

Guideline 5 provides that a person ordered to contribute has the right to petition the court to waive the fee in the event of future inability to pay. Further, the Guideline states that the court should waive a fee previously ordered if it determines that payment will result in substantial financial hardship to the person or to the person’s dependents. This Guideline is designed to provide two of the procedural safeguards noted with approval by the U.S. Supreme Court in *Fuller v. Oregon*: (1) the opportunity for a convicted person who is ordered to make repayment to petition the court at any time thereafter for “remission of the payment;” and (2) the authority for the court to “remit” payment if it determines payment will impose manifest hardship on the person or the person’s immediate family.⁴⁸

Guideline 6: Notice of Potential Obligation of a Contribution Fee

Guideline 6 reaffirms and expands upon Standard 5-7.2(b)⁴⁹ by requiring, prior to the offer of counsel, comprehensive oral and written notice to any person who might be required to pay a contribution fee. The Guideline also provides for such notice upon request for counsel if counsel

⁴⁵ 13 F.3d 275 (8th Cir. 1994) (court practice of preconditioning the appointment of counsel on prepayment of reimbursement of counsel costs held unconstitutional in violation of Sixth and Fourteenth Amendments).

⁴⁶ *Id.* at 280. *See also* Cameron v. Justice of the Taunton District Court, No. 92-203 (Mass. June 5, 1992) (unpublished, single-justice interim order reinstating counsel following district court’s denial of counsel for failure to pay \$40 contribution fee). A minority of state statutes expressly provide that failure to pay a public defender application fee may not result in the withdrawal of counsel. *See, e.g.*, CAL. PENAL CODE § 987.5(c) (West, WESTLAW through 2002 Reg. Sess., 1st and 2nd Ex. Sess., ch. 1 of 3rd Ex. Sess., and Oct. 7, 2003 election); DEL. CODE ANN. § 4607(c) (West, WESTLAW through June 12, 2003 of 2003 First Regular Legis. Session); FLA. STAT. ANN. § 27.52(2)(c) (West, WESTLAW, through 2003 First Regular Legis. Session and 2003 Special A, B, C, D, and E Legis. Sessions); OR. REV. STAT. § 151.487(2) (West, WESTLAW through 2001 Regular Legis. Session); TENN. CODE ANN. § 40-14-103(b)(1) (West, WESTLAW through 2003 First Regular Legis. Session).

⁴⁷ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.1 (3d ed. 1992). *But see* NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES Guidelines 1.7(a) (1976) (stating contribution should be required as a condition of continued representation if accused is determined able to pay).

⁴⁸ *See Fuller*, 417 U.S. at 46.

⁴⁹ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-7.2(b) (3d ed. 1992) (“Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution”).

is not offered, in recognition that a person sometimes requests counsel before an actual offer of counsel is made.⁵⁰

Guideline 6 indicates that the notice of a potential obligation of contribution should specify the exact nature of the obligation (i.e., that the person may be required to pay a fee for the cost of counsel if the person has the ability to do so without substantial financial hardship). Further, the Guideline provides that the person should be notified that: counsel will be provided at all stages of proceedings regardless of whether the person actually pays any required contribution fee, and failure to pay will not result in imprisonment (consistent with Guideline 5); the person's attorney can challenge the imposition of a contribution fee (consistent with Guideline 3); and, in the event of future inability to pay the fee, the person will have the right to petition the court to waive any required fee (consistent with Guideline 6). This information is essential to ensure that a person does not waive counsel out of fear that: (1) the person may be forced to pay a fee that the person cannot afford; or (2) no recourse is available in the event a fee is imposed erroneously or later becomes burdensome.

III. CONCLUSION

The proposed *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases* provide much-needed guidance on the procedures that should be followed to safeguard against constitutional violations when requiring indigent defendants to contribute to the costs of their defense. The ABA should adopt these Guidelines to help preserve the right to counsel for and prevent wrongful convictions of poor persons accused of crimes across the country.

Respectfully submitted,

Bill Whitehurst, Chair
Standing Committee on Legal Aid and Indigent Defendants

August 2004

⁵⁰ Even though ABA Criminal Justice Standard 5-8.1 provides that an offer of counsel should be made as soon as custody occurs, commentary to Standard 5-8.1 acknowledges that this does not always occur in reality. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-8.1 and commentary (3d ed. 1992) at 101 ("In the event the accused is not contacted and offered the assistance of counsel, he or she should at least be afforded the opportunity to request a lawyer.").