RECOMMENDATION

RESOLVED, That the American Bar Association recommends that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set; and

FURTHER RESOLVED, That each jurisdiction provide adequate resources to support effective implementation of such representation by counsel for indigent defendants.
Throughout the United States, the overwhelming majority of indigent defendants are not represented by counsel when bail is initially set in State courts. Indeed, only eight States, and the District of Columbia, provide a statutory right for counsel's assistance at the bail-setting stage. Except in one or two urban centers, twenty-three States do not provide appointed counsel for indigent defendants at bail hearings. In the remaining nineteen States, bail hearings are always conducted without appointed counsel.

An accused who cannot post bail remains incarcerated and invariably does not meet a court-appointed attorney until the next court appearance, which will be scheduled days, weeks, or months later, depending upon the jurisdiction. For instance, in some localities, such as Burlington, Vermont; Decatur, Georgia; or Bend, Oregon; the delay will be one to three days. In other local courts, such as Pittsburgh, Pennsylvania; Salt Lake City, Utah; and Richmond, Virginia, the initial attorney-client meeting occurs some time within the first 10 days from arrest. In still other localities, the delay is longer. For example, in Detroit, Michigan, and Santa Fe, New Mexico, an accused waits between 10 and 20 days; in Baltimore, Maryland, and Trenton, New Jersey, 30 days; in Cleveland, Ohio, 30-45 days; and in Greensboro, North Carolina, and New Orleans, Louisiana, 60 days.

Frequently, the pretrial detainee who is awaiting trial on misdemeanor or less serious felony charges spends substantial time in jail before being released without ever having been convicted of any crime. In Maryland, for example, more than one-half of criminal cases prosecuted in the lower criminal court during fiscal year 1996 ultimately concluded without...
conviction.\footnote{During fiscal year 1995-1996, there were 178,935 criminal cases filed statewide in Maryland's District Court. Of this total, 90,523, or slightly over 51%, criminal cases were nolle prossed, dismissed, or placed on the inactive calendar. District Court of Maryland, Criminal Filing and Disposition Statistics, July 1995-June 1996. The period for final disposition varied from county to county. In Baltimore City, for example, cases concluded within an average of 47 days from arrest. Kate Schatzkin, Attorneys for Lockup Lacking, Baltimore Sun, April 14, 1995, B1.}

The inability of individuals to post bail and to obtain counsel's immediate assistance at the bail-setting stage has resulted in serious overcrowding in local jails. In 1995, the United States Department of Justice reported that approximately one-half million people were incarcerated while awaiting trial.\footnote{Fox Butterfield, Slower Growth in the Number of Inmates, New York Times, A10 (Jan. 20, 1997) (referring to 12 States).} Because jail overcrowding results in unsafe and unhealthy conditions for correctional officers and detainees, many local jails are subject to court monitoring.\footnote{For example, in the opinion of the Administrative Judge of Baltimore City's lower criminal court, "one-third of all District Court criminal cases which are dismissed at trial could be eliminated at the point of arrest." See, Baltimore City's Russell Committee Report, see supra note 6, at 31.}

Congested court dockets and overcrowded jails would be significantly reduced if counsel were provided for indigent defendants at bail hearings. Defense and prosecuting attorneys could quickly identify individuals who are eligible for pretrial release, thereby freeing limited jail space for those who require pretrial detention. Early representation by counsel would allow immediate identification of charges that are inappropriate for criminal prosecution,\footnote{Nationally, it costs about fifty dollars daily for each individual who is held in pretrial detention. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Jails and Jail Inmates 1993-1994 (April, 1995). Using the city of Baltimore as an example, we can gain a sense of the potential savings that would be realized by providing court-appointed counsel at bail hearings. Counsel could gain the pretrial release of people who faced weak charges, or inappropriately high bailas, on the second day following arrest, rather than the forty-seventh day from arrest when most cases conclude, see supra note 6. Multiplying the $50 daily cost of detention by the 45 fewer days needed to resolve a case results in a significant savings for that one individual ($2,250). But many other detainees also would benefit from counsel's earlier representation. In fiscal year 1995, for example, Baltimore's local jails housed 25,000 people. More than half eventually were released without conviction. If lawyers succeeded in gaining release for one out of five individuals at the bail stage, the savings would be about} permitting the criminal justice system to devote its limited resources to more serious cases. With lawyers involved at the initial court proceeding, many cases also would be resolved much sooner -- in days, rather than weeks or months. The potential for economic\footnote{For example, in the opinion of the Administrative Judge of Baltimore City's lower criminal court, "one-third of all District Court criminal cases which are dismissed at trial could be eliminated at the point of arrest." See, Baltimore City's Russell Committee Report, see supra note 6, at 31.} and human\footnote{For example, in the opinion of the Administrative Judge of Baltimore City's lower criminal court, "one-third of all District Court criminal cases which are dismissed at trial could be eliminated at the point of arrest." See, Baltimore City's Russell Committee Report, see supra note 6, at 31.} savings is significant, and would
more than offset the costs needed to extend counsel's guarantee to the bail stage. In sum, by providing counsel at the accused's initial appearance, States should realize substantial savings by promoting a more efficient criminal justice system.

Representation by counsel at bail hearings also would further the legal system's deeply-rooted values of fairness and equal justice, cornerstones of our democracy. Several decades ago, the Supreme Court recognized that an accused's right to counsel is one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In 1963 in *Gideon v. Wainwright*, the Court established that the constitutional right to counsel requires each State to provide appointed counsel in felony cases to represent "any person haled into court who is too poor to hire a lawyer..." Subsequent Court decisions in *Argersinger v. Hamiliton* and *Scott v. Illinois* extended the Sixth and Fourteenth Amendment right to appointed counsel to defendants charged with misdemeanors that involve the loss of individual freedom, "so that the accused may know precisely what he is doing and... is treated fairly." While *Gideon* acknowledged that lawyers are a "necessity, not a luxury" to protect an accused's right to a fair trial, three decades earlier the Supreme Court in *Powell v. Alabama* had recognized that an accused "requires the guiding hand of counsel at every step in the proceedings against him." Powell identified "the most critical period" for counsel to commence representation as "from the time of arraignment until the beginning of... trial, when

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11 Durin the period of pretrial detention, there are incalculable social costs incurred when detainees lose their jobs, homes, or experience family dislocation because of prolonged incarceration.


14 Id. at


17 407 U.S. at 34.

18 372 U.S. at.

19 287 U.S. 43 (1932).

20 Id. at 69.
consultation, thorough-going investigation and preparation is vitally important."20 Recent Supreme Court decisions clearly establish that the right to counsel attaches once the accused appears at a judicial proceeding to answer a criminal accusation.21 The accused needs counsel who can commence an investigation and begin to prepare a defense at the time of the initial judicial appearance. But equally important is counsel's representation at the bail hearing, to protect the individual's liberty interest. For no matter who the defendant is, "an unaided layman has little skill in ... coping with an intricate procedural system,"22 such as the bail proceeding. The pro se incarcerated defendant, who has been incarcerated for hours and sometimes days, is unable to effectively present the most persuasive argument in favor of pretrial release. A lawyer, on the other hand, fully appreciates the nature of the expedited bail proceeding, and can provide the committing magistrate with corroborated information about the accused, including residence, employment, and prior criminal history. The lawyer also can propose more favorable bail alternatives, assist in explaining the procedures for posting bail, and expedite the release process.

More than thirty years ago, the federal criminal justice system recognized the lawyer's crucial role at the bail-setting stage by modifying the Rules of Criminal Procedure to guarantee representation by counsel.23 By approving the proposed recommendation, the American Bar Association takes a giant step forward to making this practice a reality in State and Territorial courts, too.

The American Bar Association is not without a voice on this issue. Standard 5-6.1 of the ABA Standards for Criminal Justice, Chapter on Providing Defense Services, Third Edition, reads as follows:

> Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before committing magistrate, or when formal charges are filed, whichever occurs earlier... [Emphasis added]

But this ABA Standard is an aspirational one, urging the appointment of counsel not only when an indigent defendant is appearing before a committing magistrate, but also for times not

20 Kirby v. Illinois, 406 U.S. 682 (1972) holding that the right to counsel attached once adversarial proceedings had commenced "by way of formal charge, preliminary hearing, indictment, information or arraignment.") Subsequent decisions declared that a defendant's initial appearance in the lower criminal court triggered an accused's right to counsel. McNell v. Wisconsin, 461 U.S. 131 (1983); Michigan v. Jackson, 415 U.S. 625 (1974)

21 Id. at 57.

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

23 See supra, note 1, referring to the language of Federal Rule 44(a) of the Rules of Criminal Procedure.
recognized by American courts as “critical stages” at which time a right to an attorney should apply.

The attached resolution has a different purpose than the Standard. Rather than aspire to a proposed height for indigent representation, the attached resolution seeks to more uniformly guarantee that the minimum level of representation is elevated, nationally. It proposes this minimum level of representation as a specific remedy to specific issues, namely fair representation of the poor and unnecessary prison overcrowding. The resolution is further distinguished by proposing that this level of representation ought not just be implemented, but be implemented through the meaningful allocation of adequate resources to carry out the additional burden it would place on existing indigent defense systems.

By adoption of the attached resolution, it is not intended nor anticipated that the ABA Standards of Criminal Justice, specifically Standard 5-6.1, would in any way be superseded or otherwise diminished. The attached resolution is an important and necessary complement to otherwise existing aspirational Association policy.

Respectfully submitted,

Ronald Goldstock,
Chairperson
Criminal Justice Section

August 1998
112D

GENERAL INFORMATION FORM

No. (Leave Blank)

Submitting Entity: Criminal Justice Section
Submit By: Ronald Goldstock

1. Summary of Recommendation(s):
   The recommendation urges that all U.S. jurisdictions insure that defendants are represented by counsel at their initial judicial appearance where bail is set and that adequate resources be apportioned for effective implementation.

2. Approval by Submitting Entity:
   This report with recommendation was approved by the Criminal Justice Section Council at its March 28-29, 1998 meeting for consideration by the ABA House of Delegates in August 1998.

3. Has this or a similar recommendation been submitted to the House of Delegates or Board of Governors previously?
   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
   Standard 5-6.1 of the ABA Standards for Criminal Justice, Third Edition, provides that:
   
   Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before committing magistrate, or when formal charges are filed, whichever occurs earlier.

   It is not anticipated that the ABA Standard would be affected by the adoption of the proposed resolution. The Standard represents a very broad aspirational goal as to when indigent defendants ought to receive legal representation. The Standard Comment notes that it exceeds the Supreme Court's interpretation of Sixth Amendment "critical stages" of when the right to an attorney ought to attach.

   The proposed resolution, on the other hand, proposes a uniform minimum standard of indigent representation that is already embraced in a minority of jurisdictions, including the federal system. Adoption of the resolution would not alter the ABA's aspirational
statement that attempts to raise the ceiling of indigent representation. It would merely seek to elevate the basement of what an appropriate minimal standard of representation should be. Recognizing that this would tax an already-taxed system of indigent representation, the resolution is further distinguished in that it ties the remedy to the appropriate allocation of adequate resources for implementation.

5. **What urgency exists which requires action at this meeting of the House?**

   As identified in the background report to the resolution, in many localities around the nation, persons simply accused of a crime may be incarcerated for periods ranging between 10 and 60 days while awaiting appointment of counsel before their trial. During this time, persons may lose a job or suffer injury to family relationships, and otherwise suffer psychologically, emotionally, and perhaps physically. Yet, many of these persons are confined pretrial unnecessarily and early intervention by counsel would have obtained their appropriate release.

6. **Status of Legislation (if applicable)**

   No legislation is pending.

7. **Cost to the Association. (Both direct and indirect costs.)**

   The Recommendation's adoption would not result in direct costs nor expenses to the Association.

8. **Disclosure of Interest. (If applicable.)**

   There is no conflict of interest that is known to exist.

9. **Referrals.**

   Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda, it is being circulated to the following:

   **Standing Committees:**
   - Armed Forces Law
   - Legal Aid and Indigent Defendants

   **Sections, Divisions and Forums:**
   - Administrative Law
   - Government and Public Sector Lawyers
   - Individual Rights and Responsibilities
   - Judicial Division
   - Law Student Division
   - Litigation
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Senior Lawyers Division
Senior State and Local Government Law
Young Lawyers Division

Affiliated Organizations:
Association of American Law Schools
The Federal Bar Association
Hispanic National Bar Association
Judge Advocates Association
National Asian Pacific American Bar Association
National Association of Attorneys General
National Association of Criminal Defense Lawyers, Inc.
National Bar Association, Inc.
National District Attorneys Association
National Legal Aid and Defender Association

10. **Contact Person.** (Prior to meeting.)

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11. **Contact Persons.** (Who will present the report to the House.)

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12. **Contact Person Regarding Amendments to this Recommendation.**

No proposed amendments are known to exist.