

Title: News from Around the Nation
Jon Mosher, Deputy Director
Sixth Amendment Center
P.O. Box 15556
Boston, MA 02215

American Bar Association, SCLAID
8th Annual Indigent Defense Summit
Gideon at 50: The Way Forward
Dallas, Texas – February 9, 2013

Good Morning - I thought the most efficient way to get through all of the news (and there was a lot this past year) is to organize my presentation around the *ABA Ten Principles*. And, since I was allotted only ten minutes, I will use my discretion to cull those ten down into one. So let's get going ...

SLIDE 2:

Independence is the preeminent need of every indigent defense system because without it, most of the other *ABA Principles* are unobtainable. That is, fearing the loss of income by not pleasing the judge or county executive or Governor who hired them, public defense counsel will take on more cases than they can ethically handle (in violation of *Principle 5*), will delay working on a case (in violation of *Principle 3*), will triage their hours available in favor of some clients, but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to *all* clients (*Principle 10*), and will agree to work under low-bid, flat fee contracts (*Principle 8*).

And, I can say that there were several news stories around each of these principles but I will defer to Cat Kelly and Steve Hanlon to talk about Missouri's workload issues; Bob Boruchowitz, hopefully, will talk about the Washington Supreme Court caseload

standards, and Doug Colbert can talk about Maryland and Principle 3's call for early appointment of counsel.

SLIDE 3:

So let's talk about the good news first

SLIDE 4:

On November 6, 2012 the New Mexico electorate voted overwhelmingly (62%) for a constitutional amendment requiring a statewide indigent defense commission. Politics has often trumped the independence of the right to counsel system in New Mexico. The Public Defender Department is a state-funded, state-administered indigent defense system that provides services through a combination of state-employed public defenders (in urban and transitional areas) and contract attorneys (for conflict representation and for primary services in rural parts of the state).

In February of 2011, the then-public defender was fired in the middle of the legislative session for daring to say that the Governor's proposed budget was not sufficient. Now, before anyone thinks that this is an attack on a sitting Republican Governor, undue political interference has known no political bounds in New Mexico. In fact, it was Democratic Governor Bill Richardson who did much the same thing *AND* vetoed a bill that overwhelming passed the legislature to create a commission several years back.

Across the nation this issue has known no political bounds whether it was then Governor Howard Dean of Vermont or most recently, New Jersey Governor Chris Christie that have dismissed public defenders for political reasons or simply as the spoils of political victory.

It will be interesting to see what happens in New Mexico, as the bill still needs to be signed by the Governor.

SLIDE 5:

Perhaps the most important news of the year, is that on December 18, 2012, the U.S. Department of Justice announced an agreement with Shelby County, Tennessee (Memphis) to usher in major reforms of the county's juvenile court system and the method for representing children in delinquency proceedings. Sweeping changes are afoot, including systemic safeguards, such as "reasonable caseloads," "attorney performance standards," and "training" for the juvenile defense function, among others. The DOJ/Shelby County agreement is an acknowledgement that the American Bar Association's Ten Principles are not just the parameters of a functioning adult indigent defense system, but a juvenile justice system as well.

Despite state law requiring public defenders to be appointed in the first instance, the Shelby County Office of the Public Defender has not handled juvenile delinquency representation in over 25 years. Rather, the Juvenile Court runs the Juvenile Defender's Office as a division of the court – with the presiding judge hand-picking the office head and certifying all of the JDO attorneys. Moreover, JDO is not a public defender office in the traditional sense. In fact, even the term "office" is a misnomer. JDO is just a collection of private attorneys that operate out of their own private law practices.

The agreement requires the defense function to be independent, specifically removing the judiciary from the administration of delinquency representation.

SLIDE 6:

Recognizing that having judges oversee the payment of indigent defense counsel “leads to conflict, disagreement, and dispute which negatively impacts the relationship between judges and lawyers and undermines the respect and dignity which is required in the criminal process,” the judiciary in Travis County, Texas has proposed a plan to create a new office of Managed Assigned Counsel that would “reposition the management of the felony and misdemeanor court appointed attorneys from the direct supervision of the Criminal Judges to a Director under the direction of an Indigent Defense Board.”

The Travis County plan inherently recognizes the need for the defense function’s independence. In particular, the plan notes that “one of the areas of greatest concern for the Travis County Judiciary,” is that it is “extremely difficult” for a judge to meet *ABA Principle 10*’s call for defense attorneys to be systematically reviewed against performance standards without the judges “engaging in advocacy in individual cases.” Moreover, judges have their own administrative duties and dockets to cover, making it impossible to supervise the “approximately 250 attorneys on the court appointed list.” According to the Travis County judges, the current system of judicial oversight results in little “significant quality control and oversight” to the point where “there may be defendants who are receiving services that are below a standard acceptable to the citizens of Travis County.”

It will be really interesting to see how this plan develops.

SLIDE 7:

Now comes the other side of the coin – those places that still have independence concerns or are retreating on the notion of

independence. To highlight this I present you with two systems that are as different as possible from one another: King County/Seattle and the state of Michigan.

SLIDE 8:

On January 3, 2013, King County, Washington publicly released a public defense reorganization plan that seeks to transition the staffs of the four existing independent, non-profit public defender agencies to full-time, county government employees. The proposed change comes on the heels of a settlement in a class action suit in which the Washington Supreme Court affirmed a lower court's determination that employees of the public defender agencies should be considered county employees for purposes of participating in the public employee retirement fund.

The King County plan weighed the benefits of three potential indigent defense structures for the Executive's proposed new county public defender agency: electing a chief public defender; placing oversight of public defender services under an independent commission; or having the chief public defender be a direct appointee of the county executive. Somewhat remarkably, the county concludes that having the chief be a direct county executive appointee meets the *ABA Ten Principles* demand for independence based on a flawed survey of like-sized jurisdictions.

In short, King County asked public defenders elsewhere, who are direct appointees of county executives or county commissioners, if they feel like their independence is ever infringed upon. Not surprisingly they said "no." Since, the public defenders *said* there is no issue, King County mistakenly concluded no issue exists.

SLIDE 9:

This is a good transition to talk about what's happening in

Michigan, because the problem of self-reporting is that it is difficult for people with no other outside experience to judge their own systems against prevailing national standards. We rarely find a public defender who will say, “my independence is compromised” when asked. This is true even in places like Michigan where public defense attorneys work on flat fee contracts for unlimited numbers of cases in which overhead expenses and trial-related expenses comes out of that single flat fee.

Such attorneys in Michigan receive their contracts directly from county administrators or judges. And due to the lack of independence, they know not to complain about the excessive number of cases they are forced to accept – because the county or the court will find someone who will do the work complaint-free. Even in the past few months, a number of Michigan attorneys have told us that they ask the police to reinvestigate cases rather than pay for an independent investigator out of their flat fee take home pay. But when asked if they are “independent,” to a person they will say “yes.”

The Michigan Legislature came really close to passing a substantial indigent defense bill this year – it overwhelmingly passed the House before getting stuck in the Senate. The clock ran out when the chair of Senate Judiciary sat on the bill. The Senator is a former Sheriff who stated on many occasions that in his thirty years he has never seen a poor person treated badly in a Michigan courtroom. It shows you just how difficult it is for stakeholders to pass *any* legislation -- let alone *good* legislation.

What I can tell you is that there is a committed group of people, including key Senators, representatives, judges, the executive branch, and, of course, the State Bar of Michigan that are still working hard on this. And, indeed just this week the makings of a deal was struck to take another shot at creating a statewide indigent defense commission with authority to set standards and the state

funding any new monies for counties to meet those standards. The devil will be in the details, but at the very least the parameters are in place.

Now because it is early and the coffee hasn't kicked in yet, the 6AC thought we would wake you up by giving you a pop quiz?

SLIDE 10:

Which state was the first state to require the appointment of counsel in all cases (including misdemeanors) *AND* the payment of counsel for services rendered?

SLIDE 11:

Hint – the year was 1875

The answer is

SLIDE 12: Nevada

I mention this because indigent defense in rural Nevada is deeply flawed.

In 1875 the legislature required attorneys to be paid \$50 per misdemeanor case and there are *still* attorneys in rural Nevada that only make \$50 per misdemeanor case today.

SLIDE 13:

The Sixth Amendment Center produced a report, to be released by the Nevada Supreme Court in March of this year, which calls for the creation of a statewide rural indigent defense commission to oversee a managed assigned counsel system.

The 6AC tells the story of Nevada's own Clarence Earl Gideon – the man who challenged a Florida court's decision to deny him an attorney. As you all know, Gideon's travails eventually led the United States Supreme Court in 1963 to hand down the landmark case of *Gideon v. Wainwright* requiring states to provide competent representation to poor people facing felony charges. In Nevada, that man was Shepherd L. Wixom – an ex-felon charged in a series of stagecoach robberies. His story, unlike Gideon's, does not result in his freedom. However, Shep Wixom's case does lead the Nevada Supreme Court to come to the forefront of right to counsel jurisprudence – almost a century before the U.S. Supreme Court's *Argersinger* decision.

The 6AC is hoping the citizens in Nevada will take ownership of the rural right to counsel crisis, embrace their heritage, and force change in 2013.

SLIDE 11:

In closing, I just want to say that if you want to keep abreast of indigent defense breaking news, you should sign up for the 6AC blog "Pleading the Sixth". It is entirely free to get e-mail notifications and we encourage everyone to go to our website and sign up.

Thank you.