AMERICAN BAR ASSOCIATION
SECTION OF CRIMINAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases that:

1. Formalize the means for providing appropriately experienced and qualified appointed or assigned defense counsel in serious criminal cases, modeled after the means prescribed in Standards 5-1.2 and 5-1.3 of the ABA Standards for Criminal Justice Providing Defense Services and in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, by:

   a. Adopting and implementing a Criminal Defense Plan to be administered by a Responsible Agency, which is either a defender organization or an independent authority; and

   b. Authorizing the Responsible Agency to establish and publish recommended standards for defense representation, including knowledge, training, and experience in the defense of serious criminal cases, and using as a guide the requirements enumerated in Standard 5-2.2 of the ABA Standards for Criminal Justice Providing Defense Services;

2. Ensure that the workloads of defense counsel be maintained at levels that enable them to provide the level of representation recommended by the Criminal Defense Plan, using as a guide the requirements enumerated in Standard 5-5.3 of the ABA Standards for Criminal Justice Providing Defense Services;

3. Ensure that defense counsel are compensated at rates no less than comparable prosecutors and that other defense team members are compensated at rates no less than comparable professionals in the private sector, using as a guide the requirements enumerated in Standard 5-2.4 of the ABA Standards for Criminal Justice Providing Defense Services;

4. Ensure that defense counsel have adequate resources and training to fulfill their obligation to conduct thorough and independent investigation into their clients' guilt or innocence in every case, including heightened scrutiny into cases that rely on eye-witness identification, witnesses who receive any benefit in return for their testimony, and confessions by youthful or mentally limited defendants;

5. Require defense counsel to investigate circumstances indicating innocence regardless of the client's admissions or statements of facts constituting guilt or the client's stated desire to pleas guilty or dispose of the case without trial.

6. Require that defense counsel cooperate fully with successor counsel, including the preservation and transfer of all pertinent records and information.

7. Require defense counsel in all cases, whether or not serious criminal cases, to meet the requirements enumerated in the ABA Standards for Criminal Justice Providing Defense Services.

REPORT

Introduction:

The overriding goal of these Recommendations relating to criminal defense counsel is to reduce the risk of wrongly convicting innocent criminal defendants. Given a properly functioning criminal justice process, particularly at the trial stage, an accurate determination can be made as to the defendant's guilt or innocence, and the role of defense counsel is critical to this determination. These Recommendations do not address the overall need for competent criminal defense counsel for all criminal defendants, as that more general issue is addressed comprehensibly by the well-established ABA Criminal Justice Standards.[1] A basic premise of these Recommendations is that all criminal defendants, regardless of their guilt or innocence, have a constitutional right to and should receive the effective assistance of counsel for their defense.[2] This fundamental Sixth Amendment right[3] is not dependent in any way upon whether or not the criminal defendant is innocent. Similarly, we recognize that the criminal defense bar has an ethical obligation to provide "competent representation"[4] to all criminal defendants and to act with "reasonable diligence"[5] in such representation, without regard for the actual innocence of those clients. We also endorse the ABA Criminal Justice Standards view that the basic duty of defense counsel is to provide "effective, quality representation"[6] and that the duties and responsibilities of defense counsel are the same whether privately retained, appointed, or assigned in some other manner.[7]

Serious Criminal Cases Not Involving the Death Penalty:

These Recommendations and supporting Report build upon this premise of effective, competent and diligent criminal defense counsel. Given the focus of our Committee, we particularly considered the unique additional implications for criminal defense counsel of the risk of convicting

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[1]AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION and PROVIDING DEFENSE SERVICES (Chicago: American Bar Association) (3rd ed. 1993) (hereinafter ABA STANDARDS].

[2]Strickland v. Washington, 466 U.S. 668, 686-687 (1984).

[3]The Sixth Amendment to the United States Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

[4]AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT at Rule 1.1 (2004) [hereinafter ABA MODEL RULES].

[5]*Id*. at Rule 1.3

[6]ABA STANDARDS, *supra* note 1, at Standard 4-1.2(b).

[7]ABA STANDARDS, *supra* note 1, at Standard 4-1.2(h).

innocent criminal defendants. Our Committee's concern goes to any and all innocent criminal defendants who are wrongly convicted, but we appreciate the broad scope and impact of our Recommendations and the extraordinary difficulty of implementing them for all criminal prosecutions nationwide. We also presume that a greater injustice occurs in the more serious criminal cases of convicting an innocent defendant instead of convicting the guilty defendant. For more serious criminal cases, the convicted defendants face more severe punishments and the communities in which the crimes occurred continue to be threatened by additional serious crimes from the actually guilty party who is still at large. Therefore, we assume that the more serious the crime, the more important the need to reduce the risk of wrongly convicting the innocent and thereby to increase the probability of rightly convicting the guilty.

Our Committee discussed at some length just what offenses should be included within the category of "serious criminal cases." We began by noting that extensive and detailed ABA recommendations already exist for the most serious criminal cases–death penalty cases.[8] Those ABA death penalty guidelines provide sweeping recommendations for defense counsel in death penalty cases and have been expressly recognized by the United States Supreme Court as a source of "well-defined norms"[9] for death penalty defense counsel. Therefore, these Recommendations and Report from our Committee expressly do not apply to death penalty cases (see Recommendation (7) above). We are left, then, with "serious criminal cases" to mean something less than death penalty cases but nonetheless "serious". Our Committee effort to define "serious criminal cases" more precisely included discussion of such categories as (1) all felonies, (2) all crimes for which ten or more years incarceration is authorized, (3) all crimes against the person, and (4) various other ways in which to draw this line. In the end, our Committee opted not to define "serious criminal cases" with any more precision than "cases involving punishments of less than the death penalty but nonetheless resulting from serious crimes." This category of crimes is considerably narrower than the sweeping category addressed by the ABA Criminal Justice Standards: "offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise."[10] Our intentionally vague definition of "serious criminal cases" can then be interpreted on a jurisdiction-by-jurisdiction basis, based upon a given jurisdiction's volume of serious crime and availability of qualified defense counsel to represent such clients.

Effective Assistance and Ethical Competency of Defense Counsel:

[8]AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Chicago: American Bar Association) (Revised ed. Feb. 2003) [hereinafter ABA GUIDELINES].

[9]Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003).

[10]ABA STANDARDS, *supra* note 1, at Standard 5-5.1.

The most common issue raised in post-trial proceedings is the ineffectiveness of the trial counsel under the Sixth Amendment as interpreted by *Strickland v. Washington*.[11] In *Strickland*, the Supreme Court held that the standard to which appointed counsel are to be held is the same for all criminal cases regardless of the seriousness of the possible sentences, and that standard is "effective assistance of counsel."[12] In order for a court upon appeal or collateral review to find that the lawyer's trial-level performance was ineffective under the Sixth Amendment, the defendant must prove first that the attorney's acts or omissions were "outside the wide range of professionally competent assistance"[13] as compared to an "objective standard of reasonableness."[14] Even if the defendant can prove that trial counsel's performance was unreasonable under this competence prong, the defendant must then prove the second prong, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[15] In making these assessments, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[16]

Along with *Strickland*, the Supreme Court decided the companion case of *United States v. Cronic*.[17] Here it was observed that the original appointment of counsel could be so defective as to be treated as a per se violation of a criminal defendant's Sixth Amendment right.[18] However, assuming that the original appointment of counsel passes constitutional muster, then the assessment of effectiveness turns to counsel's actual performance at trial.[19] The role of defense counsel is seen in *Cronic* as to assure fairness in the adversary process by confronting the prosecution's case and subjecting it to the "crucible of meaningful adversarial testing."[20]

Despite, or perhaps because of, the standards for appointed counsel laid out in *Strickland* and *Cronic*, the Supreme Court and almost all lower courts have been very reluctant to find that the performance of appointed counsel in criminal cases to have been "ineffective" under the Sixth Amendment. A large part of the reason for this has been the second prong of *Strickland*, requiring proof of a reasonable probability that the result would have been different if appointed counsel's performance had been up to par. In many serious criminal penalty cases, evidence of the defendant's

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[11] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[12] *Id*. at 686-87.
[13] *Id*. at 690.
[14] *Id*. at 688.
[15] *Id*. at 694.
[16] *Id*. at 689.
[17] 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[18] *Id*., 466 U.S. at 659-61.
[19] *Id*. at 662.
[20] *Id*. at 656.

guilt is very strong and many justifications exist upon which a harsh punishment might rest. Combined with a court's "strong presumption"[21] of reasonable performance by defense counsel, criminal defendants on appeal or on collateral review have seldom been able to prove both incompetence of their trial lawyer and prejudice resulting from that incompetence, even in cases in which a new trial might well result in an acquittal.

Even before getting to the question of whether the defense attorney did a reasonable job, one might expect that attorney at least to have been awake during key parts of the trial. This frequently-condemned image of the sleeping defense attorney has come under attack in such cases as *Javor v. United States*,[22] holding that "[w]hen a defendant's attorney is asleep during a substantial portion of the trial, the defendant has not received the legal assistance necessary to defend his interests at trial."[23] Comparing the sleeping defense attorney to the reasonable performance standard, courts have observed:

> [T]he buried assumption in our *Strickland* cases is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.[24]

A high profile case from Texas raised this same issue in *Burdine v. Johnson*.[25] During Calvin Burdine's death penalty trial, his court-appointed defense attorney "repeatedly dozed or slept as the State questioned witnesses and presented evidence supporting its case against Burdine"[26] during the guilt stage of the trial process. In *Burdine*, the federal district court had observed that "sleeping counsel is equivalent to no counsel at all."[27] The Fifth Circuit agreed, reversing Burdine's capital murder conviction.[28] Despite being petitioned loudly and aggressively by the Texas attorney general to reverse the Fifth Circuit's decision, the Supreme Court denied certiorari without comment.[29] While the Supreme Court's silence certainly has no official significance as to the merits of a particular argument, this denial of certiorari was interpreted by the national media as the

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[21] *Id.* at 689.

[22] 724 F.2d 831 (9th Cir. 1984).

[23] *Id.* at 834.

[24] Tippins v. Walker, 77 F.3d 682 (2d Cir.1996).

[25] 262 F.3d 336 (5th Cir. 2001), *cert. denied sub nom*, Cockrell v. Burdine, 535 U.S. 1121, 122 S.Ct. 2347, 153 L.Ed.2d 174 (2002).

[26] *Id*., 262 F.3d at 339.

[27] *Id*. at 338.

[28] *Id*. at 338.

[29] Cockrell v. Burdine, 535 U.S. 1121, 122 S.Ct. 2347, 153 L.Ed.2d 174 (2002).

Supreme Court's unwillingness even to imply that it is acceptable for a defense attorney to sleep through a criminal trial.[30]

The latest word from the United States Supreme Court on this issue is the case of Maryland death row inmate Kevin Wiggins,[31] also examining standards for evaluating claims of ineffective assistance of counsel in the context of the sentencing hearing in a death penalty case.[32] In this federal habeas corpus proceeding, the federal district court[33] found that defendant's sentencing counsel was ineffective for failing to investigate and present a mitigation defense during sentencing.[34] The appellate court disagreed and found counsel's performance to have been reasonable.[35] The Supreme Court decided *Wiggins* on June 26, 2003, holding that defense counsel's inadequate investigation of mitigating evidence fell below prevailing professional standards[36] and that a reasonable probability existed that the jury would not have sentenced the defendant to death if it had heard that mitigating evidence.[37] The *Wiggins* Court simply applied the now-standard two-pronged test from *Strickland*,[38] looking to whether it was reasonable under prevailing professional norms for defense counsel to have based their critical decision not to introduce mitigating evidence upon such a minimal investigation into that evidence.[39] *Wiggins* relied in part upon an earlier version of the ABA death penalty guidelines[40] to identify "well-defined norms"[41] in death penalty cases which called for aggressive investigation into all reasonably available mitigating evidence.[42]

In addition to these minimum constitutional standards that must be met, several specific legal ethics issues are relevant as indicated by the American Bar Association's most recent legal ethics rules.[43] The ABA's first ethics rule, and arguably the most basic, addresses an attorney's

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[30] *See, e.g.*, Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, N.Y. TIMES, June 4, 2002, at A16.
[31] Wiggins v. Smith, 539 U.S. _____, 123 S.Ct. 2527, 154 L.Ed.2d 471 (2003).

[32] *Id*., 123 S.Ct. at 2531, 2536.
[33] Wiggins v. Corcoran, 164 F.Supp.2d 538 (2001).
[34] *See* Wiggins v. Smith, 123 S.Ct. at 2530.
[35] Wiggins v. Corcoran, 288 F.3d 629 (4th Cir. 2002).
[36] Wiggins v. Smith, 123 S.Ct. at 2542.
[37] *Id.* at 2543.
[38] *Id.* at 2535-36.
[39] *Id*. at 2541-42.
[40] *Supra*, note 6.
[41] *Id.* at 2537.
[42] *Id.* at 2536-37.
[43] ABA MODEL RULES, *supra* note 4.

fundamental competence: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[44] However, the ethics rules make clear that even neophyte lawyers can provide competent representation in many cases, so long as he or she relies upon universal lawyering skills and then studies hard to become competent even in a "wholly novel field."[45] The ABA Criminal Justice Standards set the standard for all criminal defense counsel at "effective, quality representation."[46]

In contrast, the ABA death penalty guidelines adopted the concept of "high quality legal representation"[47] instead of Rule 1.1's "competent representation"[48] or of *Strickland's* "effective assistance."[49] As these terms are commonly understood, therefore, a criminal defense counsel's representation of a capital defendant might be both ethical ("competent") and constitutional ("effective") but fail the ABA's test ("high quality"). While the current recommendation uses the term competent, rather than high quality, the ABA standards and ethical obligations ensure that competent counsel are effective and skilled. The recommendation also specifically requires counsel to be experienced, to avoid representation in serious cases by counsel having little or no prior familiarity with handling serious criminal cases.

Resolved Clause and Recommendation (1):

While making it clear that the above Recommendations are not applicable to death penalty cases, our Committee nonetheless adopted several of the fundamental themes of the ABA death penalty guidelines in prescribing a criminal defense plan for defense counsel in serious criminal cases other than death penalty matters (see Resolved clause and Recommendation (1) above). The ABA death penalty guidelines recommend established standards for death penalty counsel and jurisdiction-wide criminal defense plans for implementing those standards.[50] A similar though less

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[44] *Id*. at rule 1.1. The ABA commentary to this rule provides more detail as to what is expected: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. *Id*.

[45] *Id.* at Rule 1.1, Comment (2).
[46] ABA STANDARDS, *supra* note 1, at Standard 4-1.2(b).
[47] *See, e.g., id*. at 1 (Guideline 1.1).
[48] *Id*. at Rule 1.1.
[49] Strickland v. Washington, 466 U.S. at 686-87.
[50] *See* ABA GUIDELINES, *supra* note 8, at Guidelines 2.1 and 3.1.

intense legal representation plan is recommended by the ABA Criminal Justice Standards for almost all criminal defense counsel.[51] This is an effort to ensure that death penalty counsel meet higher standards than simply being a member of the bar in good standing. Our Committee approached the issue of defense counsel in non-death penalty but serious criminal cases in the same manner. We concluded that establishing, implementing, and enforcing heightened standards for such defense counsel would tend to avoid instances of the innocent being wrongly convicted primarily because of incompetent defense counsel. However, our Committee chose not to mandate the detailed characteristics of such counsel standards and criminal defense plans, just as we did not mandate a hard-and-fast definition of "serious criminal cases." Instead, the approach of Recommendation (1) is to echo the general structure and approach that the ABA has already recommended for death penalty counsel.

Recommendation (2):

Recommendation (2) addresses the broader issue of defense counsel workload.. This issue is generally applicable to the entire criminal defense bar and thus is addressed by the ABA Criminal Justice Standards.[52] but our Committee senses that it has particular importance in reducing wrongful convictions of the innocent. If defense counsel are juggling literally hundreds of cases, it is highly unlikely that clients' claims of innocence will receive the attention they deserve from counsel.

No appointing body should engage a criminal defense lawyer in a case that he or she lacks the training or experience to handle competently.[53] If a jurisdiction or court provides indigent defense counsel by a contract system, it should not do so on a cost only basis. The experience of each lawyer engaged should determine the number and type of case awarded.[54] Nor should case assignments be based upon improper considerations such as political contributions elected judges receive or the fact that lawyers lacking in litigation skill or experience are easier to "move along" to the quick completion of a criminal matter. Public defenders offices must not be overburdened with such a large number of cases that the lawyers, no matter how well they may be paid, cannot provide quality representation in each case. In addition, assigned or appointed counsel should not be assigned so many cases that they cannot provide quality representation. This includes the time and ability to consult with the accused, conduct an independent defense investigation, identify issues and research the applicable law, engage in a vigorous motions practice, litigate the issue in court, launch a competent defense, and negotiate a favorable resolution in a fair and appropriate time frame.

[51] ABA STANDARDS, *supra* note 1, at Standards 5-1.2 & 5-1.3.

[52] ABA STANDARDS, *supra* note 1, at Standards 4-1.3 & 5-5.3.

[53] *See* The Ten Principles of a Public Defense Delivery System, Section 6 (February 2002).

[54] *Id.*

Recommendations (3) and (4):

Our recommendations cover general, jurisdiction-wide standards of practice for defense counsel in serious criminal cases, as well as specific efforts as to the junctures in the criminal justice process that have found to be high risk for convicting innocent criminal defendants. These critical junctures are addressed by other sets of Recommendations from our Committee, including the higher risks at these junctures of veering toward wrongly convicting the innocent and the actions that various criminal justice professionals should take to counter these risks. Complementing these other sets of Recommendations, our Committee's Recommendations preceding this Report highlight specific actions that criminal defense counsel should take regarding these specific junctures. We know that these junctures present especially high risks of wrongful conviction, and defense counsel should react to these high risks more aggressively.

Some of these special junctures and situations are easy to identify and to begin to address. For example, Recommendation (4) above asks for "heightened scrutiny" by defense counsel in cases relying upon eyewitness identification, compensated state's witnesses, and confessions by youthful or mentally limited defendants. State reliance upon such evidence should be a red flag for defense counsel, since these are some of the primary causes of convicting the innocent. All criminal justice professionals are aware that these factors, particularly eyewitness identifications and defendant confessions, tend to be very strong evidence for the prosecution, certainly in convincing a jury of the defendant's guilt. Indeed, defense counsel in cases with such evidence may too easily assume that therefore the defendant must be guilty. After all, the defendant was confidently identified by someone who saw the crime and the defendant himself or herself has even confessed to the crime. Recommendation (4) asks defense counsel to reject such predictable assumptions and instead to redouble efforts to ascertain the actual guilt or innocence of the defendant. This assumes an effort above and beyond defense counsel's well-recognized general duty to investigate the circumstances of the case.[55]

Recommendation (3) addresses adequate resources for defense counsel in serious criminal cases, just as the ABA Criminal Justice Standards address this for all defense counsel.[56] For example, assigned Counsel should be paid fees that exceed their overhead and expenses by an amount that achieves parity with that of prosecutors or appointed counsel in civil cases.[57] The

[55]ABA STANDARDS, *supra* note 1, at Standard 4-4.1.

[56]ABA STANDARDS, *supra* note 1, at Standard 5-1.6.

[57]Former Governor Ryan's Commission on Capital Punishment, April 15, 2002, Chapter 13 Funding, Recommendation 78: "Authorizing compensation for trial attorneys at a rate not to exceed $125 per hour, with an annual adjustment for inflation, should contribute significantly to development of better quality representation. The hourly rate should be reviewed regularly, however, to insure that it reflects current market rates for trial services. There are likely areas in

Constitution Project's report recognized the importance of proper funding for defense counsel, calling lack of adequate compensation 'A major cause of inadequacy of capital representation...." Public defenders should likewise receive reasonable pay. For these individuals, this should include a school loan repayment assistance program. Public defenders cite their school debt as a primary reason to leave their offices for private practice.[58] These lawyers should be encouraged to remain public defenders in order to increase experience in public defender's offices and consequently to improve the quality of legal representation received by indigent defendants.

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the state where an hourly rate of $125 per hour for this type of legal work would be adequate compensation. However, there are a number of areas in the state where $125 per hour would not adequately compensate attorneys at the re prevailing market rate for competent legal services. The language in the statute should be amended to enable judge in certain areas to award attorneys fees at an hourly rate in excess of $125 where the prevailing market rate for competent legal services exceeds that amount. If we wish to support the development of a competent private defense bar in capital cases, we should insure that court-awarded compensation will be sufficient to attract highly capable lawyers. Fees which are significantly below market rates are not likely to attract good quality defense counsel.

The importance of insuring that private attorneys undertaking capital representation receive something approaching market rates for the legal services they provide is also highlighted in the Senate Task Force Report. That report recognized that the new, proposed rate level reflected a 'much needed improvement.' Senate Task Force Report, 2000, p.6. The Task Force recommended that fees be set by the trial court, based upon 'the actual cost of retaining qualified and experienced counsel in the community in which the trial is to be held.' Report, Recommendation 4.

[58]*See* Senate Report 107-315 on The Innocence Protection Act: "According to the Department of Justice, nearly one-third of prosecutors' offices across the country reported problems recruiting or retaining staff attorneys in 2001. Low salaries were cited as the primary reason for the problems. Bureau of Justice Statistics, 'Prosecutors in State Courts, 2001,' JCJ 193441, May 2002, at 3, available at *www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf*. Similar surveys of public defender offices report significant difficulty in recruitment and retention of attorneys due mainly to low salaries and high student loan debt. A 2002 survey by Equal Justice Works (formerly the National Association for Public Interest Law) and the National Legal Aid and Defendant Association found that educational debt is cited by 88 percent of public interest legal employers as a major problem in recruitment, and by 82 percent in retention. See *www.equaljusticeworks.org/news/index.php-view+detainl&id=1166.* At the Legal Aid Society in New York City, public defenders take second jobs to make ends meet, and exit interviews have shown that the No. 1 reason for abandoning a career as a public defender is student loan debt. Letter to Senator Patrick Leahy from Susan Hendricks, Deputy Attorney-in-Charge, The Legal Aid Society, September 25, 2002 (on file with the Committee on the Judiciary)."

An adequate defense system also provides sufficient funding for experts, assistants, investigators, on line legal research, Internet access for communication with other defense counsel, technology in the form of current software and trial exhibit and aid hardware.[59] Public defender offices should also be on parity with prosecutor's offices. Therefore, these offices should have the same capacity to hire experts, and to maintain assistants and investigators to prepare and present their cases. They should also have access to on line legal research and Internet access in order to benefit from networking with more learned defense counsel and counsel for co-defendants in a secure Internet environment. The lawyers should also be furnished current word processing and case management and presentation software for their computers as well as trial exhibit programs and hardware to give them equal footing with the prosecution. If such hardware is available to the defense and prosecution in each court, equal access to practice its use should be provided to defense counsel.

Recommendation (5):

Recommendation (5) addresses the risk of wrongly convicting innocent with negotiated guilty pleas. Negotiated pleas constitute 80% to 90% of all criminal convictions, and defense counsel have a duty to pursue negotiated pleas for many obvious reasons.[60] Under *North Carolina v. Alford*,[61] a plea of guilty can be valid even though the defendant contemporaneously asserts his innocence to the underlying offense. The primary justifications given by those who advocate the use of *Alford* pleas is that it minimizes the severity and maximizes the certainty of the punishment the defendant receives.[62] *Alford* pleas are also touted as giving defendants the opportunity to plea bargain without giving up the right to tell the truth in court about their innocence vis-a-vis the alleged crime.[63] However, these perceived benefits to the defendant are at least questionable and may be neutralized by the side effects of a guilty plea and resulting conviction.[64] One fears that criminal defense counsel may simply opt for *Alford* pleas as the most expedient way to handle both the cases and the clients but without any serious inquiry into defendants' actual guilt.[65] In contrast, Recommendation (5) urges defense counsel in serious cases to approach *Alford* pleas cautiously and

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[59]ABA STANDARDS, *supra* note 1, at Standard 5-1.4.
[60]ABA STANDARDS, *supra* note 1, at Standard 4-6.1.
[61]400 U.S. 25 (1970).
[62]DAVID ROSSMAN, 2-9 CRIMINAL LAW ADVOCACY § 9.26[2][A-C] (2002).
[63]Curtis J. Shipley, *The* Alford *Pleas: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1073-74 (1987).
[64]Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 MISSOURI L. REV. 913 (2003).
[65]*See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278-89 (1975)

to give particular scrutiny to the actual guilt or innocence of the client prior to entering any plea of guilty.

Recommendation (6):

Recommendation (6) is based upon the premise that the vast majority of successful claims of wrongful convictions of innocent defendants have been raised only long after trial courts imposed those original convictions. Full cooperation between and among defense counsel at all stages of the process is necessary if such innocent defendants are ultimately to be vindicated.[66] Our Committee recognizes that this means asking lawyers to cooperate with successor lawyers who are trying to prove that the original lawyers allowed innocent clients to be convicted of serious crimes. This Recommendation sets forward the ultimate vindication of wrongly convicted defendants as a higher calling than avoiding discovery of fallibility as a practicing attorney.

Another solution to the issue raised by Recommendation (6) would be vertical representation, or representation by the same lawyer throughout the trial of a case and by the same lawyer assigned the appeal throughout the appeal of a case assures adequate representation.[67] Compartmentalizing the case and allowing for assembly line processing of the accused results in a lack of a full understanding of the particular case and insufficient familiarity with its nuances to provide competent representation. The principle of vertical representation is particularly important in serious criminal cases where long-standing counsel are well versed in the history of the case, fact and law concerning an accused in litigation, sometimes, for decades.

As explained above, these Recommendations and Report address only serious crimes which do not involve the possibility of the death penalty. This exclusion comes from the fact that the ABA death penalty guidelines[68] are quite well-developed and are even recognized by the United States Supreme Court.[69] Our committee simply endorses the ABA death penalty guidelines for counsel in death penalty cases. Throughout these Recommendations and Report, death penalty cases are not addressed. This also is the approach taken by the ABA Criminal Justice Standards.[70]

Respectfully submitted,

Catherine Anderson

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[66]ABA STANDARDS, *supra* note 1, at Standards 4-8.3 & 5-6.2.
[67]The Ten Principles of a Public Defense Delivery System, ABA, February 2002.

[68]ABA GUIDELINES, *supra* note 8
[69]Wiggins v. Smith, 123 S.Ct. at 2537.
[70]*See, e.g.*, ABA STANDARDS, *supra* note 1, at Standard 4-1.2(c) & 5-1.2(d).

Chair, Criminal Justice Section
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