TESTIMONY

of

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President-Elect of the

AMERICAN BAR ASSOCIATION

before the

NEW YORK CITY COUNCIL

COMMITTEE ON PUBLIC SAFETY &
COMMITTEE ON COURTS AND LEGAL SERVICES

on

“OVERSIGHT: EXAMINING HOW THE CITY
EVALUATES THE EFFECTIVENESS OF THE PROVISION
OF INDIGENT DEFENSE”

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Introduction

Good afternoon. My name is Paulette Brown. I am President-Elect of the American Bar Association, and I am pleased to speak to you today about evaluating indigent criminal defense systems. First, I’d like to say how happy I am that New York City is focusing on indigent defense. This is a constitutional issue that deserves far greater attention.

Standards

The American Bar Association is the voice of the legal profession in the United States. With nearly 400,000 members, it is one of the world’s largest voluntary professional organizations. For decades, the ABA has promulgated national indigent defense standards and policies. Today, I’d like to focus on the ABA Ten Principles of a Public Defense Delivery System.

The Ten Principles are a cornerstone of indigent criminal defense in America. Attorney General Eric Holder said the Principles have “not only given shape to our aspirations, but quite literally set the standard, and developed a framework, for progress.” As the National Legal Aid and Defender Association has stated, “Never before has there been such a concise and authoritative statement of the key components of an effective public defense system, in plain language accessible to busy non-lawyer policymakers.”

I’ve brought copies of the Ten Principles for each of you. Rather than discussing the Principles one-by-one, I would like to use the Principles to give a brief overview of what you should look for in an indigent defense system. You will need the right structure, the right attorneys, the right clients, and the right time and space.

Right Structure

Quality indigent defense starts with a sound structure. The first Principle tells us that an indigent defense system must be overseen by an independent, nonpartisan board so that quality representation isn’t subject to judicial or political whim. Before you look at how clients are being represented, I urge you to look at an agency’s governing body. Is there a board in place? Does the board have the power to set indigent defense policy? Are board members appointed by several, diverse bodies or by a single entity? Is the board itself diverse? Is the chief defender chosen based on merit?

Next, a quality indigent defense system must have workload limits. As we know from observation, scholarship, and recent litigation, this is one of the most important issues facing indigent defense today. For too long, criminal justice systems have prized efficiency over effectiveness, creating radically excessive workloads. Excessive workloads rob attorneys of the ability to adequately represent their clients and systematically deprive clients their sixth amendment right to the effective assistance of counsel. To put it simply, even the best attorney cannot provide quality representation when he or she is saddled with 300, 400, or 500 cases.
Although excessive workloads are addressed in the second and fifth Principles, the issue was so pressing that, in 2009, the ABA adopted *Eight Guidelines of Public Defense Related to Excessive Workloads*. The ABA has also conducted several studies to establish state-specific workload standards. If you wish to learn more about those standards and studies, you can find them at www.indigentdefense.org.

Attorney workloads are directly tied to funding. Although prosecutors have been severely underfunded for decades, remarkably, defense funding is often far worse. Principle 8 calls for funding and resource parity between prosecutors and defenders. Without proper funding, not only can you not enforce reasonable workload limits, but your office stands no chance of hiring investigators, mitigation specialists, social workers, immigration attorneys, and family law attorneys needed for holistic representation.

**Right Attorneys**

A well-funded, independent system with workload limits is just the start. A quality indigent defense system must also require—and provide—rigorous training, supervision, and evaluation for its attorneys. Principles 6, 9, and 10 provide guidance here.

How does your agency train new attorneys? What kind of continuing legal education does it provide to seasoned attorneys? Does that training cover criminal law, criminal procedure, negotiation skills, trial skills, and client communication? Do the attorneys’ training and experience match the cases to which they are assigned? Are all attorneys supervised? How often are attorneys evaluated? What measures do you use to evaluate attorneys? The *Ten Principles* not only set the basic standards here, but they also reference additional standards and policies that can assist you in evaluating attorney training, supervision, and evaluation.

Here, I’d like to make special note of the need for training regarding collateral consequences. Criminal defendants increasingly face sanctions and restrictions because of their criminal records. These consequences include deportation, work restrictions, and mandated offender registration. The ABA, working with the U.S. Department of Justice, has created the National Inventory of the Collateral Consequences of Conviction. You can find the inventory at www.abacollateralconsequences.org. As you’ll see on that site, New York criminal defendants can face over 1,000 collateral consequences, some more severe than the related criminal sentences. It is imperative that defense attorneys understand this minefield of collateral consequences and can advise their clients accordingly.

**Right Clients**

Once an independent system with workload limits, sufficient funding, and proper training and supervision has been established, your attorneys can be assigned to clients. But who are your clients? Here, we look to Principle 3. An indigent defense system should be neither under- nor over-inclusive in accepting clients. That is, poor clients must not be deprived representation in...
violation of the Sixth Amendment. Nor should clients who can afford counsel be represented by an agency devoted to indigent defense. A defense system must therefore screen clients for eligibility to ensure proper representation. Eligibility screening should not, however, include the use of “application fees” or other means intended to deter would-be clients.

**Right Time and Space**

Finally, quality indigent defense representation requires proper space and time. I’ll start with space. Principle 4 tells us that there must be a space in which attorney and client can speak confidentially. Your defense system must have private meeting spaces in jails, prisons, and courthouses.

Timing is equally important. Too often, uncounseled criminal defendants suffer serious consequences, both direct and collateral, in the first days after an arrest. Principles 3 and 4 state that counsel should be provided upon request and, at the very latest, at first appearance. After that, counsel must have sufficient time to meet with clients to discuss law, facts, and procedure. When an attorney lacks the time to thoroughly discuss a case with his or her client, no amount of training or supervision can guarantee quality representation.

**Conclusion**

New York has been an innovator in holistic defense, digital forensics, and community involvement. Yet if a system does not meet the *Ten Principles*, it is bound to fail its clients. Indigent defense systems across the country have long been understaffed, underfunded, and poorly trained. But as we have seen with recent litigation and the creation of several indigent defense commissions, the tide is turning. I applaud your Committees for tackling this issue. It is far better that cities, counties, and states improve indigent defense from within.

I hope you’ve found my testimony helpful. I’d be happy to answer any questions you may have. Thank you for your time.