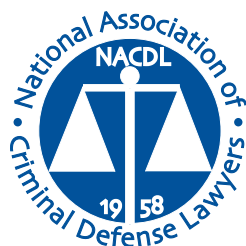


# Minor Crimes, Massive Waste

The Terrible Toll of America's Broken Misdemeanor Courts



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

April 2009

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# Minor Crimes, Massive Waste

The Terrible Toll of America's Broken Misdemeanor Courts

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# ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

4

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, amicus advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 12,000 direct members — and more than 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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# ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

**T**he Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America’s justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and assistance of effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession to the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The Foundation is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the Foundation are tax-deductible. The affairs of the Foundation are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the Foundation’s own Articles of Incorporation, and its Bylaws.

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The explosive growth of misdemeanor cases is placing a staggering burden on America's courts. Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented. As a result, constitutional obligations are left unmet and taxpayers' money is wasted.

NACDL's comprehensive examination of misdemeanor courts, including a review of existing studies and materials, site visits in seven states, an internet survey of defenders, two conferences, and a webinar, demonstrated that misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution. As a result, every year literally millions of accused misdemeanants, overwhelmingly those unable to hire private counsel, and disproportionately people of color, are denied their constitutional right to equal justice. And, taxpayers are footing the bill for these gross inefficiencies.

Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.

This report explains, in depth, these and other problems observed in misdemeanor courts and offers recommendations for reform, while highlighting best practices from across the country. The recommendations include:

1

***Divert misdemeanors that do not impact public safety to penalties that are less costly to taxpayers.***

Defenders and judges across the country noted that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers expend on average \$80 per inmate per day<sup>1</sup> to lock up misdemeanants accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, dog leash violations, driving with a suspended license, pedestrian solicitation, and feeding the homeless. These crimes do not impact public safety, but they do have a huge impact on state and local budgets across the country.

**Continued on next page**

# EXECUTIVE SUMMARY

## Continued from previous page

A number of jurisdictions have had success diverting some of these offenses to less costly penalties and reducing the caseloads of misdemeanor courts, thereby freeing up resources for other pressing needs. For example, in King County, Washington, a relicensing program allows individuals who have had their driver's license suspended pay the fines that led to the suspension through community service. The program is open to individuals regardless of whether they have a criminal charge pending, and, if completed, any pending charges of driving with a suspended license (DWLS) are dropped. An evaluation of the program found that it not only resulted in a dramatic decrease in the number of DWLS cases bogging down misdemeanor courts, but also generated net revenue.

8

## ***Reduce pressure on defendants to plead guilty, particularly at first appearance.***

2

The overwhelming caseloads in misdemeanor court put pressure on everyone in the court system — defenders, prosecutors and judges — to resolve cases quickly. Prosecutors use one time only plea offers to force early pleas. Judges utilize bail determinations and the threat of pretrial incarceration to encourage early pleas. Defenders, if they are even involved, note that a better deal might not come along and that they have no time to fully investigate the client's case. As a result, an extraordinary number of misdemeanor defendants plead guilty at their first appearance in court, whether or not they committed the crime. Not only is such coercion in stark violation of the Constitution, it also means taxpayers are footing the bill to imprison the innocent, as well as other defendants, whose situation might be better served by alternatives to incarceration.

- ◆ In New York City in 2000, almost 70 percent of misdemeanor cases were disposed of at the first appearance — most through a guilty plea.
- ◆ Site team members in Washington State observed two defenders advise as many as 132 defendants on an arraignment calendar in under four hours. Most stipulated to the police report, which resulted in a finding of guilt.

## ***Enforce ethical obligations of all participants in misdemeanor adjudications.***

3

Misdemeanor courts are rife with violations of professional ethical standards. Defenders countenance caseloads that prohibit them from providing competent representation to their clients. Prosecutors talk directly with defendants and convince them to waive their constitutional rights. Judges encourage defendants to proceed without counsel and plead guilty quickly in order to move dockets. Ethical obligations for all professionals in misdemeanor court should be vigorously enforced to ensure that every defendant receives a fair and unbiased proceeding.

## ***Provide counsel for any defendant facing the possibility of incarceration.***

# 4

Often in misdemeanor courts, defendants are not informed of their right to counsel under the Sixth Amendment, or are coerced into waiving counsel to avoid having to spend additional time in jail awaiting the appointment. Sometimes they are even required to pay an application fee in order to obtain the counsel that is guaranteed by the Constitution.

- ◆ Time and time again site team observers watched individuals plead guilty without counsel.
- ◆ Judges actually acknowledge the widespread violation of Sixth Amendment rights. For example, Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina told a group of attorneys at a state bar meeting, “*Alabama v. Shelton* is one of the more misguided decisions of the United States Supreme Court ... so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.”<sup>2</sup>
- ◆ Judges and prosecutors routinely speak directly to defendants and seek waivers of counsel in order to resolve the case more quickly. In Colorado, a state statute provides that a misdemeanor defendant must engage in plea negotiations with a prosecutor before the defendant can receive appointed defense counsel.<sup>3</sup>

It is indefensible that, despite longstanding constitutional precedent, a significant percentage of defendants in misdemeanor courts proceed without an attorney. The absence of counsel in these cases undermines the fairness and reliability of the criminal justice system and violates the Constitution, opening state and local governments up to costly lawsuits.

## ***Provide public defenders with the resources necessary to effectively represent their clients.***

Across the country, misdemeanor defenders report caseloads six and seven times greater than the national standards. In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year.<sup>4</sup> With these massive caseloads, defenders have to resolve approximately 10 cases a day — or one case every hour — not nearly enough time to mount a constitutionally adequate defense.

# 5

Defender offices, contract defender offices, and assigned counsel lists must have sufficient attorneys to permit the maintenance of ethical caseload standards. Additionally, defenders should have access to resources necessary to provide effective assistance, including legal research services, investigators, experts, social workers, and mental health support services.

The consequences for the accused individuals involved, no less for the Constitution, demand that misdemeanor courts provide due process and equal justice for all those who appear in them. All across America, misdemeanor courts are failing to meet this critical standard. Implementation of the recommendations of this report will save taxpayers much needed resources while making these courts, and our justice system, reliable for all Americans.

# INTRODUCTION

**T**he vast majority of accused individuals first come into contact with the criminal justice system through a minor offense, known as a misdemeanor. Yet remarkably little attention has been devoted specifically to understanding what happens to defendants at the misdemeanor level.

10

Criminal justice reform studies have often noted that extensive problems exist in misdemeanor courts, but have rarely focused sharply on these courts. For this reason, NACDL decided to investigate misdemeanor courts throughout the country, document the strengths and weaknesses, and identify ways to improve the operations of these courts. Drawing upon existing literature and research, on-site visits in a number of jurisdictions, interviews and survey results from defenders across the country, and the input of diverse participants at two conferences and a webinar, this report details existing problems in misdemeanor courts, highlights best practices, and makes a series of recommendations for change.

## Methodology

Over the course of a year, NACDL, together with Professor Robert C. Boruchowitz of Seattle University School of Law, gathered a wide range of existing studies, reports, and statistics on misdemeanor courts and misdemeanor defense, including law review articles, news coverage, governmental studies, and expert reports, as well as information from other organizations working on indigent defense reform, including reports and manuals on misdemeanor practice.

After reviewing these materials, the authors organized site visits to misdemeanor courts in a number of jurisdictions. Prior to the visits, NACDL representatives conducted interviews with key criminal justice personnel to understand the operation of the local misdemeanor courts, as well as perceived strengths and weaknesses. On the visits, NACDL representatives observed the operation of the misdemeanor courts, and conducted additional interviews with key players in misdemeanor proceedings, including judges, defense counsel, prosecutors, and accused persons. Where possible, site teams gathered data on misdemeanor prosecutions, public defender case-loads, and other relevant statistics.

The authors selected locations for site visits based on a preliminary assessment of problems by NACDL's staff and Professor Boruchowitz, in consultation with experts on indigent defense around the country. Geographical diversity and the type of public defense system were also considered. Site visits occurred in Arizona, Florida, Illinois, North Dakota, Pennsylvania, Texas, and Washington. In many of these states, public defense<sup>5</sup> is organized on a county-by-county basis, and, when possible, a number of counties were visited.

The authors conducted an Internet survey of defenders across the country seeking information on misdemeanor practice in each respondent's jurisdiction, as well as respondent's impressions of the operation of misdemeanor courts. In total, 185 individuals responded to the Internet survey. The respondents reported practicing in 26 states and two tribal courts.<sup>6</sup>

Additionally, NACDL held two conferences for the purpose of seeking input on the problems associated with misdemeanor courts, as well as possible solutions. The first conference was held in New York in May 2008, and the second took place in Seattle in July 2008. Over 150 public defenders, prosecutors, judges, and reform activists from across the country attended the conferences. Finally, NACDL hosted a webinar on the preliminary findings of the report with experts from across the country to seek additional input.

The report documents the findings of this extensive research effort.<sup>7</sup> The report first provides an introduction to misdemeanor courts, reviewing the charges brought in misdemeanor courts, as well as the rights of the misdemeanor defendant. It then outlines the common problems observed and reported in misdemeanor courts throughout the country. At the conclusion of each section, the report enumerates policy reform recommendations that would address the problems described, highlighting best practices observed around the country.

## The Misdemeanor Courts

In most states, crimes are divided into two categories — felony and misdemeanor. Misdemeanors are the less serious offenses, for which punishment is generally limited to one year in jail.<sup>8</sup> Common misdemeanor offenses include petty theft, disorderly conduct, public drunkenness, curfew violations, loitering, prostitution-related offenses, driving under the influence, driving with a suspended license, resisting arrest, minor assault, under-age possession of alcohol, and minor controlled substance and paraphernalia offenses.

Misdemeanors are commonly adjudicated in separate courts from felony cases. These courts often adjudicate minor civil offenses as well as misdemeanor criminal offenses. In a number of states, such as Arizona, Missouri, New York and Pennsylvania, some of the judges in these courts are not lawyers.<sup>9</sup>

## The Volume of Misdemeanor Offenses

Most people who go to court in the United States go to misdemeanor courts. The volume of misdemeanor cases is staggering. The exact number is not known, as states differ in whether and how they count the number of misdemeanor cases processed each year. The National Center for State Courts collected misdemeanor caseload numbers from 12 states in 2006. Based on these 12 states, a median misdemeanor rate of 3,544 per 100,000 was obtained.<sup>10</sup> If that rate held true across the states, the total number of misdemeanor prosecutions in 2006 was about 10.5 million, which amounts to 3.5 percent of the American population.<sup>11</sup> While this overplays the actual prosecutions by population, because of individuals charged multiple times and non-citizen prosecutions, it is a startling reminder of the breadth of the impact of these courts.<sup>12</sup>

## Rights of Defendants in Misdemeanor Cases

Misdemeanor defendants, like all those accused of crimes, are entitled to due process.<sup>13</sup> They have the right to receive the evidence against them and present evidence in their defense. They have a right to confront witnesses. And, they have the right to have their guilt proven beyond a reasonable doubt. Not all misdemeanor defendants are entitled to a jury trial, however. The federal constitutional right to a jury trial has been interpreted to apply only when a defendant is facing more than six months in prison.<sup>14</sup>

## Right to Counsel in Misdemeanor Cases

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” In *Gideon v. Wainwright*, the U.S. Supreme Court interpreted this right to require the state to provide counsel to a defendant charged with a felony who could not afford to hire his own counsel. The Court stated, “reason and reflection require us to recognize that, in our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>15</sup>

## Volume of Misdemeanor Cases

1972  5 million

2006  10.5 million

Even after *Gideon*, persons charged with misdemeanor offenses were not guaranteed appointed counsel, and the misdemeanor courts were rife with abuse. In 1968, five years following *Gideon*, Professor John M. Junker observed:

[A] large majority of the [people] annually charged with non-traffic misdemeanors must, if they are financially unable to hire an attorney, face the bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system without the assistance of counsel. The misdemeanor prosecution is the “Appalachia” of the criminal justice system.<sup>16</sup>

It is for this reason that, in *Argersinger v. Hamlin*, the U.S. Supreme Court extended the right to counsel to misdemeanor defendants.<sup>17</sup> The Court further protected the right to counsel in *Alabama v. Shelton*, holding that a defendant must have had counsel in the underlying adjudication for incarceration to be imposed for a violation of misdemeanor probation.<sup>18</sup> The Court reasoned:

Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant ... faces incarceration on a conviction that has never been subjected to “the crucible of meaningful adversarial testing.”<sup>19</sup>

### Why Are Lawyers Needed in Misdemeanor Cases?

No one should underestimate the importance of counsel advising a person of his or her rights in any criminal case. Even in a simple case, the law can prove complex.

The law is not a fixed set of rules. It is always affected by the individual circumstances of a case. For example, one might think the law regarding murder is simple — one person cannot kill another. But, if the circumstances surrounding the killing show that the person who was killed was, in fact, the aggressor, the law becomes far less black and white, and the case becomes considerably more complex.

This is no less true of misdemeanors. The law of trespass may seem obvious — either a person was on private property or the person was not. But, there are a number of factors that can complicate a trespass case: Was the property obviously private or was there some reason to believe it was public property? Was there a warning, either posted or verbal? Was an event occurring that was open to the public? The answer to these questions can mean the difference between innocence and guilt. Without an attorney to sort through all the facts and assess what is legally important, these critical distinctions too easily can be overlooked.

In addition, the sentence and the collateral consequences can be quite different depending on which crime is found to have been committed. A lawyer also is needed to help the accused person sort out the implications of plea bargains offered by the prosecutor.

As the Court stated in its decision in *Argersinger*:

The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment are any less complex than when a person can be sent off for six months or more.<sup>20</sup>

Attentive defense counsel is particularly important in misdemeanor courts because the volume of cases means that prosecutors and judges too often and too easily can overlook factual issues. Indeed, the Supreme Court observed that the volume of misdemeanors<sup>21</sup> results in pressure for “speedy dispositions,” and stated that there is significant evidence of “prejudice” resulting from “assembly-line justice” in misdemeanor courts.<sup>22</sup>

### Consequences of a Misdemeanor Conviction

There is a prevailing misconception that misdemeanor convictions do not truly affect a person. In fact, a common question received during the research for this project was, “Why are you spending time on misdemeanors?” Underlying this comment is the belief that it matters less whether the justice system is accurate in misdemeanor cases. But, the consequences of a misdemeanor conviction can be dire. As the Supreme Court noted in deciding *Argersinger*, “the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or ‘petty’ matter and may well result in quite serious repercussions affecting his career and his reputation.”<sup>23</sup> Indeed, a wrongful conviction, even in a minor case, is pernicious. If the constitutionally mandatory processes of our criminal justice system cannot determine accurately a person’s guilt or innocence of a minor criminal charge, court outcomes are subject to question in all cases.

In the years since the *Argersinger* decision, the collateral consequences<sup>24</sup> that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave. The defendant can be deported,<sup>25</sup> denied employment, or denied access to a wide array of professional licenses.<sup>26</sup> A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school.<sup>27</sup> Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family.<sup>28</sup> Fines, costs and other fees associated with convictions can also be stagger-

ing and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.<sup>29</sup>

As Rick Jones, the Executive Director of the Neighborhood Defender Service of Harlem, noted:

Standing in the courtroom, it may seem like a wise thing just to get the criminal charge over with by pleading guilty, but a criminal conviction, even for a minor offense, has an enormous impact on a client's life. She may lose her housing, her job, her health or food benefits. It can impact the custody of her children. She may face deportation. No criminal conviction should be regarded as minor or unimportant.

Misdemeanor convictions also have serious consequences with regard to any future criminal charges faced by the same defendant. A minor conviction can limit a person's ability to vacate, set aside or dismiss an earlier, more serious conviction. It can also greatly increase the punishment for any future offense and reduce opportunities for sentencing reductions. One example is the inability of a person with a prior misdemeanor conviction to utilize the controlled substances "safety valve" statute and related provision in the federal sentencing guidelines.<sup>30</sup> A defendant who was previously convicted of a misdemeanor and received 30 days or more in jail or more than one year of probation, and who later faces a federal drug crime charge, is ineligible for a reduction of sentence under a provision that permits federal judges to sentence below the mandatory minimum set forth in the statute.<sup>31</sup>

# PROBLEMS IN MISDEMEANOR COURTS

14

More than 35 years ago, Professor William Hellerstein of the Brooklyn Law School wrote “the criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about ... American criminal justice.”<sup>32</sup> The statement could just as easily have been made today.

The research, surveys, site visits, and interviews conducted by NACDL confirmed that the operation of misdemeanor courts in this country is grossly inadequate and frequently unjust. Witnesses overwhelmingly described programs bereft of the funding and resources necessary to afford even the most basic tools essential for fair adjudications. As a result, literally millions of accused misdemeanants, particularly those unable to hire private counsel, and disproportionately people of color, routinely are denied the due process to which the Constitution entitles them.

Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision. Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional

duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.

**“[T]he criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about ... American criminal justice.”**

— **Professor William Hellerstein, Brooklyn Law School.**

## **Absence of Counsel**

Despite the clear ruling by the U.S. Supreme Court that persons accused of misdemeanors have a right to court-appointed counsel, a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them. A Bureau of Justice Statistics Special Report in 2000 cited a survey of jail inmates conducted in 1989 and 1996. In the survey, 28.3 percent of jail inmates charged with misdemeanors reported having had no counsel.<sup>33</sup>



Site team observations in several states indicated that the percentage of misdemeanor defendants without counsel is greater than the BJS study suggested.<sup>34</sup> Time and time again site team observers watched individuals plead guilty without counsel.

In North Dakota, the observer noted that counsel was not appointed or present at arraignment for misdemeanor cases, despite the fact that most defendants pled guilty at that hearing and many were sentenced to jail time. The judge never informed the defendants of their right to counsel. Instead, the judge asked each defendant, “Did you speak to a lawyer?” When the defendant indicated that he or she did not, the judge asked, “Are you going to?” The defendants universally answered in the negative, and the judge proceeded to accept the plea and sentence the defendant.

In numerous other jurisdictions, as in North Dakota, site teams observed judges who failed to inform defendants of their right to have counsel appointed if they could not afford to hire counsel. In fact, frequently the disregard for the Supreme Court’s right to counsel rulings was blatant. For example, at a meeting of the State Bar, the Chief Justice of the South Carolina Supreme Court publicly stated that she instructed misdemeanor court judges to ignore a Supreme Court Sixth Amendment ruling:

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably ... by dragooning lawyers out of their law offices to take these cases in every magistrate’s court in South Carolina, and I have simply told my magistrates that we just don’t have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.<sup>35</sup>

Documentation and reports from across the country confirm the frequency with which the right to counsel is completely disregarded in misdemeanor courts:

- ◆ **TEXAS:** “Three-quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases. The vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas.”<sup>36</sup>
- ◆ **CALIFORNIA:** In Riverside County, California, more than 12,000 people pled guilty to misdemeanor offenses without a lawyer in a single year.<sup>37</sup>
- ◆ **MICHIGAN:** “People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and

**“The dirty little secret of the criminal justice system is that most eligible people do not get defenders.”**

**— Edward Monahan, Deputy Public Advocate, Kentucky Department of Public Advocacy.<sup>38</sup>**

*Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases.”<sup>39</sup>

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## Uninformed Waiver of Counsel

How is it that so many people go without counsel in misdemeanor court? As noted above, in some jurisdictions, the defendant’s constitutional rights are simply disregarded and never acknowledged. More often, however, the constitutional rights are acknowledged, but hastily disposed of with a “waiver.”

Waivers, even of constitutional rights, are not illegal. The U.S. Supreme Court has concluded that an adult defendant has the right to waive counsel, but first the judge must: (1) inform the defendant of his or her right to appointed counsel;<sup>40</sup> and (2) make the defendant “aware of the dangers and disadvantages of self-representation.”<sup>41</sup> The inquiry by the judge should be thorough.<sup>42</sup> In other words, the judge must confirm that the defendant voluntarily, knowingly, and intelligently decided against using a lawyer and in favor of self-representation. Similarly, national performance standards provide that indigent defendants should not be called upon to plead guilty until counsel has been appointed or properly waived.<sup>43</sup>

In a number of jurisdictions, site teams observed judges ignoring the rules regarding waiver. Time after time, courts made clear to defendants that they must waive counsel to proceed. There were no inquiries into the education or sophistication of the defendants and very few efforts to warn defendants regarding the dangers of self-representation or the kind of assistance counsel could provide. Often the waiver was incorporated into the first part of the proceeding and was presented as a rhetorical, compound question directed at whether the defendant wanted to dispose of the case quickly. The judge asked the defendant something like, “You are waiving counsel and wish to proceed now, right?” and the defendant responded, “Yes.”

In Maricopa County, Arizona, the site team observed a judge practically instructing defendants to waive their right to counsel. For example, the judge said the following:

You are charged with reckless driving. So, I guess basically before we talk about it, let me do a couple preliminaries. . . . I want you to waive your right to an attorney. You have a right to have an attorney, but I'm not going to give you the public defender. You would have to go and hire one and I don't think you're going to do that. I think you and I are going to talk about this right here, right now, right?

The defendant then signed a form waiving his right to counsel.

As in Maricopa County, the right to counsel and the warnings regarding waiver of counsel are frequently enumerated in a written form. In many instances, the court handed the form to a defendant with no explanation and said, "Sign here," and the defendant signed. The court did not conduct a thorough inquiry of the defendant as to his or her ability to read or whether the defendant understood what he or she signed.

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**"The defendant is usually told he must first talk to a prosecutor about his case and get a plea offer before he is allowed to have a lawyer appointed."**

**— A Tennessee public defender.<sup>44</sup>**

In Tampa, Florida, when a member of the site team entered the misdemeanor courtroom, a court official immediately presented her with a form that combined a waiver of counsel with a plea of guilty. She was told to take a seat and fill out the form. Among other things, the form asked her to attest that, "I am of sound mind and body and hereby freely and voluntarily waive my right to an attorney in the case(s) above in accordance with Florida Rules of Criminal Procedure 3.160(e)." Although the form described at the outset the dangers of waiving counsel, at the point of asking for waiver of the rights under the rule, the form neither quoted the language of the rule nor did it explain that the rule describes the rights of all defendants to court-appointed counsel.<sup>45</sup>

## Eligibility Limitations for Counsel

In some jurisdictions, counsel is not appointed due to restrictive financial eligibility guidelines. In *Gideon*, the Supreme Court provided that counsel should be appointed for those "financially unable to obtain counsel," or "too poor to hire a lawyer."<sup>46</sup> Problematically, the Supreme Court did not establish a threshold or process for determining that financial eligibility.

As a result, practices and policies for determining eligibility for public defense services differ widely from state to state. Indeed, frequently these practices and policies differ from county to county, and courtroom to courtroom.<sup>47</sup> Defenders across the country noted that many defendants who are financially incapable of retaining counsel are denied appointed counsel.

For example, in Lower Kittitas, Washington, approximately 16 percent of people who apply for defenders are denied. During the observation visit, the commissioner suggested to defendants that they might want to talk to the prosecutor before getting a lawyer. The commissioner made no inquiry into whether the defendant could afford to retain counsel. As a result, defendants who proceed without counsel may be doing so despite being unable to hire an attorney.

## Conferring Directly with Prosecutors

Often defendants are encouraged, or even required, to discuss their cases directly with prosecutors. Ethically, this is problematic, particularly if the prosecutor is aware that the waiver of counsel, if there was one, was not sufficiently informed and voluntary.

Ethics rules generally prohibit a lawyer from giving advice to an unrepresented person whose interests may be adverse.<sup>48</sup> In fact, the model ethical rules specifically require prosecutors to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."<sup>49</sup> Further, the rules forbid a prosecutor from seeking to obtain waivers of important pretrial rights from unrepresented accused persons.<sup>50</sup> Despite these clear prohibitions, site visits and research demonstrated that it is common for prosecutors to confer directly with defendants, frequently requesting and processing the defendants' waiver of counsel, and then negotiating guilty pleas.

In Hays County, Texas, for example, court staff directed misdemeanor defendants to confer with the prosecutor about a possible plea before the defendants had a meaningful opportunity to request the appointment of counsel. In fact, the site team observed that no defense attorney was present in the courtroom, nor was a judge. Two prosecutors sat at counsel table — one at each table. They called a defendant's name and then negotiated a plea directly with the defendant. The judge waited in another courtroom. After

pleas were negotiated, the defendant would proceed to the courtroom where the judge was located, and a different prosecutor would inform the judge of the plea agreement. Only in some of the cases where the plea involved a jail sentence did the prosecutor inform the defendant that he or she must sign up for a court-appointed lawyer. Unfortunately, not all defendants pleading to jail time were informed of the right to receive counsel.

The site team witnessed a similar process in a northeastern Pennsylvania county. Defendants on the misdemeanor docket were told to go to a room in the basement before their cases were called. When observers went down to the basement to observe what was happening, they discovered a prosecutor in a conference room. The prosecutor was negotiating plea deals directly with defendants who would then go back up to the courtroom to plead guilty and be sentenced.

In Kittitas County, Washington, the commissioner presiding over misdemeanor arraignments dealt directly with all defendants. Neither a prosecutor nor a defense attorney was present. The commissioner frequently advised defendants that they might be able to work something out directly with the prosecutor. The court's practice was to provide the defendant with a form that had the phone number of the prosecutor at the top of the form, and information about contacting the contract defender at the bottom of the form. During the site team's observations of the court, a number of defendants asked to speak with the prosecutor. There was no colloquy on waiver of counsel. Rather, the court warned defendants that "once you have an attorney, the prosecutor can't talk to you directly."

In Colorado, the standard practice is for a misdemeanor defendant to speak directly with the prosecutor. Indeed, a statute specifically directs the prosecutor to speak directly with the defendant and come to a plea agreement. Colo. Rev. Stat. §16-7-301(4) states:

In misdemeanors, petty offenses, or offenses under title 42, C.R.S., the prosecuting attorney is obligated to tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time. The defendant and the prosecuting attorney may engage in further plea discussions about the case, but the defendant is under no obligation to talk to the prosecuting attorney. The prosecuting attorney shall advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel. The application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4). Upon completion of the discussions, the prosecutor shall inform the court of whether a plea agreement has been reached[.]

**"Alabama v. Shelton [is] one of the more misguided decisions of the United States Supreme Court, I must say ... so I will tell you straight up we [are] not adhering to Alabama v. Shelton in every situation."**

**— Chief Justice Jean Hoefler Toal,  
Supreme Court of South Carolina.**

In practice, most misdemeanor defendants in Colorado never see a public defender. The practice is not only ethically problematic, it also violates the most recent pronouncement of the U.S. Supreme Court on the appointment of counsel, which provides that counsel must be appointed before or at the defendant's first appearance before a judicial officer.<sup>51</sup>

## Recommendations — Absence of Counsel

### 1. *The right to counsel should be observed in accordance with Argersinger v. Hamlin and Alabama v. Shelton.*

As the Supreme Court stated in *Argersinger*, "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel ... and therefore know when to name a lawyer to represent the accused before the trial starts."<sup>52</sup> Despite this pronouncement, more than 35 years later, the Court's ruling is widely ignored.

It is indefensible that, despite *Gideon*, *Argersinger* and *Shelton*, a significant percentage of defendants in misdemeanor courts do not have a lawyer represent them. The U.S. Supreme Court has time and again acknowledged that defense counsel is an integral part of the adversary system, and necessary to ensure accurate outcomes in court. The absence of counsel in misdemeanor cases fundamentally undermines the fairness and reliability of the criminal justice system.

### 2. *Waivers of counsel should be handled carefully, with judges ensuring that the defendant fully understands his or her right to counsel, as well as the dangers of waiving counsel.*

"Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of

going to jail or prison, and so that he is treated fairly by the prosecution.”<sup>53</sup> A judge should “never attempt to encourage persons to waive their right to counsel, and accept no such waivers unless they are knowing, voluntary and intelligent, and on the record[.]”<sup>54</sup> The dangers of waiving the right to counsel must be fully explained to each defendant, before the waiver of counsel is permitted, and the judge must question the defendant fully to ensure that he or she understands the right to counsel and the implications of a waiver.

A waiver form is not a substitute for a colloquy. If a waiver form is used, the colloquy must still ensure that the defendant fully understands the right to counsel and the dangers of waiving the right. The form should serve merely to reinforce the important conversation that the judge has with the defendant.

Additionally, a defendant should be encouraged to consult with counsel before effectuating a waiver. Only by consulting with a defense attorney can a defendant be fully confident that waiver is appropriate in his or her case.

### ***3. Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.***

Counsel must be appointed to any defendant who is financially unable to hire counsel.<sup>55</sup> In other words, if a person cannot afford to hire an attorney without substantial financial hardship, counsel should be appointed.<sup>56</sup> Substantial hardship should be determined by looking at the typical cost of hiring counsel for the type of charge the defendant is facing. Moreover, the individual’s ability to pay must not only assess his or her income and available resources, but also his or her expenses, including family support obligations and debts.<sup>57</sup>

The assessment of whether an individual can afford to hire counsel should be made through a formalized process that ensures uniformity and avoids conflicts of interest.<sup>58</sup> Jurisdictions should “[e]rr on the side of providing counsel, and avoid overly stringent screening criteria that chill the exercise of the right to counsel.”<sup>59</sup> A default in favor of the appointment of counsel encourages authorities to undertake screening quickly and efficiently. Indeed, if attorneys are provided to all defendants who appear without counsel at first appearance, screening should be completed in advance of any subsequent hearing, so that the defendant is never forced to appear without counsel. Additionally, prosecutors should be excluded from participating in the eligibility determination process.<sup>60</sup>

### ***4. Ethical prohibitions on prosecutors speaking with defendants should be strictly enforced.***

The American Bar Association House of Delegates passed a resolution in August 2005, which addressed the ethical obligations of judges and lawyers to meet the constitutional guarantee of effective assistance of counsel. The resolution states, “Judges should, consistent with state and territorial rules and canons of professional and judicial ethics: ... (c) take appropriate action with regard to prosecutors who seek to obtain counsel and guilty pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel.”<sup>61</sup>

In criminal cases, given that all defendants who cannot afford counsel are entitled to appointed counsel, it should be assumed that each defendant is or will be represented by defense counsel until and unless a waiver of counsel, with a full and appropriate colloquy, is processed by the court. Until that time, no defendant should be encouraged or required to talk to a prosecutor. Indeed, prosecutors should be strictly forbidden from communicating directly with defendants, and breaches of this rule should be addressed through the regular bar disciplinary authority.

## **Deterrents to Asking For Counsel**

Even when the judge informs the defendant that he or she has a right to counsel, frequently other factors, such as delay or the cost of court processes, compel the defendant to waive counsel.

### **Delay**

Judges often make it clear to defendants that there are no defense lawyers present in the courtroom to assist at that time, but, if they want the case to proceed that day, they can proceed without counsel. From observation visits across the country, site team members reported many judges saying to defendants, “You can wait for counsel, or you can proceed now without counsel.”

For defendants, delay can cause significant problems. There is the ongoing burden of having a criminal charge pending. There is also the burden of multiple court dates. Often, this obligation requires a person not only to miss several days of work, but also to find alternate child care. These inconveniences can significantly strain a defendant’s resources, particularly someone who is indigent.

The threat of delay is particularly acute for those defendants who are in custody. It is a frequent misunderstanding that people accused of misdemeanors,

particularly non-violent misdemeanors, do not remain in jail during their case. In fact, people charged with misdemeanors frequently are detained pending trial, particularly if they are indigent. In these situations, further delaying adjudication to wait for counsel means additional time in jail. Sometimes, defendants spend more time in jail waiting for their day in court than they would if they pled guilty and were sentenced.

A couple of recent cases, documented by law professors, aptly demonstrate these problems:<sup>62</sup>

- ◆ **GEORGIA:** Tony Humphries was charged with jumping a subway turnstile in Atlanta. He sat in jail for 54 days before a lawyer was appointed, far longer than the sentence he would have received if convicted. His incarceration cost the taxpayers \$2330.
- ◆ **MISSISSIPPI:** A woman accused of a shoplifting offense spent a year in jail, before any trial, without even speaking to her court appointed lawyer.

In Allegheny County, Pennsylvania, cases are assigned to an attorney a day or two before the pretrial conference, which is held six weeks after the “formal arraignment.” During that six-week period, there is no actual representation. Up to 10 weeks can pass before an attorney actually works on the case. During the site visit, one of the senior managers in the defender office described this as “the chief weakness” of the office. Another attorney noted that the court rules require motions to be filed within 30 days of the formal arraignment, which is impossible because the lawyer is not assigned to the case at that point.

## Application Fees

To receive public defense services in some jurisdictions, a defendant must submit an application and pay an application fee.<sup>63</sup> In the early 1990s, the use of application fees for those who sought appointed counsel proliferated.

In South Carolina, for example, an indigent defendant must pay a \$40 fee to be eligible for a public defender.<sup>64</sup> Although authorized, waiver of the fee does not occur often. A defender from South Carolina, in response to the survey, reported that the fee “keeps many misdemeanor level clients from seeking ... services.”

In Washington, one attorney stated that about half of her clients are college students. They are required to pay a fee of \$200, which many cannot afford. New Jersey allows application fees of up to \$200, and some municipalities charge the maximum amount.<sup>65</sup>

Application fees have a deterrent effect on the exercise of a defendant’s right to counsel. This deterrent effect can be stronger in misdemeanor cases where the defendant may erroneously view a conviction as minor or unimportant. “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 unrepresented indigent defendants charged with misdemeanors, in efforts to move cases through their overburdened dockets as quickly as possible.”<sup>66</sup> When they learn of the fee, defendants frequently choose to waive the right to counsel to avoid the charge.

## Recommendations — Deterrents To Asking for Counsel

1. *Defense counsel should be available to represent an accused person at the first appearance.*

The Supreme Court frequently has acknowledged that most defendants are not capable of effectively representing themselves in criminal judicial proceedings. As the Court stated in *Powell v. Alabama*, “[t]he right to be heard would be, in many cases, of little avail if we 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.”<sup>67</sup> The simplest, most effective way to ensure that a defendant understands the charge(s) against him or her, receives a full explanation of the court’s procedures, makes informed decisions regarding whether to invoke or waive critical rights, and does not sit in jail unnecessarily on a minor charge is to provide representation by a defense attorney at the defendant’s first appearance.

The first appearance is critical, particularly in misdemeanor cases. Not only are bail determinations made, but because so many misdemeanor cases are resolved at first appearance, pleas are entered and sentences imposed. Proceeding without counsel can have a significant prejudicial effect on the defendant. The defendant may not understand the effect of speaking to the judicial officer and may incriminate himself. He may be forced to make difficult assessments about what he should and should not tell the judicial officer. For example, imagine the defendant is a domestic worker who is paid in cash by her employer. If the judge asks the defendant whether she is employed — the defendant has to decide, without counsel, whether to say yes or just not reply. She likely will worry that saying yes will result in her employer being reported to the Internal Revenue Service, and that she will lose her job if that happens. Similarly, a defendant asked about family in the area may be hesitant to answer if the family members are in the country illegally.

When a defendant stands silent with regard to these major factors in bail determination, he or she is often jailed pending trial, which gives rise to horror stories of persons in jail,

pretrial, for longer than the maximum punishment for the crime. Such detentions are not only unnecessary, but also extremely expensive, and the costs accrue directly to taxpayers.

The potential prejudicial effects become even more serious when the defendant is considering pleading guilty at first appearance, not simply addressing the issue of bail. Too often, misdemeanor defendants are pushed, for expedience and convenience — for them as well as for the court — to accept a small punishment quickly and resolve the case.<sup>68</sup> Too many defendants plead guilty without understanding whether they had a defense to the charge, the collateral consequences of the conviction, the conditions of probation, or the consequences of violating probation, including incarceration.<sup>69</sup> It is the role of the defense lawyer to provide this information, a role that the defense lawyer can only fulfill if he or she is present when the critical decisions are being made. Particularly in misdemeanor court, the first appearance is that critical time.

## 2. *No application fee should be charged for public defense services.*

On its face, a non-waivable application fee is anathema to the right to counsel. The Minnesota Supreme Court has held that a “co-payment” required of all public defense clients was unconstitutional because it made no provision for “the indigent or for those for whom such a co-payment would impose a manifest hardship.”<sup>70</sup> Similarly, a New Jersey court reversed a conviction for driving with a suspended license because the trial judge had refused to waive the \$50 application fee or consider the defendant’s ability to pay the fee. The court wrote:

[A] trial judge must be more than an unyielding revenue officer. When the concern for collecting a fifty dollar application fee is weighed against a defendant’s right to counsel and a fair trial, the scales of justice shift dramatically in favor of the defendant. Given the serious nature of the charge, as well as the apparent bona fide indigent status of the defendant, as demonstrated by the

**“[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”**

— U.S. Supreme Court, *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

appointment of counsel on other charges, there were compelling reasons to carefully evaluate the defendant’s request for the appointment of counsel. Unfortunately, the trial judge’s preoccupation with the payment of the application fee foreclosed the defendant’s opportunity to obtain assigned counsel.<sup>71</sup>

Application fees can discourage an accused from seeking court-appointed counsel, particularly where waiver of the fee is unavailable, not understood by the clients, or rarely utilized. Those seeking counsel at public expense are doing so because they lack the funds to hire private counsel. In many jurisdictions, to be eligible to receive appointed counsel, the defendant must be at or below the poverty line, or some small multiple thereof.<sup>72</sup> If a defendant cannot pay the fee and does not understand that the fee may be waived, she may feel she has no other choice but to proceed without counsel. For this reason, no application fee should be charged to access counsel in misdemeanor cases.

If a fee must be charged for public defense services, it should be a contribution fee subject to waiver and the procedure for waiver should be well publicized and easily invoked. In 2004, the American Bar Association adopted Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases. Guideline 2 addresses the Determination of Ability to Afford a Contribution Fee, and states:

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 to 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.<sup>73</sup>

Further, the ABA Guidelines require that notice be provided in advance that a contribution fee may be required “if the person has the ability to do so without substantial financial hardship.”<sup>74</sup> The notice should state “that counsel will be provided at all stages of the proceedings regardless of whether the person actually pays the fee.”<sup>75</sup>

## Misdemeanor Caseloads

No matter how brilliant and dedicated the attorney, if the attorney is given too large a workload, he or she will not be

able to provide clients with appropriate assistance. The National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.<sup>76</sup> Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged. Similarly, in 2007, the American Council of Chief Defenders (“ACCD”) issued a “Statement on Caseloads and Workloads” recommending that defenders handle no more than 400 misdemeanors per year.<sup>77</sup>

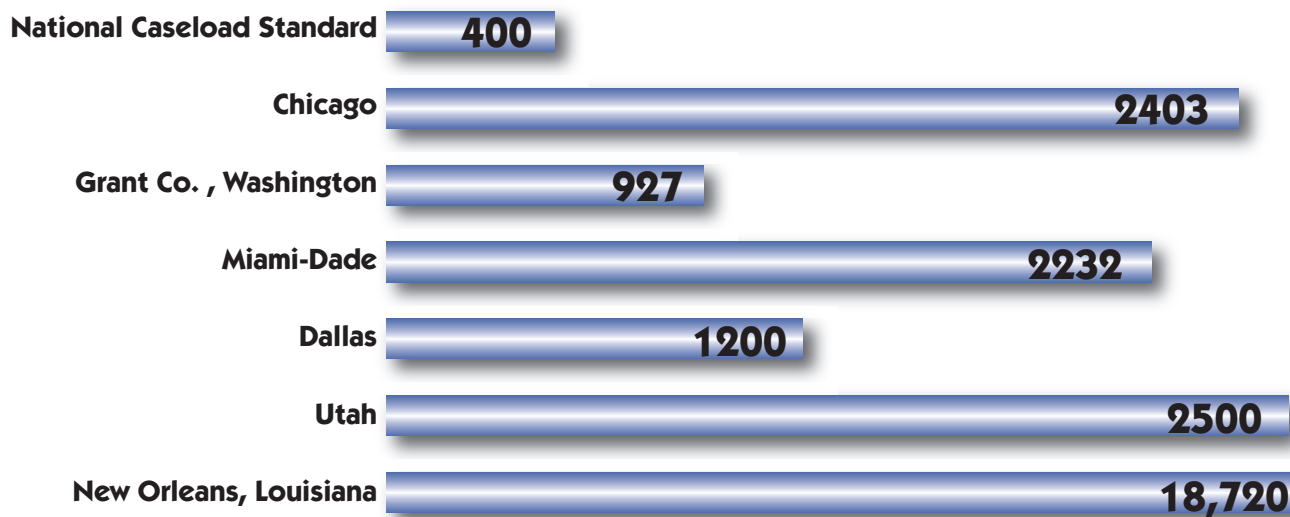
Caseloads should never surpass the maximum caseload standards. In fact, there are a variety of reasons that caseloads should be lower than the standards propose. For example, the standards assume that the defender is a full-time litigator. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. Similarly, the caseload standards assume a relatively close proximity between the defender and the courthouse. Any significant distances that must be traveled by the defender in the course of his or her work should reduce the expected caseload.

The caseload standards also assume appropriate levels of support services. In other words, they assume that the attorney has access to secretarial assistance, paralegal assistance, basic workplace technology, legal research, and investigatory services. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be approximately one paralegal, one secretary, and one investigator for every four attorneys. Offices that do not maintain the recommended ratios of support staff to attorneys must reduce their workload expectations for attorneys.<sup>78</sup> For these reasons, the ACCD further recommended that each jurisdiction review its situation and amend the standards as necessary, noting that “the increased complexity of practice in many areas will require lower caseload ceilings.”<sup>79</sup>

Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case:

- ◆ During the webinar, the acting director of the office reported that, in New Orleans, part-time defenders are handling the equivalent of almost 19,000 cases per year per attorney, which literally limits them to seven minutes per case.
- ◆ In at least three major cities, Chicago, Atlanta, and Miami, defenders have more than 2,000 misdemeanor cases each per year.<sup>80</sup>
- ◆ According to a response to the survey, in Dallas, Texas, misdemeanor defenders handle 1,200 cases per year.
- ◆ One attorney working in federal magistrate court in Arizona reported in a survey response that misdemeanor attorneys there carry 1,000 cases per year.
- ◆ In response to the survey, one Tennessee defender reported that the average misdemeanor caseload per attorney in his office was 1,500 per year. Two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards.
- ◆ In Kentucky, the defenders were assigned an average of 436 cases per lawyer in fiscal year 2007, of which 61 percent were misdemeanors.<sup>81</sup> In other words, each defender had 170 felonies, which is more than a full caseload for one attorney, plus 266 misdemeanors, which by itself is two-thirds of a full-time caseload under the national standard.

## Misdemeanor Caseloads By Jurisdiction



- ◆ An attorney from Utah reported that misdemeanor public defenders in that state carry caseloads of 2,500.
- ◆ In Grant County, Washington, in 2006, the four defenders in county misdemeanor court averaged 927.25 cases each.<sup>82</sup>

### The Meaning of the Caseload Numbers

A lawyer who takes three weeks of vacation and 10 holidays a year has 47 weeks available to work for clients. If he or she never takes a day of sick leave and works 10 hours a day, five days a week,<sup>83</sup> the attorney's schedule would allow about one hour and 10 minutes per case if the lawyer had a caseload of 2,000 cases per year. A lawyer with a caseload of 1,200 would have less than two hours to spend on each case.

The time per case has to cover the client interview, talking with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing motions and memoranda, including sentencing memoranda, and attending court hearings. There would be no allotted time for training, reading new appellate cases, or attending meetings at the courthouse or the local bar association related to misdemeanor practice.

A Kentucky columnist aptly summed up the crisis of excessive caseloads, stating: "The Sixth Amendment to the U.S. Constitution guarantees the right to an attorney, not the right to three hours of a grossly overloaded public defender's time."<sup>84</sup>

**"I think there has been a sharpening awareness of the ethical considerations for public defenders. ... Public defenders have handled caseloads few private lawyers would have ever thought of handling. Poor people have a right to a lawyer who is just as ethical as people of means do."**

— Ernie Lewis, former Public Advocate, state of Kentucky.<sup>85</sup>

**6  
Hours**



**400  
cases  
per  
year**

**2  
Hours**



**1,200  
cases  
per  
year**

**70  
Minutes**



**2,000  
cases  
per  
year**

**7  
Minutes**



**19,000  
cases  
per  
year**

## Approximate Time Per Case

### Excessive Caseloads Put Lawyers in Jeopardy

In most state ethical rules, as in the Model Rules of Professional Conduct, the very first substantive rule states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>86</sup> A number of ethical opinions have concluded that if her caseload is threatening her ability to competently defend current clients, a public defender must refuse to accept further cases. Additionally, if refusing future cases is insufficient, the public defender has a duty to seek to withdraw from existing cases to ensure competent representation for other defendants.

In 1990, the Arizona state bar issued an ethics opinion stating "when a Public Defender has made a factual determination that his or her Office cannot competently and diligently represent the number of persons assigned to it, the Public Defender must take action so that 'A lawyer's workload should be controlled so that each matter can be handled adequately.'<sup>87</sup> The opinion observed that this "will require the Public Defender to seek to decline appointments or withdraw from appointments already made until caseloads are manageable."<sup>88</sup>



## A Public Defender Stands Up, and Faces Contempt<sup>89</sup>

**O**n August 15, 2007, a young public defender in Portage County, Ohio, named Brian Jones was assigned to represent a defendant charged with misdemeanor assault. The case was set for trial the following day.

Because of his caseload, the defender had to meet with six other clients the next day, before even looking at the defendant's file. He then met with the defendant for twenty minutes.

When the case was called for trial, the defender explained to the judge that he would need a continuance in order to prepare for trial. The judge responded that the defender could have the lunch hour to prepare. The defender attempted to argue that he needed to speak with witnesses other than those the state had subpoenaed, but the judge refused the postponement. When court reconvened, the defender argued again that he should be permitted time to prepare, but the judge ordered the trial to commence.

The defender waived opening statement, informing the judge that he would not be able to participate in the trial because he was not sufficiently prepared. The judge held the defender in contempt and ordered him taken into custody. A hearing was later held on the contempt, and an ethics expert testified that the defender would have been in violation of his ethical obligations had he agreed to proceed to trial unprepared. Despite this testimony, the judge upheld the contempt citation. In upholding the decision, the judge noted that defenders plead cases and take cases to trial with minimal preparation all the time.<sup>90</sup>

The defender appealed, and the Court of Appeals reversed the conviction, stating:

*Under these circumstances, effective assistance and ethical compliance were impossible as appellant was not permitted sufficient time to conduct a satisfactory investigation as required by Disciplinary Rules 6-101 and 7-101 of the Code of Professional Responsibility, Rule 1.1 of the Ohio Rules of Professional Conduct, and the Sixth Amendment of the United States Constitution. It would have been unethical for appellant to proceed with trial as any attempt at rendering effective assistance would have been futile. Appellant properly refused to put his client's constitutional rights at risk by proceeding to trial unprepared.<sup>91</sup>*

More recently, the ABA issued a similar ethics opinion, finding:

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. ...[L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.<sup>92</sup>

The ABA Opinion further concluded that if a supervisor fails to relieve an individual defender of an overwhelming caseload, the individual defender must pursue the matter further, including seeking relief directly from the court.<sup>93</sup>

**“There can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer’s ethical obligations. ... No one seriously questions that a lawyer’s staggering caseloads can result in a breach of a lawyer’s duty of competence.”**

**— Arizona Ethics Opinion 90-10.<sup>94</sup>**

In a number of states, public defense attorneys have been disciplined for violating ethical rules by handling excessive caseloads and neglecting their clients. The California Supreme Court, for example, suspended two defenders for failures related to excessive caseloads. San Benito County hired a contract defender to do the bulk of its public defense work. The contract provided that the contractor could hire a subcontractor. The contract defender handled approximately 1,000 lower level cases per year, plus some felony cases, while the subcontract lawyer hired by the contract defender handled approximately 250 felony cases.<sup>95</sup> According to the bar discipline case against the supervisor, the subcontract lawyer “did not provide adequate legal services and was frequently not adequately prepared for court.”<sup>96</sup> The contract defender was suspended for one year for the failure to properly supervise the subcontract lawyer. The subcontract lawyer was suspended for three years after admitting that she conducted “no discovery, conducted virtually no investigation, failed to obtain the victim’s rap sheet, filed no motions in limine, submitted no jury instructions and was unable to concentrate during the trial” of a man who was charged with rape.<sup>97</sup>

Similarly, the Washington Supreme Court disbarred a former public defender from Grant County. The state bar disciplinary notice regarding disbarment cites as one of the reasons for the disbarment the fact that the attorney was “voluntarily maintaining an excessive caseload while one of the lawyers under contract to provide indigent criminal defense in Grant County.”<sup>98</sup> The hearing officer found that the attorney’s “excessive caseload was prejudicial to the administration of justice.”<sup>99</sup>

## Recommendations — Excessive Caseloads

1. *All persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.*

Excessive caseloads dramatically diminish the effectiveness of representation. For this reason, as noted above, national legal practice standards and ethical guidelines universally call for defender workload to be controlled. As one Tennessee respondent to the survey stated, “a better system would allow us to ... have fewer clients, so we could focus more and earlier on the needs of each client.”

A number of defender offices successfully set and maintain caseload standards. The Defender Association in Seattle, Washington, for example, maintains a caseload maximum of 380 cases per year per attorney in the Seattle Municipal Court. This limit is imposed both by city ordinance, which the Defenders helped to draft, and by collective bargaining agreement.<sup>100</sup> Similarly, the King County District Court

lawyers have an annual ceiling of 450, and the county budgeting process is based on that number. The Defender Director noted that in the last several years her office has managed to keep the district court caseloads lower than the 450 case credit ceiling.<sup>101</sup>

In Massachusetts, the Committee for Public Counsel Services uses assigned counsel to handle most of its misdemeanor cases. The lawyers are limited to 300 cases a year and “[a]ny counsel who is appointed or assigned to represent indigents within the private counsel division is prohibited from accepting any new appointment or assignment to represent indigents after he has billed 1,400 billable hours during any fiscal year.”<sup>102</sup>

In Wisconsin, caseload limits for public defenders are set by statute.<sup>103</sup> The standards were, in part, based on a case-weighting study conducted in the early 1990s by The Spangenberg Group.<sup>104</sup> The statute acts as a “safety-valve.”<sup>105</sup> When caseloads reach the standards set forth in the statute, the public defender can obtain relief, and overflow cases are assigned to private counsel by the courts.

2. *When caseloads become burdensome, defenders, pursuant to their ethical obligations, should seek to discontinue assignments and/or withdraw from cases until the caseloads become manageable.*

To avoid a breach of the attorney’s ethical duty, a defender office or individual defender confronting an excessive caseload is obligated to move the court to cease appointment of new cases and, if necessary, move to withdraw from existing cases.<sup>106</sup> In the past few years, a number of public defender offices have successfully petitioned courts to reduce their caseloads to prevent violations of the attorneys’ ethical obligations and ineffective assistance. These cases provide ample precedent for the duty of defenders to reduce caseloads to prevent breaches of their ethical obligations.

In 2008, the public defender in Mohave County, Arizona, won a motion to withdraw from a series of felony cases.<sup>107</sup> The order granting the motion stated:

The evidence presented at the hearing leaves the court with no doubt whatsoever that the attorneys in the Public Defender’s Office cannot continue representing the Defendants in these cases in light of their already existing caseload. ... Requiring or even allowing the Public Defender’s Office to remain as appointed counsel in these cases would likely compromise them from an ethical standpoint and deprive the Defendants in these cases of their rights to effective representation.<sup>108</sup>

The Miami-Dade County Public Defender also recently moved for appointment of other counsel in non-capital felony cases because he did not have enough attorneys to

represent the clients effectively.<sup>109</sup> In granting the motion, in part, the judge stated, “the evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused.”<sup>110</sup> The court concludes, “the testimonial, documentary and opinion evidence shows that [the public defenders’] caseloads are excessive by any reasonable standard.”<sup>111</sup> The state’s attorney immediately appealed the order, and the appeal is now pending before the Third District Court of Appeals of the State of Florida.<sup>112</sup>

In California, public defenders have an established practice of declaring that they are unavailable to take cases when the caseload reaches whatever limit the office has set. The origin of this practice is a 1970 court case, in which a California appellate court stated, “When a public defender reels under a staggering workload . . . [he or she] should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense.”<sup>113</sup>

### Why Are Misdemeanor Caseloads So High?

The need to reduce caseloads to ensure that indigent defendants across the country receive competent representation is obvious. It therefore requires an examination of the factors that lead to excessive caseloads.

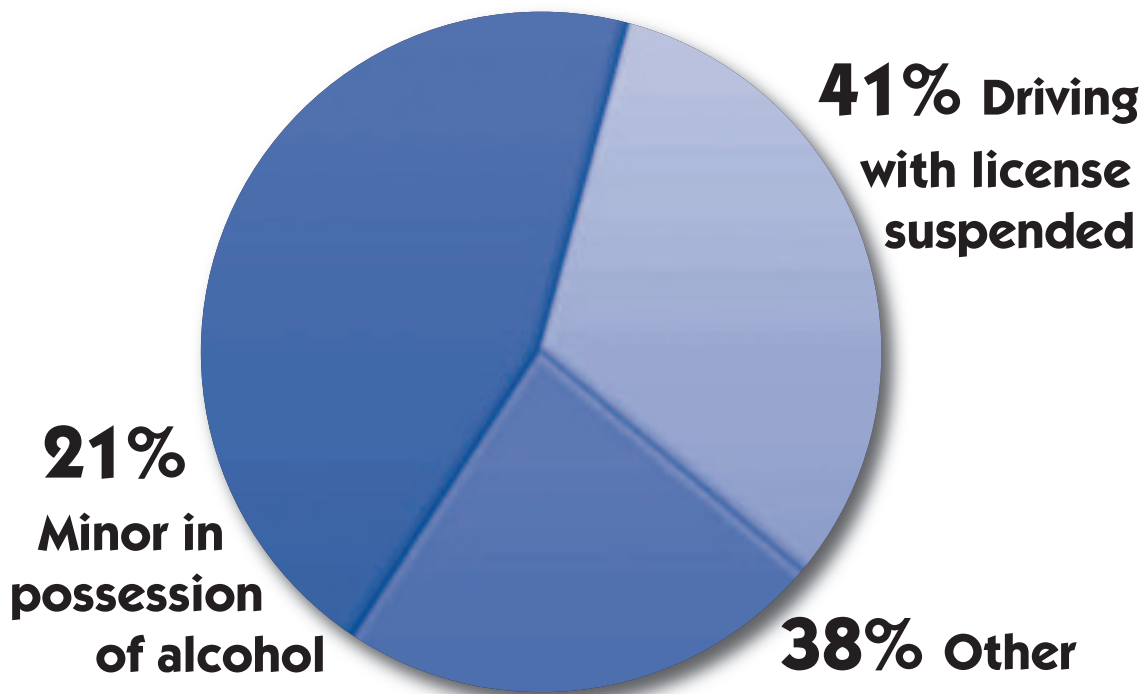
### Overcriminalization

One issue noted by both researchers and conference attendees concerning misdemeanor courts was the ardent enforcement of crimes that were once simply deemed undesirable behavior and punished by societal means or a civil infraction punishable by a fine. Conferees gave examples from around the country, including unleashed pet laws, seatbelt laws, laws prohibiting people from putting their feet on subway seats or lying down across two subway car seats, and laws against riding bicycles on the sidewalk.

- ◆ The offense of sleeping in a cardboard box is criminalized in New York under the New York City Administrative Code § 16-122(b). It is punishable by a fine of not less than \$50 or more than \$250, imprisonment for not more than 10 days, or both.<sup>114</sup>
- ◆ It is also a crime in New York to occupy more than one seat, sleep, or litter on a subway.<sup>115</sup> Each of these crimes is punishable by a fine of up to \$25, imprisonment for not more than 10 days, or both.<sup>116</sup>
- ◆ In Orlando, Florida, it is a crime to feed the homeless.<sup>117</sup>

A number of defenders noted that their dockets are clogged with crimes that they do not think should be punishable by jail, including underage possession of alcohol, turnstile

### Lower Kittitas District Court Cases



**29 cases total on a single day**

jumping, fish and game violations, driving with a suspended license, and pedestrian solicitation. In Tampa, the site team observed defenders preparing to try a case for solicitation of alcohol, which involved an exotic dancer accused of improperly soliciting a patron to purchase an alcoholic beverage.

On the day of the site visit to the Lower Kittitas District Court in Washington, 29 cases were heard. Twelve were driving with license suspended, third degree cases. Six were minor in possession of alcohol cases. Another Washington court, Lynnwood Municipal Court, has similar statistics. In January 2008, 104 cases were assigned to the contract public defender. Of these, 36, or more than one-third, were driving with suspended license, third degree, cases.

In fact, driving with a suspended license charges make up a significant part of the caseload in many jurisdictions. Most of these charges result from the failure to pay fines or fees, such as tickets for a broken tail light or not having insurance, parking tickets, or even failure to pay child support.<sup>118</sup> Many defenders observed that criminalizing driving with a suspended license is problematic because the charge usually results from a license suspension for failure to pay fees or fines. The charge thus frequently criminalizes the inability of a defendant to pay, which creates an unbreakable cycle. A North Carolina defender who handled 600 misdemeanor cases last year noted in a survey response:

One of the most common charges is driving while license revoked. Since we have

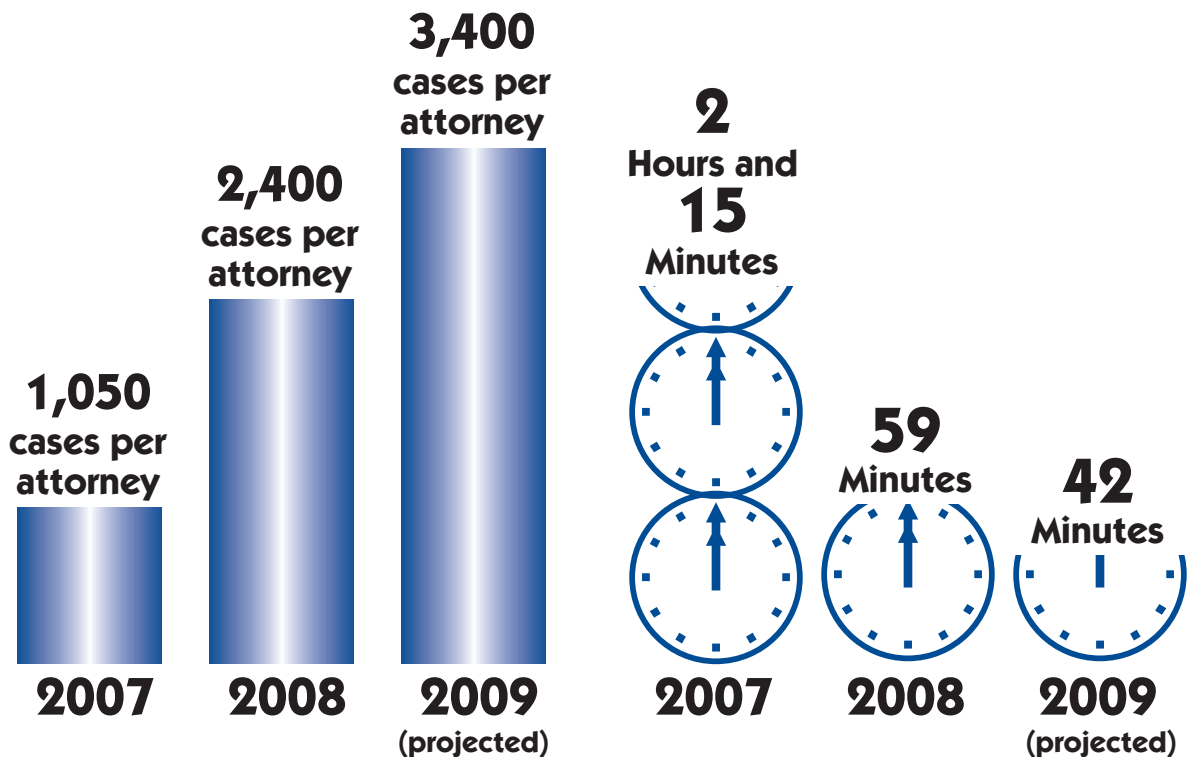
no public transportation, it is unrealistic to expect that people will not drive. Licenses are revoked for non-payment of child support, failing to pay fines, and failure to appear in court. Once a license is revoked, any moving violation convictions suspend the license even longer, which usually leads to more revoked driving charges.

An NLADA report similarly observed that in Grand Traverse County, Michigan, “approximately 10 percent of all cases are for driving with a suspended license (DWSL). . . . The prosecutor also noted that DWLS needs to be addressed, that ‘it’s an economic issue,’ and that most of the defendants have no other criminal record.”<sup>119</sup>

### Misdemeanor Indigent Defenders Take Brunt of Budget Shortages

Experts have observed innumerable times that public defender offices across the country are underfunded.<sup>120</sup> What is essentially unreported is how this underfunding disparately impacts those accused of misdemeanors. Indigent defenders facing budget shortages almost always prioritize felony cases, to the detriment of persons accused of misdemeanors. It is simple triage. The funding is not there to adequately staff both misdemeanor and felony cases. Indigent defenders scramble to provide the best defense to those in the most dire need. Thus, they prioritize clients

## Atlanta City Public Defender Office Caseloads



who are at-risk for the lengthiest incarceration or death sentences.

A Cook County defender reported that there is undoubtedly a choice to prioritize serious felonies. The office has a specialty division for homicide cases in which caseloads are closely controlled. The misdemeanor caseload, however, is more than five times the national standard.

In Allegheny County, Pennsylvania, one lawyer observed that a felony is more likely to go to trial than a misdemeanor. Another attorney in the office told a site team member that, with as many cases as they have, they have to set priorities, and they are going to be “more concerned about the guy going up the river than one looking at probation.” A supervising defender in Missouri, whose 19 lawyers handled 3,487 cases in the past year, bluntly reported, “The clients who are cheated attorney time are those with misdemeanors or lower-grade felonies.”<sup>121</sup>

When budgets are cut, misdemeanor public defense is often among the first services to be adversely affected. In Atlanta, for example, when the city faced a shortfall, among the first cuts was the city court’s defender. The Atlanta City Public Defender Office, which handles the low level city court cases, was already overburdened. In 2007, the office had 20 lawyers who together represented clients in about 21,000 cases (1,050 cases per attorney).<sup>122</sup> After budget cuts, the director reported that in addition to having to lay off six lawyers, four other attorneys had resigned, leaving her with 10 attorneys to handle an estimated 24,000 cases this year (2,400 per attorney, or six times the national standards). According to press reports, additional cuts may require reduction to only seven attorneys. These cuts would bring caseloads to over 3,400 per lawyer or more than eight times the national standards. Each lawyer would have to handle more than 13 cases each work day. The defender observed, “It’s an unfortunate situation that because of the city’s budget difficulties, we have to take our share.”<sup>123</sup>

Budget cuts also often lead to the increased use of flat-fee contracts for public defense services. A flat-fee contract is one in which a defender receives a fixed amount of money to handle a percentage or all of the public defense cases in a jurisdiction or court, or a defender is given a flat-fee per case without limit on the number of cases the defender can accept (or a limit that exceeds national standards).<sup>124</sup> Recently, the use of flat-fee contracts for public defense services has expanded dramatically.<sup>125</sup> A report in California noted that “[c]ontract defenders are the primary provider of indigent felony and misdemeanor representation in 24 counties (41 percent). . . . The amount of compensation afforded by these contracts is often based upon a fixed fee per case or a flat-fee for the expected annual caseload.”<sup>126</sup> Flat-fee contracts put enormous pressures on defenders, particularly when the caseload rises above expected levels and the defender does not have access to additional resources to handle the increase. The defender then is forced to decide that some cases will receive little or no attention, creating a conflict of interest.

## Recommendations — Causes Of Excessive Caseloads

### 1. *Offenses that do not involve a significant risk to public safety should be decriminalized.*

As the Supreme Court observed in *Argersinger*, “[o]ne partial solution to the problem of minor offenses may well be to remove them from the court system.”<sup>127</sup> Many misdemeanor crimes do not involve significant risks to public safety, yet they result in high numbers of arrests, prosecutions, and people in jail. In fact, many do not involve any risk to public safety. The criminal justice system would operate far more efficiently if these crimes were downgraded to civil offenses.

The state of Hawaii has undertaken a comprehensive effort “to make resolution of minor criminal offenses, including traffic violations, as simple as possible for the average citizen and to ensure that police, prosecutor, and judicial resources are focused on the most serious criminal offenses.”<sup>128</sup> The legislature passed an act requiring the Legislative Reference Bureau, a non-partisan governmental research institution, “to identify minor criminal offenses for which typically only a fine is imposed and which may be decriminalized without undermining the ability of government to enforce laws within its jurisdiction.”<sup>129</sup> The Legislative Reference Bureau published the report entitled “Decriminalization of Nonserious Offenses: A Plan of Action,” in January 2005.<sup>130</sup>

The report found that “numerous criminal offenses remain on the books outside the Penal Code that are routinely disposed of by a fine but which, because they are technically criminal, require at least one court appearance and all of the time and expense that goes with it. Some of these are traffic offenses but many are offenses that have become arcane, sometimes perceived as being irrelevant with the passage of time.”<sup>131</sup>

The report recommended identifying and considering for decriminalization “those offenses that, despite the possibility of serious penalties, are routinely and consistently being disposed of with fines.”<sup>132</sup> In the 2008 legislative session, the Hawaii legislature, following the recommendations of the report, passed a law decriminalizing, among other things, a number of agricultural and conservation-related offenses, as well as transportation and boating offenses.<sup>133</sup> The legislature also established a procedure for proposing the decriminalization of other offenses in the future,<sup>134</sup> and it is expected that additional statutes will be reviewed in coming legislative sessions.

Similarly, the Massachusetts legislature, in response to the rising costs of indigent defense services, established a commission “to identify all violations of the general laws that are currently classified as a misdemeanor,” determine how often each such law is charged, and determine how the cases are resolved.<sup>135</sup> Based upon this information, the commission is to

“determine the feasibility of classifying misdemeanor offenses as either ‘class A’ misdemeanors or ‘class B’ misdemeanors ... [such that] ‘class B’ misdemeanors would be criminal offenses deemed non-serious and warrant assessment of a civil fine with no possibility of incarceration.”<sup>136</sup> Although the work of this commission has not yet begun, decriminalization efforts are proceeding in Massachusetts. By general election ballot measure, the citizens of Massachusetts recently voted overwhelmingly to decriminalize possession of small quantities of marijuana. The punishment for possession of less than one ounce of marijuana is now a fine of up to \$100 and forfeiture of the drug.<sup>137</sup>

In Lincoln, Nebraska, a formal assessment of the public defender office found the office was handling excessive caseloads and recommended that the city council undertake a review of ordinances to re-evaluate appropriate punishment.<sup>138</sup> Thereafter, the public defender proposed decriminalization of a number of misdemeanor offenses, including dog leash and trespass offenses, to address rising caseload and budget challenges.<sup>139</sup>

The state criminal codes are clogged with offenses that have little to no impact on public safety, but are nonetheless punishable by imprisonment, triggering the full panoply of due process rights. Such crimes include feeding the homeless, rid-

ing a bicycle on the sidewalk, fish and game violations, and public urination. Every state should undertake a systematic review of misdemeanor offenses for the purpose of identifying offenses that can be decriminalized without substantially impacting public safety.

If it is determined that an offense should be switched from a misdemeanor to a violation, it is critical to also review the collateral consequences that can result from a conviction. Often, the collateral consequences are worse for the defendant than the punishment for the offense. For a violation, a defendant does not have access to a defender to instruct him or her on the collateral consequences of a conviction. Under these circumstances, to impose harsh collateral consequences, like housing limitations, deportation, and employment limitations would be fundamentally unfair.

## 2. *Diversion programs should be expanded.*

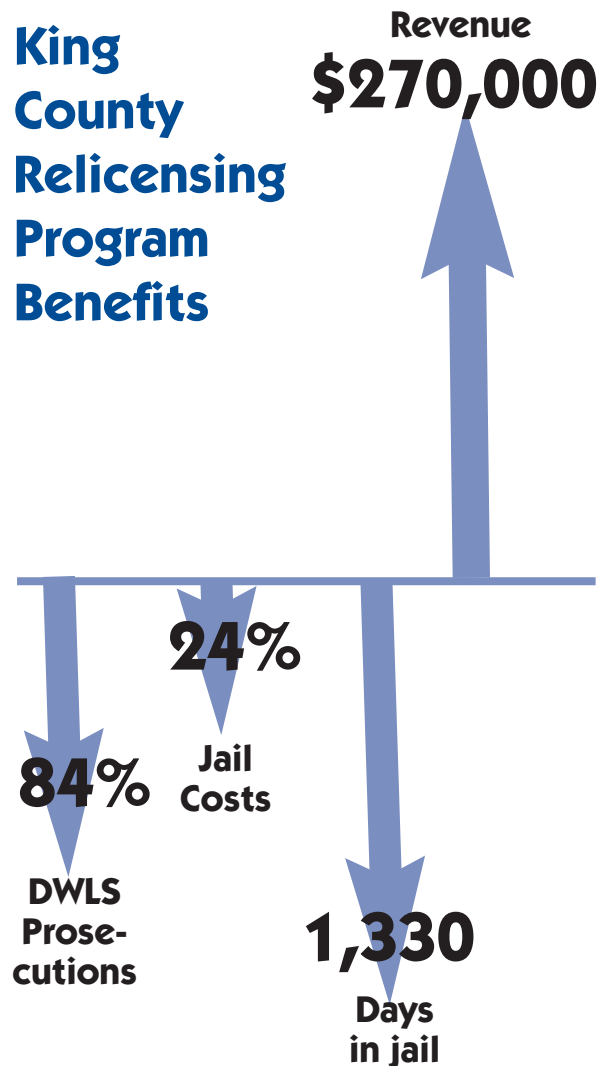
Increasingly, diversion is seen as a practical alternative to full criminal court prosecution of minor offenses. The American Bar Association has urged “federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision[.]”<sup>140</sup>

As noted above, driving offenses, particularly the offenses equivalent to driving with a suspended license, make up an extraordinary proportion of the misdemeanor caseloads in many jurisdictions. For this reason, Miami-Dade County, Florida began a diversion program called Drive Legal, which permits an individual to pay down the fines that resulted in the suspension of his or her driver’s license over time and/or through community service.<sup>141</sup>

Similarly, King County, Washington, has a diversion and relicensing program. The creation of the program was a combined effort of The Defender Association, the King County prosecutor, the district court, and the county executive and county council. In the relicensing program, which is available to individuals whose license has been suspended regardless of whether they have charges pending, the person is given an opportunity to pay the underlying fines that led to the suspension through community service or work crew.<sup>142</sup> If completed, the prosecutor dismisses the pending charges.

In 2004, a consultant analyzed the program and concluded that, in the first nine months of operation, there was an 84 percent reduction in prosecution filings in driving with a suspended license cases and a 24 percent reduction in jail costs, with 1,330 fewer jail days. In addition, the program generated twice as much revenue than it cost, both in producing payments on tickets and in savings for prosecution and defense as well as jail.<sup>143</sup>

Spokane, Washington, recently re-instituted a relicensing program. It had 340 graduates in the first three months of



operation. The city prosecutor described the program in an email as follows:

It helps all but the most violent offenders who have lost their driver's license for failure to pay tickets get into a structured repayment program in a non-collection agency status. Said another way, we help people with a program that allows them to pay down the original debts free of interest and collection fees. The twist that really makes this work is that we lift their license holds and allow them to get their license BEFORE the debts are paid in full.

Like the program in King County, an individual does not have to have a pending charge to enter the program.<sup>144</sup> The potential impact of this program on the overall caseload is significant, as the Spokane County public defender reported that one-third of his misdemeanor cases are DWLS 3. The state Office of Public Defense is funding a half-time position in the Defender office to assist clients to enter and complete the program.

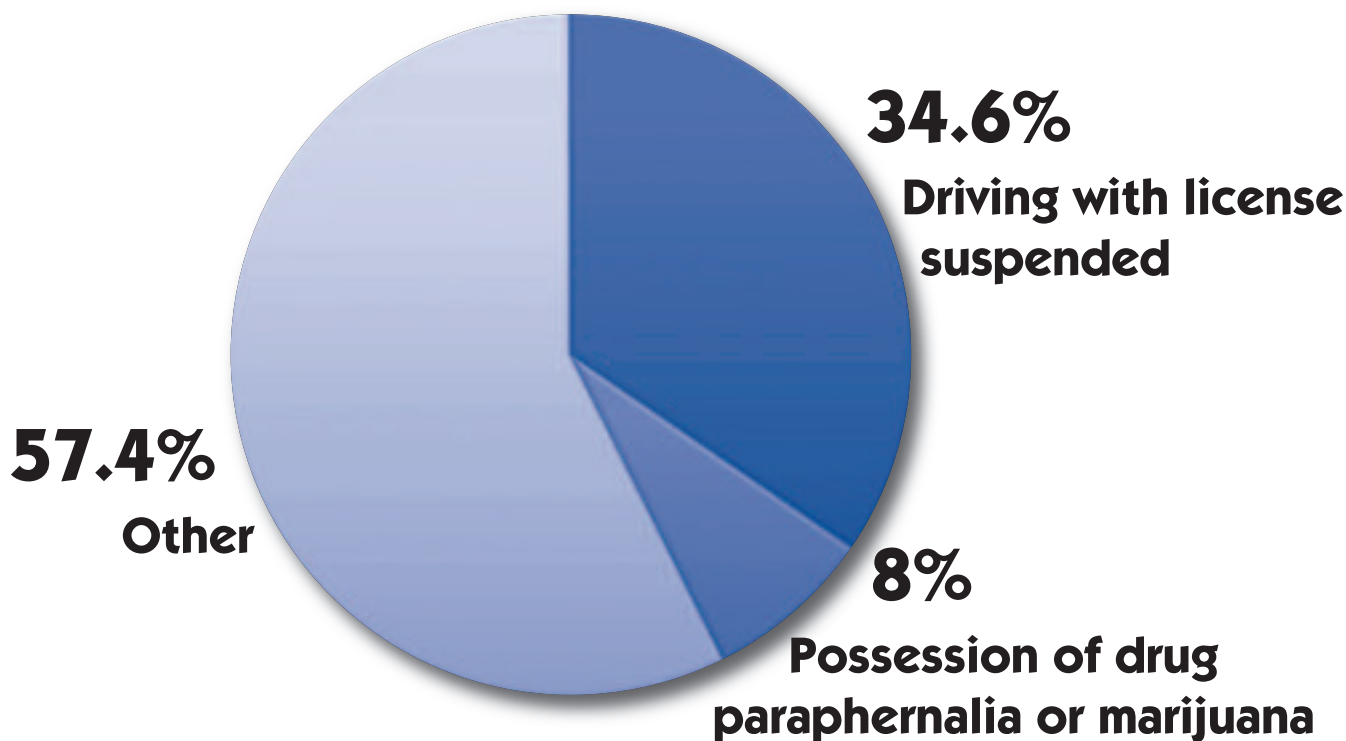
The Sacramento public defender reported in an email that, in addition to statutorily created diversion programs, they have established others as the result of negotiations with the district attorney's office:

We have the standard drug diversion. ... If the counseling classes are completed[,] then the case is dismissed and the client can report that he has never been arrested or convicted of a drug offense. ... We [also] have diversion for theft, battery, vandalism, and other low end misdemeanors.

These examples demonstrate that not only are diversion programs successful, they also can be cost effective, and provide benefits to the public. Indeed, the impact on the defendant, the court system, the taxpayer, and the community can be profound.

Consider Lynnwood Municipal Court in Washington State. As noted above, in January 2008, 104 cases were assigned to the contract defender. Of these, 36, or 34.6 percent, were DWLS 3 cases. Eight were possession of drug paraphernalia or marijuana. Pre-filing diversion of those 48 cases would have reduced the defender caseload by 46 percent, as well as drastically reducing the court docket. Instead, according to the contract defender, most defendants stipulate to the police report and are found guilty. The court then gives them up to 90 days to address the problem and return with a license. Less than half return, and often, the court issues warrants. This results in new arrests, which the public defender and courts must then handle.

### Lynnwood, Washington Misdemeanor Caseload January 2008



### 3. *Funding for misdemeanor defense should permit the maintenance of appropriate caseloads.*

To the extent misdemeanor offenses carry a possibility of incarceration, the legislative body with responsibility for funding the public defender program must appropriate funds that permit defenders to maintain reasonable caseload limits. Funding should be based on estimates of the number and types of cases the program is expected to handle in the upcoming year, with the expectation that each defender will have a caseload appropriate for the jurisdiction while not exceeding national standards.<sup>145</sup> In the event that the caseload increases, the program should be permitted to seek supplemental funds, or be permitted to stop accepting cases in order to maintain appropriate caseloads.

A number of jurisdictions have been able to maintain caseload limits by tying funding to the number of cases to which the public defender is assigned. As previously noted, in Washington, the King County district court lawyers have an annual caseload limit of 450 cases, and the county budgeting process is based on that number.<sup>146</sup> In Colorado, the limits are based on a comprehensive, jurisdiction-specific case weighting study that occurred in the mid-1990s, which has been periodically updated.<sup>147</sup> “The Colorado legislature has accepted the formula for purposes of both budgeting and analyzing the fiscal impact of proposed legislation.”<sup>148</sup>

### 4. *Counties and states should discontinue the use of flat-fee contracts as a means of providing indigent defense services.*

The primary goal of flat-fee or fixed price contracting is not quality representation but cost limitation. These contracts require an attorney to handle an undefined number of cases for a fixed price, or establish a fixed price per case and allow an attorney to accept an unlimited number of cases. In both instances, flat-fee contracts encourage attorneys to process cases quickly. If an attorney gets to count the case — and receive payment — once the case is arraigned, the attorney is motivated to dispose of the case as quickly thereafter as possible to maximize profit. These contracts discourage investigation, consultation of experts or specialists, and taking cases to trial. Accordingly, flat-

fee contracts create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions.<sup>150</sup> Taking the lowest bidder in a flat-fee contract process serves only to emphasize that the primary concern is cost containment and not the constitutional obligation to the defendants.<sup>151</sup>

Recently in Grant County, Washington, a defendant who was wrongly convicted received a \$3 million verdict after a federal court jury found that his attorney’s representation was inadequate.<sup>152</sup> The attorney had a flat-fee contract to handle indigent defense cases in the county and carried a caseload of more than 500 felony cases a year. He refused to hire an investigator or other experts, or to pay for a polygraph in the defendant’s case.<sup>153</sup>

In part because of the kind of conduct involved in this case, the Washington Supreme Court, in September 2008, amended the Rules of Professional Conduct regarding conflicts of interest with current clients to specifically bar flat-fee contracts where the contract requires the attorney to pay for any conflict attorney, investigative costs, or expert fees out of the contract.<sup>154</sup> The explanation of the new rule stated:

An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of conflict counsel. For this reason, such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so.<sup>155</sup>

According to the press report following the verdict, as a result of the new ethics rule, “17 other rural Washington counties began dumping their ‘flat-fee’ contracts with contractor public defenders.”

**“The ‘Rawhide’<sup>149</sup> imagery [of cattle being herded] is perfect. If you turn off the sound and watch Manhattan Criminal Court, there is no way you don’t think it is a cattle auction.”**

— A veteran New York attorney.

## Misdemeanor Defense In Practice

The extraordinarily high caseload numbers in misdemeanor practice inevitably require lawyers to cut corners. Site teams witnessed and were told the same things across the country: defenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal



research required or prepare appropriate motions, and their ability to take cases to trial is compromised.

In Allegheny County, Pennsylvania, for example, a lawyer who had about six months of experience told a site team member that generally the lawyers have reviewed the file before coming to court for the preliminary hearing, and they arrive early and talk to the officers and the prosecutor. Another lawyer explained that she will review the files for a few minutes each the night before, then meet with the client for about five minutes in court, negotiate a possible deal with the police officer, and discuss the deal with her client. One attorney described the process as a scramble, and another mentioned that with seven clients, seven officers, and seven DAs in one morning, “[y]ou have to be on your toes the whole session.”

A law professor recently spoke with a lawyer working in a defender office with crippling caseloads, who “candidly reported that, prior to the increase in cases in her office, she had conceived of her role as looking for the single issue that would give her client a plausible argument to make in her defense.” With case overload, the same lawyer “now looked for the one issue that she could identify to convince her client to resolve the case short of trial.”<sup>156</sup>

A respondent to the survey from Nassau County, New York, admitted, “[m]ost interviews happen on court days in the courthouse. Motions are filed but are discouraged by the court and by the fiscal restraints.” The Spangenberg Group report on indigent defense in New York<sup>157</sup> also noted deficiencies in how misdemeanor cases are handled:

In the city court, one public defender reported an open caseload of 800 misdemeanors; she has so many clients that her voice mail cannot hold all of their messages. Another reported 800-850 open cases in the arraignment part in that court. We were told that the city court cases are “triaged” and not all are fully investigated. The Monroe County Public Defender described the situation to the Commission as “outrageous.”<sup>158</sup>

Crippling caseloads make it all but impossible to take cases to trial. As one supervising lawyer in Cook County, Illinois, noted, her attorneys “do go to trial, but not as often as they could if the numbers were lower. ... [M]ost trials are bench [trials] and only last a couple of hours.” A line defender in Cook County confirmed her assessment, stating, “You can try cases [but only] with severe triaging.” One of the Chicago supervisors stated at the May 9 conference in New York that most of the attorneys fresh out of law school want to take cases to trial, but “they tend to get beaten down by the system.”

- ◆ One defender in Washington reported handling 900 cases in a year. Of those 900, he performed only eight jury trials and one bench trial (a trial rate of 1 percent).

- ◆ A Texas defender from a small city who reported having 100 misdemeanor cases and 300 felony cases last year, reported, there are “only 1-2 misdemeanor trials a year for the entire county.”

Across the country, overburdened defenders reported taking approximately one in every hundred cases to trial or even less. If a defender does take a case to trial, it cuts even further into the amount of time available for the remainder of her cases. Even a trial that lasts a day or two severely affects the lawyer’s ability to prepare the other cases.

## Meet and Plead

In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, “legal advice” often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant’s case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken. This process is known as meet-and-plead or plea at arraignment/first appearance.

**“[C]lients are forced to make VERY difficult decisions with very little investigation or discussion ... due to the number of clients and the short notice we have when appointed.”**

**— A Tennessee public defender.**

According to Professor Adele Bernhard, “In 2000 in New York City, assigned counsel lawyers handled 177,965 new defendants in the Bronx and Manhattan. 124,177 of those cases were disposed of at the first appearance — most by a plea of guilty entered after no more than a 10-minute consultation with their lawyers.”<sup>159</sup> Similarly, Professor Steven Zeidman, who directs the defender clinic at the CUNY School of Law, reported that “somewhere in the vicinity of two-thirds of all misdemeanor cases are ‘disposed of’ at the accused’s very first court appearance.”<sup>160</sup>

The Justice Department published a story about a rural California county contract defender who assigned all misdemeanor cases to one associate.<sup>161</sup> “She carried a caseload of between 250 and 300 cases per month. She was expected to plead cases at the defendant’s first appearance

in court so she could move on to the next case.”<sup>162</sup> The misdemeanor associate was fired for seeking a continuance to address pretrial suppression issues in a case.<sup>163</sup>

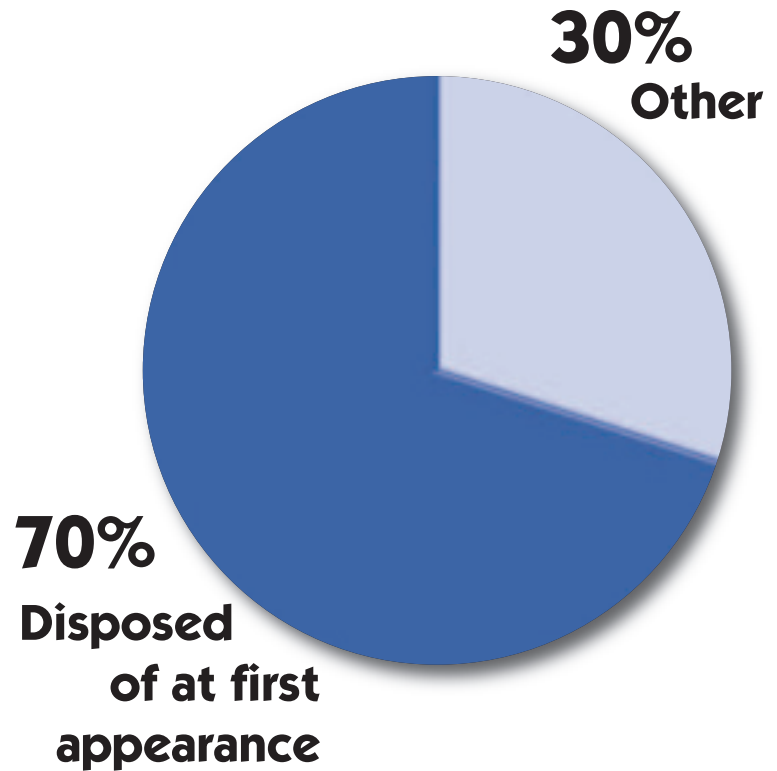
Site team members observed similar pleas at arraignments in a municipal court in Lynnwood, Washington. Two contract defenders advised as many as 132 defendants on an arraignment calendar in a three and a half hour period. Frequently, the defense lawyer was talking with other defendants in the audience gallery while another of his clients was at the podium talking to the judge.

Once in front of the judge, the total time from presentation of charges to sentencing took about five minutes. While some defendants opted for continuances in order to meet with an attorney or negotiate further with a prosecutor, many did not. Instead, they stipulated to the admission of the police report, which resulted in a finding of guilt. There was no colloquy regarding the rights being waived — including the right to a jury trial and the right to confront witnesses. The judge simply proceeded to sentencing. One defendant appeared and was sentenced to 10 days in jail and a \$500 fine for marijuana possession in less time than it takes to get a hamburger from a McDonald’s drive-through window.

In Maricopa County, Arizona, one of the more experienced defenders explained that, having advised a client and negotiated a guilty plea, defenders do not always go to court with the clients for plea and sentencing because of the long wait time in court. The defenders prepare the client, often spending a couple of hours on preparation, but they rely on the court to ensure that the plea and sentence is fair. By way of explanation the defender noted that the judges “are supposed to bring us in if there is a question.”

There is a growing body of evidence that suggests that innocent people frequently plead guilty. As early as the 1960s, scholars observed the likelihood that pressures to plead were resulting in innocent people pleading guilty.<sup>164</sup> Innocent de-

## New York City Misdemeanor Guilty Pleas at First Appearance



fendants often plead guilty because the punishment offered by the prosecutor in the plea agreement sufficiently outweighs the risk of greater punishment at trial.<sup>165</sup> In the misdemeanor context, this pressure can be even more compelling because the punishment in the plea offer, frequently time served or probation, appears minimal, and the prospect of fighting the charge has not only the risk of more substantial punishment, but also tremendous inconvenience, including possible ongoing pretrial detention, missing additional days of work, and having to find alternate child care, among others.<sup>166</sup> Adding to this pressure is the demonstrable fact that the assigned defense attorney has neither the time nor the resources to adequately prepare a trial defense.

### Denial of Bond/Inability to Make Bail and the Pressure to Plead

At the New York conference held on misdemeanor courts, attendees noted that the meet and plead situation is partially driven by defendants. In misdemeanor cases, the difference between pleading guilty at arraignment and further investigation pending trial is often related to the defendant’s custodial status. A client will plead guilty at arraignment, even against counsel’s rigorous advice, because it means he or she will be released that day or soon thereafter. A client will waive a compelling suppression motion or a viable defense in order to avoid another day in custody, particularly when that time might affect her job or the care of her children.

**“Most of the PDs do not have enough time to do thorough investigations, meet with the clients at length, research all of the potential issues, and file all potential motions specifically tailored to each case.”**

— A Florida public defender.

A Phoenix defender observed during the site visit, “If you can bond yourself out, your perception of our justice system is completely different. . . . The system uses in-custody status as a way to coerce pleas.” It was evident at the New York conference that defenders, as well as clients, feel great pressure from the volume of in-custody clients who cannot make bail. One survey respondent from New York wrote, “[b]ail is set (so high) which forces us to give up on cases in order to get the client out.” Another New York defender summed it up perfectly, stating that it is hard to fight against the excessive bonds and in-custody status. “Clients want to be home.”

A Philadelphia defender reported that they have a chronic problem with homeless and/or poverty-stricken individuals who remain in custody on minor misdemeanor charges such as public urination or disorderly conduct because they cannot pay bail amounts as low as \$100. When they finally get an opportunity to appear in court, they all plead guilty to time served, which by then is frequently longer than they would have served if found guilty of the offense.

A veteran New York defender, in a survey response, noted that the pressure to plead due to failure to make bail is often greater on defendants of color. Judges often set bails equally across defendants, but those bails are, in his experience, harder for minority defendants to pay. “Black kids and to a lesser extent Latino kids are held on bails that they are far less likely to meet . . . A judge may hold . . . client A to a \$1000 bail and . . . client B to the same, but for A it is a weekend in the city, for B it is two weeks salary or two months of public assistance.”

## Prosecutorial Pressure to Plead

Often, prosecutors put pressure on defendants to plead guilty at the first court appearance by offering a more favorable plea bargain if, and only if, the client pleads guilty that day. Time and time again, defenders reported getting plea bargain offers just before the first hearing that would allow the client to go home, if they accepted the plea that day. Such plea offers place enormous pressure on the clients, who, as noted above, want nothing more than to go home. One blogger from Texas described an experience that is consistent with the reports from around the country:

**My First Job**...was with the Wichita County Public Defender. It did not prove satisfactory for a few reasons. First of all, the misdemeanor prosecutor would offer time served and no fine to 90 percent of my clients. The Sheriff had a policy of giving 2 for 1 credit for time spent in jail.

Typically I would be assigned a defendant who had spent 21 days in jail. Defendant would be placed on the jail chain and dragged into court. The DA would offer 42 (21x2) days time served, with fine and court costs paid for. The defen-

**“A system of ‘meet’em, greet’em, and plead’em’ ... where overworked defense attorneys actually don’t even meet clients before disposition hearings — is a recipe for wrongful convictions and a pervasive lessening of respect for the rule of law.”**

— Judge Joseph Bellacosa, New York.<sup>167</sup>

dant had a decision to make — Get out of jail with no fine, or fight the case and stay in jail. Hmmmmm..... Tough choice.

It was a no brainer for defendant’s [sic] to accept the plea bargain. I spent most of my time explaining plea papers and guilty plea consequences.<sup>168</sup>

Similarly, a lawyer responded to a survey question concerning whether effective assistance is possible given the caseload as follows:

It’s a complicated question. On regular dockets, I think we do provide effective counsel, but we have a “review docket,” which is usually within 24 hours of arrest. On a review docket, there is a non-negotiable offer from the DA that we convey. We have no prior knowledge of the case and do not have time to talk to the defendant before getting offers from the DA. We have a very, very short time with each defendant. In my opinion, we do not usually provide effective assistance on the review docket. You cannot represent 30-40 people in a two-to three-hour period effectively.

**“There is no question a lot of those folks are pleading guilty to get out.”**

— A judge in the City of Phoenix court.

As this story demonstrates, plea bargains received just before the first hearing, which will expire just after the hearing, also place extraordinary pressure on defenders. They must either stand up with the client as he or she accepts the plea without knowing whether a factual or legal investigation would lead to a better result or convince the client to allow further investigation even though it would require the client to remain in jail and might not lead to a better result.

### Impact of Increased Collateral Consequences on Misdemeanor Caseloads

The secondary impact of a criminal conviction, particularly a minor criminal conviction, has expanded significantly since the caseload standards were created in the 1970s. As Seymour James of the New York Legal Aid Society observed at the conference in New York, even a disorderly conduct conviction can result in harsh civil penalties, including losing eligibility for public housing, deportation, and suspension of college student aid. As discussed in the introduction, a conviction for a misdemeanor can affect all aspects of life from child custody arrangements to employment.

This vast array of collateral consequences has a dramatic impact on the work of the defender: (1) it adds to the research and advocacy that must be done in each case, thus decreasing the number of cases that a defender can effectively handle in any given period of time; (2) it changes the cost-benefit analysis of accepting a plea bargain; and (3) it places the client at greater risk of unforeseen harm if the defender is too overburdened by his caseload to properly advise the client of the impact of the decision to plead guilty or proceed to trial. Additionally, defenders often cannot accurately advise their clients regarding future collateral consequences that might be imposed because there is no uniform enforcement of collateral consequences.

As David Newhouse of the Spangenberg Group pointed out in an email, “Even where misdemeanor caseloads may not have increased over time, workload has due to collateral consequences [and] enhanced sentences[.]” Defenders need to spend considerable time researching the possible collat-

eral consequences for a particular defendant and then develop evidence to challenge any conditions precedent to the consequence. For example, one of the most common types of collateral consequence is a sentencing enhancement for prior convictions, meaning the defendant will get a greater penalty if she previously has been convicted of certain types of crimes. To try to avoid the sentencing enhancement, the defender must assess any past convictions the defendant may have and develop an argument to challenge the applicability of the enhancement.

Professor Zeidman observed that, with the rise of collateral consequences, one should see trial rates increase, particularly for low-level offenses, where the direct consequences of the conviction are not as severe. “In these days of burgeoning collateral consequences, when arrests and pleas can result in deportation, eviction, loss of government benefits, mandatory DNA samples, etc., one would expect to see defense attorneys impelled to aggressively contest the legality of their clients’ arrests.”<sup>169</sup> In other words, the increase in collateral consequences should increase not just the amount of research and training needed by misdemeanor attorneys but also the amount of in-court advocacy they are doing.

To the contrary, no person interviewed related an increase in the number of trials conducted in misdemeanor courts as a result of the expansion of collateral consequences. In fact, the overwhelming evidence reveals that trials are nearly non-existent in misdemeanor courtrooms.<sup>170</sup>

This lack of trial activity may be due to the fact that defenders, particularly those overburdened by excessive caseloads, do not have time to research the impact of collateral consequences on their clients. At the New York conference, many defenders acknowledged that they do not know the range of collateral consequences in their jurisdictions. A district attorney in attendance noted that prosecutors do not know of all the consequences either. Attendees also stated they believe most judges do not understand the collateral consequences.

### Early Disposition Projects

In response to overwhelming caseloads, a number of jurisdictions have established early disposition projects. Intended to assist clients by resolving cases quickly, these projects have some very positive features, such as the integration of social service organizations into the adjudication process. However, they also often require defenders to carry overwhelming caseloads and frequently demonstrate how the pressure to move cases quickly results in an assembly line plea process.

In Pittsburgh, the site team observed the Allegheny County Early Disposition Project. The project was intended to benefit clients by promoting coordination between the courts and social service agencies to help clients get out of jail and resolve their cases earlier. One of the supervisors noted that the program accepts cases with minimal or no trial issues and can

**“A lot of the problems with the public defense system are structural. We can’t expect an attorney to function properly with the caseloads they have.”**

**— Cory Stoughton, New York  
Civil Liberties Union.**

resolve the case within a week, as opposed to four or five months. He observed that the program's efficiency provides the defendant with more of a connection between the punishment and the behavior.

However, because of the emphasis on speed and the failure to allocate sufficient resources to the project, defense lawyers have defaulted to a meet and plead system. One assistant public defender reported that, in the first year of the Early Disposition Project (EDP), he represented defendants in 1,800 guilty pleas. He reported spending far less than one hour on each client's case. He stated that he spent 10 to 15 minutes with the client, reviewing the allegations, the client's version of events, the prosecutor's offer, and the likely sentence. The EDP attorney estimated that about 100 of the 1,800 received jail time, often concurrent with some other case.

The EDP attorney noted that it is impossible to meet clients the day before the hearing. He also stated that he does not receive the offers from the district attorney until the night before the hearing. The office recently assigned him a legal assistant, but not the additional attorney he felt was needed "to make sure bases are covered and get a bit of a break once in a while."

The spectrum of cases resolved on the EDP calendar included possession of drugs, drunk driving, retail theft, and prostitution. The defender reported typically doing no research or fact investigation, stating, "[t]hese are not situations that necessitate that." But, one observer told a site team member that the prosecutor sends some drug possession cases to EDP because they involve questionable arrests, which raises the possibility that if the facts and law were investigated properly the court might conclude that the cases should be dismissed. And, another defender reported that, contrary to the EDP attorney's assertion, a DUI case requires a lot of preparation.<sup>171</sup>

A different early disposition project in Washoe County (Reno), Nevada, suffered from similar problems. The Early Case Resolution (ECR) project was originally intended to eliminate many non-serious cases from the court docket. The program was examined by the Supreme Court Task Force on the Elimination of Racial, Gender, and Economic Bias in 2000, which raised serious questions about whether the defendants in the program were receiving appropriate advice. The Task Force Report suggested that defendants in the program felt coerced to accept pleas, whether or not they were guilty of the crime charged. The report noted that public defenders routinely advised clients to plead, despite "not always hav[ing] the state's discovery in the client's file before discussing the plea with him or her." The report further observed that "one of the most notable effects of the ECR program is that the Washoe County Public Defender office takes only approximately 30 cases to trial each year" out of approximately 6,300: a trial rate of less than half a percent.<sup>172</sup>

In January 2008, the Nevada Supreme Court issued an order establishing performance standards for public defenders, intended to ensure appropriate representation for all per-

**"Clients feel like they are a cog in a large wheel and attorneys are unable to provide the quality time they need."**

**— An Oregon public defender.**

sons charged with criminal offenses.<sup>173</sup> Although the standards did not include formal caseload limits, they require the defense lawyer to "make available sufficient time, resources, knowledge, and experience to afford competent representation."<sup>174</sup> The standards go on to require counsel to prepare for and conduct an initial client interview, which must be held before any court proceeding.<sup>175</sup>

After the adoption of the performance standards, Washoe County immediately suspended the ECR project, noting that practices in the program may not comply with the performance standards.<sup>176</sup>

### **Effect of Excessive Caseloads On the Clients**

When caseloads are unmanageable and defenders are unfairly forced to skip steps, they render less than adequate services. One-third of the respondents to the survey fully acknowledged that the caseload of the public defense lawyers in their jurisdiction does not allow them to provide effective assistance of counsel. As one former Miami public defender recently noted, "[W]e don't know our cases through and through. The potential to make a mistake is enormous."<sup>177</sup>

The rush caused by excessive caseloads has a substantial negative effect on the clients. One Miami defender, testifying tearfully at a hearing on a motion to obtain caseload relief, gave a compelling example of the harm caused to a client. She stated that, stressed with 13 cases set for trial in one week, "she failed to convey a prosecutor's plea offer to her client. As a result, the state revoked the offer of 364 days in county jail, and the defendant was stuck accepting the state's subsequent offer of five years in state prison."<sup>178</sup>

One Oregon attorney summed up the client experience in this scheme of excessive caseloads:

Clients feel like they are a cog in a large wheel and attorneys are unable to provide the quality time they need. Many of the clients are first time offenders — they need an attorney who will guide them through the process in a respectful man-

ner and build a relationship of mutual trust and understanding. The high caseloads prevent this from happening.

## Recommendations — Misdemeanor Defense in Practice

1. *Guilty pleas should not be accepted at first appearance unless the attorney has fully informed the defendant of the options, the potential defenses, the potential outcomes, the consequences of foregoing further investigation and discovery, the possible sentences, and the collateral consequences of conviction, and the defendant understands and chooses to plead guilty. In addition to conducting a full and vigorous colloquy, judges should require defense attorneys to aver, on the record, that these steps have been taken.*

Although the decision of whether or not to plead guilty resides squarely and exclusively with the defendant, the judge has the obligation to ensure that a plea of guilty is entered knowingly and voluntarily. A plea entered upon first appearance should be inherently suspect under this standard. The defense attorney has the obligation to ensure that the defendant has been fully informed of all options and risks, including potential defenses, potential outcomes, sentences, and collateral consequences. Accordingly, the defense attorney should be willing to state, on the record, that the defendant has received full and appropriate counseling in these areas before the plea is accepted.

The plea colloquy performed prior to a guilty plea being accepted at first appearance should be more probing and vigorous. Judges should not merely ask the defendant to confirm that they were fully informed of their options and the consequences of the plea. They should ask open-ended, probing questions that require the defendant to demonstrate

an understanding of the information provided. For example, the judge should ask what the defendant understands to be the collateral consequences of the plea. Only after a defendant demonstrates some understanding and the defense attorney states that all options and consequences have been fully explained should the judge proceed to allocution.

2. *The impact of bail and bond determinations on the pressure to plead should be considered with regard to each defendant.*

As the American Bar Association has declared, “The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”<sup>179</sup> Accordingly, “[i]t should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense.”<sup>180</sup> To justify pretrial detention, a prosecutor must show substantial evidence that the defendant is a risk for non-appearance, or a threat to the community or an individual.<sup>181</sup>

Under these standards, pretrial incarceration is usually inappropriate for alleged misdemeanants. The relatively minor nature of the charges generally means that the defendant does not pose a risk to society if released. However, defendants accused of misdemeanor offenses are often jailed pretrial. This frequently occurs because a judge sets bail or bond to ensure that the defendant appears at a subsequent hearing, and the defendant cannot pay the amount necessary to obtain release.

Factors considered in bail and bond determinations are broad, ranging from seriousness of the pending charge, to previous criminal convictions, to employment, to family and the role the defendant plays in supporting a family, to other ties to the community. Among the considerations that judges should take into account when looking at bail and bond is the coercive effect that the amount may have in pressuring the defendant to plead guilty.<sup>182</sup>

For misdemeanor defendants, a recognizance bond should be considered in every case. As Professor Zeidman observed, defenders “have to attack the premise that someone pleading not guilty stays in jail, and the guilty person goes home.”

Cash or security bail and bond should be set only if there is evidence of danger to the community or evidence of risk failure to appear at the subsequent hearing. Then, the misdemeanor defendant should be questioned regarding whether he or she can afford the bail or bond contemplated before it is set. Even if a judge concludes that a misdemeanor defendant needs intensive supervision, the judge should take steps to alleviate the pressure to plead that might be created by pretrial incarceration, including granting work release during pretrial detention, and ensuring that the detention is minimized through a speedy trial.

**“The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant ... must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.**

— U.S. Supreme Court, *Powell v. Alabama*, 287 U.S. 45 (1932).

Defenders should be permitted the time and resources necessary to gather information relevant to bail and bond determination, and present the information to the court. Counsel should insist that the court review whether probable cause exists to believe that the defendant committed the alleged crime. If probable cause does not exist, the defendant should be released.

If, after learning of bail and bond, a defendant says that he or she would like to plead guilty, the defendant should be carefully questioned regarding motivations. Judges should refuse to accept pleas if, after colloquy, it appears the defendant is pleading guilty for expediency and without a full understanding of the potential consequences of the plea.

An example of a thoughtful approach to the court's bail decision process is the Washington State court rule on release.<sup>183</sup> The rule has a presumption of release on personal recognizance. "If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of" a number of conditions including restrictions on travel that the court finds are likely to ensure appearance.<sup>184</sup>

**3. *Prosecutors should not utilize time limits on plea bargains to coerce early pleas, particularly when the time limit does not permit defense counsel to fully assess the appropriateness of the plea and advise the client.***

Often, particularly in misdemeanor court, a prosecutor arrives at a hearing and says to the defense attorney something like "If your client pleads today, I will recommend time served, or probation, but she has to plead today." The defense attorney has a matter of hours, or sometimes minutes, to help the defendant make a decision. These time-limited plea offers serve only to coerce defendants to act quickly, regardless of whether he or she is fully informed. In essence, these plea offers present defense attorneys with a Hobson's choice. They can recommend against the plea bargain because they cannot fully assess its appropriateness for the client in the time allotted for decision-making, in which case they run the risk of having lost a significant opportunity for a reduced sentence for the client. Alternatively, they can accept the plea without having done the necessary investigation, and run the risk that they have encouraged a client to plead guilty who may have had a successful defense to the charge. Moreover, without time to assess the possible collateral consequences, the attorney cannot advise the client on the consequences of the choice and may be foregoing an opportunity to negotiate a plea that would have fewer consequences. Arguably, the defense attorney may provide ineffective assistance regardless of the choice he or she makes.

Additionally, foregoing an investigation in a case where one might prove useful is a violation of national performance standards, as well as the performance standards of many states.<sup>185</sup> The American Bar Association Criminal Justice

Section's Standards on the Defense Function require defense counsel to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."<sup>186</sup> The standard specifically states that the duty to investigate exists even if the defendant states that he or she is guilty or expresses a desire to plead guilty.<sup>187</sup>

The only appropriate solution is to remove the necessity of defense counsel making this Hobson's choice. Prosecutorial offices should require early plea offers to be valid for a period of days to permit the defense attorney to comply with his or her obligation to fully assess the plea and make a recommendation to the client.<sup>188</sup>

Moreover, as the practice frequently places defenders in the position of having to violate their performance obligations, the use of time-limited plea offers should not be countenanced by judges or court administrators. Too often, judges and administrators are tacitly complicit, if not actively encouraging, in the use of coercive tactics, like time-limited plea offers, to resolve cases because it helps move dockets. Such complicity has led to the overall prioritization of expediency above compliance with ethical and performance standards, as well as justice. This must be reversed, and prosecutors who do not engaged in one time only pleas should be supported.

Once freed of the pressure of a time-limited plea, defenders can seek, when advisable, to convince defendants to permit them the time to adequately research, investigate and assess the case, even if it means that they have to return to court again. Professor Zeidman observed at the New York conference that there are "very few clients who say 'absolutely not' when you ask for one adjournment." Professor Babe Howell agreed, stating "I can convince just about anyone to give me a change to fight for [his or her] case." Convincing defendants to allow defenders to appropriately investigate the case is significantly easier when the defendants know that, if the defenders assessment of the case turns out poorly, the plea deal will still be available.

**4. *When setting the caseload standards for a jurisdiction, particular attention should be paid to the collateral consequences of convictions in that jurisdiction and the time needed by the defender to research, understand, and advise clients with regard to collateral consequences.***

While caseloads should never exceed the national standards, there are a variety of jurisdiction-specific reasons that caseloads should, in fact, be lower. If, for example, the defender office serves defendants in two courthouses separated by 100 miles, the defender caseloads should be lowered to account for the travel time required. Similarly, if the scheme of collateral consequences is particularly complicated in a jurisdiction, the defender caseload should be lowered to account for the amount of time a defense attorney will have to spend researching the potential effects of a con-

viction for each defendant and advising the defendant on these consequences. In a number of jurisdictions, collateral consequences are not just located in the state criminal statutes, but also in various administrative codes, as well as county and city ordinances. Defense attorneys are often unfamiliar with these laws and the research to uncover potential consequences for the clients is, as a result, time intensive. Finding them may require consulting with attorneys who specialize in areas in which collateral consequences arise, such as housing, immigration, employment, and benefits. This time must factor into the number of cases the defense attorney is assigned.

### 5. *Early disposition projects should not be exempted from caseload limits.*

There is nothing in the national standards that permits an exception to ethical obligations, performance standards, or the national caseload standards for early disposition projects. To the contrary, the Commentary to the ABA Ten Principles states clearly: “Counsel’s workload ... should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations. ... National caseload standards should in no event be exceeded.”<sup>189</sup> While efforts to assist defendants in accessing social services and resolving cases quickly are to be applauded, they cannot come at the expense of effective representation.

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**“I get calls all day from lawyers who don’t have time to punch up Lexis.”**

— A supervising attorney in Chicago.

## **Misdemeanor Defenders Lack Access to Support Services**

To defend a client effectively, certain support services, such as the access to computers and legal research to prepare and file motions, are essential. Investigation services and expert witnesses can help defense attorneys to understand fully the facts of a case, and, depending on the case, are critical to determining what occurred and whether the defendant is properly charged. Social workers can help assess mental health and addiction needs, which can assist defenders in evaluating the intentions of their client as well as in advocating for diversion or probation.

Despite the critical nature of these support services to their work, in a number of jurisdictions, misdemeanor defenders do not have regular access to legal research, investigators, experts, or social workers. In Washington State, for example:

- ◆ In Lower Kittitas District Court, by contract the court sets aside \$5,000 per year for these services, but nine months into the new contract, the court was not aware of any requests for these funds.
- ◆ Grant County contract defenders did not make any requests for expert services in a two-year period in which they handled 7,700 cases. In the same period, they made only five investigation requests.
- ◆ Another Washington defender who worked in four counties noted that courts discourage the use of investigators. The lawyer reported using an investigator in only one case and an expert in only two.

An Oklahoma defender reported that the use of investigators required approval from state headquarters, but that it is “[n]ot even worth asking.” And a supervising attorney from Chicago said at the New York conference that, due to excessive caseloads in Cook County, the public defenders “don’t have time to do research and investigation. I get calls all day from lawyers who don’t have time to punch up Lexis.”

Among the survey respondents, 11 percent did not have investigation services available at all, and two percent reported having investigation only if they paid for the services out of their salary.

The lack of mental health evaluation assistance for misdemeanor defenders is particularly problematic. A significant percentage of misdemeanor defendants are mentally ill and end up in jail because there are inadequate mental health services available.<sup>190</sup> A Justice Department study found that in 2005, 64 percent of state jail inmates had a mental health problem. Compounding that, 49 percent of inmates in local jails were found to have both a mental health problem and substance dependence or abuse.<sup>191</sup>

Despite the obvious utility of providing mental health support services to assist defenders in identifying and addressing clients’ mental health issues, 48 percent of respondents reported no social work resources at all, with two percent reporting that they could have social work assistance, but only if they paid for it out of their salary. An Oregon defender wrote that one of the greatest challenges in misdemeanor practice is “[c]lients with mental health issues that are aggravated by being in the system. There is no point to them being in the system for such minor offenses when it just makes them worse.”



## Recommendations — Lack of Support Services

### 1. *Misdemeanor defenders should have access to legal research tools, investigative resources, and expert witnesses.*

The ABA Criminal Justice Standards, Providing Defense Services, provide that investigation, expert witness, and other necessary services should be available for defenders:

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.<sup>192</sup>

To comply with this standard, every defender should have access to legal research services, investigators, and experts. If the defender has to pay for these services out of his or her own pocket or contract amount, it creates a conflict of interest between lawyer and client. The lawyer may be motivated not to use investigators or experts to preserve funds for himself, even when the case warrants the use of outside services. To prevent this conflict of interest, the costs of these services should not be borne by the defender. For contract defenders and appointed counsel, the administrators of the program should have a separate fund to pay for services.

### 2. *Social workers or other mental health support services should work in tandem with defenders to screen clients for mental health issues.*

Given the extraordinary number of defendants with mental health issues, all defenders should receive training to assist them in spotting possible mental health issues in their clients and have access to social workers, counselors or psychologists, specific to the defense, to evaluate clients whenever appropriate. Like other expert services, the costs of these consultations should not be borne by the defender. Identifying mental health issues in defendants early may help combat recidivism by identifying, and, ideally, obtaining treatment for, underlying causes of criminal behavior. Defenders should not have to rely on government social workers to develop release or dispositional alternatives for their clients.

## Inexperienced Counsel In Misdemeanor Courts

Many public defenders start in misdemeanor courts after being hired right out of law school. They are handed a stack of case files and told their courtroom assignment. No su-

## “Many times I don’t have time to reflect on what advice to give clients”

— A Tennessee public defender who reported handling approximately 3,000 misdemeanor cases a year.

pervisor accompanies them and there is no training before they begin. On their first day, they will talk to clients, negotiate plea deals, appear before a judge and, frequently, advise clients to plead guilty.

Former Miami-Dade Chief Defender Bennett Brummer explained that his office is forced to hire attorneys straight from law school with no trial and very little other experience “because we can’t pay a competitive salary ... so we need to train them.” That training is what Brummer described as “the farm system.” Defenders start at the “little league” misdemeanor court before moving up to felony cases.<sup>193</sup>

One Washington attorney wrote that one of the greatest challenges is the “learning curve.” The attorney added, “I am a recent graduate and have been a misdemeanor attorney for 6 months. There’s a lot one needs to know to effectively counsel a client and to effectively advocate for them. I feel that both the load itself and the fact that a lot of the learning is concurrent with its practice is challenging and very time intensive.”

Another defender observed, “Often misdemeanors is how attorneys start their public defense practice and law school does not do a good job at teaching the actual practice or mechanics of law. I even took a public defense clinic where I represented someone during my third year in district court and there was a lot that was unfamiliar to me.”

## Lack of Training

Appropriate training is critical to practice, regardless of level. Misdemeanor practice, like felony practice, involves trials. To be effective, lawyers must understand, among other things, how to conduct a direct examination and a cross-examination of a witness, how to navigate the rules of evidence, how to give an opening and closing argument, and how to authenticate evidence. Attorneys representing clients in driving while intoxicated cases need to understand the forensic evidence, such as how breath tests work, to be able to assess whether there is an appropriate challenge to the test, and how to bring it. And, in any number of crimes, defenders need to understand police identification procedures and the science behind eyewitness identification in

order to understand the reliability of the evidence offered against their clients. Attorneys also need to understand sentencing options, including, for example, what is involved in domestic violence treatment, to be able to advise and advocate effectively for their clients.

Most of the survey respondents said that they have training appropriate to their practice, and 76 percent said that they have funding for it. Some defenders noted, however, that training was superficial or minimal. For example, 31 percent had no training on immigration issues.

In some jurisdictions, training, particularly training relevant for misdemeanor courts, remains elusive. One South Carolina attorney wrote that there was no training for misdemeanor practice, saying, “This area of training is completely ignored by the state bar and the state indigent defense system[, although t]here are some private DUI seminars.”

In Allegheny County, Pennsylvania, the defender provides mentoring in the first few months, but within five months attorneys are doing felonies as well as misdemeanors. One of the supervisors said that “within six months our lawyers are seasoned.”

**“[There are] simply too many cases for inexperienced lawyers to provide effective assistance.”**

**— A Colorado lawyer who stated that the caseload of the local defenders did not allow effective representation.**

### Lack of Supervision

As in other professions, before undertaking something independently, lawyers should be supervised. A homeowner would not allow a plumber to remove the water heater if he had never done it before and there was no experienced plumber around to make sure he did it correctly. Supervision is critical to ensuring that attorneys just out of law school, new to the jurisdiction, or just starting to practice criminal law, do not make a mistake. For this reason, the American Bar Association’s Ten Principles of a Public Defense Delivery System require defense counsel to be “supervised and systematically reviewed for quality and efficiency.”

Supervision of misdemeanor defenders is sorely lacking, and, often, performance reviews are non-existent. Many defenders report that supervision in their offices

is informal. One former Florida public defender noted that, officially, there were two senior attorneys assigned to supervise the approximately 30 misdemeanor attorneys in the office. However, the supervising attorneys had active felony caseloads. If a misdemeanor lawyer wanted assistance, he or she had to seek out a senior attorney and ask for assistance. She noted that, when one did this, the attorneys were happy to help when they could. When asked about a supervisor coming to court with her, the defender said, “Occasionally you could get a senior public defender to come with you if you needed to pressure the prosecutor to offer a plea.”

### Recommendations — Inexperienced Counsel in Misdemeanor Courts

1. *Public defense attorneys should be required to attend training on trial skills, substantive and procedural laws of the jurisdiction, and collateral consequences before representing clients in misdemeanor court. Thereafter, regular training on topics relevant to the practice area should be required on an ongoing basis.*

Misdemeanor practice cannot itself be considered training. Defense attorneys must receive training prior to taking on misdemeanor cases. National standards require that “defender organizations ... provide training opportunities that insure the delivery of zealous and quality representation to clients.”<sup>194</sup>

In an institutional defender office, the office should provide an extensive training program that covers the practices and procedures in the specific jurisdiction, as well as basic pre-trial and trial skills, before the attorney is ever sent to a courtroom alone. In assigned counsel and contract programs, trainings should be required before a defense attorney can join the misdemeanor assigned counsel list or receive a contract.

A number of defender offices have exceptional training programs. In Philadelphia, for example, all new attorneys complete a three-week training program before ever representing a client. Topics covered include substantive law topics such as search and seizure law, drug statutes, the sentencing scheme, identification law, procedural law topics including evidence, discovery and motions practice, and trial advocacy skills such as interviewing techniques and direct and cross-examination.<sup>195</sup> After the training, a senior lawyer goes to court with the new attorney for a week. Thereafter, lawyers attend weekly training and consultation sessions for the remainder of the first year.

Similarly, in Kentucky, the Department of Public Advocacy conducts three week-long training programs that all attorneys who join the public advocate’s office must complete. For attorneys just graduating from law school, the

first two weeks of the program occur shortly after they enter the office. The training is intensive, interactive, and limited to only 20 participants per session. In the first week of training, the attorneys become familiar with all aspects of misdemeanor practice by working through 32 common scenarios in district court. Each attorney researches and analyzes the legal issues, and then participates in mock events based on the scenarios, including client and witness interviews, bond hearings, negotiations sessions with the prosecutor, and motion arguments. The second week is a trial skills institute, and the third week covers a variety of relevant substantive and procedural law topics. Additionally, the department holds several other training events every year, including several on misdemeanor practice. A number of these trainings are held through a distance learning module, which permits replay of the training at a later date for defenders who could not attend or for defenders who wish to watch a portion of the training again.<sup>196</sup>

In Massachusetts, the Committee on Public Counsel Services hosts a variety of training events monthly, including certification events, which an attorney must complete before being qualified to serve as appointed counsel.<sup>197</sup> Similarly, the Public Defender Service in the District of Columbia provides training not only for its own staff attorneys, but also for assigned counsel.<sup>198</sup>

## 2. *Public defenders and assigned counsel in misdemeanor court should be actively supervised by experienced trial attorneys.*

It is inevitable that defender programs will continue to utilize relatively inexperienced attorneys in misdemeanor courts. For this reason, it is essential for misdemeanor defenders to have active supervision. Where possible, new attorneys should be partnered with experienced trial attorneys in the same courtroom to provide ongoing supervision. To achieve this, experienced attorneys should rotate back through misdemeanor practice. Such rotations not only serve to provide junior attorneys with supervision, but may also benefit senior attorneys by combating burnout.

In court appointed counsel and contract programs, defenders should be regularly subject to review by an experienced panel of defense attorneys who observe the defender in court, review any complaints filed, and review defender files. In New York's First Department, a comprehensive application is reviewed by a member of a Central Screening Committee before the attorney can join the assigned counsel list.<sup>199</sup> The screening committee also investigates client complaints, and conducts recertification reviews.<sup>200</sup>

## Lack of Standards

Performance standards serve to guide a defense attorney through every step of litigating a criminal case. For example, national performance standards address preparing and conducting the initial client interview, preparing for ar-

raignment, conducting investigations, obtaining discovery, filing pretrial motions, negotiating with the prosecutor, preparing for trial, conducting *voir dire*, making opening statements, confronting the prosecution's case, presenting the defense case, making closing statements, drafting jury instructions, and preparing post-trial motions.<sup>201</sup>

While each step need not be undertaken in every case, the standards set out what steps should be considered by the defense attorney, how the attorney should evaluate whether the step is necessary, and, if the attorney decides the step is necessary, how the attorney should proceed. As one set of state standards notes, "These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate, and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for criminal defendants."<sup>202</sup>

Enacting performance standards establishes an expectation about the thought process that will be used to evaluate the case of each accused defendant. They also serve to synthesize the ethical obligations with the actual practice of public defense, and provide support for defenders when they seek continuances or caseload reductions in order to ensure that all clients receive adequate representation.

The absence of standards too often has the opposite effect of confirming that there should be no expectations with regard to services. The lack of standards can lead to excessive caseloads, inadequate compensation, and ineffective representation.

Nearly 70 percent of the survey respondents said that there was no limit on caseload by standards in their jurisdiction. Moreover, some of the respondents who noted an applicable standard referred not to a standard in their jurisdiction, but to the National Advisory Commission Criminal Justice Standards and Goals or NLADA recommendations. Sixty-three percent said there was no limit by internal office policy.

## Recommendations — Lack of Standards

### 1. *Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.*

As noted above, standards establish an expectation that certain steps are considered with regard to every criminal case. In so doing, they assure defendants, as well as the governmental bodies that fund the indigent defense system, that each criminal case is evaluated appropriately, based upon its particular facts and circumstances.

A number of jurisdictions have adopted performance standards:

- ◆ The Washington Defender Association has comprehensive Standards for Public Defense Services, most

of which have been adopted by the Washington State Bar Association. The standards address caseload, supervision, support services, training, evaluation, accountability, qualifications, client complaints, compensation, and guidelines for awarding defense contracts.<sup>203</sup>

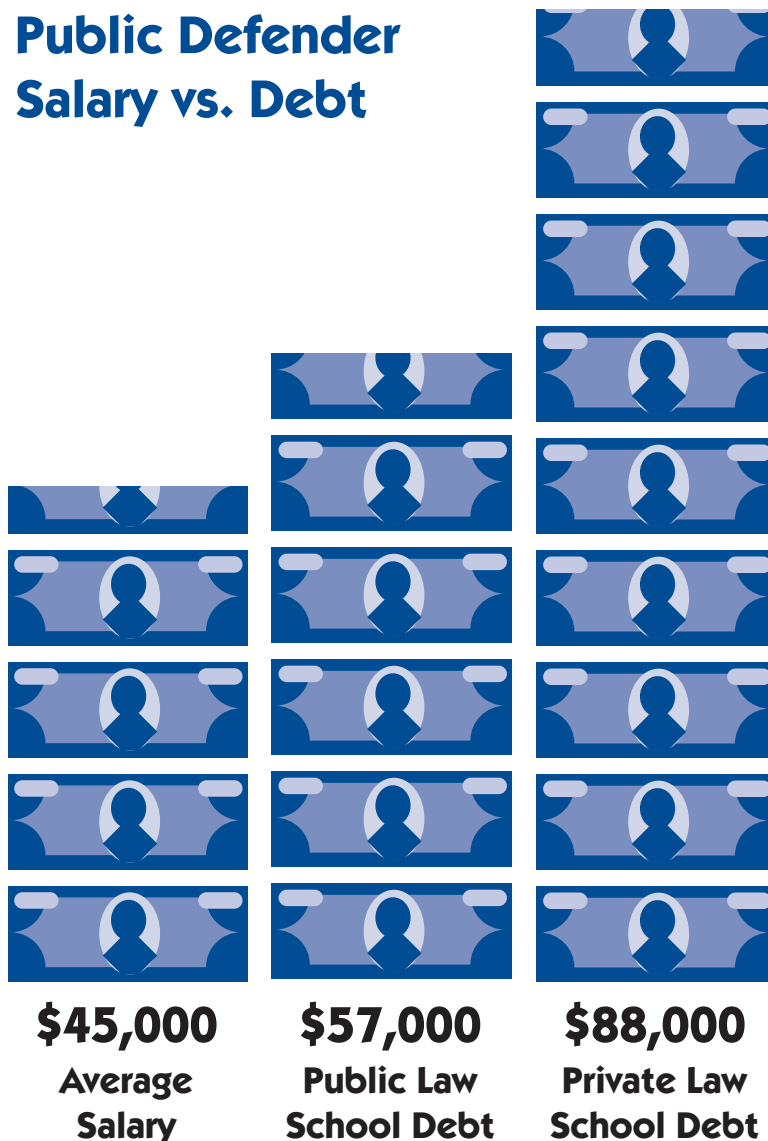
- ◆ In Massachusetts, which is primarily an appointed counsel system, the Committee for Public Counsel Services has adopted Performance Guidelines, which apply to all representation of indigent persons in criminal cases.<sup>204</sup>
- ◆ The Nevada Supreme Court adopted comprehensive performance standards earlier this year by order.<sup>205</sup>
- ◆ The New York State Bar Association House of Delegates adopted Standards for Providing Mandated Representation intended to “establish the minimum requirements for a mandated representation system.”<sup>206</sup>

## 2. Jurisdictions should have an active process for enforcement of standards.

In addition to adopting standards, jurisdictions should have a process for reviewing the performance of indigent defense practitioners against the performance standards, as well as receiving and addressing complaints from clients. As noted above, not each step addressed in the performance standards should be undertaken automatically in every case. “Steps actually taken must be tailored to the requirements of a particular case.”<sup>207</sup> However, standards do provide a set of guideposts for the evaluation of performance. For example, when standards call for prompt client interviews, and a review of a defender shows that his or her practice is not to interview clients until the day before a preliminary examination, that practice should be addressed. Similarly, standards call for considering, in each case, the utility of a variety of pretrial motions. If a defender or defender office never files pretrial motions, that practice should be addressed.

A number of states have instituted formalized processes for defender review, including receiving and addressing client complaints. In both Louisiana and Virginia, legislators seeking further funding and reform of the state’s indigent defense system viewed the establishment of a review program or compliance officer as critical to ensure accountability and the wise use of taxpayer dollars. In Virginia, the Virginia Indigent Defense Commission (VIDC), which oversees all court-appointed counsel and public defender offices in the state, is responsible for enforcement of the state’s performance standards. The VIDC has a formal process for receiving and investigating complaints from clients, after which a panel of VIDC staff attorneys holds an informal hearing to try to achieve resolution of the complaint. If resolution cannot be achieved at the informal hearing, the matter goes to formal hearing before three members of the Virginia State Bar.<sup>208</sup>

### Public Defender Salary vs. Debt



### Inadequate Compensation For Defenders in Misdemeanor Courts

Senator Dick Durbin recently noted that “the median starting salary for state and local prosecutors and public defenders is approximately \$45,000.”<sup>209</sup> This may seem like a decent salary, but, the average debt for graduates of private law schools is nearly \$88,000, and the average debt for graduates of public law schools is \$57,000.<sup>210</sup> And, by comparison, the median starting salary at law firms is \$95,000.<sup>211</sup>

Public defenders are often on the lower side of the median, as they are frequently paid less than their colleagues in the prosecutor's office.<sup>212</sup> More than two-thirds of survey respondents (81 of 121) report that their salaries are different from the salaries of prosecutors. While a few report that they are paid more than prosecutors, the bulk of respondents reported salaries that are between 10 percent and 50 percent lower than prosecutors. One Oregon defender reported that at the top of the scale, prosecutors make double what defenders receive.

In the City of Phoenix, the contract attorneys are paid \$57,120 for a caseload of 270 per year, with the possibility of an additional \$5,000 in extraordinary compensation. They do not receive any benefits. By contrast, the starting salary for prosecutors is approximately \$64,000. The prosecutors also have benefits, including retirement.

Having competitive salaries is essential to keeping experienced attorneys in the public defender office. One Illinois defender noted, "Turnover in my office is quite high and we've lost some great attorneys as a consequence." The attorney reported that the bulk of the turnover is attorneys leaving for higher salaries in private practice.

One Oregon defender wrote:

Pay needs to be increased to (at least) parity with the state. We need to attract and retain good, talented attorneys who are dedicated to helping our clients. Public defenders shouldn't have to choose between paying their mortgage or paying their student loans — a choice I make every month.

Another wrote:

After practicing for two years, I feel like I've really become a good attorney. But, now that I have a husband and baby to support, I find it nearly impossible to continue as a public defender. It's frustrating to come out of law school with \$150,000 in school debt and begin working a difficult job that barely pays the loan bills.

In Allegheny County, Pennsylvania, turnover among lawyers is high, which many people attributed to the low salaries. In July 2008, the Defender was advertising an attorney position with a maximum salary of \$3,208.33 per month, or \$38,499.96 per year.<sup>213</sup>

One Allegheny defender reported that he takes home \$24,000 per year, and noted that a lot of the lawyers in the office have second jobs. He said that he planned to get a job waiting tables, which would allow him to make \$500 a weekend. Another attorney said that "what we're paid is barely enough to get by, let alone pay debt." One of the supervisors stated that if they could pay more, they could keep

**"Public defenders shouldn't have to choose between paying their mortgage or paying their student loans — a choice I make every month."**

**— An Oregon defender.**

lawyers longer. He said that it is disheartening to come to court every day and be the lowest paid person in the room. It is noteworthy that the starting salary for deputy sheriffs is \$60,000, more than \$20,000 greater than a public defender.<sup>214</sup>

In Miami-Dade County, Florida, the Chief Defender recently pointed out that for non-capital felony attorneys, the starting salary of \$42,000 is well below the median starting salary of new lawyers in the region, and, in some instances, half of the starting salary offered by non-state, governmental entities in the area.<sup>215</sup>

Inadequate compensation is also a problem for court-appointed counsel. As a Nassau County, New York, lawyer wrote in a survey responses:

Attorneys need to be paid far better. I cannot believe that a private lawyer gets 60 dollars an hour. That is not close to what it costs just to keep an office open in this neighborhood, forget make a living wage.

## **Recommendation — Inadequate Compensation**

### ***1. Misdemeanor public defense counsel should receive fair compensation, including medical and retirement benefits.***

Defenders should be compensated at a level that reflects the importance of their work to the efficacy of the criminal justice system. A defender salary should be ample enough to attract and retain qualified lawyers. Principle 8 of the ABA Ten Principles of a Public Defense Delivery System states that there must be "parity between defense counsel and the prosecution with respect to resources."<sup>216</sup> The comment to the principle notes that there "should be parity of workload, salaries and other resources (such as benefits[])."<sup>217</sup> It further states that "assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses."<sup>218</sup>

## Judicial Conduct in Misdemeanor Courtrooms

Judges set the tone for what happens in the courtroom. While not true of all judges, often in misdemeanor courts, judges emphasize expediency over justice, to the detriment of defendants and their attorneys. Some courts advise defendants of their right to counsel, but do not provide counsel at initial appearances. Others will encourage defendants to talk with the prosecutor before obtaining a lawyer. Still others permit counsel, but push docket movement so much that defendants and their attorneys feel extraordinary pressure to enter guilty pleas.

One judge observed for this report told defendants that, despite defendants' right to counsel, he would not appoint a lawyer. Another judge, in the city of Phoenix, noted that by convincing people to proceed without counsel, he can deal with a lot of cases faster. He observed that without lawyers on either side, "[o]n a good day, I can take 35 suspended license pleas."

One veteran Massachusetts lawyer asserted that the greatest challenge to the misdemeanor practice is "[p]ressure from courts to turn cases over quickly instead of preparing the defense of them." Similarly, an Oklahoma lawyer, responding to a question about recommendations for change, wrote, "Teach judges that just because they are misdemeanors doesn't mean they are not important. Judges here convince defendants every day to go *pro se* and plead just to speed up the process without regard for the consequences to these peoples' lives."

One Oregon defender observed:

Many courts treat misdemeanors like nuisances and fail to appreciate the complexity of the cases and the fact that both the public defender and the client are human beings, deserving of respect. Comments from the bench (on the record) make it clear that some judges think all of these clients should just plead out and do not deserve a trial.

In the ABA hearings, then chief criminal Judge Michael Spearman from King County, Washington, said:

**"[I]t's easy for judges to let their frustration get the best of them and look for ways to move the calendar along."**

**— Judge Michael Spearman,  
King County, Washington.**

In dealing with large calendars and *pro se* defendants inexperienced with the law and legal process, it's easy for judges to let their frustration get the best of them and look for ways to move the calendar along. There has been more than one documented case in Washington where judges have not fully advised defendants of their right to counsel and to trial by jury or have explicitly encouraged defendants to waive those rights in the name of efficiency.

In 2006, the *New York Times* did an extensive investigation of the town and village courts in New York State, which handled more than 300,000 low-level criminal matters annually. Nearly three-fourths of the judges in those courts were not lawyers. The investigation "found overwhelming evidence that decade after decade and up to this day, people have often been denied fundamental legal rights. Defendants have been jailed illegally. Others have been subjected to racial and sexual bigotry so explicit it seems to come from some other place and time. People have been denied the right to a trial, an impartial judge, and the presumption of innocence."<sup>219</sup>

### Disparate Treatment Of Indigent Defendants

In many court systems, defendants represented by public defense attorneys are treated more harshly than defendants who have retained private counsel. In fact, more than two-thirds of the survey respondents said that both the judges and the prosecutors treat defenders and their clients differently than they treat the clients of retained attorneys.

One of the Tennessee respondents to the survey explained:

Courts hear private attorneys first and give them more leeway in continuances. Prosecutors give better offers to private attorneys. There is definitely favoritism towards college students and affluent defendants — there is a HUGE disparity in offers between clients who have the means to make bond and those who do not. Many of the judges treat the privately represented clients with more respect. Judges tend to sentence clients who are on bond to probation and clients who have not been able to make bond to more jail time.

Another Tennessee respondent confirmed:

Often times, judges will take retained counsel cases earlier. ... Judges and DAs are often more respectful of private counsel, and more willing to believe that de-

defendants who have hired counsel are more deserving of a break. I think there is often a presumption that PD clients are lazy, good-for-nothings whose futures are irrelevant to them.

A Colorado lawyer, who was a defender and is now in private practice, responded in the survey: “Often [you] get better deals on private cases [because] prosecutors view clients in a different light. Also, [the] PD does not generally have resources for investigation and expert assistance as described above, so [they] cannot present as persuasive a negotiation to [the] prosecutor.”

## Judges Face Discipline for Not Honoring Right to Counsel

Judges can be disciplined for failing to protect the right to counsel. Although it is not clear how often this occurs, because frequently the records are not public, the examples below bring into stark relief the level of abuse that can occur in misdemeanor courtrooms.

In recent years, a number of judges have been disciplined in Washington State for not meeting their obligations regarding counsel for the indigent. In one case suspending a municipal court judge, the Washington Supreme Court wrote:

People appearing *pro se* and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges. The conduct here denigrates the public view of municipal courts as places of justice.<sup>220</sup>

The same judge was subsequently charged with misconduct, which again included consistently failing to advise defendants that they have a right to counsel, requiring defendants who pleaded not guilty to waive their right to counsel and to a jury trial, and failing to appoint counsel. The judge stipulated to his ineligibility to hold office.<sup>221</sup>

In 2004, the Washington State Commission on Judicial Conduct censured a district court judge for failing to observe defendants’ fundamental due process rights.<sup>222</sup> After a warning in 2002, the judge had continued to advise defendants improperly prior to requiring them to enter a plea. She “routinely failed to advise unrepresented defendants of various rights, including but not limited to: (i) the perils of proceeding without counsel, (ii) the right to remain silent, and that anything the accused says may be used against him or her.”<sup>223</sup>

The Commission noted, “Because the practices implicate the constitutional rights of the defendants involved, the nature of the violations cannot be overstated.” The Commission added: “Protecting the rights of accused individuals is one of the highest duties of any judicial officer. Respon-

**“Judges here convince defendants every day to go *pro se* and plead just to speed up the process without regard for the consequences to these peoples’ lives.”**

**— An Oklahoma defender.**

dent’s failure to adequately perform that duty calls into question the integrity of her office.”<sup>224</sup>

In 2006, following a new proceeding in the Commission, the state Supreme Court suspended the judge for 30 days.<sup>225</sup> Among the problems identified in the new complaint, the judge, in many cases, advised criminal defendants of their right to counsel after they entered a plea. In every case, there was a waiver of counsel in the file. The commission pointed out that the intent to plead was entered before a waiver of attorney had been obtained. In addition, the judge failed to reiterate adequately to defendants at probation review hearings that they have a right to counsel and failed adequately to obtain waivers of counsel.

In 2006, an investigative report by the *New York Times* found that 1,140 of the district justices in New York State “received some sort of reprimand over the last three decades — an average of about 40 a year, either privately warned, publicly rebuked, or removed” by the Commission on Judicial Conduct.<sup>226</sup>

## Recommendations — Judicial Conduct in Misdemeanor Cases

- All judges handling misdemeanor cases should receive extensive training on the importance of criminal charges and the direct and collateral impact of pleading guilty on the defendant.***

Judges should receive regular training on the effects of criminal judgments on a defendant. Not only would such training ensure that proper respect for the proceedings is maintained, regardless of the level of charge faced by the defendant, but it would also ensure that judges can verify that defendants have received sufficient information regarding the consequences of a conviction before agreeing to plead guilty.

Judges should be equally respectful of all defendants, regardless of their ability to pay for counsel, and of all attorneys, regardless of whether they represent the people or the

defendant, as well as whether they are being paid by the jurisdiction or the client.

The Code of Judicial Conduct requires that a judge “be patient, dignified, and courteous to litigants,” and that a judge “perform judicial duties without bias or prejudice ... including, but not limited to, bias or prejudice based upon ... socioeconomic status.”<sup>227</sup> It is a central principle of the American legal system that every individual is equal before the law. This principle is grossly undercut when judges treat defendants who are represented by publicly funded defense attorneys differently from defendants who can afford private counsel. Judicial training should include the importance of equal treatment for all defendants, and attorneys who witness disparate treatment by judges should report that treatment to presiding judges and other authorities as appropriate.

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## 2. *Judges should be disciplined for failing to enforce the constitutional rights of defendants.*

Judges must refrain from pressuring indigent defendants to waive counsel, and they must refuse to accept waivers of counsel that are not entered into knowingly, voluntarily, and intelligently.<sup>228</sup> A judge’s failure to honor the basic rights of defendants constitutes judicial misconduct.<sup>229</sup> Accordingly, disciplinary action should be pursued whenever a judge fails to enforce the constitutional rights of a defendant.

**“I do not believe that there is any relief in sight and I am looking for another job.”**

— A defender in a rural, southern area.

## Lawyer Burnout in Misdemeanor Courts

The impact on defenders of excessive caseloads, lack of access to support services, supervisors or mentors, and a court that is constantly applying pressure to move the docket can be overwhelming both mentally and physically. One former public defender recalled the following:

I was a brand new appointed assistant PD in a division that moved rapidly (rocket docket). I remember on my third day in the courtroom, the Judge, from the

bench, publicly screamed at me in front of my clients something like, “You don’t know what you are doing, let me plea these clients.” Although there were two defenders in the courtroom, we both had an excessive amount of cases and could barely handle our own. I ended up getting a serious ... infection which landed me in the ER. ... For almost 6 months of my life I could not get better.

A public defender in a county in central Washington State reported that she works 10 hours a day, goes to the jail every day to visit her clients, and is a firm believer in public defense. This lawyer, who serves part time as a *pro tem* judge in another court, said that she was in “a burnout mode.” Before taking a couple days off in April, she had gone 17 months without a vacation.

One survey respondent wrote that the biggest challenge was “staying motivated with little to no support, little guidance/supervision or feedback as to performance. Minimal pay and benefits; lack of paralegals, resources (*i.e.*, books, etc.) and frequently being short staffed.”

## Recommendation — Lawyer Burnout

### 1. *Defender programs should have an active plan for combating attorney burnout.*

It pays employers to address burnout as soon as they see it because burnout has tremendous economic cost for legal employers. ... Burnout can result in absenteeism, job turnover, low productivity, decreased job satisfaction, and reduced commitment to the job. Burned out attorneys work a suboptimal pace and produce work inferior to their capabilities. ... Ultimately, the lawyer will quit the work environment[.]<sup>230</sup>

The costs of burnout in public defender offices, in lack of efficiency and frequent turnover, accrue directly to the taxpayers. And, the cost to clients can be high. For these reasons, defender program administrators should be proactive in combating burnout.

Every state bar association, and most local and county bar associations, have a lawyers’ assistance program that can help individual defenders, and often defender programs, to combat burnout. The programs help lawyers combat a number of the aspects of burnout including depression, anxiety, stress, financial problems, work-life balance issues, as well as substance abuse, gambling, eating disorders, and other mental health issues. Lawyer assistance programs are staffed by social workers and psychologists who may be able to help defender administrators develop programs to combat burnout. Additionally, every public

**Minor Crimes, Massive Waste**



defender, contract defender, and private attorney accepting court appointments should be made aware of the lawyers' assistance programs available in the jurisdiction.

Fair compensation, reasonable caseloads, adequate training, and provision of support services are necessary to recognizing the importance of the work and what is needed to provide effective representation to clients. But, there are also other things that are less dependent upon the availability of funds that defender program administrators can do to combat burnout. Recognition programs that honor victories, promotions, and longevity in the office are helpful in reducing burnout. Rotation of attorneys into other areas of practice can also be helpful.

Attorneys choose public defense work because they believe in certain principles — the importance of protecting constitutional rights and ensuring that only the guilty are punished, for example. Regular events, even CLE or other education events, at which these positive principles are celebrated and the unity of purpose is venerated will also help to eliminate burnout. Several state defender organizations, including those in California, Wisconsin, New York, and Washington, have annual conferences that provide training for CLE credits, as well as offer inspiration and networking opportunities for defenders.

## Disproportionate Effect On Minority Communities

Criminal defendants of color are more likely to utilize publicly funded defense services than white defendants. For example, in Alabama in 2001, nearly 60 percent of the defendants using the indigent defense system were Black, despite the fact that African Americans only make up 26 percent of the state's population.<sup>231</sup> Although actual statistics are rare, public defenders across the country report that their clients are almost entirely Black or Hispanic. For example, in response to a survey of public defenders conducted for this report, a Tennessee respondent wrote: "People arrested for and charged with simple possession are by and large from poor, minority communities." Similarly, a New York lawyer wrote: "Over 90 percent of the people arrested in Brooklyn are Black or Hispanic."

In Lynnwood, Washington, during one of the site visits for this report, four out of seven men (57 percent) on the in-custody calendar were observably men of color. Lynnwood, Washington, is a city of about 35,000 people, which, according to the 2000 census has a racial makeup that is 74 percent White, 14 percent Asian, seven percent Latino, three percent African American, and one percent Native American.

One reason African Americans and Latinos utilize indigent defense services more often is that they are more likely to live in poverty. In 2002, the percentage of non-

Hispanic Whites living in poverty was eight percent. By comparison, the percentage of non-Hispanic Blacks living in poverty was 23 percent and the percentage of Hispanics living in poverty was 22 percent.<sup>232</sup>

Another reason people of color make up such a high percentage of the defendants utilizing public defense services is that minority communities are disproportionately policed, so minorities are disproportionately arrested and charged.

- ◆ Eighty six percent of those stopped and searched in New York City are black or Latino.<sup>233</sup>
- ◆ A Florida lawyer responded to a racial disparity question in the survey by stating: "It is quite obvious. Black people are ... more likely to be arrested and have charges filed."
- ◆ A Tennessee defender wrote: "Obviously, young black men get arrested more often for drug charges. Cops go into black neighborhoods and approach folks asking if they have crack or pipes on them."

A number of investigative reports have demonstrated the enormous disparity in arrests in Seattle. African Americans make up approximately eight percent of the population of Seattle. Yet, a recent six-month study of drug arrests showed that more than half of the people arrested for drug crimes in Seattle were African American.<sup>234</sup> Similarly, a recent report concluded that African Americans in Seattle are also disproportionately arrested for obstruction, a misdemeanor often called "contempt of cop." Indeed, "African Americans are arrested solely for the crime of obstruction eight times as often as whites when population is taken into account."<sup>235</sup>

Because of the higher rates of minority poverty and the higher rates at which minorities are arrested, public defenders and court-appointed counsel have a disproportionate number of minority clients. As a result, the crisis in America's public defense system has a much more acute impact on communities of color. The dramatic under-funding and lack of oversight of America's indigent defense services, described at length above, has placed people of color in a second class status in the American criminal justice system.

Given the state of public defense services and the frequency with which those services are used by minority defendants, it is not surprising that minority defendants make up a disproportionate number of the wrongfully convicted. In fact, 64 percent of the people who have been wrongfully convicted of rape and then exonerated through DNA are Black, even though African Americans make up only 12 percent of the U.S. population.<sup>236</sup>

## Recommendations — Disproportionate Impact on Minority Communities

### 1. *Defender offices should gather data regarding racial and ethnic disparities.*

Most defender offices do not keep statistics on the race of the clients assigned to them. Others collect the data haphazardly, through defender reporting based on appearance. Systematic collection of racial and ethnic data can assist jurisdictions to uncover disproportionate arrest trends, as well as other incidents of racially disparate treatment in the criminal justice system. For this reason, each institutional defender office, as well as each administration overseeing assigned counsel and contract defender programs, should find a systematic way to ensure that such data is collected from every defendant to whom a public defense attorney is assigned.

### 2. *Defenders should make efforts to address racial disparities in the criminal justice system.*

Once it is demonstrable, disparate treatment — or lack of equality — is a powerful agent for reform. Too often, defenders observe racial disparity without seeking to address it. For example, a New York attorney observed in response to a survey question that there appears to be disparate application of bail guidelines. “Black kids and, to a lesser extent, Latino kids are held on bails that they are far less likely to be able to make.” This is the type of practice that, if organized, a defender system can document and bring to the attention of the judiciary.<sup>237</sup>

Some defenders have been enormously successful at addressing racial disparities in the criminal justice system, including in the context of racial profiling, selective enforcement, and sentencing issues, as well as in amending facially neutral programs that have a disparate impact on minority communities. In New Jersey, defenders were recognized for their groundbreaking work in challenging racially disparate police practices.<sup>238</sup> The defenders were instrumental in bringing a civil rights lawsuit that brought to light the New Jersey state police practice of racial profiling. Their work sparked a Department of Justice investigation, as well as other lawsuits, which together led to significant changes in law enforcement practices in the state, as well as ongoing monitoring.

In Seattle, the Defender Association established a Racial Disparity Project in 1999.<sup>239</sup> The project initially focused on helping people charged with driving with a suspended license because of the disproportionate number of people of color facing this charge. It then helped to obtain repeal of an ordinance requiring cars driven by drivers with a suspended license to be impounded. Since its formation, project staff have “participated in many discussions with community based organizations, courts and prosecutors, and local law enforcement authorities, and have participated in discussions with local and state legislators on a variety of issues” related to disproportionate treatment in the criminal justice system.<sup>240</sup> The project was initially funded by a grant from the Justice Department and has been maintained through grants from private foundations.

## CONCLUSION

This report demonstrates that the misdemeanor courts in America are in an alarming state of disrepair. The problems identified in this report significantly compromise the reliability of the criminal justice system, and, in turn, the public confidence in courts. Worse, the assembly line production of misdemeanor convictions is permanently disadvantaging huge swaths of the American public at incalculable societal cost. The recommendations in the report are intended to serve as guideposts for judges, lawyers, and policymakers who must address these problems.

The problems of misdemeanor courts, and their solutions, are related and interdependent. It is unlikely that the adoption of any one recommendation alone will solve a problem. But viewed holistically, the recommendations, if adopted, will dramatically improve the functioning of misdemeanor courts, and ensure that all defendants receive justice, regardless of the seriousness of the crime with which they are charged, and regardless of socioeconomic, racial, or ethnic background.

1. Pew Center on the States, *One in 31: The Long Reach of American Corrections*, The Pew Charitable Trusts (March 2009), at 12.
2. Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007).
3. COLO. REV. STAT. § 16-7-301(4) (2008).
4. Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHICAGO SUN TIMES, (July 24, 2006); Erik Eckholm, *Citing Workload, More Public Defenders Are Refusing Cases*, N.Y. TIMES (Nov. 8, 2008) (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-2007. By the 2006-2007 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).
5. The authors use the term “public defense” to cover any publicly funded defense service, whether provided by an institutional public defender office with attorneys on salary, a contract defender, or private defense attorney accepting appointment from the court. Similarly, we use the term public defense attorney to refer to all attorneys who accept public defense work, whether as part of a public defender office, through a contract, or by appointment.
6. The questionnaire was distributed to defense attorneys. The goal was to learn what was happening in as many jurisdictions around the country as possible. The goal was not to secure statistically accurate responses. Individuals who participated in the survey were assured that their identities would be kept confidential. Full results, with the exception of identifying information, are available upon request from Indigent Defense Counsel at the National Association of Criminal Defense Lawyers.
7. This project focuses on state courts and will not discuss either federal or tribal courts.
8. In some states, including Iowa, Massachusetts, North Carolina, Colorado, and Maryland, the sentence can be two years, or even longer.
9. A recent *New York Times* article examining New York’s town and village courts, which are frequently presided over by non-lawyer judges, reported that 30 states continue to use non-lawyer judges. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), at A1.
10. National Center for State Courts, 2007 Criminal Caseloads Report at 45, available at [http://www.ncsconline.org/D\\_Research/csp/2007\\_files/Examining percent20Final percent20- percent202007 percent20- percent207 percent20- percent20Criminal.pdf](http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007%20-%202007%20-%20Criminal.pdf) (last visited Mar. 2, 2009).
11. Other experts have presented similar estimates. Testifying in Congress on June 25, 1997, Chief Judge George P. Kazen of the U.S. District Court for the Southern District of Texas stated that in 1996 there were 9.4 million misdemeanors filed in state courts. See Transcript, House Judiciary Committee Hearing (June 25, 2007), available at [http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386_of.htm) (last visited Mar. 2, 2009).
12. The volume of misdemeanors in federal court is much lower than in state court, but it is growing. A recent federal court newsletter reported: “The Border Patrol has proposed filing 26,000 petty and misdemeanor offenses a year in the Tucson division at this time, or 100 per work day added to the court’s normal daily docket. Ultimately, the goal of the Border Patrol is to prosecute an additional 700 defendants a week, or 36,000 new cases a year.” *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (July 2008).
13. See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Smith v. Illinois*, 380 U.S. 129 (1968).
14. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 117 (1970). Some states provide for a jury trial in all cases in which a jail sentence is possible. See, e.g., CAL. PEN. CODE § 689 (2008).
15. *Gideon v. Wainwright*, 372 U.S. 225, 244 (1963).
16. John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 685 (1968) (citations omitted).
17. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
18. *Alabama v. Shelton*, 535 U.S. 654 (2002).
19. *Id.* at 667 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).
20. 407 U.S. at 33.
21. It is interesting to note that, at the time of the *Argersinger* decision, annual misdemeanor caseloads across the country were estimated at between four and five million court cases, approximately half of the estimated annual caseload today. *Id.* at 34.
22. *Id.* at 34-35.
23. *Id.* at 38 (citations omitted).
24. “The term ‘collateral sanction’ means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.” *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, American Bar Association Criminal Justice Section Standards, Standard 19-1.1.
25. For a summary of New York law concerning criminal convictions and deportation, see Manuel Vargas, *Immigration Consequences of New York Criminal Convictions*, available at <http://blogs.law.columbia.edu/4cs/immigration/> (last visited Mar. 16, 2009).
26. See Clyde Haberman, *Ex-inmate Denied Chair (and Clippers)*, N.Y. TIMES (Feb. 25, 2003) at B1; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 156 (1999)

(noting that professional licenses for which ex-offenders can be ineligible “range from lawyer to bartender, from nurse to barber, from plumber to beautician”).

27. See Editorial, *Marijuana and College Aid*, N.Y. TIMES (Nov. 2, 2007) at A26.

28. Most collateral consequences are established by state and local law, and thus the impact of a conviction varies widely by jurisdiction. There are a couple of guides that index the collateral consequences for specific jurisdictions. The New York State Unified Court System, in conjunction with Columbia University, created a Web site that summarizes collateral consequences in New York State. The Web site, Collateral Consequences of Criminal Charges – New York State, is hosted by Columbia University and is available at <http://www2.law.columbia.edu/fourcs/> (last visited Mar. 16, 2009). The Washington Defender Association publishes a guide for defenders entitled *Beyond the Conviction*, available at <http://www.defensenet.org/publications.beyond-conviction> (last visited Mar. 2, 2009).

29. See Bridget McCormack, *Economic Incarceration*, WINDSOR Y.B. ACCESS TO JUST. 25, no. 2, 223-46 (2007).

30. See 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2.

31. See *id.*

32. William Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEFCASE 151, 155 (April 1970).

33. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, NCJ 179023 (Nov. 2000) at 6, Table 13. In federal court in fiscal year 1998, 38.4 percent of people charged with misdemeanors did not have counsel. *Id.* at 3, Table 2.

34. The BJS study was only of in-custody defendants. Many misdemeanor defendants do not receive jail sentences, particularly on the first conviction, so it is likely that the percentage is far higher. The ABA has also documented the widespread failure to provide counsel in misdemeanor cases. See American Bar Association Standing Committee on Legal Aid and Indigent Defense, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Dec. 2004), at 22-23, available at <http://www.abanet.org/legal-services/sclaid/defender/brokenpromise/> (last visited Mar. 16, 2009).

35. Chief Justice Jean Hoefler Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007). Similarly, in North Dakota, judges appeared to be under the impression that if they sentenced the defendant to jail time, but suspended that portion of the sentence, appointment of counsel was not required. This stands in direct contradiction to the Supreme Court's holding in *Alabama v. Shelton*, 535 U.S. 654 (2002).

36. Texas Fair Defense Project Web site, <http://www.fairdefense.org/about.php> (last visited Mar. 16, 2009).

37. National Legal Aid and Defender Association, *Evaluation, Report & Recommendations, Riverside County Public Defender* (Dec. 2000). Since the publication of the NLADA report, Riverside County has changed its practices.

38. Cait Clarke, *Taking Alabama v. Shelton to Heart*, THE CHAMPION (Jan/Feb 2003), at 25.

39. National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* (June 2008), at 15, available at [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) (last visited Mar. 16, 2009).

40. *Iowa v. Tovar*, 541 U.S. 77, 91 (2004).

41. *Faretta v. California*, 422 U.S. 806, 835 (1975).

42. See, e.g., *State v. Chavis*, 644 P.2d 1202, 1205 (Wash. 1982) (citing *Von Moltke v. Gilles*, 332 U.S. 708 (1948)).

43. American Bar Association, Pleas of Guilty, Standard 14-1.3(a).

44. Brennan Center for Justice at NYU Law School, *Eligible for Justice* (2008), at 11, available at [http://www.brennancenter.org/content/resource/eligible\\_for\\_justice](http://www.brennancenter.org/content/resource/eligible_for_justice) (last visited Mar. 16, 2009).

45. Rule 3.160(e) states:

**Defendant Not Represented by Counsel.** Prior to arraignment of any person charged with the commission of a crime, if he or she is not represented by counsel, the court shall advise the person of the right to counsel and, if he or she is financially unable to obtain counsel, of the right to be assigned court-appointed counsel to represent him or her at the arraignment and at all subsequent proceedings. The person shall execute an affidavit that he or she is unable financially or otherwise to obtain counsel, and if the court shall determine the reason to be true, the court shall appoint counsel to represent the person. If the defendant, however, understandingly waives representation by counsel, he or she shall execute a written waiver of such representation, which shall be filed in the case. If counsel is appointed, a reasonable time shall be accorded to counsel before the defendant shall be required to plead to the indictment or information on which he or she is to be arraigned or tried, or otherwise to proceed further.

46. *Gideon*, 372 U.S. at 340, 344.

47. See *Eligible for Justice*, *supra*. n. 44, at 7-8.

48. MODEL RULES OF PROFESSIONAL CONDUCT 4.3 (2004).

49. *Id.* at 3.8(b).

50. *Id.* at 3.8(c).

51. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

52. *Argersinger*, 407 U.S. at 40.

53. *Id.* at 34.

54. American Bar Association House of Delegates Resolution 107, adopted August 9, 2005, available at <http://www.abanet.org/legal-services/downloads/sclaid/indigentdefense/res107.pdf>.

55. ABA Criminal Justice Standards, Providing Defense Services, Standard 5-7.1 and Commentary:

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

56. *See id.*

57. *See, e.g.* Rev. Code of Wash. 10.101.020 (2) ("In making the determination of indigency, the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bail.").

58. *See generally Eligible for Justice, supra*. n. 44.

59. *Id.* at 19.

60. *Id.* at 9. Prosecutors should also be prohibited from participating in the selection of defenders. The independence of the defense function cannot be maintained if the prosecutor, the adversary of the defender, has a role in selecting the defender. *See* American Bar Association, Ten Principles of a Public Defense Delivery System (Feb. 2002), at Principle 1 and Commentary (noting the importance of the independence of the defense), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (last visited Mar. 16, 2009). For this reason, an ethics opinion drafted by NACDL ethics counsel forbids a district attorney from having any involvement in the operation or administration of the public defender's office. *See* NACDL Ethics opinion 95-1, available upon request from NACDL.

61. American Bar Association Resolution 107, *supra*. n. 54.

62. Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1032 & 1035 (2006).

63. Application fees must be distinguished from reimbursement or recoupment. An application fee is a flat rate fee for use of publicly funded defense service that is assessed at the outset of the criminal proceeding, often before any representation is provided. Reimbursement or recoupment is generally charged at the conclusion of a representation and the amount of the charge generally represents the cost of the particular representation or a portion thereof. ABA policy is to forbid the use of a reimbursement charge unless the defendant engaged in fraud to obtain the public defense services. *See* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-7.2(a) ("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.").

64. S.C. CODE ANN. § 17-3-30 (2008).

65. *See, e.g.*, Freehold Township Web site, <http://www.twp.freehold.nj.us/departments/Municipal-Court/public-defender.asp>; For a summary of statewide fee programs, *see also* The Spangenberg Group, *Public Defender Application Fees: 2001 Update* (2001), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf>.

66. ABA Standing Committee on Legal Aid and Indigent Defense, Report to Board of Governors in Support of Adoption of Guidelines (Aug. 2004), at 5, available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf>.

67. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) ("[T]he obvious truth [is] that the average defendant does not have the professional legal skills to protect himself."); *Argersinger*, 407 U.S. at 32 n.3 ("That which is simple, orderly and necessary to the lawyer – to the untrained laymen – may appear intricate, complex and mysterious.").

68. *See* Misdemeanor Defense in Practice, *infra*. notes 156-168 and accompanying text.

69. It is for this reason that ABA standards require an attorney to investigate a case before the defendant enters a guilty plea. *See* ABA Criminal Justice Section, Standards on the Defense Function, § 4-4.1, available at [http://www.abanet.org/crimjust/standards/dfunc\\_blk.html#4.1](http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1) (last visited Mar. 2, 2009):

**Standard 4-4.1 Duty to Investigate:** Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

70. *State v. Tenin*, 674 N.W.2d 403, 410-11 (Minn. 2004).

71. *State v. Jolicoeur*, 327 N.J. Super Ct. 91, 95-96 (N.J. Super. Ct. 1999). By contrast, an application fee that is subject to waiver for inability to pay has been upheld. *See Stephen Cameron v. Justice of the Taunton District Court*, Slip Op. (Supreme Judicial Court for Suffolk County, June 5, 1992).

72. *See, e.g.*, OHIO ADMIN. CODE § 120-1-03(B)(2) ("Applicants with an income over 187.5 percent of the federal poverty level shall be deemed not indigent."). Federal poverty level for a single person in the lower 48 states and the District of Columbia is \$10,400. *See* Federal Register, Vol. 73, No. 15 (Jan. 23, 2008), at 3971-72. Accordingly, an individual making greater than \$19,500 per year is ineligible for public defense services in Ohio, regardless of the charge they are facing. For recommendations on how indigent defense eligibility guidelines should be structured, *see Eligible for Justice, supra*. n. 44.

73. ABA, Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases, Guideline 2, *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf> (last visited Mar. 2, 2009).

74. *Id.* at Guideline 6.

75. *Id.*

76. A number of states also have established caseload standards. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable* (Jan. 2001), *available at* <http://www.ncjrs.org/pdffiles1/bja/185632.pdf> (last visited Mar. 2, 2009).

77. Statement *available at* <http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDSTATE-LOADSTATEMENTsept6.pdf> (last visited Mar. 2, 2009).

78. *See Keeping Defender Workloads Manageable, supra*, n. 76, at 10.

79. *See* ACCD Statement, *supra*, n. 76.

80. Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHI. SUN TIMES (July 24, 2006), at 18; Erik Eckholm, *Cit-ing Workload Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), at A1 (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-07. By the 2006-07 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

81. Kentucky Department of Public Advocate, *Realizing Justice, Defender Caseload Report Fiscal Year 2007*, at 5, *available at* <http://apps.dpa.ky.gov/library/DefenderCaseloadReport07.pdf> (last visited Mar. 2, 2009).

82. Grant County's public defense services have been under the supervision of the court system following the settlement of a lawsuit alleging systemic deficiencies in felony representation. The caseload information is derived from monthly reports to the county commissioners by the attorney who supervises the defense contractors pursuant to the settlement. Reports were made available through a public disclosure request.

83. This schedule would require working more than 2,300 hours per year, far in excess of even the billable hours required by large civil defense law firms in most major cities. National Association for Law Placement, *Billable Hours Requirements at Law Firms*, NALP BULLETIN (May 2006) ("Although billable hour requirements ranged from 1,400 to 2,400 hours per year in 2004, most offices reporting a minimum require either 1,800 or 1,900 hours (24 percent and 21 percent of offices, respectively)."). The Washington Defender Association standards recommend 1,650 billable hours per year. *See* Washington Defender Association, Standards for Public Defense Services, Standard Three, Commentary. The Office of Management and Budget (OMB) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. *Performance of Commercial Activities*, OMB Cir. No. A-76 (Revised) (Aug. 1983), at p. IV-8.

84. Opinion, *It's a Fiction that Secrecy Is Good in Dealing with Kids*, THE COURIER-JOURNAL (July 16, 2008).

85. Brandon Ortiz, *Public Defenders Sue State Over Funding*, LEXINGTON HERALD-LEADER (July 1, 2008).

86. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1; *see also* ARIZ. ETHICAL RULE, Rule 1.1.; ARK. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, Rule 1.1.

87. Ariz. Ethics Op. 90-10 (1990), at 6, *available at* <http://www.myazbar.org/ethics/pdf/90-10.pdf>.

88. *Id.* at 8.

89. Unless specifically cited, facts for this story were taken from the Ohio Court of Appeals decision. *Ohio v. Jones*, Case No. 2008-P-0018 (Ohio Ct. App. Dec. 31, 2008), *available at* <http://www.sconet.state.oh.us/rod/docs/pdf/11/2008/2008-ohio-6994.pdf> (last visited Mar. 16, 2009).

90. Milan Simonich, *Contempt Upheld for Ohio Public Defender*, PITTSBURGH POST-GAZETTE (Aug. 25, 2007).

91. *Ohio v. Jones, supra*, n. 89.

92. ABA Ethics Op. 06-441, *available at* <http://www.abanet.org/cpr/pubs/ethicopinions.html#06441> (last visited Mar. 2, 2009). The American Council of Chief Defenders came to a similar conclusion in 2003:

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

ACCD Ethics Opinion 03-01 (2003), *available at* <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf> (last visited Mar. 16, 2009).

93. *See id.* at 6.

94. Ariz. Ethics Op. 90-10, *supra*, n. 87.

95. *In re Matter of Robert Pinto Public Defender San Benito County* (Cal. State Bar Court Case No. 93-O-10027).

96. *Id.*

97. Attorney Discipline, CAL. BAR J. (Feb. 1996), *available at* <http://calbar.ca.gov/calbar/2cbj/96feb/2cbj29.htm> (last visited Mar. 2, 2009).

98. Washington State Bar Association, Discipline Notice for Thomas Jay Earl, *available at* [http://pro.wsba.org/PublicView-Discipline.asp?Usr\\_Discipline\\_ID=594](http://pro.wsba.org/PublicView-Discipline.asp?Usr_Discipline_ID=594) (last visited Mar. 14, 2009). Mr. Earl abandoned his appeal, so there is no Supreme Court opinion.

99. *Id.*

100. *See* City of Seattle Ordinance 121501 (June 14, 2004).

101. Even though the 380 level is one of the lowest in the country, some defenders feel it still is too high. A lawyer from one of the other King County defender offices noted that the 380 caseload standard did not allow effective representation, and stated in her survey response: “The caseload standard is too high, and it results in us very often not being able to do as much for each client as we’d like to do.” She added that the greatest challenge in the practice is “doing justice to each case when there is such an overwhelming caseload.”

102. MASS. GEN. LAWS ANN., Ch. 211D, §11 (2008).

103. WIS. STAT. ANN. § 977.08(bn) (2008).

104. *See Keeping Public Defender Caseloads Manageable*, *supra*, n. 76. at 13-14.

105. *Id.* at 14.

106. *See, e.g.*, ABA Ethics Opinion 06-411, *supra*. n. 92; ACCD Ethics Opinion 03-01, *supra*. n. 92.

107. *See* Jim Seckler, *Judge Allows Public Defender to Withdraw from 39 Felony Cases*, MOHAVE DAILY NEWS (Dec. 18, 2007).

108. A copy of this order is available in the online appendix at [www.nacdl.org/misdemeanor](http://www.nacdl.org/misdemeanor).

109. *See* Pleadings, *available at* [http://www.pdmiami.com/ExcessiveWorkload/Excessive\\_Workload\\_Pleadings.htm](http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm) (last visited Mar. 2, 2009).

110. *See* Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other Counsel in Unappointed Non-capital Felony Cases, Circuit Court of Eleventh Judicial Circuit, Miami-Dade County Florida (Sept. 3, 2008), at 4, *available at* [http://www.pdmiami.com/Order\\_on\\_motion\\_to\\_appoint\\_other\\_counsel.pdf](http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf) (last visited Mar. 2, 2009).

111. *Id.* at 6.

112. Other offices have motions pending. Beginning in 2007, the Knoxville, Tennessee, public defender asked the court to cease appointing his office to any further misdemeanor cases so that he could reassign attorneys to handle a large backlog of felony cases. *See* Jamie Satterfield, *Public Defender Battles Load*, KNOXVILLE NEWS SENTINEL (July 19, 2007). The battle has continued for more than a year, with the state attorney general and court administrator’s office opposing the effort. *See* Jamie Satterfield, *Staffing Again an Issue for Defender*, KNOXVILLE NEWS SENTINEL (June 30, 2008). In 2007, the defenders office had 22 attorneys handling a caseload of approximately 12,500 per year (or 568 cases per attorney). *See* Caseload Data 2007, Knoxville County Public Defender Office, *available at* <http://www.pdknox.org/800main.htm> (last visited Mar. 2, 2009). Assuming the caseload was exclusively misdemeanors, the caseloads would have been approximately one and a half times national standards. In actuality it was much worse. Almost one-fourth of the caseload was felony cases. *See id.*

A misdemeanor public defender in the office filed an affidavit in connection with the motion that stated:

In misdemeanor court, my caseload assignment is determined by the docket on the particular day I am in court. ... I do not personally count the number of cases I have on a given day. Over the course of the last few years, I have been in court representing as few as 8 and as many as 50 defendants on a given day. Some defendants have only one charge, others have multiple charges. ... [A]ccording to [our computer case counting system] between January 7, 2008, and February 6, 2008, I closed approximately 107 cases. According to [the same program], between January 7, 2008 and February 6, 2008, I was assigned 120 new misdemeanor cases[.]

Affidavit of Joseph W. Ramsey, *available at* <http://www.pdknox.org/800main.htm> (last visited Mar. 2, 2009). As of March 2, 2009, the court still has not issued a ruling on the public defender’s motion.

113. *Ligda v. Superior Court of Solano County*, 85 Cal. Rptr. 744, 754 (1970).

114. *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2nd Cir. 2006), *cert. denied* 2006 U.S. Lexis 8666 (2006) (upholding arrest for sleeping in a cardboard box against constitutional vagueness challenge).

115. *See* 21 N.Y.C.R.R. § 1050.7; *see also* *Man Hauled Off by Cops for Using 2 Subway Seats*, WORLD NET DAILY (July 19, 2003), *available at* [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=33662](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33662) (last visited Mar. 2, 2009).

116. 21 N.Y.C.R.R. §1050.10.

117. *See* AP, *In Orlando, a Law Against Feeding Homeless — and Debate Over Samaritans’ Rights*, Associated Press (Feb. 3, 2007), *available at* <http://www.ih.com/articles/ap/2007/02/04/america/NA-FEA-GEN-US-Do-Not-Feed-the-Homeless.php> (last visited Mar. 16, 2009). The same AP article reported, “In Fairfax County, Virginia, homemade meals and meals made in church kitchens may not be distributed to the homeless unless first approved by the county. ... ‘We’ve seen cities going beyond punishing homeless people to punishing those trying to help them, even though it’s clear that not enough resources are being dedicated to helping the homeless or the hungry,’ said Maria Foscarnis, Executive Director of the National Law Center on Homelessness and Poverty, a non-profit in Washington, D.C.” *See also* National Law Center on Homelessness and Poverty, *Feeding Intolerance* (Nov. 2007), *available at* [http://www.nlchp.org/content/pubs/Feeding\\_Intolerance.07.pdf](http://www.nlchp.org/content/pubs/Feeding_Intolerance.07.pdf) (last visited Mar. 16, 2009); Las Vegas City Code § 13.36.055.

118. Such charges should be distinguished from license suspensions that result from reckless driving or excessive speeding, which can be viewed as threatening public safety.

119. See *Race to the Bottom*, *supra*. n. 39, at 91.

120. See, e.g., *Gideon's Broken Promise*, *supra*. n. 34, at 7-9; Barbara Mantel, *Public Defenders: Do Indigent Defendants Get Adequate Legal Representation?*, CQ RESEARCHER, Vol. 18, No. 15 (Apr. 18, 2008), at 340-41.

121. Associated Press, *Missouri Public Defenders to Begin Refusing Clients*, JOPLIN GLOBE (Sept. 29, 2008).

122. See Eric Sturgis, *Mayor Urges Cutting City Lawyers' Jobs*, ATLANTA JOURNAL-CONSTITUTION (Apr. 23, 2008).

123. *Id.*

124. It is possible to build a budget for a full time defender office or non-profit defender association that is based on a per attorney caseload limit no greater than national standards and that addresses other principles such as supervision, training, and support services including expert witnesses. There also needs to be flexibility to respond to the needs of unusual cases, and provisions for additional funding when the caseload exceeds an agreed upon level. Contracts that are designed as described here are not "fixed fee" as contemplated in this report.

125. See *Gideon's Broken Promise*, *supra*. n. 34, at 11-12.

126. California Commission on the Fair Administration of Justice, *Final Report and Recommendations* (Aug. 2008), at 101, *available at* <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (last visited Mar. 2, 2009).

127. *Argersinger*, 407 U.S. at 38, fn. 9.

128. S.B. 2400, Hawaii Legislature 2008 General Session, *available at* [http://www.capitol.hawaii.gov/session2008/Bills/SB2400\\_CD1\\_.pdf](http://www.capitol.hawaii.gov/session2008/Bills/SB2400_CD1_.pdf) (last visited Feb. 24, 2009).

129. Act 124, Hawaii Legislature, 2004 General Session, *available at* [http://www.capitol.hawaii.gov/session2005/bills/HB1749\\_sd2\\_.htm](http://www.capitol.hawaii.gov/session2005/bills/HB1749_sd2_.htm) (last visited Feb. 24, 2009).

130. See Edwin L. Baker, *Decriminalization of Nonserious Offenses: A Plan of Action*, Legislative Reference Bureau, Report No. 3, 2005, *available at* <http://www.state.hi.us/lrb/rpts05/decrim.pdf> (last visited Feb. 24, 2009).

131. *Id.* at v.

132. *Id.*

133. See Senate Bill 2400, Hawaii Legislature, 2008 General Session, *available at* [http://www.capitol.hawaii.gov/session2008/Bills/SB2400\\_CD1\\_.pdf](http://www.capitol.hawaii.gov/session2008/Bills/SB2400_CD1_.pdf) (last visited Feb. 24, 2009).

134. See *id.*

135. An Act Providing Counsel to Indigent Persons, Chapter 54 of the Acts of 2005, § 6, *available at* [http://www.publiccounsel.net/administration/pdf/Chapter percent2054 percent20of percent20the percent20Acts percent20of percent202005.pdf](http://www.publiccounsel.net/administration/pdf/Chapter%2054%20of%20the%20Acts%20of%202005.pdf) (last visited Mar. 2, 2009).

136. *Id.*

137. David Abel, *Mass. Voters OK Decriminalization of Marijuana*, BOSTON GLOBE (Nov. 4, 2008).

138. See Elizabeth Neely, *Lancaster County Public Defender Workload Assessment*, University of Nebraska Public Policy Center, at 17 (July 2008), *available at* [http://ppc.unl.edu/userfiles/file/Documents/projects/Public percent20Defender/Public percent20Defender percent20Workload percent20Assessment.pdf](http://ppc.unl.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf) (last visited Feb. 24, 2009).

139. See Kendra Waltke, *Public Defender's Office Stretched Thin*, LINCOLN JOURNAL STAR (July 27, 2008).

140. ABA Commission on Effective Criminal Sanctions, Report I: Alternatives to Incarceration (Feb. 2007), *available at* <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>.

141. See Program Description, *available at* [http://www.jud11.flcourts.org/programs\\_and\\_services/DLFAQFINAL.pdf](http://www.jud11.flcourts.org/programs_and_services/DLFAQFINAL.pdf) (last visited Mar. 17, 2009).

142. See Program Description, *available at* <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx>.

143. Costs & Benefits of the King County District Court Relicensing Program: Christopher Murray & Associates, 2004, Powerpoint Presentation, available upon request from author.

144. See Relicensing Program Web site, *available at* <http://www.spokanecity.org/government/legal/prosecuting/relicensing/>.

145. See Recommendations – Excessive Caseloads, *supra*. notes 100-105 and accompanying text.

146. See *id.*

147. *Keeping Public Defender Caseloads Manageable*, *supra*. n. 76, at 9.

148. *Id.*

149. Rawhide was a 1960's television show about a cattle drive. The lyrics of the show's theme song read in part as follows: "Keep movin', movin', movin'; Though they're disapprovin'; Keep them dogies movin'; Rawhide!" See Lyrics on Demand, *available at* <http://www.lyricsondemand.com/tvthemes/rawhidelyrics.html>.

150. See National Legal Aid & Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984), *available at* [http://www.nlada.org/Defender/Defender\\_Standards/Negotiating\\_And\\_Awarding\\_ID\\_Contracts](http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts) (last visited Mar. 16, 2009); see also U.S. Department of Justice, Bureau of Justice Assistance, *Contracting for Indigent Defense Services* (Apr. 2000), *available at* <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (last visited Mar. 16, 2009).

151. See Ten Principles of a Public Defense Delivery System, *supra*. n. 60, at Principle 8 ("Contracts with private attorneys for public defense services should never be set primarily on the basis of cost; they should ... provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.

152. See Bill Morlin, *Verdict Rebuffs Flat-Fee Defender Contracts*, SPOKESMAN-REVIEW (Jan. 30, 2009).

153. See *id.* The federal judge told the jury after its verdict:



It is the responsibility of the officials such as county commissioners in those counties to see that persons who are charged with serious offenses have the effective assistance of counsel. You have found responsibility on the part of Mr. Earl, but there is responsibility by others to see that the criminal justice system comports with our constitutional protections. Not only by this action, but by reason of the problems that have existed in these other counties coming to the fore, it is my belief that this case will serve as a catalyst for other counties, not only in the State of Washington, but probably throughout the country, to reevaluate their system of providing effective assistance of counsel.

Comments of Judge Quackenbus in *Vargas v. Earl*, Case No. CV 06-146-JLQ, Spokane, Washington (Jan. 29, 2009).

154. See WASH. RULES OF PROFESSIONAL CONDUCT, Rule 1:8 Conflict of Interest: Current Client: Specific Rules (2008), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=ga&set=RPC](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC) (last visited Mar. 16, 2009).

155. Board of Governors, Washington State Bar Association, Suggested Amendment to Washington Rules of Professional Conduct, Rule 1:8 Conflict of Interest: Current Client: Specific Rules, available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=137](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=137) (last visited Mar. 16, 2009) (citing WSBA Informal Ethics Opinion No. 1647 (conflict of interest issues under RPC 1.7 and 1.9 exist in requiring public defender office to recognize a conflict and hire outside counsel out of its budget); ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include “a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses”); *People v. Barboza*, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates “inherent and irreconcilable conflicts of interest”). As noted above, the amendment was adopted and became effective on September 1, 2008.

156. Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1509 (2003).

157. Then-Chief Judge of the New York Court of Appeals, Judith Kaye, created The New York State Commission on the Future of Indigent Defense Services, which was charged with performing a top-to-bottom examination of the state’s criminal indigent defense system and developing a blueprint for reform. Chaired by Judge Burton Roberts and Professor William Hellerstein, the commission held statewide hearings beginning in 2005. The Commission also hired The Spangenberg Group, a research firm nationally recognized for its expertise in indigent defense, to study and report on the current operations of public defense in the state of New York. The comprehensive report was submitted to the commission, and became an appendix to the commission’s recommendations for change published at the same time.

158. Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services (June 16, 2006), at 45, available at <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> (last visited Mar. 10, 2009).

159. Adele Bernhard, *Take Courage: What Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002).

160. A Statement by Kaye Commission Member Professor Steven Zeidman, available at [www.nyclu.org/node/1482](http://www.nyclu.org/node/1482) (last visited Mar. 16, 2009).

161. U.S. Department of Justice, Bureau of Justice Administration, *Contracting for Indigent Defense Services* (2000), at 1-2, available at <http://www.ncjrs.org/pdffiles1/bja/181160.pdf> (last visited Mar. 16, 2009).

162. *Id.*

163. The California Commission on the Fair Administration of Justice reported that the fired associate subsequently filed a federal lawsuit against the contract defender and received a settlement. The commission noted, “In a deposition for that lawsuit, the contract attorney boasted that he pled 70 percent of his clients guilty at the first court appearance, after spending 30 seconds explaining the prosecutor’s ‘offer’ to the client.” California Commission on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California* (Apr. 14, 2008), at 9, available at <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf> (last visited Mar. 16, 2009).

164. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968) (offering anecdotal evidence that plea bargaining induces innocent defendants to plead guilty); see also Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practice in the Federal Courts*, 89 HARV. L. REV. 293 (1975).

165. See, e.g., John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants*, 126 U. PA. L. REV. 88 (1977).

166. Cf. *id.* at 96-97 (noting that an innocent defendant might plead guilty because of: “the disparity in punishment between conviction by plea and conviction at trial; ... a desire to protect family or friends from prosecution; ... the conditions of pretrial incarceration; ... desire to expedite the proceedings, among other reasons”).

167. Joseph Bellacosa, *In Defense of a Need to Remedy Public Defense*, NEWSDAY (July 28, 2008).

168. Robert Guest (Feb. 27, 2008), blog available at [http://www.dallascriminaldefenselawyerblog.com/kaufman\\_county/](http://www.dallascriminaldefenselawyerblog.com/kaufman_county/) (last visited Mar. 16, 2009).

169. A Statement by Kaye Commission Member Professor Steven Zeidman, *supra*. n. 160.

170. See Misdemeanor Defense in Practice, *supra*. notes 156-166 and accompanying text.

171. In fact, these types of cases produce active motions and jury trial practice in many other jurisdictions. See, e.g., Ted Vosk, *DWI*, THE CHAMPION (May/June 2008), at 54 (about unreliable lab testing); Mimi Coffey, *DWI*, THE CHAMPION (Jan./Feb. 2008), at 5 (arguing that field sobriety tests are not reliable). In King County District Court in Washington State, for example, in 2007, there were

4,256 DUI/physical control filings. There were 153 trials, resulting in 31 acquittals, representing a trial rate of approximately 3.6 percent and an acquittal rate of approximately 20 percent. *See* Courts of Limited Jurisdiction, Annual Caseload Report 2007, available at [http://www.courts.wa.gov/caseload/clj/ann/2007/annualtbls07\\_wo\\_staffing.pdf](http://www.courts.wa.gov/caseload/clj/ann/2007/annualtbls07_wo_staffing.pdf) (last visited Mar. 16, 2009).

172. Nevada Supreme Court Task Force Implementation Committee for the Elimination of Racial, Economic and Gender Bias in the Justice System, *Indigent Defense Services in Nevada: Finding and Recommendations* (2000).

173. Nevada Supreme Court Order, available at <http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf> (last visited Mar. 16, 2009).

174. Nevada Performance Standards, Felony and Misdemeanor Trial Cases, Standard 3, available at [http://www.nvsupremecourt.us/documents/orders/ADKT411Order01\\_04\\_08.pdf](http://www.nvsupremecourt.us/documents/orders/ADKT411Order01_04_08.pdf) (last visited Mar. 16, 2009).

175. *Id.*, Standard 4.

176. Opinion, *Upholding Our Standards Will Mean Reaching Into Our Wallets*, RENO GAZETTE-JOURNAL (May 7, 2008).

177. *The Thin Line of Defense*, N.Y. TIMES, Video Report, produced by Kassie Bracken and Erik Eckholm, available at <http://www.nytimes.com/2008/11/09/us/09defender.html?ex=1383973200&en=69517a39c4d1aefb&ei=5124&partner=digg&ex-prod=digg> (last visited Mar. 16, 2009).

178. Jan Pudlow, *Judge Allows 11th PD to Stop Taking Cases*, Florida Bar News (Sept. 15, 2008).

179. ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.1, adopted by the ABA House of Delegates in February 2002, available at [http://www.abanet.org/crimjust/standards/pretrialrelease\\_toc.html](http://www.abanet.org/crimjust/standards/pretrialrelease_toc.html) (last visited Mar. 2, 2009).

180. *Id.* at Standard 10-5.1.

181. *See id.*

182. *Id.* at Standard 10-5.3 (“Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant’s appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.”).

183. WASH. CRIM. RULES FOR COURTS OF LIMITED JURISDICTION, Rule 3.2.

184. *Id.*

185. *See, e.g.*, Massachusetts Committee for Public Counsel Services, Performance Standards and Complaint Procedures, Criminal District Court Jurisdiction, § 4.1; § 5.1 (describing duty to investigate and noting that plea negotiations should not occur until “after interviewing the client and developing a thorough knowledge of the law and facts of the case”), available at [http://www.public-counsel.net/private\\_counsel\\_manual/private\\_counsel\\_manual\\_pdf/chapters/manual\\_chapter\\_4\\_criminal.pdf](http://www.public-counsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_4_criminal.pdf) (last visited Mar. 2, 2009).

186. ABA Criminal Justice Section, Standards on the Defense Function, § 4-4.1, available at [http://www.abanet.org/crimjust/standards/dfunc\\_blk.html#4.1](http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1) (last visited Mar. 2, 2009).

187. *See id.* (“The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.”).

188. Prosecutors are under tremendous pressure to generate convictions. Conviction percentages, or win/loss records, both for individual prosecutors and for offices, are often used as performance measures, which are reviewed by county and state authorities when considering prosecutorial performance and budgets, and which are also used by individual offices for review and promotion purposes. *See, e.g.*, George Fisher, *What Prosecutors Can’t Hold Back*, NEW YORK TIMES (May 19, 2001), at A13 (noting the “widespread suspicion” that win loss statistics are used to grant promotions and pay raises); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471-72 (2004) (emphasizing that “prosecutors want to ensure convictions” and that the “statistic of conviction . . . matters much more than the sentence”). This pressure is, in part, to blame for the pressure to plea bargain, as a plea bargain counts as a conviction or win, whereas the dismissal of a case counts as a loss. As one prosecutor noted, “When we have a weak case . . . we’ll reduce to almost anything rather than lose.” Alschuler, *The Prosecutor’s Role in Plea Bargaining*, *supra* n. 164, at 59. In misdemeanor court, the prosecutor can actually reduce the charge to almost nothing, in the form of probation, without being criticized, because the nature of the charge is minimal. The defendant, in turn, even if innocent, is under tremendous pressure to accept the plea because, as noted above, the costs of continuing to challenge the charge appear incredibly high in comparison to accepting the small punishment. To fully address the problem, the pressure on prosecutors to avoid dismissals must be alleviated. *See* American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* (2004), at 1-3 (disavowing the use of conviction rates as a performance measure), available at [http://www.ndaa.org/pdf/prosecution\\_21st\\_century.pdf](http://www.ndaa.org/pdf/prosecution_21st_century.pdf) (last visited Mar. 2, 2009).

189. Ten Principles of a Public Defense Delivery System, *supra* n. 60, at Commentary to Principle 5.

190. In some cases, defendants arrested for petty crimes are held in jail even when they are incompetent to stand trial because there is no hospital bed available. *See* Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails*, N.Y. TIMES, (Nov. 15, 2006), at A1.

191. Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Special Report (Sept. 2006), available at <http://ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf> (last visited Mar. 16, 2009).

192. ABA Criminal Justice Standards, Providing Defense Services, Standard 5-1.4.

193. Lee Molloy, *A Class C Defense*, THE SUNPOST (Sept. 11, 2008).

194. NLADA Defender Training and Development Standards, Standard 1:1, available at [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Training\\_Standards#oneone](http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards#oneone) (last visited Mar. 2, 2009). Similarly, national performance standards provide:

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.
- (b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

NLADA Performance Guidelines for Defense Representation, Guideline 1.2: Education, Training and Experience of Defense Counsel, *available at* [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines#oneone](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#oneone) (last visited Mar. 2, 2009). 195. *See* Program Description, *available at* <http://www.phila.gov/defender> (last visited Mar. 16, 2009).

196. For more information on the Kentucky training program, *see* <http://dpa.ky.gov/ed/> (last visited Mar. 16, 2009).

197. For more information on the Massachusetts training program, *see* [http://www.publiccounsel.net/Training/training\\_index.html](http://www.publiccounsel.net/Training/training_index.html) (last visited Mar. 16, 2009).

198. *See* Program Description, *available at* <http://www.pdsdc.org/LegalCommunity/TrainingSummerSeries.aspx> (last visited Mar. 16, 2009).

199. *See* N.Y. RULES OF THE COURT, APP. DIV., FIRST DEPT., Rules 612.0-612.12; *see also* Assigned Counsel Application, *application at* <http://www.courts.state.ny.us/courts/ad1/18BAPPLICATION.1stDept.FINAL.pdf>. Attorney reviews should involve attorney-client privileged material only when a client files a complaint concerning an attorney and a waiver, therefore, can be obtained. Review files should then be confidential, unless subpoenaed as part of a legal proceeding. *See, e.g.*, Washington State Bar Association, Informal Opinion 2035 (2003) (holding that privileged and confidential material should not be turned over to funding agencies); D.C. Bar Opinion 222, Nondisclosure of Protected Information to Funding Agency (Dec. 17, 1991), *available at* [www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion223.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion223.cfm) (last visited Mar. 25, 2009) (same).

200. *See* N.Y. RULES OF THE COURT, APP. DIV., FIRST DEPT., Rule 612.9 (“The Central Screening Committee may continue to process complaints against panel attorneys which relate to the discharge of an attorney’s duties under the panel plan.”).

201. *See generally* NLADA Performance Guidelines for Criminal Defense Representation, *supra* n. 194.

202. Nevada Indigent Defense Standards of Performance, Standards 1(b), *available at* <http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf> (last visited Mar. 16, 2009).

203. *See* Washington State Bar Association Standards for Indigent Defense Services, *available at* [http://www.opd.wa.gov/Trial percent20Defense/080721 percent20wsbastandards408.pdf](http://www.opd.wa.gov/Trial%20Defense/080721%20percent20wsbastandards408.pdf) (last visited Mar. 16, 2009).

204. The Massachusetts Performance Guidelines, *available at* [http://www.publiccounsel.net/private\\_counsel\\_manual/private\\_counsel\\_manual\\_pdf/chapters/chapter\\_4\\_sections/criminal/criminal\\_district\\_court\\_superior\\_court\\_murder\\_\(trial\\_level\).pdf](http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/criminal/criminal_district_court_superior_court_murder_(trial_level).pdf) (last visited Mar. 16, 2009).

205. The Nevada Performance Standards, *available at* <http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf> (available at Mar. 16, 2009).

206. New York State Bar Association, Standards for Providing Mandated Representation, adopted by the House of Delegates on April 2, 2005, *available at* <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726> (last visited Mar. 16, 2009).

207. Nevada Indigent Defense Performance Standards, Standard 1(c), *supra* n. 202.

208. For more on this process, *see* Standards of Practice Enforcement Web site at <http://www.indigentdefense.virginia.gov/StandofPracEnf.htm> (last visited Mar. 2, 2009).

209. Press Release, *Congress Passes Durbin Bill Providing Student Loan Relief for Young Prosecutors and Public Defenders* (Aug. 4, 2008), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=301775> (last visited Mar. 16, 2009).

210. *See id.*

211. *See* National Association of Law Placement, *What Do New Lawyers Earn? A 15-Year Retrospective as Reported by Law School Graduates*, NALP BULLETIN (Sept. 2007).

212. Inadequate compensation frequently afflicts both prosecutors and defenders. In many cases, both sides are paid inadequately. *See, e.g.*, Crocker Stephenson, *State Assistant Prosecutors Quitting Over Pay, Caseloads*, JOURNAL-SENTINEL (Oct. 27, 2008).

213. *See* Job Announcement, *available at* <http://www.allegHENYcounty.us/jobs/OPDdefat.aspx> (last visited Feb. 24, 2009).

214. The District Attorneys in Allegheny County are also paid poorly, although their pay increases more with experience than that of the public defenders. The starting salary in the District Attorney’s office is about \$1,000 higher than the public defender at \$39,625 per year. It increases to \$44,932 at five years, \$59,885 at eight to 10 years, \$67,663 at 11-15 years, and \$71,452 at more than 15 years. The elected District Attorney salary in 2007 was \$151,115. By contrast, the defenders are lagging behind. The Chief Defender’s salary is \$93,000. One of the senior managers receives \$62,000. One of the defender attorneys who had 10 years’ experience reported that last year he received a raise from \$48,000 to \$58,000 per year.

215. *See* Memorandum of Law In Support of Motion to Appoint Other Counsel (citing a Florida Bar survey), *available at* [http://www.pdmiami.com/ExcessiveWorkload/Memorandum\\_of\\_Law\\_in\\_Support\\_of\\_Motion\\_to\\_Appoint\\_Other\\_Counsel-Oscar\\_Munoz.pdf](http://www.pdmiami.com/ExcessiveWorkload/Memorandum_of_Law_in_Support_of_Motion_to_Appoint_Other_Counsel-Oscar_Munoz.pdf) (last visited Mar. 2, 2009).

216. Ten Principles of a Public Defense Delivery System, *supra* n. 60, at Principle 8.

217. *Id.* at Commentary to Principle 8 (emphasis added).

218. *Id.*

219. See *In Tiny Courts of New York, Abuses of Law and Power*, *supra*. n. 9.
220. *In re Hammermaster*, 985 P.2d 924 (1999) [citation omitted].
221. See Case Summary, available at <http://www.cjc.state.wa.us/search/searchResultListSpecificCJC.php?id=3210> (last visited Mar. 2, 2009); see also *In re Michels*, 75 P.3d 950 (2003) (disciplining a judge for violating the basic responsibility to make sure eligible people have counsel).
222. *In re Ottinger*, CJC no. 3811-F-110, available at [http://www.cjc.state.wa.us/Case percent20Material/2004/3811/3811 percent20Ottinger percent20Stipulation percent20Final.pdf](http://www.cjc.state.wa.us/Case%20Material/2004/3811/3811%20percent20Ottinger%20Stipulation%20Final.pdf) (last visited Mar. 2, 2009).
223. See *id.*
224. See *id.*
225. *In re Ottinger*, No. 203,389-3, Wash. Supreme Court (July 20, 2006), available at <http://www.cjc.state.wa.us/Case%20Material/2006/4475%20Supreme%20Court%20Decision.pdf> (last visited Mar. 16, 2009).
226. *In Tiny Courts of N.Y., Abuses of Law and Power*, *supra*. n. 9.
227. MODEL CODE OF JUDICIAL CONDUCT at Cannon 3(B)(4)-(5), available at <http://www.abanet.org/cpr/mcjc/toc.html> (last visited Mar. 2, 2009).
228. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).
229. *In re Hammersmith*, 985 P.2d 92 (1999) (citing *In re Reeves*, 469 N.E.2d 1321(1984); *In re Field*, 576 P.2d 348 (1978); *Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724 (1988)).
230. David M. Bateson & Tim Hart, *Combating Attorney Burnout*, BENCH & BAR OF MINNESOTA Vol. 64, No. 11 (Dec. 2007).
231. David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Toward Change*, 52 ALA. L. REV. 975, 994 (2001).
232. Mark Levitan, *Poverty in 2002: One-Fifth of the City Lives Below the Federal Poverty Line* (Sept. 30, 2003) available at [http://www.cssny.org/userimages/downloads/2003\\_09poverty.pdf](http://www.cssny.org/userimages/downloads/2003_09poverty.pdf) (last visited Mar. 16, 2009).
233. Steven Zeidman, *Time to End Violation Pleas*, N.Y.L.J. (Apr. 1, 2008), at 2.
234. Sam Skolnik, *Drug Arrests Target Blacks Most Often*, SEATTLE POST-INTELLIGENCER (May 15, 2001), at B1.
235. Eric Nalder, Lewis Kamb and Daniel Lathrop, *Blacks Are Arrested on 'Contempt of Cop' Charge at Higher Rate*, SEATTLE POST-INTELLIGENCER (Feb. 28, 2008), at A1.
236. Press Release, *200 Exonerated, Too Many Wrongfully Convicted*, Innocence Project, available at <http://www.innocenceproject.org/Content/530.php> (last visited Mar. 16, 2009).
237. Defenders may also be able to address practices that unnecessarily humiliate defendants based, in part, on the disproportionate way in which these practices apply to defendants of color. One such practice is the shackling of defendants accused of misdemeanor crimes. In many courts, all in-custody defendants appear in court in handcuffs and/or leg chains. As observed above, most such defendants are people of color. Shackling of defendants is not commonly challenged by defense attorneys, despite the profound effect that the practice has on clients and despite precedent requiring a showing that restraint is necessary for the safety of the defendant or others. See, e.g., *In re Staley*, 364 N.E.2d 72, 73-74 (Ill. 1977) ("Physical restraints should not be permitted unless there is a clear necessity for them."); *State v. Williams*, 18 Wash. 47, 51 (1897) ("The right here declared is the right to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.")
238. See Press Release, *Gloucester County Defenders Win National Award for Profiling Work*, State of New Jersey, Office of the Public Defender (June 6, 2001), available at <http://nj.gov/defender/news/p010607b.html> (last visited Mar. 2, 2009).
239. See Program Description, available at <http://www.defender.org/projects/rdp/> (last visited Mar. 2, 2009).
240. *Id.*

## Recommendations — Absence of Counsel

- ◆ *The right to counsel should be observed in accordance with *Argersinger v. Hamlin* and *Alabama v. Shelton*.*
- ◆ *Waivers of counsel should be handled carefully, with judges ensuring that the defendant fully understands his or her right to counsel, as well as the dangers of waiving counsel.*
- ◆ *Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.*
- ◆ *Ethical prohibitions on prosecutors speaking directly with defendants should be strictly enforced.*

## Recommendations — Deterrents to Asking for Counsel

- ◆ *Defense counsel should be available to represent an accused person at the first appearance.*
- ◆ *No application fee should be charged for public defense services.*

## Recommendations — Excessive Caseloads

- ◆ *All persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.*
- ◆ *When caseloads become burdensome, defenders, pursuant to their ethical obligations, should seek to discontinue assignments and/or withdraw from cases until the caseloads become manageable.*

## Recommendations — Causes of Excessive Caseloads

- ◆ *Offenses that do not involve a significant risk to public safety should be decriminalized.*
- ◆ *Diversion programs should be expanded.*
- ◆ *Funding for misdemeanor defense should permit the maintenance of appropriate caseloads.*
- ◆ *Counties and states should discontinue the use of flat-fee contracts as a means of providing indigent defense services.*

## Recommendations — Misdemeanor Defense in Practice

- ◆ *Guilty pleas should not be accepted at first appearance unless the attorney has fully informed the defendant of the options, the potential defenses, the potential outcomes, the consequences of foregoing further investigation and discovery, the possible sentences, and the collateral consequences of conviction, and the defendant understands and chooses to plead guilty. In addition to conducting a full and vigorous colloquy, judges should require defense attorneys to aver, on the record, that these steps have been taken.*
- ◆ *The impact of bail and bond determinations on the pressure to plead should be considered with regard to each defendant.*

- ◆ *Prosecutors should not utilize time limits on plea bargains to coerce early pleas, particularly when the time limit does not permit defense counsel to fully assess the appropriateness of the plea and advise the client.*
- ◆ *When setting the caseload standards for a jurisdiction, particular attention should be paid to the collateral consequences of convictions in that jurisdiction and the time needed by the defender to research, understand, and advise clients with regard to collateral consequences.*
- ◆ *Early disposition projects should not be exempted from caseload limits.*

### Recommendations — Lack of Support Services

- ◆ *Misdemeanor defenders should have access to legal research tools, investigative resources, and expert witnesses.*
- ◆ *Social workers or other mental health support services should work in tandem with defenders to screen clients for mental health issues.*

### Recommendations — Inexperienced Counsel in Misdemeanor Courts

- ◆ *Public defense attorneys should be required to attend training on trial skills, substantive and procedural laws of the jurisdiction, and collateral consequences before representing clients in misdemeanor court. Thereafter, regular training on topics relevant to the practice area should be required on an ongoing basis.*
- ◆ *Public defenders and assigned counsel in misdemeanor court should be actively supervised by experienced trial attorneys.*

### Recommendations — Lack of Standards

- ◆ *Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.*
- ◆ *Jurisdictions should have an active process for enforcement of standards.*

### Recommendation — Inadequate Compensation

- ◆ *Misdemeanor public defense counsel should receive fair compensation, including medical and retirement benefits.*

### Recommendations — Judicial Conduct in Misdemeanor Cases

- ◆ *All judges handling misdemeanor cases should receive extensive training on the importance of criminal charges and the direct and collateral impact of pleading guilty on the defendant.*
- ◆ *Judges should be disciplined for failing to enforce the constitutional rights of defendants.*

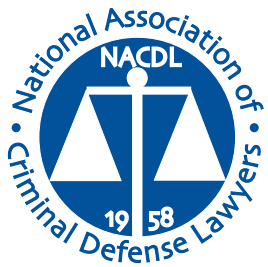
### Recommendation — Lawyer Burnout

- ◆ *Defender programs should have an active plan for combating attorney burnout.*

### Recommendations — Disproportionate Impact on Minority Communities

- ◆ *Defender offices should gather data regarding racial and ethnic disparities.*
- ◆ *Defenders should make efforts to address racial disparities in the criminal justice system.*

**Appendix available at [www.nacdl.org/misdemeanor](http://www.nacdl.org/misdemeanor)**



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