

THE GUARANTEE OF COUNSEL

**Advocacy &
Due Process in
Idaho's Trial Courts**

January 2010

**EVALUATION
OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN IDAHO**



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Researched & Written by:
National Legal Aid & Defender Association

"The right to be heard would be, in many cases, of little avail if it 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. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

***Gideon v. Wainwright*, 372 U.S. 335 (1963)**

Our Constitution is the founding contract of our collective interests, establishing the core tenets of a free society and protected by a government whose authority and power is vested upon it by its citizens. Of all the powers we give over to our government under this unique social contract, the authority to punish us for our crimes is the greatest and most fearsome. In 1963, the United States Supreme Court recognized in *Gideon v. Wainwright* the need to protect the individual against that power in ensuring due process. Declaring that it is an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases.

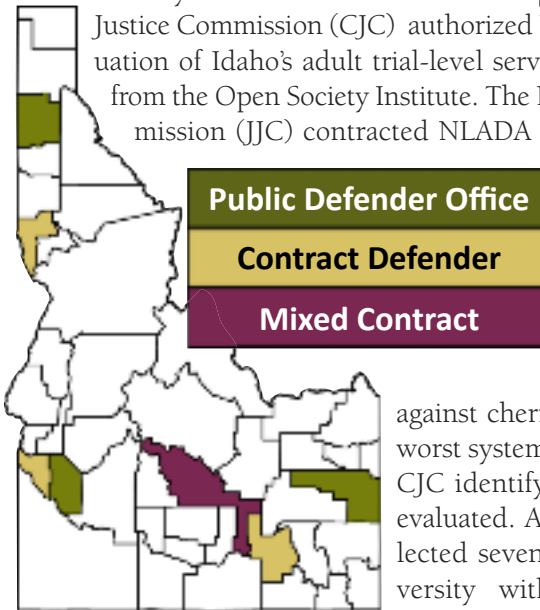
The National Legal Aid & Defender Association (NLADA) finds that the state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts. By delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qual-

ifies for services and in the level of competency of the services rendered. While there are admirable qualities of some of the county indigent defense services, NLADA finds that none of the public defender systems in the sample counties are constitutionally adequate.

The evidence to support this conclusion begins in Chapter II (page 5 – 18), with a spotlight on representation in Nez Perce County. Nez Perce County has made use of flat-fee contracts for defender services since before the *Argersinger* decision expanding the right to counsel to misdemeanor cases (1972). Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation — creating a conflict of interest between a lawyer's ethical duty to competently defend each and every client and her financial self-interest to invest the least amount of time possible in each case. The attorney handling misdemeanor and juvenile delinquency representation handles 322 percent of what national standards allow or to put it another way, she is carrying the caseload three attorneys could reasonably be expected to handle. And, this does

Origin of the Study

In June 2007, the National Legal Aid & Defender Association (NLADA) released a comprehensive management audit of the Idaho State Appellate Public Defender. The report noted that many of the workload issues facing the appellate defender office could be remedied with improvements to the various county-based, trial-level indigent defense systems across the state. Subsequently, the Idaho Criminal Justice Commission (CJC) authorized NLADA to conduct an evaluation of Idaho's adult trial-level services, under a limited grant from the Open Society Institute. The Idaho Juvenile Justice Commission (JJC) contracted NLADA in April 2008 to expressly



make juvenile representation an equal focus of the evaluation.

To ensure that a representative sample of counties was studied — and to prevent

against cherry-picking only the best or worst systems — NLADA requested the CJC identify the Idaho counties to be evaluated. A sub-committee of CJC selected seven counties representing diversity with respect to geography, population and services delivery model:

Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power.

not take into account mental commitments and termination of parental rights cases also assigned to her or her time dedicated to her private practice.

Chapter III (page 19 – 42), details the excessive workloads in the other sample counties. The failure to meet basic national standards in these counties underscores the failings of state government under *Gideon*. While a state may delegate obligations imposed by the Constitution “it must do so in a manner that does not abdicate the constitutional duty it owes to the people.” (*Claremont School Dist. v. Governor*, 147 N.H. 499, 513 (N.H. 2002)) In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so. If the counties cannot meet the delegated responsibilities, the state — as the original obligor — must step in to

fulfill this obligation. At minimum, the state should therefore have a structure to assess whether counties are meeting *Gideon*. The NLADA assessment shows that the counties are not.

- If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might be the most important benchmark of an effective system. Yet none of the studied counties have any workload controls in place, and the workloads in Nez Perce County and four of the remaining counties greatly exceed those allowed under national standards. In Bonneville, Canyon, and Nez Perce counties, attorneys are also allowed to maintain a private caseload of clients, without any monitoring of how many private cases they are handling in addition to their public caseload.
 - » In Bonneville County: A single attorney is assigned to handle more than four full-time attorneys' worth of work – and a caseload that allows only one hour and ten minutes per client. The office's five defenders are covering the number of cases 11 attorneys would be reasonably expected to handle per national norms, and their workload is compounded by the lack of investigative staff. The office has only \$6,000 in its budget for investigators, which is used almost exclusively on major felony cases. If any investigation is conducted in misdemeanor and juvenile cases, it is done by the attorney himself and rarely ever occurs.

Methodology

The concept of using standards to address quality concerns is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure fundamental quality in all facets of government. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago ceased taking the lowest bid to build a hospital, school, or a bridge and required winning contractors to meet minimum quality standards of safety. Likewise there must be minimum standards in the provision of counsel to the poor.

The American Bar Association's *Ten Principles of a Public Defense Delivery System* present the most widely accepted and used version of national standards for public defense. In the words of the ABA, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."

The ABA *Ten Principles* are a set of standards that are

interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance in each of the ten criteria and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions does not make the delivery of indigent defense services any better from a client's perspective if the appointment of counsel comes so late in the process, or if the attorney has too many cases, or if the attorney lacks the training, as to render those conversations ineffective at serving a client's individualized needs.

The NLADA protocol combines a review of a jurisdiction's budgetary, caseload, and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives is solicited and enables NLADA to form as complete and accurate a picture of a public defense system as possible. NLADA site teams visited the sample counties beginning August 2007 and concluding February 2009.

- » In Canyon County: Felony attorneys are carrying workloads at 148.9 percent of national standards. Attorneys handling misdemeanor and juvenile cases averaged 954 cases per year, a workload that is 238.5 percent of national standard maximums.
- » In Ada County: The number of first-degree murder cases is "unprecedented" leaving the office unable to ensure that workloads are limited to a level that enables counsel to provide each client with high quality legal representation. The office received 238 felony cases in a single month in 2007, which projects to approximately 2,856 cases per year, or 952 per lawyer, permitting each lawyer to spend only 2.18 hours on each felony case. The number of misdemeanor cases in Ada County is staggering, with 12,000 cases per judge per year, so that misdemeanor attorneys have 200 to 300 open cases at every moment and probably 700 – 800 cases per year, allowing slightly more than two hours of attorney time per case.
- » In Kootenai County: All attorneys carry a mixed caseload, but the attorneys handling felonies have caseloads that range from 152 percent to 217 percent of national standards, and attorneys handling misdemeanor and juvenile cases have caseloads that range from 163 percent to 213 percent of national standards.
- One Bonneville County judge we spoke with recognized the public defenders' crushing workload, noting: "The public defender shows a lack of preparation in routine hearings — arraignments, probation violations, and pre-trials. I'm convinced he doesn't even see the client before the hearings, because he's sitting in my courtroom explaining the process to the defendant and trying to work out

how they're going to plea — things that should have happened well in advance. Typically a guilty plea is what he's going to recommend, because that's the safest thing to do for your client when you don't have time to investigate.”

- The Canyon County indigent defense system devolved during the course of this study: Despite attorneys either averaging 223 felony representation cases per year — 48.9 percent above the prevailing national caseload standard of 150 felony cases per attorney per year — or 954 mixed-docket misdemeanor, juvenile delinquency, Child Protection Act cases per year (a workload, at best, more than 238 percent of the standard maximum), Canyon County officials terminated the contract of the public defender law firm due to budget constraints. The first request for proposal suggested the lowest bidder would win the new contract. A lawsuit by the original public defender law firm alleged, “The state does nothing to ensure that any particular county has either sufficient funding or adequate policies, programs, guidelines and other essential resources in place to guarantee its indigent defendants are provided effective assistance of counsel as mandated by the United States and Idaho Constitutions.” Facing growing concern over the flat-fee bidding process, the Canyon County administrators quickly terminated the earlier request for proposals for defender services.
- The low level of compensation for public defenders offered by Blaine County creates a disincentive for contract attorneys to zealously advocate for their public clients to the same degree to which they advocate on behalf of their retained clients. NLADA notes that there are few trials, except in the most serious cases, and almost everything is pled out. There is no systemic litigation, such as challenging the denial of the right to a jury trial for a juvenile charged with a serious offense, and there is no independent use of investigators or experts to challenge the testimony of probation officers, mental health doctors, or state child welfare personnel.
- Even in Idaho's most populous county right to counsel services are problematic. Because Ada County is unable to sufficiently limit the workload of its public defenders many have acknowledged being worn out and having to cut corners. Defenders lack adequate support staff and resources, especially in capital cases. The investigation staff is not trained in mitigation work. And the office lacks paralegals and social workers.

One of the most glaring deficiencies is what passes for justice in the magistrate's division of Idaho's district courts where all misdemeanors are heard and where all felony charges begin. Chapter IV (page 43 – 56) details how people of insufficient means are routinely processed through Idaho's magistrate's courts without ever having spoken to an attorney. Local jurisdictions get around their constitutional obligation to provide lawyers in misdemeanor cases in a myriad of ways, including accepting uninformed waivers of counsel, pressuring defendants to “work out a deal” with the prosecutor prior to being given publicly-financed defense counsel, and threatening unfair cost recovery measures. Although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation — all factors that tend to foster recidivism.

Chapter V (pages 57-66) and Chapter VI (pages 67-74) continue the assessment of Idaho counties' public defense systems against the ABA *Ten Principles*. In Chapter V, NLADA focuses on the need to ensure that attorneys have sufficient time and confidential spaces within which to meet with their clients and on the requirement that the same attorney continues to represent the client from the moment of appointment and throughout the life of the case. Confidentiality is necessary both to effectuate the ethical obligation to preserve attorney-client confidences and to fulfill the responsibility of the system to provide a structure in which con-

fidentiality may be preserved – an ethical duty that is perhaps nowhere more important than in public defense of persons charged with crimes, where liberty and even life are at stake and client mistrust of public defenders as paid agents of the state is high. Continuous, or vertical, representation by the same attorney guards against “assembly line justice” that: inhibits the establishment of an attorney-client relationship fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective and is demoralizing to clients as they are re-interviewed by a parade of staff starting from scratch. Due to overwhelming caseloads, Idaho’s most populous county of Ada is forced to employ horizontal representation, where a client is passed from lawyer to lawyer at each stage of the case. And all seven of the counties studied lack time and places to meet privately with clients, so that most attorneys are meeting with their clients primarily, if not only, at the courthouse on the day of a court proceeding, resulting in proceedings having to be continued, lawyers lacking sufficient information to advocate on behalf of their clients, and clients lacking understanding of what is occurring in their case.

The lack of training, supervision, and the ability to assign cases only to attorneys who have sufficient experience and training to competently handle them is the focus of Chapter VI. While attorneys recently graduated from law school or those with only basic skills can effectively handle less complicated cases and those with less serious potential consequences, significant training, mentoring, and supervision are needed to foster the skills of even the most promising young attorney before allowing her to handle more complex cases. Training must be an on-going facet of every public defense system. As the practice of law grows more complex each day, even skilled criminal defense attorneys must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client. And continuous and systematic supervision and evaluation must be provided, else attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. Public defense attorneys throughout our study lamented the lack of training available to them, variously describing what they received as “sink or swim,” “on-the-job training,” “virtually non-existent,” “you got to do it to learn it,” and “dive in and do it.” Only three of the seven counties have the ability to match the experience of the attorney to the case-type they are being assigned to handle. And none of the counties studied have any formal supervision or evaluation procedures in place. An attorney’s practice model is what he sees from his peers in court. Without any measure of performance expectations, the standard of practice as demonstrated by those who have worked in the system longest is usually what passes for all who come later.

Chapter VII (page 75 – 88) assesses the representation of indigent children in Idaho. Juveniles facing delinquency proceedings are an afterthought to the troubled adult system. Children who come in contact with delinquency courts too often have been neglected by the full range of support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk the juvenile will commit more — and worse — crimes increases. The juvenile system can have the perverse effect of actually decreasing public safety and increasing the chance that more young people will fall into a lifetime of crime and imprisonment. In most instances, juvenile representation is provided by private attorneys under flat fee contracts. In those counties with public defender offices, delinquency cases are most often assigned to the newest and least experienced attorneys. And throughout the state, children are represented by lawyers with crushing workloads, extremely limited access to adequate resources for experts, social workers and investigative support, and a complete lack of specialized training for the assigned task. Idaho’s juvenile defenders lack the time, tools and training to provide effective advocacy for the clients of the juvenile courts.

In conclusion, NLADA believes the inadequacy of the indigent defense systems in Idaho is more a result

of the evolution of a system begun decades ago and not an affirmative attempt on the part of state and local policy-makers to deny anyone's constitutional rights. Indeed, the various county defender systems NLADA observed throughout Idaho mirror much of the history seen in many of her neighboring states for much of the past four decades. However, in neighboring state after state — Wyoming, Oregon, Montana, Nevada and Washington for example — the move from county-based right to counsel systems to statewide oversight, uniformity, and funding has occurred or is occurring as of the writing of this report. Sometimes the change has come under threat of litigation, while some states have simply recognized the old way of doing things cannot be sustained. It is time for the state of Idaho to meet its constitutional duty under *Gideon*, and its progeny.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

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