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FOR IMMEDIATE RELEASE

September 21, 2006

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**NLADA RELEASES STRATEGIC PLAN TO ENSURE ACCOUNTABILITY AND
PROTECT FAIRNESS IN LOUISIANA'S CRIMINAL COURTS**

NEW ORLEANS – Today the National Legal Aid & Defender Association (NLADA) released a report commissioned by the Louisiana State Bar Association (LSBA) and the Louisiana Bar Foundation (LBF) about New Orleans' system for providing legal representation to poor people charged with crimes. While the report examines and documents the problems within the Orleans Parish system, it also concludes that comprehensive statewide reform is a necessary component of any meaningful change and suggests a path toward the implementation of such reform.

The report is premised on the recognition that every citizen has a fundamental and Constitutional right to adequate legal representation. The economic constraints on the system prior to Hurricane Katrina made the provision of such representation difficult; since Katrina, the problems have been well publicized. Through this report, the Bar seeks to assist in finding a practical and rational approach to the needed reform, thereby assuring that citizens' rights are protected.

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“The aspect of the criminal justice system which provides legal representation to those who cannot afford it has been dramatically under-funded in Louisiana for years. Lawyers, judges and law enforcement have managed meager resources as well as they could, but Katrina revealed that the struggle was a losing battle. No one component of the criminal justice system is at fault, but the NLADA report confirms that we are indeed in a crisis,” said LSBA President Marta-Ann Schnabel. “The good news is that a solution is possible, as outlined by the recommendations of the report. It is clear that these problems exist in one way or another across most of the state, and no fix is available without a comprehensive statewide plan.”

Currently, funding is primarily handled on the local level and is dependent upon court cost collections. The report recommends that indigent defense should be part of a specific annual budgeting process, which assures adequate financial resources. It further advocates for the state to increase funding of indigent defense programs to ensure accountability, uniformity and fairness in the justice system.

The LSBA’s Right to Counsel Committee, chaired by Immediate Past President Frank X. Neuner, Jr., intends to use the NLADA report as a basis for discussion and consensus building with the goal of improving the indigent defense system in Louisiana. The committee was formed to develop programs and methods which most effectively allow the Bar to work with the courts, other branches of government, and the public to ensure that the constitutionally mandated right to counsel is afforded to all.

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*A Strategic Plan to
Ensure Accountability & Protect Fairness
in Louisiana's Criminal Courts*

*EMBARGOED UNTIL 12:01 AM
SEPTEMBER 22, 2006*

A Report To
The Louisiana State Bar Association

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And
The Louisiana Bar Foundation

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Co-Author of ABA's "Ten Principles of a Public
Defense Delivery System"

“One of the greatest challenges facing the Louisiana legal system as we start to rebuild and repopulate the areas devastated by the hurricanes is protecting the constitutional rights of indigent defendants and providing them access to adequate legal representation. This is one of our basic constitutional rights, and one that all lawyers should seek to protect and defend.”

- Frank X. Neuner, Jr.

Louisiana State Bar Association Immediate Past President

Executive Summary

To say that there was a catastrophic systemic failure in the delivery of justice in New Orleans after Hurricane Katrina made landfall is not a condemnation of the men and women working under very stressful conditions to assure victims, the accused and the general public that resulting verdicts in the criminal courts were fair, correct, swift and final. Rather, it is a simple acknowledgement that no system could achieve its desired aim when *every* single element – police, prosecution, courts, defense, and corrections – experienced deep and sustained damage.

Many justice employees lost their jobs as citywide tax revenues disappeared. And those that remained had increased workloads while dealing with their own personal issues – be it the loss of a home, the death of a loved one, or the logistical problems associated with finding their child an appropriate school placing. It is a testament to the people of New Orleans that any semblance of justice was delivered during this time, given these conditions.

But it would be disrespectful to those same individuals trying to keep the system afloat to suggest that Katrina was *solely* responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina. This report to the Louisiana State Bar Association and the Louisiana State Bar Foundation by the National Legal Aid & Defender Association examines the deficiencies of one component of the justice system -- the delivery of the right to counsel to poor people in the criminal courts.

Chapter I assesses the efficiency and effectiveness of the public defender system in New Orleans both pre- and post-Katrina (pages 1-7). Pre-Katrina, the public defense system in New Orleans was not obligated to adhere to any national, state or local standards of justice resulting in public defenders handling too many cases, with insufficient support staff, practically no training or supervision, experiencing undue interference from the judiciary, all the while compromising their practices by working part-time in private practices to augment their inadequate compensation. And, each of these pre-existing defender deficiencies was even more pronounced in the delivery of the right to counsel to children in juvenile cases.

The cause of most of these pre-existing deficiencies is the unique way in which indigent defense services are funded. Louisiana is the last remaining state in the country to leave the majority of funding for indigent defense up to the vagaries of whatever money happens to be collected each month through court costs – primarily traffic tickets – rather than putting defense providers through the same rigors of local or state budgetary processes as other important government agencies. The reliance on traffic tickets left the Orleans Parish Indigent Defender Board (OIDB) drastically under funded and not knowing the office's budget from month-to-month in the years and months before Katrina.

In the aftermath of the storm things only got worse. Law enforcement officials appropriately focused resources on both rescue/recovery efforts and securing public safety in light of the unprecedented displacement of population to other parts of the state. Yet, these necessary law enforcement procedures for all intents and purposes left the

public defender office in New Orleans with no income. Strapped for funding and statutorily unable to operate in the red, the Orleans Indigent Defense Board laid off 34 of its 41 part-time attorneys. The wholesale reduction in public defender staff and resources in Orleans Parish and the coinciding detention of defendants without counsel precipitated an on-going criminal justice crisis with some judges refusing to proceed with the prosecutions of indigent clients in their courtrooms.

The bulk of the report consists of NLADA's recommendations for overcoming the deficiencies identified in Chapter I. The NLADA recommendations in Chapter II (pages 8-35) should be viewed as augmenting the significant first steps already undertaken by state and local policy-makers – most notably the \$10 million state funding increase for indigent defense proposed by Governor Kathleen Blanco and passed by the Legislature.

NLADA concludes that the problems of New Orleans' indigent defense system cannot be fixed within the boundaries of the parish itself. Long-lasting reform will necessarily take comprehensive statewide legislative action. Therefore, our recommendations are set out in three sections: A) immediate actions for the Louisiana Indigent Defense Assistance Board (LIDAB); B) legislative actions for the 2007 regular session; and, C) immediate actions for the Orleans Indigent Defender Board (OIDB).

The Louisiana Indigent Defense Assistance Board, the state entity charged with disseminating dollars to the local indigent defense systems, has historically relied on a flawed methodology for doing so - unintentionally releasing public defenders from the necessity of developing formal, performance-based budgets. This failure has retarded the ability of LIDAB to garner more resources for trial-level representation because state policy-makers do not have a true picture of actual financial need of public defenders. The inadequate resources have resulted in low salaries for public defenders and virtually no benefits. To begin to rectify this situation, LIDAB should take two immediate actions:

- 1. Require Each Judicial District to Submit a Professional Reform Plan and Performance Based Budget;*
- 2. Work in Conjunction with the Administration, or Retain the Services of an Independent Research Firm, to Conduct a Salary Survey of Appropriate Defender Salaries and Benefits.*

The current Orleans Parish indigent defense crisis is inextricably linked to the right to counsel struggles of an Avoyelles, East Baton Rouge, Caddo or Calcasieu Parish. To uniformly fix all of these crises, NLADA recommends changes to how the indigent defense services are administered and funded. Because Louisiana has grown up under a contract system, and because of the general distaste we have heard for "adding to the state payrolls" or "additional bureaucracies" generally, NLADA believes a contract-based system is the most suitable for Louisiana. Louisiana policy-makers should develop a flexible, regional delivery service system, overseen by a regulatory agency statutorily authorized to promulgate and enforce compliance with indigent defense standards and managed by a Chief Public Advocate. Locally-collected indigent defense revenues should be pooled in a central indigent defense fund and augmented by additional new general fund resources. To accomplish this, state policy-makers should:

3. *Transform the Louisiana Indigent Defense Assistance Board (LIDAB) into a regulatory agency with statutory authority to promulgate binding standards related to workload, attorney qualification, attorney performance, among others;*
4. *Create a regional contract delivery system that balances local fear of centralization with the need to maintain uniformity of justice from parish to parish;*
5. *Enforce standards in the regions through a rigorous compliance program;*
6. *Create a statewide Office of the Public Advocate;*
7. *Create a statewide Capital Trial Unit with an office in each of the regions.*
8. *Sunset local indigent defender boards in January 2009;*
9. *Mandate all locally-collected indigent defense resources revert to the state general fund; and,*
10. *Require the State to expend general fund monies for any shortfall between forecasted budget and actual need.*

That is not to say that NLADA believes that the only answer to the indigent defense crisis is for the state to spend its way out of it. A publicly financed lawyer is only required under our Constitution if there is a threat of a loss of the client's liberty upon conviction. Currently, Louisiana lacks the proper forum in which to seriously consider broader criminal justice reform, such as alternatives to incarceration, diversion courts, or the creation of a pre-trial services agency. We therefore recommend that state policy-makers:

11. *Establish an "Adjudication Partnership" to recommend statewide criminal justice reform to increase efficiencies and reduce the need for indigent defense services.*

The anticipated statewide changes will not take hold until after the 2007 Legislative session at the earliest. The current criminal justice crisis in New Orleans requires additional actions on the part of the Orleans Parish Indigent Defense Board (OIDB) in the interim. Our recommendations for OIDB reflect only the most pressing issues to be addressed rather than a full laundry list of changes needed to transform the office and its representation of low-income clients.

12. *Adopt & enforce the applicable parts of the ABA Ten Principles under their purview, including: creating jurisdictional-specific caseload standards, institutionalizing vertical representation, and adopting appropriate performance supervision practices;*
13. *Create a juvenile division that adequately defends the youth of New Orleans;*
14. *Take necessary initial steps to transform from a part-time defender office into a full-time community-oriented defender office; and,*
15. *Create a professional budget to justify the need for more resources.*

Chapter III (pages 36-39) presents the story of a young woman arrested in New Orleans on possession of a stolen vehicle charges. NLADA presents her story to illustrate how the recommendations proposed in this report would have resulted in a better outcome for, not only her, but the greater New Orleans community.

In conclusion (Chapter IV, page 41), NLADA notes that the Constitution of the United States of America promises those accused of crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common – whether we are conservative or liberal, white or black, rich or poor. As our American troops are engaged overseas fighting for democratic principles we must ask ourselves what message we are sending the world when we do not meet our own constitutionally-enshrined values here at home?

EMARGOED UNTIL 12:01 AM on SEPT. 22, 2006

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Chapter I

Assessing the Right to Counsel in New Orleans

The People in Need of Public Defender Services

The term “indigent defendant” carries with it a stigma that does not accurately reflect the characteristics of the people requiring a lawyer in court actions throughout our country, and in Louisiana particularly. Too often, the phrase conjures up images of destitute men beset by mental afflictions panhandling on our street corners too incapacitated or drug-addled to care for their own health or well being, let alone having the capacities to respect the rights and safety of others. Though people fitting that stereotype do exist - and require the competent aid of counsel in court - they are the minority of people that public defenders serve. The majority of people requiring appointed counsel are simply the working poor – the son of a co-worker, the former classmate who lost his job, or the member of your congregation living paycheck-to-paycheck to make ends meet.¹

LOUISIANA EDITORIAL: The American Press (Lake Charles)

“Those who believe the need for a public defender could never penetrate their middleclass household should remember that virtually every person reading this editorial would need a public defender if accused of a crime. Exempt are those who have connections and those with tens of thousands in the bank that can be withdrawn for suitable representation.”

-- “Speedy Trial Guarantee a Farce in Calcasieu,” October 31, 2004.

The Systemic Importance of Indigent Defense Services

The criminal justice system – like any “system” – is a group of interdependent elements forming a complex whole. The actions of any one component necessarily impact each of the other interrelated agencies, either positively or negatively. And, just as an illness in any one area of the body threatens the overall health of the entire complex human structure, the failure of any individual component of the legal system – be it police, prosecution, courts, public defense, corrections, or probation - threatens the ability of the entire system to dispense justice both uniformly and effectively.

And, since the overwhelming percentage of criminal cases require public defenders,² the failure to adequately fund and effectively administer the right to counsel delivery system will result in too few lawyers handling too many cases in almost every criminal court action. Under this scenario, courts face backlogs of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers’ expense. Failing to do the trial right the first time also means endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools and training to effectively advocate for their

clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

LOUISIANA EDITORIAL: The Daily Town Talk (Alexandria)

"Currently, because public defenders are overburdened by the case load, little fair or swift justice is being meted out. There are numerous examples of reversals, retrials, years of continuations and wrongful convictions plaguing our courts. This is wrong -- period."

-- "[Our View](#)," February 27, 2006.

Enforceable Standards: The Key to Fulfilling the Louisiana Constitutional Requirement for Uniform Quality Representation in the Delivery of Justice

Article 1§13 of the Louisiana Constitution directs the legislature to "provide for a *uniform* system for securing and compensating *qualified* counsel for indigents (emphasis added)." To date, Louisiana courts have ruled that the uniformity clause is not breached when one district has a contract system and another a public defender system.³ And, national standards agree with this position -- there is no single cookie-cutter model delivery system that must be employed for a jurisdiction to provide a uniformly adequate level of services.

The state constitutional call for uniformity is a simple call for basic fairness in the delivery of justice from parish to parish. That is, as opposed to requiring *identical* indigent defense systems in every judicial district, the state constitution simply requires that each jurisdiction maintain a uniform level of "quality" to be preserved regardless of mode of delivery service. It is only fair for a person charged with a misdemeanor in Marksville to receive as adequate a representation as a defendant in Shreveport charged with the same offense even though one may receive an appointed private attorney working under contract and the other defendant receives a public defender. In summation, the Louisiana Constitution does not allow "justice" to vary based on whichever side of a parish line your crime is alleged to have been committed.

The United States Department of Justice, *Report of the National Symposium on Indigent Defense* recommends that standards be adopted to prevent disparate services between neighboring jurisdictions.

The United States Department of Justice on "Uniformity"& "Quality"

"Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced and supervised, while the other gets a neophyte."

--U.S. Department of Justice, *Report of the National Symposium on Indigent Defense*

As the Department of Justice report notes, the concept of using standards to assess uniform quality 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 the fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the individual against the undue taking of his liberty by the state merits no less consideration.

The use of national standards of justice in this way also reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard* 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."

The American Bar Association's *Ten Principles of a Public Defense System* present the most widely accepted and used version of national standards for indigent defense. They distill the existing voluminous ABA standards for indigent defense systems to their most basic elements, which officials and policymakers can readily review and apply. The *Ten Principles* were adopted by the ABA in February 2002.⁴ In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, 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."⁵

Katrina Unmasks Deficiencies in New Orleans' System of Justice

To say that there was a catastrophic "systemic" failure in the delivery of justice in New Orleans after Hurricane Katrina made landfall is not a condemnation of the men and women working under very stressful conditions to assure victims, the accused and the general public that resulting verdicts in the criminal courts were fair, correct, swift and final. Rather, it is a simple acknowledgement that no system could achieve its desired aim when every single element experienced deep and sustained damage.

In the wake of the storm, the New Orleans justice system had to contend with, among other things: a flood-damaged evidence room; the shutting down of the district attorney's office and courthouse; the evacuation of people held in the local jail to available correctional facilities across the state; and, the dispersing of the people of New Orleans – including eyewitnesses, victims, defendants, former police officers, and potential jurors – throughout the country. Many justice employees lost their jobs as citywide tax revenues disappeared. And those that remained had increased workloads while dealing with their own personal issues - be it the loss of a home, the death of a

loved one, or the logistical problems associated with finding their child an appropriate school placing. It is a testament to the people of New Orleans that any semblance of justice was delivered during this time, given these conditions.

But it would be disrespectful to those same individuals trying to keep the system afloat to suggest that Katrina was solely responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina. For example, Hurricane Katrina certainly precipitated the need to evacuate some 6,500 detainees from the Old Parish Prison complex, but it was the existing systemic flaws that caused there to be so many people in jail waiting for their day in court in the first place.⁶ Similarly, assistant district attorney compensation is and has been too low, causing high turnover and less seniority than in other similarly situated urban prosecutors' offices.⁷ The lack of a more senior staff in turn exacerbated the difficulties associated with determining which cases should move forward, given the loss of evidence, difficulty in finding displaced eyewitnesses, and destroyed crime scenes.

But nowhere are the New Orleans systemic justice deficiencies more glaring, both pre- and post-Katrina, than in the delivery of defense services to people of insufficient means. Pre-Katrina, the public defense system was not obligated to adhere to any national, state or local standards of justice. Not surprisingly then, the Orleans Parish indigent defense system failed the vast majority of the ABA *Ten Principles* as public defenders handled too many cases,⁸ with insufficient support staff,⁹ practically no training or supervision,¹⁰ experienced undue interference from the judiciary,¹¹ all the while compromising their practices by working part-time in private practices to augment their inadequate compensation.¹² Moreover, the failure to enforce national standards of justice allowed disparate practices from courtroom to courtroom – seriously questioning the constitutional demand for uniformity even within the confines of Orleans Parish.¹³ And, each of these pre-existing defender deficiencies was even more pronounced in the delivery of the right to counsel to children in juvenile cases.¹⁴

The cause of most of these pre-existing deficiencies can be traced to the unique funding mechanism devised by state policymakers to finance the right to counsel. Louisiana is the last remaining state in the country to leave the majority of funding for indigent defense up to the vagaries of whatever money happens to be collected each month through court costs – primarily traffic tickets – rather than putting defense providers through the same rigors of local or state budgetary processes as other important government agencies.¹⁵ The funding scheme has been labeled “unstable and unpredictable”¹⁶ because there is no direct correlation between the ability of a jurisdiction to garner money through traffic tickets and the resources required to provide adequate defense services.

And, the funding mechanism unfairly places law enforcement in a conflict of interest. A sheriff in a Parish with a high crime rate may make the logical choice to focus his resources on ensuring public safety through any number of means – targeting methamphetamine labs, expanding community policing and foot patrols, cracking down on sexually violent offenders, etc. – instead of dedicating staff to writing traffic tickets. In such a scenario, the policies that may, in fact, lead to safer streets for the public will both *increase* the need for indigent defense resources (because of increased arrests) while concurrently *decreasing* available resources to meet that same need.¹⁷

The reliance on traffic tickets as the main source of revenue left the Orleans Parish public defender drastically under funded and not knowing the office's budget from month-to-month in the years and months before Katrina.¹⁸ In the aftermath of the storm things only got worse. Law enforcement officials appropriately focused on rescue/recovery efforts and securing public safety in light of the unprecedented displacement of population to other parts of the state. Yet, these necessary law enforcement procedures for all intents and purposes left the public defender office in New Orleans with no income. Strapped for funding and statutorily unable to operate in the red, the Orleans Indigent Defense Board laid off 34 of its 41 part-time attorneys.¹⁹

The wholesale reduction in public defender staff and resources in Orleans Parish and the coinciding detention of defendants without counsel precipitated an on-going criminal justice crisis. On Friday February 10th, 2006, Judge Arthur Hunter halted all prosecutions of indigent defendants in his courtroom. On Monday, February 13th, Presiding Criminal Court Judge Calvin Johnson followed suit.

The Actions of the Louisiana State Bar Association

In accordance with one of its paramount goals, "to advance the full implementation of the rule of law by achieving access to justice for all," the Louisiana State Bar Association (LSBA) undertook three major initiatives to address the growing post-Katrina indigent defense crisis. First, the LSBA provided private grant funding to the Orleans Indigent Defender Board to hire back a number of attorneys, purchase needed technology (computers, telephone system), and coordinated efforts to accept donations of office furniture and supplies from other State Bar associations.²⁰ Next, the LSBA joined forces with the Yale University Law School to convene a conference to discuss the failures of the indigent defense system and ways to overcome those systemic deficiencies.²¹ Finally, the LSBA retained the services of the National Legal Aid & Defender Association (NLADA)²² to assess the situation in Orleans Parish, with the aim of recommending a strategic plan to overcome systemic deficiencies. The NLADA recommendations were informed by the Yale Law School/LSBA conference, but NLADA was not in any way beholden to the conclusions or recommendations of the conference attendees.²³

NLADA made five site visits to New Orleans. On March 27th, a three-person research team conducted preliminary in-person interviews with key members of the Orleans Parish Criminal District Court. Based on these interviews, the NLADA then put together a site-visit team of: a) professional criminal justice researchers; b) leading public defense practitioners from the American Council of Chief Defenders;²⁴ and, c) national organizations versed in delivery of indigent defense services (For research team qualifications, please see Appendix A at page 42). Each site team conducted in-court observations and interviews with defense providers and other key players in the local criminal justice system - including District Judges, the District Attorney, court administrators, the local Indigent Defense Board, and others²⁵ - to assess the system against prevailing standards of justice, including the ABA *Ten Principles*. NLADA staff reviewed field assessment reports from each site team member. Accordingly, the views expressed in this report are those of the National Legal Aid & Defender Association and do not necessarily reflect the views of site team members or their affiliated organizations.

The first formal site visit was conducted on April 17–19. A second was held on May 8–10. Our third site team visited New Orleans between May 16–18, while our fourth and final site team conducted their work on June 12–14. Additionally, the NLADA requested permission to review, and was granted access to, the database of the New Orleans Criminal Sheriff - the only repository for arrest data in the city. The NLADA thanks Sheriff Marlon Gusman for his willing cooperation.

Official Actions Undertaken to Reform Indigent Defense in Louisiana

The National Legal Aid & Defender Association wishes to acknowledge and applaud the many steps already taken by state policy-makers and local justice officials to improve the public defense system in New Orleans and throughout Louisiana – some of which were accomplished even before Katrina wreaked her devastation. Our recommendations should be viewed as augmenting these significant first steps.

Initial indigent defense reforms were passed in the 2005 legislative session, under the leadership of Senator Lydia P. Jackson (D-District 39, Caddo), and signed into law by Governor Kathleen Blanco. Senate Bill 323 accomplished two small, but significant, reforms: a) advancing uniformity in the system;²⁶ and, b) improving oversight.²⁷

Additionally, key legislators, justices, judges and the Governor undertook further notable reform actions in the wake of Katrina. In February 2006, during the first extraordinary legislative session, Representative Daniel R. Martiny (R-District 79, Jefferson) and Senator Jackson spearheaded an effort to pass a concurrent resolution (SCR 25) in both houses of the legislature to call on the Federal Government to assist in the indigent defense crisis. Recognizing that “the state’s indigent defender system is in urgent need of funding” and that the dislocation of defendants was producing “an undue hardship” on those charged with providing the right to counsel, the Louisiana Legislature resolved to ask the United States Congress “to take such actions as are necessary to provide funding for indigent defendants.” The resolution passed both legislative chambers on a unanimous, bi-partisan vote.

The passage of the resolution helped to clear administrative hurdles traditionally preventing indigent defense in Louisiana from receiving federal grants disseminated by the Louisiana Commission on Law Enforcement (LCLE). The potential of an influx of new federal funding for the right to counsel spurred The United States Department of Justice, Bureau of Justice Assistance to sponsor a study on behalf of the Southeast Louisiana Recovery Board (SLRB) at the request of its Chairperson, Supreme Court Justice Katherine Kimball. The Department of Justice and the SLRB retained the Justice Programs Office of the School of Public Affairs at American University to conduct the work.²⁸

The US DOJ report concluded that post-Katrina New Orleans lacked “a true adversarial process” and that “the only justice that can be meted out today is for those who can pay for a lawyer and bondsman.” For those who cannot afford such services, the report concludes that “justice is simply unavailable.” The US DOJ report recommended a number of corrective actions, including: a) replacing the members of the Orleans Indigent Defense Board; b) hiring an interim director to begin the process of implementing change; and c) securing professional office space.

Significantly, the US DOJ experts estimated that the office needed sufficient funding to staff a full-time Chief Public Defender, two Deputy Chief Public Defenders,

four full-time attorney supervisors, 70 full-time attorneys, 23.5 legal secretaries, ten investigators, three full-time and one part-time client service specialists, and a full administrative staff (benefits manager, Human Resource Director, three management information specialists, three finance/receivables staff, and a receptionist). The failure of the Orleans Parish indigent defense system is perhaps best characterized by the fact that these experts recommend an \$8.2 million budget to support a staff of 124 – while the system at the time of the NLADA visits could only support twelve, mostly part-time, employees. The report did result in the OI DB receiving an LCLE federal grant for \$2.8 million.

Acting on the recommendations of that report, the Orleans Parish District Court Judges and then presiding criminal court judge, Calvin Johnson, moved to appoint a new Board to oversee the forthcoming changes of the public defender office. Following national standards for the oversight of indigent defense services, the Orleans judges appointed a Board that operates with the best interests of clients at heart. And, they heeded the recommendation of the US DOJ report calling for an interim director. In July 2006, the new board contracted with Professor Ronald Sullivan, Director of the Samuel and Anna Jacobs Criminal Justice Clinic at Yale University, to serve as a Chief Consultant with all the authority of an interim director.²⁹

Perhaps most importantly, Governor Kathleen Blanco took the critical first step of increasing state indigent defense funding by \$10 million in her proposed budget, in an effort to begin to meet that estimated funding need. Passed by both houses of the Legislature, this effectively doubles state spending on indigent defense representation (from \$10 million to \$20 million) for fiscal year 2007. Though still far short of the threshold needed to ensure adequate representation, Governor Blanco's action is commendable -- especially since the increase should impact the statewide nature of the indigent defense crisis and not just those jurisdictions immediately impacted by the hurricanes.

Conclusion

The National Legal Aid & Defender Association recognizes the inherent right of the citizenry of Louisiana to decide what is best for itself when it comes to restructuring the indigent defense system. We appreciate the opportunity presented by the Louisiana State Bar Association and the Louisiana State Bar Foundation to comment on the indigent defense crisis and to suggest a comprehensive plan for improvement. We offer our continued assistance to all three branches of government as they debate what solution is best for the people of Louisiana.

NLADA remains optimistic that Louisiana can and will move forward quickly to make the needed changes to ensure the right to counsel for all people of insufficient means. In closing, NLADA echoes the sentiments of your own Chief Justice:

“I admonish you [the Legislature], simply, to do the right thing. Provide for a workable and adequately funded indigent defense system, so that another victim does not have to go through the agony of an overturned conviction and repeat of grueling trial testimony, or so that an innocent person is spared the ordeal of an unjust conviction and punishment.”

--Chief Justice Pascal F. Calogero, State of the Judiciary, May 3rd, 2005

Chapter II

Recommendations

The National Legal Aid & Defender Association begins our recommendations with an observation that we believe is self-evident. The problems of New Orleans' indigent defense system cannot be fixed within the boundaries of the parish itself. Long-lasting reform will necessarily take comprehensive statewide legislative action. For example, though the current Orleans Indigent Defense Board is now "client-centered" - as recommended in the US DOJ report - there is currently no statutory protection that another group of duly-elected judges at some future time would not simply appoint a different board whose members might not be as qualified nor as intent on adhering to national standards requiring independence of the defense function.

Moreover, the current Orleans Parish indigent defense crisis is inextricably linked to the right to counsel struggles of an Avoyelles, East Baton Rouge, Caddo or Calcasieu Parish (For a comprehensive bibliography on all independent research, court opinions, public pronouncements by public officials, and Louisiana newspaper editorials detailing the systemic deficiencies of indigent defense statewide, both pre- and post-Katrina, please see Appendix B at page 47). And, because of the state constitutional imperative for "uniformity" in the delivery of indigent defense services, it would be unconstitutional to simply fix Orleans Parish and leave the other judicial districts' indigent defense systemic deficiencies untouched – as discussed below.

Most importantly, statewide reform is necessary to fix deficiencies in New Orleans and elsewhere because local indigent boards cannot print money. Unless and until the primary funding issue is addressed by the state legislature, no true reform of indigent defense services can ever take hold in New Orleans or statewide.

Our recommendations are set out in three sections: A) immediate actions for the Louisiana Indigent Defense Assistance Board (LIDAB); B) legislative actions for the 2007 regular session; and, C) actions for the Orleans Indigent Defender Board (OIDB).

A. IMMEDIATE ACTIONS FOR THE LOUISIANA INDIGENT DEFENSE ASSISTANCE BOARD (LIDAB)

1. *Require Each Judicial District to Submit a Professional Reform Plan and Performance Based Budget*

The NLADA report, *In Defense of Public Access to Justice*, detailed the fundamental flaws in LIDAB's district assistance fund (DAF) formula that requires local boards to simply report the number of "open felonies" annually. Basing funding simply on the number of open felony cases is not a sound measure of resource need because it fails to account for the full range of defender workload,³⁰ fails to take into account any existing backlog of cases,³¹ and inadvertently may reward poor performance.³²

The matrix was developed when LIDAB's predecessor, the Louisiana Indigent Defense Board (LIDB), was under the purview of the Court. At the time, the DAF matrix was devised as a stopgap measure until such time as a formal budgeting process could be developed -- DAF was never intended to be a permanent funding formula. But over time, it has become institutionalized.

Unfortunately, that historical reliance on the DAF funding matrix unintentionally released public defenders from the necessity of developing formal budgets based on actual need. No chief public defender has been required to look at the LIDAB standards and pertinent court rules, carefully think out what resources are needed to meet those standards/rules, develop a concise budget presentation and then defend their request through budget hearings. They simply work within the confines of whatever money comes in through local traffic tickets and whatever money is dispersed to them from LIDAB through the flawed DAF program.

Similarly, LIDAB has never been required by the state to be accountable for ensuring that the money disseminated through DAF was being used efficiently and effectively. The whole DAF process lacks any accountability. The failure to demand such accountability stands in stark contrast to the mandates of the Louisiana Government Performance and Accountability Act (LGPAA). Since 1997, LGPAA has mandated performance-based budgeting throughout the Executive Branch of Louisiana state government. There are statutory requirements under LGPAA for strategic planning, operational planning, performance accountability, and performance reporting for all Executive Branch agencies, including the Department of Justice. In 1999, performance based budgeting was extended to the judicial branch of Louisiana state government. It is time for LIDAB to mirror the best practices of state government and require performance based budgeting for any entity requesting state dollars from them.

Performance based budgeting integrates performance planning and budget allocation in a continuous cycle that relates levels of funding to program effectiveness. The process combines program planning with quantitative evidence of the impact of organizational activities. Consequently, strategic decision-making is combined with measurement of activities and outcomes as the basis for allocating money to and support for programs. This contrasts with traditional approaches to government budgeting, which were based on arbitrary formulas or a raw political power.³³

LIDAB's recent adoption of the Georgia performance standards makes the move to require performance based budget submissions by the local boards and chief defenders easier. When conjoined with the LIDAB caseload standards, the performance standards can become the basis of developing a uniform budget request document. For example, the LIDAB *Performance Standard 2.A* requires attorneys to meet incarcerated defendants within 72 hours of arrests. Local boards will have to determine appropriate staffing levels to be able to meet this standard in the vast majority of cases. More than likely, it will not be possible to do so unless and until LIDAB's own caseload standards are met. Thus, local boards must determine proper attorney levels needed to bring caseloads into compliance with LIDAB's standards.

LIDAB already has the authority to require each judicial district to demonstrate how they are striving to meet LIDAB's current aspirational standards. We recommend that all statewide budget submissions be presented with a formal improvement plan on appropriate staffing and service delivery mode to accomplish the aims of the performance guidelines. Currently, the State of Texas requires such plan submissions from its counties as a pre-requisite for any supplemental state funding. We suggest that LIDAB emulate the best practices of the Texas Task Force on Indigent Defense and create an electronic budget and improvement plan template and make all reform plans available to the public on the Internet.

NLADA recognizes the fact that it is difficult, at best, for public defender managers to construct such budget and reform plans – the historic under funding of the system causes managers to carry full-time equivalent caseloads and has left them with no professional training on how to create professional budgets. Because LIDAB is housed in the Administrative branch of state government, NLADA suggests that LIDAB work in conjunction with members of the Administration to develop such a template uniform budget form that can help local boards properly comply with performance based budget requirements more readily. Such a form may start with the total number of cases by case type (capital, felony, misdemeanor, juvenile, probation violations, etc.) divided by the LIDAB caseload standards to get a base attorney staffing level. Some jurisdictions may need to adjust that level given local variances such as travel time to and from court or jails. National support staff to attorney ratios standards could then be applied to determine appropriate support staff. Standard overhead costs could then be created and applied based on regional office space costs. LIDAB and the Administration can work together to determine the specific details of such a budget template.

Significantly, the failure to have moved toward performance based budgeting prior to now has retarded the ability of LIDAB to garner more resources for trial-level representation. Allowing state funds to be disseminated solely through the DAF matrix, LIDAB has left state policy-makers without a true picture of actual financial need of public defenders. NLADA urges LIDAB to move forward on this quickly to allow for a total statewide public defense budget to be presented to the administration and legislature prior to the start of the 2007 legislative session.³⁴ However, if it becomes impossible to implement this recommendation in time to produce accurate funding projections prior to the 2007 legislative regular session, LIDAB should retain outside services to conduct a needs assessment and calculate an accurate and adequate budget projection.³⁵

2. *Work in Conjunction with the Administration, or Retain the Services of an Independent Research Firm, to Conduct a Salary Survey of Appropriate Defender Salaries and Benefits.*

Part of the development of a professional budget request is to determine appropriate compensation and benefits for public defender work. Based on our knowledge and our own informal survey, Louisiana public defenders are amongst the lowest paid defenders in the South (and indeed the entire nation). On top of this, there are virtually no benefits whatsoever for any public defender in Louisiana – no health insurance, no retirement, no professional liability insurance. Inadequate salaries and benefits for public defenders result in high employee turnover. High turnover, in turn, contributes to the inefficient use of limited resources as the office is in a constant circle of hiring and training new staff. Less senior staff also requires more supervision increasing the cost of a healthy indigent defense system. And, non-senior staff cannot carry a full-time equivalent caseload requiring a greater number of attorneys to effectively manage the caseload.

However, increasing government-supported salaries is always a contentious debate no matter who is the subject of discussion – judges, district attorneys, teachers, or legislators. LIDAB needs to de-politicize the discussion of appropriate public defender salaries. LIDAB should either contract with a respected state research organization (e.g.

the Public Affairs Research Council of Louisiana) or secure the services of a governmental agency (e.g. The State Office of Budget and Planning) to conduct an independent, objective comparison salary and benefits survey. We suggest that comparison groups include, but not be limited too, Attorney General staff, public defenders in neighboring states or other regional states, prosecution staff, county and city attorneys, civil service and other state-paid attorneys. The study should consider all salaries and benefits, specifically including health insurance, retirement, professional dues and fees, liability insurance, professional training, and all other benefits provided to the comparison groups.

Once the data is obtained and analyzed, LIDAB should seriously consider adopting salary standards or some kind of uniformed salary schedule to be applied to the performance based budgeting submissions.

B. LEGISLATIVE ACTIONS FOR THE 2007 REGULAR SESSION

Accountability & Standards

3. *Transform the Louisiana Indigent Defense Assistance Board (LIDAB) into a regulatory agency with statutory authority to promulgate binding standards related to workload, attorney qualification, attorney performance, among others;*
4. *Create a regional contract delivery system that balances local fear of centralization with the need to maintain uniformity of justice from parish to parish; and,*
5. *Enforce standards in the regions through a rigorous compliance program;*

The most effective way to ensure that adequate standards are met uniformly is to give a statewide indigent defense commission the regulatory authority to promulgate and enforce standards uniformly throughout the jurisdiction. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) is the prevailing standard for setting up such commissions. During the Task Force meetings that ultimately produced SB 323 in the 2005 legislative session, Louisiana advocates were careful to follow these guidelines in reconstituting the LIDAB board. Because of that, the state is well situated to simply transform LIDAB into a regulatory commission without a need to re-draft large sections of the statutes.

It is important to clearly denote the change in authority of the oversight commission by changing the name of the regulatory authority to something that more meaningfully comports with its new responsibilities – i.e. the board is no longer just giving “assistance,” but now ensuring quality. For simplicity sake, NLADA will use that moniker “Louisiana Uniform Justice Enforcement Commission (LUJEC)” in the rest of this memorandum to denote a board with greater authority and responsibilities than LIDAB.

Because Louisiana has grown up under a contract system, and because of the general distaste we have heard for “adding to the state payrolls” or “additional bureaucracies” generally, NLADA believes a contract-based system is the most suitable for Louisiana. To the extent that there will continue to be 501c3 non-profit entities vying for state contracts, such an indigent defense system will be generally aided by these organizations having access to grant and foundation monies for additional support or to

try out innovative programs. For those that only know the Louisiana contract system, this recommendation may seem absurd,³⁶ but there are examples of very good contracting systems from which Louisiana can take its lead -- like the Oregon Public Defender Services Commission and Massachusetts' Committee for Public Counsel Services. While in many respects Oregon's and Massachusetts' public defender environments are not comparable to Louisiana's, they are in the minority of states with statewide indigent defense systems that opted *not* to create the more common state employee model.

The Oregon Public Defender Services Commission has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency and accountability of defense services consistent with national standards, including adopting rules regulating: professional qualification standards for appointed counsel and procedures for the contracting of public defense services. All indigent defense services at the trial level are decentralized, with 100 percent of the funding provided by the state through a series of contracts with private attorneys, consortia of private attorneys, or private non-profit defender agencies.³⁷

The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contract obligations. If a defender agency cannot meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

Oregon also enforces strict workload standards in their contracts. For instance, a typical contract with a 501c3 non-profit public defender sets a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally requires different amounts of work.³⁸ Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Oregon system reflects overall numerical caseload limits for all staff in the office combined. And, instead of pure caseload limits, the allocation of case numbers among different categories of cases according to the number of hours commonly required for each type of case essentially constitutes a case "weighting" system, i.e., measuring "workload" rather than caseload, and allowing more sophisticated planning for the office's actual work and staffing needs.

Every six months, there is a budget review process with state funding officials, in which extra funding may be negotiated for extra work performed -- for example, for cases which required more than the usual amount of time or type of services (e.g. "three-strikes" cases). In effect, the contract public defender office monitors its intake and can project the degree of compliance with its estimated workload on a *week-by-week* basis. It notifies the court promptly if workloads are being exceeded and additional appointments must be declined. If, for example, the office meets its workload level on Wednesday, the balance of all new assignments for that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows the office to consistently maintain a uniform quality of service and manageable workloads even during periods of lower-than-normal staff levels due to turnover, sickness or other authorized leave.

Other states offer similar examples of best practice "standards" promulgated and enforced by a statewide commission. Massachusetts provides indigent defense services through the Committee on Public Counsel Services (CPCS). CPCS has statutory

oversight of the delivery of services in each of Massachusetts's counties and is required to monitor and enforce standards. Private attorneys, compensated at prevailing hourly rates, provide the majority of defender services.

At the local level, attorneys accepting cases must first be certified by CPCS to take cases. To accept District Court cases (misdemeanors and concurrent felonies), attorneys must apply, be deemed qualified and attend a five-day state-administered continuing legal education seminar offered several times throughout the year. No attorney may be a member of more than two regional programs (unless she is certified as bilingual).

Attorneys seeking assignment to felony cases must be individually approved by the Chief Counsel of CPCS, whose decision is informed by the recommendation of a Certified Advisory Board composed of eminent private attorneys from each geographical region. To be certified for these more serious cases, attorneys must have tried at least six criminal jury trials within the last five years or have other comparable experience. Proof of qualification, including names of cases, indictment numbers and charges, names of judges and prosecutors, dates, and a description of the services provided must be included in the application. Recommendations from three criminal defense practitioners familiar with the applicant's work are also required. Certification is only valid for a term of four to five years, after which all attorneys must be reevaluated.³⁹

All newly certified attorneys in Massachusetts must participate in a mandatory program of mentoring and supervision overseen by regional advocacy centers. For attorneys seeking appointments to children and family law matters, for example, counsel must meet with their mentor prior to any new assignments and bring writing samples to help the mentor develop a skills profile. The mentor and mentee are required to meet at least four times per year. The mentor is instructed to follow CPCS' performance guidelines in assessing the attorney's ability. Participation in the program is mandatory for an attorney's first eighteen months, and may continue longer at the discretion of the mentor.

By being certified, an attorney agrees to abide by the set of rigorous performance guidelines that set out attorney responsibilities at every stage of the case, for each specific type of case the attorney is qualified to handle. Assigned counsel attorneys are also bound by numerical caseload limits: an attorney may handle no more than 200 Superior Court criminal cases per year, 400 District Court criminal cases, 300 delinquency cases, 200 Children and family law cases, or 200 Mental health cases. An attorney may bill no more than 10 billable hours in a day (unless this limit is specifically waived by CPCS) nor more than 1,800 hours annually.⁴⁰

CPCS assesses "quality" through a formal evaluation program based on the written performance guidelines and overseen on a regional level by compliance officers. These supervisors are given training in how to evaluate staff, and their ability to assess performance fairly is a subject of their own performance review by CPCS.

Louisiana should develop a flexible, regional delivery service that takes lessons from both Oregon and Massachusetts' indigent defense delivery systems. The basis of the delivery system should be a contract system, like Oregon, that includes LUJEC promulgated binding standards. In this way, the existing 501c3 organizations currently contracting with LIDAB will not be disrupted – though certainly they will now have to comply with state generated standards and be subjected to periodic evaluation for

efficiency and effectiveness. LUJEC's central administration and executive director should have the responsibility to certify attorneys by varying case types. And, Louisiana should create regional compliance offices that will evaluate and monitor quality at the local level. Because of Louisiana's geographic expanse, the state should be divided up into regions that will maximize oversight without becoming overly cumbersome. Because the state is already divided into appellate circuits, it makes sense for the state to follow (for the most part) the same five regional districts for the indigent defense system.⁴¹

NLADA believes that such a regional system will offer the most flexibility to account for local jurisdictional variances while ensuring adherence to uniform standards for the whole state. For example, some juvenile justice advocates have proposed the creation of separate juvenile public defender offices in certain urban centers. Rather than deciding upfront whether or not this is an effective means for delivering right to counsel services to children, the flexibility of the system will allow the model to be tested. If it proves effective, LUJEC may want to have the model emulated in other parts of the state in future years. If not, LUJEC may decide to revert back to more traditional delivery services for juveniles. This built in flexibility may result in one region creating a full-time public defender 501c3 to cover the entire region, while another may find that services are best delivered through individual contracts with attorneys or consortia of attorneys. Still other regions may find it best to have a full-time public defender 501c3 office just in the urban center of the region while having a mixed system of satellite offices, contract attorneys and/or assigned counsel attorneys to handle the more rural areas of the region.

LUJEC also should have the authority to devise the contracting requirements for each region following national standards. For instance, a standard could be promulgated requiring all urban judicial districts with a population above a certain threshold to create a non-profit staffed public defender office in which the staff of the agency is not allowed to handle *any* private cases.⁴² This would comport with national standards that state that full-time public defender offices should be created in any district that has a caseload great enough to support a full-time office. Conditions could be required stating that all contract proposals must include a retirement plan for all employees. Requests for proposals could also state that a plan requiring vertical representation by attorney staff is a mandatory prerequisite to being considered for receiving a grant.

In urban areas requiring a full-time staffed 501c3 public defender office, conflict contracts could be let to individual attorneys or consortia of attorneys, as is done in Oregon, to keep the flexibility of the current system. Small, regional LUJEC offices should be staffed with LUJEC hired compliance officers trained in conducting courtroom observation and file reviews, and responsible for enforcing compliance with national standards promulgated by the LUJEC. This regional set-up will allow local judges to be able to call someone local to address any deficiencies in service or to meet to explain the needs of the court in relation to the delivery of the right to counsel. These regional LUJEC staff should carry no caseload and follow requirements for oversight and evaluation based on predetermined LUJEC standards for oversight.

NLADA envisions that the current reform plan submissions recommended above (Recommendation #1) will inform the regional compliance officers and staffs about the most appropriate delivery system for individual regions. Such a plan acknowledges the

history of each judicial district so that services are not disrupted simply for “change for change sake.” However, we believe that LUJEC should have the authority about the final determination of the delivery system in each region. Each regional chief compliance officer will be responsible for putting together a final regional proposal and budget to be approved by the LUJEC board.

Critical to the success of these new regional delivery systems, LUJEC must promulgate, and these regional offices must enforce compliance with, the following types of standards:

- b. Performance Standards: The recent adoption of the Georgia Performance Standards must be made mandatory through the LUJEC contracts.
- c. Workload Standards: As noted earlier in Endnote 8, an adequate indigent defense program must have binding caseload standards for the system to function for the simple fact that public defenders do not generate their own work. Public defender workload is impacted by a convergence of decisions made by other governmental agencies beyond the control of the indigent defense system itself. The legislature may approve new crimes or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, etc., public defenders are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients no matter what. We recommend that Louisiana adopt jurisdictional-specific workload standards for public defender and assigned counsel attorneys.
- d. Support Staff to Lawyer Ratio Standards: The national workload standards are not adequate if attorneys do not have sufficient support staff to assist in the proper defense of clients. For example, the State of Indiana prescribes specific numerical caseload limits per attorney per year in various types of cases based upon the national workload standards. Indiana standards set a limit, for example, of no more than 150 felonies or 400 misdemeanors. However, if a county does not provide “adequate support staff” for its public defenders, the mandatory caseload limits are set at a lower level, since the duties that would be performed by support staff must be performed by the attorney, reducing the attorney’s time available for other cases. “Adequate support staff” is precisely defined, to require one paralegal, one investigator and one secretary for every four full-time attorneys; and one law clerk for every two appellate attorneys. Without “adequate support staff” the caseload limits decrease –
 - Felonies: from 150 to 120;
 - Less Serious Felonies: from 200 to 150;
 - Appeals: from 25 to 20;
 - Misdemeanors: from 400 to 300;
 - Juvenile Delinquency proceedings: from 250 to 200; and

- “Other” cases (probation violations, contempt, or extradition): from 400 to 300.⁴³
- e. Continuous Representation Standards: LUJEC should be given the authority to require every region to institute practices to allow trial attorneys to be assigned cases at first appearance without waiting until the formal arraignment process and to keep those cases through to disposition except in exceptional circumstances (like attorney illness).
- f. Qualification Standards: LUJEC should have the authority to create attorney qualification standards and have the power to create a process by which to certify attorneys to handle different classes of cases: misdemeanor, felonies, juvenile cases, and death-eligible cases.⁴⁴ The qualification standards can be linked to completion of specific LUJEC sponsored training programs.
- g. Minimum Salary and Benefits Standards: Based on the objective salary survey conducted by LIDAB, LUJEC should have the ability to create a uniform salary and benefits schedule that must be adhered to in order to be awarded a LUJEC contract.

Efficient Use of Centralized Services

6. Create a Statewide Office of the Public Advocate

The ability of defense advocates to speak with a single, unified voice on justice matters and effectively advocate for adequate resources is diluted in Louisiana by having 41 balkanized service providers (as well as a number of contract offices). It is not surprising the legislators are confused about indigent defense matters when various members of the Louisiana Association of Criminal Defense Lawyers hold different opinions from Louisiana Public Defender Association members who differ from Directors of the contract offices who may have a different position from the Executive Director of LIDAB. In most states with adequate defender systems, there is a single State Public Defender who is seen on par with the Attorney General of the state (Vermont even went so far as to name the position the “Defender General”). NLADA guidelines support the position of a state Chief Defender.⁴⁵ NLADA will use the title used in Kentucky, “State Public Advocate,” to denote the Chief Public Defender position.⁴⁶

LUJEC should hire a State Public Advocate and two Deputy State Public Advocates to manage the system from a small, centralized office housed in Baton Rouge. Generally, public defender management responsibilities can be distinguished as “inside” and “outside” office duties. If the State Public Advocate views her strengths as internal management, the external responsibilities are delegated to a Deputy. Conversely, if the State Public Advocate sees her primary responsibilities as functioning as the office spokesperson vis-à-vis the press, the wider criminal justice system, the state administration and the citizenry, one of the Deputy Public Advocate should be given the authority to oversee and implement practices to ensure the effective day-to-day operations of the organization.

The second deputy will be the Deputy Public Advocate for Juvenile Justice. As problematic as the adult representation defense system is, juvenile defender services historically have been treated as the poor relation to the adult system. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems that increase the risk that they will eventually be brought into the adult criminal justice system in later years. These are commonly children who have been neglected by parents and the range of other support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has a heavy caseload and no experience other than to dispose of the case as quickly as possible, the message of neglect and valuelessness continues, and the risk of not only recidivism, but of escalation of misconduct, increases. Recognizing this, other public defender systems have elevated the priority of juvenile representation and established special divisions not only to promote assessment and placement of juveniles in appropriate community-based service programs, but also to train and collaborate with others in the system, such as jail officials, judges, prosecutors and policy-makers, to support the same goals. The creation of a high-ranking voice for children in need of defender services will ensure that all budgets, trainings, compliance regulations, and public pronouncements appropriately address the needs of children.

LUJEC should define specific job descriptions and conduct a national search for all three positions. Current LIDAB management should not be prevented from applying for any one of these three positions.

Other centralized staff in the Public Advocate Office should include staff dedicated to training, financial management and management information systems:

- a. Director of Training & Training Staff: Louisiana's indigent defense system suffers from a deep lack of training. Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a "cost-saving device" because of the "cost of retrials based on trial errors by defense counsel or on counsel's ineffectiveness." The Preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members "more productive, efficient and effective." In adopting the *Ten Principles* in 2002, the ABA emphasized the particular importance of training with regard to indigent criminal defense by endorsing, for the first time in any area of legal practice, a requirement of *mandatory* continuing legal education.

The Office of the Public Advocate must have a Training Director and staff. They should be responsible for new attorney training. New-attorney training is essential, and should cover matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training includes a thorough introduction to the workings of the indigent defense system, the district attorney's office, the court system, and the probation and sheriff's departments as well as any other corrections components. The staff should put on new attorney training as part of the certification process in addition to on-going professional development for indigent defense practitioners in each of the regions. Indeed, to defray travel costs, the LUJEC training staff should make regional-based training a priority.

- b. Director of Finance & Financial Staff: For eight long years, LIDAB was unable to successfully advocate for new funding. During that time, the cost of living increased by 20.73% while criminal cases increased by at least 10.5%. During this same time, the Legislature increased LIDAB's responsibilities to cover post-conviction counsel without any new moneys appropriated to pay for the services. In effect, the policies of the Legislature left trial-level public defenders in parishes across the state having to cover more and more cases with less and less revenue for nearly a decade. LIDAB, as it was previously constituted, was unable to effectively change public discourse, actively advocate on its own behalf, or get critical funding increases out to the district public defenders. By definition, the LIDAB board failed to protect the rights of the poor because of its inability to effectively advocate for resources for the majority of its history.

While the vagaries of state budgeting have had a clear impact on the fate of LIDAB's budget submissions, it is also clear that the office has come to the conclusion that it can do little to affect the outcome. With a strong Director of Finance in place, several changes could, over time, strengthen the LUJEC's position in the budget process. First, strategic planning and strategy implementation should occur within the same process by which budgets are developed. Second, budget justifications should contain much greater detail than is the current practice. Specifically, quantitative data demonstrating LIDAB's historical performance and LUJEC's anticipated need should support each request for additional funding (improving data collection is discussed below).

Moreover, "uniformity" is not maintained if one defendant receives the services of a public advocate with a regulated caseload and that has received training and supervision while a co-defendant receives the services of a private lawyer appointed, paid and supervised by a trial judge. Therefore, the Public Advocate Office should be given the authority to certify private attorney conflict counsel and have the authority to assign cases in the event of a conflict – as such, LUJEC should also be solely responsible for oversight and payment of all hourly bills of conflict counsel. The Director of Finance should have appropriate staff to oversee prompt payment of these submissions.

- c. Director of Management Information Services & MIS Staff: The State Public Advocate, Deputy Advocates and the Director of Finance will all be significantly handicapped without quantitative data derived from fiscal, administrative and law practice areas to support day-to-day decision-making. On-going data reporting has the two-fold benefit of maintaining a year-round focus on the budget and of supporting the use of quantitative approaches to support management decision-making. The latter has come to be known in the management literature as "evidence-based" practices or management by outcomes. Of course, this requires that data be collected, aggregated and analyzed in a consistent fashion for a limited number of strategically determined activities – something that has been absent from LIDAB operations for some time.

A position of Director of Management Information Services should be created to oversee the case-tracking implementation and the production of regular reports to be

shared by management and staff (regarding workload, pending caseload, dispositions, trial rates, etc.). LUJEC contracts could require service providers to install and use a LUJEC case-tracking system (paid for out of the central office and *not* the regions). NLADA applauds LIDAB for their foresight in recently approving money to expand the case-tracking system developed by The Louisiana Appellate Project and supported by the Louisiana Public Defender Association to all judicial districts.

Most importantly, the Director of Management Information Services should ensure quality control over data, since any case management system is only as good as the data that are put into it. To accomplish this, the Director of Management Information Services should directly support the data input function. Data entry guidelines and standards must be developed and compliance monitored to protect the integrity of the data within each region. The MIS Director can work with the training director to put on periodic trainings to local data input specialist to again maintain uniformity in how cases are tracked. The MIS director can also work with the regional ombudspersons to ensure that data input standards are maintained on the local level.

Under the best case scenario, the Director of Management Information Services could assist the Chief Public Advocate in working with other criminal justice agencies to create a single uniform criminal justice case-tracking system that encompasses not only all indigent defense providers but all criminal justice components. The State of Rhode Island has a unified criminal justice case-tracking system that links all components of the criminal justice system (law enforcement, courts, prosecution, defense, corrections) into one network. As a United States Department of Justice report suggests, “(t)he system eliminates duplicative data entry functions system wide, implements the highest degree of data-sharing capabilities, automates criminal court calendars, and provides better statistical summaries throughout the criminal justice system.” Basically, the arrest of a person triggers notification of the courts, prosecutors and defense attorneys when data is input at booking. Protections within the system guarantee that proprietary information of the defense and prosecution is not shared with all users. Interestingly, the system was entirely funded through a Byrne grant.

7. *Create A Statewide Capital Trial Unit with An Office in Each of the Five Regions.*

The defense of people in death-eligible cases has been problematic, at best, throughout Louisiana. This is not just our opinion, but the opinion of the Louisiana Supreme Court -- as noted in several decisions regarding: the prevalence of overturned convictions,⁴⁷ the importance of voir dire,⁴⁸ the failure to prepare mitigation evidence,⁴⁹ and, of course, inadequate funding.⁵⁰

NLADA acknowledges that under current law state policy-makers have the right to decide for themselves on the need for capital punishment. But, should a state so choose to have the death penalty then the jurisdiction must concurrently provide funding for an adequate defense and adhere to national standards of justice.

Louisiana should provide trial level capital defense representation through full-time staffed capital defender units housed in each of the five regions. The offices can be either under the direct purview of LUJEC and housed in the regional offices of the Public

Advocate compliance officers, or be independent 501c3 full-time public defender offices. However, should the second option prove most prudent for Louisiana, we strongly urge that these five regional offices be satellite offices of a single independent agency. Several reports have concluded that full-time staffed public defender offices provide the most efficient and cost effective representation in jurisdictions with sufficient caseload due to a number of factors, including: familiarity with criminal law; specialization for certain types of cases; and, centralization of administrative costs.⁵¹ The current LIDAB board should conduct an inventory of how many death eligible cases are currently open across Louisiana before determining appropriate staffing levels for each of the five offices.

NLADA specifically makes this recommendation because of the unique position that state government finds itself vis-à-vis the Louisiana Supreme Court ruling in *Louisiana v. Adrian Citizen* 04-1841 (La. 2005). Given the *Citizen* decision allowing death penalty cases to be halted upon motion of defense counsel because of insufficient funding, and given the stunning lack of defense resources post-Katrina, it is hard to imagine any death penalty cases proceeding to trial unless such regional capital offices are opened. Conversely, we can envision the courts of Louisiana continuously having to deal with the ramifications of *Citizen* on a case-by-case basis unless and until the costs of defending capital cases is brought under control with a staffed office.

Also, given the specific directive of the United States Supreme Court in *Wiggins*, LUJEC should adopt and run the capital centers under the ABA *Guidelines for Death Penalty Representation*. NLADA went to great lengths to study the issue of capital representation in New Orleans during our site visit and found that the office fails virtually every ABA *Guideline for Death Penalty Representation*. The OADB lawyers' caseloads are excessively heavy,⁵² they do not have adequate support staff or access to expert witnesses,⁵³ they do not have enough time or resources to develop mitigation evidence, they do not provide representation early in the case,⁵⁴ they do not present mitigation evidence to the district attorney before a decision is made to seek the death penalty,⁵⁵ they do not fully prepare motions and briefs, they do not investigate fully their cases,⁵⁶ and they in many ways acquiesce to a culture that discourages vigorous and thorough representation.

Public defenders in the new capital offices should comply with the ABA *Guidelines*, including, but not limited to:

- The Defenders should prepare mitigation packages to present to the District Attorney before the charging decision to seek death, in an effort to persuade him not to seek death. This likely would reduce the number of capital cases, saving time and money that can be spent on other cases and on providing more thorough representation in the murder cases. It is likely that earlier decisions to dismiss or resolve cases also would save considerable expense in jail costs, allowing re-allocation of those funds.
- The Defender capital lawyers should have a trained and experienced investigator and a mitigation specialist available to them on every case. The investigator and mitigation specialist should not work on more than one capital case at a time.

- The Defender capital lawyers should more actively seek expert witnesses in all of their cases, to address mental health issues, including neurological and other physical disorders, the effects of alcoholism and other drug abuse, the effects of fetal alcohol spectrum, and forensic issues relating to guilt, including, for example, DNA evidence, blood spatter, and fingerprints.
- The Defender capital lawyers should have an active and creative motion practice, including written motions and briefs on evidentiary issues. They should integrate their use of experts into motions to suppress statements and eyewitness identification.
- The Defenders should have an office with internet access and electronic legal research available to the lawyers at the office and at home. The office should have professional space, private meeting areas, computers for each lawyer, and a computer network with a modern management information system. The office should have modern copy equipment and other audio-visual equipment to make presentations in court and to the DA.
- The capital defenders should have a team supervisor and should be regularly evaluated.

Ensuring Independence

8. Sunset Local Indigent Defender Boards (IDBs)

At the time of the 1974 Louisiana Constitutional Convention the idea of local indigent defense boards made sense. The practice of law was not as complex, not requiring as much specialization or continuing training, and requiring less oversight and accountability. The move to regionalization diminishes the need for local boards. The time has come to eliminate the local boards.

The real question is not whether to abolish the local boards but rather how to do it. There appears to us to be three legitimate options: A) simply eliminate all boards upon creation of LUJEC; B) sunset the boards at a determinant date; or, C) make the abolition of a particular board dependent on a “trigger” - like the failure to meet LUJEC standards.

Option “C” has been a cornerstone of the Louisiana Public Defender Association’s reform plan – modeled closely on the Georgia reform model. Under the statutes reforming Georgia’s indigent defense system, individual counties were authorized to “opt out” of the centralization of services if it could be independently verified that standards were being met under local control.

But unlike Louisiana, Georgia’s system emerged from a *county funded* system. Because of this, it was possible for an individual county to have adequately funded its indigent defense system (though it was rare, there were a few Georgia counties that recognized the benefit of a healthy indigent defense system prior to reform and funded the system appropriately). Thus, there was a need to allow a county the option of remaining free from the state system if it could prove beyond a shadow of a doubt that it was providing the *same or better* representation than the state could. Thus, the “opt out”

clause was devised, *not* to protect counties who simply did not want Atlanta telling them what to do, but rather to recognize those counties who had met *Gideon*'s requirement before the state did. Seen through this lens, the "opt out" clause was instituted to protect those counties who thought that the state system would *lower* their standard of practice.

NLADA's reading of the LPDA plan presupposes just the opposite dynamic. In the LPDA plan there is a presupposition that the system is under funded and that there is bad practice going on in the parishes -- but that no one should be blamed for the failure until the state ponies up more money. Because Louisiana is primarily a court cost funded system, it is impossible for a parish to say (as those few Georgia counties did) "we want better representation of indigent defendants, let's increase our funding!" In this sense there is no structural mechanism under which a Louisiana "opt out" clause would make sense.

NLADA believes that there will be a necessary transition period from LIDAB to LUJEC that will necessitate leaving some aspects of the indigent defense system at the local level until the centralized functions are properly created, housed, and staff hired. The central LUJEC team and regional ombudspersons should be hired, trained and ready to perform their duties within 18 months of the legislative start date. Assuming that a comprehensive reform package is passed in the 2007 session, and that the enabling legislation starts on August 15, 2007, and assuming that the existing LIDAB Board is transitioned to the new LUJEC Board, NLADA predicts that the hiring process for a Chief Public Advocate would take five months from advertising the position to start date. Once the Chief is on board, the other central staff could be hired and housed within another six months. At that point the housing and staffing of the regional ombudspersons could proceed and the subsequent training initiated. This would bring the emerging system on-line in January 2009. We believe that is the date that the local boards should be phased out.⁵⁷

Funding

9. *Mandate All Locally-Collected Indigent Defense Resources Revert to the State General Fund; and,*
10. *Require the State to Expend General Fund Monies for any Shortfall between Forecasted Budget and Actual Need;*

Simply put, the State needs to recognize its full constitutional obligations under *Gideon v. Wainwright*. The funding of LUJEC should be a straight appropriation out of the state general fund and justified through normal budgetary procedures and hearings.

This recommendation should not be seen as a condemnation of the practice of employing alternative revenue sources generally to fund indigent defense services, or using court cost revenue specifically. Many states employ such alternative revenue streams. For example, the State of Alabama levies and imposes a fee in every criminal case in district, juvenile or municipal court. Georgia's Indigent Defense Standards Council is financed, in part, through a \$15 civil filing fee. Where Louisiana is justly criticized is for allowing: a) the alternative revenue stream to be kept locally, and b) failing to properly augment the low revenue stream to ensure adequate representation.

Unlike Louisiana, all of the above referenced state alternative revenue streams go into a central state dedicated fund to be disseminated as needs dictate. Keeping court cost revenue locally only makes sense if the local government is responsible for the primary funding of the right to counsel. Under such a scenario, it would not matter, for instance, if a Sheriff in Parish “A” wanted to de-emphasize traffic enforcement since it would then be incumbent on the local government to fill the gap between revenue and need. In this way, there is a check and balance against the decision – i.e. local government could encourage the Sheriff to change practices since his decision increases the need for more general fund monies going to the defense of the poor. Under current Louisiana law, there is no such system of checks and balances on local practices that directly reduce indigent defense funding.

That is *not* to say that the funding of public defense should be a parish responsibility. Leaving local government responsible for administering and funding their criminal justice systems, and in particular indigent defense services, can put an undue hardship on local jurisdictions to ensure adequate representation of poor people accused with crimes. Nationally, counties with fewer sources of revenue may have to dedicate a far greater portion of their limited budget to defender services than would counties in better economic standing. For instance, crime rates tend to increase when there is a high level of unemployment.⁵⁸ Thus, at a time when tax-revenues may be down due to depressed real estate prices and people leaving the community, the criminal justice system is often expected to increase its workload. A county’s revenue base may also be strained during economic downturns because of the need for increased social services, such as indigent medical costs. In short, requiring local government in Louisiana to assume this funding responsibility would likely result in greater disparities in quality from parish to parish than under the existing law - in direct opposition of the state constitutional requirement for uniformity.

More over, a state like Alabama is statutorily responsible to “fill the gap” between revenue shortfalls and the actual cost of providing adequate representation at the local level. For example, Alabama’s “fair trial tax” was designed to uniformly offset the *entire* county cost of providing indigent defense services at the local level.⁵⁹ To the extent that the fair trial tax fund is not sufficient to cover the entire indigent defense cost to the counties, the state is statutorily required to expend general fund revenues to cover the deficit.⁶⁰

The legislature should create a LUJEC funding pool into which all local indigent defense funding receipts will be sent. The legislature should guarantee that the amount of money collected annually in this fund will never fall below the 2004 level of \$22 million. Should court costs return to their pre-Katrina levels, the state obligation would be reduced. Informed by the LIDAB performance-based budgeting submissions, the state should increase indigent defense resources to meet the actual needs of LUJEC to run a program that ensures accountability, uniformity and fairness in the delivery of the right to counsel in Louisiana.

Effective Criminal Justice Planning

11. Establish an “Adjudication Partnership” to Recommend Statewide Criminal Justice Reform to Increase Efficiencies and Reduce the Need for Indigent Defense Services.

NLADA does not believe that the only answer to the indigent defense crisis is for the state to spend its way out of it. A publicly financed lawyer is only required under our Constitution if there is a threat of a loss of the client’s liberty upon conviction. As Chief Justice Calogero suggested in the 2005 State of the Judiciary speech:

I am also here to ask you and the Task Force to explore ways to reduce the need for indigent defense and, therefore, to reduce its costs, while still protecting the public. This can be done, in my opinion, in several ways, such as developing more strategies for diverting cases from the formal system, through early intervention juvenile diversion programs, or through adult diversionary strategies as the expanded use of drug courts, and other forms of adult diversion.

Louisiana has the highest incarceration rate in the country.⁶¹ Incarceration is the most expensive way for a jurisdiction to try to deal with aberrant behavior. The focus on filling the jails to maximum capacity has not resulted in a corresponding decrease in crime.⁶²

It is not our place to say that Louisiana must de-emphasize incarceration over other alternatives. Rather, we believe that Louisiana lacks the proper forum in which to seriously consider such alternatives. The proper forum for such a revaluation of criminal justice practices is an “Adjudication Partnership.” An adjudication partnership is a formal collaborative effort in which representatives from key justice system agencies join together to identify problems, develop goals and strategies for addressing the problems, and oversee the implementation plans to manage or solve problems. Many jurisdictions have learned that there is value to leaving the adversarial process in the court room, and coming together to have a rational and reasoned discussion about best practices. In the best jurisdictions, adjudication partnerships produce joint criminal justice fiscal impact statements, such that the Legislature can make informed decisions on all criminal justice bills. For instance, increasing the funding to hire additional law enforcement officers will result in an increased workload on the courts, prosecutors and defense attorneys. Jointly, the adjudication partnership can inform policy-makers that increasing law enforcement will require “X” number of new judges, “Y” prosecutors and “Z” public defenders.

In addition to studying alternatives to incarceration, an adjudication partnership should seriously consider and recommend reclassifying some low-level felonies as misdemeanors. In *The Provision of the Right to Counsel in Caddo Parish, Louisiana*, a Louisiana State University professor found that “65% of the indigent defense clients had full-time jobs at the time of their arrests and detention.” Because public defenders do not interview clients early, the authors correctly surmise that defense counsel cannot help assess the likelihood that a client poses a risk either to the public safety or to flee court obligations. Therefore the clients are housed at taxpayers’ expense rather than continuing to contribute to the tax base. For a state struggling to find resources for reconstruction, it seems like a poor practice to incur the further costs of housing people charged with a non-violent offense, especially given that the majority of defendants hold down jobs. It

can be argued that indeterminate pre-trial detention may lead to the loss of a job, which may in turn cause domestic problems leading to further publicly supported court actions like termination of parental rights or abuse/neglect cases requiring additional public counsel. By reclassifying many misdemeanor and low-level felony offenses, the state can potentially reap a significant cost-savings on taking these cases out of the formal court setting and not relying on the corrections system.

Another subject to be discussed and debated is whether or not the time has come for the State of Louisiana to create a formal Pre-Trial Services Division of the criminal justice system. Pre-Trial Services are independent agencies tasked with, among other things, public defender eligibility screening, determining whether or not an arrestee should be detained or released on his or her own recognizance prior to initial court appearances, and presenting judges with independent assessments on bail recommendations. Creating such a division could provide greater efficiencies throughout the court system while eliminating much of the bias in bail determinations. Since much of the same information is required to determine both eligibility for a public defender and flight risk, having the indigency determination done at the same time of the risk assessment will allow for earlier notification of appointment to the public defender offices. This in turn, will allow defenders to be more informed when meeting the client leading to more informed bail hearings. Having a third party presenting objective information does not reduce the role of judges. The bail determination is still their decision. But presenting more information, including accurate criminal histories, will produce better bail decisions. Pre-Trial Services agencies also often perform an oversight function that allows for defendants to be released through a type of pre-trial probation – a cheaper alternative to pre-trial detention that allows defendants to maintain their jobs and family life. A statewide Adjudication Partnership should study the value of instituting such an entity.

Similarly, the adjudication partnership could consider eliminating the requirement that every defendant that is not released on his or her own recognizance post a monetary bond and instead consider a system like that of the Federal Criminal Court System where the bond is only paid if the defendant fails to appear.

C. IMMEDIATE ACTIONS FOR THE ORLEANS PARISH INDIGENT DEFENSE BOARD (OIDB)

NLADA wishes to acknowledge the substantial amount of work that already has been accomplished by the newly-appointed Orleans Parish Indigent Defense Board (OIDB) over the past several months. They have acted with all due diligence and speed to address historic deficiencies, identify Orleans Parish defendants incarcerated in other correctional facilities across the state, hired a contract consultant to administer their new policies, sought and received additional private grant funds, addressed the need for full-time defenders in the urban environment, participated in local criminal justice planning sessions, partnered with local law schools to institute an emergency vertical representation project, and, importantly, have begun to coordinate the services of volunteer attorneys to address the backlog of cases exacerbated by the events surrounding Katrina. Indeed, OIDB often addressed critical problem areas we believe needed

addressing as we were writing this report. To have accomplished all of this with a short time frame, and during a time of great personal sacrifice is beyond commendable.

The amount of work accomplished reflects the benefit of an independent commission made up of law school representatives, juvenile advocates, civil practitioners and others committed to the defense of poor people. Our earlier recommendation to abolish local boards should not be seen as a critique of the good work accomplished by this board – the recommendation is a simple recognition of the precarious position the new board is in vis-à-vis the judiciary. In fact, since Orleans Parish comprises the vast majority of what should become a LUJEC region, we hope that this current board could transition to the board of a 501c3 for the entire region.

The recommendations below are an acknowledgment that statewide reform cannot be accomplished overnight and that the good work accomplished should be continued in the interim. Nothing proposed below would be in conflict with the creation of LUJEC – indeed the more OIBD transforms into a model office that complies with the ABA *Ten Principles* now the less disruptive will the anticipated statewide changes be to the Orleans Parish criminal justice system.

Please note that the creation of a fully functioning defender office could be an extremely dense report in and of itself if NLADA were to choose to comment on every single aspect from procurement procedures to human resource policies to adequate representation in revocation proceedings. The suggestions below represent some of the most pressing we feel should be addressed in the coming year. In the coming months, OIBD should:

12. *Adopt & enforce the applicable parts of the ABA Ten Principles under their purview, including: creating jurisdictional-specific caseload standards, institutionalizing vertical representation, and adopting appropriate performance supervision practices.*

a. Caseload Standards

Regulating an attorney's workload is perhaps the simplest, most common and direct safeguard against overloaded public defense attorneys and deficient defense representation for low-income people facing criminal charges. The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with slight modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.⁶³ NAC Standard 13.12 on Courts states:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.⁶⁴

What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. Other national standards

support the NAC numerical limitations on caseload,⁶⁵ including the ABA's *Ten Principles* instruction that caseloads should "under no circumstances exceed" these numerical limits.⁶⁶

Despite their proven resiliency, it is not recommended that a defender office or jurisdiction adopt the NAC standards without taking into account local factors that may raise or lower the number of cases an attorney can reasonably be expected to handle in a year.⁶⁷ First, the standards were first created through what is known as a "Delphi" methodology. Instead of using a time-tracking methodology in which attorneys record time by case-type, activity and disposition, the Delphi methodology relies on experienced defense attorneys to estimate the amount of time necessary to complete specific tasks in the life of a case. These educated guesses are then averaged to produce the estimated amount of time needed to bring a particular type of case to disposition.

Because these standards were not empirically created, the assumptions that form the basis of the national caseload standards may or may not hold true for a particular jurisdiction. For example, the NAC standards do not take into consideration the variations in practice between indigent defense practices and procedures in rural, urban and suburban jurisdictions. In many rural areas of the country, public defenders must travel considerable distances to meet with incarcerated clients, staff various courts, and investigate crime scenes. These factors may decrease the number of cases any one public defender could handle in a rural area compared to a colleague practicing in an urban area in which the court, jail, and public defender office may all be situated within a single city block. In urban areas, public defenders may be able to handle more misdemeanors than suggested by the NAC standards.

The concept of workload allows appropriate adjustment to reflect other jurisdiction-specific policies and practices as well. The determination of workload limits might start with the NAC caseload limits, and then be adjusted by factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, extent and quality of supervision, and availability of investigative, social worker and support staff.⁶⁸ Some jurisdictions may end up significantly below the numerical caseload standards (e.g., if the prosecution follows a no-plea policy, or pursues statutory mandatory minimums for any class of cases), and others significantly above (e.g., if court policies favor diversion of nonviolent offenders, and judicial personnel are responsible for matching the client with appropriate community-based service providers).

Moreover, the practice of law has changed considerably during that ensuing three decades since the NAC standards were created. Technological advances alone, such as computers, allow for on-line legal research, template motions/brief banks, and automated client contact letters, assumingly making attorney time more efficient – especially in high volume, less serious cases. At the same time, scientific advances and improved police and district attorney investigative practices can mean a greater amount of time needed to be exerted by attorneys in more serious cases, effectively lowering the number of cases she could adequately handle in a given year. But because the NAC standards weight all felonies the same regardless of seriousness, and similarly all misdemeanors the same, they fail to allow for consideration of the widely varying amounts of work required by different types of dispositions and different types of cases.

For all these reasons, NLADA recommends that the NAC standards only be used as a citation to government funding bodies as a means to compare a specific office's

actual caseload with national averages in an attempt to give a general assessment of attorney workload. To establish a jurisdictional-specific standard that can form the basis of a statistical funding formula, NLADA recommends that public defender offices undergo a case-weighting study.

“Case weight” is a term that denotes the amount of effort (in staff hours) needed to bring a case to disposition. As opposed to the Delphi methodology, case-weighting studies require public defender staff to record actual hours spent on case-related and non-case-related activities over a certain period of time as the basis for formulating an object workload standard. Case-weighting studies are modeled on the successful practices of private law firms. In the private realm, employees track their billable and non-billable hours by activity to determine the net profitability of each individual case. In the public realm, similar activity-based time records are kept to determine the standard amount of staff time needed to adequately bring the average case of a certain case-type to disposition. The subsequent creation of jurisdictional-specific workload standards provides an objective, quantitative means by which public defender managers and funding agents can accurately project staffing needs, and assess whether time is spent efficiently by staff on each type of case.

The “case-weighting” methodology requires public defender employees to track their time by activity by case-type for a 12-week period. During the time study, attorneys are also required to record dispositions by case-type. The first step in forming caseload standards for budget purposes is to divide the aggregate amount of time recorded per case-type by the number of dispositions recorded for the same period to form case-specific “time per disposition” figures $[\sum (\text{staff hours}) \div \sum (\text{dispositions})]$.⁶⁹ Dividing the resulting time-per-disposition figure into the annual work year forms workload standards.⁷⁰ Staffing projections can be accurately forecasted by applying the standards to the office’s projected caseload.⁷¹

Case-weighting studies also leave public defender managers with detailed information by which to determine the most efficient use of staff. For instance, if attorneys are recording an excessive number of hours under “clerical-related activity,” it may be more cost-effective for the public defender manager to hire more support staff and shift the attorneys to more traditional attorney activities like “case preparation.” Similarly, a time study may show that attorney staff are being asked to do traditional social service activities that they may not be professionally trained to perform. A public defender manager may decide that he needs to add more social workers.

Finally, the aggregate time by activity information allows a public defender manager the quantitative data needed to assess the performance of an office against nationally recognized standards, such as NLADA’s *Performance Guidelines for Criminal Defense Representation*. For instance, Guideline 1.3(c) states, “[c]ounsel has an obligation to keep client informed of the progress of the case.” Time studies would determine whether or not attorneys are acting in accordance with the guideline and recording a sufficient amount of time under “client contact” activity code. Once the case-weighting study is tailored to a specific jurisdiction, public defender managers can recreate the study annually. Some public defender programs have even institutionalized case-weighting and require attorneys and staff to track time in the same manner as assigned counsel conflict attorneys.

NLADA recommends that OADB pursue the adoption of internal time-tracking

procedures to form appropriate case-weights and/or retain the services of a national expert to determine appropriate workload standards through the above referenced methodology.

b. Vertical Representation

As noted in all pertinent national standards, public defender offices should provide for continuous and uninterrupted representation (i.e. vertical representation) of eligible clients from initial appearance through sentencing. For a variety of reasons detailed in endnote 5, the New Orleans criminal justice system has a number of systemic deficiencies that make the need for vertical representation all the more pressing. The delay in the production of final police reports and the statutory language allowing for up to 60 days from arrest to arraignment necessitates that defense lawyers must be working on client cases during this time. Without an engaged attorney working on the case from arrest may result in difficulty in tracking down eye-witnesses and/or people's memories becoming cloudier with the passage of time.

NLADA recognizes that institution of this recommendation will result in a major cultural change for the criminal courts of New Orleans. OIDB should work in concert with the court to make changes in court structure and administration to reduce the current fragmentation and to facilitate continuous representation. We believe that having a sufficient staff with a full compliment of attorneys will ease the court's trepidation over this move.

c. Performance Measurement & Supervision

Consistent quality performance is not achievable without first creating a supervisory staff structure. A new job description for "Attorney Supervisors" should be developed. The positions should include responsibility for supervision, training and performance evaluation. Diversity of the supervisory team should be considered in the hiring process. Not only is this consistent with research and practice concerning effective client-oriented teams, it can assist the OIDB's efforts to develop better community relations and support. The new supervisors should carry no caseloads, or only extremely limited ones.⁷² Whether or not they have caseloads, willingness to try cases and skill in doing so should be among the hiring considerations.

Most staff members openly expressed the sentiment that there has never been any meaningful assessment of performance in the OIDB. There is no "one-size-fits-all" performance plan. This is not only because organizations' performance needs differ, but also because successful performance plans allow for some opportunity for staff to shape the plan. Despite differences in performance plans, sometimes even between similarly situated defender offices, there are many features that consistently appear in plans that work well.⁷³ They include:

- *Clear plan objectives.* These can vary greatly both in kind and number but they commonly include such things as: fostering and supporting professional development; giving people clear guidance about what is expected of them; and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency's mission and vision. Critically, effective plans emphasize a goal of promoting employees' performance success.

- *Specific performance guidelines.* People need to know what is expected of them in order to work to fulfill those expectations. Performance expectations should include for example, attitudinal expectations and administrative responsibilities as well as substantive knowledge and skills.
- *Specific tools and processes for (1) assessing how people are performing relative to those expectations and (2) assessing what training or other support they need to meet performance expectations.* People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan so that evaluations are done fairly and consistently.
- *Specific processes for providing training, supervision and other resources that are necessary to support performance success.*

The OI DB should immediately begin to develop a comprehensive performance plan in line with the information set forth above. Because of the agency's history and the lack of exposure to basic management philosophies and strategies, the OI DB should consider obtaining a professional from outside the agency to assist in developing a short-term planning process and to facilitate some of the management and/or staff meetings that the planning will involve.

The OI DB should write detailed position descriptions for every agency position and should immediately adopt the LIDAB *Performance Guidelines*. The OI DB should create a detailed evaluation instrument that incorporates (specifically or by reference) the position description, the *Performance Guidelines* (for appropriate positions) and references specific, relevant policies and procedures (from the manual that this report recommends creating.) The performance plan should define the methods and components of evaluations,⁷⁴ as well as the timing and frequency. Evaluations should be conducted on a regular basis (at least once a year); they should be in writing, shown to each employee and discussed with the supervisor who conducted the evaluation. The employee must be able to submit written comments on the evaluation and there must be a grievance procedure for disagreements about conclusions contained in the evaluation. To assure that evaluations are reliably done, evaluations of supervisors must address the effective use of the performance evaluation process.

At the beginning of each evaluation period employees should meet with their supervisor(s). The meeting should be utilized to discuss performance expectations and answer questions related to the performance plan (including the evaluation) process. Together, the employee and supervisor should set performance goals for that employee for the specific evaluation period and identify areas where training or other support may be needed to achieve those goals. The performance plan process should include regular training and other resource needs assessments and the OI DB should create training surveys and other tools to use routinely.

The performance plan should specify the supervision and coaching practices that the agency will employ, and the timing of the practices. For example, attorney supervision commonly involves court-watching, case file reviews, case theory discussions, role-playing, "second-chairing" or "co-counseling," trial or appellate practice groups, training,

and many other practices.⁷⁵ The OIDB should develop a yearly “supervision calendar” that gives general guidance to supervisors and the employees they supervise regarding the frequency of the various practices, while allowing flexibility to address needs individually.⁷⁶ Supervision itself is an ongoing event. If done well, it promotes good performance and makes the evaluation process go smoothly. Adequate supervision eliminates employees being surprised by what is contained in an evaluation because they will have been discussing performance issues with their supervisor throughout the year.

OIDB should link remuneration in a fair and meaningful way, to performance. In many offices, merit systems provide for raises determined by performance ratings. The justification for such systems emphasize the value of individualized incentives for good performance and regard the competition in the workplace that the system may generate as tolerable, if not positive. On the other hand, many defender offices have chosen not to utilize systems that foster that type of competition. Raises may be linked, for example, to number of years in the office, such that every one similarly situated gets the same increase annually, *provided that* they meet or exceed a certain performance rating. These offices place a premium on fostering a team environment of collective client responsibility. They view clients, in some respects, as the agency’s responsibility, not just a single attorney’s, and encourage an atmosphere in which colleagues will readily “jump in” to assist one another, for instance when emergencies arise, without regard to who is going to get credit for the act when it comes times to determine raises.

Development of a performance plan will involve time and resources. Successful implementation of this recommendation will benefit employees by fostering professional growth and increased opportunities within the organization and it will benefit OIDB by improving employee morale. Moreover, it will benefit the clients and the community for years to come. On the other hand, until a performance plan in which staff is given some ownership of the collective health of the organization is implemented, the office will not be able to break the culture that has been holding it back for decades.

13. Create a Juvenile Division that Adequately Defends the Youth of New Orleans

Children are different and their legal services should be treated accordingly. There is still hope for change and growth, and we may be better able to prevent youth from becoming those clients who ultimately encounter the adult criminal justice system. Zealous and quality juvenile defense advocates, supported by qualified investigators, secretaries, social workers, mental health and education specialists can make a huge difference in the lives of their clients. So can experts who conduct independent evaluations and whose funding is not triaged away from juveniles to serve adults. OIDB should ensure that resources for the defense of children should not be drained off to support the adult representation units.

At the very minimum, whether the following changes should be put in place to protect the children and youth who are represented by juvenile public defenders in Orleans Parish:

- Assign an experienced juvenile delinquency advocate as the Supervising Attorney for juvenile court;

- Control the Supervising Attorney's caseload so that s/he may have time to establish a model juvenile defender office, supervise attorneys, work with IT staff to build a public defender juvenile data base, and participate as a systems' advocate in the programmatic rebuilding of the Orleans Parish juvenile court system;
 - Reintegrate the juvenile division into the main office, but ensure that the division is located in a common wing of the offices with full array of equipment and appropriate technology (computers, fax, e-mail and internet capacity) a juvenile court public defender office;
 - Hire appropriate attorney, investigative, social work and support staff to support a full time public defense practice in youth court;
 - Provide consistent and on-going specialty training for all juvenile defender attorneys and staff members;
 - Change dependency court representation: OADB currently represents parents in abuse & neglect cases. Because children in delinquency proceedings are too frequently children from abusive homes, the representation of parents results in too many conflicts of interests. Moreover, the move to community-oriented defense will allow public defenders the opportunity to more readily address the needs of their youth clients if they can address the full array of issues in the child's life (both criminal and civil). This may include representing children at educational hearings related to school suspensions or expulsions;
 - Emulate the adult performance evaluation plan and supervision measures but tailor them with specific attention on the needs of representation of children;
 - Select a permanent Chief Public Defender at the appropriate time who fully appreciates the role that a strong juvenile advocacy system can and should play for the youth who come into the juvenile justice system; and,
 - Seek grant funding from the Louisiana Juvenile State Advisory Group and others to fund training, technology, etc.
14. *OADB Should Take Necessary Initial Steps to Transform from a Part-Time Defender Office into a Full-Time Community-Oriented Defender Office.*

The history of the OADB includes significant community dissatisfaction with the manner in which the office has been providing indigent defense services. When the community as a whole loses faith in the ability of the justice system to deliver fair and correct verdicts – as the lower economic classes appear to have in New Orleans - the entire system suffers. Eyewitnesses stop cooperating, defendants fail to show up on time or at all, and people think of any excuse to avoid serving jury duty.

Other criminal justice components have addressed such losses of faith by moving in the direction of community-oriented services. The benefits of community policing have been well documented elsewhere, but similar movements have had positive impacts in the area of community-prosecution, community courts, and, to a lesser extent, community-based corrections. In more recent years, a move to create community-based defender services has also come into the fore. OIDB should begin to transform from a part-time defender office into a full-time community-Oriented Defender Office.

The Core Elements of Community Defense

- a. Client-Centered Services: As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders have a unique chance to not only address a client's specific criminal charges but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. For instance, the client may have substance abuse issues, public housing issues, immigration issues, or, in the case of children, educational needs that are not being met. By addressing the full array of client issues, public defenders can both reduce justice expenditures *and*, more importantly, potentially reduce the chances that a client will re-offend. Client-centered offices typically have lawyers, investigators, social workers, and psychologists on staff to offer this fuller range of services.⁷⁷
- b. Community-Based Office: Client-centered services work best when the defender office is woven into the fabric of the community that the public defender program represents. The most effective way to achieve this is to physically locate the public defender office in the community it serves. The community defender office is thereby seen as a safe-haven where anyone can seek legal advice or air community concerns of any nature. Some community-based offices around the country provide community education on what a juvenile or adult should do when arrested, understanding the court process, or advising persons on their rights and responsibilities even before an arrest has occurred. Because these suggestions come from a known and trusted source that is non-adversarial, public education campaigns by community-based public defender offices may result in the police encountering less hostility during arrests, courts experiencing defendants with more knowledge of the justice system, and the community at large experiencing a greater stability.⁷⁸

First Steps

Even under the best circumstances, however, such a project requires significant planning and implementation time, and will require putting several critical "building blocks" into place to increase the likelihood of a successful program. Given the prudence of moving to improve relations more quickly than is possible with a complete cultural shift toward a community-oriented office, the OIDB should start with some smaller steps that can have a more immediate impact.

OIDB should develop and implement consistent policies and practices for dealing with client and community complaints, including creating a forum in which community members feel free to both air complaints and offer suggestions for how the OIDB can be

more attuned to community needs. It is especially important to reach out to the juvenile community, via youth organizations, faith-based initiatives, and schools to begin explaining the purpose of the OIDB and build trust among at-risk groups.

Some public defender agencies have found it beneficial to develop a citizens' advisory board in which a cross section of volunteer community members offer insights and feedback to defender management on an on-going basis regarding the organization's ability to fulfill the needs of its client base. They also provide a bridge back to the community, helping the public defender build relationships that ensure on-going communication and trust-building. Such groups have been invaluable to defender offices and the criminal justice system, as well as the community at-large.

Though it may be some time before New Orleans is re-populated, making it difficult at best to forecast the appropriate place to locate a community-defender office, OIDB cannot stay in their current office space. NLADA recommends that OIDB retain new office space immediately and consider creating a satellite community-defender office once the city becomes more repopulated.

In 1997, The Spangenberg Group called the office space a "disgrace," that "creates a disincentive for work" and one that inversely impacts the feeling of the client community – i.e., making the community feel like they are receiving less-than-professional law services:

"[t]he public defender's main office....is totally unacceptable. The space itself is far too small, requiring most attorneys to share a cubicle. Moreover, because the offices are created with dividers rather than floor-to-ceiling walls, there is no privacy for client interviews or conversations. The space itself is dirty and crowded, and not at all conducive to work."⁷⁹

In the intervening ten years, OIDB never moved their main office space. And, unfortunately, it remains the same dirty, unusable space it has always been. The Spangenberg Group concluded that free rent and utilities did not justify staying in the same office space.⁸⁰ We concur. OIDB must move its main office.

16. Create a Professional Budget to Justify the Need for More Resources

Planning to relocate, instituting appropriate supervision, developing an appropriate juvenile capacity, enforcing caseload standards and moving to vertical representation will all require OIDB to establish appropriate staffing levels such that the new professional offices provide acceptable room to support client-centered, community-oriented representation. Space assignment should be made to group team members (attorneys, social workers, investigators, mitigation specialists) in common areas. Space assignment should be made in a fashion that integrates paraprofessional and support personnel in common areas with attorneys.⁸¹

Thus, before OIDB can move the present offices, a detailed budget must be constructed to support an adequate staff size. NLADA spent significant time, in concert with the interim Director Ronald Sullivan, to assist in the creation an adequate budget proposal for 2007. Based on our data analysis of backlog cases and historical intake numbers, NLADA agrees with Mr. Sullivan that OIDB needs a budget of \$7,070,300 and

a staff of 60 staff attorneys, eight supervisors/executive team attorneys, and 40 support staff. NLADA acknowledges that this budget to adequately support a staff of 108 is significantly less than the estimation of the DOJ-sponsored report (\$8.2 million; 124 staff). (See Appendix C for a Detailed Budget for the OADB at page 57).

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Chapter III

How the System Will Work

A Case Study

During our site work, NLADA heard many client stories involving non-adequate defender services due to the systemic deficiencies in place in New Orleans. We were struck by the story of one such young woman and present her story to show how the recommendations proposed in this report would have resulted in a better outcome for, not only her, but the greater New Orleans community.

Mary's Story

In April of 2004, Mary Jackson⁸² was an 18-year old high school senior with no prior brushes with the law and living with her parents in the Lower Ninth Ward of New Orleans. Unfortunately for her, she accepted a ride one fateful day from an acquaintance after she missed her bus to a scheduled doctor's appointment. As teenagers are often apt to do, Mary did not think through all the ramifications of hopping a ride – she just wanted to get to the doctor's office.

As it turns out, the car was stolen. When the police attempted to pull the car over, the driver sped off. Eventually the car crashed into a light pole and the driver fled on foot. Mary on the other hand did what we hope responsible citizens would do – she stayed in the passenger seat and waited for the police. Upon being interviewed, Mary told the officer the name of the driver. As is their right, the police did not believe Mary since the named driver also did not have a rap sheet of prior offenses. In custody, and under pressure from her family to name her boyfriend as the driver (whom the family did not like and who did have a checkered past) - Mary changed her story. Whether the change in her first-person testimony contributed to the actions the police took or not, Mary was subsequently arrested and charged with possession of a stolen auto. This, despite the fact that she consistently maintained, and never wavered from, her initial statements that she had no idea the car was stolen.

Mary was just one of a number of people processed through Magistrate's Court the day after her arrest with no regard for the particulars of her case. No defense attorney had the time to listen to her side of the story or to talk to the district attorney about a reduction in charges or outright dismissal of the case. Mary's case, in this sense, was uneventful: she received a \$5,000 bail, posted it, and was released. Mary was told that she would receive a notice to come to District Court if the case was accepted for prosecution by the district attorneys office. Mary left court with no prospect of any substantive work being conducted on her case until she was appointed a different public defender at arraignment.⁸³

Mary did receive notice in early July that charges were filed against her. The case was allotted to a section of the Criminal District Court, and Mary was sent a notice to appear for arraignment fourteen days later. Mary appeared for her arraignment as directed. The Court asked if she had an attorney. She said no. The Court informed her that since she was out on bond she would not be appointed a public defender and would have to hire her own lawyer. The case was reset for arraignment and ascertainment of counsel at the end of July. Mary signed a notice to reappear on that date and, indeed, did

so as ordered. The Court once again asked her if she had hired an attorney. She said she had not been able to do so. The Court ordered her to hire an attorney and again reset the matter for arraignment for mid-August. Mary signed notice to reappear on that date, and, once again did so as directed. The Court asked her if she had hired an attorney. Mary again responded that she had tried but could not afford one. At that point, the Court finally moved forward with her arraignment by asking the public defender in court that day to represent her.

Of course, the public defender assigned to the case did not have the time or resources to learn the specific facts of her case. A quick discussion with the defendant, and, perhaps, a cursory review of the file and the hearing initiated. The result? Mary's bond was increased to \$20,000. The minute entry from the Court's docket does not indicate that any objection was lodged on behalf of Mary by the public defender. Mary was remanded to the custody of the criminal sheriff and locked in the local jail.⁸⁴

Whatever the specific reason for the attorney's actions - or more appropriately, "non-actions"⁸⁵ - that day in District Court, it is clear that the public defender saw Mary as another case file to be processed rather than as an individual in need of a lawyer to advocate for her. For if he had seen Mary as an individual he would have seen that Mary was, by now, nine months pregnant. This fact, in and of itself, should have been raised as a mitigating factor against the increased bail (if nothing else). Alarm bells should have gone off in the public defender's head regarding the judiciousness of putting a soon-to-be-mother (with no prior criminal history) behind bars. As it turns out, Mary had been on the way to see her obstetrician when she was arrested - a fact that could account for why she chose a ride from an acquaintance rather than miss her scheduled appointment. But, with complacency the order of the day, the public defender raised no objection. Mary went to jail.

And, as if the inadequate representation she received that day was not enough, Mary's life was further impacted by the public defender in court that day. Despite a 1997 independent report pointing out that the Orleans Parish public defender needed to "establish and enforce clear, written conflict of interest policies,"⁸⁶ the office had not determined an efficient way to do so in the intervening seven years. During Mary's fateful day in court, the public defender should never have even been her attorney-of-record. As it turned out, the public defender already had the alleged driver of the car as a client. Approximately three weeks after Mary was sent to jail, the defender finally realized the conflict and asked the court to formally withdraw from the case.⁸⁷

As fate would have it, Loyola Law School Clinic was appointed to handle Mary's defense. In this one aspect, Mary was lucky. The Loyola Law Clinic, in accordance with national standards of justice, does something that should seem like the most commonsense action a lawyer could do - when assigned a case they go and meet the client to hear her side of the story. When the Loyola representative met Mary, she was in tears. While incarcerated she had gone into labor. Because she was incarcerated, neither her mother nor any family was allowed in the delivery room with her as they had planned. After she gave birth, the baby girl was taken from Mary, given to the baby's grandparent, and Mary was returned to jail.

Having learned the facts of the case and Mary's individual situation, the Loyola Law Clinic immediately sought and obtained Mary's release within a matter of hours. And, working with the prosecution, the Loyola team got the case dismissed after police

photographs of the interior of the car revealed that there was no clear visual evidence to an ordinary passenger that the 18-year old car in question was in fact stolen.

The Significance of Mary's Story

So Louisiana taxpayers footed the bill for Mary's time in jail, her medical costs, her transportation to and from jail both for court hearings and medical attention. Though Mary's medical condition added to the costs of her incarceration, her story identifies other potential high costs to taxpayers of a poorly funded, non-coordinated public defender system. Having unprepared defense attorneys can and does result in a waste of man hours for court staff as public defenders try to "catch-up" on the case by interviewing their clients in court while judges, stenographers, bailiffs and prosecutors wait around for the case to proceed.

If Mary's conflict had not been caught, an overworked public defender may have advised her to plead guilty to misdemeanor charges – or worse yet, a felony charge - in exchange for time served pre-trial to get the case over with, without counsel ever having explained the impact that a criminal record has on her employment, housing, eligibility for health or income-support benefits, or immigration status – all issues that may involve future court actions at public expense. Or, Mary may have simply been sent to jail for a number of years, potentially setting up a termination of parental rights case on the public's dime in order to determine the best setting to nurture her young daughter while she remained behind bars.

How Things Might Have Been: A Deconstruction of Mary's Story

Despite the State constitutional requirement that Mary receive qualified counsel at each stage of the proceedings, a confluence of systemic deficiencies obviously aligned against Mary to prevent her from having access to competent counsel for more than three and a half months – a period of time that is usually critical to investigating claims of innocence, tracking down witnesses, and reviewing mitigating factors for defendants' actions. At almost every step of the criminal justice process, Mary's representation failed nationally recognized standards of justice.

The timely appointment of counsel required under ABA *Principle 3* encourages early interviews, investigations and resolution of cases, and avoids discrimination between the outcomes of cases involving indigent and non-indigent defendants.⁸⁸ Early intervention is especially important for teenagers like Mary. Youth have a different conception of time. And, just as a mother would not discipline her own child a week or two after an infraction - because the disconnect in time would reduce the chances that the child would learn from the consequences of his actions - so too should justice be swift for children in the court setting if we hope to encourage them to become responsible and productive citizens as adults.

The Orleans Indigent Defense Board (OIDB)⁸⁹ are in the process of changing the historic practice of hiring a single attorney to handle all of the bond hearings in Magistrates Court to comport with the ABA *Ten Principles'* demand for vertical representation (the same attorney handling the case from start to finish). Should state policy-makers pass the recommendations of this report, a new LUJEC board would also have the authority to create a similar local standard to require the same attorney to handle all aspects of a client case. Had these changes happened prior to Mary's arrest, the

attorney she was assigned at first appearance would have spoken with Mary prior to the court appearance and established her version of the facts of the case and her current medical condition. The attorney would have ownership of the outcome of her case and, perhaps, initiated discussions with the district attorney to get the case dismissed at this first appearance.

At the time of her first appearance in District Court, Mary had no idea that the Court's denial of counsel based on bond status was in direct violation of the American Bar Association Defense Services Standard 5-7.1 prohibiting such practices. The court should have recognized the fact that simply because Mary's friends and relatives were able to cobble together resources to get her out of jail, it did not mean that the 18-year old girl had anywhere near the resources necessary to hire a private attorney without a substantial hardship.⁹⁰

In any event, the passage of SB 323 in the 2005 regular session clarified the requirements under which defendants like Mary are screened for eligibility. As a young adult with no income she clearly would have passed the initial threshold of having an income below 200% of the Federal Poverty Guideline. And, her pending motherhood would have qualified as a precipitating event that would have caused her a "substantial hardship" by hiring a private attorney even if she did pass the initial poverty threshold. So, Mary's arraignment would have proceeded two months earlier than it did.

More importantly, Mary's attorney from the bail hearing would have been investigating her claims during the interim from initial appearance to arraignment. Mary and her attorney would have met in OADB's new offices to allow for a confidential communication between attorney and client in accordance with ABA *Principle 4*. This principle requires defense counsel to be provided sufficient time and a confidential space with which to meet clients to engender trust from the client,⁹¹ solicit pertinent information on the facts of the case,⁹² identify mitigating factors for the potential criminal act, explain the client's legal rights,⁹³ educate the client on the court process, advise the client on professional opinions regarding legal options, and finalize a resolution approach based on the client's decision on how to proceed.⁹⁴

In all likelihood, Mary would not have received an increase in bail. Though NLADA was not able to confirm the specific reason for Mary's increase in bail, several interviewees suggested that the attorney in question recognized that the judge was upset that Mary had not hired private counsel and increased her bail as punishment. If true, the new independence of the indigent defense system would not have placed the self-interests of the attorney against the self-interests of the client. Not fearing reprisal of judges on his ability to make a living as a public defender, the new lawyer could zealously advocate on Mary's behalf. The new attorney would also be full-time, allowing him the time to properly research her case rather than running off to handle private cases to supplement his low salary. His training, supervision, qualification would have ensured that Mary's case was properly handled. And, if there was a conflict, the conflict attorney would have been similarly qualified, trained and supervised.

Moreover, if the system still failed Mary, her family would have a publicly-known grievance procedure in which to raise issue with her representation, again triggering action to get her out of jail well in advance of her delivery date. And, a regional compliance officer and staff would be monitoring attorney performance such

that the short-comings of Mary's defense attorney would have been addressed well in advance of her appearance in court.

Had Mary received these services, it would have been one less story of how the "system" mistreats people of insufficient means in New Orleans. Clearly, a lot more repairs of community relations are needed to change the culture of mistrust, but it would be a start. And, the citizens of New Orleans and Louisiana would have saved money with this simple up-front investment in adequate public defender services.

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Chapter IV

Conclusion

“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”

- U. S. Supreme Court Justice Hugo Black

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)

As world events unfold daily in far off places like Afghanistan, Iraq, Sudan and Chechnya, the words of U.S. Supreme Court Justice Hugo Black speak to the core values that distinguish the United States from those countries under the repression of dictatorships, theocracies and despots. We are different. Unlike tyrannies, the Constitution of the United States of America promises those accused of crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common – whether we are conservative or liberal, white or black, rich or poor.

Celebrated in the closing refrain of our Pledge of Allegiance, this guiding notion of “justice for all” is the cornerstone of the American social contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law - assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

As our American troops are engaged overseas fighting for democratic principles we must ask ourselves what message we are sending the world when we do not meet our own constitutionally-enshrined values here at home? Constitutional rights extend to all Americans, not merely those of sufficient means. Though state and local government must balance other important demands on their resources, the Constitution does not allow for justice to be rationed to the poor due to insufficient funds.

The “Basic Fairness” Doctrine Underlying the Constitutional Right to Counsel

“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.”

-- Alabama v. Powell, 287 U.S. 45, 68-69 (1932)

APPENDIX A

Site Team Qualifications

Robert Boruchowitz has been the executive director of The Defender Association, a private, non-profit public defender agency providing representation to indigent defendants in King County (Seattle), WA since 1978. In that capacity, Mr. Boruchowitz administers an office of approximately 130 staff, including 90 lawyers and a budget of approximately \$10 million. He co-counseled the first King County "sexual predator" commitment jury trial (1991), and appeal in the state supreme court (1991-1993), and its remand to superior court (1993-1994). He also argued the case before the U.S. Supreme Court [*Selig v. Young*, 531 U.S. 250 (2001)]. Mr. Boruchowitz served for 20 years as the first President of the Washington Defender Association, in which he oversaw a statewide membership organization representing more than 700 lawyers and staff representing indigent people accused of crimes. He co-authored NLADA's Model Indigent Defense Contract. In 2003, he was awarded a Soros Fellowship to work to reduce the frequency of denials of counsel in misdemeanor and juvenile cases in Washington. He is certified under Washington Special Proceedings Rules as qualified to be appointed as counsel in capital appeals and post-conviction proceedings. He is a frequent speaker at CLE seminars and law schools on a wide range of issues including ethics and defending capital punishment cases.

David Carroll is the director of research & evaluations for the NLADA defender legal services division. He has directed numerous standards-based assessments of indigent defense systems on behalf of NLADA, including: Venango County (Franklin), Pennsylvania; Clark County (Las Vegas), Nevada; Avoyelles Parish (Marksville), Louisiana; Santa Clara County (San Jose), California; and the State of Montana. He also co-authored a report for the U.S. Department of Justice, National Institute of Justice on the impact of standards on indigent defense services nationwide, and provided on-site technical assistance in Maryland, North Carolina, Rhode Island, and Texas. Mr. Carroll is an advisor to the Louisiana Task Force on Indigent Defense.

Emily Chiang is an Associate Counsel at the Brennan Center for Justice at New York University School of Law. Ms. Chiang works on the Brennan Center's immigrant rights and indigent defense reform initiatives in the Center's Access to Justice Project. Prior to joining the Brennan Center, she was an associate at Cravath, Swaine & Moore LLP, where she worked on complex civil litigations involving breach of contract and securities fraud claims, indigent defense reform, and a variety of pro bono matters. She graduated cum laude from Harvard Law School, where she was a Primary Editor on the Harvard Law Review, and earned her B.A. magna cum laude in political science from Yale University.

Robin Dahlberg is a senior staff attorney in the Racial Justice Program of the American Civil Liberties Union. She has represented abused and neglected children in class action lawsuits throughout the country to reform government child welfare agencies. She has successfully litigated actions to improve the delivery of indigent defense services in Connecticut, Pennsylvania, and Montana. Working closely with New Jersey's

Department of Human Services, she developed and implemented various reform strategies that resulted in a doubling of the number of Medicaid-enrolled children screened for childhood lead poisoning. Robin is principal author of an ACLU report on the over representation of youth of color in Massachusetts' juvenile justice system. With other members of the Racial Justice Program, she has petitioned the Ohio Supreme Court to enact rules and procedures making it more difficult for juveniles to waive counsel in delinquency proceedings. Also with other members of the Racial Justice Program, she recently filed suit challenging the racially discriminatory imposition of discipline in a public school district in rural South Dakota. Robin received a BA in Sociology from Stanford University and a JD from New York University School of Law.

Fern Laethem is the Executive Director of the Sacramento County Conflict Defenders in California. She graduated from University of the Pacific, McGeorge School of Law in 1976. She began her legal career as a Deputy District Attorney in Sacramento, California and was later appointed as an Assistant U.S. Attorney for the Eastern District of California. In 1981 she opened a solo criminal defense practice, which she maintained until 1989 when California Governor George Deukmejian appointed her as the State Public Defender of California. Governor Pete Wilson reappointed her for two more terms. Fern retired as State Public Defender in 1999 and accepted a position with Sacramento County as the Executive Director of Sacramento County Conflict Criminal Defenders. Fern has served as a member of the California Committee of Bar Examiners, the Judicial Council Appellate Standing Advisory Committee, the California Council on Criminal Justice, and currently serves as a Commissioner on the California Advisory Commission on Special Education as an appointee of the California Senate.

Norman Lefstein is Professor of Law and Dean Emeritus at the Indiana University School of Law – Indianapolis, where he teaches criminal law, criminal procedure, and professional responsibility. Prior to serving as dean of the law school from 1988-2002, he was a faculty member at the University of North Carolina School of Law in Chapel Hill and held visiting or adjunct appointments at the law schools of Duke, Northwestern, and Georgetown. He also has served as director of the Public Defender Service for the District of Columbia. Since 1990 he has chaired the Indiana Public Defender Commission, and he also heads the Indigent Defense Advisory Group of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. On behalf of the ABA, this body seeks to improve defense services for the poor nationwide. For more than three decades, indigent defense has been a principal area of his legal scholarship and public speaking. Recently, he was awarded the National Association of Criminal Defense Lawyers 2005 Champion of Indigent Defense Award.

Jon Mosher is research associate for the research & evaluations division of the National Legal Aid & Defender Association. He assists in the direction of the division's standards-based assessments of indigent defense systems, and recently oversaw original research regarding possible violations of *Alabama v. Shelton* in municipal courts across the nation on behalf of the National Committee on the Right to Counsel. Jon joined NLADA in 2003 as resource coordinator with Defender Legal Services, serving as primary staff

liaison to the American Council of Chief Defenders. He is a graduate of George Washington University.

James Neuhard has served as director of the Michigan State Appellate Defender Office since 1972, and is the chair of the Michigan Legal Services State Planning Body. He has participated in drafting most of the national and state standards in the indigent defense area and is the principle author of the ABA's "Ten Principles of a Public Defense System". He a past member of ABA Standing Committee on Legal Aid & Indigent Defendants and current member of the Indigent Defense Advisory Group. Jim is a past president of the National Legal Aid & Defender Association and current Treasurer of the NLADA Insurance Corporation. Jim is a member of the US Department of Justice's Advisory Committee for Indigent Defense and an advisor to the US Department of Justice's Compendium of National and State Criminal Defense Standards. He is a graduate of the University of Notre Dame and the University of Michigan Law School.

Leonard E. Noisette is the Executive Director of The Neighborhood Defender Services of Harlem (NDS), a community-based public defender office created in 1990 to improve criminal defense services to poor residents in Harlem and to serve as a model for other defenders throughout our nation. Before joining NDS, he was a supervising attorney with New York City Legal Aid Society's Criminal Appeals Bureau, and a staff attorney with Legal Aid's Criminal Defense Division and its Criminal Appeals Bureau. Mr. Noisette was invited by Attorney General Janet Reno to be a keynote speaker at the Justice Department's National Symposium on Indigent Defense in Washington DC in February 1999, and participated in the Department's work to improve indigent defense and defense/prosecution relations. From 1999-2001, he was a member of the Executive Session on Public Defense (ESPD), sponsored by the Federal Bureau of Justice Assistance and Harvard University's Kennedy School of Government. Mr. Noisette is an active member of a number of bar associations, sits on the board the New York State Defenders Association and is currently Chair of the Board of the National Legal Aid & Defender Association. He is a graduate of New York University Law School.

Robert L. Spangenberg has been conducting research and providing technical assistance on civil and criminal justice system-related topics for over 25 years. Mr. Spangenberg began his legal career as a trial attorney, handling civil and criminal cases in state and federal courts. Subsequently, he directed a neighborhood legal services program, the Boston Legal Assistance Project, for eight and a half years before joining Abt Associates as Deputy Director of its Law and Justice Division in Cambridge, Massachusetts. Widely regarded as a national expert on justice delivery systems to the poor, Mr. Spangenberg left Abt Associates to form TSG in 1985. Since that time, Mr. Spangenberg has been involved in numerous national, state and local indigent defense systems studies, as well as overseeing the only two national studies of indigent defense services on behalf of the U.S. Department of Justice.

Phyllis Subin completed two gubernatorial appointment terms as the Chief Public Defender for the State of New Mexico in 2003. In that capacity, she was the leader of New Mexico's largest statewide law firm, the New Mexico Public Defender Department,

which had a budget of over \$30 million and which employed 320 staff members (160 attorneys) with over 100 contract attorneys. At the time of her first appointment, Ms. Subin was an Assistant Professor at the University of New Mexico School of Law and the director of the Criminal Defense Clinic. Following years as a trial and appellate public defender, Ms. Subin was the first Director of Training and Recruitment at the Defender Association of Philadelphia (PA), where she developed and taught a nationally recognized training program for lawyers and law interns. A nationally recognized expert in juvenile justice, she was instrumental in the drafting of the ACCD's and National Juvenile Defender Center's *Ten Core Juvenile Principles*. Ms. Subin serves as qualified technical assistance consultant and trainer for the Office of Juvenile Justice and Delinquency Prevention, and is a trainer at the National Juvenile Defender Summit. She was a gubernatorial appointee to the New Mexico Juvenile Crime Enforcement Coalition, and chairs the New Mexico Juvenile Justice Advisory Committee's Subcommittee on Girls in the Juvenile Justice System. Ms. Subin has consulted privately for a number of indigent defense programs, including the Kentucky Department of Advocacy and has served as chair of NLADA's Defender Trainer's Section.

Ronald S. Sullivan Jr. joined the faculty of Yale Law School in July 2004, where, after his first year of teaching, he won the Law School's award for outstanding teaching. His areas of interest include criminal law, criminal procedure, legal ethics, and race theory. Professor Sullivan is the founding director of the Samuel and Anna Jacobs Criminal Justice Clinic. He is a founding fellow of the Jamestown Project at Yale. Professor Sullivan spent a year in Nairobi, Kenya, where he helped draft Kenya's new constitution and also worked with the Kenya Human Rights Commission. In the United States, he has worked as staff attorney, General Counsel, and Director for the Public Defender Service for the District of Columbia. Professor Sullivan testified at the recent Samuel A. Alito confirmation hearings for Associate Justice of the U.S. Supreme Court. He is a Phi Beta Kappa graduate of Morehouse College, and Harvard Law School.

Jo-Ann Wallace is the President and CEO of the National Legal Aid & Defender Association. She was previously NLADA's Senior Vice President for Programs responsible for oversight of both the Civil Legal Aid and Indigent Defense Program agendas. From 1994 – 2000, Ms. Wallace served as Director of the Public Defender Service for the District of Columbia (PDS), widely regarded as the nation's model defender agency. During Ms. Wallace's tenure, the PDS budget and staff more than doubled as the agency aggressively implemented progressive criminal justice reforms. Before her appointment to Director, Ms. Wallace served the agency in a number of capacities: Deputy Chief of the Appellate Division; Coordinator of the Juvenile Services Program; and as a staff attorney representing both juvenile and adults in trial and appellate litigation. Ms. Wallace served on the NLADA Board of Directors from 1995–99, including serving as Chairperson in 1999. She also chaired the NLADA Defender Council, 1989–90, and the National Blue Ribbon Advisory Panel on Defender Services, a joint project with the United States Department of Justice (USDJ), 1995-96. Ms. Wallace was a founding Co-Chair of the Chief Defender Roundtable, now named the American Council of Chief Defenders (ACCD), a leadership council of top defender executives from across the United States. Ms. Wallace has served as a member of the American Bar

Association Criminal Justice Standards Committee. She has significant experience as an expert on criminal justice and indigent defense issues, including serving as a consultant to the United States Department of Justice, local government entities and indigent defense programs. She is a founder of the National Defender Leadership Institute, and is currently working to establish an Equal Justice Leadership Institute for civil legal aid and public defense advocates. Ms. Wallace is a graduate of New York University School of Law.

E. Vincent Warren is a senior staff attorney with the Racial Justice Program of the American Civil Liberties Union's National Legal Department where he conducts national constitutional and impact litigation in the area of civil rights and civil liberties, concentrating on issues of criminal justice, race and poverty. He coordinates the ACLU's Hurricane Katrina response team and is developing a national reform project designed to ensure that children do not waive their right to counsel in delinquency proceedings without first having consulted an attorney. From 1998-1999, Vincent served as judicial law clerk to the Hon. Ronald L. Ellis in the Southern District of New York. In 1997, he traveled to South Africa, where he monitored human rights violation hearings held by the Truth and Reconciliation Commission. From 1993 to 1998, Vincent worked as a staff attorney with the Criminal Defense Division of the Legal Aid Society in Brooklyn, New York. He has traveled to South Africa to monitor human rights violation hearings held by the Truth and Reconciliation Commission and has worked as a staff attorney with the Criminal Defense Division of the Legal Aid Society in Brooklyn, New York. Vincent is currently a Vice-President of the Center for Constitutional Rights and is a member of the board of directors of New York State Defender Association. He received his B.A. from Haverford College in 1986, and his J.D. from Rutgers School of Law-Newark in 1993, where he was named the first Arthur Kinoy Fellow.

Charles Wynder, Jr. is the vice-president of programs, leadership & support at the National Legal Aid & Defender Association. He previously served as director of the Equal Justice Leadership Initiative at NLADA. Before joining NLADA, Chuck served as the executive director of Legal Services of Eastern Virginia; as a deputy commonwealth's attorney in the Hampton Commonwealth Attorney's Office and an attorney in the Army Judge Advocate General's Corps. He is a graduate of the University of Michigan Law School.

APPENDIX B

Comprehensive Review of Documented Indigent Defense Issues

I. Independent Research

- A. The Institute for Judicial Administration. *A Study of the Louisiana Court System*. 1972: “A flexible state-funded public defender system should be instituted, which would include a number of full-time regional public defenders who could be moved to assist any court.” Page 114.
- B. The American Judicature Society. *American Judicature Society, Modernizing Louisiana’s Courts of Limited Jurisdiction*. 1973: “Louisiana should establish a statewide system of public defender offices...to assure that indigent defendants are afforded their constitutional right to counsel.” Page 138.
- C. American University Criminal Courts Technical Assistance Project. *An Evaluation of Indigent Criminal Defense Services in Louisiana and a Proposal for a Statewide Public Defender System*. 1974: “Even if the Indigent Defender Boards were substantially funded, they could not meet the demands (for the right to counsel) on a statewide basis.”
- D. The State of Louisiana Supreme Court Judicial Counsel’s Statewide IDB Commission. *Study of the Indigent Defender System in Louisiana*. Prepared by The Spangenberg Group. 1992: “The indigent defense funding in Louisiana is hopelessly under funded in virtually every judicial district in the state.” Page 38.
- E. The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. Prepared for The Orleans Indigent Defender Program. 1974: “When the OIDP prepares working budgets to provide some framework for determining which expenditures are feasible, without an annual appropriation on which OIDP administrators can rely, the process is seriously flawed.” Page 9.
- F. The American Bar Association, Juvenile Justice Center. *The Children Left Behind: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings in Louisiana*. 2001: “Recommendation 1: Increase the resources available to support representation in delinquency proceedings.” Page 93.
- G. The American Bar Association, Juvenile Justice Center. *The Children Left Behind: A Review of the Status of Defense for Louisiana’s Children & Youth in Delinquency Proceedings – Summary Update*. 2002: “The lack of adequate funding is a pervasive and dire reality of the entire indigent defense system in Louisiana.” Page 16.

- H. Kurth, Michael M., Ph.D. and Daryl V. Burckel, DBA & CPA. *Defending the Indigent in Southwest Louisiana*. 2003. This report by Louisiana residents concludes that in Calcasieu Parish: a) there is little investigative and/or legal work performed on cases prior to trial on indigent defense cases; b) public defenders routinely do not use experts; and, c) public defenders regularly do not safeguard clients' legal rights. The reason for this lack of advocacy by public defenders, they concluded, can be traced to two main reasons: a lack of resources to carry out its mission and a judicial process that tolerates delays.
- I. The National Legal Aid & Defender Association. In *Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon*. Prepared on behalf of the National Association of Criminal Defense Lawyers. 2004: "Funding indigent defense through such court costs has proven to be unreliable because there is no correlation between the ability of a jurisdiction to raise revenues and the resources required to provide adequate defense services to those unable to hire an attorney. Additionally, the policies and practices of other policy-makers can have a deleterious effect on the primary revenue stream for public defense services." Page 3.
- J. Palumbo, Dr. Bernadette Jones (Louisiana State University, Shreveport Professor of Criminal Justice) and Dr. Jeff Sadow (LSU, Shreveport Professor of Political Science). *The Provision of the Right to Counsel in Caddo Parish*. 2005. This report concludes that inadequate indigent defense funding and staffing increases the likelihood that poor people receive poor outcomes in criminal courts. And, "[p]eople of color are disproportionately affected by the failure of the system to adequately protect their state and federal constitutional right to counsel." Page 2.
- K. Moak, Stacy (Professor of Criminal Justice at Louisiana University-Monroe). *Indigent Defense in Northeast Louisiana: A Study of the Public Defense Systems of the Third, Fourth, Fifth and Sixth Judicial Districts*. 2004: This report concludes that public defender "accountability" in the 3rd, 5th and 6th judicial districts in Northeast Louisiana is "non-existent," and that all three districts lack the resources to hire and retain appropriate staff.
- L. Southern Center for Human Rights. *A Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. 2006: "Our review indicates that the indigent defense system operating in Orleans currently violates both constitutional and ethical mandates, and that an adversarial system of justice is seriously close to non-existent....[t]he problems cannot be resolved by merely adding funds to the broken system that existed prior to Katrina." Page 16.
- M. Northwestern University School of Law, Students of the Domestic Disaster Practicum. *Access Denied: Pre-Katrina Practices in Post-Katrina Magistrate and Municipal Courts*. 2006: "Defendants frequently appear in court without the assistance of an attorney....While a Public Defender may be present in court

during the proceeding, he rarely participates in the proceeding, rendering his presence meaningless.” Page 1.

- N. Chiarkas, Nicholas L., D. Alan Henry, and Randolph N. Stone. *An Assessment of the Immediate and Longer-term Needs of the New Orleans Public Defender System*. Produced by the Bureau of Justice Assistance National Training and Technical Assistance Initiative at American University. (Grant # 2005-DD-BX-K053) 2006. “Everyone agreed that the office is under-funded now and that it had been before Katrina.... The system of indigent defense is court-based, rather than client-based.” Page. 8.

II. Court Actions

- A. *State v. Peart*, 621 So.2d 791 (La. 1993). The inadequacy of the available local funding streams to generate enough revenue to ensure competent representation resulted in public defender Rick Tessier of the New Orleans Indigent Defender Program filing a motion in District Court stating that he was unable to provide effective representation to his indigent defense clients due to the combination of a lack of resources and overwhelming caseloads. The hearings on the case showed Mr. Tessier carried caseloads far in excess of national standards, and had little or no funds for experts or investigator resources, among other things. Based on the overwhelming factual evidence, the district judge found the New Orleans indigent defense system to be unconstitutional. The Louisiana Supreme Court found that there was a “general pattern...of chronic under funding of indigent defense programs in most areas of the state,” and called upon the legislature to enact indigent defense reform or the Court “may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.”
- B. *State v. Wigley*, 624 So. 2d 425 (La. 1993), the Louisiana Supreme Court held that, in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs. Before appointing counsel to represent an indigent, the district court has the responsibility to determine that funds sufficient to cover the anticipated expenses and overhead are likely to be available to reimburse counsel. If the district court determines funds are not available to reimburse appointed counsel, it should not appoint members of the private bar to represent indigents.
- C. *State of Louisiana v. Adrian Citizen* 04-1841 (La. 04/01/2005). The Louisiana Supreme Court rendered a decision allowing prosecutions in death penalty cases to be halted upon motion of defense counsel until adequate funding is obtained for indigent defense.

III. Official Public Pronouncements

- A. The House of Delegate's of the Louisiana State Bar Association's passed a resolution calling for the appointment of a Blue Ribbon commission to develop and implement a strategic plan for indigent defense reform on June 12, 2003. The resolution proclaimed, "State government has created a system in which the loss of one's liberty may be more dependent on a person's income level and the jurisdiction in which the crime is alleged to have happened than on the factual merits of the case."
- B. House Resolution 151 of the 2003 regular session called on the State of Louisiana to rededicate itself to the promise of equal justice for all, regardless of income by appointing a Task Force on Indigent Defense Services. The resolution noted: "Louisiana's current system lacks the ability to collect and verify statistical data on indigent defense caseloads and costs and to monitor performance to ensure the efficient and effective use of taxpayer resources."
- C. A concurrent Senate Resolution during the 2003 regular sessions (SR112) mirrored much of the House resolution stating "there exists no correlation between a court's ability to assess and collect court costs and the resource levels needed to ensure adequate, constitutionally guaranteed right to counsel, producing a non-uniform system" and that a "district's funding is wholly unrelated to need, is unpredictable, and leaves local boards without the ability to effectively budget from year to year."
- D. Calogero, Pascal F., Jr., Chief Justice Supreme Court of Louisiana. *2005 State of the Judiciary Address to the Joint Session of the House and Senate Louisiana Legislature*. Tuesday, May 3, 2005 PM. House Chambers. The Chief Justice's speech defined the indigent defense system as "terribly flawed."
- E. The Louisiana District Attorneys Association (LDAA) acknowledged in both the House Criminal Justice hearings on SB 323 that the need for indigent defense reform was "indisputable." This sentiment was expressed on the LDAA website (www.ldaa.org) from the close of the 2005 legislative session and the end of August 2005: "The need to begin reform is indisputable. All agree that providing adequate pay and benefits for local indigent defenders is essential for the system to function. We hope that the continuing effort to reform and improve the indigent defense system are conducted with a balanced approach and input from all stakeholders."
- F. A concurrent resolution of the Louisiana House and Senate in the 2006 extraordinary session recognizing that "the state's indigent defender system is in urgent need of funding" and that the dislocation of defendants was producing "an undue hardship" on those charged with providing the right to counsel. The Louisiana Legislature resolved to ask the United States Congress "to take such actions as are necessary to provide funding for indigent defendants." The

concurrent resolution memorialized the fact that fiscal year estimate for indigent defense funding is “\$55 million” annually. The resolution passed both legislative chambers on a unanimous, bi-partisan vote.

IV. Newspaper Editorials

- A. *The Times-Picayune* (New Orleans). “Indigent Defenseless.” (3/15/2004). “A good public defense system isn't just good for defendants; it's in everyone's interest. When the wrong person is convicted for a crime, the real perpetrator goes free.”
- B. *The Shreveport Times*. “Justice For All is a Long Way Off.” (4/22/2004). “If the public defender’s office is overworked, understaffed and underfunded, then constitutional rights are being violated.”
- C. *The Advocate* (Baton Rouge). “Best for Everyone to Do the Trial Right.” (5/10/2004). “Justice is not cheap. The defense of a criminal case -- particularly a death-penalty case -- is a cost that typically must be borne by taxpayers. Perhaps it is some consolation to know that getting it right the first time saves money. Investment at the front end can prevent expensive future litigation.
- D. *The American Press* (Lake Charles). “Indigent Defense Woefully Under funded.” (6/24/2004). “It’s not easy to lure attorneys into the work of public defense when you offering them loads of work, lots of stress, little reward and low pay.”
- E. *The Shreveport Times*. “Public Defenders Need Income.” (8/5/2004). “Louisiana may find itself in a situation such as Georgia where that ineffective and downright negligent system operated in a "meet 'em, greet 'em and plead 'em' manner, a reference to the attorneys who often didn't see their clients until court appearance. Rather than mounting defense, the attorneys would often negotiate a plea agreement. Faced with lawsuits -- one looms in Louisiana primarily focused on the overwhelmed Calcasieu district court -- Georgia reworked its funding system. It still relies on court costs, but it also added \$10 to \$15 to each civil suit fee that will help the state raise \$100 million for indigent defense. And unlike traffic tickets, the numbers of civil suits tend to hold steady year to year.”
- F. *The Shreveport Times*. “Indigent Defense Reform Overdue.” (9/16/2004). “Adequate representation by competent legal counsel is a basic right of all American citizens. It’s not a right that people should have to sign away when they cross into the state of Louisiana.”
- G. *The Shreveport Times*. “Calcasieu Lawsuit Should Rush Reform.” (9/28/2004). “The same sort of court oversight that forced changes in the state’s juvenile corrections and in numerous school districts could be headed for the state’s underfunded indigent’s defender system. The constricting pressure of a court order is not the best way to fix a problem that has been too long neglected.”

- H. *The Times-Picayune* (New Orleans). "To Be Poor An Accused." (10/11/2004). "While poor people who are accused of crimes might not make it onto a list of the state's most popular causes, justice demands that they be provided with lawyers who will work tirelessly on their behalf."
- I. *The Advocate* (Baton Rouge). "Public Defender Flaws Hurt Accused, Victims." (10/21/2004). "Thanks to cop TV shows, legal representation upon arrest is the one constitutional right that most Americans know by heart: If you cannot afford an attorney, one will be provided for you. ... critics locally and nationally, say the state has failed its duty."
- J. *The American Press* (Lake Charles). "Speedy Trial Guarantee a Farce in Calcasieu." (10/31/2004). "Those who believe the need for a public defender could never penetrate their middleclass household should remember that virtually every person reading this editorial would need a public defender if accused of a crime. Exempt are those who have connections and those with tens of thousands in the bank that can be withdrawn for suitable representation...We should be ashamed that our problem has reached such extremes that we need outside firms and attorneys to fix it. We should be ashamed that we have ignored the constitutional rights of our citizens for this long."
- K. *The Times-Picayune* (New Orleans). "Representing the Poor." (11/30/2004). "Providing lawyers for the defense of the poor makes the adversarial system fair."
- L. *The Shreveport Times*. "Prosecutor Protests Too Much." (12/8/2004). "[District Attorney Doug Moreau's] suggestion that taxpayers should not bear the burden of ensuring adequate legal representation for poor people accused of crime is unethical."
- M. *The Times-Picayune* (New Orleans). "Demanding Defenders" (4/5/2005). "Some lawmakers seem to think a sufficient indigent defense system would mean Louisiana is "soft on crime." But that's hardly true. When innocent people go to jail, they lose years of their lives. Meanwhile, actual criminals go free."
- N. *The Town Talk* (Alexandria). "Time for State to Rethink its Defense of the Poor." (4/6/2005). "But the state Supreme Court's ruling, the impending state commission report and the potential for further lawsuits by the National [Association of Criminal Defense Lawyers] should prompt legislators to resolve this critical issue. It's a matter of justice."
- O. *The Daily Comet* (Thibadoux). "Defense is Vital to Criminal Justice System." (4/7/2005). "We are glad the Supreme Court stepped in and insisted that defendants in Louisiana receive the funding necessary for them to do their jobs. Now we'll all be better off if the Legislature steps up and does its part – the part that should have been done long ago. A good nest egg to start the statewide

funding might be the millions of dollars that currently go into the urban and rural legislators' slush funds, doled out by the governor. Certainly, indigent defense is a much more worthwhile expense."

- P. *The Washington Post* (Washington, DC). "Louisiana's Wise Words." (4/12/2005). "Louisiana's system for funding indigent defense is perhaps the country's most bizarre. The bulk of money in each parish, or county, comes from court fees, in most cases local traffic enforcement. So some jurisdictions simply run out of money to pay attorneys. In the case before the state's supreme court, one parish wished to try two accused murderers but couldn't drum up money to pay a lawyer to represent them."
- Q. *The Daily Advertiser* (Lafayette). "Plan for Reform of Indigent Defender Program Offered." (4/22/2005). "National experts have told the task force that the state would have to pay about \$55 million per year to fund a reasonable indigent defense system. In these troubled economic times, reform will not happen quickly, but if Louisiana is going to uphold the right of all citizens to a fair trial, it must happen. In connection with the Supreme Court ruling on adequate representation, Justice Jeffrey P. Victory of Shreveport wrote that the duty of funding a working indigent defense system falls "squarely on the shoulders of the Legislature. ... The Legislature may be in breach of that duty."
- R. *The Shreveport Times*. "La. Gives Indigent Defense Low Priority." (4/27/2005). "So for now, there's enough money to buy the insurance commissioner a new truck; to pay for unplayed rounds of golf; to build reservoirs across the state; to fund a professional football team; to build a convention center hotel; to flirt with additional sugar mill construction; and to suggest the promise of pay raises for state officials, but there isn't enough money to guarantee the constitutional rights of Louisiana citizens. There ought to be a law against this kind of prolonged legislative neglect."
- S. *The Shreveport Times*. "Lesson Judges' Role in Indigent Defense System." (5/5/2004). "Practically speaking, judges work hard to keep the justice system from gridlock. It is in the best interests of plaintiffs, defendants, crime victims and the public at large to keep the wheels moving. But that concern could push judges to expedience that ensures speedier courts but not necessarily adequate justice."
- T. *The Shreveport Times*. "Don't Allow Justice to Derail." (5/8/2005). "Throwing up roadblocks serves no purpose but to delay fixes to the system. And that serves neither defendant, victim nor taxpayer."
- U. *The Advocate* (Baton Rouge). "Indigent Defense Reform is Costly." (5/9/2005). "The state now budgets \$9.7 million for indigent defense. But Louisiana, alone in the nation, depends on local governments to pay most of the cost for indigent defense. Funding - and quality - differ sharply from place to place."

- V. *The News Star* (Monroe). Indigent Defenders Overloaded, Under funded: If You Cannot Afford an Attorney, One Will be Provided to You -- By a System that Can't Afford It. (6/5/2005). "According to local IDB attorneys, they have it better than most other public defenders in the state, but with the marked increase in the number of new cases this year, the situation points to a larger crisis for the statewide indigent defense system in which there simply is not enough money to pay enough public defenders."
- W. *The Shreveport Times*. "Scare Tactics Out of Order: Prosecutors Off Base in Opposing Indigent Defense Reform Bill." (6/6/2005). "Jackson's bill is not the bogeyman some would have us believe, but a step in providing a most crucial constitutional guarantee, the right of anyone -- no matter how low on the social and economic ladder -- to adequate legal representation."
- X. *The News Star* (Monroe). Public Defenders Key to Fair Court. (6/13/2005). "When indigent defendants are left without adequate defense, courts are forced to slow down the process of administering justice."
- Y. *The Shreveport Times*. "Justice Delayed in Court System" (6/15/2005). "Memo to the DAs: It may be inconvenient to have potentially more independent and better funded opposition in the courtroom, but it's the law and currently Louisiana is in violation of it. In Louisiana, the reality is that 90 percent of a district attorney's courtroom opposition is indigent. Furthermore, public defenders are out-funded by a ratio of 3 to 1. And that doesn't take into account the assistance DAs rightly receive from law enforcement in the process of building a case."
- Z. *The Shreveport Times*. "Justice Means Legal Counsel -- for Everybody" (6/29/2005). "That Louisiana would take a position advocating limitations on indigent defense is no surprise. But it hasn't helped the state's dismal reputation for failing to provide adequate legal counsel to indigent defendants. It may sound complicated, but the principle of justice for all is simple. The legal director of the American Civil Liberties Union observed, "In a nation that believes in equal justice under the law, people should be punished because they deserve it, not because they are too poor to afford a lawyer." Who could disagree with that? Louisiana did." [In reference to the State's Amicus brief in *Halpert* on the side of the State of Michigan].
- AA. *The Town Talk* (Alexandria). "Time for La. to Ensure that Poor Get Legal Help" (8/28/05). "With liberty and justice for all." That's a pledge Americans make because we are a country that is governed by the people and for the people. Each of us is charged with the responsibility of making sure our government lives up to that pledge. But in Louisiana, we aren't doing so well with that pledge when it comes to indigent defense."

- BB. *The New Orleans City Business*. “Misplaced Prisoners Deserve Legal Help, Speedy Trial.” (1/15/06). “After the hurricane, it's easy to blow off the plight of prisoners. After all, they did break the law in most cases. But every American has the right to a speedy and fair trial and to legal representation. Prisoner rights should not be abandoned simply because they are a low priority in the recovery. These rights are the essence of American freedom. They must be preserved, even in the wake of Katrina.”
- CC. *The Times-Picayune* (New Orleans). “Crisis in the court” (2/14/06). “Before the storm, the shortcomings of the public defender program fell hardest on poor defendants who had trouble getting good representation in court. But now the program's travails threaten the entire criminal justice system.”
- DD. *The Daily Town Talk* (Alexandria). “Our View” (2/27/06). “Currently, because public defenders are overburdened by the case load, little fair or swift justice is being meted out. There are numerous examples of reversals, retrials, years of continuations and wrongful convictions plaguing our courts. This is wrong -- period. It's time for Louisiana to provide funding to ensure justice is served, regardless of an individual's ability to pay for legal counsel.”
- EE. *The Shreveport Times*. “LA.'s Indigent Defense Program Needs Reform.” (3/1/06). “Now a court in New Orleans is contemplating the release of nearly 4,000 prisoners whose defense the public defender office isn't equipped to handle. The immediate cause of this inability to handle cases is Hurricane Katrina. But the underlying cause is the dysfunctional nature of the indigent defense system itself. ... A healthy indigent defense system should have been able to weather the Katrina-induced chaos.”
- FF. *The Times-Picayune* (New Orleans). “Jail without representation” (3/20/06). “The justice system needs to be swift, fair and efficient. When innocent people are convicted and guilty people go free, victims are denied justice. Public safety suffers. Building a functional criminal justice system is crucial to New Orleans' future. And improving indigent defense needs to be part of the agenda.”
- GG. *The Shreveport Times*. “Gideon plus 43: Indigent defense still awaits a fix” (3/21/06). “If the public defense system was broken before August 2005, it now is submerged as well. Speedy trials for suspected criminals, never a top-tier public priority, has lost even the modest momentum it was gaining. But like so many other areas, from education to health care, hurricanes can be used as an excuse for status quo but should be used as an opportunity to set things right... With 23 exonerations of felony convictions over the past 15 years, the overloaded system with harried counsel and few resources means justice isn't always assured. Also consider that justice delayed is justice denied, not just for the defendant but for victims of crime... Last weekend marked the 43rd anniversary of the landmark case of Clarence Earl Gideon in which the U.S. Supreme Court ruled poor defendants are entitled to counsel. Almost a half-century later, the nation,

and especially Louisiana, continues to struggle with this basic American right. Perhaps a hurricane, as with so many other social and governmental issues, will blow in lasting winds of change.”

- HH. *The Times-Picayune* (New Orleans). “The Case of the Disappearing Lawyers.” (3/24/06). “Louisiana has never met its constitutional obligation to provide effective counsel for defendants who can't afford to pay for it. But, post-Katrina, the poor might as well be living in a police state.”
- II. *The Times-Picayune* (New Orleans). “Stop this resurgence” (4/2/06). “Unfortunately, the criminal justice system was in poor shape even before the storm. The city has always been blessed with individual police officers, prosecutors, public defenders and judges who do great work. But as a whole, the justice system has done a bad job of identifying suspects, enlisting witnesses, preserving evidence, exonerating the innocent and trying and punishing the guilty.”
- JJ. *The Daily Advertiser* (Lafayette, LA). “Katrina aggravates Indigent Defender Program problems” (4/20/06). “Louisiana's Indigent Defender Program was created to guarantee that those in the criminal justice system who cannot afford to pay for lawyers are granted the constitutional right to legal representation. For too long, however, the program has been so inadequately funded that a shortage of indigent defenders makes it impossible to assure competent representation.”
- KK. *Daily Town Talk* (Alexandria, LA). “Our View” (4/20/06). “Each person charged with a crime deserves a vigorous and qualified defense. Most poor defendants in Louisiana didn't get that prior to Hurricanes Katrina and Rita. Since then, especially in South Louisiana, that has only gotten worse.”
- LL. *The Times-Picayune* (New Orleans). “Progress on Indigent Defense” (5/22/06). “Repairing New Orleans' criminal justice system is just as vital to the city's recovery as fixing sewers and streetlights. Public defenders are crucial to the functioning of that justice system, because most people who are charged with crimes in New Orleans cannot afford lawyers. The justice system relies on adversarial proceedings to separate the innocent from the guilty. But that theory only works in practice if both sides have skilled representation.”
- MM. *The Times-Picayune* (New Orleans). “The criminal justice mess” (5/29/06). “The shortage of jail beds at Orleans Parish Prison is only the latest sign of a crisis enveloping New Orleans' criminal justice system.... As Judge Johnson points out, the city shouldn't use limited jail space -- and spend limited money -- to house those suspected of the least serious crimes. But he contends that the city was doing just that. "I'm not exaggerating," Judge Johnson says. "There were people in jail for spitting on the sidewalk.””

NN. *Daily Town Talk* (Alexandria, LA). "Our View: Let defendants go before trial? Yes, it's the law" (7/29/06). "The only way our court system can remain fair is to make sure everyone has competent legal representation. Overburdened, underpaid, understaffed public defender offices -- in Central Louisiana and elsewhere -- cannot provide that fair representation."

OO. *The Times-Picayune* (New Orleans). "Defendant Deluge" (8/7/06). Criminal District Judge Arthur Hunter's threat to begin releasing people awaiting trial on Aug. 29 -- the first anniversary of Hurricane Katrina -- certainly drives home his frustration with New Orleans' criminal justice system, which has foundered since the storm.

APPENDIX C

Detailed OIDB Budget

1.	Gross Salaries	\$	5,090,000
2.	Contract Salary	\$	100,000
3.	Payroll Taxes	\$	389,400
4.	Medical Insurance	\$	518,000
5.	Life Insurance	\$	15,000
6.	Attorney Liability Insurance	\$	70,000
7.	Insurance (LWCC, content, property)	\$	50,000
8.	Audit Expense / Accounting	\$	11,500
9.	Expert Witness Expense	\$	375,000
10.	Training	\$	150,000
11.	Travel & Reimbursements	\$	40,000
12.	Rent / Lease	\$	150,000
13.	Law Books / West Law	\$	30,000
14.	Equipment Inventory	\$	20,000
15.	Supplies (Office/Computer/Kitchen)	\$	25,000
16.	Telephone (DSL)	\$	18,000
17.	Copy Machine Maintenance	\$	6,000
18.	Miscellaneous (Maintenance / Building)	\$	10,000
19.	Storage Space / Rental	\$	2,400
TOTAL:		\$	7,070,300

ENDNOTES

¹ See for example: Palombo, Bernadette Jones, Ph. D. and Jeff Sadow. Louisiana State University, Shreveport. *The Provision of the Right to Counsel in Caddo Parish, Louisiana*. July 2004. “Adding to the economic burden of the Parish, 65% of the indigent defense clients had full-time jobs at the time of their arrests and detention.... Public defenders with heavy caseloads cannot advocate for the client to get out of jail pending trial so that they can remain gainfully employed – contributing to the Parish’s tax base instead of being housed at tax payer’s expense.” (Page 1).

² Throughout our country, more than 80% of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, *Defense in Criminal Cases* at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, *Indigent Defense* at 1 (1996). See generally: Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997). The actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See A.P., *U.S. Poverty Rate Rises to 12.7 Percent*, N.Y. Times, August 30, 2005, <http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58.8/30/2005>.

In Louisiana, the percentage of the working poor needing counsel in criminal cases is even greater, with the result being that the entire interdependent system of justice requires public defender involvement in virtually every case to function effectively and efficiently. See for example: Kurth, Michael M., Ph. D, and Daryl V. Burckel, DBA & CPA. *Defending the Indigent in Southwest Louisiana*. July 2003. “The court assigns approximately 90% of the 2,500 to 3,00 felony charges filed in Calcasieu Parish each year to the PDO.” (Page 14).

³ Theoretically, a legislature could pass a *uniform* ice cream law that covers chocolate ice cream, vanilla ice cream, fudge ripple, and chocolate walnut. The variances in flavor do not make any of the samples something other than ice cream. The Louisiana Supreme Court has made this abundantly clear, first in *State v. Bryant*, 324 So. 2nd 389 (La. 1975) and more recently in both *State v. Peart*, 621 So.2d 780 (La. 1993) and *State of Louisiana v. Adrian Citizen* 04-1841 (La. 04/01/2005). See for example *Peart* quoting from *Bryant*: “[T]he statutory structure which allows local IDBs to employ public defender, contract attorney, or assigned counsel models at their choosing meets the standard of uniformity set out in art.1 sec. 13.”

⁴ The *Ten Principles of a Public Defense System* is based on a paper by James Neuhard, State Appellate Defender of Michigan and former NLADA President and H. Scott Wallace, NLADA Director of Defender Legal Services, which was published in December 2000 in the *Compendium of Standards for Indigent Defense Systems* www.ojp.usdoj.gov/indigentdefense/compendium/. Mr. Nuehard is a member of the NLADA site team conducting this study.

⁵ *ABA Ten Principles*, from the Introduction. The *Ten Principles* are available at: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclai/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1

⁶ When the levees were breached in the days following Katrina’s initial onslaught, the Old Parish Prison complex was flooded. Detainees were first evacuated to a highway overpass and then to other correctional facilities. Eyewitness accounts indicate that there was no methodical rationale to how and to where pre-trial detainees were dispersed. The people housed at the Orleans Parish

Prison complex were evacuated to whatever local jail or prison was willing to take them – including housing women at the Louisiana State Penitentiary at Angola (a men’s prison for mostly violent offenders) and sending others to a facility that had been closed by the state years before (Jena Youth Prison). The end result was that over 6,500 people were dispersed to 45 different facilities all across the state (and, in some cases, Florida).

The authors of this report take no position on whether or not this was the most appropriate way to deal with the necessary evacuation. Rather, we simply point out that the historical practices and policies of the police, prosecution, courts and public defense providers put the Sheriff in the position of having to evacuate such an abnormally high percentage of people being held pre-trial.

Under Louisiana law, district attorneys do not have to formally bring charges until 45 days after arrest for a misdemeanor charge or until 60 days for a felony charge (La.C.Cr.P. Article 701). And, unlike many jurisdictions in the country where prosecutors have law enforcement’s incident report the day following an arrest (and oftentimes the same day) in an effort to promptly determine whether to charge a misdemeanor or send the case to the grand jury for consideration of an indictment, the New Orleans police only generate a simple “gist” statement of the crime - sufficient to hold a defendant on probable cause, but not enough information for the prosecutor to make a formal charging decision. The District Attorney usually does not receive from the police sufficient information to make a charging decision until the end of the 45- or 60-day period. [This information was garnered during an interview with Orleans Parish District Attorney Eddie J. Jordan, Jr. conducted by NLADA site team member Norm Lefstein, June 13, 2006.]

Additionally, local advocacy group “Safe Streets” retained the services of The Southern Center for Human Rights -- a non-profit, public interest law firm dedicated to enforcing the civil and human rights of people in the criminal justice system in the South – to evaluate indigent defense services in Orleans Parish. The Southern Center for Human Rights notes in its report that District Attorney Jordan acknowledged in a *Times-Picayune* article that more than a third of the cases dismissed by his office were dropped on the eve of the 45/60 day timeline due to poor police work, including suppressed confessions and evidence, weak testimony and officers failure to show in court. [See: SCHR, *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 12 (note 15). See also: Gwen Filosa, *Times-Picayune*. DA Pins Dismissed Cases on NOPD: Jordan’s Office Cites Poor Police Work. April 6, 2005.]

The delay in formally charging defendants held pre-trial at taxpayers’ expense is compounded because of management decisions of the former Orleans Indigent Defender Board (OIDB). All national standards require the timely appointment of counsel to encourage early interviews, investigations and resolution of cases, and to avoid discrimination between the outcomes of cases involving indigent and non-indigent defendants. [See: *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.] In Orleans Parish, the opposite of prompt appointment of counsel occurs routinely - representation by the public defender office is structured to discourage early client contact, avoid initial scrutiny of evidence and/or eliminate virtually any action that could result in a speedy disposition of the charges. Magistrate’s Court is the court of preliminary jurisdiction in all felony and most misdemeanor cases. The Orleans Indigent Defense Board (OIDB) has historically hired a single attorney to handle all of the bond hearings in Magistrates Court. This attorney does not do any formal work on investigating the clients’ charges other than to simply argue the conditions of bond in court. A different public defender will be appointed to do substantive work on the case (e.g. investigation, interviews, motions practice, etc.) if prosecution is instituted and the defendant is arraigned.

National experience dictates that this type of representation – known as “horizontal” representation – is implemented not in the best interests of the defendant, but because it is a *supposed* cost-cutting measure. After all, the bond hearing lawyer need only sit in one courtroom all day long receiving a stream of files and then passing them on to another lawyer for the next stage of the proceeding in the manner of an “assembly line.” But national standards of

justice uniformly and explicitly reject horizontal representation, for various reasons: it 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, and is demoralizing to clients as they are re-interviewed by a parade of staff each starting from scratch. [See: NSC at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; *Moore v. U.S.* (432 F.2d 730, 736 (3rd Cir. 1970); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971). Also, *ABA Defense Services*, commentary to Standard 5-6.2, at 83.] And, it ultimately *increases* the cost of the criminal justice system because poor front-end representation leads to unnecessary pre-trial confinement, excessive appeals, and re-trials.

The use of ‘non-continuous’ or ‘horizontal’ representation in New Orleans has been independently verified and documented. [See: SCHR, *Report on Pre- and Post-Katrina Indigent Defense in New Orleans* at page 10: “Individuals arrested on criminal charges were brought to court for an initial appearance a day or two after being arrested. Some individuals were brought to magistrate’s court, where an OID Program attorney was appointed ‘solely for the purposes of this hearing.’ These individuals reported that the assigned attorney did not conduct even the most cursory interview to solicit information about the arrestee’s ties to the community, employment history, charges, or any other information,” and at page 11: “There is no continuity of representation, with pre-trial detainees often represented by a number of different public defenders throughout the proceedings. One 59-year-old African-American man who was arrested the day after Christmas in 2004 and charged with possession of crack and marijuana has been represented by 5 different public defenders during the 15 months he has been incarcerated awaiting trial.”]

These practices continued unabated after Katrina. [See: Northwestern University School of Law, Students of the Domestic Disaster Practicum. *Access Denied: Pre-Katrina Practices in Post-Katrina Magistrate and Municipal Courts*. April 2006. Page 1: “While a Public Defender may be present in court during proceedings, he rarely participates in the proceedings rendering his presence meaningless. Public defenders typically do not obtain information from detainees to present to the court, they do not make arguments to the court, and they do not explain the process to detainees.”] Because of this, the indigent defense system in Orleans Parish fails both Louisiana Indigent Defense Assistance Board Standard 5-1.1 (requiring that “counsel should be provided to the accused as soon as feasible and, in any event, after custody begins.”) and LIDAB standard 5-1.4 requiring continuity of representation.

Therefore, criminal court judges cannot be faulted for erring on the side of public safety and remanding a higher percentage of defendants to the correctional facility pre-trial considering the practices of the police, district attorney and public defender ensures that bond decisions are made with no accurate accounting of the charges by the police and no mitigating factors offered by the defense counsel. [See: Northwestern University Law School, *Access Denied*, at page 1: “Except in rare cases, the Court is not provided with relevant information about detainees and consequently does not engage in any meaningful individualized bond determination.” See Also: SCHR. *Report on Pre- and Post-Katrina Indigent Defense in New Orleans* at page 10: “Bonds in New Orleans were unusually high, yet OID Program attorneys almost never advocated for lower bonds. Paid attorneys routinely and vigorously argued for bond reductions. A number of interviewees reported it was understood among arrestees that if you wanted someone to argue for a reduction in bond, you would have to hire a private attorney because OID Program attorneys seldom or never did.”]

Furthermore, the failure to appoint an attorney that will handle the case from beginning to disposition erodes any chance of conducting a trial in a reasonable period of time. Under the state’s speedy trial statute, if a motion is granted, trials for a defendant facing a felony charge must occur within 120 days if detained or 180 days if the defendant is not in custody. Since the

initial bond-hearing attorney does nothing substantial on the case prior to arraignment and has no responsibility for the case post-arraignment, nothing that would help the client (investigation, psychiatric exams, drug-treatment placement) occurs until some indefinite time after the case is assigned at arraignment. In most instances, this will be on the eve of preliminary hearings or pre-trial settlement conferences – several months later. The speedy trial rules have proven ineffective to overcome this dynamic because, under Louisiana law, the defense lawyer must stipulate on the record that he or she is prepared to go to trial. Since they are effectively just beginning the case, the lawyer cannot do so and often waives the right to a speedy trial.

Please note that the high costs associated with unnecessary pre-trial detention is not solely a New Orleans phenomena. [See: Palombu, Bernadette Jones and Jeffrey Sadow. *The Provision of the Right to Counsel in Caddo Parish*. July 2004. Page 1: “The failure to promptly meet with clients costs taxpayers of Caddo Parish money. A full 70% of inmates of the Parish jail are pre-trial detainees. The Commander of Caddo Correctional Center (“CCC”) attributes this problem to the lengthy detention of pre-trial detainees represented by the Public Defender’s Office. According to this Commander, this problem represents an additional administrative and financial burden on CCC, and he suggests that this problem could be resolved with speedier indigent defense representation. He estimates that Caddo Parish residents must bear the financial burden of six months additional pre-trial detention on average per inmate at an approximate annual cost of one half million dollars.”]

Also note that the delay in bringing cases to timely disposition is, again, not simply a New Orleans problem. In Calcasieu Parish it takes an *average* of 501 days to dispose of a felony case, and only 20% of all felony cases are disposed of within one year of the date of arrest. The average length of time from arrest to arraignment on a felony charge is *315 days*. By comparison, the U.S. Department of Justice reports in *Felony Sentences in State Courts, 1998*, Bureau of Justice Statistics Bulletin, October 2001, that the average time from arrest to disposition for felony cases nationwide is 214 days, with 90% of all felony cases disposed of within a year. [See: Kurth, Michael M and Daryl V. Burkell, *Defending the Indigent in Southwest Louisiana*, July 2003, page 29.]

Furthermore, the University of New Orleans Survey Research Center conducted a citizen’s evaluation of the Louisiana Courts in 1998. The research found that “Delay in the courts is an area in which the public gives Louisiana negative evaluations. Only a third of the users and non-users think that court cases are completed in a reasonable amount of time and that waiting time in court is reasonable.” Further: “The vast majority of Louisiana residents believe that there is too much time between arrest and trial.” Survey summary available at: www.uno.edu/~poli/suprem98.htm.

⁷ Prior to the most recent legislative salary increases for Assistant District Attorneys (ADA), ADA’s were paid \$30,000 annually by the state. This is well below both national district attorney compensation levels and the average remuneration of district attorneys in other similarly situated Southern urban jurisdictions. When district attorneys are underpaid it leads to similar problems experienced in under funded public defender offices – high turnover; excessive cycles of hiring, training, re-hiring, and retraining; and, lower seniority requiring a larger staff and reduced caseloads while the attorneys learn how to handle a full caseload. [Information obtained through an interview with M. Elaine Nugent-Borakove, Director, Office of Research & Evaluation, American Prosecutors Research Institute, conducted by David Carroll, August 8, 2006).

The potential problems of both under funded district attorney offices and public defender services within the same jurisdiction is the reason why the ABA *Ten Principles* calls for parity of workload, salaries and resources *only if the prosecutors office is adequately funded*. [See: ABA *Ten Principles*, Number 8].

Low attorney compensation rates for both prosecutors and defense attorneys are compounded

by the oftentimes staggering law school debt most attorneys have upon completion of their education. According to the ABA, the average law school student leaves with an average debt of between \$70,000- \$80,000 with monthly payments of \$1,100. [See:www.abanet.org/poladv/priorities/student_loan.html].

An attorney making \$30,000 per year would have approximately \$1,750 take home pay after Federal taxes. This means that nearly two-thirds of their net income must go to re-paying student loans. This is a staggeringly high percentage that prevents many young attorneys from entering the field of public criminal law. It is also a major obstacle in the desire to recruit and retain people of color in both district attorney and public defender offices. The seriousness of low compensation in the criminal justice system has led the American Bar Association (ABA), the National District Attorney Association (NDAA) and the National Legal Aid and Defender Association (NLADA) to support federal student loan forgiveness. [United State Representative Scott (R-GA) and U.S. Senator Durbin (D-IL) have introduced legislation in the House (H.R. 198) and Senate (S. 2039) that would extend to public defenders and prosecutors the same program of student loan repayment assistance as is already available to federal government attorneys and congressional staff – up to \$6,000 to \$10,000 per year in repayment relief, up to a cap of \$40,000 to \$60,000, for attorneys making a commitment to such governmental service.]

Please note, that the experiences of the Orleans Parish District Attorneys office in relation to salaries is *not* the norm for district attorneys across the state of Louisiana. NLADA confirmed with the United States Department of Justice, Bureau of Justice Statistics and the American Prosecutors Research Institute that many, if not most, Louisiana Parishes supplement the salaries of District Attorneys and assistant district attorneys. The State of Louisiana pays elected District Attorneys \$50,000 per year. The average District Attorney receives an additional \$70,000 from local sources raising their salary to \$120,000 per year. Local sources also add, on average, \$45,000 to the salaries of assistant district attorneys raising their compensation rate to \$75,000 per year. NLADA does not take issue with the local augmentation of prosecutors' salaries. In fact, we believe that the average salaries of District Attorneys (\$120K) and assistants (\$75K) are reasonable and defensible. Rather, we note that the ABA *Ten Principles* recommend parity of prosecutors and public defenders' salaries to prevent an imbalance in the delivery of services.

⁸ Orleans Parish (indeed all of Louisiana) has no binding caseload standards for public defenders. An adequate indigent defense program must have binding caseload standards for the system to function, for the simple fact that public defenders do not generate their own work. Public defender workload is impacted by a convergence of decisions made by other governmental agencies beyond the control of the indigent defense system itself. The legislature may approve new crimes or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, etc., public defenders are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients no matter what.

But it is next to impossible for public defenders to meet their ethical duty when, in jurisdictions such as New Orleans, the tap is never shut off on the constant influx of cases. Without public defender caseload standards, the system will either bog down as the increased arrests get bottlenecked in the court or defense attorneys will cut back on the services they are ethically bound to give their clients or - as is the case in New Orleans - both.

And, not surprisingly, public defenders in Orleans Parish have historically carried caseloads far in excess of national caseload standards for full-time attorneys, even though they work only part-time. The Spangenberg Group, an internationally renowned private company specializing in indigent defense technical assistance and the research arm of the American Bar Association in this field, studied the Orleans Parish public defenders office in 1997. Though precise caseload

records for Orleans Parish defenders were not available during the 1997 Spangenberg study, the anecdotal information led The Spangenberg Group to conclude that the caseload numbers are “astounding and beyond any public defender office we have ever visited.” The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. (p. 15).

⁹ The role of support staff (investigators, social workers, paralegals, legal secretaries, and office managers) in public defender offices has taken on more importance over time, both in terms of quality and cost-effectiveness. Investigators, for example, have specialized experience and training to make them more effective than attorneys at critical case-preparation tasks such as finding and interviewing witnesses, assessing crimes scenes, and gathering and evaluating evidence – tasks that would otherwise have to be conducted, at greater cost, by an attorney. Similarly, social workers have the training and experience to assist attorneys in fulfilling their ethical obligations with respect to sentencing, by assessing the client’s deficiencies and needs (e.g., mental illness, substance abuse, domestic problems, educational or job-skills deficits), referring them to available community-based services and resources, and preparing a dispositional plan meeting the requirements and expectations of the court, the prosecutor and the law. Such services have multiple advantages: as with investigators, social workers are not only better trained to perform these tasks than attorneys, but more cost-effective; preparation of an effective community-based sentencing plan reduces reliance on jail, and its attendant costs; defense-based social workers are, by virtue of the relationship of trust engendered by the attorney-client relationship, more likely to obtain candid information upon which to predicate an effective dispositional plan; and the completion of an appropriate community-based sentencing plan can restore the client to a productive life, reduce the risk of future crime, and increase public safety.

Both the ABA and NLADA standards require that support services are a vital part of adequate representation. Standard 5-4.1 of the ABA Standards for Criminal Justice, Providing Defense Services, directs that: “The legal representation plan should provide for investigative, 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.” ABA Defense Function Standard 4-8.1 requires the defense at time of sentencing to “be prepared to suggest a program of rehabilitation based on defense counsel’s exploration of employment, educational and other opportunities made available by community services.” And NLADA Performance Guidelines for Criminal Defense Representation require counsel to obtain information as early as possible relating to matters such as the client’s mental health, education, medical needs, and other background and personal history, in preparation for sentencing or negotiated disposition. [Guidelines 2.2(b)(2), 4.1(b)(2)(c), 8.3.]

The Guidelines for Legal Defense Systems in the United States issued by the National Study Commission on Defense Services direct that “defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office.” [National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States*, 1976, 4.1, Task Allocation in the Trial Function: Specialists and Supporting Services.] The Guidelines further prescribe precise numeric ratios of attorneys to non-attorney staff: 1) One full time Legal Assistant for every four FTE attorneys; 2) One full time Social Service Caseworker for every 450 Felony Cases; 3) One full time Social Service Caseworker for every 600 Juvenile Cases; 4) One full time Social Service Caseworker for every 1200 Misdemeanor Cases; 5) One full time Investigator for every 450 Felony Cases; 6) One full time Investigator for every 600 Juvenile Cases; 7) One full time Investigator for every 1200 Misdemeanor Cases.

Numeric guidelines for professional business management staff are not in the National Study

Commission guidelines, but the Commission commented that “professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.”

Historically, the New Orleans public defender office has never had adequate support staff. See: The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. 1997. (p. 13). “Five full-time investigators work out of the OIDB main office at the District Court building and are available on an as-needed basis to assist attorneys in all divisions. Most of the criminal court attorneys whom we interviewed indicated that they rarely, if ever, make use of the investigators for criminal investigations. There are no paralegals on staff, and while the office’s secretarial/support staff is available, they are also stretched thin.” The current investigation showed that the number and types of support staff *decreased* in the intervening ten years beyond the 1997 level that already failed national standards. Post-Katrina, there was only one remaining investigator – and he was used strictly as an interpreter.

¹⁰ Historically, training has been relegated to an afterthought in Louisiana. The 1997 Spangenberg Group report notes that training and professional development have always been given “low priority” in Orleans Parish. [Ibid. page 21] Though some of the most important training that any public defender receives is that provided when he is just out of law school or a clerkship and is about to begin representing clients, the Orleans Parish public defender office has no formal indoctrination program of any kind. Formal training ideally teaches the new attorney how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. It makes use of role playing and other mock exercises, and videotapes to record student work on required skills such as direct and cross-examination, and interviews (or mock interviews) of clients, which are then played back and critiqued by a more experienced attorney or supervisor. Orleans Parish attorneys simply learn their practice through the “sink or swim” culture that has pervaded the public defenders office in Orleans Parish for years.

Standards requiring training are typically cast in terms of both quality of representation to clients and various systemic interests in maximizing efficiency and avoiding errors. Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a “cost-saving device” because of the “cost of retrials based on trial errors by defense counsel or on counsel’s ineffectiveness.” The Preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members “more productive, efficient and effective.” [www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards.]

In adopting the *Ten Principles* in 2002, the ABA emphasized the particular importance of training with regard to indigent criminal defense by endorsing, for the first time in any area of legal practice, a requirement of *mandatory* continuing legal education. Standards typically relate indigent defense training to the level of training available to prosecutors in the jurisdiction. As stated in the Attorney General’s Introduction to *Redefining Leadership for Equal Defense: Final Report of National Symposium on Indigent Defense 2000*, “public defenders need access to training resources to the same degree that Federal, State and local prosecutors have the same.” [Office of Justice Programs, U.S. Department of Justice www.ojp.usdoj.gov/indigentdefense/symposium.pdf, at viii.]

On top of that, the national standards indicate that training should be a continual facet of a public defender agency. Skills need to be constantly refined and expanded, and knowledge needs to be updated as laws change and practices in related fields, such as forensic sciences, evolve.

Thus, on-going training is always critical, but even more so where experienced attorneys never received any initial “new attorney” training and may need to re-learn skills or unlearn bad practices. The public defender’s office in Orleans Parish had no money for a formal training program of any kind.

The lack of meaningful training is made even worse when – as in Orleans Parish – the public defender office lacks formal oversight and supervision. People need to know what is expected of them in order to recognize when performance is not living up to expectations. In the worst cases, supervision needs to be in place to address, work with, and, occasionally, remove an attorney that is performing his duties in a way that is especially harmful to the interests of his client.

Historically in Orleans Parish, there never has been a way to supervise and systemically review the performance of public defenders – again in violation of the ABA *Principles*. [See: The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. (p. 20-21). “Each of the OI DP’s various divisions operates virtually autonomously, with little or no day-to-day oversight from the Director.... This lack of oversight creates scheduling and accountability problems. It also exacerbates the problems inherent in a part-time system where some attorneys may already be subject to divided loyalties between their public defender and private clients. With little supervision and no formal accountability requirements, many OI DP public defenders come and go as they please once their court day is over.” The Orleans Parish public defender office had no institutional capacity to help attorneys assess their legal performance or improve his skills – no performance standards, no training, no on-going supervision, and no annual reviews.]

¹¹ In violation of ABA *Principle 1* calling for independence of the defense function, Louisiana judges can exert undue influence over public defenders, because they have been given the power by the state legislature to appoint local defender boards, who in turn make decisions about the hiring and firing of defense lawyers.

This undue judicial influence is increased in jurisdictions, like Orleans Parish, where public defenders practice in front of the same judge day in and day out. Being assigned to a specific judge heightens the desire of public defenders to keep the judge happy by keeping the dockets moving, rather than keeping the client happy by zealously advocating on his or her behalf. In 1997, The Spangenberg Group found that the underlying philosophy among the Orleans Parish public defender staff is to “placate and please the judges, even when this approach might harm clients.” [See: The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. (p. 25).]

A United States Department of Justice sponsored report would conclude that the culture of malaise still persists nearly ten years after The Spangenberg Group report. “The System of indigent defense is court-based, rather than client based.... The attorney tends to focus on the preferences and work patterns of the particular judge to whom s/he is assigned and with whom s/he works everyday, rather than on the indigent defendants whom pass through the court.” *An Assessment of the Immediate and Longer-term Needs of the New Orleans Public Defender System*. Produced by the Bureau of Justice Assistance National Training and Technical Assistance Initiative at American University. (Grant # 2005-DD-BX-K053) April 10, 2006. The Southern Center for Human Rights reports that a number of attorneys reported that when a judge disliked a particularly active public defender, the OI DB members would have that defender re-assigned or terminated (See: SCHR. *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 7). The members of the current study’s site team confirmed that such undue interference occurred on a regular basis.

Additionally, the authors of this report tried to interview all present and immediate past OI DB Board members. We were unable to meet with the former chair, Frank DeSalvo, to talk about independence issues. We do note that a number of interviewees informed us that Mr. De Salvo is

the in-house attorney for the Police Association of New Orleans. Mr. De Salvo's position as police attorney at least raises the perception of yet another form of undue influence, if his OI DB work conflicted with his police association work. The Southern Center confirmed Mr. De Salvo's position with the NOPD (See: SCHR. *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 8, note 8.))

¹² For a variety of reasons, public defender salaries have not been able to keep up with the cost-of-living. In Orleans Parish (and throughout the state) public defenders are allowed to maintain a private practice in addition to their assigned indigent cases as a way to augment their low salaries [See: SCHR. *Report on Pre- and Post Katrina Indigent Defense in New Orleans*. Page 7: "In a recent hearing before the Chief Judge, the Chief Defender of the OID Program admitted there was no limit on the number of private, paying cases a public defender could take."].

Such practices disregard ABA Criminal Justice Standard 5-4.2 that states a full-time public defender program is preferable to a part-time system because the former deters attorneys' temptation to increase total income by devoting time and effort to private clients at the expense of non-paying clients. Dispensing with cases as quickly as possible may earn the public defender an extra hour or two to work for his more affluent clients. The problem of public defenders carrying private caseloads was further exacerbated in New Orleans pre-Katrina because the law firms of OI DB Board members employed many of the public defender attorneys. It is easy to see how Board members may have been wont to have their employees time spent on public cases when they could have been billing time to private cases – yet another example of undue interference with the defense function. In their defense, at least one board member defended the practice because of the drastic under funding of the office. In short, the low funding reduced public defender pay so this one board member felt that the only way to keep "good" lawyers in the public realm was to augment their salaries with private employment.

¹³ Just as the minimum standard of justice should not be dependent on which side of a parish line your crime was allegedly committed, so too should the adequacy of your defense not be dependent haphazardly on whichever courtroom or to whichever judge your case happens to be assigned. For example, the ABA *Ten Principles* state that the appointment process in conflict cases "should never be ad hoc, but rather be coordinated and directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction." (See: ABA *Principle 2* citing ABA, Standard 5-2.1). Despite this, the Orleans Parish criminal justice system has no such coordinated method of dealing with conflicts. Each judge appoints conflict counsel however he or she sees fit. Some judges maintain their own lists of attorneys that they assign to conflict cases; others appoint one of the two law clinics. Still other judges simply appoint any lawyer in town regardless of their qualifications or experience with criminal law -- and often without any compensation to the attorney for her efforts.

Appointing attorneys that do not possess the requisite qualifications violates ABA *Principle #6* requiring defense counsel's ability, training, and experience to match the complexity of the case. [See ABA *Principle 6* citing ABA Standard 5-2.1 and commentary; Assigned Counsel, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct)].

More importantly, the potential ad-hoc appointment of a real estate lawyer to handle a serious criminal matter undermines the constitutional requirement for uniformity within the confines of Orleans parish itself. All attorneys have an ethical obligation to accept only those cases for which they know they have the knowledge and experience to offer zealous and quality representation. [See, e.g., ABA Model Rules of Professional Conduct, Rule 1.1; NLADA Performance Guidelines, 1.3(a).] *Principle* Number 6 integrates this duty together with various systemic

interests – such as efficiency and the avoidance of attorney errors, reversals and retrials, findings of ineffective assistance of counsel, wrongful convictions and/or executions, and attendant malpractice liability – and restates it as an obligation of the indigent defense system within which the attorney is engaged to provide legal representation services.

Typically, this requirement is implemented by classifying attorneys according to their years and types of experience and training, which correspond to the complexity of cases, the severity of charges and potential punishments, and the degree of legal skills generally required. Attorneys can rise from one classification to the next by accumulating experience and training. Assigned counsel programs commonly maintain various “lists” from which attorneys are selected according to the classification of the offense. Public defender programs place attorneys in different divisions of the office.

¹⁴ Since the turn of the century the juvenile justice system in Louisiana, as well as juvenile indigent defense representation, have received significant attention. In June 2001, the American Bar Association released *The Children Left Behind: An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings in Louisiana*. That comprehensive report documented the extremely high waiver of counsel, the high use of admissions (guilty) pleas in juvenile delinquency cases (frequently without counsel), a lack of reliable, uniform case tracking information by juvenile defenders and by the local indigent defense boards, and the lack of training and supervision for juvenile defenders who did not receive parity of resources or salary with either their felony/misdemeanor public defender practice peers or with the juvenile prosecutors. It also documented the intrusive role of probation/parole officers in determining the fate of juveniles in many district or city courts.

The Children Left Behind: Annual Update 2002 continued to document not only the problems and issues related to juvenile justice in Louisiana, but also the continuing challenges that face juvenile indigent defense representation services across the state. Following a speech by Supreme Court Chief Justice Pascal Calogero, Jr. in 2001 regarding the reforms needed in the juvenile justice system, the Legislature created a joint Legislative Juvenile Justice Commission (JJC), chaired by then State Representative, now Lt. Governor, Mitch Landrieu. The JJC’s recommendations became part of Children’s Code statutory reform related to abuse/neglect, adoption and juvenile justice, the latter involving authorization for hearing officers, teen court, truancy, and non-discriminatory dispositions. (See, 2003 Regular La. Legislative Session) These statutory reforms impacted neither the structure of juvenile indigent defense services nor the funding for juvenile legal representation.

The Louisiana Council of Family and Juvenile Court Judges and the Louisiana City Judges Association also voiced their support for juvenile justice system reform through the passing of resolutions and for improving the level of advocacy and representation of children.

In the 2002 Update Report (p.2), the writers (JJPL and the ABA Juvenile Justice Center, now the National Juvenile Defender Center) issued a three step Action Plan for Louisiana juvenile defense representation which included the following recommendations: 1) acknowledge that the system of defense for youth is broken and needs repair; set fundamental principles to guide the transformation of the juvenile system of defense, including, minimally, the following (training, supervision, performance standards, and independence); and 3) invest in juvenile defender services by increasing funding.

Following the issuance of not only the Louisiana juvenile assessment and update, but also the assessments in twelve additional states, all of which document highly problematic and substantive problems with the representation of juveniles and state juvenile justice systems, the American Council of Chief Defenders and the National Juvenile Defender Center adopted the *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (Dec.2004). These Principles set out a best practices model for indigent defense delivery

systems to follow, and they strongly uphold the right to well trained juvenile defense advocates who receive parity with their peers within the indigent defense system's structure. (One of the principle authors, Phyllis Subin, is an NLADA site team member on the current report.) The Louisiana indigent defense representation system employed in New Orleans pre-Katrina failed all ten of these basic principles. [See: The Report Card of the Louisiana Justice Coalition at www.lajusticecoalition.org/reports+resources/report+card+juvenile/]

Even before Katrina, the New Orleans indigent defense system had no operable office space for the juvenile public defenders in the courthouse. No phone, computer, copier, fax, or any of the "normal" office suite equipment deemed necessary for the practice of law. And, what little space they did have was lost post-Katrina. The authors of this report were told that the juvenile public defenders were "kicked out" of their former, pre-storm office which is directly across from delinquency Courtroom E and which is now occupied by court FINS staff.) The 1997 Spangenberg report noted that juvenile court office "was too small to even hold a staff meeting, let alone meet with clients in privacy" and that the "juvenile division desperately needs both more office space and a library to operate properly." [See: The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. (p. 29).

Similarly to the adult representation, those charged with the defense of children were handling far too many cases prior to Katrina. Prior to the storm, the OIJD ran its juvenile division with six part-time attorneys. National workload standards recommend that juvenile attorneys handle no more than 200 cases per year. Reviewing caseload data from the six months prior to Katrina, it showed that, on average, that the office handled 150 children a month representing 115 indictments with 193 charges. This extrapolates out to a caseload that is more than double the national caseload guidelines for full-time attorneys despite working only part-time. This caseload includes not just delinquency and children in need of care (represented by public defenders) but also adoption, child support, mental health, domestic abuse, protection of terminally ill children, surrender of parental rights, minor marriages, and misdemeanor prosecution of adults. Case filings do not include probation violations or modification hearings on disposition, all of which require the presence of counsel an estimated additional workload of between 25% to 33% for these types of additional hearings.

In addition, there is and was no supervision or practice management/direction provided by the main office pre-Katrina. Unless they sought it out, which the attorneys do not, there is no practice supervision or oversight for the juvenile attorneys, and no reporting requirements. Even "experienced" attorneys may be assisted and have their practice level upgraded by a trained, knowledgeable supervisor who knows the Children's Code, the judges and all the juvenile justice systems' programs and players. The 1997 Spangenberg report mentions a supervising attorney for juvenile court. This supervisor did not in fact actually supervise when he was in that position and he provided neither substantive practice assistance nor specialized training on juvenile/delinquency system issues. He did cover some cases/court listings when an attorney was sick or on vacation. And, even this minimally inadequate level of supervision was removed when the employment of the supervisor was terminated in 2003.

Pre- and post-Katrina, juvenile public defenders are not supported by any additional staff deemed essential to the sixth amendment right to counsel. At one point in time prior to 2003, there was a secretary. She is no longer in place and was not in place when Katrina hit.

¹⁵ Twenty-five states fund 100% of indigent defense services (Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin). Eight states fund the vast majority of indigent defense services [Georgia (66%), Iowa (97%), Kansas (77.6%), Kentucky (94.8%), Oklahoma (66.2%), South Carolina (67.4%), Tennessee (87.3%) and

Wyoming (85%)). The rest of the states rely on county government to fund the majority of indigent defense services or – in the case of Pennsylvania and Utah – rely on counties to pay for the entirety of indigent defense services. Louisiana is the only state that does not have either state or local government as the primary of funding for indigent defense services.

Moreover, it has been sometime since any state has tried to rely predominantly on court costs as the main right to counsel funding stream. As in Louisiana, Alabama levies and imposes a fee, or “tax”, in every criminal case in district, juvenile or municipal court. Unlike Louisiana, the revenue from these fees is remitted on a monthly basis to a “Fair Trial Tax” fund administered by the State Treasury. Alabama’s fair trial tax was designed to uniformly offset the *entire* county cost of providing indigent defense services at the local level. Thus, to the extent that the fair trial tax fund is not sufficient to cover the entire cost to the counties, the state is required to expend general fund revenues to cover the deficit. Because projections of collections rates never materialized as originally forecasted, the revenue stream from court costs has remained relatively stagnant over time. So, as increased caseloads, rising assigned counsel rates and new science, like DNA evidence, has increased the cost of providing indigent defense services throughout the state, the percentage of indigent defense expenditure paid by the Alabama state government has grown correspondingly. In 2005, the State of Alabama paid for approximately 74.3% of all indigent defense expenditures. State government has been the primary funder of indigent defense service in Alabama for well over a decade.

¹⁶ In 1993, in *State v. Peart*, 621 So.2d 780 (La. 1993), the Louisiana Supreme Court described the funding mechanism as “unstable and unpredictable” in finding that there was a “general pattern...of chronic under funding of indigent defense programs in most areas of the state.” The Supreme Court called upon the legislature to enact indigent defense reform or the Court “may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.”

The lone dissenting Justice called for the entire system to be ruled unconstitutional, stating: “[t]he Legislature’s relegating all indigent defender programs in the state to operate almost exclusively on funds raised from criminal violation assessments has resulted not only in a generally under funded system, but also (and more significantly) in widely disparate, non-uniform and totally inadequate funding (and resultantly inadequate legal services) in those judicial districts with high felony rates and proportionately low collections on traffic violations.”

¹⁷ The Spangenberg Group documented this exact scenario in 1997: “One of the most serious drawbacks to the OIDP’s reliance upon the Indigent Defender Fund is that it is directly tied to the number of traffic tickets written. Since these offenses are far and away the most common, they generate the most income for the Indigent Defense Fund. In fact, the \$250,000 emergency grant the OIDP recently received from the LIDB was necessitated by a sharp decline in traffic court revenues. We were told this decline resulted in part from the New Orleans Police Department’s redoubled efforts to reduce the city’s serious crime rate, leaving them fewer staff to pursue traffic offenders.” The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. (p. 5-6).

¹⁸ There is no way that a public agency can apply sound business principles to its day-to-day practices when it does not know its budget from month to month. [See: The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. 1974: “When the OIDP prepares working budgets to provide some framework for determining which expenditures are feasible, without an annual appropriation on which OIDP administrators can rely, the process is seriously flawed.” Page 9.]

¹⁹ Unlike other government agencies that can reduce staff as the need for future services warrant, the criminal justice system requires its full complement of staff until such time as the pre-existing backlog of cases are resolved. That is, a time delay from alleged crime to disposition of the case necessarily is needed to ensure due diligence in investigation and case preparation to serve the ends of justice -- for prosecutors and defense attorneys alike. So, even if Katrina precipitated a decrease in crime by indigent suspects (which does not necessarily appear to be the case), the same attorney staffing levels are still needed to ensure that the thousands of defendants already in the system are assured their inalienable right to counsel as their cases proceed.

²⁰ The Louisiana State Bar Association has made two grants to the OADB. The first was a \$105,000 grant specifically to be used to hire attorneys. The second, in the amount of \$50,000, was granted to improve technology in the office.

²¹ Held in Springfield, Louisiana in the early part of May 2006, the conference “provided comparative information on the structure, operation and funding of public defense systems in other states, and facilitated informal discussions and consensus among individuals critically involved in Louisiana’s public defender efforts” – including judges, lawyers and academicians.

²² The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); The Ten Principles of a Public Defense Delivery System (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems*, *infra* n.12) (<http://www.abanet.org/legalservices/downloads/scleid/10principles.pdf>); Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989), Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994). Other related national standards: American Bar Association, Standards for Criminal Justice, Providing Defense Services (3rd ed., 1992); American Bar Association, Standards for Criminal Justice: Defense Function (3rd ed., 1993); Report on Courts, Chapter 13: The Defense (National Advisory Commission on Criminal Justice Standards and Goals, 1973).

With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the government policy-makers themselves may lack expertise. In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor. NLADA standards-based assessments utilize a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 by NLADA and other organizations, such as the Criminal Courts Technical Assistance Project of the American

University Justice Programs Office. The design incorporates reviewing budgetary, caseload and organizational information from a jurisdiction in addition to site visits to perform court observations.

The current NLADA site assessment methodology employs the national standards as an objective measurement of an individual organization's mechanisms for effectuating key requirements of an indigent defense system including: independence, accountability, training, supervision, effective management, fiscal controls, competent representation, and workload. In developing a standards-based assessment methodology for the Orleans Parish site visit, NLADA conducted preliminary telephone interviews with district judges, public defenders, law school clinic directors, private defense counsel and the Executive Director of the Louisiana Indigent Defense Assistance Board (LIDAB).

²³ In the wake of Katrina, several reports were done on the indigent defense system in Orleans Parish, including: The Southern Center for Human Rights' *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*, Northwestern University Law School's *Access Denied: Pre-Katrina Practices in Post-Katrina Magistrate and Municipal Courts*, and The United States Department of Justice, Bureau of Justice Assistance's *An Assessment of the Immediate and Longer-term Needs of the New Orleans Public Defender System*. The current report differs than these others in scope. Because of the support of the Louisiana State Bar Association, NLADA was able to be more thorough and spend more time on site and more time analyzing available data than was possible for these other endeavors. The current study also had an eye toward developing a more specific long-range sustainable reform plan, whereas the others were more intent on addressing the immediate crisis needs. NLADA wishes to thank all who participated on these three studies, and recognizes that these three reports were critical in fixing some of the most immediate needs in New Orleans while we took the necessary time to complete the more comprehensive study. As with the LSBA/Yale Law School discussions, NLADA's recommendations were informed by these three studies but not beholden to them in any way, shape, or form.

²⁴ The American Council of Chief Defenders (ACCD) is a section of NLADA that brings together public defender leaders from across the country to promote fair justice systems by advocating sound public policies and ensuring quality legal representation to people who are facing a loss of liberty or accused of a crime who cannot afford an attorney.

²⁵ In-person or telephone interviews were conducted with each of the following: (a) *Orleans Parish Criminal District Court Judges* [Calvin Johnson (presiding judge), Terry Q. Alarcon, Lynda Van Davis, Ernest Hanson, Arthur Hunter, Julian Parker, and Benedict Willard]; (b) *Orleans Parish Juvenile Court Judges* [David Bell (chief judge), Mark Doherty, C. Hearn Taylor, and Ernestine Gray]; (c) *Court Personnel* [Derrick Freeman (director, Juvenile Drug Court Program), Ilona Picou (juvenile court recovery coordinator), Shannon Sims (criminal court administrator), Geoff Stewart (clerk of the juvenile court), Gabrielle Thomas (interim judicial administrator)]; (d) *District Attorney Staff* [Eddie Jordan (district attorney), Ralph E. Brandt, Jr. (executive assistant DA), Brandi Dohre, Val Solino, and Byron Williams]; (e) *Current Orleans Indigent Defender Board* [Denny Le Boeuf (chair), Derwyn D. Bunton (treasurer), Phillip A. Whittman, Jr., Dane S. Ciolino, Kim Boyle, John T. Fuller, Pam Metzger]; (f) *Former Orleans Indigent Defender Board* [James C. Lawrence, Jr., and Laurie White]; (g) *Orleans Indigent Defender Program Staff* [Tilden Greenbaum (chief public defender), Jason Cantrell, Donald Donnelly, Dwight Dosky, Derrick Honore, Clyde Merritt, Joe Meyer, J.P. Murrell, Townsend Myers, and Jeffrey Smith]; (h) *Others* [Jean Faria (assistant federal public defender and former Executive Director for Louisiana Indigent Defense Board), Edward Greenlee (Executive Director,

Louisiana Indigent Defense Assistance Board), David A. Lindsey (Probation & Parole District Manager 3/Adult Division of Probation & Parole), Jim Looney (Director, Louisiana Appellate Project), Sheila Myers (clinical professor, Tulane Law School Criminal Defense Clinic), Jelpi Picou (Director, Capital Appellate Project and former Executive Director of the Louisiana Indigent Defense Assistance Board), Neal Walker (Director, Louisiana Capital Assistance Center), and Richard A. Winder (Director, Department of Human Services, City of New Orleans)].

²⁶ Historically, state government in Louisiana has had to rely on speculation and presumption about how best to fund criminal justice components because of the overwhelming dearth of objective data. Policy-makers simply need to know basic indigent defense financial and caseload information in order to be able to prioritize and allocate scarce resources to the most serious needs.

No corporate entity, whether public or private, would attempt to justify their present state of affairs without such sound data. Yet, before SB 323 was enacted, the State of Louisiana did essentially that by allowing each local indigent defender board to use whatever standard they so choose to assess public defender caseload (by indictment, by defendant, by charge, etc.). Louisiana law now defines how cases must be counted so that all jurisdictions must provide uniform data on workload. To guard against claims of potential bias in data reporting, SB 323 took its basic “case” definition from The Conference of State Court Administrators and the National Center for State Courts – well-respected, independent agencies unassociated with any bar agency. It should be noted that the American Prosecutors Research Institute also uses the recommended “case” definition in its national and local workload assessments.

The bill also uniformly defined “indigency.” The law created a single standard by which all defendants are judged, to assure taxpayers that only the truly needy are afforded free counsel. The standardization of who is deemed indigent also recognizes the simple fact that qualifying for appointment of counsel should not be dependent on the Parish in which your crime was alleged to have been committed. Thus, the legislation mirrors the national standards defining “hardship” and sets a presumptive standard based on federal poverty guidelines in a way consistent with the majority of states. See: The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state that, “[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation (Guideline 1.5).” “Substantial hardship” is also the standard promulgated by the ABA. (*ABA Standards for Criminal Justice: Providing Defense Services* 5-7.1 states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”) While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel 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.

In practice, the “substantial hardship” standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly expenses, local private counsel rates) would result in a “substantial hardship” were they to seek to retain private counsel.

Please note, the site team noted several instances in which this provision of SB 323 was not being followed. Several New Orleans judges were still denying counsel to people simply because they were able to post bond. All national standards, especially American Bar Association Defense Services Standard 5-7.1, prohibit such practices. The court should recognize the fact that simply because a defendant’s friends and relatives are able to cobble together resources to get

them out of jail, it does not mean that the defendant has anywhere near the resources necessary to hire a private attorney without a substantial hardship. In Louisiana, it would have cost a defendant \$600 to post a \$5,000 bail. NLADA conducted an informal survey of private criminal defense attorneys in the area and determined that the cost of hiring any private criminal defense lawyer for the simplest of felony charges generally runs between \$5,000-\$10,000.

The adoption of SB 323 also ensures that people are assessed a uniform court cost of \$35, whether they be from a rural parish, an urban parish or a transitional parish. The guiding principle on this recommendation was that the level of funding available to an indigent defender board should not be dependent on the political will of a local judge to raise fees.

²⁷ SB 323 also reconstituted the Louisiana Indigent Defense Assistance Board to meet national standards of independence. To be efficient and effective, the oversight board needed to be broadened in accordance with prevailing standards and best practices. National standards call for a diversity of appointing authorities with *equal* ownership for proper oversight by all three branches of government so that no single branch can unduly influence the delivery of the right to counsel. Best practices suggest that law schools and the state bar should also have appointing authority. The people in need of defender services should have an advocate on the policy board – to both empower them to make decisions and to ensure that the voice of the voiceless is heard in all policy decision. National standards also expressly forbid active prosecutors, law enforcement representatives, judges and court officers from participation on the oversight board for the simple reason that there is a clear conflict of interest. As a *Shreveport Times* editorial points out in regards to prosecutors’ involvement in indigent defense issues: “you wouldn’t let University of Florida help pick the Louisiana State University’s football coach.” [*The Shreveport Times*. “Scare Tactics Out of Order: Prosecutors Off Base in Opposing Indigent Defense Reform Bill.” (6/6/2005)]

National experience also dictates that those people standing to financially benefit from the policies of a board like LIDAB should not be permitted to hold board positions that form said policies. Currently 31 states and the District of Columbia have a statewide indigent defense commission (or 63%). Of these jurisdictions, just three of 32 allow public defenders to have an appointing authority (or 9%). In fact, more states (5 of 32, or 16%) specifically prohibit public defenders or private assigned counsel attorneys who take indigent defense cases from oversight commissions than allows for them to be on the commission. In the balance of the states with commissions (75%) the lack of specific exclusionary language has never been to my knowledge put to the test of trying to put an active public defender on the commission because of the clear conflict it would cause.

²⁸ The nationally-renowned Justice Programs Office (JPO) provides technical assistance to federal, state, and local justice systems with a particular emphasis on: 1) public accountability of government agencies and officials; 2) the ethical responsibilities and standards of performance of government employees; and, 3) the cultural and historical foundations of the role of courts in a democratic society. JPO provides these services for all components of the criminal justice system – not simply for the defender services.

²⁹ Professor Sullivan is a member of the NLADA site team.

³⁰ “Even if open felonies were reported uniformly and accurately, and LIDAB was in a position to verify the statistics, ‘opened felony cases’ or ‘new assignments’ is not a sound measure of resource need. First of all, a jurisdiction may have a high percentage of juvenile delinquency cases or misdemeanor cases that is never factored into the equation. For example, District Y may have 500 felony cases, but only 100 juvenile delinquency cases whereas District Z may have 450

felony cases, 250 juvenile cases and 1,000 misdemeanor cases. Under the current LIDAB formula District Y would get more assistance despite District Z having a greater need for services (assuming that both hypothetical districts are uniform in every other way – e.g., have the same cash reserves, etc.).” NLADA. *In Defense of Public Access to Justice*. 2004. Page 62.

³¹ “More importantly, new felony assignments alone cannot give an accurate portrayal of need without an examination of pending cases, as explained earlier in this report. For instance, suppose that District A has 220 new felony cases in a given year but can only dispose of 150 of them. It leaves a balance of 70 cases still to be completed during the ensuing year. If in year two the same District is assigned another 220 felony cases but can still only adequately dispose of 150, the District will have 140 cases pending at the start of year three. This means that in year three, District A has 360 felony cases to work on (despite only being assigned 220 new cases). Contrast this with District B that has 250 new felony cases assigned to it during year one but can dispose of all of them. The same thing happens in each of the subsequent years. Under DAF disbursement calculations, District B would get more funding (again if all other factors are equal) though District A has a greater need for indigent defense resources.” *Ibid.*, Page 62.

³² Simply reporting open felonies *without* any independent verification of those numbers may lead to a situation in which a local indigent defense system simply never administratively closes out the cases correctly leaving a large number of open cases on the books. The large number would result in more resources despite the fact that the reporting was based on inefficient and non-effective administration of the system.

³³ Performance based budgeting (PBB) has two distinct effects on programs and program managers. First, decision makers allocate funding based on the proven effectiveness and quality of programs. Second, management accountability is subject to objective evidence with respect to achieving results. Effectiveness is rewarded in a PBB environment, rather than popularity or political advantage.

³⁴ Though there are currently not enough resources to fund every judicial district at appropriate levels, the current LIDAB budget could be pro-rated such that every judicial district uniformly receives the same portion of their total need (i.e. every judicial district will receive a uniform “60%” of their actual need, or whatever the appropriate percentage ends up being).

³⁵ At a 2004 meeting of the Louisiana Task Force on Indigent Defense, NLADA Director of Research, David Carroll, estimated that Louisiana need at least \$55 million to adequately fund indigent defense services. That projection was delivered with a caveat that the general lack of data may it difficult to make an accurate assessment. The \$55 million estimate was memorialized in the concurrent resolution passed in the first extraordinary session of 2006 asking for federal government support of indigent defense services in Louisiana post-Katrina. NLADA recommends that LIDAB and state policy makers think of the \$55 million estimate as a floor for proper adequate funding.

NLADA believes that there is a potential conflict for our organization to recommend that LIDAB hire us to conduct the needs assessment and financial projection. As such, we point LIDAB to the American Bar Association’s Standing Committee on Legal Aid & Indigent Defense (SCLAID) and its Indigent Defense Advisory Group (IDAG) as an appropriate resource to conduct this work.

³⁶ “An IDB in a judicial district in which the need for public defense services is greater than can be afforded through court costs must look for cost savings to stay afloat. There are only two

ways to cut costs related to indigent defense: either reduce the number of cases coming into the system or cut spending on salaries and case-related expenses. Since public defenders do not control their own caseload (it is dictated by the prosecution and courts), IDBs across the state have turned to low-bid, flat fee contract systems in which an attorney takes all of the indigent defense cases in a jurisdiction for a fixed fee. Flat-fee contracts create a financial disincentive for the attorneys to provide adequate representation since the attorney must pay for all case-related services (investigation, expert witnesses, etc.).” NLADA. *In Defense of Public Access to Justice*. 2004. Page 31.

Louisiana’s current contract system is mostly based on flat-fee compensation of attorneys described above. Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases, as practiced currently in much of Louisiana, create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled “Conflicts of Interest,” prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would “decrease the Contractor’s income or compensation to attorneys or other personnel,” because this situation creates a conflict of interest between attorney and client. The same guideline addresses contracts which simply provide low compensation to attorneys, as practiced in Avoyelles Parish, thereby giving attorneys an incentive to minimize the amount of work performed or “to waive a client’s rights for reasons not related to the client’s best interests.”

For these reasons, all national standards, as summarized in the eighth of the ABA’s *Ten Principles* direct that: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

³⁷ The Office of Public Defense Service contracts with ten non-profit organizations to provide primary indigent defense services in 11 of the state’s 36 counties. Twenty-four counties are served through either consortium contractors or individual law firm/private attorney contracts. In one county, indigent defense services are provided through an assigned counsel plan. In this county, and for conflict representation in other counties, the Office pays attorneys an hourly rate. All individual private attorneys must apply to the Office and receive certification in order to receive appointments.

³⁸ For example, in fiscal year 2000-2001, the workload for the Public Defender Services of Lane County (Eugene) was estimated at a total of 12,668 cases, or 6,334 cases for each six-month period. An appendix to the contract delineates the estimated caseload by case type – e.g., four murder cases in the year; 4,752 felonies; 1,992 non-DUI misdemeanors; 504 DUI misdemeanors; 2,760 violations of parole; 216 contempt, mental health or other civil matters; 720 appeals; 192 juvenile dependency proceedings; 1,032 dependency review hearings; 264 juvenile probation violations; and 16 cases representing parents in termination-of-parental-rights proceedings. Each type of case has a presumptive dollar value attached to it, based on the presumptive number of hours of work required – for example, \$15,000 for a non-capital first-degree murder case, or \$2,200 for representation of a parent in a termination-of-parental-rights proceeding.

³⁹ First and second degree murder cases require proof of five years of criminal litigation experience, familiarity with Massachusetts criminal courts, service as lead counsel in at least ten jury trials of a serious and complex nature over the preceding five years, at least five of which

have been life felony indictments resulting in a verdict, decision or hung jury. As with Superior Court certification, applicants must submit information along with recommendations of three criminal defense lawyers.

⁴⁰ A full-time attorney (i.e., a 40-hour work week) with two weeks vacation and observing federal holidays will work 1,850 hours in a year.

⁴¹ NLADA recognizes that the appellate circuits do not follow the current judicial districts in all instances. In the 11th judicial district, De Soto Parish is in the Second Appellate Circuit while Sabine Parish is in the 3rd Circuit. Similarly, the 16th judicial district is split over two appellate circuits (St. Martin & Iberia Parishes in the 3rd Circuit; St. Mary Parish in the 1st Circuit). Finally, the 23rd judicial district has Ascension and Assumption Parishes in the 1st Appellate Circuit while St. James is in the 5th. NLADA advises that in these few instances it is best not to break up the local judicial district in favor of the appellate circuit.

⁴² The citizenry of Louisiana will have to decide an appropriate threshold to require full-time public defenders. We suggest that the threshold be based on the 2000 Census and, at least, guarantee full-time public defenders in jurisdictions with a population of 400,000. Serious consideration should be given to lowering the threshold to 150,000.

⁴³ Indiana's indigent defense standards are promulgated by the Indiana Public Defender Commission. Their standards are available at: www.in.gov/judiciary/pdc/.

⁴⁴ The sixth of the ABA's *Ten Principles* provides that: "Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation."

⁴⁵ Under Guideline 2.11, the primary function of the Indigent Defense Commission should be to select the State Defender Director. The Chief Public Defender should only be removed for just cause. Guideline 2.12, Qualifications of Defender Director and Conditions of Employment: "The Defender Director should be a member of the bar of the state in which he is to serve. He should be selected on the basis of a non-partisan, merit procedure that ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria. "The Defender Director's term of office should be from four to six years in duration and should be subject to renewal. The director should not be removed from office in the course of a term without a hearing procedure at which good cause is shown."

⁴⁶ The switch from "public defender" to "public advocate" is more than just a linguistic exercise. The name change signifies to the people seeking their services that there is now a special focus on advocacy of the public.

⁴⁷ "Since 1976 jurors in Orleans Parish have recommended that the death penalty be imposed against 36 defendants. However, of the 36 capital cases, 23 ultimately became 'decapitalized' as the result of direct review in this Court or in the United States Supreme Court, post-conviction proceedings in the district court, or by executive action of the Governor's office. In addition, one case remains pending in the district court on remand from this Court following conditional affirmance of the defendant's conviction and sentence." *State v. Harris*, 892 So. 2d 1238, 1259-1260 (La. 2005)

⁴⁸ The Louisiana Constitution art. 1, § 17 guarantees that "the accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily." [cited in State v. Hall, 616 So. 2d 664, 668 (La. 1993), which overruled a death verdict from Orleans, noting that the trial judge failed to give defense counsel wide latitude in questioning.]

⁴⁹ In 1992, the Louisiana Supreme Court reversed because of ineffective assistance a death sentence in a case in which one of the veteran defenders had been the trial lawyer. State v. Sullivan, 596 So. 2d 177 (La. 1992) The conviction was upheld, but later reversed on different grounds in Sullivan v. Louisiana, 508 U.S. 275 (U.S. 1993). The state supreme court made striking findings about the complete failure of counsel to prepare mitigation. The practice it described seems quite parallel to many of the current defender cases. This case is now 14 years old and could have been used to change the practice, but it appears to have had little impact on the defender office. We quote below a significant portion of the opinion:

We note at the outset Sullivan's trial counsel, in the evidentiary hearing, candidly admitted he failed to prepare for the penalty phase of the trial because he "arrogantly" thought the jury would return only a second degree murder conviction, thereby precluding a penalty phase. Given the facts of this case, we believe his assumption to have been unreasonable. *We agree with the court which conducted the evidentiary hearing that any time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned.* (emphasis added) See Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985) (attorney who fails to make preparation for penalty phase deprives client of reasonably effective assistance of counsel). [footnote omitted]

We conclude in this case a reasonable investigation would have uncovered mitigating evidence. Counsel would have been able to put before the jury the fact Sullivan was raised in an abusive, alcoholic, often brutal environment. Sullivan's mother and sisters, had they been contacted, would have testified at length and corroborated the details of Sullivan's turbulent childhood. They also would have told the jury they loved him and pleaded with the jury to spare his life.

Further inquiry by Sullivan's counsel would have proved the existence of mental illness and explained its significance. The records of Sullivan's 1968 hospitalization for schizophrenia were readily accessible.

The Court continued:

We next conclude there can be no tactical reason for defense counsel's failure to put this evidence before the jury. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Busby, supra, at 171 (citing Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)).

Counsel's frank admission in the evidentiary hearing that he conducted no investigation whatsoever because of his abiding faith in his ability to obtain nothing more severe than a second degree murder conviction negates any assumption trial strategy motivated the decision to keep this evidence from the jury. Rather, it was counsel's complete failure to perform his duty to investigate that resulted in the jury's not having the benefit of the mitigating evidence, evidence which was both relevant and admissible. See Lockett v. Ohio, 438 U.S. 586, 605-06, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). Under these circumstances, then, we conclude the level of representation

Sullivan received at the penalty phase of the trial amounted to constitutionally ineffective assistance of counsel. *State v. Sullivan*, 596 So. 2d 177, 191-192 .

⁵⁰ Again, the *Citizen* case allows for death penalty case to be halted upon motion of defense counsel for inadequate resources.

⁵¹ See: West Virginia Office of Legislative Auditor, *Preliminary Performance Review of Public Defender Services* (1998) - available at www.wvpds.org ; West Virginia Public Defender Services, *Report of the Indigent Defense Task Force*, January 2000 – also available at www.wvpds.org . Report includes: The Spangenberg Group, *Final Report to the West Virginia Indigent Defense Task Force*, January 2000; North Carolina Indigent Defense Services, *FY02 North Carolina Public Defender & Private Assigned Counsel Cost Benefit Analysis*, 2003 – available at www.ncids.org .

⁵² The Commentary to the ABA Guideline notes: “In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.”

In other jurisdictions, it is well settled that defense attorneys may only work on one trial level capital case at one time. In Washington state, by Court Rule, “Both counsel at trial must have five years’ experience in the practice of criminal law, be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case.” SPRC 2. http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=supsprc2 In King County, Washington, by contract with the County, a defender office that had 32 open cases would have 64 attorneys working on those cases. Orleans defenders in effect are carrying caseloads that are more than 20 times greater than defenders in King County. Professor Singer reports that in Colorado, the defender office also limited attorneys to one capital case at a time.

The OADB capital caseload exists in the context of a criminal justice system in which it is accepted that part-time public defenders will handle 600 felony cases per year. One former capital attorney reported in May that he was juggling 1000 felony cases, and he could not find some of his clients. One former defender reported that before the hurricane, he would receive 25 new clients every other week, and do his private practice on the other weeks. That lawyer admitted that “some days my head was spinning.” This caseload, equivalent to 1200 felony cases per year, is eight times the national standard of 150 cases per lawyer per year. (At 1650 billable hours per year, this caseload would permit only 1.38 average hours per felony case. This is shockingly insufficient to provide effective representation.) The lawyer reported that he won acquittals in 9 of ten defender trials, with the other resulting in a lesser charge.

One veteran lawyer reported that he used to do one capital case a year within a regular felony caseload that ranged as high as 400 to 500 per year. He said that he would try 50 to 60 trials a year and one year tried 102. He was able to resist continuances by the DA and had one of the highest *nolle pros* rates. He agreed that he was basically “winging it”. He described the practice as “guerilla lawfare”, with a jiu jitsu defense. He used his big docket as a device to put pressure on the judge, to get reductions, dismissals, decent sentences. He acknowledged that “maybe something is short-changed.”

He noted that “custom and usage” in New Orleans was that trials would take about a day. When he himself was a judge for a while, he pushed a capital trial to finish in four days. “To me,

it seemed like the way things are done.” This was despite the request of the non-defender trial lawyer, Clive Stafford Smith, to take two weeks. There was no penalty phase in the case. At the time of the hurricane, he had 200 open cases in his section of court. His list of clients was wiped out in the storm, and he has been reconstructing it, identifying about 80 of his clients in his section, and about 70 in another section that he was covering after the storm. This lawyer criticized his colleagues for pleading so many people guilty to long sentences, and gave an example of a prostitution case he tried in which he won an acquittal, telling the jury he was ashamed of his colleague who had told the client to plead guilty in an earlier case.

This attorney said that he had tried about two dozen capital cases, obtaining a few acquittals, and the only death verdict, his first capital case, was reversed on appeal. He only had about half a dozen penalty phase trials. This lawyer reported that he has cut back his private practice since the early 1990's, and never really regarded himself as a part-time defender. He noted that he did do a first degree murder case in Jefferson Parish as his last real big private case.

The defenders seem to think that their workload is manageable and that generally they do a competent job. There is no question that at least some of them work long hours. One of them provided prompt email answers to several questions a member of the NLADA team sent on the weekend, at night, and on a holiday. Another attorney reported that he is in the courthouse from 9 a.m. to 7 p.m. most days. But the amount of time they can spend on a case is quite limited.

One veteran lawyer recommended that the defenders should be full time. He said that “The practice of law is a business.” He said that faced with the choice between staying in court on defender work or going to the office to generate new private revenues, “logic says it is going to prey on your mind.”

Ed Greenlee, head of the LIDAB, wrote of the caseload standard set by LIDAB: “5 is the maximum. Even though we don’t formally have case weighting procedures, informally that is what the conflict panel directors do is to subjectively limit the cases based on the severity. That is why it says no more than 5.” It appears that almost all capital attorneys in publicly funded capital trial offices have a private practice. Mr. Greenlee described the modest limitations on that practice: “They are allowed a minor outside practice. The limitations are no outside capital or other serious criminal cases or serious civil cases if it would require a trial that would keep them out of the office. In effect, they mostly handle DWI, traffic or drug cases that don’t require much in the way of in court appearances.”

⁵³ As noted above, the defenders have limited support staff and expert resources. The capital defenders report that they do not get timely investigation reports and that in some cases they do their own investigation, carrying a tape recorder. They would like “a true mitigation expert to help me do the things I am not qualified to do”, and to obtain records and psychological evaluations.

The head of the capital unit said that at times the capital lawyers had to share an investigator with ten other lawyers. They had a “great” investigator about ten years ago, but she left saying that she had to lower her standards to keep going. The director acknowledged that one of the staff investigators had been fired from his previous job as a police officer. He said he did not know the reason for the firing.

One defender said that he relies on experts who will work for free. He said that there have been times when he has not been able to get an expert, noting one in which he wanted a psychiatrist to be prepared for the penalty phase. He said he did not ask because he knew the financial state of the office and “the mood of the judges”. He observed that this situation puts the director of the defender program in a bind, choosing between salaries for staff and experts for the client's case.

One defender said that he can assess competency himself. The defenders frequently have relied on doctors willing to work without compensation as experts. Similarly, one defender said,

when asked whether he would have an expert to testify about the effects on his client of long-term alcoholism: “As to expert, and not being facetious, but we here in New Orleans are unfortunately all experts on the effects of alcohol. One of the benefits of living in a city where there are no closing laws and many visitors come to get drunk.”

The ABA commentary states: “Counsel’s own observations of the client’s mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation).” 31 Hofstra Law Review 913, 956 (footnote omitted).

The most senior capital attorney said that he would like the NLADA team to recommend money for experts. He noted that if the defense asks the court for money for experts, the judge says the office has money. It has been a “long, long time” since an out of state expert was used. He said that they need more resources, equipment, investigators, and dedicated funds for experts. He said he currently has two cases that require experts, and suggesting that he would not have the money for them, said “I’m going to cry and hope they will get life.”

⁵⁴ Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

One of the most striking omissions in the New Orleans practice is the lack of any mitigation preparation before the district attorney makes the charging decision to seek the death penalty. Generally, the capital defenders do not work on the cases until at least 60 days after the client is taken into custody, after the state has made the decision to seek death. The head of the capital unit said that when he knows of an inmate who has had a preliminary hearing he asks the mitigation staff to give an opinion on the need for experts. But he does not assign an attorney to the case until the 60 days has passed, because he does not have the resources to do so. He notes that a significant percentage of cases are “refused” -not pursued by the district attorney-and that many are “accepted” as charges other than first degree murder.

He agreed that it would be helpful to do mitigation work before the charging decision, if the district attorney would be willing to listen to it. He remembered one case in which the district attorney had given him that opportunity. A senior district attorney noted that “if we feel a deal is appropriate, we make sure to get a lawyer” for the defendant. When told about the King County, Washington, practice of the defense presenting comprehensive mitigation packages to the prosecutor before the death penalty charging decision is made, the senior district attorney said, “I have never seen that. What I have seen OADB do a high school kid could have found.” He noted that in one case, the defense attorney brought family records that if they had had before the grand jury, “it probably would have been different.”

⁵⁵ There is reason for concern, however, about the OADB lawyers’ skill in the investigation, preparation, and presentation of mitigating evidence, based on their infrequent use of expert witnesses, their failure to develop mitigation presentations to the district attorney prior to the charging decision, and some case law indicating a complete failure in the past to conduct mitigation investigation. Even if skilled, their overwhelming caseload and lack of support staff make it impossible to prepare consistently effective mitigation presentations. It is clear, as discussed above, that generally no negotiations occur during the critical first 60 days of the case, as the defenders do not even represent the defendants during that time. In addition, because of

limited resources, the lawyers make judgments about which cases need mitigation. This is a dangerous approach and in conflict with ABA Guidelines and the national standard of practice and the standard of practice other Orleans capital lawyers follow. There simply must be development of a mitigation package and evidence in any case in which the government has not made clear that it will not seek to kill the client.

⁵⁶ The OIIB lawyers do not conduct thorough investigations. As the commentary points out, this risks not only death verdicts but also conviction of innocent people:

“ Unfortunately, inadequate investigation by defense attorneys - as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, flawed or false forensic evidence, and the special vulnerability of juvenile suspects - have contributed to wrongful convictions in both capital and non-capital cases. In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error. This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.”

The Commentary outlines the elements of an appropriate investigation including interviewing “ witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense....”

The Commentary also points out investigation needs that the OIIP lawyers typically do not meet:

“Because the sentencer in a capital case must consider in mitigation, “anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,” “penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.” At least in the case of the client, this begins with the moment of conception.” [footnotes omitted]

⁵⁷ NLADA acknowledges and applauds the Louisiana Public Defender Association’s proactive approach to indigent defense reform by spending time developing a reform plan. Though NLADA takes exception to the “opt out” provision of the LPDA plan, it should be noted that we have adopted many aspects of their work, including a reasonable roll out of the changes rather than a sweeping change on a specified date, a contract based system, and regionalization.

⁵⁸ Amburgey, Bryce. Kentucky Department of Public Advocacy. “Will 9/11 Drive Crime Rates and Defender Workloads Up? The Experts Say Yes.” *NLADA Cornerstone*, Winter 2001/2002, Issue 4; Gould, Eric with Bruce Weinberg and David Mustard. “Crime Rates and Local Labor Market Opportunities in the United State: 1979-1997. National bureau of Economic Research Summer Institute Workshop. Cambridge, MA. July 6, 1998 (Revised October 2000).

⁵⁹ The State Comptroller of Alabama keeps \$50,000 from the fund to offset the costs of administering the fund.

⁶⁰ As noted in SCR 25 of the first extraordinary session of 2006, the legislature has memorialized that the estimated need for indigent defense in Louisiana is in the neighborhood of \$55 million dollars a year. Admittedly, this estimate is based on limited data, but it does incorporate an intimate understanding of indigent defense funding in the other 49 states. For example, despite having a lower crime rate and lower poverty rate than Louisiana, Alabama state government

spends about \$37 million (or nearly twice the amount that the State of Louisiana currently spends and nearly four times more than Louisiana spent prior to Governor Blanco's recent budget increase) to augment its indigent defense alternative revenue streams for a total expenditure of \$45 million. By comparison, a state like Oregon (with a population that is three quarters the size of Louisiana and has a vastly lower crime and poverty rate) spends nearly \$100 million on its defense services.

⁶¹ One out of every 121 Louisiana residents are incarcerated in federal prison, state prison or local jail (37,000 of the state's nearly 4.5 million residents. United States Department of Justice, Bureau of Justice Statistics. July 2003.

⁶² Louisiana's crime rates are among the highest in the country. For example, Louisiana ranks 22nd of the 50 states in population. In 2000, Louisiana had a total Crime Index of 5,422.8 reported incidents per 100,000 persons, ranking the state as having the fourth highest total Crime Index of the 50 states. For violent crime, Louisiana had a reported incident rate of 681.1 per 100,000 people. This ranked the state as having the 7th highest occurrence for violent crime among the states. In the same year, Louisiana had 12.5 murders per 100,000 people, ranking the state as having the highest murder rate in the country.

To complete the picture, Louisiana's robbery rate was 168.5 ranking the state 8th highest for robbery. The state also had 466.6 aggravated assaults for every 100,000 people, the 6th highest among the states. For crimes against property, the state had a reported incident rate of 4,741.7 per 100,000 people, which ranked as the 5th highest. Louisiana has the 4th highest burglary rate in the nation. Larceny-theft was reported 3,229.9 times per 100,000 people in Louisiana, which is the 7th highest among the states. Vehicle Theft occurred 475.9 times per 100,000 people, the 10th highest among the states. All statistics are for the year 2000.

(<http://www.disastercenter.com/crime/lacrine.htm>).

⁶³ See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

⁶⁴ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 186.

⁶⁵ NSC, Guideline 5.1, 5.3; ABA, Standards 5-5.3; ABA Defense Function, Standard 4-1.3(e); NAC, Standard 13.12; Contracting, Guidelines III-6, III-12; Assigned Counsel, Standards 4.1,4.1.2; ABA Counsel for Private Parties, Standard 2.2 (B) (iv).

⁶⁶ The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. See *Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded indigent defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355,

681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den.* 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

⁶⁷ NLADA, *Indigent Defense and Commonsense: An Update*, (Washington, DC 1992), p. 7.

⁶⁸ For maximum efficiency and quality, national standards call for particular ratios of staff attorneys to other staff, e.g., one investigator for every three staff attorneys (every public defender office should employ at least one investigator), one full-time supervisor for every ten staff attorneys, as well as professional business management staff, social workers, paralegal and paraprofessional staff, and secretarial/clerical staff for tasks not requiring attorney credentials or experience. National Study Commission, Guideline 4.1.

⁶⁹ For example, if attorneys recorded 2,520 hours and 288 dispositions during the time study under the “juvenile delinquency” classification, then the average delinquency case in the jurisdiction takes eight hours and 45 minutes to bring to disposition ($2,500/288 = 8.75$). An exception to this rule is in civil cases such as Children in Need of Services. Since those case-types may continue on for years with out a formal disposition, attorneys will be asked to track the number of hearings. In these cases only, standards will be form based on the number of attorney hours required per hearing.

⁷⁰ Public Defender attorneys are generally considered exempt employees. Using nationally recognized methodologies to measure workload of exempt employees, a 40-hour workweek is used as the starting point for calculating a work year (NLADA recognizes the fact that public defenders often work in excess of a 40-hour workweek.) The work year is determined by multiplying 40-hours by 52 weeks minus hours associated with vacation, holidays, other allowable leave time and required training days.

⁷¹ If a jurisdiction’s public defender work year were 1,750 hours, then the resulting juvenile delinquency standard in the example above would be 200 cases ($1,750/8.75 = 200$). This means that no public defender attorney should handle more than 200 delinquency cases in a single year if that were the only type of case she handled. If a defender manager projects 2,200 delinquency cases for the ensuing year, the office requires 11 attorneys to handle the juvenile representation ($2,200/200 = 11$).

⁷² There are compelling reasons to requiring attorney supervisors to carry a limited amount of cases, including: (1) it helps them to stay current on criminal law and court practices as they change; (2) watching skillful, experienced attorneys in court is often good for morale and is an effective way to demonstrate practices than less experienced attorneys can; and (3) it provides mentoring opportunities for less experienced attorneys through “co-counseling” or “second-chairing” cases. Attorney supervisors with caseloads generally are assigned more complex cases that are likely to go to trial.

⁷³ NLADA can provide OADB with sample performance plans from other public defender

organizations to assist in this endeavor.

⁷⁴ A meaningful evaluation process should include both “objective” measures of performance such as case dispositions and other statistics, and the so-called “subjective” measures such as courtroom observation and review of files. The “subjective” measures should be employed by reference to the policies and procedures and may also include the judgment of experienced supervisors about an attorney’s courtroom performance, sensitivity in dealing with clients and other factors. Whether “objective” or “subjective,” these measures should be memorialized as performance standards and should be consistent with the NLADA *Performance Guidelines* and other national standards. The performance expectations should be published and made available to all staff, and they must be applied equally to all staff in the same categories (for example, all first year attorneys).

⁷⁵ While some of the emphasis here is on attorneys, it should be clear that the performance plan should include position descriptions, performance guidelines, supervision and evaluation processes, etc. for all staff, although tailored to the specific position functions.

⁷⁶ Some practices, like watching supervisees in court, may occur only a few times during a supervision cycle, while others, like case discussions, could be a weekly occurrence. Ultimately though, frequency should be determined individually, and may vary based on experience levels and individual needs.

⁷⁷ Some of the best community-oriented defender offices exist in Southern states. For example, in addition to addressing a client’s pending criminal charges, the public defender of Knox County, Tennessee (Knoxville) has developed a Community Law Office (CLO) with a social service component dedicated to working directly with the client to design a life skills plan of action. This plan offers clients the opportunity to address individual needs and to utilize their skills and talents to generate personal and community value. Rather than dictating a direction for the future, the CLO empowers the client to play an active role in shaping his or her own personal goals, including: assessment of client’s physical needs including housing, food, transportation, and clothing; assessment in client’s need for alcohol and drug treatment; assessment in client’s mental and behavioral health needs; aid in obtaining valid identification, such as Social Security card, valid Drivers License, or Birth Certificate; Job counseling; housing placement assistance; Life skills classes, including budgeting and parenting; and, literacy classes. In addition, the CLO sponsors other innovative initiatives, including the “Introduction to Communication through Art” program. The program is open to at-risk kids ages 11-19, or siblings of clients of the Public Defender’s Office, Juvenile Court clients, and youth at risk and supports dramatic arts performances, music and art classes.

Fulton County, Georgia (Atlanta) is typical of urban areas throughout the United States with respect to the pressures on its criminal justice system. Court calendars, courthouses and jails are overcrowded. Judges, defense attorneys, prosecutors, probation officers and ancillary court personnel cope with immense caseloads. The prevalence of substance abuse-related crime is all but absolute and there is an over representation of people charged with crime who have mental disabilities. The Fulton County Conflict Defenders (FCCD) began the “SB440 Youths Indicted as Adult Defendants” program to address the needs of 13 to 17 year old teenagers who are charged with felonies in the adult Superior Court. Upon assignment, a FCCD staff social worker immediately begins assessment and case mitigation activities. The social workers can complete psychological, social and personal history assessments as needed. Consequently, trial strategies can be developed quickly and effectively without the need to retain outside experts. The social workers are directly involved in development of dispositional and sentence mitigation strategies

related to such things as substance abuse residential treatment programs, supervised residential living and outpatient treatment.

A problem faced by the SB440 program was a lack of family and home support for young people charged in the adult court. This inhibited judges from releasing these young people on bond and discouraged dispositions other than incarceration. Simply said, there was no place for these kids to go besides jail. So, FCCD created a place by seeking partners and establishing Rosser House, a group home that cares for and supervises SB440 youths. In collaboration with other community stakeholders, FCCD obtained funding to rent a two-story house in suburban Decatur, obtained the necessary licensing and permits, refurbished the house, installed phone lines for each resident subject to ankle monitoring, and contracted an established residential service provider to supervise the youth.

⁷⁸ One of the best community-based offices is The Neighborhood Defender Services of Harlem (NDS) in New York City. NDS was founded in 1990 on the premise that the public law office should be situated in the client community rather than near the courthouse. NDS offers its clients both public defender services and civil legal services to address both the pending criminal charges and the life-situations that may have contributed to the client becoming caught up in the criminal justice system. NDS practices what is known nationally as “team” representation. NDS clients are assigned not solely to a single attorney but to a “cross-functional” (multidisciplinary) team of attorneys, investigators, social workers and others, all of whom are expected to be able to step in if necessary to provide services to a particular team client.

Through educational workshops and youth programs, NDS also teaches community members about the legal system, the rights and responsibilities of ordinary citizens and members of law enforcement, and the myths and realities of the criminal justice system. Community members ranging from teenagers to senior citizens want advice on how to deal with police who stop them on the street; parents and grandparents want to know how to help children who get in trouble; and everyone wants help navigating a criminal justice system that seems foreign and hostile. NDS’ education and outreach programs respond directly to these needs, helping people cope with the daily frustrations and occasional crises of life in a heavily policed inner city.

⁷⁹ The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. February 1997. Page 28-29. The Spangenberg Group report paints a vivid image of the poor office space public defenders were working under at the time of their visit. At page 11, the report comments that the bathroom and kitchen look like they have not been cleaned in years and that a rat was reported to be in the kitchen during their visit. Spangenberg also commented that the public defender office is located next to the coroner’s office and that the waft of dead bodies wafts into the public defender office. See page 11-12.

⁸⁰ Ibid, page 11-12.

⁸¹ It is also beneficial to the overall health of the organization to re-integrate juvenile and municipal court staff back into the main office. Attorneys and staff are best served when a cross-pollination of ideas freely float between specific criminal specialties to address the clients’ needs.

⁸² The name of the defendant has been changed to protect her privacy. NLADA site team members reviewed her case file and interviewed her attorneys to validate the facts stated here.

⁸³ This problem was also described in the Southern Center’s report: “Individuals arrested on criminal charges were brought to court for an initial appearance a day or two after being arrested. Some individuals were brought to magistrate’s court, where an OID Program attorney was

appointed ‘solely for the purposes of this hearing.’ These individuals reported that the assigned attorney did not conduct even the most cursory interview to solicit information about the arrestee’s ties to the community, employment history, charges, or any other information.” SCHR. *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 10.

⁸⁴ See Also: SCHR. *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 10. “Bonds in New Orleans were unusually high, yet OID Program attorneys almost never advocated for lower bonds. Paid attorneys routinely and vigorously argued for bond reductions. A number of interviewees reported it was understood among arrestees that if you wanted someone to argue for a reduction in bond, you would have to hire a private attorney because OID Program attorneys seldom or never did.”

⁸⁵ See: SCHR *Report on Pre- and Post-Katrina Indigent Defense in New Orleans*. Page 11. “The men and women who could not afford to hire attorneys pre-Katrina and now continue to languish in jail described their appointed attorneys’ pre-Katrina performance as ‘passive,’ ‘not interested,’ and ‘absent.’”

⁸⁶ The Spangenberg Group. *The Orleans Indigent Defender Program: An Overview*. p. 37

⁸⁷ Again this delay in identifying conflict cases was criticized by The Spangenberg Group in 1997. “In practice we were told that attorneys often wait as long as possible to declare a conflict and frequently represent co-defendants during many stages of the criminal proceeding.” (Ibid. p. 20).

⁸⁸ *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.

⁸⁹ Louisiana Revised Statutes require each judicial district to form an indigent defender board (IDB) [La. Revised Statutes, Title XV § 144]. Across the state, IDBs vary in size – but must have at least three members and no more than seven. Each district board is required to select one of the following procedures or any combination thereof for providing counsel for indigent defendants [La. Revised Statutes, Title XV § 145.]: a) *Assigned Counsel System* -- Appointment by the court from a list provided by IDB of volunteer attorneys licensed to practice law in the state. In the event of an inadequate number of volunteer attorneys, appointment shall be from a list provided by IDB of non-volunteer attorneys; b) *Contract System* -- IDB may enter into a contract or contracts, on such terms and conditions as it deems “advisable” with one or more attorneys licensed to practice law in the state and residing in the judicial district to provide counsel for indigent defendants; or, c) *Public Defender* -- IDB may employ a chief indigent defender and such assistants and supporting staff, as it deems necessary. The chief indigent defender is to be appointed for a period of three years and may not be a member of the board. IDB sets the salaries of the chief indigent defender, and all assistants and supporting personnel.

The Orleans Indigent Defense Board delivers services through the third option – a public defender office.

⁹⁰ In Louisiana, it would have cost Mary \$600 to post a \$5,000 bail. NLADA conducted an informal survey of private criminal defense attorneys in the area and determined that the cost of hiring any private criminal defense lawyer for the simplest of felony charges generally runs between \$5,000-\$10,000.

The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state that, “[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to

obtain such representation (Guideline 1.5).” “Substantial hardship” is also the standard promulgated by the ABA. (*ABA Standards for Criminal Justice: Providing Defense Services* 5-7.1 states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”) While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel 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.

In practice, the “substantial hardship” standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly expenses, local private counsel rates) would result in a “substantial hardship” were they to seek to retain private counsel.

In the 2005 regular session, Senate Bill 323 established a presumptive threshold of 200% of the federal poverty guidelines. There is some question as to whether judicial districts are using this threshold uniformly.

⁹¹ ABA Standards for Criminal Justice: Defense Function, Standard 4-3.1(a).

⁹² NLADA Performance Guidelines for Criminal Defense Representation, Guideline 7.5

⁹³ ABA Standards for Criminal Justice: Defense Function, Standard 4-3.6, 4-3.8; NLADA, *Performance Guidelines for Criminal Defense Representation* Guideline 1.3(c).

⁹⁴ ABA Standards for Criminal Justice: Defense Function, Standard 4-5.1, 4-5.2, 4-6.1, 4-6.2.