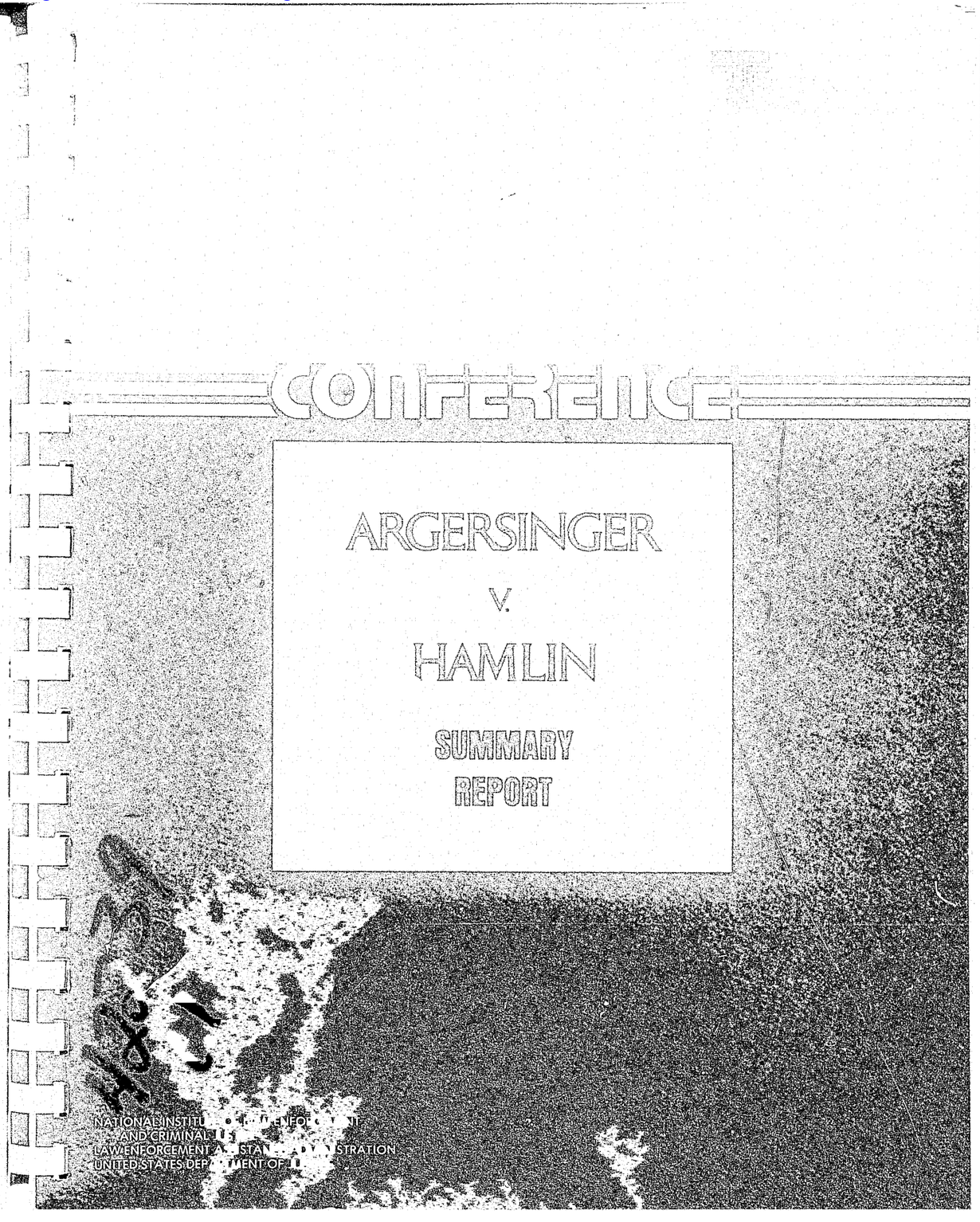

As a research agency, the National Institute is interested in exploring the tradeoffs involved when one aspect of the administration of justice is altered. When the U.S. Supreme Court in 1972 handed down its decision in Argersinger v. Hamlin, mandating that counsel be provided for all defendants who faced the possibility of incarceration, the Institute decided to fund a study of its implementation.

To disseminate the research findings, the Institute sponsored a conference in October 1976 for more than 115 members of the legal profession. Experts in the field wrote position papers and conducted workshops on various aspects of implementation.

These proceedings include a summary of discussions on important issues: appointment of counsel; defender or counsel management; eligibility; legislative and rule changes; determination of needs and demands; and measuring the effectiveness of counsel. The report also includes the major addresses made by then-Deputy Attorney General Harold R. Tyler and Dean John F.X. Irving, of the College of Law, Seton Hall University.

The Institute hopes that this conference report will contribute to a better understanding of the problems associated with delivery of legal counsel to indigent defendants.

Gerald M. Caplan
Director
National Institute of Law Enforcement
and Criminal Justice

National Institute of Law Enforcement
and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

Argersinger v. Hamlin

Summary Report of a Special Conference

Prepared by:

UNIVERSITY RESEARCH CORPORATION
Washington, D.C.

This report was supported by Contract J-LEAA-022-76 awarded by the Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

EXECUTIVE TRAINING PROGRAM
IN ADVANCED CRIMINAL JUSTICE PRACTICES

CONTENTS

FOREWORD

Cheryl Martorana

Director, Courts Division
Office of Technology Transfer
Law Enforcement Assistance Administration

As most of you know, the Argersinger decision, which held that no person may be imprisoned unless he was represented by counsel at his trial, was handed down by the Supreme Court in 1972--over four years ago. It might seem strange that we're still trying to determine how to implement that decision. In fact, however, the reason for considering it now is not the decisionmaking by the Supreme Court, but the publication last year of a research study by Boston University's Center for Criminal Justice, sponsored by the National Institute, to see how the decision was being implemented in the states and make recommendation on how to improve the quality of representation being provided to indigents accused of misdemeanors.

When the Court handed down the Argersinger decision, both the Justices themselves and a number of observers, including those who would be responsible for implementing the decision, expressed much concern. Their concerns pertained to whether it was even feasible to speak of implementing the decision. There was speculation about what results would be produced within the criminal justice system by adding such a major burden to it. Jurisdictions that had been having difficulty supplying counsel in felony cases would now have to supply counsel in ten times more cases than they had previously.

The Boston University study, directed by Sheldon Krantz, was an effort to look at all the implications of the decision and analyze the practical impact on the courts. Further, the researchers tried to look for those jurisdictions which seemed to be doing a good job and use their experiences as a basis for recommendations to other jurisdictions faced with the same problems. The Center staff then took an in-depth look at the operation of the indigent defense systems in nine jurisdictions and conducted more preliminary work in a wider range of jurisdictions around the country. They concluded that, for the most part, the decision was being ignored or flaunted and that serious attempts were being made to override the intent of that decision. For instance, judges were openly encouraging waiver of the right to counsel. There were a number of jurisdictions where a defendant would have to choose between making bail or getting an attorney, because if he made bail (even if it was a $50 bail) it was assumed that he should be able to pay for his own attorney.

The research team's discovery of an alarming lack of compliance with the decision prompted the National Institute's interest in increasing the level of awareness of the problem among members of the bar and the judiciary and in stimulating more appropriate responses. Although the study report is currently available from a private publisher, we determined that it was essential to make summary copies of the report available throughout the criminal justice system. As a result, we distributed copies of the report to some 6,000

officials throughout the United States who would be in a position to act upon the recommendations in it. These officials included trial judges, district attorneys, and court administrators, in addition to public defenders.

Now it is appropriate to consider and discuss the implications of the study's findings and whether recommendations for improvement can be made to work. LEAA and the Institute also looked to this conference as an opportunity to get ideas about how to build on the work that has been done and determine what kind of follow-up activity is required.

INTRODUCTION

Geoffrey M. Alprin

Director, Office of Research Programs
National Institute of Law Enforcement and Criminal Justice

The research effort that forms the focus of this conference is one of several undertaken by the Institute to analyze and improve the quality of counsel available to indigent misdemeanants. We have also sponsored a major national survey of public defenders on issues relating primarily to the quality of representation.

This survey, conducted by the National Legal Aid and Defender Association, focused on four issues: plea bargaining practices, the relative cost of assigned counsel and public defender systems, obtaining the most effective use of support personnel, and the accessibility of legal counsel to defendants.

A report is now being completed, but the initial survey findings verify what many of us already know--that in many jurisdictions there is generally little adequate legal representation, especially in misdemeanor cases. For example, in 60 percent of the defender systems surveyed, a misdemeanor's first access to legal counsel occurred at the first court appearance. In another 20 percent of the systems, counsel's first contact with the defendant was made after the first court appearance. With regard to workloads, some 13 percent of the chief defenders responding to the survey indicated that full-time attorneys on their respective staffs handle in excess of 500 misdemeanor cases annually, and that very little preparation time goes into the average misdemeanor case. Twenty-eight percent said the average preparation time is one hour or less, while another 31 percent said it was about two hours. Less than 15 percent of the chief defenders reported an average preparation time of four hours for a typical misdemeanor case.

These kinds of statistics are being verified in another research project that is also just being completed. It studies the opposite side of the coin--the defendants', rather than the lawyers', perspective on the criminal justice system. This project, conducted by Jonathan Casper of Stanford University, studied 600 defendants--200 each in Baltimore, Detroit, and Phoenix. It has found that about two-thirds of the defendants who had public defenders spend less than a half hour total time with their respective attorneys. Nearly half of this group reported that they spent less than 10 minutes with counsel. In view of these findings, it is not surprising that nearly half of the public defender clients participating in this survey felt their attorney was on the prosecution's side.

People working in the criminal justice field know full well that the kind of legal representation available to a poor person is in no way comparable to that which can be obtained by a person who can afford to pay. Perhaps nothing can be done about that. The rich will probably always have more careful and more precise legal representation than will the poor. However, the first

obligation of those who operate in the public sector is not to see that the quality of representation is necessarily equal, but to ensure that the representation provided to the poor is at least adequate, that it meets minimum standards. A defendant in a criminal case spending 10 minutes with an attorney does not meet anyone's idea of minimum acceptable standards for effective assistance of counsel.

To determine whether minimum requirements were being met, the Institute awarded NLADA another grant that resulted in the development of an evaluation design for defender offices. This model instructs an outside team of evaluators in the specific items that should be available in any defender agency seeking to meet minimum requirements for effective assistance of counsel. It also provides detailed instructions on both the substance and procedures to be used in assessing a defense delivery system and contains a manual that can be used by defender offices to evaluate their own operations and identify areas where they do not meet minimum standards.

We hope that through meetings such as this one, in which the needs of the indigent defense system are discussed, and through the use of evaluation tools we have helped develop, an awareness of the needs of the defense bar and of methods for improving the public defense aspects of the criminal justice system operation will be realized. You may not agree with the position papers presented in the workshops. You may not agree with all the potential ways to reduce the defense workload through legislative and procedural changes recommended by the researchers at the Boston University Center. But we hope that you will be more informed of the options available for improving the operation of the defender system, and that you will be enthusiastic enough to try to implement some of the more promising possibilities in your jurisdiction.

Address By

John F. X. Irving
Dean of College of Law, Seton Hall University

It has been said that you can judge a society by the way it deals with its offenders, its unfortunate. If so, we are not ready to be judged. It has also been said that the way we treat the indigent in trouble, the elderly, and the troublesome child tells us something about ourselves, but, we don't want to hear it. They say we can see in the young drug abuser our own latent dependencies gone wild, but we refuse to face the possibility that this may be so. They say the juvenile court is a great experiment that hasn't worked; that the criminal courts, in our inner cities at least, are in their death throes; and that the municipal courts in many communities--the misdemeanant courts--are the poorest examples of American justice. And unfortunately, they are the most visible.

If all these allegations are true, then we have not reacted in a healthy fashion to our problems, just as our legal profession responded to Watergate in a most feeble fashion.

I would suggest that in fact we cannot react because of emotional shell-shock that affects us all. We have witnessed enormous waste of federal state monies, widespread political corruption, scandal after scandal, kickbacks by corporations, influence peddling by elected officials, and wholesale violence for entertainment, and murder for fun. We have lost our ability to be shocked. We have seen so many human beings suffer indignities that we ourselves have become to some extent dehumanized.

The right of the misdemeanant to counsel, therefore, is especially important as a fountain for rejuvenation of our energies and enthusiasm, especially in directing our attention to the uneven, half-hearted, and, yes, even insincere mechanisms and responses to the Argersinger Rule.

I submit that the right to counsel for misdemeanants could have been predicted a long time ago. The full panoply of due-process rights is still unfolding. It seems to me that the day must come when no human being loses a legal right--civil or criminal--without a fair hearing, whatever that may mean. The extension of that right, its interpretation, is one of the areas still to be defined by leaders in criminal justice.

We see the inadequacy of the response in volume every day. I regret that the implications of Argersinger have not been taken seriously. There is evidence of at best a dubious commitment to the Supreme Court mandate, if not of insincerity, across the country. I see a lack of full commitment. One judge said to me, "I don't care if the Supreme Court of the United States reverses me once in a while; I reverse the Supreme Court every day."

Recent surveys indicate the inadequacy of the response to the mandate to provide counsel prior to any incarceration. A year and a half ago, I toured one of the worst municipal courts in the country. The public defender, a year and a half or so out of law school, took me through this old building. The defender and the police prosecutor shared the same office which should not be, and received messages on the same phone. Fortunately, they were civil to one another. Neither had a secretary. There was no privacy in interviewing defendants. The tapes required by the state supreme court of such hearings were inaudible. Appeals, therefore, were impractical.

I stood in the clerk's office and watched untrained clerks issuing warrants for the arrest of indigents. There was no finding of probable cause under oath, and nobody raising a hand, saying, "Yes, this is so-and-so." Partially as a result of that, many a man was arrested improperly when his son was in trouble, because he and his son had the same name.

When I complained about the fact that all of those judicial clerks were officers of the court and able to sign these warrants and when I complained about the violation of the Federal rights, I was told, "We have been making progress. Until recently, the signatures were affixed by a handstamp. And now, the untrained clerks are signing their names." One cannot help wonder about the progress of our times.

Last June, a student in the seminar I teach on The Administration of Justice; Problems, and Remedies, did a survey as part of the seminar requirement on municipal courts in one county. I want to mention four of her findings. First, the judges played the role of both prosecutor and judge. Second, many called witnesses back for cross-examination, but some refused to let the defender do any further questioning. Three, many judges have the defendant's complete record in front of them even during the adjudication. Finally, in very few instances are the full rights of the defendant explained to him.

What should be the role of counsel? There is a notion prevalent that the role of the defense counsel is to keep the cases moving. I reject that notion. At the juvenile level, there's a widespread feeling that the obligation of the attorney for the child is not to worry so much about guilt or innocence, but to work out some rehabilitation plan for him. I reject that. Since 1962, the standards have said that the role of counsel for the indigent accused of crime--or now of a misdemeanor--is to provide competent, zealous, and experienced representation, and not to be a social worker within the court system. How has this role been implemented, and what is the potential for providing quality counsel at the misdemeanant level? I think that is the overriding question.

There are three little-appreciated facts about counsel and about municipal and misdemeanant courts. The first, as Marshall Hartman pointed out some time ago, is that the Argersinger decision should prompt the legislators in each of the states to decriminalize some of the victimless crimes which now occupy excessive time of the police and courts. I have not seen that happen.

A second observation is that the misdemeanant, so often a first-time offender, is exhibiting serious behavioral problems. I have watched many of them be dismissed from the court with a warning but without any recommendation that they seek professional help. I wonder how many crimes of violence or suicides could be avoided if we had more sensitive officials in misdemeanant courts. I'm afraid that too often misdemeanant courts are counterproductive. I'm afraid the defendant is rushed through an assembly-line system, leaves the court, and goes back on the street more hostile to society than when he came in.

I've seen the same things in county jails. I think one of the ironies of our joint effort to upgrade our system of justice is that some of the facets of the system are making it more difficult for us, in that they engender hostility instead of good will; they make hardened offenders instead of law-abiding citizens.

The third observation I would like to make is that, unlike the chaplain who traditionally walks the last mile with the defendant, the defense counsel helps him take the first step back. Those of us who have been in this field for many years believe that the first step in rehabilitation is to give the defendant, however hardened he may be, the feeling that he's had his day in court; he's had a fair hearing; the judge has heard his side of the case; and the disposition is fair.

Let me make a few recommendations about this general subject matter and broaden it somewhat. I would urge, first, that we consider recommending to the National Legal Aid and Defender Association, a far more aggressive and ambitious role for itself in terms of advocacy, not only at the misdemeanant level, but throughout the entire process of defending people accused of crime. I also think that those of us who are concerned about organized defense must broaden our basis and not talk merely about that, only because it appears to many to be self-serving. I think we need to talk about the entire court--the needs of the judge, the needs of the prosecutor, and the needs of the defense counsel. As we broaden our horizon and concerns, I think we bring into the defense field people who otherwise would not be committed to us. I think we need to recommend merit selection in our various states as the preferred process by which people get on the bench. The fact of the matter is--and you know it better than I--that the quality, the tone, the pace, the integrity of the court, is set by the judge.

Half of the country has still to adopt the 1937 standards of the American Bar Association for judicial selection which have been called for since 1970 by four or five national organizations or national conferences. I urge, that we begin to move more and more toward interdisciplinary training. I feel that some of the LEAA funding is counterproductive to this extent: that too often we who are defense counsel or defender-prone gather with one another. We are already converted, presumably. When do we sit down with prosecutors and judges and try to look at the total needs of the court or the total needs of the system? I fear that the longer we stay

off in our own corner lamenting the harshness of prosecution or the hanging judges, the more we tend to perpetuate the fragmented system.

I've made the point in some of my speeches that the tragedy in the war on crime is that the only side organized is crime. After watching this for some 15 years or more, I think that one of the great weaknesses is our failure to adopt the standard that has been preached for at least as long. That is: the role of the defense counsel is not only to relate to the defendant, but also to look over one's shoulder and to enlist community support, to educate the community, to create citizens' committees within our own communities and statewide. They can give us a broader base and can look at the needs of the criminal, felony, and misdemeanant courts. In so doing, they can see and can be persuaded of the great and pressing needs of defense.

I also think we ought to have the genuis to match supply and demand. In legal education, people are wondering about the purpose of the third year of law school. Students themselves are wondering. Tom Clark and others have said, "Let's make it a clinical year." Justice Brennan has suggested greater use of law students in order to make counsel available at the misdemeanant level. Without fostering malpractice by law students or incompetency of counsel, can we not create a system in which that supply of talented men and women about to enter the profession can be matched up with that enormous demand for legal services, at least at the misdemeanant level? I see no reason why we cannot. We haven't done it so far.

Let me conclude with two observations. There is a motion picture--The Wizard of Oz--originally intended for children which has now become a classic. It's a classic because it represents and personifies the deepest aspirations of all of us for the kind of lives and careers we want. The scarecrow asks for intelligence and a brain, and goes on that yellow brick road looking for magic. There is the tin man who asks for a heart and for compassion. (Without compassion, we are all tin men.) And there is the cowardly lion who asks for courage, the kind of courage that you and I need to get through each day, to achieve our goals, to advance our careers. It seems to me that what we need in relation to defense services is intelligent planning, the compassion, and the courage to say: "The misdemeanant courts are simply not good enough. We are not going to let this continue any longer. We are going to stand up and say, 'Halt, we've had enough of the factory, assembly-line system of justice. We want something that really smells like and tastes like and feels like the fresh air of honest justice.'"

Defenders are very special people, because they represent the very best tradition of the profession, reaching out for those who are unfortunate. They represent those best traditions at a time when it's very important for our beleaguered profession to look to its traditions. I would say, as one lawyer to another, that the history of this country indicates that whenever any monopoly fails to extend its services and its product to all citizens, the monopoly itself, of necessity, must be destroyed. Time is against our profession in trying to say, on the one hand, "We want to have total control over dispersal of legal services," and yet be unable to come up with a pattern which makes competent, zealous, and experienced legal services available even at the misdemeanant level.

One of my favorite quotations is from Oliver Wendell Holmes. It is one I think of, and have used in talking to defenders, since I believe that maintaining the rights of indigents is "where some of the action is" in terms of reassessing and reaffirming the dignity of our profession and the dignity of man. Holmes said, "Every man must be involved in the actions and passions of his time, at the risk of being said never to have lived."

Thank you.

Address By

The Honorable Harold R. Tyler, Jr.
Deputy United States Attorney General

It has been my view since 1972 that the Supreme Court had a good notion about giving some strong Sixth Amendment clout to the issue of counsel in criminal cases, but that it did not practually anticipate the problems that would arise from the mandate of Argersinger v. Hamlin.

The excellent monograph written by Sheldon Krantz and his associates at Boston University is, in a few well-chosen words and a few tightly-packed pages a damning survey of most of the problems which affect our criminal justice system. It provides a precise analysis of the holdings and dicta set forth in what I consider one of the less inspiring opinions to come out of the Supreme Court in my professional lifetime. Justice Douglas, writing for the majority, certainly did not write an opinion that was up to his usual high standards. I do not think that the concurring opinions were any better. The trouble was, and is, that the opinion sets forth much information that is either totally false, in the experience of those who work in the system, or totally misleading. Sad to say, I do not think my own Department, through the amicus briefs submitted by the Solicitor General's Office, contributed much in the way of accurate information or sensible ideas to the deliberations of our high court. I believe that the case has perhaps created more problems than it ever should have, and that it will continue to do so for some time.

I do not intend to parse Argersinger. But, since the case was handed down, there are so many things that have not been done, either by the legislature or the judiciary, that there is some cause for despair. To begin with, Argersinger illustrates very aptly and precisely the sad fact that in this our Bicentenary there has been no significant change, either on the federal level or on the state and local level, in the substantive criminal law. This illustrates our inability, or our unwillingness, or perhaps both, to grapple with the great issue of decriminalization. If ever one judicial decision provided the incentive to do so, Argersinger is that decision. But now, in 1976, we know that we have spent almost 10 years on the federal level, without being able to enact what is currently known as S-1, the proposed federal criminal code. Obviously, passing a federal criminal code will not deal with the thousands upon thousands of cases affected by the holding in Argersinger v. Hamlin. But, the federal government should be a model for state and local jurisdictions in coping with issues such as decriminalization and in reviving, if you will, sensible, sound principles of substantive criminal law in the United States.

It's very popular to say that the crime problem and all the politics that surround it really date back to 1968 and the federal statute of that year, which, among other things, created LEAA. But it doesn't take a student of nineteenth-century American history to know that the crime problem is deeply rooted in our society and has been for more than 200 years. We proceed, as usual, to recklessly ignore the fact that we have been unable to

come up with a sensible definition of "crime." Anyone who has read the appellate decisions of any of our court systems in this country in the last decade will agree that very, very few deal with substantive criminal law problems. They all deal with procedure, and they aren't very inspiring. They aren't very sensible, and they aren't very well written.

Now, in the monograph of Sheldon Krantz and his associates in Boston, there is a discussion of the implications of Argersinger for police practices, or, more precisely, the options which the police have available to them. There is a discussion of "intervention," or "criminal diversion," which the monograph writers think is a principal responsibility of the judges and the courts. There is a discussion of our shabby legal services, and our inability to make up our minds as to just how we wish to deliver those legal services.

My own view is that a mixed system--partly private, partly public--should be advocated. But, sadly, in 1976 there is ample evidence that the organized private bar of the United States is still largely unwilling to participate in criminal cases, particularly the kinds of criminal cases that clutter our courts. The most important courts, so far as our public is concerned, are the local courts that handle misdemeanors and so-called minor felonies.

I hope that, when I resume private practice, I will remember those words. I should, and so should every other private lawyer. It is certainly no credit to our profession that we're turning out more law students than ever before but really doing nothing to encourage good private attorneys to participate in criminal cases.

Not long ago, the New York Daily News did a series on the implementation of the Criminal Justice Act of 1964, as amended, in the Southern and Eastern Districts of New York. It was determined that relatively few private lawyers handled the bulk of the criminal cases, that is, that there was no spreading of the defense burden across the entire bar. The articles tended to criticize the courts and those few private lawyers who got most of the fees simply because they did most of the representation. In my opinion, that does not go far enough. The real reason the system isn't working the way Congress hoped and intended is the absolute failure of most private lawyers to turn a hand and represent unpopular, scruffy, inarticulate, mal-educated offenders in cases of no great public notoriety which create or suggest no substantial legal issues of great interest.

If this is so in two of the largest federal courts in this republic, just think what the situation is in the big-city courts and the small-city courts. It is a sad thing, and one for which the private Bar bears major responsibility, but which it never even discusses, so far as I know, because the committees which work on this don't, in my judgment, get the audience they deserve.

One other thing which is hinted at and discussed briefly, but quite perceptively, in the monograph is the issue of prepaid legal services.

Prepaid legal services, of course, are now supposed to be getting their innings. But, as Krantz et al. point out, in order for those services to really cover the field suggested by the Justices in Argersinger, there will have to be a built-in condition that these plans or policies mandate legal representation in misdemeanors as well as in more serious cases. Otherwise, there is really no way to expect that prepaid legal services or group plans will work. One reason is that most people assume that they'll never commit a crime or that they will never be caught committing crime.

Something has to be done. When I say that I would support, as the writers of the monograph obviously do, a mixed system, I am referring to a system that would include private lawyers, who should be encouraged and required to come into the system at all levels.

Secondly, we cannot ignore the expertise and dedication of the legal aid societies and public defender organizations which do great work when they're not overburdened. But there are those of you here who know, because you're in these organizations, what we've done since Argersinger. We've just dumped these cases in those 15 states or so which have tried to do something about the Argersinger holding since 1972. And when you get cases dumped on you, you can't, no matter how good you are, do much about the ordinary case, even where imprisonment is likely to follow conviction. You just can't give it the attention it deserves; nobody is that good when they're that overworked.

Finally, there should be thrown into this mix, as I have suggested, some kind of sensible application of the prepaid medical-plan concept.

Another important point is hinted at in the literature since Argersinger, namely, the clear need for objective, all embracing data about what goes on in all of the courts in this country, most particularly those courts which handle the kinds of cases discussed in Argersinger. In the Department of Justice, we now spend $60 million a year for various information systems, most of which are of relatively little concern to the people who work on them or who receive answers or results from them. The data are prepared by those who probably cannot, no matter how hard they try, be objective in disseminating and reporting those data. They are law enforcement agencies, they are bureaus of prisons, and so on. What we need is a single, economical mechanism for the collection and dissemination of data that everybody knows are objective, as well as readily accessible. We have nothing like this in the United States, despite the activities of the federal courts, the state courts, and everybody else. Think what it would mean, in trying to fulfill the promise of Argersinger, if would could turn to one objective national data center and obtain information.

Finally, there is still a lack of sensible criteria of need, or eligibility, for publicly-funded counsel fees. For many years, I struggled to identify the proper criteria for determining whether a person was eligible to receive legal aid funds in the City of New York. The Federal Defender Unit is now by contract the responsible office for representation in the criminal courts in my part of the state.

For many years legal aid had various criteria. They didn't work too badly, but they were somewhat difficult, particularly as an increased volume of cases began to hit the courts. In the states and localities that volume has been an acute problem. It is true, as the monograph writers suggest, that we still haven't settled on practical, national criteria. This seems to me worthy of further study. It's not a front-line political issue, but it's a terribly important issue if we are going to properly serve indigents, or people in the middle classes, who get the worst deal of all. The people who get the worst break, particularly in our federal courts, but to an extent in all courts, are not the very rich and the very poor, but the middle class. One of the things that I think America has got to worry about is seeing to it that the criteria are such that even a member of the middle class can receive legal services. If he gets caught, let's say, in a huge, complicated, white-collar prosecution, trial can go on from three weeks to six weeks to six months. Just think what a burden legal fees are for a person making a reasonably decent salary and being paid as much as the Bureau of Labor Statistics says a person above the poverty line earns. Think what it would cost such an individual to pay counsel, even at minimum billing rates, to handle a trial like that. It's no surprise to any of us who are in the business to know that very frequently in Security and Exchange Commission fraud cases or any other kind of big, white-collar cases, men and women plead guilty in part because of this phenomenon. Now, if this is true in our so-called higher courts, it is obvious that the situation is even worse in our lower courts, even though trials there tend not to last so long. You have the situation of a breadwinner who has a perfectly decent job, who has to go in for calendar calls, pretrials, plea bargaining sessions, and all those other arcane things that we have dreamed up in the mid-twentieth century and pass off as a viable criminal justice system. That takes time and it takes money. We cannot ask the legal profession not only to respond as lawyers, but also to finance this kind of thing by their own sweat, their own time, and their own efforts.

It is probably true that one of the reasons the private Bar has not come into this field with anything approaching decency and alacrity is the financial burden of doing so. When I have criticized the private Bar to the extent that I have, I should in fairness point out that lawyers might try to get their feet wet, if they did not have to incur a financial burden as well as take time away from better-paying business.

I hope that the Department of Justice of the United States, though its 3,500 lawyers do not very often get into this kind of case, will not only honor such commitments as we've already made, principally through the Law Enforcement Assistance Administration, but that we will do more. This includes not only financial and consultant work, which I think we can give more generously of, even under the budget constraints of the mid-1970's, but also the duty to argue, particularly through the Office of the Solicitor General of the United States, for a clear exposition, soundly anchored to the Sixth Amendment, of just what the Argersinger decision really means. Everybody I know agrees that the Court sooner or later will come up with procedures to vindicate the important ideas contained in Argersinger v. Hamlin.

WORKSHOP A
APPOINTMENT OF COUNSEL AND HOW HANDLED

John C. Cratsley, Moderator

Special Justice
Roxbury Municipal Court

Lecturer on Law
Harvard Law School

Presenting the Accused's Rights At the Initial Appearance in Court

To meaningfully discuss the appointment of counsel, we must start by asking how the total set of rights is presented during arraignment or "first appearance."[1] Although the right to counsel is only one of the important rights to be reviewed with the accused at arraignment, for purposes of the Conference, it is the most critical.

Current practices in our busy lower courts indicate that the mass or group presentation of rights is most common. The detail with which those rights are presented varies tremendously, as does the degree to which these rights are reviewed with each individual defendant. It is difficult to criticize the group or mass rendering of rights at the initial court hearing because it is so imminently sensible that everyone about to undergo a similar set of procedures in a new and strange setting be advised of just what will be happening to him or her. Consequently, it is important that this group procedure be carried out with exceeding detail and in understandable language. In addition, it is highly recommended that when each individual defendant appears for the proceedings unique to his or her arraignment or "First Appearance," these rights be individually reviewed and an individualized determination made that they are understood.[2] It is advisable that in addition to individualized oral inquiry, there be some form of written confirmation that the appropriate rights were stated to and understood by the accused.[3]

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[1]This terminology comes from the Criminal Justice Standards Bench Book for Special Court Judges (ABA; second edition; April 1976). It is used in preference to "arraignment" because some jurisdictions do not take or require a plea at the initial or first appearance of the accused. Chapter I of the Bench Book (pp. 8-12) deals with the First Appearance in some detail and includes a judicial "Dialogue for First Appearance."

[2]The Bench Book, supra, at page 8 stresses the "concept of dignified, individualized treatment of defendants" and presents the "Dialogue for First Appearance" to implement that philosophy.

[3]Many lower courts also make a pamphlet available to the accused at initial appearance describing his rights in writing. A copy of one used in

Generally speaking, the range of rights to be presented to any group of new defendants and reviewed with each individually, includes: (1) a statement of the charges against the defendant, together with confirmation that he or she understands the substance of them;[4] (2) a reminder of the Fifth Amendment Right not to incriminate himself or herself, and that anything the defendant says might be used against him or her;[5] (3) a detailed review of the right to counsel, as well as the right to appointed counsel, if indigent;[6] (4) a statement of the right to be released on bail;[7] (5) a review of the right to trial by jury, or other preliminary hearing, and to such speedy scheduling of it as may be provided by state law;[8] (6) any appropriate rights to pretrial diversion applicable to the particular court and/or charges in question; and (7) any other rights applicable to the particular court or state in which this initial hearing occurs.

Determining Financial Eligibility for Appointed Counsel

Whatever the manner and content of presenting the right to counsel to the accused, there will come a moment when the judge must make a determination of the question of counsel.[9] Logically, this should immediately follow the full presentation of rights. It should also be as close in time as possible to the conversation with the individual defendant about his or her right to counsel, including appointed counsel, if the defendant is indigent.[10] If those rights have been carefully explained, and this inquiry promptly follows, the defendant will be best able to respond to the questions involved.

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a District Court in Michigan is included in this paper, and it is readily apparent how a written acknowledgment of these rights could be obtained on a similar form from each defendant.

[4]Bench Book, supra, fn. 13, p. 11; ABA Standards Relating to the Administration of Criminal Justice, Standards on Pre-Trial Release 4.3(b); National Advisory Commission on Criminal Justice Standards and Goals. Courts, Standard 4.5.

[5]Bench Book, supra, "Dialogue for First Appearance," p. 9.

[6]Bench Book, supra, fn's. 7 and 8, pp. 10 and 11; ABA Standards, supra, Providing Defense Services 5.1, 5.2, Pre-Trial Release 4.2, 4.3(6); NAC, supra, Courts 4.5.

[7]Bench Book, supra, fn. 3, p. 10; ABA Standards, supra, Pre-Trial Release 5.1; NAC, supra, Corrections 4.4.

[8]Bench Book, supra, "Dialogue for First Appearance," p. 9.

[9]Some readers will question whether a judge should conduct the inquiry and make the final determination regarding counsel. For purposes of this paper, the predominant judicial role is assumed.

[10]Given the large amount of important information to be covered in the dialogue with the accused, some confusion about counsel can be avoided if

Some jurisdictions use precourt interviews by probation officers or other court personnel to assist in the determination of indigency.[11] Still other jurisdictions use judicially-initiated oral questioning during the initial appearance. It seems highly advisable both in terms of efficiency and accuracy for there to be some preappearance inquiry conducted by representatives of the court. This will not only speed up the judicial time required for such determinations, but may well ensure that the accused provides accurate information to the court. In some jurisdictions, the inquiring official makes specific recommendations to the court about indigency.

Nevertheless, no matter how detailed the preappearance interview is, and however firm the interviewers' recommendations are, the judge should conduct an independent inquiry.[12] This is advisable not only to act as a check on the interviewing party, but also to further promote communication between the judge and the defendant. This inquiry may take the form of reviewing the factual material obtained through the pre-court interview, or it may lead into areas not covered by that interview. It may serve as a form of clarification of the concept of "indigency." Often the information given during the pre-court interview will not be complete or will not be given with the understanding that it relates to the question of paying for a lawyer. The judge's personal inquiry may remedy such misunderstandings.

Most jurisdictions do not have fixed indigency standards for the appointment of counsel. It is recommended that such be established.[13] One of the most frequent criticisms of the lower criminal courts is that no fair standards are used for the appointment of counsel, particularly with regard to financial eligibility. Much of this confusion would be alleviated if similar courts of similar jurisdiction within the same state had similar standards for the appointment of counsel. Such standards are not difficult to establish. Federally funded legal services programs use them, as do numerous federal and state benefit programs. Many public defender offices use them as a form of internal checking on their own clientele. Publication and use of such guidelines will help remove uncertainty and unequal treatment.

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the judge will review the right early on and then return to it again just before the inquiry necessary to make a final decision.

[11]An example of this is found in Massachusetts General Laws, Chapter 221, Section 34D, which provides that: "Before the trial judge assigns counsel the probation officer shall prepare and furnish him with a written report containing his opinion as to the defendant's ability to pay for counsel."

[12]Bench Book, supra, fn. 16, p. 11; ABA Standards, supra, The Function of the Trial Judge 3.4, Providing Defense Services 6.1, 6.2, 6.3, and 6.4, NAC, supra, Courts 13.2.

[13]On the other hand, the Bench Book, supra, fn. 16, p. 11, approves the general, discretionary guidelines of the ABA Standards, supra, to the effect that counsel be provided to any defendant who is "financially unable to obtain adequate representation without substantial hardship to himself or his family."

Determining the Likelihood of Imprisonment

Closely related to the subject of financial eligibility for appointed counsel is the subject of outcome--or sentence--eligibility for appointed counsel. Since the Argersinger decision only requires counsel where imprisonment is the result of a misdemeanor conviction, many jurisdictions have established some mechanism for predetermining which accused misdemeanants will have appointed counsel. That predetermination concept largely revolved around a hunch, guess, or "gut feeling" about who will and will not go to prison upon conviction. Worse yet, it could involve a pretrial review of the accused's prior record or known relations with the arresting police department. This is an intolerable state of affairs. Even rough standards such as "the seriousness of the charge," or whether the judge "knows" the accused, hardly promote the fair and evenhanded working of the trial system. Far better is the standard already used by many states that any possibility of going to jail as prescribed by the penalties for the charge is sufficient to establish the right to counsel.[14] Any standard short of this fixed rule can only lead to guess work, to uncertainty of application, and possibly even to the embarrassment of justices who find themselves wishing they could impose a prison sentence after earlier stating or finding that none would be forthcoming.

Deciding Who the Appointed Counsel Will Be

Once the accused is advised of all of his or her rights, and a determination of indigency made, the question remains about the source of appointed counsel. Many jurisdictions rely exclusively upon public defender systems. Other jurisdictions use private counsel, some on an unpaid volunteer basis. Law students participating in clinical programs are another resource. While much has been written, and the debate hardly resolved, many valid points can be made for a delivery system that used both salaried public defenders and the private bar. The potential for the salaried public defender program to become the slave or workhorse of the criminal court is all too likely if it is the sole agency representing indigents. When the private bar alone represents all indigents, its resources are usually stretched so thinly that achieving effective representation may be seriously hindered. A mixed system using both sources of appointed counsel has the advantages of: (1) distributing the burden among the profession for this important but demanding work; (2) providing models of advocacy for each other to review; (3) providing cross-fertilization of ideas; and (4) drawing upon the largest numbers of attorneys to meet the need.[15]

Assuming that a mixed system is used for providing counsel for indigent defendants, there remains an important question of how the public defenders or private attorneys who are appointed receive notification of their new

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[14] This standard is recommended by the authors of The Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin, and is reported to be the current approach in fifteen states.

[15] While the ABA Standards, supra, and those on "Providing Defense Services" in particular, do not specifically recommend a mixed approach, the introduction to the latter does confirm that "all systems are in reality 'mixed' to some extent." It is precisely this "reality" which should be systematically organized and improved to provide a comprehensive system using numerous, properly trained attorneys.

clients. It is highly recommended that any attorney, public or private, who is appointed to represent an indigent defendant be available in court on the day of appointment to meet the new client. This usually requires that the public defender's office have a representative covering the arraignment or First Appearance session to meet each new client and carry out any adversarial tasks on their behalf that are necessary. Similarly, the appointed counsel from the private bar should be present in the court room to meet and represent his or her new client. Systems which use a large rotating list of private counsel often fail in this regard, preferring to send a letter to private attorneys notifying them of their appointments. As will be pointed out later, the potential detriment to the new client on the questions of bail, prompt interviewing, and prompt investigation is serious.

The private bar, on the other hand, has a legitimate interest, as do taxpayers, in seeing that no small group of available counsel is specially favored with appointments. The concept of "courthouse-hangers-on" is familiar, and the bench, bar, and public should all appreciate and be suspicious about such a situation. Two techniques exist for dealing with this concern and yet affording the accused immediate access to the services of an appointed attorney.[16] One of these is for a private attorney on a rotating basis to cover the court for an entire day for all arraignments and other ongoing matters like probation surrenders. The attorney will have been notified some months in advance of his or her responsibility to be in court for the entire day, and will have scheduled this obligation. He or she then represents all such indigent clients as the court appoints to him or her during his "duty-day." A second system is that there be an open invitation to all attorneys who wish appointments to be present in the arraignment court with the understanding that appointments of counsel will be made only from those present who can proceed to represent their new clients that day. A master list is kept of who receives the appointments on a day-to-day basis, thus assuring equal distribution of appointments. The potential disadvantage in this approach is that only a small group may be favored who have the time, energy, and inclination to come to the courthouse each day. While they will be "favored" in an even-handed manner because of the statistics maintained, it is also important that regular efforts are made to enlarge that group so that fresh faces and new ideas appear before the court.

Waiver of Counsel

A major dilemma for both the judge and the accused is posed by the question of waiver of the right to be represented by counsel. This dilemma usually

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[16] The ABA Standards, supra, on "Providing Defense Services," 2.1, favors a systematic distribution of assignments and states that "assignments should not be made to lawyers merely because they happen to be in court at the time the assignment is made." From a practical day-to-day point of view, however, the unavailability of randomly-selected counsel combines with the urgent tasks which available counsel can perform for their new clients to suggest a different approach.

begins if there is confusion about the existence of the right to all. Obviously, the clearer and more carefully the right to counsel is articulated and individually confirmed at the initial appearance, the less likely a confused waiver is to result. The second basis for confusion comes from the presentation of the possibility of waiver at all. Once the concept is raised by the judge, the accused naturally entertains numerous thoughts regarding its significance, including the possibility that more favorable treatment may resolve. Obviously again, the manner in which the concept of waiver is presented influences the accused's perception of its desirability. It is recommended that, in all cases in which the right to counsel applies, all judicial commentary be slanted against waiver. An initial appearance may be appropriately made without even mentioning the subject.[17] In fact, much of the abuse of the waiver concept occurs because the major figure conducting the court proceedings--the judge--raises its possibility. The better judicial practice is to avoid mention of the subject and to affirmatively advise against it when it is mentioned by the defendant or others. It is also advisable for the judge to articulate precisely what is being given up when waiver of counsel is proposed by the defendant. This should include statements to the accused that a trained lawyer: (1) knows far more of the intricacies of the system than a lay person does; and (2) will be able to deal with certain specifics of the charge--such as potential mandatory penalties--and certain procedural aspects of the court--such as possible diversion programs--far better than a layman can.[18]

A major procedural step in dealing with the question of waiver is the use of the written waiver form.[19] If the accused persists in wishing to waive counsel--despite judicial advice to the contrary along with a careful review of what is being given up--the accused should then be asked to review and sign a written form. That form should clearly state what is being given up and should call for the written signature of the defendant, as well as the written

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[17]As the Bench Book, supra, fn. 15, p. 11, indicates, the only time the question of waiver of counsel should arise is if the accused answers "No" to the question "Do you wish to be represented by an attorney?" The Bench Book and the ABA Standards are silent on whether the judge should affirmatively discourage waivers of counsel stating only the propositions (1) that an attorney should not and cannot be forced upon an unwilling defendant; and (2) that all waivers of counsel should be intelligently and understandingly made.

[18]Although both the Bench Book and ABA Standards are silent on whether the judge should review what "the effective assistance of counsel" could mean to each defendant proposing to waive counsel, the Bench Book, supra, fn. 15, p. 11, does recommend that the waiver inquiry include a review of the rights applicable to trial. This is because the defendant should know at his initial appearance and before waiving counsel, exactly what would be lost by a future, unrepresented guilty plea.

[19]A copy of one such rule and form promulgated by the Supreme Judicial Court for use in the Massachusetts District Courts is included in this paper.

confirmation by the justice, that the defendant was apprised of all consequences of the waiver and executed the waiver in the judge's presence. This at least provides a written record for the act of waiver of counsel, though it still leaves open many subjective questions about the reasons for the waiver. A further precaution that may be taken in regard to waiver, and with regard to the intelligent execution of waiver forms, is for the court to appoint counsel simply to discuss waiver with the accused.[20] Often the removal of the client from the pressures of the courtroom, the opportunity to talk privately and informally with a member of the bar, and a few minutes of less pressured reflection, can lead to a more careful and reasoned result.

The Rule and Form Used by the Massachusetts District Court

3:10 Assignment of Counsel in Noncapital Cases. (Ed. Note: Most of the text of the old rule remarks in the new rule, as the major change in the new form. Changes in the text are emphasized.) If a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel. Before assigning counsel, the judge shall interrogate the defendant and shall satisfy himself that the defendant is unable to procure counsel. If the judge finds that the defendant is able to procure counsel, he shall make a finding to that effect on the form herein established which shall be filed with the papers in the case. If the defendant elects to proceed without counsel, a waiver and a certificate of the judge on the form herein established shall be signed, respectively, by the defendant and the judge and filed with the papers in the case. If the defendant elects to proceed without counsel and refuses to sign the waiver, the judge shall so certify on the form herein established, which shall be filed with the papers in the case.

An attorney supplied by the Massachusetts Defenders Committee (G.L.c.221, § 34D, as amended), or by a voluntary charitable group, corporation, or association, or one serving without charge, shall be appointed under this rule to represent an indigent defendant, unless, exceptional circumstances, for example, a conflict of interest, or the need of counsel speaking a foreign language, justify another appointment. If a judge shall find the appointment of another attorney be justified he shall record in writing, to be filed with the clerk and placed with the papers in the case, a statement of reasons.

The clerk shall establish and maintain, currently indexed by name of the appointee, as part of the public records of the court open during regular business hours to public inspection, as appointment docket with respect to each such appointment. Such docket shall contain the following:

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[20]Bench Book, supra, fn. 15, p. 11; ABA Standards, supra, Providing Defense Services 7.3.

(a) the docket number and the name of the case
(b) the offense or offenses charged against the defendant
(c) the name of the appointee
(d) the date of appointment
(e) the name of the judge making the appointment, and
(f) the amount of the fee for legal services

The form of such docket shall be that prescribed by the Chief Justices of the Superior Court of the Municipal Court of the City of Boston, and of the District Courts for their respective courts.

The form established by this rule shall be as follows:

COMMONWEALTH OF MASSACHUSETTS

.....ss. .....Court
No.(s).....
.....
.....

COMMONWEALTH

v.

.....

FINDING OF JUDGE

I,....., hereby find that
Name of Judge

..... is
Name of Defendant

( ) unable to procure counsel

( ) able to procure counsel

Signed .....
Signature of Judge

....., 19....

WAIVER OF COUNSEL

I, ..., have been informed
Name of Defendant

of my right, pursuant to Rule 3:10 of the Rules of the Supreme Judicial Court,

( ) to have a lawyer appointed by the court at public expense

( ) to hire a lawyer at my own expense

to represent me at every stage of the proceedings in this case. I elect to proceed without a lawyer and waive my right to such a lawyer.

Signed .....
Signature of Defendant

CERTIFICATE OF JUDGE

I, ..., hereby certify that
Name of Judge

..... has been informed of his right
Name of Defendant

( ) to have a lawyer appointed by the court at public expense

( ) to hire a lawyer at his own expense

to represent him at every stage of the proceedings in this case;

that he has elected to proceed without a lawyer, and that

( ) he has executed the above waiver in my presence.

( ) he has refused to sign a waiver.

.....
Signature of Judge

..... ., 19....

Conflicts of Interest

Another problem for the judge appointed counsel is presented by multiple defendants and the possible conflicts of interest that may arise between them. For fiscal or other reasons, often there is pressure to appoint one attorney for a group of defendants. Serious constitutional questions are raised by this practice. A number of decisions from both federal and state courts have indicated that it is the responsibility of the appointing judge to determine at the earliest possible time the existence, or the possibility, of conflicts of interest among multiple defendants such that separate attorneys for each would be required.[21] It is, in fact, not difficult for the judge to make such determinations. More likely than not, the justice will have heard some summary of the factual allegations either as part of the charging process or as part of the bail setting process. As a result of this information, he or she may readily determine if a conflict of interest results. The simple test is for the judge, (or, for that matter, the attorney appointed) to ask whether an assertion must be made or a position taken for the effective representation of one client which is contrary to that necessary for the effective representation of another. Frequent examples in lower courts include the differing positions: (1) between driver and passenger in an allegedly stolen car; (2) between tenant and guest in the apartment in which narcotic drugs were recovered; and (3) among multiple parties arrested as the result of a large disturbance.

As just indicated, appointed counsel also plays a significant role in ascertaining conflicts of interest. The Code of Professional Responsibility indicates that it is counsel's duty, whether appointed or retained, to avoid participation in conflict situations.[22] Any such possibility should be promptly reported to the appointing judge so that he or she may take the appropriate steps to ensure that each defendant has a separate attorney. Action by both judge and lawyer to resolve this potential problem at the earliest possible stage will reduce difficulties in the future. Needless continuances, potential embarrassment to bench and bar, last-minute withdrawals and unfortunate client accusations, may all be avoided by prompt recognition of conflict situations at the initial appearance stage. As a basic practice, it is recommended that the presiding justice indulge all presumptions in favor of the existence of conflicts of interest among multiple defendants and appoint separate counsel whenever multiple defendants appear before the court.[23]

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[21] United States v. Foster, 469 F. 2d 1 (1st Cir., 1972); ABA Standards, supra, The Function of the Trail Judge 3.4 (b).

[22] Canon 5; DR 5-101 through 107; ECS-1 through 5-24; ABA Standards, supra, The Defense Function 3.5 (a) through (d) and 6.2 (c).

[23] Although the ABA Standards, supra, require only judicial inquiry into potential conflicts, the Commentary to The Function of the Trial Judge 3.4 (b) does commend an "absolute rule of separate counsel with waiver only after the defendants have each been fully informed of the probable hazards."

The Duties of Appointed Counsel at the Initial Appearance

Discussion of appointment of counsel and the role of the judge and attorney in implementing the appointment would not be complete without discussing what the judge should expect counsel to do and what counsel is obligated to do for his or her new client. The initial appearance is, for all intents and purposes, an adversary proceeding. The question of bail, as numerous studies have shown, is usually critical to the future disposition of the accused's case. Counsel appointed at the initial appearance for the indigent defendant should represent that client to the fullest on each of the issues arising during the proceeding. Not only should the attorney prepare and deliver argument for the speedy pre-trial release of the client on the most favorable terms possible (for example, personal recognizance), he or she should also be fully aware of all of the diversion opportunities which may be available or initiated at this stage so that the client may avoid prosecution altogether.[24] The attorney also has an obligation to ensure that the client receives, if he or she wishes, the speediest possible trial of the charges in question.[25] The appointed attorney has further obligations to promptly interview the client as well as those who form the basis of the charges against the client.[26] Often such interviews can take place on the day of the initial appearance, particularly interviews of the arresting police and related civilian witnesses who may not be as readily available again until the trial date.

All of these lawyering activities just mentioned form the basis of what has come to be known as the "effective assistance of counsel." The appointing judge carries the responsibility to see that both the courtroom procedures and the actions of the appointed attorneys implement these basic minimum steps of effective representation.[27] The possibility of removal from the roster of attorneys eligible to receive appointments should exist for those who do not undertake these minimal steps on behalf of their clients.[28] At the same time, counsel should insist that the court provide ample opportunity for these steps to be taken. This should include a recess during the initial appearance process for appointed counsel to consult with the new client to prepare an effective bail argument.[29]

This should include courtroom facilities which afford a meaningful opportunity to interview the client as well as those who have made charges against

[24] ABA Standards, supra, The Defense Function 3.6 (a).

[25] Ibid. 1.2.

[26] Ibid. 3.2 and 4.1.

[27] ABA Standards, supra, The Function of the Trial Judge 1.1.

[28] Ibid. 6.5.

[29] ABA Standards, supra, Pre-trial Release 4.3 (d).

him.[30] This should also include the opportunity as part of the initial appearance procedure for counsel to determine if the client is eligible for various pretrial diversion programs operating in the court.[31] If the court is run in such a way that these basic steps may be taken easily and without fear of sanction by appointed counsel, and if appointed counsel use them, much can be done at this early stage to aid in the swift and fair resolution of the case in the future.

[30] Ibid. 4.3 (a) and (b) (iii) and The Defense Function 3.2 (a) and 4.1.

[31] Ibid. and The Defense Function 6.1 (a).

Workshop A

Summary of Proceedings

Basically, the workshop on appointment of counsel produced two recommendations and one concern.

The first recommendation on which there was consensus is that the appointment process--namely reviewing questions of indigency, the formulization of standards, and the actual putting together of lawyer and client--be removed from the judiciary and moved into the system earlier than the first appearance or arraignment-type of situation. We also agreed that it should be conducted either by a public defender agency, a bail agency, or some agency independent of the judge. The reasons for this were the judiciary's concern--unwarranted concern, in the opinion of most--for dockets control, speed, efficiency, moving cases through, favoritism in appointing counsel, maintaining special lists, and what seemed to be an inappropriate concern with budgets and finance. The latter is particularly true in systems with elected judges or locally appointed judiciary.

The secondary benefit that would seem to accrue if the appointment process were taken from the judiciary and moved into this system earlier would be to help place defense counsel or some independent investigatory party into the police station or the jail. It might even tie into earlier adversary needs on behalf of the accused, such as contact with family, legal help, lineups, and other types of adversarial assistance, prior to going before any justice.

Obviously, this consensus does not include the questions of implementation. Nor does it include the difficult question of how we get from here to there in many states where judges rather zealously guard the appointment power. We heard from two states and one city--Georgia, Rhode Island, and Oklahoma City, Oklahoma--where this is presently done. In the aforementioned areas, there is virtually no judicial interference and screening of the decision of the public defender program to take or reject cases as a pre-first appearance situation.

The second point of general agreement--although there was dissent on this, particularly from the fully staffed comprehensive public defender organizations--was that we needed to continue to find a way for the private Bar to play a role in indigent criminal defense work in the misdemeanor and lower courts. This came from a concern for training in and the nurturing of the practice of criminal law. There are a large number of young lawyers ready and willing to take appointed cases, particularly if there is an adequate compensation system. These lawyers want to grow in their work in criminal law. There is a responsibility, professionally speaking, that this opportunity be afforded. For the better criminal lawyers of the future will really come from those who practice criminal law in the misdemeanor courts today and shortly after law school.

Secondly, there was a feeling that the overall health of the legal profession and of the criminal justice system as a whole is aided if criminal law does not fall exclusively to the specialists within the public defender

office or to the high-priced specialists from the private bar who take the felony cases only.

Again, the concept of an active role for the private Bar in misdemeanor representation leaves open the question of implementation. Now, there is widespread concern about any system for involving the private Bar and whoever runs it--regardless of whether it is a judicial appointment system, a pre-judicial appointment system run by a public defender, or an administrated appointment system run by some agency. That concern pertains to the need for private attorneys who participate to be screened, trained, and certified in some form, to be adequately compensated; and that there also be some form of sanction or removal for ineffective representation in their appointed roles. So the fitting together of a private Bar system with the requirements of competency and with the possibility of sanction is really the unresolved question in that recommendation. It seems quite do-able. It is not as complicated as it seems. Neither is it as difficult as the first recommendation, which would move the appointment of counsel away from the judiciary to an earlier stage. It is basically an administrative task. There seems to be a merging of interests there between the private Bar, the public defender--who is largely overworked in the misdemeanor field--and the judiciary--who wants a healthy profession, using as many members of the profession as possible. I think the motives are there for cooperation.

The third area--which is really not a recommendation but, I think, a consensus of concern--pertains to the ongoing failure of the lower-court judiciary to implement Argersinger in its basic terms and to flesh out its principles or meaning beyond the primary language of the decision. We heard from jurisdictions where all number and all manner of devices are being used to subvert its basic meaning. We also heard from jurisdictions where persons are still being jailed in lower courts without having counsel appointed. We heard of a situation where the state appellate defender can have 15 or 20 inmates released on a writ of habeas corpus signed by the same judge who put them there the week before. I think that the failure of the lower court was the rather overwhelming concern of quality of judicial conduct in the lower courts, where this decision applies, and where the misdemeanant defendant appears.

What is on the horizon in that area seemed less optimistic. There is, of course, judicial training at the national, state, and regional levels in an increased number of sessions and workshops. There is a Criminal Justice Standards Bench Book--although people are still unfamiliar with it. It does exist. It does provide the standards approach for the type of work we are talking about today.

Finally, there is a need for continued advocacy. The concept of ineffective work by the lower-court judiciary can be met, or at least ought to be met in part, with the continued use of the adversary system. Public defenders and appointed counsel need to continue aggressively raising the rights that apply at the first-appearance level through appeals, test cases, and petitions that seek the exercise of the supervisory power of higher courts over the inadequate practices of the lower-court judiciary.

Workshop A

Discussion Highlights

At what point should counsel be appointed for an indigent defendant? Who should be responsible for determining whether a defendant is eligible for court-appointed counsel as mandated by Argersinger? Are judges more concerned about dockets control (i.e., moving cases swiftly through the criminal justice system) and cost effectiveness than with ensuring that indigent defendants are provided with effective assistance of counsel?

The consensus of workshop participants was that the appointment of counsel process (i.e., determining indigency and at what point in the criminal justice process a defendant really needs legal counsel) should be conducted either by a public defender agency, a bail agency, or some other agency independent of the judge. The primary reason for this was that the workshop participants were of the opinion that all too many judges, particularly those who are elected, are inordinately concerned with dockets control and cost effectiveness. Additionally, it was believed that such a process would allow for early entry of counsel.

Secondly, it was believed that the private bar should play a greater role in defending indigents accused of crimes. This gave rise to the question of how private attorneys should be screened, trained, and certified, and whether sanctions for ineffective representation could be imposed.

Third, there is a need to develop a mechanism to ensure effective implementation of Argersinger, thereby precluding as much as possible the likelihood of lower court judges to subvert the spirit and the letter of that Supreme Court decision.

COURT PROCEDURES AND
LEGAL RIGHT

You are here today to be arraigned for an alleged violation of law. This may be your first visit to this Court and it is our desire that you be fully advised of your rights and the Court's procedures.

1. When your name is called, please come forward.
2. The charge against you will be read and you will be expected to enter a plea.
3. If you plead guilty your case will be disposed of either by fine, imprisonment, adjournment for pre-Sentence Investigation or probation. In traffic cases a record of conviction is forwarded to the Secretary of State and will become a permanent part of your driving record.
4. If you are unable to pay a fine, tell the Court immediately.
5. If you plead not guilty, stand mute or if your plea is rejected, a hearing or trial is required. Trial will be set for a future date.
6. Before trial you may request from the City Attorney or Prosecutor in charge of your case, a conference about your case. But what you tell them could and would be used against you in the event of a trial.
7. When your case is not immediately disposed of, the Court may ask a number of questions to determine if a bond will be required to assure your appearance at a later date.
8. Please report to the clerk's office after leaving the courtroom.
9. If you are dissatisfied with either the decision or sentence of the Court, you have a right to appeal within 20 days. (Forms may be obtained from the clerk.)

YOU HAVE THE RIGHT to plead guilty, not guilty or stand mute (remain silent):

a. A plea of guilty is admitting that you committed the offense.
b. If you plead not guilty, you are denying committing the offense.
c. If you stand mute the Court will enter a plea of not guilty.

YOU HAVE THE RIGHT to be released from custody on a reasonable bond if you plead not guilty or stand mute. The bond may be satisfied through a professional bondsman, cash, or a misdemeanor (10%) bond with the Court.

YOU HAVE THE RIGHT to a reasonable period of time to consult with an attorney, contact witnesses, and generally prepare for your trial.

YOU HAVE THE RIGHT to have an attorney represent you or you may act as your own attorney. If you can't afford an attorney, the Court will appoint one for you if you may be sentenced to jail if convicted.

YOU HAVE THE RIGHT to a jury or non-jury trial where all testimony is given under oath.

YOU HAVE A RIGHT to be faced with your accuser at trial.

YOU HAVE THE RIGHT to cross examine any witness that testifies against you.

YOU HAVE THE RIGHT to present physical evidence or have witnesses testify for you. The Court will issue subpoenas to compel the appearance of such witnesses. (These witnesses have a right to a statutory fee for testifying.)

YOU HAVE THE RIGHT to testify or not in your own defense. Failure to testify will not prejudice your case or be used against you.

When you leave Court, please drive carefully and observe all laws; our community can only be as pleasant and safe to live in as each of us make it. Any suggestions or comments you have on the operation of our Court and/or your experience here will be appreciated. Please give your comments to the Magistrate. No system is perfect but we strive to improve.

WORKSHOP B
DEFENDER OR COUNSEL MANAGEMENT

William R. Higham, Moderator

Attorney at Law
Higham & Hulse
Pleasant Hill, California

Managerial Implications of Argersinger v. Hamlin

Problem Overview

> The holding of the Court today may well add new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it. (from Argersinger v. Hamlin)

The full impact of Argersinger has yet to be felt in the villages, towns, and cities of the United States. The casual visitor to courtrooms in America may well find that, as far as misdemeanors are concerned, things are about the same today as they were on June 11, 1972. In some instances, indigent misdemeanor representation was already a reality in such communities when the decision was handed down. In others the law of the case is being tacitly ignored or circumvented. However, for all jurisdictions not providing counsel for the legally indigent in misdemeanor cases at the time of the decision, the impact thereof has already been felt in full or the day is hastening closer when it will be.

In almost all communities, indigent defense services prior to Argersinger included representation by counsel in felony matters, appeals from convictions therein, juvenile court matters and, often, mental health act proceedings. When eligible misdemeanants are represented, experience indicates that (numerically) the caseload[1] is likely to increase 100, 200, or 300 percent or even more. Typically, manpower requirements will double. Therefore, it is important to organize finite resources for best results.

Defender Office Management

Transferability of Principles and Techniques

The admonition to defender managers that they should seek to apply managerial principles and techniques which have been successful in helping solve

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[1]For the purposes of this article, a case is considered to be a single set of charges (or counts) facing one client in a unified proceeding in a particular court.

the problems of business, industry, institutions, and (other) government has, by now, been elevated to the status of well-worn cliche. Few persons involved in defense management would dispute the fact that the transference of successful applications of helpful ideas is a good thing. The problem for busy law-trained defender managers has been to find which principles and techniques within the colossal inventory of those available can be readily applied with some probability of success in the management of defender offices. For example, numerous books and other publications have dealt with the favorite topic of "management by objectives (MBO)."[2] It has become heretical in many circles to question the applicability of MBO in any and all areas of organizational endeavor. The conscientious manager of the typical defender office may study the concept of MBO and how it has benefited many large business organizations and conclude, probably correctly, that efforts to formally implement management by objectives as a structured operation technique in a medium-sized office would create more problems than it would solve. Yet, the study of the applications of MBO will give the defender manager insight into a number of more simple and yet more useful concepts, such as goal-setting, measurement of objective-attainment, delegation and responsibility, and personal effectiveness of staff.

In response to both Argersinger and the general upswing in criminal charging rates, defender offices and organizations are becoming larger and more difficult to manage. As a result, management training programs designed especially for defenders have begun to appear, and management training and consultant firms have begun to focus on problems peculiar to staffed criminal defense programs. These programs will frequently provide the defender manager with shortcuts to valuable applicable know-how developed in other disciplines and activities.

Resource Management: Dealing with Reality

The social scientists have given us two categories of "variables" that may affect any system. These are exogenous variables (those variables outside the system's control) and endogenous variables (those within its control). The defender manager must recognize the reality implicit in these two categories and, to borrow conceptually from a popular prayer, change those things which he can change, accept those things which he cannot change, and have the wisdom to know the difference between them.

After eligibility criteria have been applied, a defender caseload results. After the planning and budgeting process has occurred, a budget (or award of funds) results. For the average defender office, final decisions in both of these areas are made by others and, therefore, these "variables" are outside of its ultimate control. Few defender offices have much to say about the size of their caseload and probably none have any final control over the amount of resources they receive in order to handle said caseload.

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[2]One definition: "The establishment of effectiveness areas and effectiveness standards for managerial positions and the periodic conversions of these

The "endogenous variables" turn on how they use their resources, both fiscal and human. And, in even the most overworked, underfinanced offices, there are (when postbudget shock wears off) often options available which will enable the defender manager to stretch (usually inadequate) resources so as to better service an increased caselcad.[3] A few of these, not novel or original, are given as examples; others can be uncovered or realized through review of management literature and use of management consultative services.

1. Review of Salary and Promotional Policies and Procedures

Complaints are frequently made that defender office salaries are too low. While there is frequently much merit in this complaint, it is equally true that, in many offices (including some badly underfunded ones), internal practices have resulted in personnel being overpaid. The causes of this usually lie in nonexistent or inadequate salary screening or review procedures. It is seen as being easier for "the boss" or whichever harried manager makes decisions in this area to grant the annual raise or increase in grade than it is for him to explain why it is being denied or deferred. The absence of strictly-enforced merit increase or promotional programs not only deprives the office of valuable funds, but also frequently tends to result in retention of nonperformers who would have to take a cut in pay if they went elsewhere.

In addition, salary scales should be reviewed periodically to assess them in the light of whether recruitment or retention of staff is the more pressing (current) problem. If there are 100 applicants for every beginning-level opening, but senior staff are resigning in order to take higher-paid positions elsewhere, it suggests that an imbalance exists here.

2. Review of Organizational Structure and Administrative Hierarchy

It is frequently observed that many defender offices are seriously deficient in the number of supervisory staff. Closer inspections of such offices will often reveal that, while they well may not have enough supervisory personnel at the operating level (with the result that newly-admitted attorneys receive insufficient on-the-job training and guidance), there may be overstaffing at middle-management levels. This phenomenon is a common one in all human service organizations and seems to result in large part from lack of critical reexamination of the office structure during growth periods (not to mention internal personnel pressures). An example follows:

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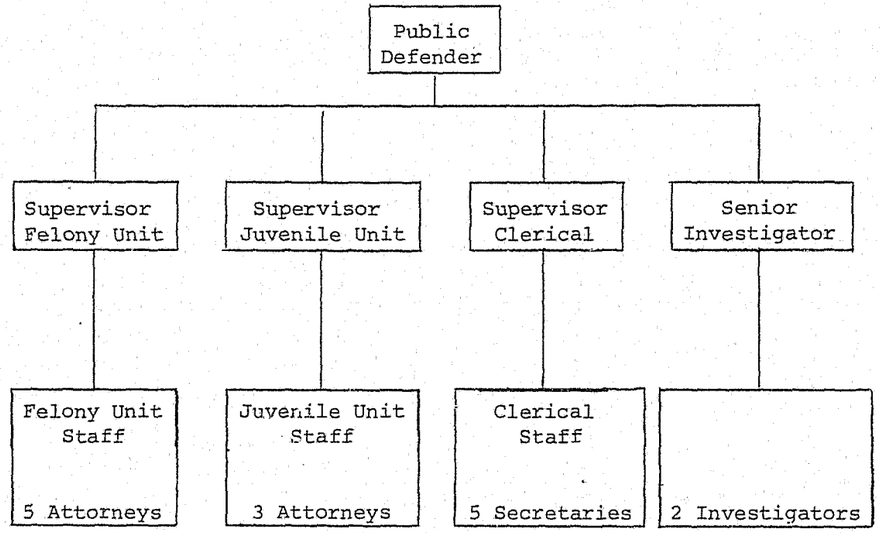
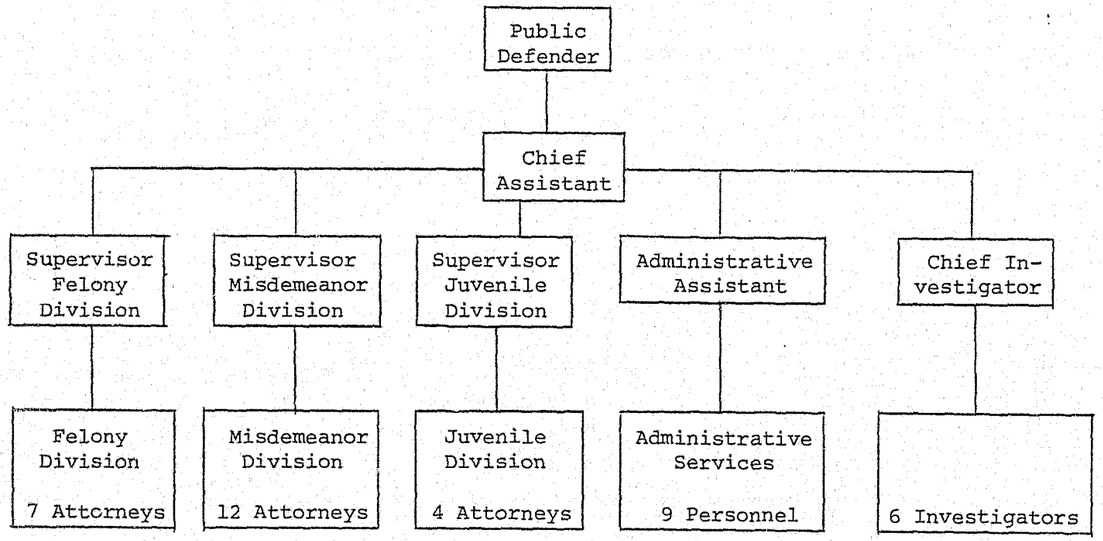
into measurable time-bounded objectives linked vertically and horizontally and with future planning." From Effective Management by Objectives, W. J. Reddin, McGraw-Hill, N.Y., 1971, page 12.

[3]No defense of the almost universal practice of underfunding defender offices is proffered. It is the writer's contention that publicly-mandated economies in the criminal justice system should be effectuated through prioritization in the enforcement area.

Hypothetical Defender Office: Pre-Argersinger



Same Office: Post-Argersinger



Problem: The new misdemeanor division (we don't call it a "unit" any more) is badly understaffed. Where can we get more help?

A critical review of the function of the "Chief Assistant" may well reveal that this function is unnecessary. If the working supervisors are doing their jobs, and the Public Defender[4] is doing his or her job, there may not be much for the Chief Assistant to do. Or, at least, there may not be enough to justify depriving the misdemeanor division of another attorney (or dividing it into two divisions, each with a working supervisor).

3. Increase Use of Paralegal and Other Nonattorney Staff

Increasingly, law offices are experimenting with the use of skilled nonattorney personnel to do those things which do not, either in a legal or practical sense, require a lawyer's efforts. Some defender offices have been hesitant to explore this field. This is due to a well-motivated fear of a drop in the quality of their representation, or because of a well-founded fear that the funding agency will cut their budgets and thereby rob them of the benefits of the savings achieved. Success in using this method of getting more (effective) man-hours with fewer dollars appears to depend largely on managerial skill in organizing the use of nonattorney personnel and partly on the office's ability to control its own budget expenditure (that is, relative freedom from "line-item" rigidity).

4. Use of Resources to Maximize Attainment of Office Goals and Objectives

This topic has less to do with stretching resources and more to do with making wise use of them. Ironically, Argersinger has, in many instances, moved a community's misdemeanor caseload away from a position in which it is the subject of judicial neglect in the area of defense and into a position in which it is the subject of administrative neglect in a defender office. Too often, the "misdemeanor division" is the stepchild of the defender program.[5]

Most defender managers, while properly insisting that every client receive full, competent, and zealous representation, would tend to agree that (subject to such foregoing consideration) resources should be applied where

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[4] Government and military organizations seem to depend heavily on single-position, second-in-command classifications. Business and industrial organizations seem to do quite well without them much of the time. This discussion is not intended as a polemic against hard-working "number twos"; rather, it is intended to highlight the necessity of scrutinizing all purely administrative functions from time to time. See Management and Machiavelli, Antony Jay, Holt, Rinehard and Winston, N.Y., 1967, (Chapter 9, "The Fearful Symmetry").

[5] Although, to be sure, many offices neglect their mental health act representational function even more.

they will do the most good. And yet, notwithstanding the fact that misdemeanor cases receive less investigative attention than felonies from both police and prosecution (with the concomitant result that a higher percentage of misdemeanor defendants may be innocent or likely to be acquitted after trial), many defender offices allocate little or nothing in terms of investigative resources to these cases. By the same token, offices having presentence counseling and investigative capability may save such capability for three-time-loser felony defendants rather than use these services for misdemeanants who may truly benefit from them.[6]

Personnel Administration

1. The Effective Lawyer

Like opera singers, trial lawyers have a reputation for being hard to supervise. Their professional posture tends to be that of the rebel, and the gamesmanship which makes them efeective in the courtroom may make them difficult, if not seemingly impossible, to deal with back at the office.[7]

The advent of Argersinger has produced substantially larger defender offices and, as the office staff enlarges arithmetically, the opportunities for interaction between staff increase geometrically.

Which of us have not heard the sentiment: "It was so much more pleasant working here when the office was smaller?"

The dynamics of size call for defender managers who are not only expert lawyers and talented budget administrators but who, in addition, are reasonably well acquainted with principles of industrial psychology and personnel interaction. Fortunately, training in this field is starting to become available,[8] and defender managers who have the opportunity to avail themselves of these programs should do so. Managerial failures in this area can lead to

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[6] To state the problem is to highlight the defender manager's dilemma. Using the example cited, does one "pull all the stops" and use available staff to attempt to avert a major prison sentence for a client who is beyond rehabilitation or does one save these person-hours for first-offender misdemeanants who can be salvaged but who are facing possible short jail terms? The point of the discussion is that conflicting demands must be met with established office policies setting priorities, and these priorities must be thought through and periodically reassessed.

[7] See "The Defender Office: Making Managers Out of Lawyers," W. R. Higham, NLADA Briefcase, Vol. XXXIII, Number 12, October 1975, page 6.

[8] The National Center for Defense Management, 2100 M Street, N.W., Washington, D.C., sponsored such a program in 1975, and the California Public Defender Association, 1404 Franklin Street, Oakland, California, has sponsored such programs for its members. Both have used professional management training firms functioning in a residential setting.

serious staff morale and effectiveness problems, and threaten attainment of the most basic program goals and objectives.

2. Time Management

Many, if not most, private law firms engage in efforts to maintain strict accountability over their professional time. Since many of them bill by the hour for their services, to lose track of time is to lose track of money--perhaps lots of it.

Many defender managers bemoan the understaffing which they believe threatens the function of their office. Yet, often, a visit of a few days to their offices would suggest to the observant outsider that much of their staff's time was being wasted. One medium-sized office instituted a timekeeping system and found out that, initially, less than half of its professional person-hours were being used for client representation. An office which calculates itself to be 25 percent understaffed may well find that the additional person-hours necessary to its function exist in the form of lost and dead time of its present staff and that a budget augmentation is, in fact, not necessary.

However, it is one thing to talk about better time management (almost everyone does) and quite another thing to achieve it. The lost hours are not regained by issuing memos on the subject or whip-cracking; these may, in fact, have the opposite effect. The subject of time management has received the attention of leading managerial authorities in this country, and formal training in the field is available.[9]

One essential prerequisite to effective time management is some type of effective timekeeping system. For a timekeeping system to be effective, it must have the full cooperation of the staff involved. Since, even among professionals (perhaps especially among professionals) the institution of timekeeping is usually viewed as an effort by management to get everyone to "punch the clock," a system which is introduced without full consultation with and input from those involved will usually be promptly and thoroughly sabotaged (if, indeed, it does not become the cause of an office mutiny). The art of timekeeping system design and the managerial skills necessary to effective implementation are not innate in any of us. It is highly advisable for the defender manager to receive specific training in this area or to obtain outside professional consultative help before attempting to institute any timekeeping and time analysis system in his or her office. Since there are

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[9] See How to Get Control of Your Time and Your Life, Alan Lakein, Peter H. Wyden, Inc., N.W., 1973: The Effective Executive, Peter F. Drucker, Harper & Row, N.W.,1966; and the film, available through rental agencies, "Time Management" (Peter F. Drucker Productions).

For training in the area, consult your local University Extension class catalogues and Adult Education services, or make inquiry through nearby schools of management.

differing views and approaches even among the experts in this field, it may be advisable to "shop around."

3. Assignment of Personnel to the Misdemeanor Division Within the Office

This topic has been touched on briefly above in the section on Utilization of Resources so as to Maximize Attainment of Office Goals and Objectives. It was noted that misdemeanor units or divisions, where they exist as separate entities within defender offices, often receive stepchild treatment when it comes to the allocation of office resources. By the same token, where such units or divisions are established, they also tend to be used as training grounds for the inexperienced or as places for assignment of the less experienced or even the less competent! The writer has even seen instances where attorneys have been assigned to handle misdemeanors as a form of punishment.

Not surprisingly, morale may be low in the misdemeanor units or divisions of many defender offices. Also not surprisingly, this fact may communicate itself to clients of the office, who then feel, appropriately enough, that they are receiving substandard representation.

Probably the best of all systems would be for defender attorneys to represent a mixed caseload of felony and misdemeanor clients, each attorney providing representation in all of his or her cases from beginning to end of the proceedings (appeals perhaps excepted).[10] For many offices, this will simply not be possible because of scheduling problems, and there are sound reasons for not starting brand-new lawyers off with a caseload which includes serious felonies.

As previously noted, misdemeanor cases often include a high percentage of cases (higher than among felonies, in many jurisdictions) in which the skills of the advocate and supportive staff can produce dramatic results on behalf of the client. Aside from office morale considerations, therefore, a strong case can be made for rotation of attorney staff through the misdemeanor (and other) divisions, or units. In actual fact, continued felony representation itself may tend to be enervating, and assignment to a misdemeanor (or other) caseload may operate as a sabbatical as well as fulfilling the spirit and not just the letter of Argersinger.

Management: Argersinger and the Private Bar

Private Representation in Misdemeanor Cases

In many parts of the United States, the private criminal defense bar is an endangered species. Rising standards of criminal defense competence require

[10] Some argument can be made for making juvenile court cases and mental health act cases the subject of specialization, although the writer believes that rotation in such functions is desirable. The writer also favors specialized appellate attorneys who can and will then take a fresh look at cases on appeal.

both enhanced know-how and an increased number of hours devoted to each case by the attorney. Given Abraham Lincoln's oft-quoted truism about a lawyer's time and advice being his stock in trade, it is not surprising that the effect of such a rise in standards is to compel many practitioners to price themselves out of the market,[11] thereby causing increased numbers of misdemeanor defendants to become clients of defender offices or assigned counsel. And, as more defender offices are formed and fewer defendants can afford private counsel, the ranks of the private criminal defense bar are thinned out to the point where private bar involvement in the criminal law and its development drops and the pool of private practitioners skilled in handling complex criminal cases has shrunk.

If, in Chief Justice Burger's words, the dynamics of the legal profession are to rise to this situation, some management expertise must be applied to the problem of reinvolving the private bar in the criminal defense process. Both in the context covered by this paper (Argersinger) and in terms of what is realistic, the field of misdemeanor defense must receive particular attention. For it is in this field that the greatest opportunities exist for the private bar to increase the number of nonindigent defendants and for newly admitted private attorneys to become quickly familiar with criminal defense practice.

A major cause of legal indigence is the practice of many private practitioners of quoting too high a fee in a case to a prospective client. The general rule (referred to in many places as "rule one") is to get one's fee in advance. Extension of credit is seen as impractical in criminal cases and it is often difficult for the lawyer to evaluate the needs of the case in terms of services to be rendered prior to the first court appearance (at which time he or she becomes locked into the case as counsel of record). The natural tendency, therefore, is to quote a fee which represents the maximum cost of services likely in the particular case, and which may assume a high degree of probability of trial. Such caution is inevitable when the actual probability of trial cannot be assessed at the time, even though the statistical probability of trial in criminal cases generally is likely to be 1 in 10 or 2 in 10.

More realistic quotes of fees can be made when: (1) the attorney is an experienced criminal practitioner; (2) full discovery during early stages of the case is possible so that accurate case evaluation can take place; and (3) well-planned court schedules minimize both the number of court appearances necessary and the amount of "dead time" spent waiting in court for proceedings to take place.

[11] In California, rising standards of competence and sanctions against incompetence have had another economic impact. The insurance carrier having the official State Bar malpractice insurance contract has sought to raise premium rates some 300 percent, causing members of the bar to limit their practices to familiar areas of the law and avoid adventurous excursions into the unknown, which, for many, includes the criminal field.

However, these things alone are not sufficient to put private legal representation within the economic reach of substantially more of America's misdemeanor defendants. An additional requirement is that the cost of private defense services decrease. And, since few criminal defense practitioners would be willing, in the long run, to accept the economic martyrdom of significantly lower incomes (such incomes are already considerably lower than those of their brothers and sisters in tax or corporate law practices), this means that management sciences must be brought to bear on the problems of private law offices. Specifically, some of the techniques which have been tried out in defender and federally-funded legal services offices must be tried out in private law firms engaged in criminal defense practice. The use of trained paralegals must be explored further. The day of the one- and two-attorney office may be over. The economies of scale in terms of overhead and volume of cases may be the only answer to currently prohibitive hourly rates.[12] As in the case of defender offices, the problem will be to cut such hourly rates while not only not cutting but in fact increasing competence; whether or not training (see below) and formal specialization in the field of criminal law will make this a realistic possibility remains to be seen.

Entrepreneurial Management in the Private Sector

Entrepreneurial management related to developing low-cost private criminal defense programs is one possible response to Argersinger, but it is not the only one. There exists the need for improved assigned counsel systems either to share indigent representation with defender offices or to simply handle "conflict" cases.[13] Methods of appointment which discriminate against attorneys engaging in zealous representation, permit favoritism and cronyism, and are administered haphazardly and unevenly must be replaced. Bar associations should move to replace such systems with well-administered programs, preferably operated by the organized bar itself, in which appointment panel membership is conditioned on demonstrated competence and zeal and willingness to engage in ongoing training in the criminal defense field. One such bar-operated, coordinated assigned counsel system program operates at cost levels competitive with equivalent defender services and enjoys a high professional reputation.[14] Others exist in New York and Washington.

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[12]Group legal services programs, some offering criminal defense services, have in fact begun to appear. See San Francisco Magazine, September 1976, Vol. 18, No. 9, pp. 10-12, in which charging rates for the Consumers Group Legal Services of Berkeley, California are set out; an hourly rate of $30 is quoted in a region where $60 is perhaps the average.

[13]See Report of Courts Task Force, National Commission on Criminal Justice Standards and Goals, Chapter 13, Standard 13.5 (Methods of Delivering Defense Services) in which mixed systems of full-time public defender organizations and coordinated assigned counsel systems are advocated.

[14]The San Mateo County, California, Private Defender Program, provides defense services by virtue of a contract between the County Bar Association and the County government. Under this contract, the bar association is paid

However, systems development in the private sector of criminal defense practice cannot end with the creation of programs: (1) for those who can retain counsel, and (2) for those who categorically cannot and are indigent in the full sense of the word. There are large numbers of defendants (particularly misdemeanor defendants) who are misnamed the "partially indigent" and who would like to choose and hire their own lawyer and have some funds for this purpose but not enough. Today, such persons usually wind up as clients of the public defender or appointed private counsel and, in states having recoupment statutes, they are then billed for defense services through court order or some other type of governmental action.

It is submitted that development of programs based on what has been called the "Toronto Plan"[15] should be encouraged. Clients with some funds available for legal representation who wish to employ private counsel should be permitted to do so, with the difference being made up from government sources. Obviously, some criteria would have to be established governing which cases qualified for the plan, and the program would require administration (perhaps by the entity, such as the bar association, already operating the local coordinated assigned counsel system).

Through development of such systems as these which have been suggested, the legal profession can, in the spirit of Argersinger, indeed rise to meet the burdens placed upon it.

Training and Continuing Education

A discussion of the managerial implications of Argersinger cannot be complete without a few comments about training and continuing education, the necessity for which has been directly and indirectly alluded to in other parts of this paper and which is unquestionably essential to the success of the various programs discussed above. The need for graduate legal training in the criminal defense field has been recognized, and such successful institutions as the National College of Criminal Defense Lawyers and Public Defenders

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pursuant to a formula contained in the agreement which is based on numbers and general categories of cases. The bar, in turn, maintains a panel of trained and qualified attorneys for all persons eligible for court appointed counsel. A full-time attorney-administrator of the program selects lawyers from the panel for appointment in specific cases and administers the program, including payment to the lawyers in accordance with a fee schedule developed by the bar association. The bar also provides investigative and support services in cases, operates training programs for panelists, and assists courts with eligibility standards.

[15]Under this program, the Law Society of Upper Canada operates the Ontario Legal Aid Plan. The plan calls for the client to pay whatever he or she can for the lawyer of his or her choice; the difference between this and the fee established by the plan is made up from a subsidy provided by the provincial government.

have made it a reality for numerous attorneys engaged in the defense of the indigent. However, the facts remain that: (1) there are not enough locally based programs, and (2) in the era of Argersinger, there are not enough which deal with commonly-encountered misdemeanors.

A personal anecdote at this point will assist in highlighting the problem. As I, a private practitioner in California, sat at my desk drafting this paper, a mailed announcement from a local misdemeanor-level court was dropped into my in-basket. The announcement listed a change in schedule for 13 jury misdemeanor trials (one of which is mine), all of which had been set for October 18, 1976. Of these 13 jury trials, 11 involved charges of driving while intoxicated. Of these 11 so-called drunk driving cases, four were shown as public defender cases and six as having private retained counsel.

In California, as in most jurisdictions, effective representation in drunk driving cases requires that the attorney not only be well versed in the statute and decisional law governing the substantive crime itself, but in what is called the "implied consent" (mandatory chemical testing) law and the law governing the consequences of refusing testing. The attorney must be familiar with the motions to suppress the results of chemical testing which are available under certain circumstances. He must be familiar with the administrative policies and procedures of the Department of Motor Vehicles relating to non court-ordered license suspensions.

Added to that is the fact that the attorney must be familiar with the chemistry and physics involved in blood, breath, and urine testing (particularly gas chromatography) and the physiology of the human body as it relates to alcohol ingestion, liver, and kidney functions, and excretion. He must be familiar with the effects of alcohol on the central nervous system, and with neurological disorders and conditions which mimic intoxication. He must be aware, in breath-testing cases, of the functions of human pulmonary alveoles and how alcohol-laden breath is exhaled, and the physical principles of vapor pressure and temperature as they affect such exhaled gases.

In recent years, an entire title of the state administrative code was added. This title established standards and criteria for the operation and maintenance of laboratories and laboratory equipment used in chemical testing in drunk driving cases. The attorney must be aware of these as they affect admissibility of evidence in these cases.

Simple drunk driving is a very common misdemeanor in California and most states. It is a crime in which Argersinger has considerably extended the right of indigent representation. It often carries serious consequences for the convicted defendant.

It requires an incredible degree of expertise on the part of defense counsel, if the most elemental concepts of competency are to be fulfilled.

It requires training: Indepth training because of its complexity. Ongoing training because of continual changes in law and scientific methodology. Effective training because the defense at trial of one of these cases, if properly conducted, is difficult in the extreme.

And, while few other misdemeanors share the difficulty and complexity of the defense of this one, there are many others which possess their own set of legal or factual ramifications which make them require particular expertise to defend properly. Training for all of them is a "must," since these are the common and often encountered crimes of America.

Some Suggested Topics for Discussion

A. How can defender offices best be organized and structured so as to maximize the effective use of their staff to meet the mandate of Argersinger?

1. Are there common problems related to internal staff deployment which unnecessarily cost offices person-hours?
2. Do "misdemeanor divisions" and units, where they exist, receive their fair share of resources and experienced personnel?

B. What, if anything, is the future of paralegal personnel and other skilled specialists in defender offices?

1. Can budgets be stretched through use of such personnel without adversely affecting the quality of representation provided?
2. If such personnel can be used effectively, how should they be used?

C. What entrepreneurial and other functions can and should the bar as a whole undertake to assist in meeting the burdens of Argersinger?

1. Group legal service plans and other low-cost programs? How?
2. Coordinated assigned counsel programs? How, when, and what?
3. "Toronto-type" plans? If so, what needs to be done?

D. Is there a particular need for training of attorneys in misdemeanor defense representation that is not now being met? If so:

1. Of what should such training consist?
2. Should it be administered at the national or local levels (or both)?
3. Whose responsibility is it to effectuate it?[16]

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[16] Remember that to say everybody is to say nobody. C. F. Powell v. Alabama (1932), 287 U.S. 45.

Workshop B

Summary of Proceedings

In our workshop on management problems related to meeting the mandate of Argersinger, there was almost universal acknowledgment that in defense organizations, particularly those of medium and large size, where the representation in the misdemeanor field is assigned to a particular group of lawyers in a misdemeanor division or unit, the misdemeanor representation tends to suffer from neglect by comparison to that in the felony field or, possibly, the juvenile field. This area of representation suffers badly from a lack of prestige among its members. We recognized, of course, that this is an attitude that pervades our whole society. Murders are simply more glamorous than drunk-driving cases, and lawyers inevitably tend to prefer to try them.

The fact is that the misdemeanor division is often the training ground for the new lawyers. Nobody could figure out how to provide training differently. Worse than that, there is often a tendency for offices to assign either incompetent people or people perceived as less competent but who might have been around a while to the misdemeanor representational function.

The second major management problem is a general insufficiency of resources. This is a problem that almost invariably plagues defender offices at all times and in all places. This insufficiency of resources somehow tends to become even more pronounced in the misdemeanor area, again, as compared to that in the felony area.

Some solutions were perceived: As far as the general neglect of the misdemeanor function and its lack of status is concerned, there was a fairly well pronounced majority view that staff should be rotated; that people should not see themselves as stuck in the misdemeanor division until they could get promoted to the felony division; that from the head of the office downward these functions should be considered as of equal importance; and that people who have been working in the felony division should then spend a period of time representing clients in the misdemeanor field. This was seen as having virtues over and above elevating the status of misdemeanor representation. Some people even saw it as a sabbatical from felonies. It was suggested that in those offices where the head of the office still handles cases from time to time, he or she should handle them in the misdemeanor courts. It was noted that there was a pronounced tendency of office heads, when they showed off to the troops by taking a case, to take a big murder case. This has a two-fold effect. First, it stresses the fact that the murder is an important case, not like misdemeanors. The second adverse effect is that it successfully deprives the office of its management for quite a few months while the murder case is litigated. Both of these things were seen as undesirable.

Another suggestion was that there be incentives. For example, felony-trial lawyers might be given the incentive of being promoted to line supervisors in misdemeanor units. One large office is attempting to implement this.

The second major problem is the generalized lack of resources. How do you stretch the office's resources in an era of tight money? There was heavy

discussion of the use of paralegal personnel. Unfortunately, I think most of those participating in the three workshops had not had direct, extended experience with paralegal personnel. But it was generally felt to be a good idea to try to make budget dollars go further by using paralegal aides, because attorneys in defender offices tend to perform many, many functions which need not be done by lawyers. However, it was felt that there was a definite need to define the functions and roles of paralegals and for defender offices to participate with educational institutions in shaping the kind of training that paralegals should get. It was noted that a lot of training institutions are going off in a number of directions which may not always be the right ones in terms of training provided. Consequently it was noted that the LEAA Reference Service can guide people to literature on the subject of using paralegals.

The use of law students as a method of extending the budget provoked candidly mixed reactions. There were those who felt that law students could be used to actually try cases. There were also those who saw this as an invitation to malpractice.

There was also a discussion of the use of timekeeping systems in offices, not only to assist staff in their efforts to make the most and the best use of their time, but also for recordkeeping and credibility purposes where needed. Additionally, time management systems enable one to analyze on an officewide basis whether or not there are serious time losses that could be compensated for by reorganization or other techniques.

The topic of training did come up in the context of enhancing the effectiveness of attorneys, and particularly those doing the misdemeanor work. There was some discussion--but no clear consensus--of whether there was a need for training which had a greater misdemeanor orientation than that currently available. However, one thing that did come out, whether the training was misdemeanor oriented or felony oriented, was that the lecture, demonstration, and practice method of training--rather than pure training by lectures--was desirable. By the lecture, demonstration, and practice method, we're talking about listening to a lecture on a subject, perhaps final argument, then watching a demonstration of how it's done, and then actually engaging in the final argument in a practice session. Afterwards, you see yourself on a video playback and learn in the process.

Discussion Highlights

Managing the administration of defender organizations presents a very important problem, particularly in a tight money climate (i.e., how to make things work better and make resources go further). Although not widely applicable, perhaps, Management by Objective topics such as delegation of responsibility, goal setting, and communication are relevant to managing defender organizations. Still another tool is formal management training, such as those programs now operating with the California Public Defender Association (which has a private firm handling the training), or those sponsored by the National Center for Defense Management or the National College for Criminal Defense Lawyers.

How to stretch resources: (1) periodically evaluate salary structure and administrative hierarchy to maximize effective use of staff and ensure equitable pay levels; (2) institute time management and recordkeeping systems to enable staff to make the most and best use of their time; (3) examine the use of paralegals and/or law students and other support staff to free attorneys from having to do things which do not necessitate legal expertise.

Perhaps the most pernicious problem in defender offices is that all too many attorneys perceive misdemeanor case representation as having low status or priority, particularly when such is compared to the "glamor" of felony case representation (i.e., handling a drunk driving charge v. handling a murder case). Oftimes, unskilled attorneys are assigned to handle misdemeanor cases, while the more experienced and competent ones are assigned to felonies. The consensus was that something must be done to upgrade the status of misdemeanor case representation. Some suggestions were that attorneys be assigned to cases on a rotating basis, or mixing the caseloads so that no one attorney is inundated with merely misdemeanors or felonies. Additionally, it was noted that training of law students should focus on misdemeanor case representation, which has its advantages (i.e., greater rate of wins v. losses, less time consuming). Another means of relieving the burdensome workload of defender organizations is great participation by the private bar, which has priced itself out of the market in misdemeanor case representation. An important factor in securing effective assistance of counsel from among the ranks of the private bar is to provide adequate fees to court-appointed attorneys.

WORKSHOP C
ELIGIBILITY

Charles D. Smith, Moderator

Staff Attorney
Boston University School of Law
Center for Criminal Justice

Argersinger Eligibility

The purpose of this paper is to set out a framework for conference discussion of Argersinger eligibility. Argersinger holds "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." The importance of Argersinger lies in its extension from Gideon of governmental responsibility to appoint counsel to certain nonfelony (petty and misdemeanor) defendants. The issue of eligibility asks us to identify who those defendants are.

To respond to this issue, two perspectives on decisional and implementation analysis are necessary: the legal and the political. While these two approaches together frequently help illuminate the meaning and impact of appellate decisions, they are particularly helpful to Argersinger, where the Supreme Court's discussion clearly recognized that our lower courts are jammed with poor people. Had the Court felt that most defendants could easily hire private attorneys, there would have been no hesitation over fully extending Gideon to any indigent criminal defendant without regard to trial outcome. But by extracting the fact of Jon Richard Argersinger's imprisonment as its fulcrum for extending the Sixth Amendment right to counsel to some nonfelony defendants, the Court acknowledged troublesome fiscal and manpower implications behind its holding. And through its concentration on the conclusion of a trial rather than, Gideon-like, on its initial cause, the Court blurred focus on the decision's rationale. Thus, although its discussion repeatedly emphasized the Sixth and Fourteenth Amendment bases for its decision--e.g., "the requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution,"--many trial judges received Argersinger principally as a sentencing case and only secondarily as a counsel case. This is because an Argersinger appeal most explicitly lies when a judge, after a counselless trial, imprisons an indigent defendant who did not waive counsel. Within the most narrow interpretation of the Court's holding, therefore, counsel is not required in a nonfelony case when: (1) no imprisonment results; or (2) the defendant waives counsel appointment; or (3) the defendant is not indigent. Thus, a judge can avoid appointing counsel by: (1) deciding at the outset of the trial that he will not use a permissible imprisonment sanction; or (2) inducing a waiver of counsel; or (3) finding the defendant not indigent. In the latter two situations, the judge arguably has not given up his option to imprison. And in all three situations, the politically appointed or elected judge, presiding over a court whose funding base is a hard-pressed municipality, county, or state, has protected the public purse. But in so doing, the judge's

conformity to the isolated letter of Argersinger's holding may be at the expense of his impartial judicial role and the spirit of justice behind the Court's decision.

It is helpful to view Argersinger eligibility as posing two sequential questions that, when each is answered affirmatively, require counsel appointment. First, is this an Argersinger case? Second, is this an Argersinger defendant? What follows are suggestions on how these questions might be answered in order to find that sometimes too-elusive Argersinger defendant.

The Argersinger Case

Is this an Argersinger case? That is the predetermination question. The starting point is the statute or ordinance the defendant is accused of breaking. If the legislature, be it federal, state, or local, did not authorize imprisonment so that imposed or suspended jail sentences are not permitted, no interpretation of Argersinger can require counsel appointment, with the possible exception of probationary terms that amount to disguised imprisonment or jailings for nonpayment of fines. If imprisonment is a legislatively permissible sanction, then the Argersinger threshold may be crossed. At that point, three basic predetermination standards can be posited: "individualized-prediction," "class-of-offense," and "imprisonment-in-law."

Individualized-Prediction

The narrowest predetermination standard is "individualized-prediction" (alternatively called "imprisonment-in-fact"). Under this interpretation, Argersinger is essentially a sentencing decision mandating counsel appointment only when imposed or suspended imprisonment is a substantial probability upon conviction. In other words, only when a judge wishes to reserve his power to impose an imprisonment sanction on a particular defendant must trial counsel be appointed. This is the most personalized approach to predetermination and it is the most subject to serious judicial abuse of defendants. Therefore,

> The individualized-prediction standard should not be used as a method of predetermination. Any such standard for predetermination that evaluates the background of each individual defendant would be impractical and have an unnecessarily prejudicial effect on the defendant's right to a fair trial.[1]

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[1]This recommendation is taken from Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin (1976; Ballinger Publishing Company, 17 Dunster Street, Cambridge, Massachusetts 02138). This book is a result of a two-year LEAA-funded Argersinger study by the Boston University School of Law Center for Criminal Justice. All of the recommendations highlighted in this paper come from that study. Many of the recommendations are supported by standards developed by the American Bar Association and the National Legal Aid and Defender Association.

Legally-viewed, individualized-prediction invites a judge--either directly through his own pretrial analysis or indirectly through prosecutorial pretrial opinion--to learn more about the particularities of the offense or the defendant than he should to remain impartial. As well, much of the information will be irrelevant or otherwise inadmissible on the trial issues, possibly erroneous, and probably incomplete given the state of police and probation reports especially in the lower courts. And finally, much of this information should come to the judge's attention only after conviction when he is called upon to tailor a sentence and when defense counsel is positioned to rebut, modify, verify, and add to the information beyond those facts elicited at trial. Still, from an immediate political point of view, individualized-prediction is a tempting standard because it promises minimization of the number of Argersinger cases with their attendant costs. But such political concerns should not overwhelm legal principles or compromise judicial integrity.

Class-of-Offense

Another predetermination standard is "class-of-offense." This is a hybrid between individualized-prediction and imprisonment-in-law. This standard applies a "judicial realism" variant in which the judges in a jurisdiction decide and announce that certain charges known from experience to be likely to result in imprisonment will be Argersinger cases and that for other charges, that likewise could result in imprisonment, no jail sentences, imposed or suspended, will be used so that such cases will not be Argersinger cases. In essence, the judiciary under this standard takes over the legislative function of ordering the severity of offenses. Although for different reasons, the class-of-offense standard is as improper as individualized-prediction. Therefore,

> The class-of-offense standard should not be used as a method of predetermination. Such a judicial determination that counsel will never be appointed for financially eligible defendants charged with an offense for which the statute permits imprisonment as a sentence usurps the legislature's power to fix sentences and is an abuse of judicial authority.

Under the class-of-offense standard, not only are individual rights deriving from the Constitution measured by group probabilities, but as well such "judicial realism" could turn probabilities into greater certainties, making class-of-offense Argersinger defendants surer jail candidates.

While the separation of powers problem in the class-of-offense standard is clear, the advantage to this approach is that it recognizes facts. These facts are that most persons charged with most nonfelonies are not imprisoned, either by imposed or suspended jail terms, through contempt for nonpayment of fines, or constructively by heavily restrictive probationary terms that amount to imprisonment without walls. The usual nonfelony disposition is an imposed or suspended fine. But recognizing these facts and acting to remove the imprisonment option is a job for the legislature, not the judiciary. In practical (that is, economic) as opposed to more theoretical (that is, legal) political terms, the class-of-offense standard may limit to some extent the number of

Argersinger cases; but it does so through illegal judicial action. Still, there is much to be said for this analytical view of Argersinger, and the bar should explore with police and legislative bodies the cleansing of infrequently used imprisonment options from statutes and ordinances.

Imprisonment-in-Law

The proper Argersinger standard is imprisonment-in-law, whereby any case involving a charge that permits imprisonment is an Argersinger case. Therefore,

> The assistance of counsel should be offered to all financially eligible defendants who are charged with an offense for which there is a potential punishment of imprisonment. This is the imprisonment-in-law standard.

This is the preferable standard legally, because the other two standards promote dubious judicial behavior. But imprisonment-in-law is the most vexatious standard politically, because it is the most inclusive. The vast majority of nontraffic cases as well as a substantial minority of traffic cases tried in the lower criminal courts will be on charges for which imprisonment is an authorized sanction. Thus, while imprisonment-in-law is the most legally correct way to view Argersinger cases, it clearly is the most costly.

In addition to its legal propriety, imprisonment-in-law, like class-of-offense, forces to the surface a fundamental political question implicit in Argersinger's sentencing emphasis: Are we not an overcriminalized society where legislative bodies feel impelled to create more and more criminal statutes and to tack onto them authorizations for the judiciary to deprive persons of their liberty, without regard to whether that penultimate penalty is rationally related to the law's purpose or to the actual operation of the constitutional right to counsel? Adoption of an imprisonment-in-law standard surely must be accompanied by serious attention to the substantive criminal law base from which prosecutions flow.

Defining the Argersinger Case

The topsy-turvy nature of the Argersinger holding, which puts the end of the trial before the beginning, creates an awkward dilemma for the trial judge asked to ensure adherence to constitutional rights yet constrained by budgetary concerns. The individualized-prediction and class-of-offense interpretations have superficial appeal, particularly when balanced against the potential drain on tax monies from widespread counsel appointment; but they both are legally untenable. The proper place to find answers to the legal question of what is an Argersinger case is the statutory base of the criminal prosecution; when the legislature mandates that a judge consider imprisonment as a sanction, any case including such a charge is an Argersinger case.

The imprisonment-in-law standard should be articulated in court rules directing counsel appointment and in any legislation, such as public defender and assigned counsel statutes, relating to counsel appointment. As well, litigation aimed at ensuring that this standard is the proper Argersinger

interpretation should be commenced, buttressing the Sixth Amendment with arguments based on state constitutions and due process and equal protection principles. Furthermore, Argersinger should be viewed by legislators as an important stimulus to reconsider the statutory criminal law base, both for the immediate purpose of removing useless imprisonment sanctions and the longer-range purpose of decriminalizing many current offenses and generally recodifying the criminal law. For it should always be kept in mind that Argersinger should be no more than a temporary resting point along a continuum toward full implementation of the Sixth Amendment; surely the Sixth Amendment means no less than what it says: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense." The goal of this litigation should be the constitutional interpretation that

> The Sixth Amendment requires that right to counsel be extended to all criminal defendants, regardless of whether they face imprisonment or not.

The Argersinger Defendant

Once it has been determined what an Argersinger case is, a decision must be made on a case-by-case basis whether the individual defendant with an Argersinger case qualifies for appointed counsel. The issue here is not what might happen to the defendant at the end of the trial; that predetermination question has already been answered: he might be imprisoned. Rather, the question simply is whether or not the government has a constitutional responsibility, if it wishes to prosecute, to supply the defendant with a commodity--a lawyer--that the defendant cannot obtain through his own means. Often this is called the determination of indigency.

It is crucial that jurisdictions articulate standards and procedures ensuring that indigency determinations are made fairly and rationally. The following recommendation incorporates a hardship view used by the ABA and the NLADA, implies that there should be a presumption of financial eligibility for appointed counsel rebuttable by the defendant's own calculations or by the defendant falling outside an objective uniform financial standard, and proposes that the commodity the defendant should be able to purchase from the legal marketplace is more than the physical presence and attention of a lawyer: it is the effective assistance of that attorney.

> No defendant should be found financially ineligible for publicly provided criminal defense counsel unless he can purchase effective counsel assistance in the private marketplace without substantial hardship to self or family.
>
> The development of uniform financial eligibility standards for appointment of public counsel should be mandated by the appropriate statewide authority, be it the legislature or the judiciary. Depending upon the state, these standards should be developed either statewide or within smaller units such as regions

or local jurisdictions if economic variables so require. The standards should be known and understood by the public, should be based on a fair and honest appreciation of the economic hardship to an individual trying to obtain effective private criminal defense counsel, should be applied equally and with no coercion, and should represent a policy giving preference to public counsel appointment.

Of the two strategies for uniform financial eligibility procedures, preference should be given to the accused's self-determination over the alternative of hardship presumptions based on income and appropriate assets.

Self-Determination

Self-determination has many advantages. With no commonly accepted definition of "indigency" that is clear and objective, any formulation of an eligibility standard based on "indigency" will have a great deal of subjective content and thus a large measure of arbitrariness. The defendant's subjective evaluation of his own economic situation is perhaps as valid as anyone else's. As well, the cost involved in seriously attempting to verify information supplied by the defendant and measuring it against some standard of indigency could be quite substantial both in time and in public expenditure. The procedure involved in self-determination would eliminate such costs entirely.

A properly administered self-determination program will provide each defendant with the information necessary for him to make the right calculations. With a clear understanding of the importance of counsel in determining guilt or innocence, sentence, and collateral consequences and of the cost of hiring effective counsel, a defendant will be able to make a knowledgeable and intelligent self-determination. Therefore,

Public counsel in criminal proceedings should be provided for any accused who, based on his own uncoerced assessment of his economic condition and an informed judgment of the probable cost of an effective defense, has determined that he is financially unable to meet such cost without substantial hardship to self or family.

There are at least three substantial concerns that could be raised against this approach:

(1) it may be abused by many defendants, depleting both an important source of private bar business and the public purse, particularly in the usual nonfelony context where many defendants may view counsel as having marginal utility;

(2) it relies on defendant self-interest to inhibit abuse and in so doing implicitly ratifies the erroneous but commonplace defendant assumption that retained counsel is better than appointed; and

(3) if defendant choice is whimsical and unpredictable, a jurisdiction will be unable to plan, budget, and project necessary appropriations for its public defender and/or assigned counsel system.

Despite these possible drawbacks, self-determination should be seriously considered. A controlled experiment may reveal that: (1) well-informed defendants are not generally dishonest; (2) private attorneys maintain or increase their number of retained clients; (3) the demands on public monies remain constant or decrease; (4) self-determination is cost-effective, when weighed against the cost of determining and verifying "indigency"; (5) defendant selection to retain counsel is not based on a view that appointed counsel is unprofessional, but rather springs from other intangible notions about self-esteem, charity, and the value of things purchased as opposed to received for free; (6) planning can be done properly using experimental data; and (7) fewer defendants go unrepresented because they are now better informed about counsel's desirability and availability.

Uniform Standard and Determination of Hardship

The alternative approach to self-determination is the establishment of objective financial criteria for appointment. Under this approach, someone obtains personal information from the defendant, verifies that information, and then applies it to a formula that has allowance for unusual situations. This is a judicial task in many jurisdictions, often leading to hasty and ill-informed decisions. It is preferable to have someone other than the judge make this eligibility determination.

The chief administrator of the defender system should be responsible for determining eligibility. Day-to-day financial eligibility determinations should be delegated to the salaried professional staff, which comprises the core of the defender system. The judiciary should not be responsible for these initial determinations of financial eligibility. The trial court should refer for a determination by the defender staff those defendants appearing without counsel who have not been found ineligible. The trial court should serve as the first forum of review of determinations of ineligibility.

For determinations to be fair and uniform, a standard must be articulated from which a formula that permits just yet personalized application can be devised. The following standard is a proper starting point.

To assure equal treatment of defendants, jurisdictions should develop uniform eligibility standards. Counsel should be provided to any person who is financially unable to obtain effective representation without substantial hardship to self or family. In applying this standard, the following criteria and qualifications should govern.

--A presumption of ineligibility should not be drawn because a defendant has posted bail or is capable of posting bail.
--Resources of persons other than the defendant and his spouse (in community property states) should not be considered in the determination of eligibility.

--Assets of the defendant which are not liquid within the time span available to retain effective private counsel should not be considered in the determination of eligibility.
--Liquid assets such as cash in hand, stocks and bonds, bank holdings, savings, and property convertible into cash in the time span available to retain effective private counsel are relevant in the determination of eligibility.
--The current annual income of the defendant and his spouse (in community property states) is relevant in the determination of eligibility.
--The defendant's assessment of his financial ability to retain effective private counsel should be considered.
--Family size should be determined functionally to include, in addition to those for whom there is a legal responsibility to support, those persons who are in fact part of the family unit.

Public defense in criminal proceedings should be provided to any accused if his income is less than the appropriate standards of living as determined by the Bureau of Labor Statistics. The preferable standard for measuring substantial hardship is the Bureau's "moderate living standard." Jurisdictions might adopt immediately the "lower living standard" for purposes of a planning period designed to establish demand under the moderate standard.

In cases where the defendant's income is over the standard adopted, the defendant should be found eligible for public defense counsel if he can show that he is unable to meet the cost of effective defense without undue hardship.

The criteria and qualifications listed in this recommendation are supported, in principle, by recommendations of the ABA and the NLADA. Basically, they establish the parameters of those personal financial resources that should or should not be considered available for retention of counsel. As well, they reflect the "ready cash" assumptions of the private bar which in almost all criminal cases require that the bulk of the fee be paid "up front." The notion of family size being viewed functionally as well as legally is a recognition of the fact that many persons, particularly from immigrant and minority communities, may have extended family responsibilities.

A most difficult and delicate problem is deciding where the objective income line should be drawn. This decision essentially relates to two factors: (1) where presumptions of substantial hardship lie; and (2) the amount of money necessary to retain a lawyer to provide effective assistance of counsel. Drawing this line is made more difficult by the political pressures from the private bar desirous of ensuring a sufficiently large pool of potential retained clients.

The financial position of nonfelony defendants is obviously quite varied. At the top of the range are defendants charged with nonfelonies who will automatically retain private counsel; therefore, there is no need to consider

providing public defense services to them. They readily make the value judgment that private counsel is desirable, and they allocate their resources accordingly, with no further public impetus needed.

At the lower end of the range are those defendants who will be eligible for the maximum public defense services available. This group would include those on welfare and those benefitting from other public assistance programs. Because they lack funds for essentials, legal representation clearly would be beyond their means. They are automatically entitled to public defense services.

The group that must be considered here is found in that wide range between those two extremes. It is composed of defendants who are not destitute yet are not financially capable of mounting an effective defense without aid. This range includes individuals with very modest uncommitted funds, which under some circumstances might be adequate for a counsel-assisted guilty plea to a simple misdemeanor or ordinance violation, as well as individuals whose familial responsibilities extend beyond the legally recognized family unit. It also includes middle-income defendants with an intricate and costly defense to a serious, complicated, or constitutionally-suspect misdemeanor charge.

This middle-income group very well may not fall within that economic class traditionally considered "indigent," which usually is taken to mean insolvent or destitute. And this group is increasing in size, according to a recent Census Bureau report, due to continuing high rates of inflation and unemployment and exhaustion of unemployment benefits. The present poverty level is $5,500 for an urban family of four. That is the level usually used by civil legal service programs; and that cut-off line may be quite appropriate as a screening device for those legal programs with roots in the "War on Poverty," with limited funds, and with cases where there is no constitutionally-based right to counsel and where private attorneys may be available on contingent-fees or small down-payments. Where, however, the right to counsel is fundamental and derives from the Constitution, policy decisions that, in fact, deny effective counsel services to a class of citizens must be viewed as contrary to constitutional minima. Accepting public responsibility only for the destitute leaves the lower-middle and middle-income persons in a precarious position. These persons all too frequently are pressured, cajoled, and sold in what Abraham Blumberg calls "the practice of law as a confidence game." Ineffective assistance is their lot; the letter of the Sixth Amendment may be met, but the spirit is denied.

Although the poverty level is inappropriate for defining financial eligibility for constitutionally-protected counsel rights, there is an alternative government standard that merits attention: the Standard of Living Budgets, computed by the United States Department of Labor's Bureau of Labor Statistics. The Bureau carefully disavows any social policy intent in preparing its budgets for three standards of living (low, middle, and high). Using scientifically developed nutritional and health standards for food and housing and consumer price and expenditure analyses for other components, the Bureau calculates living costs for a hypothetical urban family of four. The standards vary geographically and there is a formula for adjustments by family size. It should be noted that the standards include no expenditures for legal services. The following chart

in their purposes. The bar and the judiciary, joined by the media, must make sure that no defendant in any American court who faces the possibility of imprisonment goes without the full opportunity to be effectively represented by counsel.

Workshop C

Summary of Proceedings

The most common conclusion is that there really is no systematic approach anywhere to determining eligibility.

Basically, our discussions broke down into two parts. First was an effort to answer the question of what an Argersinger case is. The question there is whether or not a judge ought to be taking a case-by-case approach, or whether the judge or the system ought to assume that any case that involves a charge which might result in imprisonment is, ipso facto, an Argersinger case. Clearly, in the latter situation, the volume of cases is much heavier than in the former.

One fruitful approach that was suggested was that the local legislative units be stimulated to change their laws. Many charges where imprisonment is a possibility currently are brought under either local statutes or under state statutes that don't have a local counterpart. In these latter cases, perhaps local laws could be devised with the imprisonment sanction eliminated, thereby reducing the number of Argersinger cases. It was also suggested that there be greater scrutiny of the role of police in making arrests and of judges and magistrates in issuing arrest warrants. Additionally, there ought to be greater screening and exploration of the full use of diversionary approaches.

The second question pertained to whether or not an individual defendant who has an Argersinger case is financially eligible for appointment of counsel. The one consensus was that the poverty line is improper. There was also consensus about what factors are proper and improper in determining financial eligibility or indigency. It was suggested that the legislation, especially the state legislation, and the court rules authorizing counsel appointment be reviewed to see whether or not they are too restrictive or too vague. It was also suggested that possibly the best approach would be just to give counsel to anybody who asks for it. Others thought that a very calculated indigency form would be preferable.

Basically, the two questions that were addressed were--One: What is an Argersinger case? Two: Who is an Argersinger defendant? From my own perspective, the one major conclusion is that there appears to be a serious need for extensive planning, because virtually no one who attended the session was able to present a clear outline of the eligibility situation in his or her jurisdiction. That made it very difficult to construct jurisdiction-particular arguments pertaining to the functioning of any sort of defense system.

I would suggest that LEAA or your state funding agencies be urged to provide money for individuals to gather the data that is necessary for you to present rational and logical arguments to your local legislative bodies.

Discussion Highlights

Is there a systematic approach to determine eligibility under Argersinger? Although most workshop participants agreed on what constitutes an Argersinger case, many felt that the high court decision, in its purest form, cannot be fully implemented because of political and economic realities (i.e., how does one justify appropriating funds for counsel to represent "criminals," while simultaneously laying off law enforcement officials?).

In reference to the potentially heavy volume of cases which could be classified as Argersinger cases, participants noted that local legislators should be encouraged to decriminalize laws pertaining to so-called "victimless crimes" (i.e., public drunkenness) or, at least, eliminate the imprisonment sanction thereby reducing the number of Argersinger cases.

The second issue broached in this workshop pertained to determining the financial eligibility of an Argersinger defendant in deciding whether he or she is entitled to court-appointed counsel. The consensus was that the government-established poverty level is inappropriate. Although there was no consensus as to what constitutes indigency and, thus, entitles a defendant to court-appointed counsel under Argersinger, it was suggested that state legislation authorizing counsel appointment be reviewed and that counsel be appointed for anyone so requesting.

A concomitant issue is that of deciding who should be charged with the responsibility of determining eligibility for court-appointed counsel. Public defenders, for the most part, are already overburdened and placing this duty with the court allows the judiciary too much discretion.

WORKSHOP D
LEGISLATIVE AND RULE CHANGES

Dr. Shelvin Singer, Moderator

Professor of Law
Illinois Institute of Technology
Chicago-Kent College of Law

Consultant to National Legal Aid
and Defender Association
Chicago, Illinois

Introduction

To poor people, the promise of Argersinger v. Hamlin, 407 U.S. 25 (1972) (the availability of counsel for misdemeanor-accused persons who cannot afford their own attorneys) is, at best, illusory. The delivery of defense services is so cumbersome and delayed that the legal representation provided in the vast majority of cases becomes pointless. Indeed, perhaps such representation may even be detrimental to the accused.

Consider the plight of most poor people in misdemeanor cases who meet their appointed attorneys for the first time in the courtroom. In most cases, these defendants have waited in jail up to three days before they have come to court. Some (about 22 percent of defender clients) have waited even longer. For, being poor, they were unable to post bond.[1] In many instances, the sentence on the crime charged is one which will result in time already considered served in jail, or no more than a day or two longer in jail, upon a plea of guilty. However, if the accused is innocent--or has some other defense--and requires any preparation at all, this means a continuance. Consequently, the accused will have to await the continuance date, incarcerated. Thus, whether convicted or acquitted, the accused will have spent more time in jail than if he had pled guilty at the initial court appearance.

The choice whether to plead guilty or contest the matter is meaningless. For under such circumstances, it is rare that one will await proper preparation. The result is that most non-fee misdemeanor defendants either go to trial with an unprepared case or plead guilty. This paper will suggest several legislative and court rule remedies for this sorry situation: (1) entry of the appointed attorney at the time of arrest or shortly thereafter; (2) mandatory requirement of summons in misdemeanor cases; and (3) alternatives to money bond. These are not intended to be mutually exclusive or all-inclusive remedies. Indeed, they all should be implemented, if legal representation in misdemeanor cases is to be meaningful. Other procedures may also present themselves to assume early representation.

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[1]Unpublished Report, Indigent Defense Systems Analysis Project, National Legal Aid and Defender Association, 1976.

Entry Prior to Court Appearance

One of the deterrences to early case entry (i.e., prior to court appointment) is the statutory provision found in the majority of states which directs that the court appoint counsel for non-fee defendants. Some may claim that there are inherent problems which make pre-court appearance entry too difficult. The thesis here is that delay in case entry until court appointment presents so serious an obstacle to effective misdemeanor representation that, whatever administrative problems are encountered in providing for pre-court appearance representation, the need for such early case entry is so great that it should be achieved despite the problems.

Court appointment necessarily means court appearance by the defendant in most instances. Thus, case entry by the lawyer is delayed until then. Moreover, the court appointment practice acts as a deterrent to the development of pre-court appearance entry procedures in many places, for it provides an excuse to avoid taking the administrative steps necessary for early case entry. It is urged here that state statutes referring to appointment of counsel specifically direct that non-fee lawyers make contact with clients immediately after arrest, or even prior to arrest when a person comes under suspicion and requests assistance. This will require that the defender agency make the initial judgment on eligibility, and statutes should authorize accordingly.

One of the best examples of legislation authorizing pre-court appearance entry of non-fee counsel is found in Colorado (Colorado Rev. Stat., (1973) 21-1-107), which authorizes entry into a case by the defender at the request of a charged person and before court appearance. Section 21-1-105 authorizes the Colorado Defender to determine eligibility for non-fee legal services subject to judicial review. This statute has been interpreted by the Colorado Defender to require his office to conduct continuous jail checks for arrested persons who are without lawyers and who are unable to retain lawyers before initial court appearance. This case entry is accomplished before court appearance.

The California Defender statute is another excellent example of authority to enter prior to court appointment and appearance. It, too, authorizes defender case entry upon request of the accused. (California Gov. Code, (1975), Sec. 27706.)

While the proposal here is for statutory changes to specifically authorize pre-court appearance entry, this is not intended to suggest that entry cannot be accomplished early even in those jurisdictions which do not expressly, by statute, provide for pre-court entry (as in California and Colorado). United States Supreme Court decisions such as Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1258, (1964), would seem to make at least police-station pre-court appearance representation essential in some instances. Defense lawyer entry into a case before the first court appearance is recommended by the American Bar Association's "Standards Relating to Providing Defense Services." 1968, 7.1 and 5.1. The ABA Defense Services Standards also provide for wide publication of the availability of free legal services for eligible accused persons. Standard 1.2 accordingly encourages

the accused, his friends, or his relatives to contact the defender immediately after the person is arrested.

Likewise, the National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 13.3, recommends pre-court appearance case entry by non-fee counsel.

Accordingly then, it would appear that defense lawyers should generally enter the case immediately after the arrest. Statutes which direct that lawyers be appointed at a court appearance are not intended to preclude pre-court appearance case entry by non-fee counsel. Such statutes pertain to only those situations in which the defender has not entered the case by the time the defendant reaches court. (See People v. Potts, 17 III. App. 3d 867 (1974).)

Utilization of the Summons in Place of a Custodial Arrest for Misdemeanor Offenses

For many offenses, a number of states have authorized police to issue a summons or a notice to appear to a suspected offender, rather than effectuating a custodial arrest. (See III. Rev. Stat., 1975, Ch. 38, Sec., 102-11 and 107-12.) However, in most such statutes, the summons or notice is discretionary with the police and, in fact, is seldom used in place of an arrest (except in minor traffic violations). Utilization of the summons rather than arrest will leave the suspect free in the pre-trial stage no matter what his resources. Thus, the suspect has the opportunity to make contact with a public defender or other lawyer on his own initiative. Of course, this should be coupled with advisement that the suspect has the right to counsel and the right to publicly-paid counsel if he cannot afford private counsel. The defendant should also be provided the address of the defender office.

If the suspect has not obtained counsel prior to the initial court appearance, and should counsel be appointed at that time, the free status of the defendant makes a short continuance a practical alternative to going to trial with unprepared counsel.

Alternatives to Money Bond

Where the accused is too poor to post even the most modest money bond, an alternative method with which the accused can comply should be substituted. Bandy v. United States, 81 S. Ct. 197 (1960), and 82 S. Ct. 11 (1961). Indeed, imposition of a bond so high that the accused cannot meet it may be constitutionally impermissible. Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951); Reynolds v. United States, 80 S. Ct. 30 (1959).

In minor misdemeanor cases, there would seem to be little reason for most defendants not to appear, for non-appearance may involve a more serious offense than the original charge. Hence, it is often unreasonable to : quire any conditions for pre-trial release. To avoid unduly harsh pre-trial release conditions, a rule of court directing that all persons arrested for specified minor misdemeanors be released without posting money bond immediately after

the arrest would facilitate meaningful representation. In the rare situation where the arresting officer might reasonably believe bond conditions are appropriate, a magistrate available upon a 24-hour basis should be utilized to set specific terms of release in all cases involving poor defendants. (See Pelletier v. United States, 343 F 2d. 322 (D.C. C.A., 1965), for an excellent discussion of alternatives to money bond.)

Having the accused free in the pre-trial state provides an opportunity for trial preparation even in the most minor of cases. This suggestion is similar to utilization of summonses or notices to appear instead of arrest. However, the misdemeanor recognizance rule may be implemented by court rule alone, since bond discretion is a court prerogative.

Conclusion

The foregoing does not replace the need for criminal defense delivery systems to universally develop pre-court appearance entry procedures. Such procedures do not require legislation or the exercise of rule-making power. Rather, achievement of early case entry by defenders takes the initiative and ingenuity of the leaders in the defense delivery system.

Entry into a case by a defender agency prior to first court appearance will require that preliminary decisions on eligibility, or even final decisions on eligibility, be left to the defender agency. The key to effective legal representation in minor misdemeanor cases, perhaps even in all cases, hinges upon lawyer entry into the case immediately after arrest.

Workshop D

Summary of Proceedings

With respect to legislative and rule changes, there were three directions suggested for legislative and rule making in regards to implementing Argersinger. The first was that there should be adoption of a statute allowing early entry into criminal cases, and that this entry should be available at the request of the accused or by court appointment.

Secondly, there was a mandatory-summons or order-to-appear suggestion. Last, there was the possibility of a release-on-recognizance statute.

The statute about early entry was well received. However, most people would prefer not only that the defendant be able to make the request, but also that there be an explicit court appointment in case the defendant did not do so. We were fortunate to have with us some attorneys from a jurisdiction where such a statute was in effect. They reported that in this particular jurisdiction the sheriff would take down the request from defendants as they came in after they were arrested, and would notify the public defender, or the public defender would come up every day and interview these clients. Therefore, when they went to get bail, or whatever, they would already have a file prepared and would, thus, have more effective representation.

There was a cool attitude toward the summons and notice-to-appear position. I think this was because the summons itself is largely discretionary in terms of police--whether it's because of police socialization bias, or because the police seemingly lack legal or other authority. Some jurisdictions which had such a summons reported that these were rarely, if ever, used. Police were still making arrests, instead of issuing summonses in misdemeanor cases.

Third, the release-on-recognizance (R.O.R.) idea was accepted with much enthusiasm. Some people pointed out that this, indeed, was the way that things seemed to be progressing, and that this seemed to be an alternative to the summons concept. R.O.R. was accepted with a caveat that exceptions be provided. If a person did not receive R.O.R., then the sitting judge would have to make specific findings of fact on the record for those exceptions.

There were several other legislative initiatives. One of these was that there needed to be more legislation concerning state-level funding for defenders' functions. It was felt that local funding was not inadequate, but that it was very difficult politically to get local funding across and get it passed. Secondly, it was suggested that legislation be enacted requiring the police to allow the defendant three complete phone calls--one to an attorney, one to the family, and one to a bail bondsman, if applicable--and imposing sanctions if this was not carried out. Last, there was a proposal calling for legislation expanding court hours so that there would be criminal trials, perhaps, at night and/or on Saturdays. This would make trial more readily available to wage earners particularly. Instead of having to plead guilty to avoid spending more time in the court system, they would instead be able to go to trial and execute their Constitutional rights.

Discussion Highlights

There were three proposals for legislative and rule changes which would facilitate full implementation of Argersinger.

First, it was suggested that legislators be encouraged to enact statutes allowing (or, perhaps, mandating) early entry of counsel in criminal cases. This would serve to safeguard the defendant's right to effective assistance of counsel at the earliest possible point. The consensus was that the defendant not only be allowed to request counsel, but also that there be an explicit court appointment in the event the Defendant failed to do so.

Second, there should be a mandatory summons or order to appear in all misdemeanor cases. The summons, at present, is largely discretionary and is rarely, if ever, used by the police, who oftimes prefer to arrest suspects.

Third, release on recognizance (R.O.R.)--with certain exceptions--may be a viable alternative to issuing a summons. One caveat here was that if a defendant did not receive R.O.R., then the presiding judge should be required to make specific findings of fact on the record for those exceptions.

Other suggested initiatives included the following: (1) legislation specifically pertaining to state-level funding for defender functions to facilitate appropriations and preclude some of the political ramifications of providing counsel to "criminals"; (2) legislation mandating that the police allow a defendant three complete telephone calls--one each to an attorney the family, and a bail bondsman, if applicable; and (3) legislation expanding court hours so that wage earner defendants, in particular, have more access to the courts and are not virtually coerced into waiving their right to trial.

WORKSHOP E
PLANNING: DETERMINATION OF NEEDS AND DEMANDS

Harold S. Jacobson, Moderator

Special Assistant for Planning and Management
Criminal Defense Division
Legal Aid Society of New York City

Planning: Determinations of Needs and Demands
Implementation of Argersinger

Invariably, criminal justice planning efforts for defense systems are macro-oriented; national requirements are forecast. Those efforts are misdirected inasmuch as criminal justice system defense demands and the resource requirements to meet those demands are micro-governmental units--city and county units with a high degree of dissimilarity in the environments in which they operate. Therefore, linear analyses of requirements which presume equal demands on homogeneous units invariably offer little guidance and, perhaps, even misguided approaches for problem-solving.

Initially, planning efforts to implement Argersinger requirements must focus on existing defense efforts. For example, the Legal Aid Society of New York City has been providing the complete panoply of defense services for persons charged with misdemeanors and lesser offenses since the inception of its Gideon-based contract in 1966. Therefore, the advent of Argersinger did not have any impact at all on our operations. On the other hand, the District of Columbia Public Defender has, since its inception, focused solely on felony offenders--a factor which, at the moment of Argersinger, presented a void and an opportunity. Moreover, these dissimilar situations emphasize the need for individual, case-by-case microanalyses for planning purposes, rather than the normal, national macro response.

Legal aid societies, public defenders, and assigned counsel systems to provide defense services are a response to the governmental framework of court systems and concepts for providing or funding governmental services. In New York State, legislation in response to Gideon required local units of government to provide a legal aid society, public defender, or assigned counsel system. Recently, Ohio provided for a state defender system, unless local units of government chose to provide the defender system with reimbursement from the state. The varying approaches by government have major implications for addressing the implications of Argersinger.

There are several theories regarding court approaches to Argersinger as to when the decision of a defendant's right to counsel must be made. I suggest that most of the theories are cost-based and not justice-based in their orientation. Systems that note extensive use of pre-trial diversion and non-penal sanctions for decision-making are avoiding the questions precedent to those penalties: Will a defendant who refuses to exercise those options be subject to serving time in prison? The uncounseled defendant, under coercive options,

may consistently avoid the penal sanction and may constantly be the subject of injustice through coercive systems. In re Gault, for example, was a reaction to those who would penalize a juvenile for "his own good" without due process guarantees. We, therefore, explore planning to implement Argersinger without considering the various convoluted approaches designed to preclude effective assistance of counsel.

The scope of cases requiring appointment of counsel is as broad as the offenses in which legislatively-prescribed penalties of imprisonment exist. This unsophisticated, front-end analysis avoids the problems inherent in judicial screening and prejudgment taint in case by case reviews by judicial authorities. Moreover, it also avoids judicial tampering with legislative functions by not requiring courts and judges to hold non-penal court sanctions as standing rules where the executive and legislature have set out penal sanctions. First, there are areas--specifically traffic offenses and public intoxication. that should be legislatively excised from the Argersinger mandate. In New York, traffic cases almost exclusively are covered by administrative law rather than criminal law under the New York State Administrative Adjudication Bureau. This shifted over 800,000 moving traffic infractions and over 3,000,000 non-moving infractions from the jurisdiction of the criminal courts of the City of New York.

Effective this past July, public intoxication was also removed from criminal sanctions (with potential penal sanctions) to civil status which evaluated the need for government intervention for a person's welfare, intervention being a last resort.

Therefore, an initial step in planning effective and complete implementation of the Argersinger mandate is a thorough review of unnecessary criminal law jurisdiction and potential sanction. The defense bar and public defenders should be actively involved in that review, and should seek to reverse the governmental propensity to overcriminalize status and conduct that are not favored, but do not rise to a level warranting criminal and penal sanctions. A recent example of this governmental approach occurred recently in New York City, where smoking in certain areas was given criminal liability. This was not done because of fire safety concerns, but because a segment of the public finds such behavior offensive. Given competing areas of public safety, should public funds for law enforcement, prosecution, and defense efforts under Argersinger be focused on this subject? I would answer, emphatically, no.

A second step in the planning process is a review of programs--both existing and in the planning stage--which short-circuit the arrest process for persons charged with misdemeanors and lesser offenses. For example, in several cities there are now community dispute mediation programs which consider incidents and situations that regularly appear in the criminal justice system. Disputes over property ownership--which could be translated into petty larceny--and checks returned for insufficient funds--which could be translated into fraud and larceny--are instead mediated as civil disputes.

There are also diversion programs at the police arrest stage and at the prosecutor complaint drawing stage which will impact on defense requirements under Argersinger. Diversion programs, however, do not completely remove the requirement for defense counsel, whereas community dispute mediation does. Diversion, with potential reinstitution of charges, clearly does require defense counsel, albeit on a more limited legal advice and counselling role. Arrested persons entering such programs must be advised regarding admissions and the lack of confidentiality of communications, the waiver of speedy trial and other rights, and, more importantly, the ramifications of failure in a diversion program--reinstitution of the underlying criminal charge.

Planners must, therefore, consider the impact or potential impact of community dispute mediation programs, and precinct and pre-charge diversion programs on defense counsel requirements. The enlargement and extension of these types of programs will sharply reduce the defense resources required to implement Argersinger.

Another important consideration in evaluating the demand for defense resources is a determination of the stage at which defense counsel and staff should enter the proceedings. For example, for misdemeanor or lesser offenses, do the police issue citations and summonses, or do they use the arrest process? In New York City, for example, one-half of persons charged with misdemeanors are arrested, and 23 percent of persons charged with petty offenses are arrested. If the latter is typical of police practices, requirements for defense counsel and staff are extended pre-charge into the field. If the police are using the arrest process, defense counsel requirements are generated by arrested persons, for example, in response to the Miranda litany by the police regarding furnishing an attorney. Moreover, the police arrest process generates the potential for defendant prejudice in the use of lineups, the taking of statements, and delay in bringing the arrested person to a speedy arraignment. A concomitant result is the requirement for defense counsel to have the capacity to intervene on a timely basis to bar prejudice to an arrested person through assertion of constitutional rights and privileges.

A jurisdiction's policies and practices regarding release on recognizance (R.O.R.) or bail also affect the scope of defense counsel requirements. In systems that make extensive use of R.O.R. for persons charged with non-felony crimes, there is a lesser requirement for defense counsel than in jurisdictions predominantly using bond and cash bail requirements. Moreover, those jurisdictions that set bond and cash bail requirements at exorbitant levels are generating extensive pre-trial detention, with parallel defense counsel requirements, since the defense counsel's function regarding bail setting and review and the panoply of collateral requirements regarding pre-trial detention must be raised and prosecuted. Therefore, planners should review the decisional model used for arrest or citation for non-felony cases and its impact on defense counsel requirements. Planners should evaluate the potential for revising the decisional model to strengthen the presumption of citation issuance for nonserious misdemeanors or lesser offenses, especially where the charges alleged are property- rather than person-based or are considered "victimless."

Planners should also review the decisional model regarding R.O.R. or bail and the framework for setting the amount of bond and/or cash required. More extensive use of R.O.R. and alternatives to conventional bond and cash

bail reduces defense work requirements and resources in preparing and arguing writs regarding pre-trial detention. Moreover, the extent of pre-trial detention in misdemeanor and lesser offense cases has a substantial impact on how broadly staffed the defense function should be, since detention cases have, or should have, calendar priority, thereby creating more frequent appearances and less time between appearances. As a result, the number of attorneys required to meet defense demands increases directly as a function of pre-trial detention.

A particularly difficult factor for planners to consider in implementing the Argersinger mandate is the determination of eligibility: who should be afforded counsel at public expense? The two broadly-stated elements are the defendant's resources and the cost of obtaining counsel. Regardless of the type or level of standard set, the judgment is clearly more difficult in non-felony cases, since the resource requirements and the cost of retained counsel are of a lesser magnitude. On the other hand, felony charges create a condition of disaster proportions allowing relatively unsophisticated judgment. The non-felony case is also complicated by waiver of counsel where a defendant's perception of potential sanctions is not as threatening as in a felony case, especially in systems having provisions for recoupment of public funds through civil action. The so-called "intelligent" waiver often is not, since a defendant's judgment is made on a potential recoupment basis, rather than on the legal situation he faces. The waiver decision is substantially affected by the judicial officer who explains the options which subtly but substantially imply to the defendant that choice of counsel may produce a less favorable case outcome. The most recent experience the Legal Aid Society of New York encountered regarding waiver of counsel coercion was in the mixed administrative-criminal area of parole revocation. Hearing officers of the Parole Board, while explaining the right to counsel to parolees charged with violations of that status, were regularly communicating that electing to employ defense counsel would result in revocation of parole, and service of all time still owed to the state. Our Parole Revocation Defense Unit succeeded in dispelling that myth only through achieving a high degree of success in aborting revocation of parole or substantial time to be served through court-based litigation reversing the predictable actions of hearing officers and the Parole Board.

In determining eligibility of persons charged with misdemeanors and lesser offenses, planners should consider the ability to retain counsel to mean "effective assistance of counsel." Knowledgeable criminal justice system persons, especially in urban centers, are aware of particular attorneys who carry their offices in their pockets and whose legal scholarship extends to their ability to read the criminal complaint and to know the code section their clients plead to. These attorneys, whether they are known as "Baxter Street boys" in New York City or by some other label, cannot economically afford to prepare writs or motions, to engage in legal research, to try a case, or to prepare a pre-sentence memorandum because of the limited fee for their "service." Moreover, one questions whether it is solely a matter of economics or a combination of economics and competence. They will be the ones who will raise a hue and cry regarding public defender and legal aid society eligibility

criteria, resulting in acceptance of clients having virtually any funds at all. Nevertheless, the Argersinger mandate was intended to assure effective assistance of counsel, not to protect the fees of persons who cannot meet that standard.

Therefore, planners should evaluate the costs of obtaining effective assistance in setting eligibility standards. The test of a defendant's resources should be that of "substantial hardship" and should consider liquid assets only, using the same exemptions from attachment or execution allowed in the civil law. The standard proposed by the National Commission on Defender Standards (to be published shortly) is as follows:

1.4 Financial Eligibility Criteria

(a) Effective representation should be provided to anyone who is financially unable to obtain such representation without substantial financial hardship to himself or to his dependents. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the payment of current obligations and which are not needed for the support of the person or his dependents. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.

(1) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing, and any property declared exempt from attachment or execution by law should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond, or the resources of a spouse, parent, or other person be considered.

(2) The cost of representation includes investigation, expert testimony, and other costs which may be related to providing effective representation.

(b) If the accused is determined to be eligible for defense services under the foregoing provisions, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition to continued representation at public expense.

(1) The defender office or assigned counsel program should determine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the accused's eligibility is determined.

(2) The amount of the contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner, provided, however, that the amount of the contribution should not exceed the lesser of:
a) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction; or
b) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

1.5 Method of Determining Financial Eligibility

(a) The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney-client relationship.

(b) A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal. The record on appeal should include all evidence presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility.

In summary, the factors of eligibility and waiver are critical determinants regarding defense requirements under the Argersinger mandate. These factors can be regulated as a control mechanism over the potential intake of clients to be afforded counsel with public funds. Cynically manipulated, the threshold can be used as a cost regulator regardless of its impact on furnishing effective assistance of counsel. Planners should require that eligibility standards and their application be reviewed regularly to ensure that the objective of meeting the Argersinger mandate is viable.

Effective assistance of counsel requires more than defense attorneys. Support staff including investigators and para-professionals are required, albeit in a lesser ratio than in felony cases. The requirement for independent investigation by the defense is fundamental, regardless of the classification of charges as misdemeanor or lesser offenses. Providing support staff may be a more difficult proposition under an assigned counsel system than under organized defense systems provided by public defenders and legal aid societies. Nevertheless, a major function of an assigned counsel plan should be to establish the mechanism for assuring the timely availability of quality support staff.

A major question for the planner is who should provide the services required: an appointed counsel plan, a legal aid society, a public defender, or a mixed system? NLADA and many leading defenders support the mixed system concept and consider involvement of the private defense bar essential to maintaining defense standards. In felony cases, that goal is more easily achievable through regular assignment of cases--beyond conflict assignments--to members of the panel. However, experienced competent attorneys are not nearly as likely to accept assignments to misdemeanor and lesser offense cases, unless there is an unusual fact pattern or question of law. Panel attorneys regularly accepting assignments for these categories of offenses are similar to or the same as those described above.

If the public defender or legal aid society is the option selected, another issue arises. Many court systems are bifurcated with preliminary felony matters, misdemeanors and lesser offenses being prosecuted by a lower court, and felony matters being disposed of in a superior court. Many public defenders and legal aid societies are divided organizationally along these court divisions or, in some cases, defender offices only operate in the superior court. Traditionally, those offices operating in both courts place their inexperienced staff in the lower court, with the focus for that staff being preparation for felony matters. Therefore, misdemeanors and lesser offenses are not accorded priority attention except as those cases provide less experienced attorneys with on-the-job training. Moreover, many organizations do not afford their lower court units the full panoply of support staff and operating funds, reserving those expenditures for felony cases. Continuity of representation is viewed as essential and as a priority goal for felony cases, but misdemeanor and lesser offense assignments are not accorded that mode of representation.

Planners, in determining the budgetary needs for defender operated programs, should not accept the normal parameters, which include constant turnover of experienced staff to felony matters, with a resulting lower salary structure for implementation of the Argersinger mandate. Nor should planners accept prior expenditure patterns for support staff and operating funds, since defender programs under restricted budgets did not afford appropriate resources for lower court operations. Instead, a new cost model should be developed which assumes that funding and staff will be provided for effective assistance of counsel in misdemeanor and lesser offense cases. This requires an analysis of the trend in caseload composition and an evaluation of the incidence of different proceedings for each category of offense. For example, for misdemeanor grade narcotic cases, this means sampling how many will require suppression

hearings on search and seizure issues, how many will require addiction hearings, how many will be tried by a jury, and how many will require a court trial. By developing the proceeding ratio (proceedings per filing), the average processing time by proceeding, proceeding weights (time per filing), and filing weights (time per filing) can be developed to determine resource requirements. Moreover, a re-evaluation of staff workload capacity is also required, since the previous assumption has been that given a finite amount of defender time, an infinite number of misdemeanors and lesser offense cases can be processed. The result has been that the primary objective becomes case flow and disposition rather than effective assistance of counsel. Therefore, the workload capacity model should be redrawn using new parameters consistent with the Argersinger mandate and the effective assistance of counsel standard.

In developing workload standards, each jurisdiction should develop the range of cases an attorney with appropriate support staff and operating expenses can competently represent. The caseload standards set out by the President's Commission on Law Enforcement and Administration of Justice started with the Airlie House estimate of 300 to 1,000 cases per year and concluded that:

> . . . one may assume that each year a single lawyer working fulltime could provide representation in 300 to 400 serious misdemeanor cases (with felony counterparts), in 1200 social nuisance cases, or in 600 of the remaining misdemeanor cases.[1]

Estimates based on estimates which were derived from speculation do not afford guidance or provide an opportunity for validation or application to local jurisdictions. The National Advisory Commission on Criminal Justice Standards and Goals subsequently offered a standard maximum; to wit ". . . misdemeanors (excluding traffic) per attorney per year: not more than 400; . . . ."[2] The Commission's standard is an estimate based on a review of those past estimates, therefore having an equal amount of validity as the President's Commission's standard. Clearly, national estimates or standards are not instructive for local jurisdictions except, perhaps, as maximums. What is required is a methodology which local planners can readily apply and validate. I have previously suggested part of an approach which looks at proceeding and filing weights related to specific offenses. Each jurisdiction, in addition, should evaluate court effectiveness and its impact on defender workload; what is the ratio of attorney productive time to nonproductive time attributable to court calendaring and scheduling practices. Moreover,

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[1]Task Force Report: The Courts, Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, Washington, D.C., 1967, p. 56.

[2]Courts, National Advisory Commission on Criminal Justice Standards and Goals, Washington, D.C., 1973, Standard 13.12, Workload of Public Defenders, p. 276.

each jurisdiction should analyze the impact of criminal procedures regarding discovery, papering requirements on writs and motions, and other requirements on attorney workload capacity.

In evaluating attorney workload, one realizes that data collection and analysis is fundamental to making informed determinations. Moreover, in all of the above addressed issues, the collection of information--objective data and descriptive narrative--are a prerequisite to the analysis and decision-making process. To be economical and effective, information collection, however, requires a framework. That structure is developed by first reviewing what questions must be answered and what decisions must be made. Those questions and decisions are translatable into data requirements, which then can be turned into data collection assignments. That process is fundamental, especially in criminal justice, which has always operated on commonly accepted "myths" and "rules of thumb." Planners should be highly aware that there are major variations in the size of thumbs and that conflicts between what data collection and analysis reveals, and what criminal justice system decision-makers' thumbs tell them, will not automatically be resolved by the objective data. To the contrary, the initial presumption will be that the data gatherers or analysts erred "since everyone knows. . .".

Finally, planners should realize that the data collection and analysis required to determine the demand for defender services, the present supply of defender services, and the resource requirements to bring them into equilibrium is not a process of the most advanced, sophisticated techniques and quantitative tools. However, they will generally be faced with poor quality record and statistical data systems, and resistance to extension of data collection systems by defender attorneys. Therefore, planners should educate attorneys regarding the objectives of the data gathering and analysis process: to analyze and document the resource requirements necessary to meet the Argersinger mandate with effective assistance of counsel. Clearly, this objective should meet their self-interest as well as the interests of their clients.

Workshop E

Summary of Proceedings

I think the biggest thing that developed from the Planning Workshop really had nothing to do with planning directly, but rather with an attitudinal focus. One prosecutor stated that defenders had adopted the "White Nigger Syndrome," and there were knee-jerk reactions all over the place. He probably proved his point. He was talking about an institutional hardening, so that you could no longer notice problems as defenders. Conferees clearly were talking about the problems of the prosecutor, resolving problems of the court, needing to keep calendars current, and really sounding like court administrators rather than defenders. I think it was very helpful to have that issue raised, especially by a prosecutor. The most startling thing to me was that there really wasn't much of a reaction, like "We really have a problem here." Attorneys basically indicated that they don't think there's much of a problem. In fact, with misdemeanors and lesser offenses, the attorney really doesn't have much of an impact. What's going to happen is going to happen. So he's there for that occasional case where, because of the fact pattern or a particular question of law, an attorney is needed. But in other instances, he's basically a ticket taker. He's a courtroom observer. If he handles 1,300 cases, they get carried through on momentum. He just watches them go through, and every once in a while, when the system sticks a little, he gives it a little push and gets it rolling.

I think some people came to this session looking for an easy answer to their funding problems in regard to Argersinger, and I get the impression that they were looking for money from Washington. I think it's about time that we recognize what has happened with LEAA funding and with federal funding generally. The manna is no longer falling from the heavens. We have to get back to basics and start looking to your state and local governments to fund the programs.

I think the most important thing that one can do relative to Argersinger, especially with cost-conscious public officials, is to get them to start looking at unnecessary jurisdiction. We don't have to pull someone into court every time he spits in the street. We may find it offensive behavior, but that action does not rise to the level that requires public criminal sanctions. If there's a cost consciousness by public officials today and if there's a concern by defenders that if you're going to provide representation, then it has to be effective representation. Let's eliminate unnecessary jurisdiction. Let's cut down the criminalization of public behavior. There are alternatives to criminal prosecution: community dispute settlement, administrative or civil responses to property disputes or to traffic offenses, or decriminalization of public intoxication. Let's get those things out of the criminal court system. Then we will be able to offer effective representation to all persons who do come in. Because there's no such thing as a lesser offense to someone who is jailed even for 10 days. To him, that's an awful lot.

Basically, we did very little planning. We did find out that most people don't have much data and that those who do really aren't ready to use it. They're much more concerned with who's going to pay for it.

Discussion Highlights

The issue of planning was subordinate to that of how defender organizations can solve their funding problems relative to Argersinger, since it was noted that the principal reluctance to fully implement the high court decision is based on the lack of adequate resources.

It was noted also that, initially, everyone had looked to Washington to secure Federal funding for programs. However, that source is no longer as willing (or, perhaps, able) as previously to fund "bright, shiny new ideas." Consequently, new sources--such as state and local governments--must be tapped.

Additionally, with the potentially overwhelming volume of cases which could rightfully be classified as Argersinger cases, how does one ensure effective assistance of counsel?

Concomitant with the problem of depleted financial resources, particularly with cost-conscious public officials, is that of decriminalization of certain offenses which do not necessarily require criminal sanctions. One suggested alternative to criminal prosecution is community dispute settlement. As one workshop participant also noted, "We are overlawed--not overlawyered!"

WORKSHOP F
ADVOCACY METHODS

Professor Bruce S. Rogow, Moderator

Nova University
Center for the Study of Law
Fort Lauderdale, Florida

Advocacy Methods for Ensuring The Right to Counsel in Misdemeanor Cases

The Supreme Court decision in Argersinger v. Hamlin, 407 U.S. 25 (1972) set the misdemeanor right to counsel standard to be followed by lower courts. Because misdemeanor prosecutions generally occur in the low visibility of the criminal process, it is not always easy to determine if trial court judges are properly carrying out their obligations under Argersinger. Unless those courts are monitored, the rule of Argersinger, limited as it is, may be an empty promise. Thus, any advocacy method discussed here presupposes that someone--public defenders, private attorneys, civil rights organizations--has a commitment to observe the misdemeanor trial process in his local courts and take steps to remedy any denial of counsel which may occur. Ultimately, the responsibility for carrying out the constitutional mandates of the Supreme Court depends on the vigilance of the bar. This paper is an attempt to provide tools to lawyers willing to accept that responsibility.

The Rule of Argersinger

For our purposes, we accept the proposition that Argersinger stands only for the rule that no person may be imprisoned for a misdemeanor offense, unless counsel has been provided for him or he has knowingly and intelligently waived the right to counsel. 407 U.S. at 37. Therefore, a violation of Argersinger occurs only at the moment a defendant is incarcerated after trial. While much has been written about the shortcomings of such a rule, it is the law. The advocacy methods discussed here attempt to create remedies for this unique problem--the right to counsel becoming extant solely upon post-trial imprisonment.

The Immediate and Long-Range Goals

Since the need to enforce Argersinger is triggered by incarceration, the immediate goal for counsel must be the release of the individual defendant from custody. The long-range goal should be devising a method to ensure that other defendants are not subject to imprisonment absent their right to counsel.

Methods for Obtaining the Goals

There are several methods which may be utilized to realize both the immediate and long-range goals. They are: (1) motions for new trial and release on bond or recognizance pending decision; (2) appeal and release on

bond or recognizance pending appeal; (3) habeas corpus or other appropriate available collateral remedy; (4) injunctions; (5) civil damage actions. Each of these methods will be discussed more fully below. They are stated here to begin to shape the scope of the remedies which should be considered. But first it is necessary to address some of the circumstances which often lead to the Argersinger violation.

The Argersinger Violation in Context

Two problems generally attend possible Argersinger violations: (1) waiver; and (2) imprisonment for non-payment of a fine contrary to Tate v. Short, 401 U.S. 395 (1971). Counsel must understand these problems and inquire into them before seeking affirmative relief.

A. Waiver

The standard for determining the validity of the waiver of a constitutional right was stated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A valid waiver requires an "intentional relinquishment of a known right or privilege." Waiver of the right to counsel cannot be presumed from a "silent record." Carnley v. Cochran, 369 U.S. 506, 516 (1962). Thus, it is the obligation of the court to advise a defendant of his right to counsel. In Carnley, the Court said:

> . . . when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished "whether or not the accused requested the appointment of counsel." 369 U.S. at 513.

The first line of inquiry for counsel, thus, should be to determine if the defendant was properly advised of his right. Often, the advice regarding counsel is given to all the defendants, or sometimes to the whole courtroom in the expectation that the defendants are all there. This blanket advice is inadequate, because it fails to inquire into the defendant's ability to understand that he might be incarcerated; his ability to understand the charges against him and the possible defenses to the charges; his financial ability to obtain counsel; or his ability to defend himself considering his age, education, or intellectual capacity.

Nevertheless, one case has seemingly approved the blanket advice given to a whole courtroom. Alvis v. Kimbrough, 455 F.2d 922 (5th Cir. 1971). Alvis, a pre-Argersinger decision involving some unique facts, should not deter you from seeking relief, if you are confronted with a blanket advice situation. Johnson v. Zerbst, with its call for a knowing and intelligent waiver, offers strong ammunition. One cannot make a knowing and intelligent decision, unless informed of the actual consequences of his decision. A judge cannot be assured that a person is so informed, unless he secures a personal affirmation of that knowledge upon inquiry. No court would tolerate blanket waivers of jury trial or en masse pleas of guilty. Similarly, en masse waivers of counsel by a group of defendants should be discarded as constitutionally insufficient.

Even if the defendant had been individually advised of his right to counsel, serious questions can be raised about the ability of the defendant to know and understand what he waived. Educational background, past court experiences, and age are all relevant factors in overcoming a waiver argument. Often no record has been made of the proceedings and the trial judge has a limited recollection of exactly what was said to the individual defendant. In those instances, the advantage resides with the party claiming no waiver.

If you determine that the defendant did knowingly and intelligently waive his right to counsel, no Argersinger violation occurred, and relief under the decision should not be sought. However, it appears that very few cases fall squarely into that category. If in doubt about the validity of the waiver, seek relief.

B. Tate v. Short, 401 U.S. 395 (1971)

Often a defendant who does not have counsel is incarcerated after a misdemeanor trial, because of his inability to pay a fine. Such imprisonment is a direct violation of Tate v. Short, 401 U.S. 395 (1971). The relief under Tate is release of the defendant and an opportunity for him to pay the fine in installments. The Argersinger relief is broader. A defendant convicted and imprisoned without counsel is entitled to have his conviction set aside and a new trial. See Wall v. Purdy, 465 F.2d 933 (5th Cir. 1972).

The argument can be made that, regardless of how "the actual deprivation of a person's liberty" occurs (407 U.S. at 40), Argersinger is implicated and, thus, its broader relief should be sought. One case has unsuccessfully made this argument. Rollins v. Florida, 299 So.2d 586 (Fla. 1974), cert. denied, 419 U.S. 1009 (Justice Douglas dissenting) (1974). A similar argument was recently forestalled on comity principles. Williams v. Rubiera, ___ F.2d ___ (5th Cir., Sept. 27, 1976).

The point of this discussion is that counsel should be aware that the interplay of Argersinger and Tate v. Short must be considered in assessing the relief to be sought. The Supreme Court's denial of certiorari in Rollins does not stand for rejection of the theory advanced in that case. "[T]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case. . . ." United States v. Carver, 260 U.S. 482, 490 (1923). Therefore, counsel should not foreclose the possibility of seeking Argersinger relief, if he finds that the imprisonment has been for non-payment of a fine, and not a direct jail sentence.

Seeking Relief

We have enumerated several modes of relief which should be considered. The efficacy of two of them--motions for new trial and appeals--will depend upon the procedures available in the respective states. Some issues common to these forms of relief in all jurisdictions can be mentioned without detailed knowledge of all state laws.

First, since the defendant is incarcerated, the immediate objective is his release. If monetary bond is required as a condition for release pending

motions for a new trial or appeal, an indigent defendant will remain imprisoned. Counsel should urge upon the court some non-monetary conditions of release, pointing out that if the term is served, the damage will be irreparable. Argersinger forbids imprisonment without counsel. To force a defendant to suffer that harm, while asserting that his Argersinger rights were violated, renders the decision meaningless to the imprisoned defendant. Hopefully, some judges will find the argument persuasive.

But even if a defendant is released from custody, a more serious procedural problem must be overcome. If the record is silent as to waiver, the Carnley v. Cochran doctrine will establish that there has been none, and you should prevail. But if some kind of waiver has ostensibly been obtained and the record reflects it, some kind of hearing will be necessary to invalidate that contention. Since appeals are generally limited to the record already made, it would be impossible to supplement the record with your client's version of what happened regarding the advice to counsel. There may be more latitude on motions for new trial for an evidentiary record on waiver to be made. In many cases, there will be no record of anything except the docket entries on a court form. Carnley is persuasive in that situation, but it may be preferable to have a clear record of the waiver proceeding in case an appellate court shuns the Carnley doctrine.

For all of these reasons, habeas corpus is probably the speediest and most effective remedy for vindicating a denial of counsel to a misdemeanor defendant and securing his immediate release.

A. Habeas Corpus

A state habeas corpus petition need only allege that the petitioner is in the custody of the respondent as a result of a judgment and conviction for a misdemeanor and that the petitioner was not advised of, nor did he waive, his right to counsel under Argersinger. Therefore, his custody violates the Sixth Amendment. Since Federal habeas corpus is available only if state remedies have been exhausted, Title 28 U.S.C., section 2254(b), it will be a rare case in which Federal relief will be sought. State courts must have the first opportunity to address the denial of counsel issue and, in most cases, there should be little difficulty in obtaining relief.

But if your state petition gets snagged on a waiver or Tate v. Short problem, you may need to appeal through the state system and then either seek certiorari in the Supreme Court of the United States or file a Federal habeas petition in a United States District Court. If that occurs, once again it is essential to secure the recognizance release of the defendant pending appeal. See Boyer v. City of Orlando, 402 F.2d 1966 (5th Cir. 1968). If the defendant serves his time while review is sought, mootness problems arise. See Berry v. Cincinnati, 414 U.S. 29 (1973), discussed below.

Even if the petitioner is not in physical custody, Federal habeas is available. In Hensley v. Municipal Court, 411 U.S. 345 (1973), a defendant released on recognizance pending execution of his sentence was deemed to be "in custody" for the purposes of the Federal habeas corpus statute.

If the defendant has served the sentence, Argersinger relief will still be available if the petitioner can "allege and prove a bona fide existing case or controversy sufficient to involve the jurisdiction of a Federal court." Berry v. Cincinnati, 414 U.S. at 30. Here the Court pointed to Sibron v. New York, 392 U.S. 40, 50-58 (1968); Carafas v. LaVallee, 391 U.S. 234, 237-238 (1968); and Ginsberg v. New York, 390 U.S. 629, 633-634 N 2 (1968) as the cases offering assistance on what facts will be sufficient to show the necessary controversy. Carafas and Ginsberg make similar analyses. See Matthews v. Florida, 463 F.2d 679 (5th Cir. 1972), which concluded that points assessed against a driver's license, among other things, met the Carafas collateral consequences test.

B. Injunctive and Declaratory Relief

If one can allege and prove a pattern and practice of denying counsel in violation of Argersinger, Federal "injunctive relief" can be sought utilizing Title 42 U.S.C., section 1983, and Title 28 U.S.C., section 1343(3). In Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972), various Jacksonville, Florida municipal officials were enjoined from depriving defendants of their Argersinger rights.

Obtaining a declaratory judgment and an injunction will require a strong evidentiary showing. But if you are faced with a trial court which you can prove has given Argersinger short shrift, the most difficult aspects of a section 1983 suit are the procedural hurdles. The recent Fifth Circuit decision in Williams v. Rubiera--F. 2d--(5th Cir. Sept. 27, 1976) is illustrative of the reluctance of the Federal courts to enjoin pending state prosecutions. Younger v. Harris, 401 U.S. 37 (1971) is the seminal case.

The guide to successfully threading the procedural needles is Gerstein v. Pugh, 420 U.S. 103, 108N. 9 (1975). Here is the method: with your incarcerated defendant as plaintiff, file a section 1983 suit against the trial judge, alleging that your plaintiff was denied counsel under Argersinger. Allege that the plaintiff represents a class under 23(b)(2) of the Federal Rules of Civil Procedure (described as all persons who are and will be denied counsel by the defendant judge's failure to follow the mandate of Argersinger.) Move to certify the class at the same time the suit is filed. This is essential because it creates an exception to the mootness doctrine. Gerstein v. Pugh, noted above.

Do not seek release from custody in your Federal complaint. That would smack of habeas corpus and confront you with problems presented in Preiser v. Rodriquez, 411 U.S. 475 (1973). Seek only to enjoin the future (not pending) prosecutions which will violate Argersinger, alleging that your client and his class will be faced with the loss of those rights unless the defendant is restrained. Since Argersinger is violated by any incarceration, it is impossible to secure adequate relief by habeas corpus or other remedies which arise after the loss of liberty. Only a prior restraint on the illegal conduct offers protection. At the same time you seek future relief, pursue your state habeas to gain immediate release of the defendant. The two remedies are not inconsistent.

By careful draftsmanship and speedy filing, you should be able to sidestep the mootness problem which will occur when your client is released. The case will continue via the class which he represented at the time the suit was filed. Since you do not seek to interfere with any pending state court action, a declaratory judgment is available under Steffel v. Thompson, 415 U.S. 452 (1974) and an injunction is not barred by Younger. Try it.

A claim for money damages is something to consider, if a pattern and practice of Argersinger violations has repeatedly denied defendants their clear Sixth Amendment rights. The judicial community doctrine of Pierson v. Ray, 386 U.S. 547 (1969) and the prosecutorial immunity doctrine of Imbler v. Pachtman, ___ U.S. ___, 96 S. Ct. 984 (1976) foreclose success against those officials. But a willful deprivation of the right to counsel could create a violation of Title 18 U.S.C., section 242, the criminal analog of section 1983. See O'Shea v. Littleton, 414 U.S. 488 503 (1974) and Imbler, 96 S. Ct. at 994.

Conclusion

Vindicating Argersinger is hard work. Some of the methods discussed above will require a substantial commitment of time and energy to see them through. Pre-litigation investigation will be necessary to accurately determine where the need to enforce Argersinger is greatest. If the promise of Argersinger is to be fulfilled in the smallest, least visible courts in the country, the work must be done.

Workshop F

Summary of Proceedings

In our workshop on advocacy methods for ensuring the right to counsel, we tried to find out some way that we could ensure that Argersinger was being followed on a day-to-day basis.

One of the things that came out of our session is that most of us are in jurisdictions in which there is some compliance with Argersinger. This compliance may not be perfect, but some people are trying to make some efforts, and are monitoring the courts. We have to find the other jurisdictions where there is no compliance, where the courts can't be monitored on a day-to-day basis, and try to deal with the problems there. One thing that concerns me is that the methods and remedies that are available are not going to be used throughout the country. Every day municipal courts are violating Tate v. Short, or putting people in jail for nonpayment of a fine.

So I think that one of the things we have to do is to go out and try to stir up people in our states to monitor courts. They don't have to be lawyers. Lay people can give us some feedback about what's happening. Then we can try to use some of the remedies that we dealt with in Workshop F.

Some of the things which confronted us were problems of eligibility and waiver such as those that arise when a judge says that the client is ineligible for public defense or for appointment of counsel, or that he waived his right to counsel. There probably has not been a valid waiver of counsel or a valid decision on eligibility made in most state courts, because most judges do not really conduct the kind of inquiry that is needed. One standard that we suggested be used is the Federal standards. Look and see what the Federal magistrates are saying to defendants who come before them. That's the Federal standard for the right to counsel. Look and see how the Federal courts are determining eligibility. Use that standard. Then, if you file a habeas corpus petition, use that standard as the one by which any state waiver or state determination of ineligibility should be judged.

One of the major problems was the interplay between Tate v. Short and Argersinger v. Hamlin. Because there are public defenders in the jurisdictions in which we operate, a lot of people are not going to jail because they've been denied counsel. They're going to jail because they've failed to pay a fine. We decided that there must be some mechanism which automatically allows these people to have an adversary hearing to determine whether their failure to pay that fine was willful or was due to some extraordinary circumstances and they shouldn't have to go to jail. Two methods of achieving that formal process were offered. One was the suggestion that a computer printout be given to the public defenders, so that they know every person who has been put in jail the night before, and can go right down that list and say, "Hey! Here's a Tate v. Short violation. Let's go to court and get a hearing on it."

Another method would require filing a 1983 suit [42 USC Section 1983, the Deprivation of Civil Rights], and trying to get injunctive relief to

compel a hearing immediately after people have been taken into custody for alleged violation of Tate v. Short.

We discussed one blockbuster of a remedy, too, which we caution should only be used if you're about to leave town. That is the use of 18 USC Section 242, which is the Federal criminal analog to 1983. This involved a willful, malicious deprivation of someone's civil rights, where a judge continually refuses to appoint counsel, or puts people in jail because they don't pay fines. Of course, this is the ultimate kind of weapon in the arsenal of advocacy methods, but it's something to be aware of.

We also talked about using Argersinger in some other criminal context. For instance, when your client is being impeached on the stand after he's testified, and prior counselless convictions which predate Argersinger are used, there is a clear right to knock out those prior counselless convictions and prevent any impeachment in that situation. The same is true for sentencing. An enhanced sentence based upon convictions obtained without counsel prior to 1972 also should not be tolerated. The use of Argersinger for convictions obtained prior to that decision and which now result in enhanced bonds or disqualify some people for pretrial intervention programs is another example. These are some of the areas where you can begin to use Argersinger creatively and imaginatively.

Discussion Highlights

What advocacy methods can be used to ensure that a defendant's right to counsel, as mandated by Argersinger, is being granted?

It was noted in Workshop F that, although compliance with Argersinger may not be perfect, some individuals are making efforts to monitor the courts and provide feedback on how effectively the 1972 high court decision is being implemented.

A particular problem in obtaining compliance is that counsel is often confronted with judges who indicate that a defendant was ineligible for court-appointed counsel or waived his right to counsel. Workshop participants, however, noted that there probably has not been a valid waiver of counsel or a valid decision on eligibility made in most state courts, and encouraged the use of Federal standards for right to counsel.

Another problem pertains to the interplay between Tate v. Short and Argersinger v. Hamlin, Sheriff. In many jurisdictions, defendants are not going to jail because they have been denied counsel, but because they failed to pay a fine. Workshop participants urged the development of some mechanism which would automatically allow such defendants to have an adversary hearing to determine whether their failure to pay a fine was willful or was due to extenuating circumstances.

WORKSHOP G
MEASURING EFFECTIVE ASSISTANCE OF COUNSEL

Martha Lane, Moderator

(Formerly Management Analyst
Defender Evaluation Project
National Legal Aid and Defender Association)
Washington, D.C.

A Design for the Evaluation and Self-Evaluation of the Office of the Public Defender

By Roberta Rovner-Pieczenik and Martha Lane

Introduction

The concept of a publicly-funded criminal defender is an old one; "advocates of the poor" existed in the Spain that Christopher Columbus left to discover America. Yet it was not until the 1963 landmark Gideon v. Wainwright decision (372 U.S. 335) that the U.S. Supreme Court implemented the concept. That decision required that individuals unable to afford legal representation be provided with assistance of counsel at trial in all state prosecutions of serious criminal cases. This obligation was expanded in the 1972 Argersinger v. Hamlin decision (407 U.S. 25), by which states became obliged to provide counsel for indigent defendants whenever the possibility of incarceration existed.

The relatively recent expansion of both the concept and reality of the government's role in providing defender services to the indigent was accompanied by a concern with standards for public defenders. Statements of minimum acceptable performance were issued by the American Bar Association, the National Advisory Commission of the Law Enforcement Assistance Administration, U.S. Department of Justice, and the National Legal Aid and Defender Association. From a concern for defender standards, it was but a short step to a concern for evaluating the quality of representation being given the indigent defendant.

Study Objectives

The Defender Evaluation Project (DEP) was a one-year grant funded by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, to the National Legal Aid and Defender Association. The project's objectives were two-fold:

(1) To develop a model evaluation design which could be used by a team of consultants to assess the nature and adequacy of organized defender offices in a particular jurisdiction; and,

(2) To develop a self-evaluation manual which could be used internally by a defender office to pinpoint strengths and weaknesses in client representation and office management.

Both evaluation designs were developed for the small (one to five attorneys) to medium-sized (six to 25 attorneys) office providing representation at the trial level for both felony and misdemeanor cases.

Designing an Evaluation

Evaluation research is a method of assessment which attempts to make the process of judgment both accurate and objective. An evaluation generally follows program implementation and provides a basis for further planning and program refinement. It is not, however, technical assistance in which a defender office is given precise details on "how to" rectify problems.

It should be emphasized that the evaluation design described below is one of many approaches which might have been selected. This design follows from basic tenets of evaluation research: (1) a program or performance evaluation should take place on a periodic basis; (2) the criteria against which a program or performance is measured should be credible and acceptable to the legal profession; and (3) the design of the evaluation should lead to conclusions which are both valid and reliable. These principles are applicable to any aspect of defense services, including misdemeanor representation.

Goals and Objectives

A necessary feature of any evaluation is the existence of one or more goals or objectives toward which the program to be evaluated is working. A successful evaluation of a defender office should allow the evaluator to determine whether, and to what extent the office is complying with these legal and professional standards. It should also provide the defender office with information and recommendations which are useful for improving both daily office operations and the quality of client representation.

This evaluation design is based upon the need for defender offices to comply with three major goals:

Goal I: To facilitate the effective and efficient delivery of legal and supportive services to all persons who need and qualify for public representation in criminal and related proceedings.

Goal II: To ensure that the representation of clients is of high quality.

Goal III: To assist in the exposition and improvement of the adversary process within the criminal justice system.

These goals were further divided into 11 objectives, found in Table 1. The goals and objectives were abstracted and synthesized from existing standards; a review of relevant literature; discussions with defenders, clients, and criminal justice and community leaders around the country; field visits to defender offices; and a series of test evaluations. The full evaluation design further divides each objective into a series of specific criteria for compliance against which the defender office's performance is rated.

Management of a defender office was rated against criteria which correlated with the above 11 objectives. These criteria addressed the management functions of planning, organizing, administrating, and controlling.

The Evaluation Phases

The evaluation design was structured in four phases:

Phase 1. Preliminary Evaluation Period. During this period, the evaluation request is formalized and the evaluation team and its captain selected. The skills required for any evaluation are: legal, management, community, statistical, and administrative. The chief defender at the office to be evaluated is asked to complete a pre-evaluation profile of his/her office that is reviewed by staff together with the team captain during a preliminary site visit. (The term "staff" refers to the individual or group concerned with organizing and administering the evaluation effort. On some evaluations, staff and the team captain will be the same individual.) These materials are summarized for and mailed to team members; the administrative and logistical aspects of the on-site evaluation are planned.

Phase 2. Case File/Docket Study Period. This aspect of the evaluation includes a statistical analysis of cases closed by the defender office during the preceding six months of operation, and cases closed by the court during the same time period. The case file and docket studies provide comparable information for the defender and private attorney.

Phase 3. On-Site Evaluation. During the on-site period, team training is provided on the concepts and principles of evaluation research and on the utilization of the evaluation handbooks and materials developed through the grant. Extensive in-depth interviews with individuals in the defender office, criminal justice system, and community take place, as do observations of the attorneys and office personnel at work. The management analysis of office operations focuses on the management components of planning, organization,

admin stration, and contro. In general, the evaluation of a small office requires three to four evaluators on site for five days (including team training and report outlining); evaluation of a medium-sized office requires five evaluators on site for six to seven days.

Phase 4. Post-Evaluation Period. During this period, team members attempt to reach a consensus on the performance of the defender office and conclusions and recommendations they will highlight in their final report. A draft report outline is written on site by the team members and expanded in the following weeks; it is edited by the team captain and reviewed by team members. A copy of the draft report is mailed to the chief defender for review and commentary. The final report, including dissenting team member and chief defender comments if made, is then given to the defender office and/or agency requesting the evaluation.

A full-scale evaluation of a small or medium-sized office, according to the phases defined above, can be completed within a four-to-six-month period. The design is flexible in terms of time and budget requirements, so that it would be possible to omit some aspects of the evaluation and still maintain its credibility and relevance.

Types of Data Gathered

Four types of data should be gathered during the course of the evaluation:

1. Background: Information which describes the criminal justice system and general community within which the office operates, as well as some aspects of defender office operations. This information is gathered during the pre-evaluation preparation period; some of it will be validated by the evaluators during the on-site period.

2. Quantitative: Statistics which are drawn from a variety of sources. Two sources are closed defender case files and the court docket. Other sources include the daily jail visitor logbook and probation and parole statistics. This information is gathered both prior to and during the on-site evaluation.

3. Qualitative: The subjective assessment of individuals who are asked to focus on a specified defender activity or function and to make a judgment about it. This information is gathered during the on-site evaluation through interviews with defenders, clients of defenders, criminal justice personnel, and community groups, and through the observation of defenders at work.

4. Management. Data on the day-to-day aspects of office operations which indicate whether the operations of planning, organization, adminis-

tration, and control are efficient and are fostering the achievement of the objectives established for defender offices. This information is gathered during the on-site evaluation period.

All of the data gathered are used in complementary fashion, so that the team's final evaluation is based upon a large assortment of information which has been gathered through a variety of techniques.

Data Gathering Techniques

No one technique of data collection can be totally relied upon for a defender office evaluation. Rather, the information sought as indicators of defender office performance will be gathered through a variety of techniques.

Statistical Analysis: A statistical analysis has two broad functions: (1) to summarize a large amount of information by using numbers to make the information more manageable; and (2) to generalize about a large population on the basis of a sample drawn from this population. In the evaluation of a defender office, a statistical analysis of closed defender case files summarizes patterns of case handling and case outcome and explores relationships among a large number of case variables. A similar analysis of the court docket allows comparison of defender activities with those of the private attorney and assigned counsel. Statistics are not used as an "evaluation" in their own right, but are gathered as a starting point from which interviews and observations take their cues.

Observation. Observation becomes a scientific technique only when it serves a formulated purpose, is carefully planned, and is recorded systematically. Its major asset is that an individual's actual behavior is observed. One need not try to predict that behavior from statements by that individual or others. In addition, observation is not dependent upon an interviewee's ability or willingness to articulate responses. The major limitation of this technique, however, is that the observer is never sure that the behavior witnessed is typical of the situation, or whether some of it has been "altered" for the observer. Also, the number of hours of observation time is severely limited by the time constraints of the evaluation. It is for these reasons that observation is not relied upon to "prove" a point, but is another source of information used to supplement or interpret information gathered through other techniques discussed. In the evaluation of a defender office, team members are asked to observe the conduct and activities of the defender during interactions with the court and clients.

Interviews. The interview, in contrast to observation, has the advantage of retrieving a great deal of information in a short period of time. Not only can the evaluator ascertain facts about behavior, but he/she can probe into beliefs about policies, reasons for beliefs, feelings, standards of action, and past behavior. Interviews conducted during the on-site period of a defender evaluation should be flexible and adaptable to the specific situation. The interview formats developed specify the focal concerns of each interview and are a guide for the interviewer. Each team member has the leeway to use additional questions deemed appropriate to a particular respondent or situation. To accomplish this, questions--their content, sequence, and wording--are not

fixed. This places a minimum of restraint upon the interviewer, but a maximum amount of pressure to know ahead of time what is being sought from a particular interviewee.

Content Analysis. Content analysis is a method of studying and analyzing communication in a systematic, objective, and quantitative manner. Instead of observing people's behavior directly, or asking them to respond to questions in an interview, one looks at "communications" that people have produced or that have been produced about them. Newspaper accounts of the criminal justice system are the subjects for such a content analysis. In a defender evaluation, the assumption is made that the communications analyzed either: (1) reflect reality; or (2) offer a perception of reality. Both are important for evaluation purposes. A content analysis of newspaper articles is undertaken by staff prior to the on-site period, and a summary of findings is given to team members.

Case Study. The case study is an approach to gathering data which views any unit as a whole. This technique's major asset lies in making a process understandable which incorporates the interactions of many variables at the same and at different times. It also allows time to be condensed, so that a full case, from pre-trial to post-conviction, can be reviewed in a relatively short period. On the other hand, this technique suffers from the problem of having its users generalize inappropriately from a few cases to many; that is, its users often make the faulty assumption that the few cases reviewed are representative of most or all cases handled. The case study technique is also used to scrutinize, in detail, a small number of cases handled by the defenders.

In addition to the above techniques, factual data will be gathered on the criminal justice system and community which will serve as background information against which other information will be interpreted.

Reliability and Validity of Design

In order to undertake an evaluation, an evaluator must make judgments. These judgments, however, should not depend upon the subjective assessment of any one individual. An evaluation which is reliable means that the evaluation procedure will produce the same results each time it is applied, regardless of who the evaluators are. While the importance of individual expertise must not be minimized, the reliability of this design has been increased by stressing the careful selection and orientation of evaluators who have the requisite skills; by establishing a uniform method of exploring issues, interviewing individuals, and collecting data; and by providing a standard reporting format.

Judgments should also be based upon what is actually taking place in a defender office. An evaluation which is valid means that the results of the evaluative procedure accurately reflect what exists in reality. The validity of this design has been increased by incorporating feedback from defenders on both logistical and substantive aspects of the evaluation design; by fostering defender review and critique of any report issued by an evaluation team; by having team members reach final decisions through a consensus process; and by each team member interviewing similar individuals on topics which overlap with those of other team members.

Testing the Design

The evaluation design and accompanying materials were tested during three site evaluations using different evaluation teams. The independent criteria used for validation purposes to assess an office's performance were substantiated by team conclusions. Anonymous feedback received by DEP staff from interviewees at each site agreed that questions asked were relevant and that interviewers were professional and objective. Chief Defenders, although not always in agreement with team member conclusions, felt that the evaluations were fair and the results appropriate. DEP staff who were on site during each evaluation noted that the design was closely followed at each evaluation site. In short, there is little reason to doubt the general reliability and validity of the evaluation design when tested in a variety of situations.

Goals and Objectives for the Delivery of Defender Services

GOAL I: To facilitate the effective and efficient delivery of legal and supportive services to all persons who need and qualify for public representation in criminal and related proceedings.

Availability/ Immediacy — Objective 1) Representation should be available beginning at the time the individual is arrested or requested to participate in an investigation that has focused upon him/her, or at the request of someone acting on his/her behalf.

Eligibility — Objective 2) Representation should be provided to any individual who is eligible and desires representation.

Scope — Objective 3) Representation should be available throughout all criminal and related proceedings at which an individual is faced with possible deprivation of liberty or continued detention.

Duration — Objective 4) Representation should be available until all reasonable avenues of relief are exhausted.

GOAL II: To ensure that the representation of clients is of high quality.

Competence — Objective 1) Representation on behalf of clients should be competent.

Zeal — Objective 2) Representation on behalf of clients should be zealous.

Political Influence — Objective 3) Representation on behalf of clients should remain free from political influence.

Judicial Control — Objective 4) Representation on behalf of clients should remain free from improper judicial control.

Discrimination — Objective 5) Representation should not be affected by racial, cultural, religious, or sexual characteristics of clients.

GOAL III: To assist in the exposition and improvement of the adversary process within the criminal justice system.

Community Education — Objective 1) Defenders should contribute to the community's knowledge about the adversary process and the role of counsel.

System Improvement — Objective 2) Defenders should seek to improve the criminal justice system and other components therein.

GOAL II

OBJECTIVE 1: Representation on behalf of clients should be competent. (Competence)

Commentary

It is axiomatic to our adversary system of justice that skilled advocacy on both the prosecution and defense sides, coupled with the presence of a judge knowledgeable about both the criminal law and the roles of the advocates appearing before him, is essential to a fair determination of issues and facts in law. While defendants are permitted to represent themselves if they so choose, unanimous opinion among professionals in the criminal justice system militates strongly in favor of representation by counsel. This is not only because of assumed benefits to the defendant's best interest, but also as a means of promoting efficiency in the determination of cases.

The legal profession, unlike many other professions, has been remiss in providing practical training at the academic level. It becomes incumbent upon defender programs to assist new attorneys in acquiring and developing the very specialized skills necessary for criminal defense advocacy, and to promote continued study of new developments in the law.

Of equal importance in effective representation is the defender's attitude toward his/her clients. In short, the evaluation of attorney competence, if it is to be a true measure, requires consideration of many aspects of the defender's training and performance.

Criteria for Compliance

1. Entry-level orientation/training is provided for all staff to help them acquire/develop job skills.
2. Continued legal training is provided attorneys and support staff to keep them abreast of developments in criminal law, procedures, tactics.
3. Recruitment, selection, promotion, and retention are based upon merit and performance.
4. Sufficient resources exist for good defense work.
5. Outside expert and support services are used to provide an effective defense.
6. Appropriate defender personnel assist attorneys in performing tasks not requiring attorney credentials or experience.
7. Case preparation and management reflects a competent defense.
8. Defenders are able to limit their workload if the assumption of additional cases might result in inadequate representation for some or all of that attorney's clients.

9. Each experienced defender has general responsibility and authority for services provided to his/her client.

10. Representation is comparable to that provided by a skilled and knowledgeable lawyer competent in the practice of criminal law.

GOAL II, OBJECTIVE 1: Representation on behalf of clients should be competent. (Competence)

Nature of Data	Indicators	Instructions
1. Codes	A. Statutes	A. Review appropriate Appendix in Team Member Handbook.
	B. Jurisdictional Rules	B. Review appropriate Appendix in Team Member Handbook.
	C. Defender policies and procedures	C. Gathered during the course of or following interviews or observation periods.
2. Statistics	A. Defender Case File Statistical Analysis	A. Review appropriate Appendix in Team Member Handbook.
	B. Court Docket Statistical Analysis	B. Review appropriate Appendix in Team Member Handbook.
	C. Other Statistics Defender a. charges breakdown b. pleas c. # and % of trials d. caseload/attorney e. support staff ratio f. salaries	C. Gathered during the course of or following interviews or observation periods. Where information is inaccessible, unavailable, or absent, ask interviewees for their estimation of numbers and percentages.
3. Media	A. Local Newspaper Articles	A. Review appropriate Appendix in Team Member Handbook.
	B. TV programs	B. Gathered during the courts of or
	C. Radio programs	C. following interview or observation periods.
4. Reports	A. Annual Defender Report - statements and statistics related to competency	A. Review appropriate Appendix in Team Member Handbook.
	B. Background information on criminal justice system	B. Review appropriate Appendix in Team Member Handbook.

GOAL II, OBJECTIVE 1: Competence

Nature of Data	Indicators	Instructions
5. Interviews	Each interview will attempt to ascertain: CRITERIA FOR COMPLIANCE BEING MET 1. Entry-level orientation/training 2. Continued legal education 3. Personnel policies based on merit and performance 4. Sufficient resources for good defense 5. Expert & support services utilized 6. Support staff assist in casework 7. Case preparation and management reflects competent defense 8. Ability to limit workload 9. Defender responsible for services to his clients 10. Comparable to skilled private attorney OTHER QUESTIONS 1. Opinion on objective 2. Reputation in community 3. Comparison w/ private attorneys in casework 4. Problems unique to defenders 5. Need for change 6. Effort toward change 7. Explanation of statistical studies	Interviews should be obtained from: Chief Defender Defenders Defender Staff Private Attorneys Judges Appellate Attorneys Prosecution Personnel Police Personnel Court Personnel

Additional Data: Defenders and Private Attorneys

1. Ask Defenders and private attorneys to describe a typical misdemeanor and felony, how they would be handled (decisions to be made, strategies to select, probable case outcomes).
2. Which are the most important recent procedural statutes in their work and how they learn of new legal developments.
3. How plea bargaining goes (procedures, outcomes, attitudes of clients and criminal justice personnel)

GOAL II, OBJECTIVE 1: Competence

Nature of Data	Indicators	Instructions
6. Observations	Defender a. Dignity of the proceedings (e.g., noise, milling behavior, disturbances, delays) b. Defender courtroom performance (e.g., presentation of issues, apparent confidence, advocacy role, relationship to prosecutor) c. Defender appearance (e.g., dignified manner, choice of words) d. Client information imparted--type and amount of information imparted to client on case, court procedure, rights e. Defender presentation (e.g., confident, knowledgeable, unhurried) f. Discerns strengths and weaknesses of prosecutor's case g. Knowledge of mitigating factors h. "Trade-offs" with other cases.	Defender 1. During first court appearance 2. During preliminary hearing 3. During trial 4. During plea bargaining
7. Records	A. Defender Cases - Review files closely for comprehensive work in: a. general background information on client and family b. investigative reports on circumstances surrounding charge c. witness examinations d. motions, memos of law e. client interviews f. preparation for bond hearings, preliminary hearings g. pleadings h. notes on conferences with client, police, etc. i. trial documents, including background of jurors, notes for opening statements, etc. j. contacts related to sentencing, and sentence alternatives k. transcripts (where available) for protecting the record for appeal, closing arguments	Ask Defenders to select five recently closed typical cases.

GOAL II, OBJECTIVE 1: Competence

Nature of Data	Indicators	Instructions
	After review, ask Defender to discuss his/her strategy and approach in these particular cases.	
B. Legal Resources-- Review brief bank, law motion bank interchange, memos, library, handbooks on tactics, form motions for appropriateness, recency	B. Review legal resources that attorneys utilize frequently	
C. Training Materials for attorneys, investigators--orientation, in-service, continuing education.	C. Gathered during the course or following interviews or observation periods.	
D. Personnel Criteria--recruitment, selection, promotion, retention, dismissal	D. Gathered during the course of the management analysis (Handbook IV)	
8. Management	A. By Objective, review: 1. Planning 2. Organization 3. Administration 4. Control or	A. Gathered during the course of the management analysis (Handbook IV)
	B. By management operations, review: 1. Case Flow Management 2. Public Relations 3. Personnel 4. Training 5. Resources	B.

OBJECTIVE CHECK LIST

Instructions: To be used cumulatively, throughout on-site visit, by the Team Member with primary responsibility for this Objective. Check (x) when information is gathered on topic by any Team Member.

Goal II, Objective 1: Representation on behalf of clients should be competent.

Data Gathered and Reviewed

1. Codes
   - _____ Statutes
   - _____ Jurisdictional Rules
   - _____ Defender Policies and Procedures

2. Statistics
   - _____ Defender Case File Statistical Analysis
   - _____ Court Docket Statistical Analysis
   - _____ Other Statistics
     - _____ Defender
       - _____ charges
       - _____ pleas
       - _____ trials
       - _____ caseload
       - _____ support
       - _____ staff ratio
       - _____ salaries

3. Media
   - _____ Local Newspaper articles
   - _____ TV programs
   - _____ Radio programs

4. Reports
   - _____ Annual Defender Report--statements and statistics related to competency
   - _____ Background information on criminal justice system

5. Interviews
   Total Number
   - _____ Chief Defender
   - _____ Defenders
   - _____ Defender Staff
   - _____ Private Attorneys
   - _____ Judges
   - _____ Appellate Attorneys
   - _____ Prosecution Personnel
   - _____ Police Personnel
   - _____ Court Personnel
   - _____ Other
   - _____
   - _____

6. Observation

Number	Site
_____	Defender during first court appearance
_____	Defender during preliminary hearing
_____	Defender during trial
_____	Defender during plea bargaining

7. Records

_____ Defender Cases (No. Reviewed _____)
_____ Legal Resources
_____ Training Materials
_____ Personnel Criteria

8. Management

Discuss with Management Analyst

Function	Management Issue: Training
PLANNING	Indicators: • Written policies exist concerning the training of attorney and support staff. • Written and/or known procedures exist on: - orientation of all personnel - entry-level training of all personnel - on-going training of all personnel - including private criminal attorneys in training efforts - involving other members of criminal justice to both providing and participating in training - attorney and staff provide training to office and other interested groups - distribute summaries of new court decisions which pertain to office
ORGANIZATION	Indicators: • Positions are defined and designated within an organizational structure to handle training.
ADMINISTRATION	Indicators: • Someone is delegated the responsibility to ensure training is provided. • Activities of attorneys and support staff both providing and participating in training courses are observed and reviewed. • Authority is further delegated to other individuals to prepare, provide, and review training courses.
CONTROL	Indicators: • New employees are introduced to staff members and appropriate criminal justice personnel. • New employees are given an office manual and have their responsibilities explained. • Training is provided and procedures "walked through." • New employees are observed closely by an experienced person until they are capable of assuming full responsibility. • New attorneys assist in trial proceedings until competent to take full responsibility. • Attorneys are observed in court to determine any areas of weakness. Training is planned around these areas. • Staff meetings encourage discussion of difficult pending current cases. Closed cases are examined to see if next effort could be better.

Function	Management Issue: Training
CONTROL (continued)	• Support staff are observed in their roles to determine weak areas. Training is planned around these areas. • Attorneys are required to prepare a topic of interest and chair discussion on it. • External seminars are sought which would be of interest and personnel are sent. • Possibilities for scholarships to seminars are investigated. • Personnel records are reviewed to ensure all staff members are being provided training. • Private criminal attorneys are invited to participate in defender training sessions. • Members of criminal justice system are invited to appear before defender training sessions. • Defenders participate in training of other members of criminal justice system. • Training materials are reviewed and updated. • Feedback from training sessions is requested as to relevance, length of class, and presentation. • Training is at least comparable to that provided by prosecutor's office.

Workshop G

Summary of Proceedings

In Workshop G, we discussed measuring effective assistance of counsel.

First, I would like to briefly define what an evaluation is, and what our design specifically entailed. An evaluation is a process of assessment using scientific methodologies and logic to make judgments more accurate and objective. It indicates compliance or noncompliance to stated goals and objectives. It is not technical assistance, and although we wanted to find remedies, all we can do is point to strengths or weaknesses.

To develop an evaluation designed for the Public Defender Office, we used the existing standards from the ABA, the NAC, and the NLADA to set our goals and objectives. Our first major goal was to facilitate the effective and efficient delivery of legal and supportive services to all persons who need and qualify for public representation in criminal and related proceedings. As goal two, we want to ensure that representation of clients is of high quality. Goal three was to assist in the exposition and improvement of the adversary process within the criminal justice system.

We subdivided these goals further into objectives and then into specific indicators. To determine the compliance, we tried to gather several different types of data, including background and quantitative data, a statistical analysis of closed-case files in the Defender Office and the courts, a qualitative assessment of the work of many of the people within the criminal justice system, and an actual analysis of their management techniques. To gather this data, we observed and interviewed the people. We used statistical analysis. We performed content analysis on newspaper and television reports concerning the Defender Office. And we performed some case studies to see what type of preparation was involved.

All of the conclusions reached were judgments, but they were based on variety of data that was collected on a lot of objectives in accordance with a structured design. The judgments were made by an evaluation team composed of attorneys, management analysts, and community people.

Some of the major concerns that were expressed in the workshop were to ensure that clients were involved in the evaluation process. We had taken this into consideration. On our advisory board was an ex-offender who made sure that we involved the clients in all aspects. We interviewed them and we talked to a lot of other people concerning clients and the diversion programs.

A lot of attorneys are worried that their style may be so unique that there's no way to measure their effectiveness. Even so, we found over and over again that there are basic indicators which demonstrate whether you are doing an inadequate or an adequate job. We got some indication not only from our own personal feelings, but also by actually talking to the attorneys. We gathered as much objective data as we could.

Some people were worried that there was a personal prejudice on the part of the evaluators about the way things were done in an office. We agreed that this might be. But in prior evaluations and other efforts that have been made, there's been no actual structure to an evaluation. This is a first attempt at structuring it.

The biggest issue that arose was that of actual confidentiality. It was considered from two aspects. First, we did not disseminate any of the test evaluations to anyone except the Defender Offices involved. The issue of dissemination, however, has to be resolved by LEAA and the people involved in the evaluation.

There was the problem of attorney-client privilege, because we studied defender files. There's a great concern that this is an imposition on the attorney-client relationship. This, too, must be resolved. But our staff attorney investigated it and talked to many other defenders. They found nothing wrong, as long as it was used in research, the person was not identified in any way, and the end results assisted the Defender Office in improving its services.

Discussion Highlights

Existing standards of the ABA, the NAC, and the NLADA were used to establish goals and objectives in measuring effective assistance of counsel. The primary goals, which were later subdivided into objectives and specific indicators, were as follows:

(1) To facilitate the effective and efficient delivery of legal and supportive services to all persons who need and qualify for public representation in criminal and related proceedings;

(2) To ensure high quality representation of clients; and

(3) To assist in the exposition and improvement of the adversary process within the criminal justice system.

Workshop participants had dichotomous feelings about the evaluation of public defender offices. On the one hand, they believed that researchers perusing confidential files was a serious breach of the attorney-client privilege. On the other hand, they also believed that the results of the study, which was sponsored by public funds, should be made public.

WORKSHOP FEEDBACK

DISCUSSION

PROFESSOR KRANTZ: What tangible things might be done to implement the Argersinger v. Hamlin decision? The findings of our study still hold. It is now four years since Argersinger v. Hamlin and there are still coerced waivers. There is still a tremendous lack of uniformity in eligibility, and a tremendous disparity in the quality of legal representation around the country. Certainly, there is some very good representation, but there is also shameful representation. Problems appear to be getting worse, not better. The reasons for that may be, first, that we are increasingly facing an eroding tax base. It's getting harder for public defender agencies to stay even. Secondly, because there is a move to cut back at local levels, there are even many jurisdictions where public defenders are facing competitors for the first time. Groups of lawyers are coming in and offering cut-rate services cheaper than those a public defender can provide. In addition, it's fair to say that we're at a time in our history when the rights of defendants in criminal cases are not of paramount concern to a good part of our population. If that is true--and it's certainly not true everywhere--it's possible that the situation may seem more hopeless than ever, even more than in 1974.

Deputy Attorney General Tyler commented that one conference alone can do very little to take on a major problem. I agree with that notion. But I also think that one conference can start a movement or can participate in a movement for something that really has to be done.

Let me list some of the things that I would like to see result from this conference. Some will develop slowly; perhaps some can take place rather quickly. Based upon this conference, our studies, and the studies of others, I think the most important thing that has to happen is that the legal profession has to stand up and accept responsibility for what I consider a colossal failure in the criminal representation of the poor. Many of you may remember that Chief Justice Burger, in Argersinger v. Hamlin, made the following comment: "The holding of the Court today may well add large new burdens on a profession already overtaxed; but the dynamics of the profession have a way of rising to the burdens placed on it."

Well, my feeling is that that has not happened. If it is true that the dynamics of the profession can rise, I think it has to start very soon. Public defenders, law professors, judges--all of us have to be honest. We have to acknowledge that we are having a gross failure in criminal representation of the poor in this country. We have to tell the American public why this is true. We have to tell the public that in many jurisdictions, in which we are working, we have unconstitutional and unprofessional ways of providing legal services to the poor in criminal cases.

Now, just saying that, obviously is not enough. We should take up Deputy Attorney General Tyler's suggestion that the Department of Justice, for example, assume a position of leadership on this issue. Those of us

who play a role in the American Bar Association must basically coerce the ABA to stand up and be counted and to indicate that for the next few years one of its priorities is going to be to upgrade the quality of criminal representation throughout the country. I would hope that state and local Bar associations would respond in kind, as would local judges, and other groups. I frankly don't think much is going to happen or that many of the resources are going to be provided, unless we own up to the poor quality of legal representation today. That may be a hard thing to do, but without that I don't think we'll be very successful.

Secondly, it's very important for those of us who are in positions of litigation to continue to pursue the kinds of Constitutional litigation that Bruce Rogow was talking about. We must continue to fight in terms of what the scope of representation means under the Sixth Amendment. We must continue to try to get Constitutional interpretation of what effective assistance of counsel means, what indigency means. The kind of thing that started with Wallace v. Kern, where class actions attack the way a public defender system operates when it does not have enough resources may require greater movement in the future than it's had up to now. There's a lot of work that remains to be done in terms of Constitutional litigation. We can be successful in starting something.

The decriminalization or removal of incarceration as a possible penalty requires tremendous development around the country.

A lot has come out of this conference about the need for statutes and court rules dealing with standards of representation, indigency, predetermining, and so forth, which have been focused and refocused. Many models exist in this country now: the American Bar Association standards, National Advisory Commission standards, NLADA standards, proposals in our study and other proposed models. Actually, they're more than models; they're legislation in given jurisdictions. We now have a wealth of material that can be used in defining Argersinger and the quality of counsel or the demands of counsel. I think we ought to pursue those. I think a lot has been said about public defenders and the need for them to do more than suffer the day-to-day crises of an overwhelming caseload. A lot has been said about the need to define guidelines and policies in terms of what is expected of individual lawyers. And a lot has been said about the need to sharpen requirements on caseloads so that the public defender can say, "That's too much," when the cases get too heavy. We need to sharpen supervision or training. We need to allocate resources, so that we can plan and establish priorities, if we can't take on every case. And, certainly, we need to have research and law reform units that can work, along with the public defender, to bring class actions or to notice trends that individual lawyers cannot. There's a lot that can be done in the field of public defenders.

The same is true for assigned counsel. We need a new movement. We need to get high-quality private lawyers back into the criminal business, to establish formalized mixed systems, to establish panels with requirements.

These are things that really have to begin again. They died largely because of the quality of private lawyers years ago. We clearly needed a public defender movement in the sixties. But we need something to join that public defender movement today, and that is the reassertion of all members of the legal profession that practicing criminal law and representing the poor is a matter of the highest order. We have to get back into the business.

We need to monitor the quality of performance of public defenders and private lawyers. This should be done largely by public defenders internally, after they establish their own standards. A lot of public defenders, frankly, do not know what the standards of their agency are, because there aren't any. Now, NLADA and others have done a lot of good work in trying to develop standards. I think this has to be done at the local level. Trial judges in the misdemeanor area have to do far more in terms of monitoring the quality of performance. The Bar itself, for the first time perhaps, has to seriously assume its responsibility for the quality of representation in criminal cases. There have to be grievance procedures available to defendants, when they are not satisfied with the kind of service that they've had.

Law schools have not assumed their responsibility in the area of advocacy training. Here, I mean a focus on disposition as opposed to simply trying cases. Law schools need to invite back lawyers who are interested in this field to upgrade their ability. All that has to be done.

With respect to federal funding, we have very few ideas for LEAA. Perhaps we don't need so much Federal money, basically. Perhaps we have to push state and local governments to provide the resources. I agree with that fundamentally. There must be a state and local commitment. But I also know from bitter experience that the state and local governments rarely support innovation. They rarely support research and planning. It's one thing for New York City to say, "We don't want Federal money," and it's another thing for smaller jurisdictions.

We do need Federal support in the field of planning, in technical assistance related to making the best kind of arguments we can to local bodies, in developing research capability, and in trying new programs and new approaches such as prepaid legal services. But we ought to be stronger than ever in trying to selectively use Federal money in ways that can advance the field.

An analogy can be made between what has been done in the medical profession and how we ought to try to provide a stimulus for people to get back into the criminal field. The analogy is: In the medical profession, in return for fellowships and scholarships which support their education, medical students commit themselves to a period of time to work in poverty or rural areas. I recognize that the legal profession for years has been terrified of Federal control. But it seems to me that we have to do something to reascertain our commitment to the field of criminal representation. When we basically delegate the responsibility of criminal representation to three, four, or five percent, or whatever it is, of the legal profession,

there's something basically wrong. This is particularly true when we have an overwhelming number of law students who continue to glut our profession looking for jobs.

In summary, we have been lax, and we need to spark a new commitment to provide quality representation for the poor. It can be done; we have to do it.

MR. SHELDON PORTMAN: The legal profession has not lived up to what Justice Burger referred to in the Argersinger decision. It seems to me that the bench really carries the greater onus. It's ridiculous for us to continue to labor under this farcical standard with regard to competence of counsel, while the public hears what miserable lawyers we have. This situation is symptomatic. We have to ask and demand, in fact, that the bench, and particularly the Supreme Court, live up to the unfulfilled promise of Argersinger. Until the appellate court and the Supreme Court go beyond Argersinger decision, we'll continue to labor under the present situation.

With respect to Federal funding, as so many areas, the Federal Government has the greatest tax base. The resources of state and local governments are being bled dry because of welfare and unemployment, the need for medical care, and so on. In terms of local and state funding authorities, we come last on the totem pole. Rather than minimize the need for Federal funding, we should maximize it. After all, it's the Federal Constitution which has imposed the Argersinger requirement.

We ought to put the fire to the feet of the state officials. They set the limits of jurisdiction. Their knee-jerk response is to create criminal sanctions which include jail time. The best way to deal with that jurisdictional problem is to lay the costs on the state. And if they find that it's too expensive, then cut back on the jurisdiction and get the nonsense-type of statute--the social nuisance, the offensive behavior, the visual pollution--out of the criminal courts. Then we can concentrate resources on those things that belong in the criminal courts and we won't have to look to Washington. We are setting up a "catch-22 situation." If we look to Washington for the money, while letting the states continue to set jurisdictional limits, the states can then say, "We can expand criminal jurisdiction to cover anything because Washington is going to pay for it anyway." We may have the Federal Constitution, but it's the state statutes that we're dealing with every day. It's the local ordinances that we're dealing with when we talk about Argersinger.

ROGERS BLANCHE: As a matter of fact, it goes even deeper than that. What seems to happen is that the poor cop on the beat ends up interpreting and dealing with problems that didn't originate with and can't possibly be resolved by him. He becomes the community conscience. This is facetious.

Also, if you're to try to get the Federal government to pay for everything, then you're consistently going to be waiting for them to do things and you'll be deferring the dream forever.

I hope that the ABA and other groups capable of setting standards will come up with some things that deal more with developments in the community sense of equity, rather than professional ethics to decide who will be represented and the quality of service to be provided. The costs of developing some software, documents, standards, and research may well be shared by the Federal government. However, the onus, the costs, and the means of straightening out the system and reducing some of its imperfections should be handled locally. We have some situations that can be resolved by adopting local ordinances. Then, basically we can go to the Federal government for monies for development and litigation.

VERONICA DEVER: This is a need to form a task force. It's not enough to be sold on the fact that the misdemeanor defendant needs representation; we have to implement it. If we don't implement it at the Federal level, we should have a task force that can sell the idea to state legislators. It appears that people from the outside do a little better than people from inside the state saying, "We have to implement this."

MARSHALL HARTMENT: LEAA ought to be congratulated, because this is the first in a series of 100 criminal justice training seminars to be held around the country. LEAA and the Justice Department recognize our problem. I think it is praiseworthy that the first priority of this first conference is defender services and the indigent defendant. I think we should try to organize on the state and Federal levels to obtain the resources and funds we need to do the job.

Participant List
Special Conference
Argersinger v. Hamlin
October 11-12, 1976
Philadelphia, Pennsylvania

John E. Ackerman
Bates College of Law
Houston, Texas

Charles W. Allen
Legal Aid Society
Birmingham, Alabama

Junius L. Allison
Vanderbilt University School of Law
Nashville, Tennessee

Geoffrey M. Alprin
National Institute of Law Enforcement
and Criminal Justice
Washington, D.C.

Carol Anfinson
Office of the Public Defender
Wheaton, Illinois

Marvin E. Aspen
Circuit Court of Cook County
Chicago, Illinois

Donald Austin
County Courthouse
Utica, New York

Jan G. Banker
National College of District Attorneys
Houston, Texas

Phillip Bartlett
Washoe County
Reno, Nevada

Michael J. Barry
Lafayette Parish Indigent
Defender's Office
Lafayette, Louisiana

Bruce D. Beaudin
D. C. Bail Agency
Washington, D.C.

Rudolph Becker
Legal Aid Society
Milwaukee, Wisconsin

Peter Bell
Greater Upstate Law Project
Rochester, New York

Charles A. Bellows
Bellows & Bellows
Chicago, Illinois

Lawrence Benner
Office of the Defender
Grand Rapids, Michigan

Dante G. Bertani
Public Defender
Philadelphia, Pennsylvania

Numa V. Bertel, Jr.
Orleans Indigent Defender
Program
New Orleans, Louisiana

Chris Blair
Ohio Public Defenders
Association
Columbus, Ohio

John Bodner, Jr.
Howrey & Simon Law Firm
Washington, D.C.

Rogers Branch
National Clients Council
New Orleans, Louisiana

Craig Brown
Sangamon State University
Springfield, Illinois

Bennett Brummer
11th Judicial Circuit of Florida
Miami, Florida

John J. Callahan
Openlander, Callahan & Connelly
Toledo, Ohio

Charles Y. Cameron
Administrative Director of Courts
Montgomery, Alabama

Michael F. Cavanagh
Judge
Lansing, Michigan

Betty Chemers
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Alvin W. Cohn
University Research Corporation
Washington, D.C.

Tom Cone
Governor's Office
Columbia, South Carolina

John Cratsley
Roxbury District Court
Boston, Massachusetts

Maupins Cummings
Circuit Judge 4th Judicial District
Fayetteville, Arkansas

William W. Daniel
Attorney at Law
Atlanta, Georgia

Jack G. Day
Cuyahogo County Court House
Cleveland, Ohio

Veronica M. Dever
Erie County Public Defender
Sandusky, Ohio

Jerome Doherty
Mental Commitment and Misdemeanor
Seattle, Washington

James E. Duggan
New Hampshire Defender
Manchester, New Hampshire

Howard B. Eisenberg
State Public Defender
Madison, Wisconsin

Sidney A. Emeson
Public Defender's Office
Decatur, Georgia

Julie Ann Epps
Moore, Epps, Giner & Coleman
Jackson, Missippi

Catherine Ewing
National Legal Aid and Defender Association
Chicago, Illinois

William E. Falvey
Ramsey County Public Defender
St. Paul, Minnesota

Lee D. Foreman
Colorado State Public Defender
Denver, Colorado

Jane L. Frank
Subcommittee on Constitutional Rights
Washington, D.C.

Richard F. Friedman
Institute for Criminal Justice
Chicago, Illinois

Donald Froeb
State Capitol Building
Phoenix, Arizona

Louis O. Frost, Jr.
Fourth Judicial Circuit of Florida
Jacksonville, Florida

Paul Froyd
Center for Criminal Justice
Boston, Massachusetts

Dewaine L. Gedney, Jr.
Pre-trial Services Agency
Washington, D.C.

Gerald S. Gold
Gold, Rotatori & Messerman
Cleveland, Ohio

Robert Gold
Misdemeanor Defender's Office
Detroit, Michigan

Daniel T. Goyette
Jefferson District Public Defender
Louisville, Kentucky

Steffen W. Graae
Clarke & Graae
Washington, D.C.

Carol Rogoff Hallstrom
Center for Criminal Justice
Boston, Massachusetts

Marshall Hartman
Criminal Defense Consortium
Chicago, Illinois

Robert Keith Hickerson
Legal Aid Society
Oklahoma City, Oklahoma

J. Patrick Hickey
Public Defender Service
Washington, D.C.

William Higham
Higham and Hulsey
Pleasant Hill, California

Charles M. Hollis
Law Enforcement Assistance Administration
Washington, D.C.

John F. X. Irving
Seton Hall School of Law
Newark, New Jersey

Jeffrey Isralsky
National Legal Aid & Defenders Association
Chicago, Illinois

Harold Jacobson
The Legal Society
New York, New York

Ellen Jasper
Law Enforcement Assistance Administration
Washington, D.C.

Jack O. Johnson
Public Defender
Bartow, Florida

Gary Jonas
University Research Corporation
Washington, D.C.

Bettye H. Kehrer
Georgia Criminal Justice Council
Atlanta, Georgia

Michael Kelhby
Seneca County Public Defender
Tiffin, Ohio

Karen S. Metzger Keithley
Attorney at Law
Denver, Colorado

Roger William Kienzle, Jr.
Wooster/Wayne Public Defender
Wooster, Ohio

Ira R. Kirkendoll
3rd Judicial District Public Defender
Topeka, Kansas

Daniel M. Kirwan
Illinois State Appellate Defender
Mt. Vernon, Illinois

Charles Knox
National Conference of Black Lawyers
Chicago, Illinois

Carol A. Koller
New Mexico Public Defender Department
Albuquerque, New Mexico

Thaddeus L. Kowalski
Public Defender's Office
Chicago, Illinois

Albert S. Krieger
Private Attorney
Coral Gables, Florida

Martha Lane
Police Foundation
Washington, D.C.

Morris Levenberg
Justice of the Peace Court
Wilmington, Delaware

Eben H. Lewis
Alaska Court System
Anchorage, Alaska

Paul Ligda
Hall of Justice
Fairfield, California

James D. Little
Nance, Collier, Singleton, et al
Fayetteville, North Carolina

Wilbur F. Littlefield
Los Angeles Public Defender
Los Angeles, California

Martin Lively
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Cheryl Martorano
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Louis A. Mayo
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Mary M. McCormick
Illinois Defender Project
Chicago, Illinois

Henry F. McQuade
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Joe D. Miller
U.S. Army Legal Services Agency
Falls Church, Virginia

Verna Mills
University Research Corporation
Washington, D.C.

Ernest Milner
National Institute of Law Enforcement and Criminal Justice
Washington, D.C.

Malvin Nathanson
Prisoner Right Project
Boston, Massachusetts

Frederick E. Naragon
Columbiana County Ohio
Salem, Ohio

Roger P. Owens
Polk County Defender
Des Moines, Iowa

Richard Parker
Public Defender
Gainesville, Florida

Robert L. Patterson
Colorado Public Defender's Office
Denver, Colorado

Phillip Pennypacker
Deputy Public Defender
San Jose, California

Overton P. Pollard
Public Defender Commission
Richmond, Virginia

Sheldon Portman
County of Santa Clara
San Jose, California

William F. Reilly
Providence County Superior Courthouse
Providence, Rhode Island

Dorothy Richardson
National Clients Council
Pittsburg, Pennsylvania

Jake Roberts
University Research Corporation
Washington, D.C.

Bruce Rogow
Nova School of Law
Miami, Florida

Gilbert S. Rosenthal
Attorney at Law
New York, New York

Richard Ross
National Center for State Courts
Denver, Colorado

David Rossman
Center for Criminal Justice
Boston, Massachusetts

Ronald S. Samuels
National Bar Association
Chicago, Illinois

Shelvin Singer
Defender Services, NLADA
Chicago, Illinois

Charles Smith
Center for Criminal Justice
Boston, Massachusetts

Ronald C. Smith
John Marshall Law School
Chicago, Illinois

Harry H. Sonnemaker, Jr.
Illinois State Bar Association
Peoria, Illinois

Robert Stein
Public Defender
Concord, New Hampshire

Sheldon S. Steinberg
University Research Corporation
Washington, D.C.

Joseph G. Studholme
City of Lakewood
Lakewood, Colorado

Christopher A. Tabb
Jackson Public Defender
Jackson, Mississippi

Ann Tarbutton
Division of Legal Aid Society
Cincinnati, Ohio

Preston Trimble
National District Attorney's Association
Norman, Oklahoma

Alan E. Trimming
Matthews, Lee and Wilson
Boise, Idaho

Harold R. Tyler, Jr.
Deputy Attorney General
Washington, D.C.

William P. White, III
Fourth Judicial Circuit
of Florida
Jacksonville, Florida

END