



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT OF
DENNIS ARCHER
on behalf of the
AMERICAN BAR ASSOCIATION
before the
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND
SECURITY
COMMITTEE ON THE JUDICIARY
of the
U.S. HOUSE OF REPRESENTATIVES
for the
Hearing on Representation of Indigent Defendants in Criminal Cases: A
Constitutional Crisis in Michigan and other States

March 26, 2009

Good morning. I want to thank the Chairman of the Judiciary Committee, Representative John Conyers, the Subcommittee Chair, Representative Bobby Scott, the Ranking Member, Representative Louie Gohmert, and the Members of the Subcommittee for scheduling this important hearing on the crisis in indigent defense for criminal defendants today. I am Dennis Archer and I am pleased to appear today on behalf of the American Bar Association (ABA), for which I served as President in 2003-2004. I also appear in my capacity as past President of the State Bar of Michigan, as a former Mayor of the City of Detroit, and as a former Justice of the Supreme Court of Michigan.

Led by Walter Mondale, then Attorney General of Minnesota, 22 State Attorneys General in 1963 filed an Amicus brief in support of Earl Gideon's handwritten request to the United States Supreme Court -- for an attorney. Earl Gideon's unlikely allies recognized that Gideon's request went to the very heart of our country's sense of justice and fundamental fairness. No one should face the prospect of losing his or her life or liberty without the guiding hand of counsel.

Indeed the United States Supreme Court has held that the right to counsel is the seminal right that makes meaningful all the other rights guaranteed to us by our Constitution.

But, how meaningful is advice whispered in a crowded hallway minutes before trial? How thoughtful is advice spread over staggering caseloads? How independent is the advice given by attorneys beholden to judges for their daily work and the essential tools of their profession -- investigators and experts? And, how guiding is the hand of a poorly trained lawyer?

Over the five decades since *Gideon*, the ABA has played an instrumental role in developing standards and guidelines setting forth what competent counsel must do to adequately represent his or her clients. It has published white papers describing the state of public defense in America and, finally, the ABA has provided technical assistance to every state attempting to improve its public defense delivery systems. Those efforts have not been enough.

Too many states still fall far below an adequate standard, and my home state, Michigan, a state that has led the country in so many important ways, is one of the worst.

Thirty years ago, the ABA recommended that the federal government establish and fund an independent, non-profit Center for Defense Services to administer matching grants and other programs to strengthen the services of public defenders, private assigned counsel, and contract defenders. As envisioned by the ABA, the proposed Center would receive funds directly from Congress and be governed by an independent Board of Directors appointed by the President. The establishment of such a program continues to be an ABA goal.

In an effort to speak directly to policy-makers, we developed the *ABA Ten Principles of a Public Defense System*. Their straightforward language describes what a sound public defense system must look like. It is the constitutional floor below which no system should go. These 10 Principles provide a template to measure a system's health, find what is broken, and then tell how to fix it. They are now used across the country in jurisdictions large and small. They have

been used to guide the improvement of public defense systems in Nevada, Montana, and even post-Katrina Louisiana. And they have been used to evaluate the health of existing systems – most recently that of my home state, Michigan. Michigan fails nearly all of the *Principles*. I have attached the ABA Ten Principles, which I request be made part of the hearing record.

In 2003 and 2004, the ABA held hearings across the United States to honor *Gideon*'s fortieth anniversary. The resulting report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (2004), concluded that "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction." The ABA report recommended that in order to fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings. While some federal funding reaches state criminal defenders and defender offices under the Byrne Grant and Justice Assistance Grant programs, indigent defense services have remained a "poor stepchild" compared to state prosecutors and prosecutorial resources funded through the administration of those programs. The ABA believes that state indigent defense should be made a priority area of support for those critical federal programs.

Rules of professional responsibility, underscored by a recent ABA ethics opinion, require defenders and their supervisors to provide competent services and not to accept excessive caseloads that undermine the quality of their representation. However, the relentless assignment of new cases routinely prevents adherence to this admonition. And the situation has gotten much worse due to the economic downturn.

The ABA believes that the need is urgent. A chronic, persistent indigent defense crisis has reached a point of system breakdown in a number of states and lawyers increasingly have sought relief in the courts, often unsuccessfully. For example, last year in Knoxville, Tennessee, the public defender filed a motion to limit the office's overwhelming caseload. However, judges refused to rule on the motion for more than eight months and, finally, despite uncontroverted evidence, rejected all relief. Just last month in Kentucky, a declaratory action filed by that state's Department of Public Advocacy was dismissed, although that agency's excessive caseload has repeatedly been documented. The judiciary is not responding to the crisis; the legislature must.

Let me briefly describe to you what is happening in Michigan. Two years ago the National Legal Aid and Defender Association in conjunction with the State Bar of Michigan conducted the first comprehensive study of the state's public defense system in response to a bi-partisan, joint resolution passed by both chambers of the Michigan legislature. The report's conclusions were devastating, describing a system failing in nearly every way. For example, a judge in Oakland County indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. In the district court in Chippewa County, there is no confidential space for an attorney to meet his or her client. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others talk in the corridor. Another example takes place in Grand Traverse County, where the judiciary forces public defense attorneys to provide

certain legal services for which they are not compensated if they wish to be awarded public defender contracts. This in a state that once led the nation in providing assigned counsel to its citizens.

In the 1850's Michigan became the first state to provide paid appointed counsel in criminal cases. It placed this cost and the method of providing counsel on the county government, a choice that was practical and efficient in the 1800's. Today, that method of funding has resulted in a patchwork of underfunded, unaccountable systems where the private bar remains the primary method of providing counsel.

I sat on the Michigan Supreme Court when serious challenge to this system came before the Court. That effort attempted to raise the level of attorney fees paid to the private bar to handle the criminal cases in Detroit. The fees had not changed in over twenty years – during a period of extreme inflation. The challenge went to the very heart of the system itself, because the fees were relied on to fund the entire public defense system in Detroit, in every case from homicides to homelessness. From these fees, attorneys had to pay not only their salary, but all the tools of the trade – their training, libraries, computers, support staff – indeed all those things necessary to be effective. In homicide cases, if you did what was needed, attorneys earned as little as \$10 an hour. Sadly, the reform attempt was not successful. After I left the Court, Judge Tyrone Gillespie was appointed as a master to make findings on the adequacy of the fees paid in the criminal courts of Detroit. Almost 15 years after he made them, all of the failings he found still remain, and the changes he recommended have yet to be made.

I have attached a summary of Judge Gillespie's report that I request be made part of the hearing record.

When fees are not reasonable and do not even cover the overhead of the attorney, one devastating result is that experienced attorneys are driven from the roster and those who remain are forced to accept crushing caseloads to earn sufficient money to stay on the lists. When turnover is high, training is impossible, serious cases go without competent counsel and our system that depends on equal adversaries cannot function.

And the noble, practical, and constitutional vision expressed by Earl Gideon and those 22 Attorneys General remains unfulfilled.

In Michigan our counties cannot fund our public defense system. Likewise we know that the states cannot fund their systems without help from the federal government.

We are all in this struggle together. We at the ABA know that learned lessons can be shared and implemented. The payoff will be not only a justice system that meets all our standards of fundamental fairness, but a system that is effective and efficient at all levels and in all corners of our country.

Thank you for the opportunity to appear today. I would be glad to answer any questions you may have.