The Michigan Indigent Defense Commission

and the

Macomb County Bar Association

present the following training opportunity:

Skills Training for Criminal Defense Lawyers

Friday September 16, 2016

Macomb County Circuit Courthouse

40 N. Main Street

Mt. Clemens, Michigan

Skills Training for Criminal Defense Lawyers

Objective: Designed as a pilot project model for compliance with the *basic skills acquisition* requirement for the MIDC's *conditionally approved* Standard 1, this training event is designed for lawyers accepting appointments in adult criminal cases. Topics to be covered include initial interviews with clients, ethics and client-centeredness, preliminary exams and motion practice.

Schedule:

9:00 a.m. – 10:30 a.m. – Client communication essentials: early meetings, effective and ethical advocacy, advising your clients (*Cheryl Carpenter, MIDC Regional Consultant and Marla McCowan, MIDC Director of Training, Outreach and Support*)

10:30 – 10:45 – Break

10:45 – 12:15 – Skills training: interview and advocacy techniques in practice *(facilitated by Cheryl Carpenter and Marla McCowan)*

12:15 – 1:15 – lunch on your own

1:15 – 2:15 – Preliminary examinations (*John Shea, MIDC Commissioner and Attorney at Law, Ann Arbor*)

2:15 – 2:30 – Break

2:30 – 3:30 – Defender Motion Practice: core motions and innovative practice, legal updates, critical arguments, and strategy *(Brian Legghio, Attorney at Law, Mt. Clemens)*

3:30 – 5:00 – Skills training: Motion practice and procedure for criminal defense attorneys *(facilitated by Cheryl Carpenter and Marla McCowan)*

Order

Michigan Supreme Court
Lansing, Michigan

June 1, 2016

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

ADM File No. 2015-27

Administrative Order No. 2016-2

Regulations Governing a System for Appointment of Counsel for Indigent Defendants in Criminal Cases and Minimum Standards for Indigent Criminal Defense Services

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Pursuant to the Michigan Indigent Defense Commission Act, 2013 PA 93, the Michigan Indigent Defense Commission submitted to this Court proposed standards that would regulate the manner in which counsel would be appointed to represent indigent defendants in criminal cases, and would further impose specific training, experience and continuing legal education requirements on attorneys who seek appointment as counsel in these types of cases. The Court published the proposed standards for comment, and after due consideration, conditionally approves the standards as set forth below.[1]

This approval is subject to and contingent on legislative revision of the MIDC Act to address provisions that the Court deems to be of uncertain constitutionality. These provisions include:

1. MCL 780.985 creates the MIDC as an "autonomous entity" and places it within "the judicial branch." Employees of the judicial branch are subject to this Court's exclusive constitutional authority to exercise general supervisory control. See Const 1963, art 6, §§ 1, 4, and 7; *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 298; 586 NW2d 635 (1998). We are concerned that placing the MIDC within the judicial branch, while denying the Court the ability to supervise and direct the commission's activities and employment, may contravene the general principle of separation of powers under the Michigan Constitution, Const 1963, art 3, § 2, and impinge upon the specific constitutional function of this Court to supervise the judicial branch.

2. MCL 780.983(f) defines "indigent criminal defense system," an entity subject to the authority of the MIDC, in a manner that includes trial courts, and combines trial courts with nonjudicial local governments. In addition,

[1] The conditional approval reflects the Court's ongoing authority to establish, implement, and impose professional standards. See Administrative Order No. 1981-7 (approving regulations and standards for the appellate indigent defense system); Administrative Order No. 2004-6 (altering the standards of AO No. 1981-7).

MCL 780.989(1)(a) allows the MIDC to "[d]evelop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state;" and MCL 780.989(1)(b) allows the MIDC "to assure compliance with the commission's minimum standards, rules, and procedures." We are concerned that these provisions might contain enforcement mechanisms that present an unconstitutional usurpation of this Court's authority under Const 1963, art 6, § 4, which provides that the Supreme Court "shall have general superintending control over all courts." They also raise general separation of powers concerns under Const 1963, art 3, § 2.

3. MCL 780.989(1)(f) and (2) and MCL 780.991(2) arguably allow the MIDC to regulate the legal profession. The Constitution exclusively assigns regulation of the legal profession to the judiciary. See Const 1963, art 6, § 5; *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000); *Attorney General v Michigan Public Serv Comm*, 243 Mich App 487, 517; 625 NW2d 16 (2000).

To promote the goal of providing effective assistance of counsel for indigent defendants in criminal cases without disruption, the Court urges legislative revision of the MIDC Act to address the constitutional concerns raised herein by this Court. If this Court determines before December 31, 2016, that legislative revisions of the MIDC Act have sufficiently addressed our concerns, the standards approved conditionally by this Court today will then take full effect. Otherwise, this Court's conditional approval of these standards will be automatically withdrawn on December 31, 2016. The Court will then determine what, if any, further action it may take to preserve its constitutional authority.

The conditionally approved standards and requirements, together with the commentary of the MIDC and the MIDC's description of the principles governing the creation of the standards, are as follows:

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to

counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

Standard 2

Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court is as follows:

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting. If confidential videoconference facilities

are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pre-trial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

8. Systems without adequate settings for confidential visits for either in-custody or out-of-custody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

Standard 3

Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel…" MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court is as follows:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4

Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) …counsel

continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

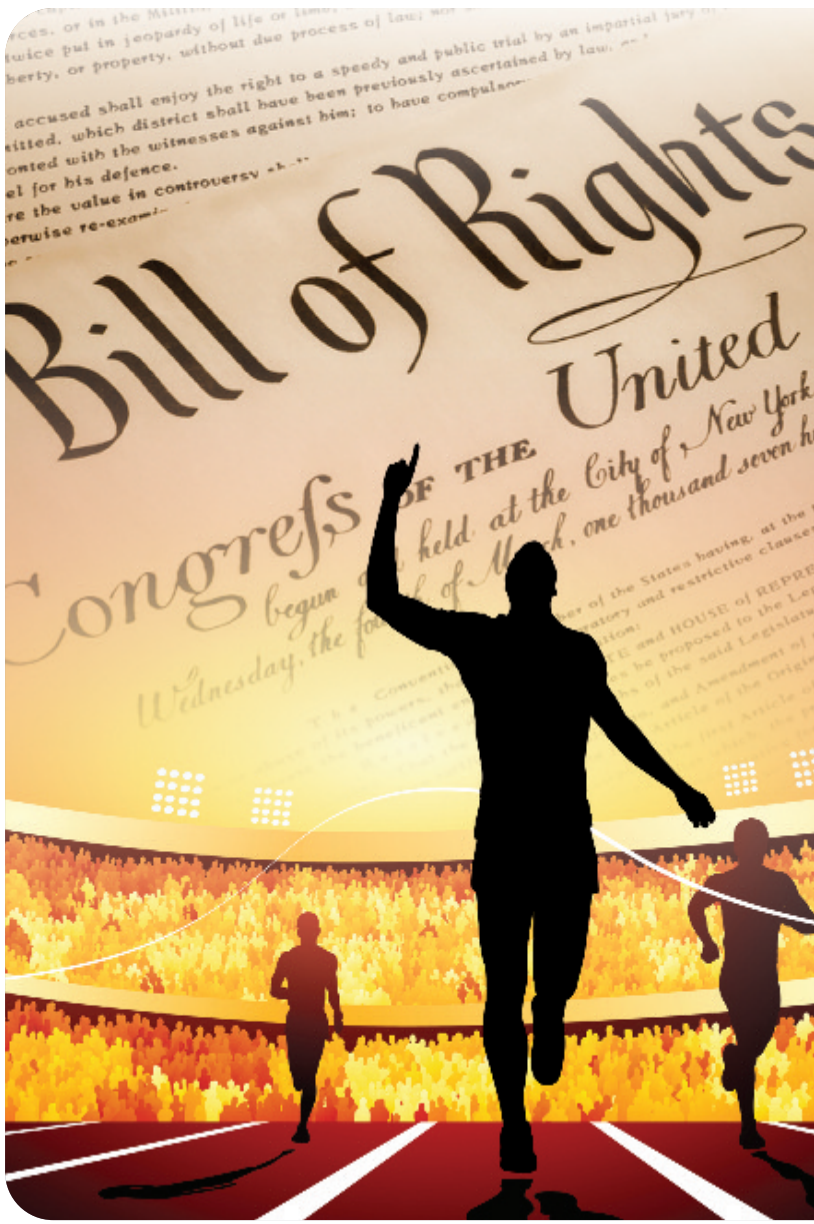
5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

Redefining Success as a Public Defender:

A Rallying Cry for Those Most Committed to *Gideon*'s Promise

By Jonathan Rapping



Young public defenders express the following sentiments almost daily:
"What's the point?"

"I cannot make a difference."

"I'll never be the public defender my clients need me to be!"

As the 50th anniversary of the decision in *Gideon v. Wainwright* approaches, the criminal justice system is not close to fulfilling its promise. Public defenders are on the front lines of a battle for the country's very sense of justice. They are the ones most acutely aware of the nation's failure in indigent defense. Yet every day they fight on, without the resources necessary to do the job well. Often they internalize the country's failures, blaming themselves for not achieving the most basic tenets of justice for the poor and disenfranchised. As they watch injustices proliferate, they often see themselves as failures. Public defenders are far from failures; they are just so focused on a long-term ideal that they have trouble seeing the many successes they have achieved.

The Dilemma of the Conscientious Public Defender

What does it mean to be successful as a public defender? Every public defender has good days and bad, and how we distinguish between them has everything to do with how we answer this question. Eighteen years after beginning my career as a public defender, I am still redefining my view of what it means to be successful as a public defender. Of course, the conscientious public defender is focused on achieving his or her client's desired objective. But this narrow way of thinking of success may drive the most conscientious public defenders from the profession when they fail to achieve this singular goal. Thus, the answer must involve more than merely winning an acquittal,

earning a dismissal, or negotiating a great plea.

I began my career at the Public Defender Service for the District of Columbia (PDS) as a lawyer with the simplistic notion of success just described, a notion which, to be honest, nearly kept me from surviving my first year. I was five months into my new career when I was assigned to represent a 15-year-old boy who was playing with a gun when it accidentally discharged, killing his best friend. I spoke with him in his cell; it was not much of a conversation. The young man appeared almost comatose, unable to communicate, and grief-stricken over the role he played in his best friend's death. It was apparent that there was no punishment the juvenile justice system could visit upon this child that was greater than the punishment he was wielding on himself. Far from being a threat to society, he was a young man deep in the throes of remorse and sorrow. Yet he was charged with murder.

As my co-counsel and I prepared for trial, we got to know this young man well. He was smart, compassionate, and so appreciative to have us fighting for him. He desperately wanted to finish high school and go on to college, something that would be unlikely if the court committed him to Oak Hill, a juvenile detention facility where kids were more likely to be guided towards crime than higher education. He made a mistake, a costly mistake. But he grew up in an environment where guns were prevalent and easily accessible. He and his friends were curious teenagers. He never meant to hurt anyone, and would almost certainly have nothing to do with guns again. None of that seemed to matter to the prosecutor who charged him, or to the judge who handed down the conviction. The judge sentenced the teenager to Oak Hill until his 21st birthday. That boy's dreams ended at that moment. As he was led through the courtroom's back door towards the cellblock, and I walked through the front door, I felt defeated. I walked to my office, closed the door, turned out the lights, and cried. Intellectually, I knew I had done all I could for this young man, but viscerally I felt like I failed. I could not prevent what was clear to me to be a great injustice. I questioned my career choice: "This work is too hard," I told myself. "It is too hard watching terrible things happen to people you come to care about deeply." I knew this was part of the job, and I knew I could not change it. I decided to quit.

Fortunately I worked in a public defender office where I was surrounded by a community of committed, inspiring lawyers. They supported me. They helped me understand that the result would have been the same if this young man had any other lawyer, and that this young man benefitted from having a lawyer who cared, treated him as a person, and fought for him. They helped me understand that we cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

I survived the setback and continued as a public defender, but I still never dealt with "losing" very well. At that stage of my career, I equated losing with guilty verdicts. I still labeled this experience a failure. I was young. I had much to learn.

We cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

The Epiphany

I learned the true importance of that lesson six years later when I was assigned to represent a man accused of committing a series of sexual assaults. I was provided a police report and asked to go to the jail to meet my new client. As I read the report, I learned this man was accused of picking up women and brutally raping them. The violence involved was horrific, leaving the women horribly injured, both physically and psychologically. The evidence was overwhelming. DNA, hair, and clothing fibers linked the client, the crimes, and the victims (strangers to the client) to the van that he allegedly used to pick them up. The women all identified him as the perpetrator. Although he never admitted to committing the crimes, he made a statement that placed him at the relevant scenes at the relevant times.

At this stage in my career I had represented many people accused of serious felonies, including rape and murder. I had yet to meet a client I did not deeply connect with on a human level. A quote adorning my office wall, by Sister Helen Prejean, served as a constant reminder of the humanity of every person we represent: *"The dignity of the human person means that every human being is worth more than the worst thing they've ever done."* However, as I read about the horrific nature of the assaults on perfect strangers who could have been my mother, my sister, or my wife, I wondered who could do these things. As I considered the strength of the evidence pointing to the man I was about to meet, I wondered if this would be the first client I could not connect with on a human level. When I arrived at the jail, my expectations were proven wrong.

Upon walking into the visiting room, I met a man in his early 40s. He was soft-spoken and polite. He asked how I was; he asked about his family; and he expressed concern for the women who were his accusers. He showed concern for everyone but himself. My newest client was not what I expected. I was no longer convinced by the evidence as laid out in the police report. But if he committed these crimes, he proved the message that hung on my office wall. People are complex and we cannot define them based on their worst moments.

I soon met his family: a very concerned mother, three doting sisters, a loving and supportive wife, and two little children who loved their daddy very much.

Through each of them, I came to understand my client better. As our trial date approached, we became closer. He never seemed worried about his own fate, but was very concerned about how this ordeal would impact his family. The trial lasted a couple of weeks and, as expected, the evidence was quite damning. However, the jury deliberated for several days, giving the defense team increasing hope. Then the jury reached a decision.

As we stood in the courtroom, awaiting the verdict, I was hopeful. The foreperson was asked to share the jury's findings. The foreperson did – *guilty* on all counts. The judge sentenced this man to a term of imprisonment that would guarantee he died in prison. As my client was led through the back doors and I walked through the front, I had that same feeling that I remembered from six years earlier. "This work is just too hard. It is too hard watching terrible things happen to people you come to care for." That evening I collected myself and went to see my client at the jail.

As I entered the visiting room to meet him, I looked at him and said, "I am so sorry."

He interrupted me. "Mr. Rapping, thank you."

"Thank you?" I replied. "Maybe you don't understand what happened today, but things didn't go so well."

He smiled. "No, you don't understand," he told me. He continued:

> All my life I've been in the system. I went to D.C. public schools and never had a teacher who cared about me. I was in the juvenile system and never had a lawyer care about me. I've had adult charges before and no lawyer ever fought for me. But you, your co-counsel, your investigator, and your law clerks, you all cared about me. You fought for me. You gave me the kind of representation the Constitution says I deserve. And for that, I thank you. But even more importantly, my family sat through the trial. My mother, sisters, wife, and children heard what they said I did and are convinced that the jury got it wrong. I could easily spend the rest of my life in prison as long as my family does not believe I had anything to do with these awful crimes. For that, I thank you.

I went home that night and had an epiphany. For the first time in six years I had an understanding of what it meant to be successful as a public defender with which I was comfortable. It was not simply "not guilty" verdicts, dismissals, and great plea offers. It meant being able to look in the mirror each night and know on that day I had given each and every client the representation she or he deserved.

I had spent six years in an organization surrounded by public defenders who could do this work every day. Not only were these lawyers talented and committed, but they had reasonable caseloads and the resources necessary to represent every client well. We earned a fraction of what our law school classmates were earning in the private sector. We worked long hours and dealt with the emotional stress that comes along with being a lawyer for poor people accused of crimes. But at the end of any case we could always say we did everything we could for each client. My career to date had been filled with "good days" – as measured by this more nuanced understanding of my role. I continued to hold this as the standard for public defender success for the next three years.

I became the training director for PDS and continued my career surrounded by lawyers who worked long hours, suffered emotional fatigue, watched terrible things happen to people they cared about, but still could find that each day was a "good day." Poor people in the District of Columbia could not get better representation than they received through PDS.

Then I moved to the South. Over the next few years I would be intimately involved in efforts to reform indigent defense, in Georgia following legislation to develop a statewide public defender system there, and in New Orleans helping to rebuild the public defender offices in the wake of Hurricane Katrina. During this time I worked with public defenders and represented indigent clients in states across the southeast. Unlike my experience in Washington, D.C., these systems did not hold high expectations for their public defenders. Far too often, the expectation was merely that these defenders would process huge caseloads efficiently. There was little respect for thorough investigation, case-specific motions practice, client loyalty, or the need to develop relationships with the people we represented. For the public defender who wanted to do these things, crushing caseloads and too few resources made it impossible. I came to understand that the most basic constitutional and ethical obligations were seen as inconveniences in systems that prioritized processing a high volume of cases over all else. The pressure on public defenders to conform to this practice was intense. In this world it simply was not possible for a public defender to provide every client the representation to which she or he was entitled.

Idealism Shattered

In 2004 I agreed to serve as the first training director for Georgia's new statewide public defender system, and have spent the last eight years working with public defender offices across the Southeast. It is a region with a shameful history regarding indigent defense. For many years there were well over a hundred legal lynchings annually in the South.[1] Once accused of a crime, the sentence was pronounced, without the slightest pretense of due process. While a national outcry put an end to much of this blatantly illegal practice, to keep the lynch mobs at bay the system replaced lynchings with "speedy trials that reliably produced guilty verdicts, death sentences, and rapid executions."[2]

Common were cases like the infamous Scottsboro Boys in which nine illiterate black youths, accused of rape, escaped an Alabama lynch mob only to be rushed to trial 12 days later with a lawyer appointed the morning of trial.[3] The defense conducted no investigation, called no defense witnesses and made no closing arguments. The prosecution sought death sentences against eight of the boys. Eight death sentences were handed down.

The same year the Scottsboro Boys were tried in Alabama, John Downer was accused of rape in Elberton, Ga.[4] One week after being arrested, Downer was tried. Like the Scottsboro Boys, counsel for Downer was appointed the day of trial. No continuance was requested so that the lawyers could conduct an investigation or interview their client. Trial began around 11:00 a.m. and concluded that afternoon. The jury deliberated a mere six minutes before returning a guilty verdict. Downer was sentenced to die.

The year was 1931 and defense attorneys were used as mere window dressing to further the appearance of legitimacy, allowing the public to rest easy that justice had been served. The Supreme Court attempted to end this charade when it decided *Gideon v. Wainwright* in 1963,[5] but 21 years later,

in *Strickland v. Washington*,[6] the Court set such a low bar for what constitutes effective assistance of counsel that for many indigent defendants not much has changed. Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Consider the 14-year-old boy arrested in Union County, Miss., for allegedly taking $100 from an elderly woman. Despite his protestations of innocence, his lawyer never investigated his claims or even consulted with his client. Presumably concluding that the boy was guilty, and that he would lose at trial, the court-appointed lawyer advised him to plead guilty and told him that he was "looking at life" if he lost at trial. The lawyer assured the boy he would be eligible for parole in six years. The boy had spent months in jail with no meaningful access to counsel. Feeling he had no other option, he pled guilty. To add insult to injury, his lawyer's advice was wrong. Now 15, the boy was sentenced to 25 years and would not be eligible for parole until he served at least 10.[7]

Consider the countless clients of a defense attorney who held the contract to represent indigent defendants in Green County, Ga., for 14 years.[8] Although his position was only part time, and he continued to maintain a private practice, the attorney's annual appointed caseload was twice the recommended national standard. He began his public defender career as a young lawyer and quickly adapted to the expected standards of practice that prevailed in Georgia. The judges demanded that he process his cases quickly, and he obliged. In one four-year period he handled 1,493 cases, with 1,479 (more than 99 percent) resulting in pleas. Some days he would plead dozens of clients in a single court session, and he had little time to get the details necessary to negotiate on their behalf. He did not request investigative or expert services "claim[ing] not to need these resources, anyway, because most of his cases were 'pretty open and shut.'"[9] In addition he did not want to arouse public disapproval about spending the county's money. When clients complained about the limited time counsel spent talking to them, he chalked it up to "their [bottomless] need for attention," adding, "You have to draw the line somewhere."[10] He considered his high-volume, plea-bargain practice "a uniquely productive way to do business," and believed that he "achieved good results" for his clients.[11]

As shocking as these stories are, they are not isolated. They represent an embarrassingly low expectation of representation for poor people in much of the country. The lawyers who engage in this substandard practice are shaped by the systems in which they work. The judges who preside over these cases provide their tacit approval of the system. They are judges like Atlanta's Andrew Mickle who, when Georgia refused to fund its young public defender system a couple years after its birth, recommended a return to the days when indigent defense was localized and "starving" lawyers would handle a case for 50 dollars regardless of the time invested.[12] Although this policy would guarantee that no lawyer could afford to adequately represent a client, Mickle's concern was with processing people, not with justice.

Judges are often instrumental in creating this system of inadequate representation for the poor. Johnny Caldwell, for example, presided over the case of Jamie Weis in Pike County, Ga., who was charged with capital murder and appointed counsel experienced in death penalty litigation.[13] When the state did not have the funding to pay Weis' counsel for the preparation necessary to defend him, Caldwell removed his lawyers, over their objection, and appointed two local public defenders. The public defenders resisted, citing crushing caseloads that would make it impossible for them to adequately defend Weis. One had well over 200 cases already and the other more than 100 cases along with significant administrative responsibility. They further pointed out that the removed lawyers had represented Weis for over a year and they could not now recreate the attorney-client relationship. If Judge Caldwell were truly concerned with the right to counsel, these arguments would have been persuasive. He was not.

Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Judges like Caldwell were common in New Orleans when I joined the management team charged with rebuilding the public defender office there after Hurricane Katrina. The scene I observed on my first courtroom visit was typical of what I observed throughout my stay there. It was chaotic. Lawyers wandered about the well of the court chatting with one another. The judge was on the bench and the prisoners were lined up in a row on the left side of the courtroom, wearing orange jumpsuits. The lawyers had no contact with the defendants and it was not clear that any of the lawyers had ever met any of the defendants.

When a case was called, one of the lawyers would speak for the accused. However, none of the men in jumpsuits would be brought to his spokesman's side and the lawyer often barely acknowledged his client. Then, the judge called a case with no lawyer. When it was clear that there was no representative for this particular man, the judge turned to the row of defendants and asked the man to stand. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," answered the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case, completely unfazed by the answer.

In another instance in New Orleans, I was waiting to observe evening First Appearance Hearings when the magistrate took the bench at 6:35 p.m. There were approximately 40 arrestees whose cases needed to be heard that evening. A private attorney represented one of the defendants. The others were left to a team of two public defenders. As a professional courtesy, the judge called the private attorney's case first. After about 10 minutes of discussion, the judge granted the requested bond. Then, at 6:45, the judge turned to the public defenders in the courtroom and said, "You better talk fast because we are going to finish the rest of these by seven o'clock."

As I repeatedly witnessed judges showing such little concern for the rights of the people who rely on publicly funded lawyers, I often thought back to the first training I conducted when I moved to the South. One session focused on litigating basic

suppression motions: challenging searches and seizures, confessions, and identification on Fourth, Fifth, and Sixth Amendment grounds. The subject matter was foundational to the work of any criminal defense lawyer and there were many new public defenders present. I wanted to make sure all understood how to effectively litigate these issues. The first person to approach me after this session was a Circuit Public Defender, one of the nearly four dozen lawyers appointed to lead this new reform effort. He told me that he really enjoyed the session. He explained, however, that his lawyers could not do the things we were teaching. Confused, I assured him that they could do these things, and that the session was based entirely on federal and state principles that applied in his circuit. He then explained to me how things worked where he practices. The judges become very upset if the lawyers file motions, he explained. Because it slows down the docket, they would not allow his lawyers to litigate these issues. At the time I was dumbfounded. Over the next two years I trained and mentored young lawyers who would return from training sessions eager to demand hearings and litigate issues, only to encounter irate judges of the kind described. It was a daunting, but educational, experience for someone used to much different procedures in a well-functioning system.

It is a grueling task to spend every day pushing back against a system that harbors such low expectations for the quality of representation. It is not surprising that some lawyers enter this system full of idealism but ultimately resign themselves to the status quo. Others simply find it too difficult and leave before the pressure to conform overwhelms them. This is what happened to Marie, a young lawyer who came to Georgia in 2005 to be involved in the new reform effort.

Marie was a fiery lawyer who was part of a cohort of public defenders who was going to help transform indigent defense in Georgia. But Marie ultimately became discouraged as countless numbers of her clients fell through the cracks. In her final 13 months as a Georgia public defender, she resolved 900 cases, allowing her three hours per year to devote to each client if she worked 50-hour weeks without taking any vacation time or sick leave.[14] Given that these three hours included court time and client meetings, there was no time for her to be competent in every case. She struggled on as best she could under these conditions, until she found herself at a crossroads. Should she stay in Georgia, she saw herself becoming a desensitized lawyer resigned to processing poor people through an inhumane system. She left to become a public defender in a well-resourced system.

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My mother is an author who frequently writes about criminal justice. Marie's story reminds me of a dedication in one of my mother's books to "all the public defenders … who toil in the trenches every day, against the greatest odds, and with little financial or social reward, in the Sisyphean effort to make our government live up to the democratic rhetoric of its own Constitution."[15] Her reference to Sisyphus, the Greek mythological king condemned to endlessly push a boulder up a hill only to watch it roll back down, symbolizes the seemingly impossible task of advancing the cause of justice in the indigent defense arena. Many throw their hands up, accepting the current state of injustice. Others leave the important mission of trying to reform indigent defense in the most dysfunctional systems. But for those who remain energized and idealistic, they do move the cause of justice forward each day. This was a lesson I learned working in the South, which caused me to rethink my idea of success as a public defender. To explain what I mean, let me tell you about Janelle.

Like Marie, Janelle moved to Georgia to join the new statewide system in 2005. Despite her business suits and briefcase, as one of two African-Americans practicing in her county, it took some time before courthouse personnel stopped asking her where her lawyer was when she entered the courtroom. Undeterred, she threw herself into her new career, and quickly won over those with, and before whom, she practiced. Over time, she brought change to the courthouse. In one example, Janelle prepared a seemingly obvious release argument for her client that she had not heard made by any of the more experienced practitioners. One experienced lawyer advised her that the argument would be a waste of everyone's time. Unmoved, Janelle made her pitch to the judge against a chorus of snickers from some of the more experienced members of the bar. But the judge agreed with Janelle and released her client. Some of the lawyers who snickered subsequently adopted Janelle's argument. Janelle had acted on her duty to her client, not the corrupt ways of the existing system, and thus achieved the best outcome for the client. In the process she began to gradually change the practice in the courthouse. Even had the judge rejected her arguments, however, having the courage to challenge that system, in my newly evolving way of thinking, would have been success.

Today's Civil Rights Struggle

Given my experiences working in the South, I have come to understand something about the public defenders working in corrupt systems. That they fail to provide every client the representation they deserve does not necessarily mean they are worse lawyers than

those I practiced with at PDS. Rather, it indicates that even excellent lawyers, working in systems such as those I experienced in Georgia and Louisiana, have an impossible task. Over time, some do lose the will to continue to fight against the system. They come to accept the status quo and participate in injustice. But others, and they are heroic, never lose sight of our systems' ideals and their obligation to try to make them a reality for every client. They fight mightily every day to close the gap between those ideals and the reality of the American criminal justice system.

While there are some model public defender systems like PDS across the country, they are the exception. Most public defenders appear before judges who expect them to help process cases rather than fight for their clients. Most carry overwhelming caseloads and lack the resources necessary to do everything required of them. The most heroic public defenders find a way to maintain their ideals in the most broken systems, fighting every day to try to realize a modicum of justice for clients who otherwise would not have a chance. These lawyers are exceptional. But most are not able to maintain their values against the odds they fight each day. If we are ever to reform indigent defense in this country, we must find a way to steer the best public defenders to the systems that need them the most and provide them with training and support to help them maintain their idealism while raising the standard of representation where they work.

These experiences, and the need to train and nurture more public defenders committed to true justice, led me to create the Southern Public Defender Training Center (SPDTC). The driving goal of SPDTC is to groom a generation of public defenders in the South who will help raise the standard of representation across the region. We provide the training they need to have a strong sense of what their clients deserve. We provide mentorship and support to help reinforce these lessons when systemic pressures send the opposite message. Perhaps most importantly, we give these lawyers a community of like-minded colleagues to continually support and encourage them as they carry on the "Sisyphean effort" of rolling that seemingly immovable boulder of justice forward.

These ideas stemmed from my years at PDS. When I was a young public defender there, a group of my peers and I would meet regularly to remind ourselves of the reasons we chose this line of work. These gatherings connected us to one another, helping to build a much-needed support network, and kept us inspired as we shared and nurtured each other's idealism. It was this community to which we would turn to reassure us of the rightness of our mission when outsiders exhibited so little respect for our work and our clients.

In one such gathering a close friend, whose parents were active in the civil rights movement, told us that he chose to be a public defender because he always wanted to be a civil rights lawyer. In his mind, public defense was our generation's civil rights struggle. At the time I did not appreciate the importance and truth of this sentiment. I associated civil rights with efforts to desegregate the Woolworth's lunch counter in Greensboro, N.C., in 1960 or to register Black people to vote in Mississippi during Freedom Summer in 1964. I knew the work we were doing was important, but I did not see it as civil rights law. Now, after my experience in the South, the connection is clear and the realization that indigent defense is this generation's civil rights struggle has helped me to refine my view of what it means to be a successful public defender.

> Defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. This is a noble and heroic task.

The lawyers I work with today, given caseloads and inadequate resources, cannot live up to the standard of success held at PDS. Despite their incredible sacrifices, they cannot make *Gideon*'s promise a reality overnight. Law students frequently ask me whether they should go to a well-resourced office that can give their clients all they deserve or join the growing community of lawyers in the South who frequently fall short. Whenever I am asked this question, I am reminded of my friend's point about the civil rights movement and a segment of a documentary I watched in which a rabbi discussed her experience with Freedom Summer.[16] She describes being with a group of summer volunteers on a college campus in Ohio training for the summer's work. The day before they were to board the bus for Mississippi, news of the disappearance of three civil rights workers made its way North. The workers were out investigating a church bombing when they failed to return. They were feared dead (fears that were confirmed later that summer). One of the civil rights workers training the volunteers told the group the frightening news. The worker explained that protection of the volunteers could not be guaranteed, and that if any of them had second thoughts about boarding the bus the next day, the trainers would understand. The future rabbi then describes a phone call to her mother later that evening. After explaining the situation, her mother urged her not to get on the bus. The young woman reminded her mother of their family members who perished in the Holocaust. She questioned whether, if more Germans had "gotten on the bus," some of her family might have survived. Given that history, she asked, how could she not go to Mississippi?

I think of that documentary when students ask whether they should forgo an opportunity to join one of the model public defender offices in the country to work in the South. In the 1960s there was important work to be done all across the country, but the front line of the civil rights movement was in places like Mississippi, Alabama, and Georgia. Ultimately, that movement was successful because of the civil rights workers in those states. Likewise, there is important work to be done in public defender offices across the country. And the lawyers working in the best public defender offices help provide a model for what all poor people accused of crimes deserve. But if we are to ever realize meaningful indigent defense reform on a national level, we will have to win the battle to bring justice to places like Mississippi, Alabama, and Georgia. I explain to these students that we need good public defenders here. Then comes the inevitable follow-up: "Can I make a difference under such challenging circumstances?" Again, I am reminded of my friend's civil rights analogy.

Changing the World Without Realizing It

Last year I read a book called *Freedom Summer* about the Summer Project in Mississippi in 1964.[17] The author chronicled that summer through the stories of the young people who spent the summer in Mississippi. Some were civil rights workers from the South. Others were college students from across the country. They signed up to change the world. They planned to register voters and educate children and adults in Freedom Schools in Black communities across the state. The task proved more difficult than they imagined. They witnessed beatings and fire bombings. Many people were too afraid to be seen speaking to them. One after another, the workers wondered if they were making any difference at all. They wondered if the Summer Project was a waste of time. The author then flashes forward to 2008. John Lewis, one of the leaders of the Summer Project and later a member of Congress, explained that had it not been for Freedom Summer, Barack Obama would not have been elected president of the United States. While in the middle of the firestorm, these young activists did not realize they were changing the world.

As I read that book, I thought of the countless calls from public defenders in Tennessee, Louisiana, Mississippi, South Carolina, and Alabama. How frequently these heroic lawyers expressed frustration that they could not provide the representation they know their clients deserve. I recalled the desperate email from a Georgia public defender, who several years later continues to raise the standard of representation in his rural county, worrying that he was losing his idealism and that he was "becoming part of the machine." These lawyers do not have the time they need to meet with all of their clients as frequently as they should. They lack the investigative resources to pursue important leads. With caseloads that can be two to three times the recommended maximum, they often have to prioritize the cases that will get the attention they deserve, leaving other clients neglected.

Like those heroes of Freedom Summer, these lawyers do not see the difference they make every day. The next generation will know a very different criminal justice system thanks to the work they do. They are changing the world.

The Epiphany Revisited: A Good Day as a Public Defender

I ultimately tell prospective public defenders that they can make a difference in places with the greatest need for reform. But they will only survive if they refine their view of success. In a handful of public defender offices, the standard I came to understand six years into my career defines a good day as a public defender. For the vast majority of public defenders, it is not possible to realize this ideal. They simply cannot give all clients the representation to which they are entitled by the Constitution. They have caseloads that are too overwhelming, insufficient resources with which to do their jobs, and they work in environments that pressure them to process cases efficiently. But that does not mean they are not successful. Every day that they do everything they can to close the gap between what clients deserve and what the system tolerates, they are successful. At times, theirs may be the only voice reminding the system of our most sacred ideals. That is when the voice is most valuable.

The last chapter of my journey as a public defender has proven transformational. It has caused me to once again redefine how I think about good and bad days for a public defender in those jurisdictions where *Gideon*'s promise remains an aspiration. It has helped me to understand that to sustain oneself in these environments, defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. Again, this is a noble and heroic task.

Bad days will always exist. They are the ones when the defender becomes discouraged and decides to leave, or becomes complacent and begins to conform. Good days are those in which the defender can continue to raise the standard of representation, however incrementally, without losing sight of the representation clients deserve.

As more committed public defenders choose to work in places where *Gideon*'s promise remains unfulfilled and are able to embrace this standard of success, we will move towards a day when the gap between reality and our ideals is closed. Perhaps our children will see that day. When they do, they should be reminded that it was committed lawyers working to represent one client at a time, incapable of understanding the global difference they were making as they struggled, that made this day a reality.

Notes

1. Michael J. Klarman, *Powell v. Alabama*: The Supreme Court Confronts 'Legal Lynchings,' Criminal Procedure Stories 1 (Carol S. Steiker ed., 2006).
2. *Id.*
3. *Powell v. Alabama*, 287 U.S. 45 (1932).
4. This account of John Downer's case is taken from Anne Emanuel, Elbert Parr Tuttle: Chief Justice of the Civil Rights Revolution 1-7 (2011).
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
6. *Strickland v. Washington*, 466 U.S. 668 (1984).
7. NAACP Legal Defense and Educational Fund, Inc., Assembly Line Justice, Mississippi's Indigent Defense Crisis 13 (Feb. 2003).
8. This account is taken from Amy Bach, Ordinary Injustice: How America Holds Court 12-17 (2009).
9. *Id.* at 15.
10. *Id.* at 17.
11. *Id.* at 13.
12. Andrew A. Mickle, *Is the Process Choking the PD System?*, Daily Report, Atlanta, Ga., April 11, 2008.
13. For a summary of the facts, see Appellant's Brief at http://www.schr.org/files/post/WEIS_BREIF_GaSCt_9-2-09_0.pdf.
14. *See* Marie Pierre-Py, *Public Defender System Fails Georgians and Their Lawyers*, Atlanta J.-Const., Mar. 30, 2009.
15. Elayne Rapping, Law and Justice As Seen on TV (2003).
16. The Jewish Americans, PBS Home Video (2008).
17. Bruce Watson, Freedom Summer (2010).

About the Author

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CHAPTER 2
Doing Right By Your Client While Doing Right: Ethics and Client-Centered Representation

As lawyers committed to representing poor people accused of crimes we must constantly strive to simultaneously live up to two important ideals: to be a client-centered lawyer and to be an ethical lawyer. The Rules of Professional Conduct (the Rules) set boundaries, outside of which we may not venture without violating our responsibility to our profession. However, within those boundaries we are often given wide latitude and much discretion. The duty of loyalty that we owe to our clients, people who did not choose us as their representatives and who have nowhere else to turn, dictates that we must strive to resolve all ethical dilemmas in a manner that falls within the range of permissible responses, while at the same time is calculated to maximize the likelihood of achieving the objectives of the representation as explicitly articulated by the client.

> *[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.*
> -- *Henry Lord Brougham*

I. 7 Principles of Ethical Lawyering

Jack Martin, an outstanding Georgia lawyer who has devoted much of his career to defending indigent defendants charged with the most heinous crimes, articulates seven principles of ethical lawyering. These principles serve as an excellent foundation from which to begin our discussion of ethics and indigent defense[19].

1. You don't have to do this work if you don't want to

This first principle serves as an obvious, yet important, reminder that we chose to do this work and, to therefore, shoulder the special responsibilities that come along with it. We do this work, in part, because we understand that a person's income should not determine the quality of justice s/he receives in our criminal justice system. The indigent defendant does not get to choose his or her attorney. The lawyer is appointed to represent the client without the client having any say in the matter. At a minimum, each client should expect that his or her lawyer will work as hard, and be as loyal, as if the client paid handsomely for the lawyer's services. As was discussed in the chapter on *The Special Role of the Public Defender*, this job is not for everyone. There is no shame in opting for another career path. However, if a lawyer chooses to represent poor people accused of crimes, s/he must always strive to provide the kind of representation s/he would want for his or her own loved ones.

[19] While the seven principles come from Jack Martin, the discussion of these principles represents the views of this author.

2. **If you do take on a client's case, you are ethically obligated to employ every legal means to maximize the outcome for your client**

It is not for the lawyer to decide how much justice a client deserves. Every client should receive as much justice as is available under the law. It is the lawyer's duty to ensure that happens. Therefore, unless the law or the Rules of Professional Conduct prohibit it, the lawyer should take any course of action that will advance the client's cause. At times the Rules are permissive; they tell us that a lawyer "may" undertake a course of action. Other times the Rules are mandatory; instructing that the lawyer "shall" undertake a course of action. While the lawyer must always do what the Rules, and the law, require, when there is discretion the criminal defense attorney should always choose the course most likely achieve the client's desired outcome. When the lawyer identifies an outcome or strategy that will benefit the client, it is incumbent upon the lawyer to look for legal avenues to achieve that end.

3. **It is your client's case, not yours, so it is unethical to preempt your client's moral judgments**

There will be times when the lawyer's moral compass will not be perfectly calibrated with the client's. It is not the lawyer's job to impose his or her moral code upon the client. As long as accomplishing the client's desire does not require the lawyer to violate the law, or the ethical rules, the lawyer should defer to the client. The case will be but one of many for the lawyer. For the client, it represents his or her life. The client should have the ultimate say since it is s/he who will have to live with the outcome. Of course, the lawyer serves as a counselor and advisor. It is the lawyer's duty to discuss the pros and cons of any strategy, and to advise the client about how various decisions will impact the case. However, there will be times when, after all counseling and advising is done, the client will not agree with the lawyer's advice. At these times, the lawyer must respect the client's wishes.

4. **The client, in making his or her decisions, has the right to know the law, *and the evidence*[20]**

This principle reminds me of a training session I facilitated for a group of young law firm associates who were preparing to handle some pro bono misdemeanor cases. The topic was client interviewing and relationship building. I posited that before asking the client for his or her version of events, you should begin by letting the client know the evidence the state has and the possible defenses to the charges. I opined that to ask the client to jump into his or her version of events before knowing anything about the case, the law, or the lawyer, would invite a distrustful client to give a version that s/he assumed would be favorable. This might lead to the client feeling wed to a narrative that is neither truthful nor helpful.

One of the lawyers in the audience suggested that to provide the client with this information without first ferreting out what s/he claims happened is tantamount to coaching the client. The lawyer argued that the client would then tailor his or her account based on the knowledge the lawyer provided. Suddenly, a young lawyer from the firm interrupted, implying that the other lawyer was employing a double standard. The younger lawyer reminded the audience that the firm represents white collar defendants and that these wealthy clients routinely walk into a firm

[20] Jack Martin's 4th principle only addresses the client's right to know the law but it is equally true that the client has the right to know all of the information about the case that the lawyer knows whether from informal discussions with the prosecutor, discovery, investigation, or another source.

lawyer's office demanding to know the charges against them, the evidence against them, and the possible defenses. The white collar client wants this information before he says a word. The younger lawyer suggested that not a lawyer in the room would refuse to provide the requested information until the client first committed to a story. The younger lawyer went further and said that if any firm lawyer did so, the client would simply go elsewhere and the lawyer would be appropriately chastised for his handling of the matter. The young lawyer concluded by asking, "Why should our more criminally sophisticated clients receive a better quality of representation than the less fortunate clientele we are volunteering to represent?"

This anecdote helps to illuminate the fact that many of us, whether consciously or sub-consciously, have a different standard for the indigent client. Some of us are more willing to assume that the poor client is going to concoct a lie if given the information with which to do so. Others are of the view that a client who is sophisticated enough to ask for the information that would allow him to craft a creative defense is entitled to it but that there is something wrong with the lawyer educating the ignorant client so that he can make the same decisions. However, it is our job to educate the client about the law and the facts that will impact the case. It is not our job to decide which clients are able to responsibly handle having certain information. Ultimately, the case is the client's and we work for him or her.

The American Bar Association Model Rule of Professional Conduct 1.4[21], governing the lawyer's duty of communication, supports this view. In requiring that the lawyer "promptly comply with reasonable requests for information," it is clear that if the client were savvy enough to ask for the information, the lawyer would have to provide it. Part of our responsibility in representing poor clients, who are often less educated , is to ensure they are equipped with the information and knowledge that a more sophisticated client may have so that justice is not determined by one's ability to maneuver in the criminal justice arena. Comment [7] to Rule 1.4 mandates that, while there may be extraordinary circumstances where sharing information with a client might not happen immediately, a lawyer may never "withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person." If a lawyer assumes the worst in the client, s/he are not giving the client the representation s/he deserves. If the lawyer believes that s/he needs to withhold information from the client in order to protect the client from his own shortcomings, the lawyer would do well to remember Principle #1: You don't have to do this work if you don't want to.

5. Never lie to or mislead a client, especially as to the confidentiality of communications

It is never okay to lie to, or to mislead a client. Imagine if you hired a lawyer, only to find out that s/he had been withholding information from you or lying to you about what s/he knows. You would likely fire that lawyer. Indigent defendants deserve no less than we expect from our agents and representatives. The lawyer must always be honest with his or her clients, even when the lawyer fears that doing so may upset the client or cause disharmony within the defense team. Successful representation requires that the client be able to trust his or her lawyer. The client must understand that the lawyer works for the client and has the client's

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[21] When we refer to the Rules of Professional Conduct, and related commentary, throughout this article, we will be referring to the American Bar Association Model Rules of Professional Conduct and the comments to those Rules. While the Model Rules are not binding on any state, they serve as the model of the codes of professional conduct adopted by almost every state.

interests at heart. Only then will the client have the confidence in the lawyer necessary for a successful attorney-client relationship.

One way in which lawyers violate this principle is by withholding information, or lying about what they know, because they fear that disclosure will cause the client to make a choice with which the lawyer does not agree. Perhaps the lawyer has been advocating one defense theory over another and it has taken a while to get the client to agree with the lawyer's view. Suppose the lawyer later learns some information that the lawyer believes a jury will give little weight but that s/he fears will cause the client to gravitate back to the less desirable theory. There may be a temptation to not fully disclose the information. But this information belongs to the client, as it was learned during the course of the representation. Not sharing this information with the client, or lying about what we learned, is not an option. Lawyers must operate with full and honest disclosure, serving as counselor and advisor to help the client make the best decisions to achieve his or her goals.

A second way that lawyers frequently mislead clients is by disclosing confidential information. This is frequently done without the lawyer realizing s/he is violating a duty to the client because lawyers often do not appreciate the breadth of the obligation. Other times lawyers disclose confidential information because they believe it will help the client's cause. This is always permissible with the client's express permission, after consultation. But a lawyer may never preempt the client's decision about whether to reveal confidential information.

Confidentiality, as defined by Rule 1.6, is much broader than privileged information learned directly from the client. As the Comment makes clear, "the confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[22] Therefore, the Rules protect all information, whether learned through the client, investigation, discovery, or even public records, as long as that information relates to the representation.

When a lawyer undertakes the representation of a client, s/he makes a promise not to disclose any confidential information without the client's "informed consent."[23] S/he must never break that promise to the client.

6. Preserving client confidences preserves the truth finding process

Those who do not understand the defense function in our criminal justice system are sometimes critical of the defense lawyer's obligation to protect confidential information. These critics argue that this Rule keeps the truth from surfacing. They suggest that once a lawyer knows information that will shed light on important details, it thwarts the ends of justice to keep those facts confidential. This conclusion is the product of flawed thinking. In fact, preserving client confidences promotes the truth seeking process.

During the course of defending a criminal case, the defense attorney learns a lot of information that is not in the possession of the prosecution. Much of this information may come from direct conversations with the client. This is information that can only be learned if the client chooses to reveal it. Other important facts are gathered through the investigative process. Much of these investigative fruits ultimately trace back to leads acquired through communications with the client. Without the client's involvement, there are often important details that would never be

[22] Rule 1.6, Comment [3]
[23] Rule 1.6(a).

discovered. Frequently, it is the defense that is introducing evidence at trial that would otherwise remain hidden.

The Rule protecting client confidences is the reason the defense lawyer is able to learn anything from the client. Clients would frequently be unwilling to provide information and leads if they believed that they would have no say in whether the fruits would be provided to the prosecution. It is the confidence in knowing that the defense team will decide whether and how to reveal details learned during the course of its investigation that promotes candid communications between the client and the lawyer. While the defense attorney is not at liberty to disclose everything s/he learns while preparing the case, much of what the defense does disclose would never be learned otherwise.

Every time a defense lawyer violates the confidentiality rules, the client becomes more distrustful of the lawyer and is less willing to share information. The lawyer, in turn, is rendered a less effective vehicle through which important information about the case can be unearthed. By remaining faithful to the confidentiality rules the lawyer maximizes his or her ability to learn about the case, thereby increasing the likelihood that the defense will be a vehicle through which otherwise unknown information is learned.

Furthermore, comment [2] of the ABA Model Rules suggests that the confidentiality rules encourage individuals to seek legal advice and to openly reveal "legally damaging subject matter." This, in turn, allows lawyers to give appropriate legal advice. The commentators conclude that the facilitation of this relationship helps to uphold the law, as individuals will more often err on the side of violating the law if forced to make decisions without the counsel of an attorney.

7. To practice defense law defensively is unethical, because by definition you are then conflicted counsel

The Henry Lord Brougham quote at the start of this article brings home the truism that in order to be an effective advocate for one's client, the lawyer cannot consider any potential personal cost. The lawyer who considers how a course of action will impact him or her personally, is practicing defensively. This lawyer has pitted his or her own interests against those of the client. By definition, the lawyer is conflicted and, therefore, incompetent to represent that client.

This phenomenon manifests itself in many ways. We see it when a lawyer requires a client to sign a letter acknowledging that the lawyer relayed a plea offer and the client rejects it, if the motivation is because the lawyer thinks the client should have taken the plea and is worried that the client will later claim the lawyer never conveyed it.[24] This effort to gather evidence to be used against the client at a later date is defensive lawyering. We also see it when a client insists that a certain argument be made and the lawyer prefaces the argument with a disclaimer

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[24] I do not mean to suggest that a lawyer should not thoroughly document all communications with the client. However, the instinct to require that the client sign a letter acknowledging the plea is often a way to gather evidence **against** the client should he later want to deny the lawyer ever conveyed the plea offer. One lawyer suggested to me that he has his client sign a letter rejecting a plea because it forces the client to take the decision more seriously. This potential benefit must be weighed against the risk that asking a client to sign such a letter may cause the client to view the lawyer's motives with suspicion. The client may perceive that the lawyer is trying to protect himself and that s/he does not trust the client. In any event, the lawyer should never practice defensively; taking precautionary steps to protect himself against the client.

that s/he is only making the argument because the client insists. This is usually the result of a lawyer who is more concerned about his or her reputation with the judge than making the best argument for the client. We see it when lawyers fail to file necessary motions or litigate important issues because they are afraid that the judge, whose primary interest is moving the docket along quickly, will become angry.

In each of these scenarios, the lawyer has failed to appreciate his or her constitutional obligation to provide zealous and loyal representation; that "the highest claim on the most noble advocate [is] . . . unquestioned, continuing fidelity to the client."[25] By allowing his or her own interests, or those of others, to interfere with the zealous defense of the client, the lawyer is conflicted.[26] This lawyer will be unable to fulfill his or her obligations as an advocate.

II. Review of the Rules Most Relevant to Our Practice

There are several Rules that are implicated in our practice most frequently. In this section we will quickly review the most relevant lessons from these rules. We are only examining aspects of certain rules that come up most office in the public defenders practice. Every lawyer must thoroughly review all of the rules to ensure that s/he is in compliance. Keep in mind that we are reviewing the ABA Model Rules and that any given jurisdiction may have made modifications to these Rules. You should be sure to consult the Rules in the jurisdiction where you are practicing.

1. Rules 1.1 and 1.3 – Competence and Diligence

Combined, Rules 1.1 and 1.3 place an obligation upon the lawyer to have the appropriate expertise and time to competently represent the client in a diligent manner. A lawyer may be rendered incompetent because s/he does not have the experience or skill to handle a particular matter. Obviously, some cases are more complex than others, either because of the charges involved or the evidence at issue. A new lawyer should not endeavor to handle a serious felony where the stakes are high and there is a great need to be skilled in many facets of practice. Likewise, a lawyer who has no understanding of a complicated issue like DNA should not take on a case where that issue is central to the prosecution.

A lawyer may also be rendered incompetent because s/he does not have the time to thoroughly study and prepare for the representation. Every client is entitled to a lawyer who will have the time to research up to date law relating to issues in the case and thoroughly investigate the relevant facts. Even the least complicated representation involves a significant investment of time devoted to investigation, legal research, discovery, drafting motions, client meetings, and other preparation.

Rule 1.3 requires that the lawyer have the time to fulfill these obligations promptly, so that the client does not have the burden of a pending criminal charge hanging over his or her head longer than necessary and so that the benefit of prompt attention, like pursuing investigative leads while they are still warm, does not fade.

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[25] Nix v. Whiteside, 475 U.S. 157, 189 (1986).

[26] Rule 1.7(a)(2) tells us that whenever the lawyer's personal interest materially limits his responsibilities to a client, the lawyer is conflicted.

The complete version of the Michigan Rules of Professional Conduct can be found online at this link:

http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf

Some of the rules most frequently referred to in the practice of indigent defense are:

1.1 Competence

1.2 Scope of Representation

1.3 Diligence

1.4 Communication

1.6 Confidentiality of Information

1.7 Conflict of Interest: General Rule

1.9 Conflict of Interest: Former Client

1.10 Imputed Disqualification: General Rule

1.16 Declining or Terminating Representation

3.1 Meritorious Claims and Contentions

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party and Counsel

3.7 Lawyer as Witness

4.1 Truthfulness in Statements to Others

4.2 Communication with a Person Represented by Counsel

4.3 Dealing with an Unrepresented Person

5.3 Responsibilities Regarding Non-Lawyer Assistants

(E) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

Rule 1.110 Collection of Fines and Costs

Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.

Rule 1.111 Foreign Language Interpreters

(A) Definitions

When used in this rule, the following words and phrases have the following definitions:

(1)"Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.

(2)"Party" means a person named as a party or a person with legal decision-making authority in the case or court proceeding.

(3) A person is "financially able to pay for interpretation costs" if the court determines that requiring reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court. For purposes of this rule, a person is financially able to pay for interpretation costs when:

(a) The person's family or household income is greater than 125% of the federal poverty level; and

(b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter.

(4) "Certified foreign language interpreter" means a person who has:

(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) met all the requirements established by the state court administrator for this interpreter classification, and

(c) registered with the State Court Administrative Office.

(5) "Interpret" and "interpretation" mean the oral rendering of spoken communication from one language to another without change in meaning.

(6) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) met the requirements established by the state court administrator for this interpreter classification; and

(iii) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(i) both the entity and the person have registered with the State Court Administrative Office; and

(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(i) the entity has registered with the State Court Administrative Office; and

(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services

(B) Appointment of a Foreign Language Interpreter

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.

(2) The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding.

(3) In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under subrule (B)(1), the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record. If no such requests have been made, the court may conduct an examination of the person on the record to determine

whether such services are necessary. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(C) Waiver of Appointment of Foreign Language Interpreter

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings

The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) Avoidance of Potential Conflicts of Interest

(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c)The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety.

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)(4). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)(4) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)(4) within a reasonable time.

(b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by this rule and is not otherwise disqualified.

(F) Appointment of Foreign Language Interpreters

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)(6). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2) If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person.

(3) The court shall appoint a single interpreter for a case or court proceeding. The court may appoint more than one interpreter after consideration of the nature and duration of the proceeding; the number of parties in interest and witnesses requiring an interpreter; the primary languages of those persons; and the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding.

(4) The court may set reasonable compensation for interpreters who are appointed by the court. Court-appointed interpreter costs are to be paid out of funds provided by law or by the court.

(5) If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs.

(6) Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter.

(7) At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement. The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information.

(G) Administration of Oath or Affirmation to Interpreters

The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

(H) Request for Review

(1) Any time a court denies a request for the appointment of a foreign language interpreter or orders reimbursement of interpretation costs, it shall do so by written order.

(2) An LEP individual may immediately request review of the denial of appointment of a foreign language interpreter or an assessment for the reimbursement of interpretation costs. A request for review must be submitted to the court within 56 days after entry of the order.

(a) In a court having two or more judges, the chief judge shall decide the request for review de novo.

(b) In a single-judge court, or if the denial was issued by a chief judge, the judge shall refer the request for review to the state court administrator for assignment to another judge, who shall decide the request de novo.

(c) A pending request for review under this subrule stays the underlying litigation.

(d) A pending request for review under this subrule must be decided on an expedited basis.

(e) No motion fee is required for a request for review made under this subrule.