

**Oregon State Bar
Indigent Defense Task Force III
Report**

May 22, 2000

Introduction

The current Indigent Defense Task Force is the third task force formed by the Oregon State Bar (OSB) to study the provision of indigent defense services in Oregon. In 1993, then Oregon State Bar President Julie Frantz appointed a project oriented Indigent Defense Task Force to replace the former OSB Committee on the Indigent Accused. That Task Force (Task Force I) was charged with providing recommendations to the Board regarding "funding", "quality of representation" and 1993 legislative issues. Task Force I delivered its final report in July 1994, and included the recommendation that the OSB promulgate and adopt standards for providing indigent defense services. The second OSB Indigent Defense Task Force (Task Force II) took on that task. It submitted its final report in June 1996, entitled "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases". That report comprehensively defined the standards that counsel, including indigent defense providers, should meet to provide competent legal counsel; in essence, the report established, for every step of criminal, juvenile and civil commitment proceedings, the practices and procedures viewed by Task Force II as essential "to assure that the system operates as an integrated whole in the delivery of justice". The Board of Governors adopted the principles and standards set out in the Task Force II report. Those principles and standards have been incorporated into the Oregon Indigent Defense Services Division's contracts with indigent defense providers across the state and copies of the report are provided to indigent defense providers and other participants in the criminal justice system.

The current Task Force has focused on issues relating to the quality of legal representation as it is actually provided to indigent clients in this state. As charged by the Board of Governors, Task Force III has examined whether there are types of providers, types of cases, or geographic areas of the state in which quality of services is a concern. In examining the questions set out by the Board, Task Force III also has reviewed existing monitoring practices in the various judicial districts across the state to determine what monitoring for quality is conducted.

To conduct this study, the Task Force began with an interview of Ann Christian, the director of the Indigent Defense Services Division of the State Court Administrator's Office. That interview was followed with an interview of Dan O'Leary, the chair of the Task Force II. Following those interviews, Task Force III members developed a survey designed to inquire, in an open-ended manner, into the areas of quality concern identified in the Board charge. The survey was administered by Task Force III members with substantial assistance from many volunteer surveyors recruited by Task Force members; the volunteer surveyors and Task Force members each made a substantial time commitment to the survey effort, and this study would not have been possible without their considerable contributions.

The survey was designed to solicit the experience and opinions of legal professionals throughout the judicial system. Approximately two hundred legal professionals were interviewed: judges, prosecutors, defense lawyers and administrators of defense firms were all surveyed. Many of the interview subjects were chosen at random from comprehensive lists of local lawyers and judiciary but an effort was made to include all top administrators and a sampling of lawyers in various other roles: staff lawyers at public defender and contractor offices, private bar members, and sole practitioners participating in consortia. Similarly, almost all the elected prosecutors of

each county were surveyed but input was also solicited from staff prosecutors. Surveys were conducted in every district of the state and, although no formalized equation was applied to determine how many surveys were conducted in a particular district, an effort was made to select a number of survey participants in proportion to the population of the district involved. In all, the Task Force believes opinions were solicited from a large and representative sample across the state.

The charge to Task Force III was to ascertain what quality controls currently exist. We address that issue first. We also evaluate, pursuant to your charge, whether certain factors impact the quality of indigent defense services in the state: the type of provider, geographic area, and the case type. Each factor is addressed separately below. Following the draft report are appendices of Karen Garst's letter of April 1998 setting out the BOG charge to our Task Force (Appendix A), Bar President Mark Johnson's letter of December 1998 to the selected survey participants (Appendix B), a sample survey (Appendix C), the survey letters and instructions circulated to those enlisted to conduct the survey (Appendix D), a roster of the members of this Task Force (Appendix E).

Summary

The theme that arose again and again, throughout our many interviews, was that funding is the key to fulfilling the state's obligation to provide adequate representation to people charged with crimes or facing other serious restrictions of their liberties. Although some mechanisms exist for promoting high quality indigent defense services, those mechanisms are dependent, finally, on a provider organization's ability to fund them. Supervision and training require time, and that time can only be provided when adequate funding is available. Perhaps most importantly, based on the responses we received from participants across the criminal justice spectrum, sufficient funding must be available to adequately staff provider organizations so that caseloads do not overwhelm the ability of individual attorneys to perform necessary services. This last factor was stressed so consistently that we conclude that high caseloads have become a serious problem in the state and are the most frequent cause of inadequate representation.

Overburdened attorneys are most likely to miss the opportunity to establish a client's innocence or to fail to develop effective disposition plans for a case. This issue is of particular concern to members of this Task Force because no quality control safeguards exist in many jurisdictions. The Indigent Defense Services Division does not conduct any formal monitoring for quality so no uniform procedure is utilized to assess the quality of indigent defense services across the state. The Indigent Defense Services Division does not have the budget to conduct comprehensive quality control checks. It occasionally solicits input from the local judiciary but those efforts have decreased significantly in recent years. For the most part, the Division's quality control efforts consist of responding to problems brought to its attention. Survey participants noted a decrease in the Indigent Defense Services Division's monitoring of the quality of the services it administers. In particular jurisdictions, quality control mechanisms have developed as a matter of local practice. Statutory post conviction remedies exist but are not viewed as an adequate safeguard, for the most part, because the quality of representation afforded to post conviction petitioners is considered the most under-funded and least sufficient in

the criminal justice system. In short, official monitoring and quality control procedures are almost non-existent and those that exist are not utilized in any consistent manner statewide.

Monitoring, in the view of this Task Force, is not an end in itself. Its goal is to assure consistently adequate legal representation. While the Task Force concludes that some form of statewide monitoring should be implemented to identify problems, it is important to consider whether that monitoring system will increase the workload of the affected providers and thus exacerbate the very problems the monitoring attempts to identify. In order to effectively implement a statewide monitoring system, additional funding for both the Indigent Defense Services Division and for providers may be needed.

Types of Providers

Oregon employs a hybrid system of indigent defense representation. Historically, judicial districts maintained lists of attorneys who accepted appointment to indigent defense cases. Judges exerted almost complete control over the private bar lists and were even known to use their authority to enlist members of the civil bar when the need arose. Often, the 'private bar' attorneys combine indigent defense work with more varied law practices. Over the years, starting with the larger metropolitan areas, the demand for representation became so great that public defender offices were formed to specialize in indigent defense work. More recently, two other types of provider organizations have emerged: the Indigent Defense Services Division has begun to award indigent defense contracts to small firms, referred to as contractors, and to consortia of sole practitioners and small firms.

Task Force members were surprised to find such a wide variety of provider models across the state: there may not be two judicial districts, statewide, employing exactly the same model for providing indigent defense services. Outlying counties appear to be converting, by and large, to a contracting system, with small firms sometimes staffing offices in more than one county seat and shifting staff attorneys among the counties served. (In the geographically expansive but sparsely populated judicial districts, many counties may be encompassed within a single judicial district.) Public defender offices are employed, for the most part, only in the more populous districts, although not all relatively large districts have public defender offices and some mid-size population centers, including Pendleton and Roseburg, house public defenders. Consortia appear to be most popular in the mid-to-large metropolitan areas of the mid-Willamette Valley, with almost all indigent defense representation in Marion and Clackamas provided by consortia. Relatively small consortia also exist in Multnomah and Jackson Counties. In Multnomah and Washington Counties, however, the general model is best described as a combination of public defender offices and small firm contractors. Appellate representation in the state is provided, for the most part, by a single appellate public defender office, supplemented by private bar appointments; that office is separate from the Indigent Defense Services Division. Statewide, the number of private bar appointments has decreased significantly, corresponding to the increase in contracted caseloads. In almost all jurisdictions, with the notable exception of Yamhill County, private bar appointments are now used only as a 'safety valve' to the contracted caseloads. With the exception of the remaining private bar hourly-rate assignments, most

indigent defense work is now funneled through contracts providing some variation of a flat-rate-per-case payment structure.

No one district employs a public defender office, a large consortium and also significant small firm contracts, so the Task Force was unable to make side-by-side comparisons of the three types of organizations. Responses from various districts were compared, however, to come up with an assessment of relative strengths and weaknesses. Public defender organizations are well regarded in every district in which they exist and in many others, with the exceptions limited to those jurisdictions that were politically averse to the possibility that a public defender office might 'take over' local practice. Likewise, respondents from districts utilizing large consortia of relatively experienced attorneys report few quality concerns. Large consortia are viewed as having two advantages over smaller organizations. First, the individual attorneys invited to join consortia are relatively experienced, brought in at a level more equivalent to that of a partner than associate, thus decreasing the need for oversight. Second, the design of the consortia lends itself to internal quality control in that large consortia are administered by coordinators who oversee the work of consortia members and who are available to address problems that arise with respect to individual member attorneys. Public defender offices have similar design advantages in that central administrators can provide uniform training and oversight and can utilize broader resources to assure consistent work product. Respondents from districts employing both consortia and public defender office models view the presence of a central administrator to investigate and respond to problems as an effective quality control mechanism. Respondents in districts with small firm contractors did not relate the same general confidence in the internal quality control mechanisms of small firm contractors. Many respondents reported limited avenues to address perceived problems with the quality of representation provided by individual lawyers in small firms. Some respondents also commented on the different economic dynamic of a contract office compared to a public defender or consortium of sole practitioners: small firm contractors were viewed as the most vulnerable to financial pressures since the principals in those firms have personal financial liabilities for the offices they head that are far greater than their counterparts. Public defender offices are non-profit organizations, so their administrators are unlikely to bear great financial responsibility for the organization's obligations. Sole practitioner members of a consortium are likely to be responsible only for their own overhead and to have retained practices that will cover expenses if indigent defense appointments come to a halt. Small firm contractors, however, usually employ several associate attorneys and are personally obligated for the overhead expense necessary to support those attorneys; long-term obligations to pay for proportionately larger overhead expenses may make it a practical impossibility for a small firm to forego a subsequent contract, even if the contract funds are insufficient to fulfill the contract's requirements adequately. Although observers do not suggest that this occurs frequently, concerns were voiced about particular contractors in some districts.

Staffing

Many indigent defense providers, particularly small private firm contractors, report difficulty hiring competitive candidates to handle indigent defense caseloads. The degree of difficulty attracting satisfactory candidates appears to fluctuate by district and is influenced by the general legal market but respondents report that indigent defense positions are almost always at the bottom of the legal community's pay scale. Many recent graduates have such significant student

loan debt that they must bypass public service employment. Given the unattractive compensation available, it is no surprise that applicant pools are often small and contract administrators find it difficult to retain experienced practitioners. Most of the attorneys hired by contract firms are recent law school graduates. Even where satisfactory candidates are not available, great pressure exists to find lawyers to fill positions because failing to provide counsel is not a viable option: judges have a constitutional obligation to appoint counsel so the Indigent Defense Services Division and, in turn, the contract administrators and public defenders must hire from the pool of available attorneys. A few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered; in more than one situation, the Indigent Defense Services Division has gone to great lengths to entice new lawyers to relocate to underserved areas. Many respondents foresee an increase in incidents like this across the state, as more experienced providers opt to forego the difficulty of attracting and retaining staff attorneys while managing ever more complicated caseloads without meaningful increases in compensation.

Survey respondents often noted, however, that the skill of the individual lawyer can have a far greater impact on the quality of representation provided than the type of office providing the service: a skilled and diligent lawyer may overcome obstacles that cause another to falter. Yet, as counties grow larger and contract offices become more common, there is a clear tendency to judge quality on an office-by-office basis rather than lawyer-by-lawyer. The most criticized offices are described as high volume, low experience, high turnover offices, in which lawyers leave before developing satisfactory skills. Unlike most public defender offices or consortia providing services in all, or almost all, case types, small firm contractors often fill particular niches or specialized areas of practice. Often, districts have implemented procedural changes - in an effort to promote efficient processing of cases in high volume areas like drug dockets and traffic courts - and contracts have been created to provide attorneys to handle the specialized dockets. Given this genesis, it is not surprising that some contractors are viewed as providing a type of high volume service that precludes in-depth individual assessment of clients' cases. In rarer cases, the specialized contracts are viewed as bringing a greater expertise or specialization to an area of practice. The latter situations illustrate the potential advantage of awarding specialty contracts to smaller firms but the more common experience seems to be diminished quality. High volume dockets, on their own, do not dictate lower quality representation but high volume dockets combined with a low flat-rate payment structure will inevitably lead to this result. It is not clear that larger offices, whether public defender or consortia, would effectively resist this dynamic, but the survey suggested that the larger offices could better absorb the stresses and resist the pressures to sacrifice quality for judicial efficiency. The overall perception of survey respondents appears to be that fast track dockets may result in the culpable clients receiving initial probationary offers that are more attractive than they might have been under older, less 'efficient' models, but the gain of culpable clients may come at the expense of those whose more cognizable claims are overlooked or obscured by lawyers too busy to give individual cases the attention they may deserve. Experience is widely perceived as the single most important attribute of an attorney, assisting the attorney to distinguish between meritorious cases and those that should be disposed of on a fast-track basis in an environment where little case preparation is possible. Many respondents singled out particularly attorneys as exemplary and worthy standards for the profession: for those providers who were praised, "experienced" was the most commonly used word.

Training

Larger firms, particularly public defender offices, are able to provide far superior levels of training and supervision through institutionalized mentoring programs and formalized seminar presentations. The larger defender offices have a practice of rotating even their most experienced attorneys through misdemeanor and juvenile caseloads to provide peer assistance to younger attorneys; the practice also allows the more experienced attorneys to reduce their stress with periods of less complex litigation. Public defender offices and consortia are reported to be the provider models least likely to appoint inexperienced attorneys to cases they are not equipped to handle.

Larger consortia are by nature less susceptible to training and mentoring deficiencies than small contract firms: consortia tend to be comprised of older, experienced attorneys – mostly sole practitioners - who have formed voluntary associations to share the administrative burdens of indigent defense without impeding the ability of the individual attorney members to pursue private practices. Therefore, the nature of the attorneys involved in consortia allows beneficial collaboration and oversight without the need for the extensive training and mentoring that inexperienced attorneys require.

In smaller offices, training resources are limited and fewer mentors are available. More experienced attorneys in the firm may not have the time to provide ongoing assistance to the newer attorneys if, rather than serving primarily as administrators, they carry their own full caseloads. The problem is compounded by the high turnover rate many contract firms experience: once a staff attorney gains trial experience, the lawyer is likely to leave, commanding a higher salary and better prospects for advancement in the private sector than the indigent defense system will provide. The constant hiring cycle makes it that much more difficult for the contract firm administrators to provide meaningful training and supervision.

Although public defender offices have the most formalized systems in place, consortia and contractors often provide mentoring to new attorneys and employ rotation models that allow newer members to observe and be observed by the more experienced attorney members. However, the common perception is that the larger the organization, the more likely it is that effective mentoring and peer support mechanisms will allow deficiencies to be recognized and dealt with in-house before serious mistakes occur.

Geographic Analysis

Despite the nominal consolidation of the county courts into a statewide system in 1983, there continue to be significant differences among Oregon judicial districts' indigent defense operations. Uniform distinctions between urban and rural districts are less easy to draw than might be expected. Similarly, after compiling the survey results, the Task Force came to the conclusion that generalizations about geographic regions of the state are difficult to make. In large part, this is because judicial districts adjoining one another often have very different frameworks for providing indigent defense services. Also, since most procedures and policies are set at a local level by presiding judges and elected prosecutors, political boundaries create

significant divisions even within seemingly contiguous geographic regions. Nonetheless, it is possible to see some broad patterns, particularly when urban counties, such as Multnomah, Washington, and Clackamas, are compared to more rural counties.

The single universal response in all locations, large and small, urban and rural, is that inadequate funding for indigent defense services is the cause of most existing problems. Every county, with the possible exceptions of Marion and Clackamas, reported that attorneys are forced to accept too many cases in order to meet office expenses, preventing adequate time and attention from being spent on each case. After caseload size, however, there was a split between larger and smaller counties as to what systemic problems were perceived to be the most serious. In the larger counties, lack of training and experience were most often the next highest rated problems while, in smaller counties, District Attorney charging practices and lack of extraordinary expenses authorizations for investigators and expert witnesses were rated the highest. It is noteworthy that District Attorney charging practices were not viewed as significant a factor in many of the larger counties.

Another difference between large and small counties is the extent to which judges involve themselves in monitoring the adequacy of representation by individual attorneys. In smaller counties, the judges have personal experience with all the lawyers handling indigent cases and often take an active role in responding to concerns about adequacy of representation, either as reported to the court or as actually observed by judges themselves. In some of these counties, the bench has developed informal procedures for responding to such concerns. Often, the procedure involves direct contact with the attorney in question. In smaller counties, judges continue to have direct control over the appointment process and are able to utilize that control to address concerns about the quality of representation. On occasion, the judiciary will limit an attorney from handling certain types of cases while the perceived problem is addressed. This "hands on" approach is more difficult to employ in counties with many judges and defense attorneys, due to the dilution of personal contact between the attorneys and judges. Therefore, it appears that more monitoring occurs in the more sparsely populated counties.

The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. Anecdotally, it appears that peer oversight plays a valuable role in monitoring the quality of representation. In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

Types of Cases

Throughout the state, concern for the quality of representation in certain kinds of cases is voiced. Juvenile court representation is widely viewed as an area in which representation is often inadequate. Parents in dependency actions who face possible termination of their parental rights are viewed as routinely receiving some of the poorest representation. Juveniles in delinquency

actions, the rough equivalent of adult criminal charges, follow close behind. However, ironically, convicted defendants who bring post conviction petitions to challenge the adequacy of their trial level representation are viewed as the 'adult system' clients who receive the most problematic representation: although most respondents are generally unfamiliar with post conviction practice, those with experience in the area are very direct in voicing their concerns. All three types of representation – post conviction, juvenile dependency/termination and juvenile delinquency – are viewed as areas in which clients' interests are often served poorly by their appointed lawyers. Unlike other case types, where instances of inadequate representation are considered to be unacceptably high but certainly not the norm, clients with legal matters of these types are viewed as facing an unreasonable likelihood of receiving poor representation.

Concern is voiced about the quality of representation provided in other types of cases, as well, although the observations were somewhat less pointed and less uniform: misdemeanors and sex offenses are reported to be other areas of consistent concern statewide, as well as minor felonies and drug cases in some areas. Observers noted that the attorneys providing services are often the least experienced and appear not to receive enough training or support to cope with their ever enlarging caseloads. With respect to misdemeanors, minor felonies and drug cases, many districts have adopted practices to streamline dockets and encourage speedy resolutions; while these efficiencies have many benefits, they serve to encourage minimal effort and interaction with the client for some indigent defense providers. Some offices providing such services are viewed as little more than "plea factories", staffed with lawyers who may not recognize or act on differences between clients and cases. Inadequately trained, inexperienced attorneys struggling to cope with caseloads that continue to grow in size are the reported causes of inadequate representation, universally linked to the system's failure to adequately fund defense services. In many instances, those surveyed observed that more experienced attorneys are unwilling to handle fast track, high volume dockets that do not allow or encourage good trial practice.

Sex offenses present their own set of problems. The cases are always challenging, presenting difficult pre-trial and trial issues. Unlike most other case types, the factual backgrounds are often extremely complicated, involving numerous interactions and connections between prospective witnesses. Competent investigation often requires not only interviewing witnesses over many hours but also obtaining records relating to various medical, school and family issues. Counsel can expect vigorous resistance from many sources, not the least of which can be the prosecutor's office. The work load associated with developing a case to the point that a competent decision can be made about whether or not to take a case to trial is far greater than that associated with any other case type, save homicides. However, unlike homicides, sex offenses have a particular stigma to which many practitioners, themselves, react. Combined with the funding inadequacies present throughout the system, and the prospect of Measure 11 sentences that can amount to true life sentences, the cases present a challenge that even many experienced practitioners find overwhelming. As a result, experienced practitioners in many judicial districts refuse or avoid appointments to sex cases. The people charged with these most serious of offenses, by default, have appointed counsel who may lack both the experience and the time to handle the cases adequately. Again, participants in our survey report that the only solution is to provide significantly greater resources to encourage experienced attorneys to take on the challenge of these cases.

Post conviction cases can be equated to sex offenses in this regard: they are perceived as being among the most difficult cases, factually, legally and emotionally. Litigious prisoners will be a part of a post conviction caseload, and those clients are not prized by most practitioners. Representing post conviction petitioners also necessitates criticizing the work of other members of the Bar, an often unenviable obligation. Problems with post conviction representation are detailed at greater length below. However, like sex offenses, competent representation by experienced attorneys is at its most important in the area of post conviction relief: only an experienced, diligent attorney is likely to assess a post conviction claim adequately and federal legislation has increased the likelihood that overlooked issues will be fatal to future efforts to obtain relief. Respondents indicate that only increased compensation will make these cases attractive enough to experienced practitioners to draw competent representation.

In less populated areas of the state, judges repeatedly note difficulty in obtaining qualified representation for more serious or specialized kinds of cases; local legal economies are often too small to support such specialists and the few attorneys with sufficient experience may be unwilling to accept indigent rates of pay. Along with sex offense and post conviction cases, parental terminations were raised by a very high proportion of respondents as a particular concern. Ballot Measure 11 charges, generally, have presented a problem in certain judicial districts, as attorneys tire of handling cases with significantly increased sentencing consequences but no commensurate increase in compensation. The Indigent Defense Services Division and, in districts where judges retain control over the appointment process, the courts seek to appoint the most skilled attorneys to the most serious cases; in the smaller districts, limited options can force appointment of less-qualified lawyers.

In the more populous judicial districts, however, the dynamic is different: the more serious the offense, the more likely the person charged will receive experienced and skilled legal representation. In the larger districts, the concerns voiced were about the "fast track" dockets and newer attorneys handling caseloads that were too large for their abilities. Particular concerns, however, should not obscure the fact that even more experienced and competent attorneys are feeling the effects of increasingly difficult caseloads. Experienced practitioners and other observers report that cases are more complex than five or ten years ago, requiring greater investigation and preparation, due to enhanced procedural laws and sentencing provisions. The increase in mandatory sentences makes clients more resistant to negotiated resolutions, causing difficulty in client relations and complicating the work involved. As a result, even more experienced attorneys are struggling to manage burgeoning caseloads of complex cases.

Post Conviction Proceedings

Our Task Force has chosen to address the adequacy of post conviction representation at greater length than other kinds of cases where inadequacies in representation were generally observed due to the concern of Task Force members that post conviction relief itself is supposed to - but does not - provide a viable forum for monitoring the adequacy of the representation provided in individual cases.

Post conviction petitions are handled almost exclusively in the relatively few judicial districts where state prisons are located. Small firm contractors in the relatively remote areas where prisons are located handle a disproportionate amount of the post conviction work, although the Marion County consortium represents most post conviction petitioners in Salem-area prisons. As a result, relatively few judges and practitioners in the state have firsthand experience with this post conviction work. There is limited understanding of and appreciation for the role of post convictions in most areas of the state. In areas where the cases are heard rarely, if at all, the general assumption reported in our survey is that post conviction procedures provide adequate safeguards and effectively monitor the quality of representation. However, those with more familiarity with post conviction representation have a very different view. Geographically, in rural areas where prisons are seated, local judges and the state Indigent Defense Services Division report chronic difficulty finding competent attorneys willing to accept the cases for the funds allocated. Funding is considered grossly inadequate to meet the challenges the cases present. In another judicial district, the unwillingness of consortium members to handle post conviction cases has forced the consortium administrator to offer post conviction attorneys an hourly fee significantly higher than for other non-capital indigent defense work: Marion County attorneys earn more for post-conviction, habeas and Measure 11 cases than other case types. Overall, it appears that competent experienced attorneys are not interested in handling post conviction cases as presently compensated.

The Task Force interviewed Steven Wax, the Federal Defender for the District of Oregon. His office represents persons convicted in the state courts who bring federal petitions for habeas corpus relief, the final level of review for most state court convictions. His perspective of the quality of representation provided to indigent clients across the state is a uniquely broad one. Mr. Wax has come to the conclusion that neither state post conviction nor federal habeas review adequately monitors state indigent defense representation. One factor he points to as particularly troubling is that state post conviction cases are underfunded even more than trial level representation: unlike trial level representation, where cases are often negotiated by way of plea or other compromise resolution, virtually every post conviction case goes to trial. The Indigent Defense Services Division bids case loads, for all case types, with the assumption that a certain percentage of the cases assigned will be resolved by way of guilty pleas or dismissals but, unlike most case types, this assumption is not valid in the context of post conviction cases. There is no procedural mechanism in the area post conviction relief for negotiated resolutions. Virtually all post conviction cases go to trial. Every post conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office has found, however, that few post conviction cases in state court are investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Effective advocacy in this area should occur at the state court level, as well, and greater funding to attract experienced attorneys and investigators is the key to success in this area.

Having less qualified attorneys review the work of other defense practitioners, without the benefit of meaningful investigative resources, is certain to fail as a safeguard against the unjust results that post conviction relief is supposed to provide. This problem is exacerbated by attorneys' reliance on the McClure standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. McClure v. Maass, 110 Or.

App. 119, 821 P.2d 1105 (1991), *rev. denied*, 313 Or. 74 (1992). Under this standard, the attorney is only required to investigate and present the issues identified by the client. Yet, few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may not have been legally adequate. Often, critical issues, concerning the adequacy of representation and fundamental due process rights are not preserved, due to a client's lack of sophistication or awareness. Issues not raised in the state court proceedings are increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. Where no one but the often unsophisticated and resourceless client is attempting to identify constitutional violations or serious factual errors, the assumption that an adequate safeguard to wrongful conviction exists is seriously flawed.

Observers note that the need for increased funding is perhaps most significant in the area of post conviction relief, so that the attorneys handling the cases can reduce their caseloads and concentrate on the work that needs to be done. Likewise, observers noted that investigative resources must be developed in this area, education for providers must be increased, and oversight mechanisms for post conviction contracts must be improved. Particularly in light of the tendency of federal courts to disallow review of issues that have not been raised in the state courts and the corollary fact there is no real forum for challenging inadequate post conviction representation, the Indigent Defense Services Division should provide greater assurance that state post conviction clients are receiving meaningful representation at both the trial and post conviction level.

Suggestions and Conclusions

The Board of Bar Governors has asked Task Force III to continue this inquiry by examining various quality control mechanisms available and offering suggestions and conclusions about the ways in which monitoring for quality should be pursued and improved in this state. The Task Force expects to present an addendum to this Report addressing those issues for the Board's consideration this fall.