Right to Counsel

Justice Speakers Institute
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http://justicespeakersinstitute.com
As a result of this seminar, you will be able to:

1. Apply the sixth amendment properly
2. Explain how a system should provide counsel at first appearance
3. Avoid some of the pitfalls that deny defendants their right to an attorney
4. Implement a system for having an attorney at first appearance
We hold...absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, (or) misdemeanor.... unless... represented by counsel....

Argersinger v. Hamlin
How do we meet the constitutional requirements to provide counsel?

The approached used in Michigan

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The approached used in Michigan

The commission was created as a result of efforts to improve legal representation for indigent criminal defendants in October 2011.
The approached used in Michigan

In June of 2012 the commission issued a report on indigent defense needs with 12 recommendations
These recommendations included:

1) Create a permanent commission
2) Commission should create and enforce minimum standards
3) Using local systems
4) Legislature should provide resources
5) Including funding
In July 2013 The legislature passed and the governor signed a new law based upon the recommendations

1. Courts employ loose and varied guidelines in determining the eligibility of defendants for appointed counsel services.

2. In the majority of courts, defendants whose requests for counsel have been denied have no recourse to further pursue assistance.
3. There is inconsistency in attorney compensation for appointed cases, with hourly rates ranging from $33 per hour to over $100 per hour.
4) Most appointed counsel systems do not operate independently from the judiciary.

5) Approximately 25% of assigned counsel systems can be considered independent, 15% of contract defender and 40% of public defender office systems operate independently.
6) Only 6% of district courts require attorneys to be present at first appearance, despite the documented importance of legal guidance in these early stages.
7) 63% of court systems report the existence of confidential meeting space in both their courthouse and holding facility.

8) “Private” meeting rooms are often filled to capacity, difficult to book, or composed of cubicle-type spaces that do not actually allow for confidential discussions.
9) Only 15% of indigent defense systems currently report the existence of local guidelines requiring participation in Continuing Legal Education courses.
1) The first four proposed minimum standards for indigent defense delivery systems were submitted to the Michigan Supreme Court.
In January 4, 2016

Standard 1: Education and Training of Defense Counsel

• Indigent criminal defense systems employ defense counsel who have attended continuing legal education relevant to counsels’ indigent defense clients.
Standard 1: Education and Training of Defense Counsel

The first standard has two components:

• All attorneys shall annually complete at least twelve hours of continuing legal education, and;

• Attorneys with fewer than two years of experience shall participate in one basic skills class.
Standard 2: Initial Interview

- Defense counsel must be provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with client.

- The initial client interview is a crucial step in beginning to investigate the case, and in laying the groundwork for a positive relationship.
Standard 3: Investigation and Experts

• The United States Supreme Court has held that the effective assistance of counsel includes the duty of counsel to make reasonable investigations in cases, and consult with expert witnesses.

• Establishes minimum standards for defense investigation and experts.
Standard 4: Counsel at First Appearance and Other Critical Stages

• The United States Supreme Court has repeatedly recognized that the right to counsel is implicated when the defendant’s liberty is jeopardized,
In January 4, 2016

Standard 4: Counsel at First Appearance and Other Critical Stages

• Despite the documented importance of legal guidance, only 6% of Michigan’s district courts currently require attorneys to be present at both the bail hearing and at arraignment.
In February 6 2017

The Standards involve education and training:

• The initial client interview, experts and investigators,
• Counsel at first appearance and;
• Other critical stages in front of a judge.
• Allegan/Van Buren Regional Indigent Defense Program (RIDP): An innovative regional model joined/hybrid Public Defender Office to provide Indigent Defense Services;
The Commission offered grant opportunities

- Calhoun County Indigent Defense Intake Study: To identify & develop best practices for the indigent defense intake and reimbursement process to identify the truly indigent, & assure integrity of the system and increase compliance with reimbursement orders.
The Commission offered grant opportunities

- The creation of a Managed Assigned Counsel Model for the 3rd Class District Courts of Macomb County: To study the feasibility of joining 3rd Class District Courts in Macomb County to provide a single administrator to manage each of the court's indigent service plan.
The Commission offered grant opportunities

- Assessment of Metropolitan Justice Center State Defender Office (Wayne County) Felony Practice: To obtain the consulting services of The Defender Initiative at Seattle University & its partner The Sixth Amendment Center with the assistance of the National Legal Aid & Defender Association to study SDO's felony representation.
Pilot Project in the 73rd District Court Attorney at Arrangement

- 2016 9 of 209 cases had attorney
- 2017 208 of 208 of cases had attorney
- Number of resolutions 2% in 2016, 14% in 2017.
- 20% higher reduction in interim bond 2017 vs 2016
Michigan counties to submit plans for indigent defense reform to the Michigan Indigent Defense Commission (MIDC). Those plans must include the adoption of four new standards established by the MIDC last May.
The legislature authorized spending $84 million to indigent defense in Michigan funding counties and other local governments to improve their court-appointed attorney systems to meet new standards.
Right to Self Representation

- Faretta v. California 422 U.S. 806 (1975)
- 6:3 decision held criminal defendant had right to represent him/herself
- Decision must be made voluntarily and knowingly
- Should be made aware of the dangers and disadvantages of self-representation
- Not absolute
- Right by statute in Federal court since 1789
- In 36 state constitutions before Faretta
Pitfalls With a Pro Per/Se Criminal Defendant

• If in custody, how to move around the courtroom? Submit exhibits? Publish exhibits to the jury?

• What, if anything, should you say to the jury about status of accused?

• How do you both remain neutral and fair to the defendant?
Scenario #1

• Voir dire is about to begin. You notice defendant has a 1” thick wad of papers with questions on them. You ask if those are his questions and he says, “Yes.” He then proceeds, for the next two hours, to ask each potential juror every question. He’s gotten through six so far. What to do?
Scenario #2

• The defendant must not be getting any sleep. Every morning she presents you and the prosecutor with a new motion. This happens at the time the jury was asked to be back. You say you'll read it at the end of the day but she says it relates to evidence that will be introduced today. You read her motion, listen to her and the DA’s arguments and rule against her. The jury has now been waiting one hour. You warn her that you don’t want any more motions. She says, “Are you denying me the right to fully litigate my case?” You sigh. How can you manage this?
Scenario #3

• A juror tells your bailiff that another juror was seen talking to the defendant in the court parking lot. What do you do?
Scenario #4

• Defendant seeks to introduce a building inspection report done on the scene of the crime. It is clearly relevant evidence. Equally clear is that it is hearsay. The prosecutor makes a hearsay objection.

• Do you tell the defendant to go to the county building across the street and get the document certified?

• Do you deny the motion because there’s such an easy fix to make it not hearsay?

• Do you sustain the object to the overwhelmingly chagrin of the defendant?
What ethical issues do you see?

• Possible ex parte contact by the defendant (Canon 2 A judge shall perform the duties of judicial office impartially, competently, and diligently.) (Rule 2.9(A) A judge shall not initiate, permit, or consider ex parte communications)

• Being seen as favoring pro per/pro se defendant (Canon 2 A judge shall perform the duties of judicial office impartially, competently, and diligently.) (Rule 2.2 A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.)

• Being seen as discriminating against pro per/per se defendant (Canon 2 A judge shall perform the duties of judicial office impartially, competently, and diligently.) (Rule 2.2 A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.) (Rule 2.2 A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.)
Thank you for kind attention

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