April 14, 2008

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

REPORT AND RECOMMENDATIONS

ON FUNDING OF DEFENSE SERVICES IN CALIFORNIA.

Introduction.

The constitutions of the United States and of California guarantee a right to counsel for all accused in criminal proceedings, and indigent accused are guaranteed competent counsel regardless of their ability to pay. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In 2003, after convening public hearings and hearing the testimony of 32 expert witnesses, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants concluded:

> Forty years after *Gideon v. Wainwright,* indigent defense remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.

A key recommendation of the Committee's report was that State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings. ABA Standing Comm. on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004).

Many of the causes of wrongful convictions that the Commission has previously recognized (mistaken eyewitness identifications, false confessions, perjured jail informant testimony, faulty forensic evidence) could have been exposed and addressed if the defendant had been represented by competent zealous counsel who had fully investigated and prepared the case. A study of the first 74 DNA exonerations in the United States found that defense lawyer incompetence was a factor in 32% of the cases. Scheck, Neufeld & Dwyer, *Actual Innocence,* p.365 (New American Library, 2003).

The Defense of Indigent Accused in California.

The Commission has learned that the quality of representation afforded indigent accused is far from uniform in California, and sometimes falls short of the constitutional minimum. In California, the primary responsibility for providing competent counsel at the trial level to indigent accused falls upon each individual county. California's fifty-eight counties meet this obligation in a variety of ways. Thirty-three counties (57%) have created one or more institutional public defender offices as county departments to serve as the primary provider of criminal defense services to indigent accused. This includes every county in California with a population in excess of 500,000, with the exception of San Mateo County.

Contract defenders are the primary provider of indigent felony and misdemeanor representation in 24 counties (41%). Eight counties have contracted with a single law firm, which provides various types of representation through branch offices. Some counties contract with solo practitioners. Several counties, for example, have four different solo contract defenders handling different portions of the caseload, and one county has seven separate contract defenders. The amount of compensation afforded by these contracts is often based upon a fixed fee per case, or a flat fee for the expected annual caseload. While this type of system is heavily concentrated in rural counties having populations of less than 100,000, it also exists in some urban counties in which public defenders are the primary providers. Many counties with a public defender office, for example, use a contract defender to handle cases in which the public defender declares unavailability due to conflicts or overload.

In virtually every county, assigned counsel systems exist to handle some clients in multiple defendant cases where the primary provider would have a conflict of interest in representing more than one defendant. An assigned counsel is ordinarily appointed by a court to handle a single case. Only one county, San Mateo, uses an assigned counsel system administered by the local bar association as the primary provider of indigent defense services.

The Commission received evidence at our July 11, 2007 public hearing related to inadequate funding of defense services in some California counties, especially for crucial investigative and expert support. Competent investigation of one's case, as well as the employment of expert witnesses, constitute the "basic tools of an adequate defense," and are just as fundamental as the right to competent counsel. *Cf. Ake v. Oklahoma,* 470 U.S. 69 (1985) (*Right to expert assistance in capital case raising a mental defense*).

Professor Larry Benner of California Western School of Law conducted a statewide survey of judges and lawyers for the Commission. He also examined 2500 reported appellate decisions in which ineffective assistance of counsel claims were raised from 1997 through 2006. According to Benner's study, courts found ineffective assistance of counsel in 121 of these cases, and in 104 of them the judgment of conviction was reversed and those cases were remanded for a new trial. Professor Benner reported that the most frequent performance deficiency, reported in 44% of the 121 cases, was failure to investigate.

Responses to the Benner's surveys came from 85% of the state's public defender offices, 33% of the contract defenders, 109 certified criminal specialists, and 38 judges. Nearly all survey respondents agreed that lack of resources for investigation was a serious problem. Further, changes in the conduct of preliminary hearings has reduced in some cases the opportunity for defense

attorneys to assess the strength and weaknesses of the prosecution's case.[1] Every public defender responding agreed that excessive investigator caseloads were a problem. Over two-thirds of judges surveyed indicated that providing sufficient investigative resources for the defense was a problem in their county. In six counties, defenders had no investigative staff. While some public defender offices have budgeted funds to retain expert witnesses, others must obtain court approval for such assistance. More that one-quarter of the offices (28%) report difficulty in obtaining such approval. The Los Angeles Public Defender's Office prefers to insist that the court fund such services.

The Benner Survey also inquired into the issue of excessive attorney workloads. All public defender offices save one agreed that attorney workloads were a problem they faced. Over 81% indicated that attorney workload was a significant, very significant, or serious problem. Lawrence A. Benner, *Preliminary Report: Systemic Factors Affecting the Quality of Criminal Defense Representation* (2007), available on the Commission's website.

Despite heavy workloads, California's institutional public defenders have generally provided competent representation for their clients, and vigorous

[1] An initiative measure, Proposition 115, adopted in 1991, provides that the finding of probable cause can be based in whole or in part upon hearsay gathered by police in the course of their investigation. See California Penal Code §872(b). Since then, preliminary hearings often rely upon testimony from the investigating officer unless the prosecution believes the interest of justice requires testimony from the victim or other percipient witnesses. Under current California law, the purpose of the preliminary hearing is not to facilitate discovery, but to determine probable cause. *Whitman v. Superior Court,* 54 Cal.3d 1063 (1991).

advocacy for adequate funding of defense services. The California Public Defenders Association recently surveyed public defender offices to determine the level of compliance with the State Bar Guidelines for Indigent Defense Delivery Systems, and found a high degree of compliance. Institutional Public Defenders handle 80% of the State's felony filings. We believe that California's public defender offices, and certainly the largest ones, meet reasonable standards of acceptable workloads. That does not diminish the need, however, for California to assure that constitutional standards are being met in every case, regardless of the county in which it occurs, and regardless of the type of indigent defense provider.

Flat Fee Contracting.

While there is nothing inherently wrong with competitive bidding for contracts to supply defense services, when such contracts are awarded on a flat fee basis it may, in some cases, create a conflict of interest for the contracting lawyer. Unless it is separately reimbursed, the portion of the contract amount employed for investigative services or expert assistance comes off the top, and reduces the compensation or profit for the contracting attorney. Such contracts may also burden a defendant's right to jury trial, since the contractor's compensation will not be enhanced by the additional expense of preparing and presenting a case for trial. As described by Barry Melton, Yolo County's public defender and immediate past President of the

California Public Defenders Association, to the extent a flat fee contractor does not provide services, he or she makes a profit. So if at all possible, the contractor may avoid going to trial because going to trial is expensive.[2]

In *People v. Barboza*, 29 Cal.3d 375 (1981), the California Supreme Court found that the contract between the County of Madera and the contract defender was illegal because it created a disincentive to declare a conflict of interest. Under the contract, the Madera County public defender was paid $104,000 per year, with $15,000 deducted and held in reserve to be drawn against by conflict counsel. Any deficiency in the reserve account was to be deducted from monthly payments to the public defender. Any balance left in the account at the end of the year was to be paid to the public defender. The Court concluded that this arrangement created an "inherent and irreconcilable" financial disincentive for the public defender to declare a conflict. In declaring the contract unlawful, the Court broadly condemned "contracts of this type" pursuant to "a judicially created rule of criminal procedure." By analogy, an inherent and irreconcilable financial disincentive for a contract defender to investigate the case or hire experts also creates an unacceptable conflict of interest. The Commission has concluded that flat-fee contracts in California should separately reimburse

[2] Miller, *California Defense Firm Borrows Wal-Mart Business Model,* The Recorder, Dec. 26, 2007.

the contracting attorneys for the expenses of adequate investigation and needed experts.

In April, 2000, the U.S. Department of Justice funded a national study of Contracting for Indigent Defense Services. The Study Report began with an example of how critics' worst fears about indigent defense contract systems came true. The example came from an unidentified California county. It is a very sobering account:

> In 1997 and 1998, a rural county in California agreed to pay a low-bid contractor slightly more than $400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases – less than 0.5 percent of the combined felony and misdemeanor caseload – to trial.
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> One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month. The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case. One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.
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> The only material in the case file was five pages of police reports. In these reports, she found evidence of a warrantless search, which

> indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's sixth amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.

The Spangenberg Group, *Contracting for Indigent Defense Service: A Special Report,* U.S. Department of Justice Office of Justice Programs, April, 2000. The Commission independently verified the facts reported in this account, and learned that the unidentified California County was, in fact, Shasta County. The fired associate, Gabrielle Fitzmaurice-Kendrick, subsequently filed a federal lawsuit against the contractor who fired her, and received a substantial settlement. *Fitzmaurice-Kendrick v. Suter, U.S. District Court for E.D. Calif., 1999.* In a deposition for that lawsuit, the contractor boasted that he pled 70% of his clients guilty at the first court appearance, after spending 30 seconds explaining the prosecutor's "offer" to the client. *Deposition of Jack Suter.* Shasta County subsequently abandoned the use of flat-fee contracts, and established a public defender office which currently enjoys an excellent reputation. As disturbing as the scenario recounted in the federal report may be, little has been done in California to prevent the recurrence of such scenarios.

While the State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006) recommend that the cost of resources such as investigators, qualified experts, paralegals, laboratory fees and support technology "should not operate as a charge against the indigent defense provider to such an extent that the net personal compensation to the defender is diminished," (pp. 30-31), flat fee contracts are still being negotiated for defense services with no separate funding for investigators and ancillary services.

The Commission heard the testimony of Len Tauman, who described the bidding process in Placer County. Tauman was awarded the contract to provide indigent defense services in Placer County in 1990, although he was not the lowest bidder. He had eighteen years experience as a public defender, and managed a conflicts office for ten years. His contract was renewed in 1994 despite another lower bid, when a judge convinced the Board of Supervisors that the top quality representation was worth the $1 million difference in the bids. The Board vote was 3-2. Tauman's contract was renewed in 1998 and 2002. In 2000, the defender budget in Placer County was 41% of the District Attorney budget. By 2005, they were operating at 27% of the District Attorney budget. Tauman submitted a bid

for $28 million, to increase funding up to 38% of the D.A. budget.[3] He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts with eight California counties to provide defense services.[4] The Barker-Ciummo bid was $16.8 million. The County accepted the lower bid.[5] Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors won't."[6] Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages.[7] While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for

[3] The Commission has rejected a comparison of District Attorney and Public Defender budgets as a means of measuring the adequacy of defense funding, since District Attorneys are required to fund broad categories of activity that do not affect the work of public defenders, and the nature of these activities vary significantly from one county to another. Comparisons across time within the same county, however, may suggest changes that signal growing inequity.

[4] In addition to Placer County, Barker/Ciummo has been the primary public defender for Madera County since 1988 (Annual Caseload 8,000); for Amador County since 1994 (Annual caseload 1,000); for Modoc County since 1999 (Annual caseload not reported); and for Calaveras County since 2001 (Annual caseload 1,100). They also provide contract defense representation for Napa County in dependency matters, for Fresno County in conflict cases and juvenile dependency matters, and for Sonoma County in juvenile dependency matters. See website, www.ciummolaw.com. The Ciummo website, under the headline, "What Would Your County Do With Hundreds of Thousands of Dollars?", boasts that "Every county we have contracted with has saved substantial funds over their previous method of providing these services. Additionally, our firm has an excellent record of containing cost increases."

[5] Wiener, *Placer Swaps Legal Teams,* Sacramento Bee, June 28, 2006.

[6] Miller, *California Defense Firm Borrows Wal-Mart Business Model,* The Recorder, Dec. 26, 2007.

[7] *Id.*

investigative services.[8] There is no comparative data available to track the impact upon per attorney caseloads or trial rates in the counties that have entered into flat-fee contracts for indigent defense. Mr. Ciummo did not respond to Professor Benner's survey for the Commission regarding any of the counties with which he contracts. In two recent unpublished rulings of the California Courts of Appeal, convictions have been reversed and/or remanded because of a conflict of interest created by Ciummo's representation.[9]

The most direct way to deal with the potential conflicts that could be presented by flat fee contracts for indigent defense services would be for the legislature to mandate certain provisions be included in such contracts. Contracting standards are already imposed by the state for county contracts for public works. See California Public Contracts Code, Sections 20120-20145. Minimal standards could be drawn from the Guidelines on Indigent Defense Services Delivery Systems approved by the State Bar of California in 2006. The State Bar Guidelines provide:

> Indigent defense providers should enjoy parity, to the extent permitted by law, on a relative scaled basis, with prosecutors in access to

[8] *See, e.g.*, Agreement with Richard A. Ciummo and Associates for Alternate Indigenet Defense Services, June 6, 2007, available at www.co.fresno.ca.us/portal/BBRs/Agreement%20with%20**Richard**%20A.%20**Ciummo**%20and%20Associates%20for%20Alter...

[9] *People v. Cousins*, 2007 Cal. App. Unpub. LEXIS 2844 (3rd App. Dist. April 9, 2007); *In Re Manuel L.*, 2004 Cal. App. Unpub. LEXIS 8335 (5th App. Dist. Sept. 13, 2004).

> technology, criminal history information, other criminal justice databases such as those housing DNA information, legal research tools, investigators and investigative tools, including a travel budget, experts, paralegals, forensic labs, facilities, data processing and exhibit creation capability. *The cost of these resources should not operate as a charge against the indigent defense provider to such an extent that the net personal compensation to the defender is diminished.*

Id. at 30 (emphasis added). The Commission recommends that legislation be enacted to provide that when Counties contract for indigent defense services in criminal cases, the contract shall provide separate funding for accessing technology and criminal justice databases to the extent those are provided by law, legal research tools, travel expenses, forensic laboratory fees and costs, data processing, modern exhibit capabilities, paralegals, investigators and expert witnesses with appropriate qualifications and experience.

Oversight of Defender Services.

Just regulating flat fee contracts, however, will not address problems of underfunding and overload that can affect all defender offices, whether contractual, assigned, or public defender types. Comparisons of defender

offices to measure the availability of resources is currently impossible, because these offices are not required to collect data on the handling of cases or report it to any state agency. California lacks any statewide authority to monitor the adequacy of defender services, leaving it up to each county to determine the level of funding to be provided. That level may be determined without appropriate deference to minimum standards for delivery of defense services.

Essential minimum standards for indigent defense delivery systems have been drafted by a Commission of the State Bar of California. *Guidelines on Indigent Defense Services Delivery Systems* (2006). The Guidelines provide clear standards with respect to standards of representation, qualifications of indigent defense providers, quality control, training, juvenile practice, resources, compensation, ethics and management/leadership. The Guidelines were drafted by a group of lawyers broadly representative of the defense bar, including public defenders, contract defenders, appointed lawyers and private practitioners. As previously noted, a survey by the California Public Defenders Association found a high level of compliance

with the guidelines among institutional public defender offices. The Guidelines themselves lack any direct enforcement mechanism.[10]

As the State Bar Commission noted, workload standards vary significantly from state to state, and the 1973 national standards formulated by the National Advisory Commission on Criminal Standards and Goals[11] are of limited utility today. Because the organization of the courts and assignment of deputies varies substantially from county to county, it is not possible to devise numerical caseload standards on a statewide basis. There is not even agreement, either in California or on a national basis, of how to define a "case" for purposes of caseload standards. But it might be possible to identify counties where the workloads are excessive, and broad numerical standards could help to identify those counties where excessive workload may be a problem, and calls for further investigation.

The Commission has considered whether the functions of establishing statewide performance standards and monitoring the adequacy of defender services at the county level should be assigned to an agency with statewide

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[10] The California Rules of Professional Conduct require a lawyer to act competently, and this includes the duty to supervise the work of subordinate attorneys. Rule 3-110, California Rules of Professional Conduct, and Discussion to Rule 3-110. In addition, Rule 1-120 provides "A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act." Thus, public defenders may risk State Bar discipline if excessive caseloads are not addressed.

[11] Standard 13.12 of the NAC Standards were: no more than 400 misdemeanors per attorney per year; or no more than 150 felonies per attorney per year; or no more than 200 juvenile cases per attorney per year. The associate attorney who was discharged in Shasta County was being assigned 3,600 misdemeanors per year.

jurisdiction. The composition and role of such an agency would have to be carefully defined after full input from the affected defender service providers. The Commission reviewed three alternatives which might be employed to achieve this goal in California. The alternatives are:

(1) The Administrative Office of the Courts (AOC). The AOC already funds the appellate projects which provide counsel for indigent appeals. Minimum standards to qualify for appointment as counsel for indigent appeals and death penalty appeals and habeas claims have been established. In 2002, the California Judicial Council also set minimum standards for appointment to represent defendants at trial in death penalty cases. Individual defender offices and contractors could be required to report to the Administrative Office of the Courts, on an annual basis, the data necessary to confirm their compliance with minimum standards for the hiring of deputies, whether the caseloads assigned to them may be excessive, the adequacy of training, compliance with ethical standards, independence, quality control, investigative resources and compensation. The AOC could then certify that particular counties are meeting minimal standards. The AOC has accumulated broad experience in weighting caseloads in order to assess court workloads. They would be uniquely equipped to measure

defense caseloads in California and identify counties that fall outside the normal range.

The disadvantage of using the Administrative Office of the Courts, however, is a potential conflict of interest and violation of the constitutional separation of powers. The identification of a county as falling outside the normal range could give rise to claims of ineffective assistance of counsel that the courts would have to litigate. The intrusion of a judicial agency into the operation of defender offices could cross the line into executive and legislative functions.

(2) The California State Bar (CSB). The California State Bar Commission on the Delivery of Legal Services to the Indigent Accused promulgated voluntary guidelines for the delivery of indigent criminal defense services in 1990. In 2005, the Bar Board of Governors appointed a ten member working group to collect information and public comment on the 1990 Guidelines and submit a revised set of guidelines by December of 2005. The *Guidelines on Indigent Defense Services Delivery Systems (2006)* discuss standards of representation and quality of services, with suggested adaptations for each of the alternative delivery systems. While no effort was made to establish numerical caseload standards, and no means of enforcement was suggested, these tasks could be delegated to the California

State Bar by the legislature. Through appropriate legislation, the State Bar could be designated as the repository of mandated reports from defender organizations and contract defenders throughout the state, empowered to establish minimum standards, and authorized to conduct investigations and certify counties that are in compliance.

One difficulty of utilizing the State Bar, of course, is that the State Bar is funded entirely by the dues paid by its member lawyers. It would be unfair to tax the bar to fund a function that is the ultimate responsibility of the State as a whole. Thus, any delegation of this task to the State Bar should be accompanied by state appropriation of funds to finance this activity.

(3) Establishment of a new Indigent Defense Commission (IDC). In recent years, a number of states have responded to the national crisis in underfunding of indigent defense services by the creation of agencies to establish statewide standards and oversight of defense services. In 2001, Texas enacted landmark legislation, known as the Texas Fair Defense Act. It provides for statewide standards and oversight of defense services through a new Texas Task Force on Indigent Defense, and provides partial state funding of defense services for the first time ever.

Just as in California, Texas counties have the primary responsibility for funding and organizing indigent defense services. Counties can opt to

use a court-appointed counsel, public defender or contract counsel system to provide indigent defense services, or they can use some combination of these models. Out of the state's 254 counties, however, only seven have a public defender office. The Texas Task Force on Indigent Defense provides state formula grants to counties, whose costs increased from the reforms put in place by the Texas Fair Defense Act. In addition, the Task Force develops minimum standards of quality indigent defense services; monitors and assists counties in meeting those standards; and works to bring consistency, quality control and accountability to indigent defense practices in Texas. *See* http://www.courts.state.tx.us/tfid/.

In 2004, Virginia enacted legislation creating the new Virginia Indigent Defense Commission, which began overseeing both assigned counsel and public defender programs throughout the state in July, 2005. Among its other duties, the Virginia IDC is charged with settting caseload limits and establishing and enforcing qualification and performance standards for indigent defense representation.

Statewide systems have also operated successfully for many years in Massachusetts and Indiana. In Massachusetts, a single, independent organization, known as the Committee for Public Counsel Services, oversees both public defenders and 2,000 private attorneys statewide, and has adopted

training and performance standards as well as caseload limits. Indiana has a state commission, known as the Indiana Public Defender Commission, which is authorized by statute to reimburse counties 40% of their expenditures in felony and juvenile cases, provided the counties create an independent board to oversee defense services and comply with the commission's caseload, qualification, and other standards for representation. Currently, 53 of the state's 92 counties have adopted the commission's standards and established independent boards. *See* Gideon's Broken Promise: America's Continuing Quest for Equal Justice (American Bar Assoc. 2004).

The difficulty with assigning this task to a new independent agency is the costs of the creation of a new bureaucracy, and its tendency to grow. The ideal system would assign *both* the function of collecting data (preferably though statutorily mandated reporting from defense contractors and public defenders) to establish performance standards, *and* the function of identifying counties which are in compliance, to the same entity. Conceivably, however, those functions could be separated. The Administrative Office of the Courts or the State Bar, for example, could be charged with collecting the data needed to propound statewide caseload and performance standards, and formulating those standards. The subsequent

identification of noncompliance with those standards could then be delegated to a newly created IDC.

The Commission was unable to agree upon either the need for oversight or the identification of the appropriate oversight entity. Strong opposition was registered by public defenders who are concerned that the designation of an oversight agency could be counterproductive. Some public defenders have expressed concern that, rather than elevating the quality of indigent defense services in California, a process of identifying providers who are in compliance with minimum standards will create a race for the bottom. Counties that currently provide adequate funding for defense services could seek to cut funding to the level that meets minimal standards for compliance. In today's budget climate, this is a realistic cause for concern.

The Commission recommends that the California State Bar reconvene its Commission on the Delivery of Legal Services to the Indigent Accused to resolve the issues of how adequate funding of defense services in California can be achieved.

RECOMMENDATIONS OF THE COMMISSION

1. The Commission recommends that legislation be enacted to provide that when Counties contract for indigent defense services in criminal cases, the contract shall provide separate funding for accessing technology and criminal justice databases to the extent those are provided by law, legal research tools, travel expenses, forensic laboratory fees and costs, data processing, modern exhibit capabilities, paralegals, investigators and expert witnesses with appropriate qualifications and experience. Full time defense counsel should be compensated at rates equivalent to comparable prosecutors.

2. The Commission recommends that the California State Bar reconvene its Commission on the Delivery of Legal Services to the Indigent Accused to make recommendations regarding the adequacy of funding for defense services which meet acceptable standards of competent representation.

Respectfully submitted,

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