

“Laws grind the poor, and rich men rule the law.”
Oliver Goldsmith

I. INTRODUCTION:

I would like to believe that justice is blind and that the quality of mercy is not strained. I would like to believe that there is equal justice for all and that justice is truly blind to race, religion and wealth. However, after nearly twelve years of defending many poor people, charged with committing crimes, I know that the sad reality of our criminal justice is that generally those who can afford the best defense usually get it, while the “have nots” are ground up and discarded into the wastelands of the penal system. For the most part Oliver Goldsmith’s quote was right. The criminal justice system has in the past and continues today to grind the poor. Unfortunately, Alabama’s treatment of indigent defendants is a prime example. This State ranks as one of the lowest in funding for the defense of indigents charged with crimes. There are few adequately funded public defender programs in the State and none in the three largest cities in Alabama. Finally, there is no public defender program for representing indigents charged with capital crimes unlike many other states.

The current indigent defense system in Alabama relies primarily on the willingness of the bar to accept appointments to these types of cases. This means lawyers must be willing to defend what in many times are horrible cases for little compensation. The product of little compensation and the thankless task of representing the poor is many times sub par legal representation. Many veteran lawyers refuse to take these cases because such cases can financially cripple them. Other lawyers take these cases in large numbers and plead them out in mass in order to make money based on sheer volume. Finally, many of these cases are handled by new lawyers with little if any “trench warfare” experience. Many new lawyers are dropped into a hostile system virtually unarmed to battle the State and the subsequent casualties of war are the indigent clients. The indigent defense system virtually allows young lawyers to “cut their legal teeth” many times at the expense of the object poor.

While the tenor of this introduction expresses my disdain for the current system, I am aware of many fine lawyers who provide zealous and effective assistance of counsel to the poor regardless of the meager compensation. These materials are geared to provide some ammunition to the new lawyers entering this system. The tradition of representing the poor is a noble and honorable. Without the willingness of lawyers, especially new lawyers, to effectively represent the poor our criminal justice system will become criminal rather than just.

“Most good lawyers live well, work hard, and die poor.”
Daniel Webster

II. ALABAMA’S INDIGENT DEFENSE SYSTEM (An Overview):

Section 15-12-2 Code of Alabama (1975) provides the methods by which the circuit and district courts of a county in the State can create an indigent defense system.

Typically indigent defense in Alabama falls into one of three categories:

- 1.) Contract Lawyers
- 2.) Public defenders
- 3.) Appointed Lawyers

The “Contract Lawyer” system empowers the judicial circuits to contract with lawyers and/or firms, associations, corporations or partnerships of licensed lawyers to provide representation to indigent defenders. (Section 15-12-26 through 15-12-29 Code of Alabama (1975)). This system is employed in a variety of degrees in different courts throughout the State, most notably to my understanding in Mobile and Montgomery.

The “Public Defender” system allows for a licensed lawyer to be chosen by a county’s indigent defense commission for a term not exceeding 6 years. The public defender must provide defense services to indigent defendants charged with felonies and misdemeanors within the geographic jurisdiction. Also, if

requested and consented to by a municipalities governing body and the indigent defense commission, the public defender can provide defense services to indigents in municipal courts in the geographic jurisdiction. A public defender may represent an indigent on appeal in the State appellate courts if the indigent defense commission consents. Finally, if empowered by the presiding circuit court judge and the indigent defense commission, the public defender may administer the system of appointing private counsel (for conflicts) to represent indigents within the geographic jurisdiction.

The public defender is a salaried position set by the indigent defense commission and approved by the Administrative Director of Courts. The salary and expenses of public defenders are all paid by the State through the Fair Trial Tax Fund; except, that in counties authorized to impose their own court costs that county shall fund the defender's services from their court costs, and the State pays a reasonable share of the cost of maintaining the public defender. Finally, the indigent defense commission, subject to the approval of the Administrative Director of Courts, may approve expenditures for additional attorneys, investigators, and other personnel and nonpersonnel expenses of the public defender of the given geographic jurisdiction. (Sections 15-12-40 through 15-12-46 Code of Alabama (1975)).

A "Public Defender" system is in place in several counties in Alabama; the largest is in Tuscaloosa, which has numerous lawyers and support personnel. Several smaller offices exist elsewhere in the State, such as in Shelby County.

The "Appointed Counsel" system is the most prevalent indigent defense system in Alabama. Under this system, judges appoint private lawyers who are willing to represent indigents. Typically most lawyers are appointed at the district court level however, appointments can be made at the circuit court level, for appeals, or post-conviction matters (i.e. Rule 32 petitions). Appointed lawyers in Alabama are now paid \$50.00 hour out of court and \$30.00 hour in court with a different maximum fees ranging from \$3,500.00 in Class "A" felony cases, \$2500.00 in Class "B" felony cases and \$1500.00 in Class "C" felony cases. In capital or life without parole cases there is no maximum fee limit. (1975)). For appellate representation the hourly is \$50.00 with a maximum fee of \$2,000.00. In post conviction representation, the maximum fee of \$1000.00. Effective October 1, 2000, the hourly rates will be increased from \$40.00 to \$60.00 for in court representation and from \$30.00 to \$40.00 for out of court representation at the trial level, while the increase for appellate and post conviction representation also increases. The appointed lawyer is paid after the completion of the case. (i.e. plea of guilty, dismissal, mistrial, acquittal or guilty verdict). Appointed lawyers must

file a fee voucher with the particular court in which the representation took place. If approved by the court the clerk's office transfers the voucher for processing to the Comptroller's Office. If approved by the Comptroller, the appointed lawyer receives payment from the State. Appointed counsel can expect to wait upwards of 12 weeks from the time their voucher is submitted to the Comptroller's Office for payment. (NOTE- The "Appointed Counsel" system also serves as a parallel system for contract lawyers and public defenders in cases where multiple representations of indigents creates a conflict.).

In my estimation, Alabama's current indigent defense system is still woefully overburdened and under funded. Contract lawyers and public defenders on the State level become "plea mills" whereby the majority of cases are plead out because of a combination of the sheer number of cases combined with a lack of lawyers, investigators and support staff necessary to provide any real individualized legal representation. Appointed counsel does not fair much better despite the fact the hourly rates have increased it to 18 years and the inclusion of the hike to a judicial pay raise bill to get it passed in the legislature and signed by the Governor.

To put these rates into perspective the \$3,500.00 cap on a Class A felony such as murder is exhausted by 57 hours out of court time in preparation of a case or 25 hours in court time. Combine the rates in preparation of a murder case from initial appointment at the district court level through trial in circuit court it is clear to see the maximum will be reached quickly. It is very common for appointed lawyers to reach and surpass the statute's monetary maximum *prior to* the trial of a given case.

As I touched on above the funding for appointed lawyers is provided through the Fair Trial Tax Fund. A fair trial tax of approximately \$30.00 is assessed on all criminal and civil filings in the circuit, district and municipal courts in the State. The revenue from this fund not only reimburses appointed lawyers but is also used to pay expert professional services, (i.e. investigators, psychiatric evaluations, and court reporter fees). Once again, to add some prospective, in 1996 approximately \$40 million dollars of the State 's budget was allocated to Alabama's district attorneys. This figure does *not* include millions of dollars allocated in local supplements nor the \$1.3 million of additional funding for support services through the Office of Prosecution Services. In 1995, approximately \$10.7 million was spent from the fund for court reporters (\$1 million), experts, investigators *and* to compensate lawyers *statewide* for indigent representation. (A Report On Alabama's Indigent Defense System - Capital Cases, The Equal Justice Initiative, March 1997.).

*“To be an effective criminal defense counsel,
an attorney must be prepared to be demanding,
outrageous, irreverent, blasphemous, a rogue, a renegade,
and a hated, isolated lonely person...
few love a spokesman for the despised and the damned.”*
Clarence Darrow

III. APPOINTMENTS AND DEFENDING THE INDIGENT CLIENT:

A. How To Get Appointed Cases:

My knowledge of the indigent defense system does not extend to every county in the State of Alabama. My practice is primarily in Jefferson County, which currently operates on an appointed lawyer system. However, whether your county’s indigent defense system is public defender, contract or appointments, sooner or later you may either voluntarily or involuntarily be appointed to defend an indigent person on a criminal charge.

For those of you actively seeking such appoints, I suggest you first meet with all the district and circuit judges in your home judicial circuit and advise them you wish to accept such appointments. For example, in Jefferson County the three district court judges in the criminal division keep a list of all lawyers willing to accept appointments. The judges scroll down the list alphabetically appointing lawyers to various cases. The vast majority of appointments are made at the district court level, so it is vital to get on the individual judge’s appointment list. To do so you should call or write the Judge or his secretary and ask that your name be included on the appointment list of each of the three judges. Typically you will be notified by phone as well as in writing of your appointment by the court’s bailiff or secretary.

At the circuit court level (in Jefferson County), appointments occur for indigents at the trial level, for direct appeals, and post-conviction representation (i.e. Rule 32’s or probation violations). New lawyers should also try to meet with

circuit court judges and inform them of their desire and availability to represent indigents. It has been my experience that out of county appointments are few and far between. Typically judges appoint lawyers from within their own county. On some occasions, especially in high profile terrible fact situations, judges will call other judges from other counties seeking an out of county lawyer to accept the appointment.

B. Defending In The State District Court:

I am not going to pretend that I can provide new lawyers with a foolproof map of how to defend any given criminal case. Every case and client is unique and must be handled in an individualized manner given the facts of the case. However, I will offer some tips on dealing with appointed cases on the district court level.

First, some GROUND RULES. Once you've been appointed go PULL THE DISTRICT COURT FILE- READ IT! Check the charge, bond, age of client, aliases, phone numbers, and addresses, the State's witness list, etc. Run your client's name through the State computer system to see if your client has any prior convictions and/or pending cases.

MEET WITH YOUR CLIENT! Most indigent defendants are in jail because they are too poor to make bond, their bond is too high, they do not have bond, or a combination of these things. If the client is in jail go and there and spend sometime getting to know the client and his or her's case. Too many lawyers ignore these clients in jail and rarely meet with them. Do not expect the client to respect you or your advice if you will not spend anytime with them. Set ground rules with them about how often you can meet with them, how long you can meet with them and whether you'll accept collect calls from the jail. Also if you can't meet with them as much as they want, write them, you'll be surprised how much this means to anyone in jail.

If your client is in jail you should determine if you could get them out on BOND. Depending on the case, the client's prior record, and a variety of factors, you should determine what avenues that might be available for their release. Are there any relatives or friends who could make the bond by using their property? Is there a pretrial release service such as TASC (Treatment Alternatives to Street Crime) or through the Sheriff's department pretrial release program that can help them arrange bond? Is this client's charge minor enough that he or she qualifies

for a personal recognizance bond from the court? Explore what might be available in your jurisdiction for your client's release.

Request or have a PRELIMINARY HEARING on the case. Unless the facts of a given case and the client wish to enter into plea negotiations for settlement of the case, or if you are sure the facts are so bad that after the hearing the judge may revoke or increase your client's bond, then you should have a preliminary hearing. In Jefferson County a preliminary hearing is automatically set in district court, while other counties may vary. So check into it and file a request for a preliminary. (Rule 5.1 Ala.R.Crim.P.). If you have a preliminary hearing be sure its MEMORIALIZED (i.e. tape recorded or by court reporter)! Generally you will not get money for a court reporter so ask the judge if you can use a pocket tape recorder and record the witness' testimony. (Also see if the Deputy DA will stipulate to the recording as an official transcript of the hearing in trade for giving them a written copy.). Trust me; if the case goes to trial this will help you later. Sometimes weaknesses in the State's case can lead to a dismissal of the charge by the judge after a preliminary hearing, or the State may be more willing to offer a favorable settlement to your client.

Generally the defense does not offer witnesses at a preliminary hearing in support of a specific defense to a given charge; however, this decision is not an ironclad rule. Remember that the State only has to prove "probable cause" and it will invariably rely on hearsay to do so. (See, Rule 5.3(c)Ala.R.Crim.P.). If you want a specific State witness' testimony, you need to subpoena that person yourself. Also type "Not on Call" on the subpoena to make sure they show up. Subpoenas and subpoena duces tecum (subpoenas for documents) are issued through the district clerk's office. Go to the clerk's office and ask for the form. Subpoenas are \$8 per subpoena, but the costs are now figured in to the overall court costs so no money is due up front. (In appointed cases type "INDIGENT" across the top of the subpoena form). Finally, the preliminary hearing is not intended to be a discovery device (a coin phrased by a prosecutor no doubt); however, you are entitled to discovery in some situations so use it for that purpose. You can file a discovery motion under Rule 16 of the Alabama Rules of Criminal Procedure. If a witness uses a document, report, etc., to refresh recollection then you entitled to it for cross-examination. If your client has made a statement, you are entitled to it. If the witness testifies based on hearsay (i.e. a detective reading from another officer's police report or a witness' statement) then you are entitled to the document, report, etc., for cross examination. The more information you can acquire at prior to trial the better prepared will be for trial.

If you WAIVE a case to the grand jury (i.e. no preliminary hearing) be sure to get some kind of discovery from the State (i.e. police reports, etc.). Do not give them something for nothing. Also, if an offer is made by the State and your client does not choose to accept it, then make sure that the prosecutor holds the offer "OPEN" so you will not lose it at the circuit court level.

PLEAS in district court are very common. Many times, the State will reduce charges to misdemeanors for some first time offenders. Youthful Offender status may be available for offenders under 21 years old. Drug Court (intensive drug treatment program) or deferred prosecution (drug treatment program for minor drug offenses) may be available to some first time drug offenders. Find out what plea options are available before you plea to any felony. There is a lot of paper work involved in a guilty plea, check with the court's bailiff or clerk as to what particular forms you'll need to complete.

The best advice I can give new lawyers is if you do not know how to do something or answer to a particular question, ASK FOR HELP!! Do not look to the prosecutors for help because they are adverse to you. While many are honorable advocates, this does not mean you might not be taken advantage of by some of them. Many veteran lawyers are willing to give you advice on the ins and outs of the various courts, prosecutors, and other matters that will prove extremely helpful to you in the long run. Seek these people out for help because legal mistakes can prove costly to you as well as your client.

District Court Checklist:

- 1.) Review District Court File
- 2.) Meet with Client ASAP!
- 3.) Resolve Bond Situation
- 4.) Preliminary Hearing or not (Tape It!!)
- 5.) Settlement to plea or not to plea?
- 6.) ASK FOR HELP!!

C. Defending in the State Circuit Court:

Circuit court representation typically involves cases that are going to be tried or for whatever reason could not be resolved in district court. Cases at this level move either quickly or at a snails pace depending upon the jurisdiction. Hopefully, these tips will make the job somewhat easier. Before we push on through circuit court let us spend a minute in that twilight zone period between district and circuit court known as “the grand jury”.

When a case is bound over or waived to the grand jury from district court there is a certain amount of lag time before an indictment is handed down and the case is docketed in circuit court. The amount of lag time varies with each geographic jurisdiction. In Jefferson County this time can drag out to 4 to 5 months because of the sheer volume of cases. Appointed counsel should use this time in preparation of the case. (i.e. legal research, witness interviews, etc.) This time is especially hard on those indigent languishing in jail on high or no bonds. You may wish to consider filing a Petition for a Writ of Habeas Corpus to the circuit court or the Court of Criminal Appeals while the case is at the grand jury for relief from a high or no bond. Also, VISIT YOUR CLIENT IN JAIL!! No not every day, but maybe once every other week and/or accept a collect call here and there. Generally you’re the only source of information the client has about the case, so get up to jail and see them!

Let’s begin with the GROUND RULES for circuit court. You’ll probably receive notice by mail that your case has been assigned to a particular judge for arraignment/pretrial. Once you’ve received this notice, if you haven’t already be checking, go to the clerk’s office and PULL THE CIRCUIT COURT FILE - READ IT! Why, you ask? Didn’t I do that in district court? Yes, you did, but in many jurisdictions the circuit court file will contain a variety of things not contained below, such as the indictment (the document that tells you specifically what you client’s charged with doing) and most importantly the GRAND JURY SHEET!! The grand jury sheet is usually a one-page document that lists the STATE’S WITNESSES. This document can help you ascertain who testified at the grand jury and when. It also contains addresses and phone numbers of witnesses so you can conduct your own investigation. READ IT, USE IT!!

The ARRAIGNMENT/PRETRIAL HEARING. While varying from jurisdiction to jurisdiction, this hearing holds a variety of purposes. Your client will either be formally arraigned or you’ll execute a waiver of arraignment. If your client is eligible for Youthful Offender consideration, you need to make an application with the court at this time. Generally, it is at the pretrial at which the State will make a settlement offer. In Jefferson County, many cases are resolved at the pretrial. If it is a drug case you should re-approach the prosecutor about

drug court or deferred prosecution. If the case cannot be settled the case will be set for trial and placed on the next available trial docket. If your client is in jail this is another opportunity to seek a bond reduction.

PRETRIAL MOTIONS. Hopefully, if you had access to the circuit file prior to the arraignment/pretrial hearing, you should have already filed any pertinent pretrial motions. **REMEMBER, ALWAYS FILE A PRETRIAL DISCOVERY MOTION!!** The discovery motion is the legal vehicle by which you request the State to provide you with the information necessary to defend your case; this evidence includes exculpatory evidence, physical evidence, etc. Try to file any other motions at this time (be sure to serve a copy on the DA's office). The number and nature of pretrial motions generally dictate whether a judge will hold a hearing. For example, motions to suppress albeit a statement or physical evidence is heard at a separate hearing or immediately prior to trial depending on the judge. You will have to determine what motions are applicable in your case. Once again, if you are not sure what motions to file seek out some advice from other lawyers you can trust!

INVESTIGATORS & EXPERTS. Appointed lawyers can obtain through the circuit court funds to hire independent experts or the services of a professional investigator. In non-capital cases the circuit court may authorize up to \$500 dollars for such expenses. (See, 15-12-21(d) Code of Alabama (1975)). However, this princely remuneration must be requested and approved in advance of trial. Motions such as these can be filed *ex parte* and under seal (i.e. no service to the State) so you can articulate to the judge what you and why you should get it. (See, Ex parte Moody, 684 So.2d 114 (Ala. 1996); Ex parte Dubose, 662 So.2d 1189 (Ala. 1995)). Remember, if you get these funds approved by the judge, they are paid at the end of the case not at the beginning, so your expert or investigator will have to wait to get paid just like you.

TRIAL PREPARATION. The trial of an indigent's case is no different than any that of any other criminal case from my perspective. The key to success for your client is your PREPARATION! Do not forget to use subpoenas to get witnesses and documentary information for trial. Prepare motions *in limine* for any disputed evidentiary issues. Prepare for your voir dire as it relates to the specific case your trying. Provide the court with jury charges pertaining to the most important issues. Preserve issues for appellate review during the trial. Develop the THEORY OF YOUR CASE and THEMES associated with the theory. Prepare your client and any witnesses for the rigor of cross-examination. Make sure your client has appropriate clothing for court (not necessarily a suit)

and most of all provide zealous, vigorous, and effective representation for your client at all times inside and outside the courtroom.

CONVICTIONS & SENTENCING. Whoever coined the phrase, “You can’t win them all.” was probably a criminal defense lawyer. Even the best criminal defense lawyer will tell you that you are going to lose cases, welcome to Reality 101. However, even after conviction your job is not over. After a conviction you should ask the court for a pre-sentence report for your client. A conviction does not necessarily preclude probation or a spilt sentence for your client. Get the report in **ADVANCE OF SENTENCING** and go over it for errors with your client. Be prepared to attack the propriety of any prior convictions the State may wish to use to enhance your client’s sentence pursuant to the Alabama Habitual Offender Act. Try to give the judge sentencing alternatives to incarceration. Preserve sentencing issues for appeal.

Following sentencing, decide whether to file a Motion for New Trial and/or whether to file Notice of Appeal. You must know the specific time requirements in order to timely file the appropriate pleadings. Typically, you will remain as appellate counsel after a conviction, unless you file a motion to withdraw and are relieved by the trial court from any further representation. Make sure the trial court allows the client to receive a free transcript of the trial based on the client’s indigency, regardless if you remain on or withdraw from the case.

Circuit Court Checklist:

- 1.) Review the Circuit Court File
- 2.) Prepare and File Pretrial Motions
- 3.) Get Discovery From the State
- 4.) Review Settlement Possibilities
- 5.) Get Bond Reduction
- 6.) Experts and/or Investigators
- 7.) Trial Preparation
- 8.) Conviction & Sentencing Preparation

D. Defending on Appeal & Post-Conviction:

Indigent representation at the post-conviction level falls mainly into three categories: Appeals, Rule 32 Petitions, and Probation violations. I will try to hit the highlights (if there are any) of each category.

APPEALS. As I mentioned before, lawyers appointed at trial generally remain on through the direct appeal of a conviction, unless relieved by the trial court. (Rule 24(b)(1) Alabama Rules of Appellate Procedure). A circuit judge typically appoints lawyers, after the withdrawal of the appointed or retained counsel. Direct appeal of the conviction and sentence is taken to the Alabama Court of Criminal Appeals. If the conviction is affirmed, appointed counsel can seek a Rehearing with the Court of Criminal Appeals, and if the rehearing is denied, then a Petition for a Writ of Certiorari with the Alabama Supreme Court can be filed. The Court of Criminal Appeals recognizes that indigent representation *does not* extend to filing an application for rehearing or Petition for Certiorari. (See, Kinsey v. State, 545 So.2d 200 (Ala.Cr.App. 1989)). However, if you wish to give you client a chance at Federal Habeas review then go ahead and file to exhaust the State remedies.

RULE 32 PETITIONS. The Rule 32 petition is Alabama's post-conviction pleading. The Rule 32 petition is a convicted indigent's last gasp in the State system for post conviction relief. Generally, the most asserted grounds for relief is that prior counsel was ineffective and that the client was prejudiced by that ineffectiveness. Typically, these petitions are written and filed *pro se* and/or written by "jailhouse lawyers" with little if any understanding of the law. A circuit judge in whose court the petition was filed generally appoints the lawyer to represent the indigent on the petition. Some petitions are dismissed summarily; however, if there appears to be merit, then judges will appoint lawyers to represent the petitioner.

This representation is truly thankless. The indigent serving time in the penitentiary probably already had an appointed lawyer who he or she thinks (or has been lead to believe) sold them out. The trial judge sees Rule 32's a frivolous pleadings further backlogging their docket. Prosecutors deem them frivolous and a waste of time and resources in having to respond to them. Finally, the original lawyer is not fond of being referred to as "ineffective" and probably will be somewhat hostile to your position. Sounds fun, huh?! So let us hit the **GROUND RULES!**

REVIEW THE PETITION & THE CIRCUIT COURT FILE. Most indigent petitions are filed *pro se* so as you can imagine they are terrible. Make sure the petition asserts viable legal grounds in accordance with Rule 32 of the

Alabama Rules of Criminal Procedure. By reviewing the underlying circuit court case file, you will bring yourself up to speed with what happened procedurally prior to the petition. **MEET WITH THE CLIENT.** This means travel. Inmates in the State penitentiary file most Rule 32's so this means you'll have to make arrangements to go to one of Alabama's correctional facilities. Because you cannot always be driving up and down Alabama's highways on one case, it is important to write your client or accept collect calls. The client is an important source of information. Many times the client has a copy of the transcript of the trial and other documents that may prove helpful in presenting the petition.

AMEND THE PETITION TO INCLUDE ALL POSSIBLE ISSUES. Remember the Rule 32 petition will probably be bare boned and shoddily written. It's your job to insure the petition not only meets the procedural requirements of the rule, but also is factually and legally sufficient. All potential legal issues for relief *must be addressed* in the petition. **FILE DISCOVERY & OTHER PRETRIAL MOTIONS.** Look at the case as you would from the beginning and try to get as much relevant information as possible. **THE RULE 32 HEARING.** If the court does not boot you out summarily, then you will probably get an evidentiary hearing on the issues you have raised. Be prepared to subpoena witnesses and present evidence in support of the petition. The burden is on you!! If ineffectiveness is the major ground for relief then try to get a lawyer to testify as an expert for your client (this is extremely touchy area and experts are hard to find). The most important thing you can do at this hearing is **PRESERVE THE RECORD FOR APPEAL** because the court denies the majority of such petitions. If you lose be prepared because you will probably carry on as appellate counsel.

PROBATION REVOCATION HEARINGS. There is an old saying that in Alabama once you are appointed on a case, you are appointed for life. This saying, while not totally accurate, seems to true concerning probation revocations. Let us say you have successfully negotiated a plea, or convinced a judge after trial to granting your client probation or if the sentence has been spilt, and the client has served some amount of time and is placed on probation for the remainder of time. Invariably, one of your former clients, long after you have been paid and have closed the file, will do or fail to do something that causes them to be arrested for a probation violation. (i.e. an arrest on a new charge, failure to report to probation, etc.). Many judges will require you to continue your representation of the client regarding the probation violation charge or a new lawyer will be appointed to handle the violation.

In handling these matters, you first need to determine the nature of the violation. If the violation is not based on a new criminal charge, you may have a better chance at getting the judge not to revoke your client's probation. GET A COPY THE PROBATION VIOATION REPORT. Go to the court file and read over the probation officer's report. CONTACT THE CLIENT'S PROBATION OFFICER. If your client has not totally alienated the probation officer against them, you may be able to get the probation officer not to recommend revocation. If the violation is based on a new charge you'll need to contact the client's other attorney in order to determine the status of the new case in order to determine how you'll proceed on the revocation charge. (i.e. if the new case will be settled you may wish to consent to the revocation and get the judge to order that the remainder of the sentence on the revocation be run concurrently with the sentence on the new charge).

*"A lawyer starts life give \$500 worth of law for \$5,
and ends giving \$5 worth for \$500"*
Benjamin H. Brewster

IV. COMPENSATION IN INDIGENT CASES:

A. How To Get Paid (State Level):

Once the case is completed (i.e. plea of guilty, dismissal of charge, acquittal, conviction or mistrial) the last step in the process is getting compensated for your representation. The method by which you get paid is as arduous a process as the representation itself, if you do not know what you're doing. I hope this explanation of the process makes the process easier for all.

FEE DECLARATION FORMS. This is a multi- page form, which can usually be located at the Court Administrator's office, is the sole form, which you use in order to be paid by the State. The form requires a variety of information including the case number, appropriate court, style of the case and charge, dates of appointment and disposal of the case, hourly and expense totals and the total monetary claim. In addition to the form you *must* attach to the form an "Itemized

Worksheet” that sets out in detail your in-court and out of court activities and expenses by date with the amount of time involved in each activity. How you chose to create this worksheet is up to you.

DOCUMENTING EXPENSES. If you have incurred expenses, which have been approved by the court, you will need to provide documentation of the approval with the voucher. This task is accomplished by attaching a copy of the specific order to your voucher. Failure to attach the order will mean your voucher will be returned to you by the Comptroller’s Office for you to provide them with a copy of the order. In the case of expert and/or investigative services in addition to the authorizing court order, you will need to attach a worksheet from the expert or investigator specifically documenting their time and activities; failure to do so may mean the return of the fee declaration form. (NOTE - Remember the expert and/or investigator’s fee is included in your check so you will have to make a separate distribution of their fee through you office’s operating account).

The Court of Criminal Appeals usually allows appointed appellate lawyers to include in the fee declarations documentary proof of incidental expenses (i.e. printing, binding and mailing costs) which can be recouped. So keep all your receipts in appeal cases and attach copies of them if you want to be reimbursed.

Once the fee declaration form, worksheets, orders, etc., has been completed, (make sure you have extra copies for the court and one for yourself) and take the original and copy to the judge in whose court the case was completed so the fee declaration can be approved. Generally the judge’s bailiff or secretary will take the form from you and give it to the judge to be signed. After approval, the form is sent to the Clerk of the Court who, in turn forwards the form to the State Comptroller’s office in Montgomery for processing and payment. If the form passes the “audit and allowance” review in the Comptroller’s office, then distribution of the fee is made to you in the form of a check from the State. Try to file your fee declaration within 30 to 45 days after the case has been completed. In cases involving appeals, send the fee declaration and copy to the Clerk of the Court of Criminal Appeals for initial processing.

PITFALLS IN THE PAYMENT PROCESS. The biggest pitfall in getting paid for indigent representation at the State level is the failure to properly document. Lawyers must keep organized records of the their activities, time spent, and their expenses. The glitch usually occurs during the State Comptroller’s review. If they feel you have made a mistake the Comptroller’s Office will return the entire voucher to you with a letter describing your error. If

you do not understand the error, CALL THE COMPTROLLER'S OFFICE AND ASK FOR HELP! Ask them to explain what is wrong and what you need to do to correct it, then re-submit the fee declaration form to the Comptroller's office for re-processing.

B. "May" Motions & Overhead Expense Reimbursement:

Thanks to the efforts of criminal defense lawyer Jim May and a variety of criminal defense groups in Alabama, appointed lawyers now have the ability to include an hourly rate for their office overhead in addition as part of the fee paid pursuant to the indigent compensation statute. In May v. State, 672 So.2d 1307 (Ala. Cr. App. 1993), cert. denied, 672 So.2d. 1310 (Ala. 1995), that the "expenses reasonably incurred" section of the statute concerning compensation for appointed attorneys included compensation for office overhead expenses reasonably incurred in representing the indigent client and that such expenses reasonably incurred and calculated, if approved in advance by the trial court must be paid. This overhead reimbursement is compensation *separate* from other expenses. Further payment of a lawyer's overhead expenses is not altered or deleted by the increase in the hourly rate.

In response to May, appointed lawyers have begun to file "May Motions" in all appointed cases seeking an hourly rate based on their individual office's overhead as part of the "expenses" they can receive for their representation. Some jurisdictions have issued Administrative Orders paying a certain hourly rate and allowing lawyers to submit affidavits for higher hourly rates. On March 16, 1998, the Presiding Judge of the Criminal Division of Jefferson County issued an Administrative Order eliminating the need for lawyers to file May motions unless expenses over \$35.00 an hour are sought. The Court of Criminal Appeals has instituted a specific May motion form which it sends out to appointed lawyers to file to receive this compensation.

CALCULATING HOURLY OVERHEAD. The basic formula to calculate these expenses is to figure out or get your CPA to send you last year's overhead expenses (i.e. rent, phones, staff salaries, etc.) and divide it by 2080 (the result of multiplying 52 weeks by a 40 hour work week). For example, a yearly overhead of \$70,000.00 divided by 2080 would produce an hourly overhead expense rate of \$33.65. After you have determined your hourly overhead expense rate, you then multiply that amount by the total number of in court and out of court hours compiled in the case. For example, if you compiled a total of 50 hours with an overhead expense rate of \$33.65, you would bill an additional \$1,682.50 to you fee

declaration. As you can see this additional compensation can work out to be much more than the statutory cap. (NOTE - Be sure to attach a copy of the court's standing order approving the hourly overhead to your fee declaration form.).

I suggest all appointed lawyers file these motions as soon as they are appointed. This additional compensation is the only ray of sunshine regarding compensation for appointed lawyers in the last 18 years, so take advantage of it on all levels of representation. The Court of Criminal Appeals added a new twist to May motions in 1996 ago in Ex parte Barksdale, 680 So.2d 1029 (Ala.Cr.App. 1996). In Barksdale, the Alabama Court of Criminal Appeals noted it would be a better practice for appointed lawyers to include a rough estimate of the hours the lawyer expected to spend in the defense of the case in conjunction with the hourly expense rate to assist the court in deciding these motions. So, in practice, be prepared to give a "rough" estimate of how many hours you may spend in defending the case in your May motion.

*"If we are to keep our democracy, there must be one
Commandment: Thou shall not ration justice."
Learned Hand*

V. CONCLUSION:

Indigent defense work in Alabama is neither glamorous nor financially profitable for lawyers. In my opinion, those who do turn a hefty profit from this work probably work a high volume plea mill. The defense of the liberties of a person, rich or poor, is the noblest work in the legal profession. It is these lawyers who truly breathe life into the Bill of Rights and the Constitutions of Alabama and the United States.

To truly do justice to the topic of indigent defense would require me to write a book on the subject or at least to take each indigent system on the State and Federal levels separately in at least a half dozen CLE programs. These

materials are designed to give new lawyers some guidance in navigating the mine-infested seas of indigent defense work. I am cautiously optimistic that one day Alabama will emerge from the “dark ages” treatment of its indigent defendants to the more enlightened reality that reasonable compensation for appointed lawyers will provide a more even playing field for the system and a bit more justice for all.