Model Defense of Needy Persons Act

Reed Dickerson

Indiana University School of Law

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Recommended Citation

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MODEL DEFENSE OF NEEDY PERSONS ACT

Reed Dickerson*

Recent decisions of the Supreme Court have expanded the duty of the states to provide counsel for defendants in criminal cases. The following statute seeks to set up a workable system of assuring the accused the assistance of counsel early in the proceedings against him and, if necessary, at no cost.

PREFATORY NOTE

The interest of the National Conference of Commissioners on Uniform State Laws in needy persons accused of crime existed long before the recent case of Gideon v. Wainwright.¹ In 1959, the Conference adopted a Model Defender Act based on careful study and close cooperation with the National Legal Aid and Defender Association, the Standing Committee on Legal Aid Work of the American Bar Association, and the Section on Criminal Law of the Association. The Special Committee that prepared that Model Act was then discharged.

Further study, made in the new light cast by recent Supreme Court decisions, suggested the advisability of re-evaluating the earlier work of the Conference. Accordingly, a Special Committee to Review the Model Defender Act was created by action of the Executive Committee at the 1963 Annual Meeting. The Model Defender Act of 1959 was withdrawn until an appropriate revision could be approved. An entirely new Model Act resulted.

In carrying out its functions, the Committee was guided by the views expressed by the Supreme Court in Gideon, in Escobedo v. Illinois,² in Miranda v. Arizona,³ and in other cases. Through-

*Professor of Law, Indiana University; author, LEGISLATIVE DRAFTING (1954); THE FUNDAMENTALS OF LEGAL DRAFTING (1965); Commissioner for Indiana and Chairman, Special Committee to Review Model Defender Act, National Conference of Commissioners on Uniform State Laws. Commissioner Dickerson was draftsman of the Model Defense of Needy Persons Act, approved by the Conference August 4, 1966, the final text of which appears here. The Prefatory Note and Comments are based on the note and comments to be published by the Conference. Other members of the Special Committee of the Conference are Commissioners Albert E. Jenner, Jr., Chicago; James K. Northam, Indianapolis; and Arie Poldervaart, Albuquerque.

out, the objective was to assure fair treatment for the needy defendant within the bounds of what is administratively practicable.

In general terms, *Gideon v. Wainwright* gave the needy criminal defendant the same right to legal representation in a State court under the 14th amendment (whether "equal protection" or "due process") that the 6th amendment gives to criminal defendants in federal courts. The minimum requirements of representation, therefore, are to be found not only in the express assurances made in *Gideon* itself but also in what the court had previously found to be required of federal proceedings under the 6th amendment.

According to the majority opinion, written by Mr. Justice Black, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Representation is assured "unless the right is competently and intelligently waived" (citing *Johnson v. Zerbst*, the first case to extend the right to counsel to needy persons). At the same time, in *Douglas v. California*, the Court extended the needy person’s right to counsel to include at least his first appeal.

As for the necessary expenses of defense other than the services of an attorney, the Supreme Court, in *Griffin v. Illinois* and *Draper v. Washington*, has already assured the needy defendant in a federal criminal case the right to a free transcript (or its equivalent) on appeal.

The criminal defendant’s right to counsel covers every critical stage of the proceedings against him. It includes arraignment and preliminary hearing. In *Escobedo* the Supreme Court held that, under some circumstances at least, a person under arrest for murder has a constitutional right to the presence of counsel while the police interrogate him as a suspect. Accordingly, it threw out a confession obtained while the counsel retained by the accused was excluded from the interrogation. On the basis of *Gideon* and *Escobedo*, it seemed likely that the

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4. U.S. Const. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”
5. 372 U.S. at 344.
12. 378 U.S. at 492.
Supreme Court would extend the same protection to needy suspects.

In *Miranda* the Supreme Court held that once a person (in that case, a needy person) had been taken into custody by the police no confession, admission, or exculpatory statement made outside the presence of counsel could be used against him, unless, after being fully informed as to his rights, he had waived his right to counsel voluntarily, knowingly, and intelligently.\(^{13}\)

From these cases, it has seemed clear that:

1. the Supreme Court has extended to state cases the protections that it provides in federal cases;
2. it has extended to needy persons the protections that it provides to persons of adequate means;
3. it has made the right to counsel absolute and not dependent on particular circumstances or, except in some respects for petty offenses, on the nature of the crime;
4. it is interested in the suspect from the moment he is taken into custody or comes into court to plead; and
5. it is tending to extend its protection of needy persons to all aspects of an "adequate defense," including necessary facilities for investigation and trial.

The approach of the new Model Act is not to define the exact limits of the right to an adequate defense, but to provide that, whatever the Supreme Court says it consists of for persons of adequate means, the needy person is entitled to the same protection and that, to the extent that he is unable to pay for it, he is entitled to have it paid for by the state.

Also, there has been no attempt in it to codify the other aspects of a constitutionally adequate criminal procedure. For instance, the act says nothing about the suspect's right to remain silent, or his right to bail. It is confined to equipping the needy person with necessary defensive facilities. Lest anyone read a negative implication into this limited coverage, section 16 has been included to prevent one from arising. As a model, rather than uniform, act it is designed for the typical state and seeks only as much uniformity as is consistent with local conditions. Matters most likely to vary from state to state are in brackets.

In its particulars, the Model Act follows, for the most part, the recommendations resulting from three thorough studies, one by a special committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender

\(^{13}\) 384 U.S. at 478-79.
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The act also meets the specific standards respectively promulgated by the special committee of the Association of the Bar of the City of New York, the National Legal Aid and Defender Association, and the Special Committee on Defense of Indigent Persons Accused of Crime of the American Bar Association, all as approved by the House of Delegates of the American Bar Association. Consideration was also given to the Criminal Justice Act of 1964 and to the tentative proposals of the American Law Institute respecting pre-arraignment procedure.

MODEL DEFENSE OF NEEDY PERSONS ACT

SECTION 1. [Definitions.]

In this Act, the term:

(1) "detain" means to have in custody or otherwise deprive of freedom of action;

(2) "expenses," when used with reference to representation under this Act, includes the expenses of investigation, other preparation and trial;

(3) "needy person" means a person who at the time his need is determined is unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation;

18. ABA, Guidelines for Adequate Defense Systems 8 (1964). See also ABA Project, op. cit. supra note 17, app. B.
(4) "serious crime" includes:

(i) a felony;
(ii) a misdemeanor or offense any penalty for which includes the possibility of confinement [for 6 months or more] or a fine of $[500] or more; and
(iii) an act that, but for the age of the person involved, would otherwise be a serious crime.

COMMENT: The term "detain" is defined in terms, drawn from *Miranda v. Arizona*,²³ that make it clear that the act in this respect is co-extensive with the Constitutional requirements respecting the kind of situation in which the needy person is entitled to be represented by counsel.

The term "expenses" is given a partial ("includes") rather than an exhaustive ("means") definition because it is necessary only to make clear that preparation and trial are an integral part of adequate representation.

The term "needy person" is defined to make clear that partial need and supervening need are also included. "Undue hardship," not being susceptible to precise definition, is left to the sound judgment of the court. Minor hardship is no reason for providing relief; unreasonable hardship is.

The term "indigent" is not used, because it would suggest that only a destitute person was entitled to free counsel or services.

The term "serious crime" is defined along the lines of Mr. Justice Harlan's concurrence in *Gideon*,²⁴ which left open the question whether counsel was required in the case of petty offenses. The Criminal Justice Act of 1964 excepts "petty offenses,"²⁵ which are defined by federal statute as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both."²⁶ Although *Miranda v. Arizona* recognizes no exception for petty offenses, that case did not deal with the broad right to counsel but only with the conditions precedent to the admissibility of a confession, admission, or exculpatory statement.

Although the standards approved by the House of Delegates of the American Bar Association²⁷ recommend that confinement for any period be considered "serious," a bracketed limitation to confinements "for 6 months or more" is included because of the differences in opinion as to whether protection should be extended to what the Criminal Justice Act of 1964 treats as a petty crime. The Supreme Court has not yet clarified the matter. In the meantime, it is believed that, if a time limitation is used to define the minimum confinement necessary to constitute a "serious crime," a period longer than 6 months would clearly be excessive.

²³. 384 U.S. at 477.
²⁴. 372 U.S. at 351 (Mr. Justice Harlan, J. concurring).
²⁷. Supra note 20.
Through the use of the word "includes," the term "serious crime" is given a partial definition to provide judicial flexibility in any case where the court believes that special circumstances make the crime serious in fact even though the legal penalties do not meet the specific criteria of this clause.

SECTION 2. [Right to Representation, Services, and Facilities.]

(a) A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation).

The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court determines need, is unable to provide for their payment without undue hardship.

(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

(2) to be represented in any appeal; and

(3) to be represented in any other post-conviction proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.

(c) A needy person's right to a benefit under subsection (a) or (b) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

COMMENT: This section defines the right to representation generally. Although Miranda v. Arizona defined only the earliest time when the presence of counsel became a condition precedent to the admissibility of a
confession, admission, or exculpatory statement, that time being the moment
the suspect is taken into custody, it is believed that this occasion also repre-
sents the time the right to counsel will be held generally to attach.

If the accused is formally charged before he is taken into custody, the
right to counsel is assured even though no confession, admission, or excul-
patory statement has been made. Counsel is necessary, for example, if the
accused wishes to plead guilty. If the accused is formally charged before he is taken into custody, the
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accused wishes to plead guilty.

Arraignment is a critical stage because
some defenses and pleas in abatement would be waived unless asserted at
that point. There is a strong consensus among judges, prosecutors, and
defense counsel that appointment of counsel at the earliest possible stage
is the most critical aspect of providing valuable and effective representation.

The section does not undertake to spell out all the circumstances in
which a criminal defendant is entitled to counsel. It provides only that,
whenever a man of adequate means is legally entitled to counsel, the needy
person is likewise entitled to counsel. "Legally entitled" is intended to
mean "under the law," whether constitution, statute, regulation, or ordi-

The section also makes clear that the criminal defendant is entitled to
all the necessary elements of adequate representation.

The section provides that relief is to be given only to the extent of the
need; under section 4(c) the accused must contribute as much as he
reasonably can. It also allows for relief in the case of supervening need
or change of mind about a previous waiver.

The words "at the time the court determines need" are included in sub-
section (a) to take care of the case where there is a significant change
in the defendant's financial condition between the time he receives legal
assistance and his first appearance in court (i.e., when need is determined
under section 4). If he is not needy when he receives assistance but is
needy at the time of determination, there is no point in requiring him to
pay what he is then unable to pay. (If he later becomes able to pay, he
can be required to do so under section 8(a)). Conversely, if he is needy
when he receives assistance but can pay at the time of determination, he
should be required to pay. (If he does not pay then, he will have to pay
later under section 8(b)). The same analysis applies where the change
in financial condition is one only of degree.

Clause (1) of subsection (b) follows the theme of Gideon v. Wain-
wright: the needy accused has rights of representation co-extensive with
those of a person with adequate means.

Clause (2) makes clear that the right to counsel on appeal is absolute.
This complies with Douglas v. California.

Clause (3) provides that the right to counsel in any other post-conviction
proceeding attaches unless it is found to be frivolous. It also spells out
what constitutes frivolity.

SECTION 3. [Notice and Provision of Representation.]

(a) If a person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court upon formal charge, as the case may be, shall:

(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the public defender, non-profit organization, or trial court concerned, as the case may be, that he is not so represented.

As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

(b) Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

(c) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender, notify the non-profit organization, or assign an attorney, as the case may be.

(d) Upon notification or assignment under this section, the public defender, non-profit organization, or assigned attorney, as the case may be, shall represent the person with respect to whom the notification or assignment is made.

(e) Information given to a person under this section is effective only if:

(1) it is in writing or otherwise recorded;

(2) he records his acknowledgment of receipt and time of receipt, or, if he refuses to make this acknowledgment, the person giving the information records that he gave the information and that the person informed refused so to acknowledge it; and

(3) the material so recorded under clauses (1) and (2) is filed with the court next concerned.
COMMENT: One of the most critical elements in the adequate protection of a needy accused is adequate notice of his legal rights respecting counsel and representation. The section attempts to insure that adequate information will be given him at the earliest possible moment and at each critical stage thereafter.

When the accused does not have an attorney, the section sets the wheels in motion for representation by providing for notification of the operating defender agency, which is required to act upon receiving notice.

Before the accused's first appearance in court, the right to representation does not depend on a finding that the accused is a "needy person". It is enough that he does not have an attorney. At this stage, time is a critical factor. Equally important, the determination of need is best made by a judge. It should not be made by the police or by a defender. Determination by the police would impose on them an unnecessary and undesirable burden. It would also risk undesirable delay at a stage when time may be of the essence.

If it is later found that the accused was not a needy person, he may be required to pay under section 4(c) or under section 8(a).

SECTION 4. [Determination of Financial Need.]

(a) The determination of whether a person covered by Section 2 is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 8, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

(b) In determining whether a person is a needy person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

(c) To the extent that a person covered by Section 2 is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

COMMENT: For reasons given under section 3, the determination of need is left to the cognizant court. This does not create a gap in needed protection, because under section 3(d) the right to an attorney arises as soon as the defender is notified or assigned.
A special provision on bail is inserted in subsection (b) because in some jurisdictions the ability to post bond has been held to negate eligibility for counsel at public expense. Such a position fails to recognize that bail may have been provided as an accommodation by someone not legally obligated to provide counsel to the accused.

To reduce the incidence of misrepresentation, the alleged needy person is required by subsection (b) to certify, subject to the penalties for perjury, such facts as the court considers appropriate under the circumstances. This process need not be elaborate if the need is fairly evident, as, for example, where the accused is already on public relief.

SECTION 5. [Competence to Defend.]

No person may be given the primary responsibility of representing a needy person unless he is authorized to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime. Competence shall be determined by the court at the first court proceeding after the giving of primary responsibility.

COMMENT: It is clear from the cases that, where the accused is entitled to be represented by counsel, he is entitled to be represented by competent counsel. "Competent counsel" does not mean the best counsel, but only counsel meeting the minimum requirements of an adequate representation in a criminal case. The attorney must be a member of the bar with some background in criminal law, but he need not be an expert. Although a law student is believed not to meet the minimum qualifications for handling serious crimes, he is not precluded from assisting qualified counsel in the case of a serious crime. Nor is he precluded from having the primary responsibility for handling a non-serious criminal case, which is not covered by this act. An assigned counsel system should be based on a roster of experienced trial advocates.

Persons "authorized to practice law in this state" include not only persons who are licensed by the state but persons licensed by other states who by court order or otherwise are authorized to practice in the state.

As with the determination of need, determination of competence is left to the cognizant court.

SECTION 6. [Substitute Defender.]

At any stage, including appeal or other post-conviction proceeding, the court concerned may for good cause assign a substitute attorney. The substitute attorney has the same functions with respect to the needy person as the attorney for whom he is substituted. If the substitute attorney is not in the office of the
public defender nor in a non-profit organization serving under this Act, the court shall prescribe reasonable compensation for him and approve the expenses necessarily incurred by him in the defense of the needy person.

COMMENT: This section is largely self-explanatory. Regardless of which plan the county selects under section 10, each substitution is to be by court assignment. This system will protect the defendant while remaining flexible enough to meet any need to substitute, regardless of source.

SECTION 7. [Waiver.]

A person who has been appropriately informed under Section 3 may waive in writing, or by other record, any right provided by this Act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with English, and the complexity of the crime involved.

COMMENT: Although the right to waive a right is well recognized, it is important that a waiver of so basic a right as the right to counsel be recognized as valid only where it is clear that the accused knows the significance and consequences of his act. Hence the requirement that the waiver be done voluntarily, competently and intelligently.29

To make sure that an adequate foundation for a waiver is laid, the act requires that the accused be adequately informed of his rights respecting representation. The requirement that it be written or otherwise recorded not only provides evidence of the act but makes clear that the mere absence of a request for counsel, or a plea of guilty, cannot be construed as a waiver.31

The phrase “and if the waiver is otherwise according to law” is included because some states have adopted additional safeguards.

The last sentence is intended to make more uniform the widely varying waiver practices among the states.

SECTION 8. [Recovery from Defendant.]

(a) The [county] attorney may, on behalf of the [county], recover payment or reimbursement, as the case may be, from

each person who has received legal assistance or another benefit under this Act:

(1) to which he was not entitled;
(2) with respect to which he was not a needy person when he received it; or
(3) with respect to which he has failed to make the certification required by Section 4 (b);

and for which he refuses to pay or reimburse. Suit must be brought within 6 years after the date on which the aid was received.

(b) The [county] attorney, on behalf of the [county], may recover payment or reimbursement, as the case may be, from each person, other than a person covered by subsection (a), who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it according to the standards of ability to pay applicable under Sections 1 (3), and 2 (a), and 4 (b), but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received.

(c) Amounts recovered under this section shall be paid into the [county] general fund, except that so far as they represent money provided by the state under Section 12, they shall be paid into the [general fund] of the state.

COMMENT: A recapture provision is included as subsection (a) for three purposes: (1) to discourage misrepresentation; (2) to provide for repayment where legal services were provided, under section 3(d), to a person who, upon subsequent court determination, is found not to have been a needy person; and (3) to avoid unnecessary costs to the county or state.

Clause (2) covers the special case where a person with adequate means but without an attorney was provided with an attorney, but for some reason was not required to pay for his services at the time the court made its determination of need under section 2(a). Clause (1) is inadequate for this purpose because before his first appearance in court an accused who does not have an attorney is entitled to one under section 3(d), whether he can pay or not.

A reimbursement provision is included as subsection (b) to avoid unnecessary costs to the county or state, where within a reasonable time the dependent becomes able to pay.

Statutes of limitation of 6 years and 3 years, respectively, are included.
SECTION 9. [Choice of Local Program.]

(a) The [appropriate legislative authority] of each [county] shall provide for the representation of needy persons who with respect to serious crimes are subject to proceedings in the [county], or are detained in the [county] by law enforcement officers. They shall provide this representation by:

(1) establishing and maintaining an office of public defender;

(2) arranging with an appropriate non-profit organization to provide attorneys;

(3) arranging with the courts of criminal jurisdiction in the [county] to assign attorneys on an equitable basis through a systematic, coordinated plan and, if the [county] has a population of more than [400,000] according to the most recent decennial census, under the guidance of an administrator; or

(4) adopting a combination of these alternatives.

Until the [appropriate legislative authority] elects an alternative, it shall be considered as having elected alternative (3).

(b) If it elects to arrange with a non-profit organization to provide attorneys, the [appropriate legislative authority] of a [county] may join with one or more other [counties] in arranging with such an organization.

(c) If it elects to establish and maintain an office of public defender, and if the [appropriate legislative authorities] and [county courts of general jurisdiction] concerned respectively agree on qualifications, term of office, compensation, support, and appointment under Section 10(a), the [appropriate legislative authority] of a [county] may join with the [appropriate legislative authorities] of one or more other [counties] to establish and maintain a joint office of public defender. In that case, the participating [counties] shall be treated for the purposes of this Act as if they were one [county].

(d) If the [appropriate legislative authority] of a [county] elects to arrange with the courts of criminal jurisdiction in the [county] to assign attorneys, a court of the [county] may provide for advance assignment of attorneys, subject to later approval by it, to facilitate representation in matters arising before appearance in court.
COMMENT: The section reflects the unanimous agreement among those who have studied the subject that no single kind of administrative system for providing attorneys is best adapted to all localities. Accordingly, the local governmental unit is authorized to provide for representation by (1) a public defender system, which is well adapted to the more heavily populated areas; (2) a legal aid or other private non-profit group; (3) a program of court-assigned attorneys, which is well adapted to the more lightly populated areas; or (4) any combination of these. The section also authorizes a group of local units to join in a combined program suitable to their common needs. This would permit, for example, two counties that could not otherwise support a full-time public defender to have one.

If the local unit of government selects a court-assigned attorney system, the persons administering it are required to spread the responsibility equitably among the available eligible attorneys and to adopt a coordinated system. This is intended to avoid the haphazard and inequitable aspects of many existing programs.

In areas with large populations it has been found desirable to operate a court-assignment system under the guidance of an administrator. Subsection (a)(3) so requires.

Lest the purposes of the act be defeated through a failure of the local unit to act, it provides that, until an alternative is elected, a court-assignment system is in effect.

Subsection (d) is included to help adapt the usual court-assigned attorney system to the need to provide counsel during police interrogation before appearance in court.

SECTION 10. [Compensation, Expenses, Term of Office, and Appointment.]

(a) If the [appropriate legislative authority] of a [county] elects to establish and maintain an office of public defender, the [appropriate legislative authority] shall:

(1) prescribe the qualifications of the public defender, his term of office (which may not be less than 6 years), and his rate of annual compensation (which may not be less than $............. a year and not proportionately less than that of the [county prosecutor]); and

(2) provide for the establishment, maintenance, and support of his office.

The [county court of general criminal jurisdiction] shall appoint the public defender from a panel of not more than 5 and not fewer than 3 persons (if that many are available) designated by a committee of lawyers appointed by the senior judge of that [county] court, or from the candidates making the 3 or less
highest scores on an appropriate merit-system examination. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, the public defender may not engage in the practice of criminal law other than in the discharge of the duties of his office.

(b) If the [appropriate legislative authority] of a [county] elects to arrange with a non-profit organization to provide defenders, the [county] shall reimburse the organization for such direct expenses as the courts respectively concerned have determined to be necessary in the representation of needy persons under this Act.

(c) If a court assigns an attorney to represent a needy person, it shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed.

(d) An attorney under subsection (b) or (c) shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. [However, he may be compensated at a rate no higher than $15 an hour for time spent in court and no higher than $10 an hour for time spent out of court, subject in each case to a maximum total fee of $500 in case of a felony and $300 in any other case, unless the court concerned finds that special circumstances warrant a higher total fee.]

COMMENT: Where the local unit of government elects to establish an office of public defender, this section attempts to insure that the incumbent will have adequate tenure and be paid as much as the local prosecutor. (The word “proportionately” is used because the public defender may be on a full-time basis while the public prosecutor is on a part-time basis.) A term of office of less than 6 years would provide insufficient security to attract career personnel and insufficient opportunity for breadth and depth of experience. Two alternative methods of selection, each designed to increase the chances of attracting high quality professional defenders, are provided. If a merit-system examination is considered undesirable, appointment from a panel selected by representatives of the bar is available as an alternative.

Although a full-time public defender is usually desirable, it is not always feasible to provide one. Accordingly, the prohibition against practicing law on the side is limited to the practice of criminal law.
For court-appointed attorneys, a liberal maximum fee is desirable to allow the court some flexibility in reflecting the variations in complexity among differing cases. An overriding maximum assures the public that its resources are not being distributed too liberally. Although the specific figures named in the act were drawn from the Criminal Justice Act of 1964, they are only suggested. Local conditions may make other figures more appropriate.

If a legal aid or defender organization has been selected, any possibility of exorbitant legal fees can be dealt with through the court's power, under subsection (d), to determine the necessary direct expenses for which the organization is entitled to be reimbursed.

SECTION II. [Personnel and Facilities.]

(a) If an office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the [appropriate legislative authority], as many assistant public defenders, clerks, investigators, stenographers, and other persons as the [appropriate legislative authority] considers necessary for carrying out his responsibilities under this Act. A person employed under this section serves at the pleasure of the public defender, unless his position is under a civil service system in which he may be removed only for cause.

(b) If an office of public defender has been established, the [appropriate legislative authority] shall:

(1) provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in the jail) necessary for carrying out the public defender's responsibilities under this Act; or

(2) grant the public defender an allowance in place of those facilities.

(c) A defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the [county prosecutor]. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the [county].

COMMENT: Subsections (a) and (b) are intended to make sure that a public defender is adequately equipped to meet his responsibilities under the act. Consistently with the state's civil service system, he should have full control of his personnel.

Subsection (c) is intended to equalize, so far as possible, the facilities available to the prosecutor and the defender, regardless of the defender system under which the local unit of government is operating.

SECTION 12. [Financing of Local Program.]

(a) The [appropriate legislative authority] of each [county] shall annually appropriate enough money to administer the program of representation that it has elected under Section 9. If in any fiscal year the payments made by the [county] under Section 10 are greater than ……. per cent of its annual budget, the state shall reimburse the [county] for the amount of the excess out of the [general fund] of the state.

(b) If the [appropriate legislative authority] of a [county] elects to establish and maintain an office of public defender, the [county] may accept private contributions toward the support of his office.

COMMENT: Subsection (a) provides for the local financing of the existing defender program, with provision for state underwriting of the excess in situations where the aggregate financial burden on the particular governmental unit becomes disproportionately large.

Subsection (b) is intended to ease the financial burden of maintaining an office of public defender.

SECTION 13. [Allocation of Expenses.]

(a) Subject to Section 12, any direct expense, including the cost of a transcript [or bystander's bill of exceptions or other substitute for a transcript] that is necessarily incurred in representing a needy person under this Act, is a [county] charge against the [county] on behalf of which the service is performed.

(b) If 2 or more [counties] jointly establish an office of public defender, the expenses not otherwise allocable among the participating [counties] under subsection (a) shall be allocated, unless the [counties] otherwise agree, on the basis of population according to the most recent decennial census.

COMMENT: Subsection (a), in recognizing that the necessary expenses of defense are not confined to the personal services of an attorney, takes its cue from Griffin v. Illinois,33 and Draper v. Washington.34 These

cases assure the needy defendant the right to a free transcript (or its equivalent) on appeal. A few states use a bystander's bill of exceptions or other substitute for a transcript.\(^3\)

Subsection (b) allocates expenses between counties on the basis of their respective abilities to pay. An alternative approach would be to allocate them on the basis of the respective number of cases handled. Even this index would tend to follow the distribution of population.

**SECTION 14. [Records and Reports.]**

(a) A defending attorney shall keep appropriate records respecting each needy person whom he represents under this Act.

(b) The public defender, non-profit organization, or person administering a court-assigned defender plan, as the case may be, shall submit an annual report to the [appropriate legislative authority] showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed by this Act. A copy of the report shall also be submitted to each court having criminal jurisdiction in the [counties] that the program serves.

COMMENT: The sound administration of any defender plan depends on keeping adequate records and reports.

**SECTION 15. [Representation in State and Federal Courts.]**

This Act applies only to representation in the courts of this state, except that it does not prohibit a defending attorney from representing a needy person in a Federal court of the United States, if:

1. the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or
2. representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the [appropriate legislative authority].

COMMENT: In view of the establishment in the Criminal Justice Act of 1964 of a defender program for the Federal courts, it seems desira-

\(^3\) E.g., ILL. APP. CT. (CRIM.)R. 2 (intermediate appellate review only); KY. R. CRIM. P. 12.63 (in forma pauperis), 12.70 (bystander's bill), & 12.72 (agreed statement); TEX. CODE CRIM. PROC. art. 40.09 (1966).
ble that a unified defender system be permitted to operate in both state and Federal courts if the arrangement meets the approval of both the Federal court and the local legislative authority. Such a program is believed to be economically expedient and practically sound.

The term "defending attorney" is believed to be broad enough to include a public defender under section 9(a)(1).

SECTION 16. [Protections not Exclusive.]

The protections provided by this Act do not exclude any protection or sanction that the law otherwise provides.

COMMENT: The section is included to preclude any negative implication that might otherwise arise by reason of the fact that the act does not deal with rights of the accused other than those involved in providing adequate representation and the other elements of an adequate defense. No inference, for example, is to be drawn from the fact that the act says nothing about the accused's right to remain silent or his right to bail.

SECTION 17. [Severability.]

If a provision, or an application of a provision, of this Act is held invalid, the valid provisions and applications that can be given effect without the invalid provision or application are intended to be in effect. To this end, the provisions of this Act are severable.

SECTION 18. [Repeal.]

The following acts and parts of acts are repealed:

(1)
(2)
(3)

36. Currently several defender offices, including those in New York, Philadelphia, Cleveland, and Kansas City, are operating in both court systems.