

MEMORANDUM

To: LSBA House of Delegates
From: Judge Milton Moore, Chair
Right to Counsel Committee
Date: December 15, 2009
Sub: Reclassification of Offenses
Re: Study of Reclassification of Offenses for House of Delegates Resolution

On June 12, 2009, the House of Delegates of the Louisiana State Bar Association passed a resolution requesting the Right to Counsel Committee study reclassification of selected non-violent misdemeanor and municipal ordinances. In completion of this request, the Committee has examined several recently completed evaluations of the issue with the purpose of determining whether reclassifying certain non-violent offenses into petty offenses, carrying fine-only sentences to which the right to counsel does not attach, will effectively reduce caseloads and relieve the financial strain on communities while continuing to promote public safety and improve the fair administration of justice in Louisiana. The Right to Counsel Committee of the Louisiana State Bar Association has examined the issue of reclassification, and presents an overview of its finding in this memorandum. A copy of the LSBA Resolution on Reclassification, which will be submitted to the House of Delegates in 2010, is attached for review.

ABA Position on Reclassification

American Bar Association policy and standards have long promoted and encouraged the use of alternative sanctions for criminal behavior. Policy and standards illustrate a preference for diversion to community agencies, deferred sentencing over incarceration, and other criminal penalties that minimize permanent conviction records for offenders who are eligible for community supervision.¹

The ABA Criminal Justice Section recently completed a misdemeanor study as the basis of a resolution to be proposed to the ABA House of Delegates. While the CJS report reflects national trends, it provides an overview of reclassification issues that is useful for the LSBA's policy on reclassification of non-serious misdemeanor offenses. The ABA Criminal Justice Section reported the following findings:

- 1) **Indigent misdemeanor representation is too often ineffective and inefficient.** When public defenders are faced with staggering caseloads, their ability to effectively represent their clients is reduced. Large misdemeanor caseloads also drain valuable resources from prosecutors, making it more difficult to obtain conviction in serious cases.
- 2) **The Reclassification of non-violent misdemeanors and traffic and ordinance-violation offenses will reduce caseloads.** Most people who go to court in the United States do so for misdemeanor charges. Decreasing the prosecution of minor misdemeanor offense will improve currently overburdened caseloads and the quality of representation and outcomes for all parties.

¹ American Bar Association, Defense Function, § 4-6.1 (Duty to Explore Disposition Without Trial); ABA Commission on Effective Criminal Sanctions, *Report I: Alternatives to Incarceration* (Feb. 2007), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>

- 3) **Civil Citation can be used as a mechanism for juvenile justice reform.** Civil Citation for juvenile offenders has been utilized in many places to provide an efficient alternative to arrest, permitting an officer to issue Civil Citations to juveniles for minor crimes instead of taking them for booking. Programs modeled after the Civil Citation program in Miami-Dade County allows officers a means to avoid arresting juveniles, but still satisfy their commitment to public safety by referring youth for treatment services. The Miami-Dade model of Civil Citation is endorsed for its universal applicability and results: yielding a 20% reduction in arrests and a 34% reduction in misdemeanor cases, while attaining an 82% successful completion rate and a mere 3% recidivism rate.² Cost efficiencies are also relevant, as an independent economic study concluded that Civil Citation costs only \$1,280 per youth, versus \$1,749 for traditional diversion and \$3,491 for detention.³
- 4) **Many states have begun implementing reclassification measures with positive results.** For example, California recently implemented a pilot program that allows certain District Attorneys to sentence people convicted of driving without a license to be electronically monitored within their homes rather than spend time in a county jail.⁴ Similarly, in 2006 Massachusetts amended a statute to allow District Attorneys to treat certain misdemeanors as civil infractions, such as driving with a suspended license or operating an uninsured motor vehicle, which reduces the need for appointment of counsel to indigent defendants.⁵ In 1995, Minnesota's legislature removed the delinquency classification from certain alcohol-related juvenile offenses, among other minor crimes. By eliminating the possibility of detention for these offenses, appointment of counsel was no longer needed. This was expected to reduce the misdemeanor caseload by 8,000 cases.⁶ In 1992 New Hampshire began classifying misdemeanors into two categories, Class A and Class B. Any non-violent misdemeanor can be charged as a Class B. Additionally, if a person is convicted of a Class A misdemeanor, but does not receive a sentence of possible or actual incarceration, the conviction will be recorded as Class B. A year after these measures were enacted, the need for court appointed lawyers dropped, saving \$40,000 in payments to assigned counsel. Delays in New Hampshire district courts were also reduced.⁷
- 5) **The Criminal Justice Section concludes that,** where misdemeanors are concerned, local, state, and federal governments should re-characterize certain minor crimes that pose little or no threat to public safety. Furthermore, implementing a system of civil fines and remedies as an alternative to the criminal sanctions currently in place will benefit prosecutors and public defenders by decreasing their burden and helping the criminal justice system to operate more efficiently. Local, state, and federal governments should also be urged to enact laws and policies allowing prosecutors to have greater discretion to dismiss or divert to community-based treatment programs where appropriate for non-violent misdemeanors not covered by this resolution.

² Data Sources: 1998-2009. Miami-Dade County Juvenile Services Department Data Warehouse; 2009, July. Miami-Dade County Juvenile Services Department Performance Scorecard; 2008, July. Miami-Dade County Criminal Justice Information System (CJIS).

³ 2008, October. "Juvenile Services Department Cost Analysis" conducted by the Office of Strategic Business Management, Miami, Florida.

⁴ De-Crim 2 (Georgia)

⁵ De crim 4 (Georgia)

⁶ *Id.* at 4.

⁷ *Id.* at 5.

The Constitution Project Report

The Constitution Project's Right to Counsel Committee conducted a study to assess the impact of misdemeanor offenses on the justice system and to formulate recommendations about how to improve systems of indigent defense to ensure fairness for all Americans. A synopsis of the Constitution Project's report "Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel" is provided below.

Findings

The Report of the National Right to Counsel Committee found that the criminalization of minor offenses has created a significant burden on the justice system. For example, in New York, where felonies and violent felonies have decreased in recent years, there has not been a concomitant decrease in indigent defense caseloads due to the proliferation of violation and lo-level misdemeanor charges.⁸ The report has also found that reclassification can be extremely cost effective. In Massachusetts, a commission created by the legislature quantified the costs of categorizing low-level offenses as crimes, rather than civil infractions. The state paid for attorneys to represent indigent defendants in almost 59,000 cases for petty offenses. Had these cases been dealt with as civil infractions with monetary and administrative penalties, the state would have save approximately \$8.5 million in representation costs alone.⁹

Recommendations

A significant way in which the need to provide defense counsel can be reduced is by reclassifying certain non-serious misdemeanors as civil infractions, for which defendants are subject only to fines. If the potential for incarceration of the accused is eliminated, counsel need not be furnished under the Sixth Amendment. In order to promote the fair administration of justice, certain non-serious misdemeanors should be reclassified, thereby reducing financial and other pressures on a state's indigent defense system.¹⁰

LSBA Right to Counsel Committee Proposed Resolution and Recommendations

Through the research examined and from anecdotal information collected from Louisiana public defenders, the committee finds the growth of misdemeanor and municipal offenses has placed a burden on the entire criminal justice system, forcing state and local governments to spend tax dollars to prosecute and defend lesser offenses. Staggering municipal caseloads not only create a significant financial burden on Louisiana communities, they threaten the fair and efficient administration of justice in our state. Prosecutors faced with bringing charges in misdemeanor cases are not able to put sufficient resources into prosecuting more serious offenses, while public defenders lack capacity to effectively and ethically represent the thousands of municipal and misdemeanor clients entitled to representation.

In reclassifying these offenses, great care should be taken to protect the funding streams for the indigent defense system, as misdemeanors and municipal offenses fund nearly half of the public defense system in Louisiana. Therefore, any reclassification effort must include language that allows the \$35 special costs currently collected by courts of original criminal jurisdiction when a defendant is convicted after a trial, a plea of guilty or *nolo contendere*, or after forfeiting a bond, to be collected as a civil fee and be payable to the to the district indigent defender fund. To assure that the criminal justice system remains properly funded, the Right to Counsel Committee recommends that La. RS. 15:168 be amended to reflect the need for funding and prevent a significant negative impact on the funds of the indigent defense system.

⁸ The Constitution Project, "Justice Denied", April 14, 2009, p. 72-73.

⁹ *Id.* at 73.

¹⁰ *Id.* at 198.

**RESOLUTION PROPOSED BY THE
THE RIGHT TO COUNSEL COMMITTEE
OF THE LOUISIANA STATE BAR ASSOCIATION**

WHEREAS, an important component of the mission of the Louisiana State Bar Association is to ensure access to and aid in the administration of justice.

WHEREAS, the right to counsel is a fundamental procedural safeguard to assure a fair trial where the government and the accused stand equal before the law.

WHEREAS, the growth of misdemeanor and municipal offenses are placing a burden on lower courts, forcing state and local governments to spend tax dollars to prosecute lesser offenses, creating a financial burden on these communities.

WHEREAS, crushing municipal caseloads often make it difficult for a public defender to effectively and ethically represent her municipal and misdemeanor clients.

WHEREAS, the increase of misdemeanor and municipal arrests for jail-carrying offenses has placed a burden on local jails, overcrowding them to dangerous levels.

WHEREAS, no component of the criminal justice system can function effectively without reasonable resources.

WHEREAS, the Right to Counsel Committee of the Louisiana State Bar Association has studied the reclassification of offenses and has found that reclassification of selected non-violent misdemeanor and municipal ordinances that do not impact public safety into petty offenses, carrying fine-only sentences to which the right to counsel does not attach, will:

- (1) reduce the case loads of public defenders, bringing them more in line with established national standards;
- (2) allow prosecutors and law enforcement to focus on more violent offenses;

- (3) relieve the burden on criminal courts by diverting petty offenses out of the courtroom, resulting in fewer trials and reducing court caseloads; and
- (4) reduce the burden on jails by decreasing the number of pre-trial detainees; and

NOW, THEREFORE BE IT RESOLVED, that the House of Delegates of the Louisiana State Bar Association and its members support reclassification of selected non-violent misdemeanor and municipal ordinances that do not impact public safety into petty offenses, carrying fine-only sentences to which the right to counsel does not attach.

Respectfully Submitted,
LSBA Right to Counsel Committee
December 16, 2009



Hon. D. Milton Moore, Chair
Right to Counsel Committee