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The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?

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Comment

The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?

I. INTRODUCTION

The sixth amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the *Assistance of Counsel* for his defence."[1] Although the amendment was adopted in 1791, it is still unclear today what privileges it bestows on an accused, what responsibilities it places on the state and federal governments, and what safeguards it provides our adversary system of justice. The sixth amendment, like other constitutional provisions, is still in a state of evolution.

Development of the constitutional right to assistance of counsel has focused on two major areas: (1) The *right to counsel*;[2] and (2) the *right to effective counsel*.[3] Although each principle is a distinct concept, the right to counsel cases often emphasize the importance of the right to effective counsel. The rationale used by the Court to extend the right to counsel in a given situation demonstrates that it demands more than the mere appointment of an attorney to fulfill this right. The Court expects the attorney to assume an active role as an advocate and counsel. For example, in the landmark decision of *Gideon v. Wainwright*,[4] the Court held that the sixth amendment's guarantee of the right to counsel extended to the states through its incorporation into the due process clause of the

1. U.S. CONST. amend. VI (emphasis added).
2. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972) (no person can be subjected to imprisonment unless counsel is made available); Coleman v. Alabama, 399 U.S. 1 (1970) (an indigent criminal defendant has a right to an attorney at a preliminary hearing held to determine whether there is sufficient evidence to submit the case to the grand jury); Douglas v. California, 372 U.S. 353 (1963) (an indigent criminal defendant is entitled to appointed counsel on appeal, when appeal is granted as a matter of right).
3. *See* § II of text *infra*.
4. 372 U.S. 335 (1963). The Court held that the right of an indigent criminal defendant to appointed counsel is a right fundamental and essential to a fair trial. *Id.* at 345.

fourteenth amendment.[5] In so holding, the Court stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He *requires the guiding hand of counsel at every step* in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[6]

The right to counsel is more fully developed than is the right to effective counsel. The Supreme Court has on numerous occasions directly addressed the issue of whether the right to counsel should be extended in given instances, and, as a result, it has enumerated specific situations in which an accused must be provided with counsel. In addition, the Court has established a general criterion for determining the other situations in which an attorney must be provided.[7] However, in reference to the right to effective counsel, the Supreme Court has done little more than recognize that there is such a right. It has been left up to the various federal circuit courts and the states to develop their own criteria for determining when in a given situation there has been effective representation by counsel. As a result, there is confusion and a notable lack of uniformity in the area.

The Supreme Court has specifically held that reversal is automatic when one has been deprived of one's right to counsel. Prejudice due to that deprivation need not be established. The Court has held that the right to counsel is among the "constitutional rights so basic to a fair trial that its infraction can never be treated as harmless error."[8] However, the Supreme Court has not addressed this issue with regard to the right to effective counsel.

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5. *Id.*
6. *Id.* at 344-45 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (emphasis added)).
7. The Supreme Court has held that an indigent criminal defendant must be provided with counsel at any "critical stage" of a criminal proceeding. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967) (Court held that once an accused is indicted, the accused is entitled to have counsel present at a line-up where witnesses seek to identify the perpetrator of the crime). A critical stage has been defined as one which requires an attorney's presence in order to preserve the defendant's right to a fair trial; that is, whether at any period of the proceedings there is a substantial possible prejudice to the defendant's rights and whether the presence of counsel would help to avoid that prejudice.
8. Chapman v. California, 386 U.S. 18, 23 (1967).

Many of the federal circuit courts and state courts have held that the same error rule—that prejudice need not be shown—should also apply to both situations since the right to counsel would be meaningless without the right to effective counsel. However, others have held that the two rights address different problems; the right to effective counsel is not so essential to a fair trial as to require automatic reversal in its absence.[9] They instead have employed the harmless error rule, which requires the demonstration of prejudice. In those jurisdictions which have used the harmless error rule, the extent of the right to effective counsel is obscured by an additional controversy over which party has the burden of showing prejudice. Some courts have held that it is the defendant's burden, others have held that it is the government's, and still others have taken an intermediary position.[10]

Another controversy which exists with regard to the right to effective counsel but not as to the right to counsel is whether one who has retained counsel has the same right to effective assistance as one whose attorney was appointed. Once it has been determined that a defendant has the right to an attorney, counsel may be retained or appointed; either type of representation will satisfy the right. However, with respect to effective counsel, some courts have held that the right applies only to defendants with appointed counsel; others have applied the right to those with either retained or appointed counsel.[11]

This comment will examine these controversial aspects of the right to *effective counsel.* Special emphasis will be placed on the law of Nebraska and of the Eighth Circuit Court of Appeals.

II. THE PROBLEM

In 1973 Chief Justice Warren Burger made the allegation that significant numbers of American lawyers are incompetent in the area of trial advocacy. He stated:

> Whatever the legal issues or claims, the indispensable element in the trial of a case is a minimally adequate advocate for each litigant. Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent. I draw this from conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers. It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.[12]

9. *See* § VI of text *infra.*
10. *See* § VII of text *infra.*
11. *See* § V of text *infra.*
12. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certifi-*

Chief Justice Burger delineated six aspects of inadequate advocacy which he observed as a trial judge in the federal court system: (1) the inability to develop concrete images for the triers of fact through the questioning of witnesses in conformity with the rules of evidence; (2) the inability to know when and when not to cross-examine, and the inability to cross examine effectively; (3) the lack of knowledge of when leading questions may be asked; (4) the lack of knowledge on the part of many lawyers that "inflammatory" evidence should not be placed in the sight of jurors until after it has been offered into evidence; (5) the tendency of many lawyers to dwell unduly on issues which are not in controversy; and (6) the failure of attorneys to observe rules of professional manners and etiquette.[13] Others in the legal profession have agreed with the Chief Justice that there is a problem of incompetence. They have disagreed, however, with his statistics. For example, a 1978 survey dealing with the quality of advocacy in the federal courts revealed inadequacy on the part of one-twelfth of the lawyers appearing before the federal courts.[14]

The members of the legal profession are not alone in the observation of this problem. Since the 1960's, the number of ineffective assistance of counsel claims brought by criminal defendants has been increasing. A survey done by Professor Strazzella revealed that during the years 1963-1965 (pre-*Gideon*) there were 78 claims of ineffectiveness reported by the federal courts of appeals, whereas between the years 1969-1971 (post-*Gideon*) there were 282 claims reported—nearly a 300% increase.[15] These claims were brought on direct appeals, on motions for new trials, on habeas corpus writs, and in other collateral proceedings.[16] The claims

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cation of Advocates Essential to our System of Justice?, 42 FORDHAM L. REV. 227, 234 (1973). Judge Bazelon of the Federal Court of Appeals in the District of Columbia similarly stated: "I have often been told that if my Court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 22-23 (1973).

13. Burger, *supra* note 12, at 234-35.
14. Oakes, *Lawyer and Judge: The Ethical Duty of Competency*, in ETHICS AND ADVOCACY: ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 57, 58 n.10 (Final Rep. 1978).
15. Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 445 n.8 (1977). Strazzella attributes the increase to the expansion of the sixth amendment by the Supreme Court, and to the expansion of devices for collateral attacks, as a result of three Supreme Court cases that expanded the use of habeas corpus: Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963). Strazella, *supra*, at 443-44.
16. Annot., 26 A.L.R. FED. 218, 230 (1976). Today the sole remedy for a sixth amendment violation due to ineffective counsel is an overturning of the conviction with a retrial usually following. *Id.* The scope of review on direct ap-

have been based on a varied set of fact patterns, including attorneys sleeping during the trial,[17] being drunk during the trial,[18] failing to make objections at trial, failing to make motions on time, failing to institute proper pre-trial investigations, and failing to be free of all conflicting interest.[19]

Despite the general recognition of the problem of incompetence, the courts have done little to eliminate it. They have failed even to take the initial step of establishing clearly what constitutes incompetence. As Justice Brennan noted in *Wainwright v. Sykes*,[20] "most courts [the Supreme Court included] traditionally have resisted any realistic inquiry into the competency of trial counsel."[21] What needs to be established is a criterion for the determination of what constitutes effective representation. The test needs to be flexible enough to handle a wide range of factual situations. Yet it also needs to be stringent enough to allow for meaningful evaluation of a claim, and to give the courts and attorneys sufficient guidance to enable them to act.

One commentator has noted the additional problem of finding a standard that will also take into consideration various institutional factors.[22] Among these are: (1) the judicial tendency to uphold convictions because of the supposed importance of the finality of judgments;[23] (2) the difficulty of securing "seasoned practitioners" for the numerous criminal cases which arise each year;[24] (3) that public defenders are hampered by the lack of adequate support staff, the wide diversity of their caseload, and the size of that

peal is usually limited to the record of the trial, while in a collateral proceeding, matters outside the record may be brought in as evidence. *See also* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964).

17. United States v. Katz, 425 F.2d 928 (2d Cir. 1970).
18. Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941).
19. *See* Annot., *supra* note 16; Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J. L. SOC. PROB. 1, 8-13 (1977). Professor Strazella's survey revealed of the 282 claims filed between the years 1969-1971, two claims were filed concerning lack of effectiveness at the arraignment proceeding, three cases concerned the preliminary hearing, two cases dealt with sentencing, 11% of the cases involved pre-trial preparation, 27% concerned guilty pleas, 4% dealt with pre-trial practice, 47% involved trial performance and 6.7% concerned failures to perfect appeal. Strazella, *supra* note 15.
20. 433 U.S. 72 (1977).
21. *Id.* at 117 (Brennan, J., dissenting) (footnotes omitted).
22. Comment, *supra* note 19, at 22-24.
23. *Id.* at 23.
24. *Id.* at 22.

load;[25] and (4) that most dockets are so overcrowded that many trial judges are motivated "to push parties to a disposition, denying continuances to unprepared attorneys whose clients may later successfully claim ineffective representation owing to lack of sufficient time for preparation."[26]

III. SUPREME COURT CASES

Since 1932 the United States Supreme Court has recognized that the Constitution not only provides for the right to assistance of counsel in criminal cases, but also the right to effective assistance of counsel. In *Powell v. Alabama*[27] the Supreme Court stated that

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court whether requested or not to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[28]

Powell held that the right to effective counsel was denied when the trial court appointed the local bar *en masse* to represent indigent codefendants. The Court asserted that a specific individual or individuals should have been assigned, and emphasized that appointed counsel should be imbued with a "clear appreciation of responsibility or impressed with the individual sense of duty."[29]

Since *Powell* the Court has declared unconstitutional various state established procedures which acted to limit an attorney's effectiveness. For example, in 1975 the Court held unconstitutional a state statute which gave a judge in a non-jury criminal trial the power to deny defense counsel the opportunity to deliver a closing argument.[30] Similarly, the Court has indicated that procedures that are constitutional on their face cannot be used in such a manner as to prevent effective representation. For example, the Court held that a request for a continuance cannot be denied if it would preclude any consultation between counsel and the defendant. The Court found that such denials would be subject to review even though the disposition of requests for continuance is generally

25. *Id.*
26. *Id.* at 23.
27. 287 U.S. 45 (1932).
28. *Id.* at 71. Another problem in *Powell* was that it was never made clear by the appointing court whether the bar would appear on behalf of the defendants after the arraignment.
29. *Id.* at 56.
30. Herring v. New York, 422 U.S. 853, 858 (1975).

within the discretion of the trial judge.[31]

Many commentators have asserted that the Supreme Court has been avoiding the issue of assessing the competency of actual performances of attorneys.[32] Since *Powell*, the Court has not set aside a single verdict due to incompetent attorney performance.[33] In one case presented to the Court, the attorney did not consult with his client until they were on the way to the trial.[34] Although the attorney was totally unfamiliar with the facts of the case and had no trial strategy planned, the Court chose not to rule on the issue of whether that performance constituted ineffective counsel. Instead, it held that the defendant's right had not been violated because he failed to prove that he had been prejudiced by the lawyer's performance.[35]

It was not until 1970, in *McMann v. Richardson*,[36] that the Court formulated any sort of criteria for determining when counsel has or has not been effective.[37] The Court held that the determination of whether an attorney was incompetent in advising a defendant to plead guilty depended on whether that advice was within the range of competence demanded of attorneys in criminal cases. It did not depend on whether a court would in hindsight consider the advice to be right or wrong.[38] However, the Court refused to delineate what was within that zone of competence, stating:

> Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the constitution is to serve its purpose, the defendant cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.[39]

Most of the federal trial courts have attempted to abide by the Supreme Court's position. Several of the federal circuit courts have extended the scope of *McMann* to apply to situations other than that of the guilty plea. A few courts have gone beyond that,

31. Avery v. Alabama, 308 U.S. 444, 445-46 (1940). The Court stated that counsel must be given an opportunity to consult with the defendant and to prepare a defense; otherwise, it "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the [constitutional] requirement that an accused be given assistance of counsel." *Id.* at 446. The Court emphasized that the sixth amendment right to counsel could not be satisfied by mere formal appointment. *Id.*
32. *See, e.g.*, Bazelon, *supra* note 12, at 21.
33. Oakes, *supra* note 14, at 62.
34. Chambers v. Maroney, 399 U.S. 42, 53 (1970).
35. *Id.* at 54.
36. 397 U.S. 759 (1970).
37. *Id.* at 771.
38. *Id.*
39. *Id.*

however, and have established specific guidelines; nevertheless, others have refused to adopt any meaningful standard at all.

IV. STANDARDS OF THE FEDERAL CIRCUIT COURTS

In the 1955 Supreme Court case of *Michel v. Louisiana*,[40] the petitioner alleged that he had been denied effective assistance of counsel because his attorney failed to file a timely motion to quash his indictment even though the attorney had a reasonable time within which to do so.[41] In addition, the petitioner pointed out that his attorney was seventy-six or seventy-seven years old at the time of the trial, and that he had been ill for several months during that year.[42] The Court rejected the petitioner's arguments, holding that there is a presumption of effectiveness, and that the evidence of this case did not overcome that presumption.[43] The Court observed that the decision whether or not to file the motion was a question of trial strategy, and this "was entirely within the discretion of [the attorney]."[44] The Court also took notice of the fact that the attorney was a well-known criminal lawyer who had been honored by his local bar, and who had more than fifty years of trial experience.

The Court's observations gave way to a set of general rules that have been adopted by all of the circuits. They are: (1) all attorneys who are admitted as members of the bar are presumed to be competent, and are presumed to have acted competently in any given situation; (2) the fact that counsel was physically or mentally ill, aged, intoxicated, young or inexperienced, does not itself overcome the presumption of effectiveness; (3) such facts, however, may be combined with other evidence to establish a claim of ineffectiveness; (4) great deference is to be given to the attorneys in the area of trial strategy and trial tactics;[45] (5) courts will not judge an attorney's performance on the basis of hindsight; and (6)

40. 350 U.S. 91 (1955).
41. *Id.* at 100.
42. *Id.*
43. *Id.* at 101.
44. *Id.* at 101 n.7.
45. One commentator has vividly criticized this rule, stating that

> [the] no-reversal-on-matters-of-tactical-judgement rule is an imprecise principle which clouds the consideration of ineffectiveness claims. What is a 'tactical' matter and what is not is by no means clear. The vagueness of the rule makes it a convenient tool for the courts to avoid analysis and dismiss the claim for a number of unstated reasons. . . . The crucial inquiry is not whether appellate judges can imagine an argument to justify counsel's behavior, but whether the record indicates that the attorney was aware of the problem, considered the alternatives, and made a reasonable choice of the best course of action.

effective representation does not mean that the lawyer has to be perfect or infallible, or that the defendant has to prevail.[46]

A. Farce And Mockery Standard

Beyond these rules, the standard today for determining whether a given performance amounts to effective representation varies among the courts. Until 1973, the standard employed by all eleven federal circuit courts was the "farce and mockery" test, *i.e.*, whether counsel's performance was so poor as to reduce the trial to a farce or render it a mockery of justice. The performance had to have been "so lacking in competence that it [became] the duty of the court or the prosecution to observe and correct it."[47] It must have been "perfunctory, in bad faith, a sham, a pretense or made without adequate opportunity for conference or preparation."[48]

In 1970, the Court of Appeals for the Second Circuit applied this standard in *United States v. Katz*,[49] and held that the petitioner was not denied effective assistance of counsel despite the fact that his counsel was observed sleeping on two occasions when the prosecution was examining a witness. The appellate court, in support of this holding, noted that the trial judge "[i]n denying the motion for a new trial . . . stated that the testimony during the periods of counsel's somnolence was not central to Katz' case and that if it had been, she would have awakened him rather than have waited for the luncheon recess to warn him."[50]

The "farce and mockery" standard is best illustrated, however, by the case which originated it, *Diggs v. Welch*.[51] The petitioner, Diggs, alleged that he had been denied his constitutional right to effective assistance of counsel when his attorney, either because of ignorance or incompetence, misadvised him to plead guilty.[52] The federal district court phrased the issue as "whether a prisoner may obtain a writ of habeas corpus on the sole ground that counsel

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Comment, *supra* note 19, at 20.

Another problem in this area is the impact it will have on the question of forfeiture. It has been held in Nebraska and elsewhere that "trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims [resulting from that strategy] in the absence of exceptional circumstances." State v. Fowler, 201 Neb. 647, 657, 271 N.W.2d 341, 347 (1978). The issue is thoroughly discussed in Strazella, *supra* note 15, at 474-84.

46. 5 AM. JUR. PROOF OF FACTS 2D, *Ineffective Assistance of Counsel* § 4 (1975).
47. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 899 (1945).
48. Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir.), *cert. denied*, 401 U.S. 1010 (1970).
49. 425 F.2d 928 (2d Cir. 1970).
50. *Id.* at 931.
51. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 899 (1945).
52. *Id.* at 668.

properly appointed by the court to defend him, acted incompetently and negligently during the proceedings."[53] The court said no: after recognizing that the petitioner had the right to "effective" counsel, it stated that the word "effective" was not to be given a liberal or broad interpretation.[54]

The "farce or mockery" standard was defined by the court to mean "representation so lacking in competence that it becomes the duty of the court or prosecution to observe it, and to correct it . . . [a]llegations even of serious mistake on the part of an attorney are [not] grounds for habeas corpus standing alone."[55] The court emphasized that any *particular* allegation of mistake would be reviewed only as details making up a larger picture, the rationale being that

> "[f]ew trials are free from mistakes of counsel. How much these mistakes contributed to the result can never be measured. There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective."[56]

Generally, the reasons given for the development of such a high standard for ineffective claims have been: (1) the fear that unprincipled lawyers would act in collusion with their clients and would perform below the minimum standards, so as to make their clients' conviction vulnerable to collateral attacks;[57] (2) the fear that the courts would be overburdened with frivolous appeals;[58] (3) the fear that the claims would have the effect of putting defense counsel on trial;[59] and (4) the fear that a lower standard would prevent attorneys from accepting appointments in criminal cases.[60]

The standard has been sharply criticized by many commentators and by modern courts.[61] The critics have argued that experience over the years has proved much of the test's rationale to be unsound. Furthermore, statistics on feigned ineffectiveness prove that trepidation to be baseless.[62] The temptation to feign ineffectiveness appears to have been outweighed by the fear of losing

53. *Id.*
54. *Id.* at 669.
55. *Id.* at 670.
56. *Id.*
57. Comment, *supra* note 19, at 31.
58. *Id.*
59. *Id.* at 30.
60. *Id.*
61. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Bazelon, *supra* note 12; Comment, *A Standard for Effective Assistance of Counsel*, 14 WAKE FOREST L. REV. 175 (1978).
62. Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978).

one's good reputation and of possible disciplinary action.[63] Statistics similarly belie the rationale that the strictness of the test will eliminate frivolous appeals. As one commentator noted, most petitions filed during the time the "farce and mockery" test was applicable involved claims with little chance of success, thus indicating that the "possibility of victory . . . [is] not a major factor in the defendant's decision to seek post conviction relief."[64]

An additional criticism is that the test's apparent focus on protecting the interests of the lawyers representing the criminal defendants, rather than on the rights of the defendants, is misplaced. One commentator has claimed that the test "requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment."[65] Another remarked that it is a puzzle why the legal profession requires so much from other professions but so little of itself: "[d]octors after all owe their patients much more than a mockery of medicine."[66] Critics also have argued that the needs to thwart feigned cases and to prevent putting defense counsel on trial are insufficient to justify the imposition of the strict standard in all situations.[67] As noted by one commentator, "[e]mbarrassment caused counsel by an unjust charge of ineffective assistance is a price that unfortunately must be paid at times for careful judicial administration. And where the charge is the remedy, it is not to save counsel from embarrassment but to save his client from unjust conviction or sentence."[68]

Still other criticism addresses the difficulty of administering the test. The central complaint is that the "farce and mockery" standard is but a "descriptive metaphor," and thus provides no guidelines for courts' or counsels' decision making.[69] What constitutes effective representation under this standard is left to the subjective determinations of judges. Uniformity and predictability under the test are noticeably lacking. In addition, the test encourages the court to "define the affirmative duty of effective assistance by negative explanations."[70] By allowing the courts to uphold the results of any trial in which counsel's performance falls short of gross mis-

63. Comment, *supra* note 19, at 31.
64. *Id.*
65. Bazelon, *supra* note 12, at 28.
66. Bines, *supra* note 16, at 928. The author also notes that unlike lawyers, doctors are not presumed to be competent; moreover, doctors unlike lawyers, "cannot offer evidence of good reputation or specific instances of skill to rebut evidence of malpractice." *Id.* at 928 n.9.
67. Comment, *supra* note 19, at 31.
68. Bazelon, *supra* note 12, at 25 (quoting Mitchell v. United States, 259 F.2d 787, 796 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958)).
69. Comment, *supra* note 61, at 194.
70. *Id.* at 195.

representation, the courts "clarif[y] the misconduct to be avoided rather than the positive steps which the attorney should take to protect the accused's right to effective assistance."[71]

Another problem with administering the test is that the test assumes that the errors will be recorded in the trial transcript. Thus, the test is limited to judging the effectiveness of counsel at trial. The importance of pretrial investigation, motions and advice is given little credence. Furthermore, judgment of counsel's performance at trial, if limited to review of the record, may be incomplete since "many errors will not be evident to an appellate court precisely because defense counsel's performance was ineffective."[72]

One last major criticism of the standard is that it is outdated and can no longer stand up to analysis in light of the Supreme Court's *Gideon* and *McMann* decisions. The argument is that the "farce and mockery" test gained prominence before the sixth amendment right to counsel was fully entrenched, and that, in fact, *Diggs* is a fourteenth amendment case rather than a sixth amendment decision. The fourteenth amendment imposes a higher standard for claims than does the sixth amendment. Thus, those courts still using the case as authority, it is argued, are misguided.[73]

As a result of these criticisms, only two circuit courts, the Tenth and Second, have continued to apply the "farce and mockery" standard. These courts have not offered any justification for retaining the test, other than the fact that the test has been applied for a long time in their respective circuits.[74] However, the Second Circuit in two recent cases has suggested that, given the proper opportunity, it will reassess its use of the standard, in light of the other circuits' abandonment of it.[75]

B. Reasonableness Standard

Eight of the federal circuit courts and the Nebraska Supreme Court have adopted a standard of reasonableness for use in determining whether counsel's performance was effective. There are four major categories of expressions of the reasonableness stan-

71. *Id.*
72. Comment, *supra* note 19, at 32.
73. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1320 (9th Cir. 1978); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).
74. United States v. Riebold, 557 F.2d 697 (10th Cir.), *cert. denied*, 434 U.S. 860 (1977).
75. *See* United States v. Medico, 557 F.2d 309, 318 n.15 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); Rickenbacker v. Warden, 550 F.2d 62, 66 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977).

dard: (1) The quality of a defense counsel's representation should be within the range of competence expected of attorneys *in criminal cases* (First and Fourth Circuits).[76] (2) The quality of defense counsel's representation should be within the range of customary skill and knowledge which normally *prevails at the time and place* (Eighth, Third, Ninth, and the District of Columbia Circuits; the state of Nebraska uses a combination of this and the first standard).[77] (3) The quality of counsel's representation needs to meet *a minimum standard* of professional responsibility (Seventh Circuit).[78] (4) Assistance of counsel required by the sixth amendment is counsel *reasonably likely to render and rendering* effective assistance (Fifth Circuit;[79] the Sixth Circuit uses a combination of this and the first standard).[80]

Despite these variations in the wording of the reasonableness standards, in application they appear to be practically the same in each circuit, with the exceptions of the Fourth Circuit and the District of Columbia Circuit, which have delineated specific guidelines for defense counsel to follow. In applying the standards, all the courts have tended to utilize the same three sources as guidelines.[81] The previously mentioned general rules[82] which have been

76. *See, e.g.*, United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

77. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970). The standard in Nebraska as stated by the Nebraska Supreme Court is whether counsel's performance measured up to that of a lawyer with ordinary training and skill in the criminal law in his or her area as well as a showing of conscientious protection of the interest of the client. State v. Bartlett, 199 Neb. 471, 472, 259 N.W.2d 917, 920 (1977).

78. United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976). What this test purports to do is to give the indigent defendant assistance in all areas of representation (pretrial, investigatory, trial or otherwise) at a level closely resembling that of the prosecution's representation. The court has also stated:

> The Constitution, unlike the judicial oath, does not go so far as to promise equal justice to the poor and the rich. . . . While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard.

United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

79. Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

80. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

81. Those three sources are the: ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA CODE]; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971) [hereinafter cited as ABA STANDARDS]; RESTATEMENT (SECOND) OF TORTS (1965).

82. *See* notes 45-46 & accompanying text *supra*.

adopted by all the circuits are the basic reason for this similarity. Most important of these is the presumption that lawyers are effective, and that inexperience in a given area of the law does not in itself overcome that presumption. Also significant is the great deference given to an attorney in the area of trial strategy and tactics. One should, however, be aware of the difference in the wording of the reasonableness standards, for it does indicate a potential for a variation of the level of competence demanded by the various circuits. As criminal law becomes more specialized, the disparity between the first standard, which is tied to the trend in criminal cases, and the others which are more general, will greatly increase.

The Eighth Circuit's reasonableness standard evolved from a long line of cases that modified the "farce and mockery" standard. Those cases attempted to lessen the strictness of the mockery standard in several different manners so that the test would no longer prevent courts from making a meaningful evaluation of a sixth amendment violation claim. For example, in 1967 the court held, in *Cardarella v. United States*,[83] that the standard for the circuit was the "farce and mockery" standard. The court stated that for a claim of ineffectiveness to be reviewable, the claim needed to show error vital to the defendant's right to a fair trial, for otherwise "there is no possible basis for a contention that counsel was grossly negligent."[84] The court quoted the following from a Tenth Circuit case as stating the "farce and mockery" standard:

> But the constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill. . . . It is instances in which resulting from the substandard level of the services of the attorney the trial becomes a mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to effective assistance of counsel.[85]

The court, however, went on to hold that the petitioner's claim for ineffectiveness was not valid, for reasons that required more from the attorney than the "farce and mockery" standard. The court stated that the petitioner's motion failed because:

> Petitioner makes no claim that counsel did not try the case competently and in good faith insofar as concerns the trial strategy and tactics, including the production of defense evidence and the examination and cross-examination of witnesses, as well as making a skillful and cogent argument to the jury and adequately objecting to the charge. Nor does he contend that counsel had any physical or mental disability or had inade-

83. 375 F.2d 222 (8th Cir. 1967).
84. *Id.* at 230.
85. *Id.* (quoting Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1965)).

quate time to prepare for trial.[86]

In 1971, in *Robinson v. United States*,[87] the Eighth Circuit interpreted the "farce and mockery" standard to mean the deliberate abandonment of one's *ethical duty* to one's client. The deliberateness had to be such "as to render pretextual an attorney's legal obligation to fairly represent the defendant."[88] In early 1974 the court held in *McQueen v. Swenson*[89] that the "farce and mockery" standard was not to be taken literally; instead, the standard merely placed a heavy burden on the defendant to show ineffectiveness of counsel.[90]

Later in 1974, the court held, in *Johnson v. United States*,[91] that a more appropriate standard "would refer more precisely to the professional competence of one who has completed a long and arduous course of study for professional license, and who has acquired some experience in applying legal principles and conducting court trials."[92] Finally, in a 1976 case, *United States v. Easter*,[93] the court, citing the *Johnson* and *Robinson* cases, held that the standard "established in our prior decisions" was that an attorney fails to act effectively when the attorney "does not exercise the customary skill and diligence that a reasonably competent attorney would perform under like circumstances."[94] The court noted that when an attorney fails to meet this standard, "the proceedings may be said to have been reduced to a 'farce' and 'mockery' of justice."[95] The most recent Eighth Circuit cases on this point have recited the customary skill test established in *Easter*, with no mention of "farce and mockery."[96]

The Nebraska Supreme Court adopted the "reasonableness standard" in 1974 in *State v. Leadinghorse*.[97] That opinion and those following it give no indication why the test was established and why the mockery test was abandoned. One possible reason is that the court was merely following the lead of the Eighth Circuit. The *Easter* decision has been cited by the court on occasion as authority for the standard.[98]

86. 375 F.2d at 230.
87. 448 F.2d 1255 (8th Cir. 1971).
88. *Id.* at 1256.
89. 498 F.2d 207 (8th Cir. 1974).
90. *Id.* at 214.
91. 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).
92. *Id.* at 646.
93. 539 F.2d 663 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977).
94. *Id.* at 666.
95. *Id.*
96. *See* DuPree v. United States, 606 F.2d 829, 830 (8th Cir. 1979); United States v. Brown, 605 F.2d 389, 397 (8th Cir. 1979).
97. 192 Neb. 485, 222 N.W.2d 573 (1974).
98. *See* State v. Bartlett, 199 Neb. 471, 472, 259 N.W.2d 917, 920 (1977).

To give substance to the competence standard, the State of Nebraska and the Eighth Circuit, as well as the other circuits employing the reasonableness standard, have utilized the American Bar Association's Standards Relating to the Prosecution Function and the Defense Function.[99] The ABA Standards, which set forth guidelines for lawyers to follow generally and in specific situations, were formulated by a committee of trial judges and lawyers and reflect in large part their "long and varied experience."[100] The ABA House of Delegates formally adopted the Standards in 1971. The District of Columbia Circuit and the State of Wisconsin have judicially adopted them as their official criteria for determining competency.[101] Nebraska and the remaining circuits have utilized them only as advisory guidelines.[102] These courts have tended to cite to specific provisions of the Standards rather than to the Standards as a whole. Furthermore, these courts apparently have applied the Standards on a haphazard basis rather than automatically applying them to every claim.

In applying the ABA Standards, both the Court of Appeals for the Eighth Circuit and the Supreme Court of Nebraska have held that defense counsel has a duty to consult with his or her client, to advise that client, to assert at trial what may be that client's only defense, and to make such preparations for arraignment and trial as the facts of the case fairly demand.[103] The details of this last duty, the duty to investigate, are set forth in Defense Function 4.1:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists *regardless* of the accused's admissions or statements to the lawyers of facts constituting guilt or his stated desire to plead guilty.[104]

In addition, the Nebraska Supreme Court, relying on Defense Function 3.6, has held that an attorney must take prompt action to preserve the defendant's legal rights, and that the attorney "should consider all procedural steps which in good faith may be taken, including, for example, . . . moving to suppress illegally ob-

99. ABA STANDARDS, *supra* note 81.
100. *Id.* at 7.
101. United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973); State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973).
102. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540, 545 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).
103. *See, e.g.*, United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); State v. Lang, 202 Neb. 9, 272 N.W.2d 775 (1978); State v. Bartlett, 197 Neb. 471, 474, 259 N.W.2d 917, 920 (1977).
104. ABA STANDARDS, *supra* note 81, at 225-26 (emphasis supplied).

tained evidence."[105] This emphasis on pretrial motions and pretrial investigation indicates that under the reasonableness standard, an inquiry concerning whether a given attorney's performance was competent will not be limited to his or her conduct during the trial, as it was under the "farce and mockery" standard.

Reasoning along lines similar to the rationale underlying the ABA Standards, some appellate courts (not including Nebraska and the Eighth Circuit) have urged trial courts to apply a set of specific things counsel should or should not do, in order to ascertain the "range of competence demanded." The Fourth, Sixth and District of Columbia Circuits have prescribed their own sets of criteria.[106] These judicial criteria are to complement the ABA Standards and, in some instances, state bar canons.[107] For example, the Fourth Circuit has developed a list of six specific requirements for effective sixth amendment representation: (1) counsel should be appointed promptly; (2) the attorney should be given an opportunity to prepare a defense; (3) the attorney should confer promptly and often with his or her client; (4) the attorney should advise the client of his or her rights; (5) the attorney should elicit from the client information necessary to ascertain the availability of certain defenses; and (6) the attorney must make a thorough factual and legal investigation of the case and must provide himself or herself with sufficient time to contemplate and prepare for trial.[108] In addition, the District of Columbia Circuit, also has required that counsel take all necessary steps to preserve the rights of his or her client, and that the attorney should discuss with the client all potential strategies and tactical choices.[109]

Unlike the others, the Ninth Circuit Court of Appeals has expressly avoided providing specific guidelines. The court recognized that "[s]uch a checklist would serve to enhance the objectivity of the general standard," but felt that it would be inappropriate because "it would be unwise to restrict the constitutional requirement to a list of essential elements applicable to all of the infinite variety of factual situations that arise."[110] The court cited

105. State v. Bartlett, 197 Neb. 471, 474, 259 N.W.2d 917, 920 (1977).

106. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968).

107. *See, e.g.*, United States v. DeCoster, 487 F.2d at 1203 n.23. The court noted that these enumerated duties were meant to be only starting points for the court to use in developing "clearer guidelines for courts and for lawyers as to the meaning of effective assistance." *Id.*

108. Marzullo v. Maryland, 561 F.2d 540, 547 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (quoting from Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968)).

109. United States v. DeCoster, 487 F.2d at 1204.

110. Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978). The court stated that

McMann as authority for the proposition that guidelines are inadvisable, and that the determination of the effectiveness of counsel is best left to the discretion of the trial courts.[111]

Another weapon in the judicial arsenal for deciding ineffective representation claims is the American Bar Association Code of Professional Responsibility.[112] One court said that the "reasonably competent" standard is no more than shorthand for the standard imposed by Canons 6 and 7 of the Code of Professional Responsibility and the Disciplinary Rules thereunder.[113] In addition, the ABA Standards impose a duty on every lawyer to know the standards of professional conduct, as defined in codes and canons of the legal profession "to the end that his performance will at all times be guided by appropriate standards."[114] Comments to the ABA Standards urge law schools and bar associations to make efforts to ensure that all attorneys are fully cognizant of their ethical responsibilities.[115] Additionally, one commentator has even urged the use of disciplinary procedures to help remedy ineffective representation.[116] Yet the majority of the circuits have failed to utilize the ABA Code, even as an advisory guideline. Although the Nebraska Supreme Court and the Eighth Circuit Court have drawn authority from the Code,[117] their use of it has been sparse.

Applying the Code in *Thomas v. Wyrick*,[118] the Eighth Circuit held that an attorney, to be effective, must at all times exercise his or her professional responsibility on behalf of his or her client.[119] Furthermore, he or she should not habitually disregard available information.[120] The parts of the Code used to support these two principles were Canon 5 (A Lawyer Should Exercise Independent

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one of the reasons the circuit abandoned the "farce and mockery" test was that it was too subjective. While also recognizing that the reasonableness standard "involves a measure of personal judgment," the court justified its use because the judgment can be made by "reference to a fact the court knows or can determine by inquiry." *Id.* at 1329-30.

111. *Id.* at 1330. The Supreme Court in *McMann* held that, for the most part, what constitutes the right to effective counsel is up to the discretion of the trial courts. The Court, however, urged the lower courts to maintain a standard of performance for attorneys, noting that the right to counsel would be meaningless if counsel is ineffective. McMann v. Richardson, 397 U.S. 759, 771 (1970).

112. ABA CODE, *supra* note 81.

113. Schoonover v. State, 582 P.2d 292, 299 (Kan. Ct. App. 1978).

114. ABA STANDARDS, *supra* note 81, at 171.

115. *Id.* at 175-76.

116. Bines, *supra* note 16, at 972-74.

117. *See* Thomas v. Wyrick, 535 F.2d 407, 418 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); State v. Lang, 202 Neb. 9, 272 N.W.2d 775 (1978).

118. 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976).

119. *Id.* at 413.

120. *Id.*

Professional Judgment on Behalf of a Client) and Canon 6 (A Lawyer Should Represent a Client Competently) and Disciplinary Rule 6-101(A).[121] This Disciplinary Rule states that: "A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him."[122]

The court in *Wyrick* found that the attorney was incompetent because he failed to interview the government's witnesses. An important aspect of this decision is that the holding was made despite the fact that, in the community at the time, there existed a general policy of not interviewing such witnesses.[123] This might indicate that the Eighth Circuit would consider a standard of reasonableness that is not community-oriented; however, this has not been the trend. The circuit's two most recent cases dealing with incompetence have employed the community standard test announced in the *Easter* decision.[124]

The Nebraska Supreme Court, in *State v. Ondrak*,[125] used Canon 7 to hold that an attorney had acted competently. The defendant in *Ondrak* claimed that he had been denied effective assistance when at sentencing, his attorney, instead of urging the judge to place the defendant on probation, merely made comments about the defendants past behavior.[126] The court said:

> ABA Code of Professional Responsibility, Canon 7, states that one of the primary duties of an attorney is to represent a client 'zealously within the bounds of the law.' The record in this case demonstrates that the lawyer involved did just that. We can only characterize the publication in the briefs and the allegations of the petition herein [*sic*] being an irresponsible attack on a lawyer who did the best he could for a defendant in an almost impossible situation and accomplishing a result which is perhaps better than he could hope for. The defendant's best interests were served by not pursuing an impossible approach; rather his best interests were served by pursuing the few elements in the defendant's past record that seemed to have a chance of success in influencing the sentencing judge.[127]

Some courts utilized the *Restatement (Second) of Torts* section on the Undertaking a Profession or Trade as a third source to give substance to the competence standard.[128] A cite to the *Restate-*

121. *Id.* at 413 n.6.
122. ABA CODE, *supra* note 81, Canon 6, DR 6-101(A).
123. 535 F.2d at 413.
124. *See* DuPree v. United States, 606 F.2d 829, 830 (8th Cir. 1979); United States v. Brown, 605 F.2d 389, 397 (8th Cir. 1979).
125. 186 Neb. 838, 186 N.W.2d 727 (1971).
126. *Id.* at 841, 186 N.W.2d at 729.
127. *Id.*
128. RESTATEMENT (SECOND) OF TORTS § 299A (1965). *See, e.g.*, Marzullo v. Mary-

ment is usually accompanied by cites to annotations that discuss the standard of care required of doctors and surgeons.[129] Section 299A states that "unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[130]

Nebraska's competence standard adopts a similar community comparison approach: "[C]ounsel's performance is measured against that of a lawyer with ordinary training and skill in the criminal law *in his area* as well as a showing of conscientious protection of the interest of the client."[131] In light of this community orientation, and because Nebraska attorneys are engaged in practice in communities that vary greatly in size, it would seem appropriate, in determining the effectiveness standard in the state, to note the following comment to section 299A:

> Allowance must be made also for the type of community in which the actor comes on his practice. A country doctor cannot be expected to have the equipment, facilities, experience, knowledge and the opportunity to obtain it, afforded him by a large city. The standard is not, however, that of the particular locality. If there are only three physicians in a small town, and all three are highly incompetent, they cannot be permitted to set a standard of utter inferiority for a fourth who comes into town. The standard is rather that of persons engaged in similar practices in similar localities, considering geographical location, size and the character of the community in general.[132]

The comment also notes that the allowance is for those professions where the degree of variation in the skill and knowledge among members is high, for example, surgeons and physicians. Attorneys, it avers, do not fit into this category and thus, "allowance for

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land, 561 F.2d 540, 544 n.9 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); Moore v. United States, 432 F.2d 730, 736 n.24 (3d Cir. 1970).

129. *See, e.g.*, Moore v. United States, 432 F.2d 730, 737 n.27 (3d Cir. 1970). The standard of care required of a doctor is dependent upon the locality of his practice. Generally the rule is that

> a physician must possess that reasonable degree of learning, skill, and experience which ordinarily is possessed by others of his profession, and that he must exercise reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge, and exert his best judgment as to the treatment of the case entrusted to him—in short, a physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the neighborhood, in the same general line of practice, ordinarily have and exercise in like cases.

61 AM. JUR. *Phys. & S.* § 110 (1972) (footnote omitted).

130. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

131. State v. Bartlett, 199 Neb. 471, 472, 259 N.W.2d 917, 919 (1977) (emphasis added).

132. RESTATEMENT (SECOND) OF TORTS § 299A, Comment g (1965).

them has seldom been made."[133] Arguably, however, such an allowance should be extended to lawyers because the resources available to small town and small firm attorneys simply do not equal those available to the larger community and larger firm attorneys. This is particularly true in an age that puts emphasis on pretrial investigation and on specialization. Can a small town general practitioner be compared with a criminal law specialist?

Beyond reference to these three sources of guidance, *i.e.*, the ABA Standards, the ABA Code, and the *Restatement of Torts*, the best way to grasp an understanding of what would be deemed reasonable representation is to review some of the courts' most recent opinions. This is necessary because the reasonable representation issue is largely left to the discretion of the courts. Reviewing Nebraska case law, the emphasis apparently has been on whether counsel *fully* asserted defendant's innocence and defenses at trial, and on whether counsel *vigorously* represented his or her client.[134] It also is apparent that the Nebraska courts have analyzed the defense attorney's performance in light of the strength of the prosecution's case.[135] A quirk also has appeared: Nebraska courts, unlike many of the federal circuit courts, have taken notice of the experience of the attorney, as well as the attorney's recognized legal accomplishments.[136]

C. Criticisms Of The Reasonableness Standards

Some of the same criticisms directed at the "farce and mockery" standard have also been directed at the reasonableness standards. The major criticism has been that the standards are too vague and lack any clear criteria which courts can use in applying them.[137] Thus, some critics have argued that in application, the reasonableness standards are just as subjective as the "mockery" standard.[138] The exceptions to this line of attack, of course, are those reasonable standards which incorporate a set of specific criteria. One commentator expressed the view that:

> [U]tilization of lists of defense counsel's duties offers great potential for improving the handling of ineffective cases. Such lists will not eliminate ineffectiveness claims, nor make them capable of instant disposition. But in providing a statement of what effective representation is and not merely a negative shibboleth about what it is not, the lists offer an objec-

133. *Id.*
134. State v. Mays, 203 Neb. 487, 492, 279 N.W.2d 146, 150 (1979).
135. *See* State v. Nokes, 192 Neb. 884, 889, 224 N.W.2d 776, 779-80 (1975).
136. *See* State v. Robinson, 194 Neb. 111, 112, 230 N.W.2d 222, 224 (1975); State v. Oziah, 186 Neb. 541, 547, 184 N.W.2d 725, 728 (1971) (used while applying the "farce and mockery" standard).
137. Comment, *supra* note 19, at 41; Comment, *supra* note 61, at 194.
138. Comment, *supra* note 19, at 41.

> tive and uniform starting point from which all courts can determine what defense counsel should have done . . . . [T]he guidelines will aid appellate judges in the dispatch of their duties, providing a common ground from which they may develop a rational analysis and evaluation of the facts in each case.[139]

A related criticism of the reasonableness standards has been that some of the standards beg the question by incorporating the very terms that they attempt to define.[140] For example, the Fifth Circuit's standard refers to "counsel reasonably likely to render and rendering reasonably effective assistance of counsel."[141]

There are advantages to the reasonableness standards. First, the standards, at least on their face, are more generous to the defendant bringing a claim of ineffectiveness than the mockery of justice standard.[142] Second, they allow courts to make more serious evaluations of the claims than does the mockery test. As one commentator pointed out, "[t]he more a particular standard is oriented toward the mockery-type test—the easier it will be for a court to find that the pleading requires no evidentiary hearing since the allegations of ineffectiveness will have to be proportionately more extensive and persuasive."[143] Third, the reasonableness standards allow a court to overturn a conviction for something less than two attorneys' *serious* breach of duty which deprived the defendant of a fair trial. In other words, the reasonableness standards move away from the policy, reflected in the "farce and mockery" standard, that finality in criminal cases outweighs the consequences of inferior representation except under the most unusual of circumstances. The emphasis under the reasonableness standards is on the defendant's right to effective representation. Fourth, the reasonableness standards, unlike the "mockery" standard, take the emphasis off the trial proceedings, and allow ineffective assistance claims to be brought concerning all areas of the law.[144] Finally, some commentators have argued that the flexibility in the reasonableness standards is an advantage rather than a disadvantage. The argument is that "by specifying the level of practice prevailing in the community as a concrete standard . . . some of the subjectivity inherent in the [mockery] test can be avoided."[145] And by being flexible, the reasonableness standards prevent the test from being applied mechanically in a

139. *Id.* at 53.
140. Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973); Comment, *supra* note 61, at 194.
141. Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).
142. Comment, *supra* note 19, at 40.
143. Strazzella, *supra* note 15, at 454-55.
144. Comment, *supra* note 19, at 41.
145. *Id.* at 41-42.

very volatile area. This viewpoint is reflected by the Supreme Court opinion in *McMann* and by the Ninth Circuit, which refused to adopt a specific checklist for attorneys and the courts, opting instead to leave it to the discretion of the district judges.[146] As one commentator has noted:

> [the standards] call for case-by-case determinations since precedents of broad general value are scarce in this area. . . . [T]here is no formula that will or should work mechanically in the ineffectiveness area. The best that can be done is to isolate relevant factors and apply them with an eye on the realities of defense work and on the vital constitutional right involved.[147]

V. RETAINED v. APPOINTED COUNSEL

The trend today in the disposition of ineffectiveness claims is *not* to make a distinction between retained and appointed attorneys. However, at least two federal circuit courts, the Fifth and the Tenth, have retained the distinction.[148] Two theories have been advanced to support the holding that an allegation of ineffective assistance of retained counsel is not actionable: (1) The errors of the attorney are, under an agency theory, imputed to the defendant who hired the attorney as a representative; and (2) the fourteenth amendment's state action requirement is not satisfied when counsel is retained rather than appointed.

An example of the application of the agency theory can be seen in *United States v. Riebold*,[149] in which the Tenth Circuit Court of Appeals stated:

> [W]e observe that even had Morgan's then retained counsel undertaken 'little or no action' between December, 1974 and August, 1975, thereby rendering *his* representation a sham, farce or mockery as now contended, (a) it did not extend to or affect the representation at trial, and (b) Morgan must assume the fault for any failure of his trial counsel to exercise greater diligence inasmuch as counsel was retained in each instance.[150]

An older case which illustrates the extreme to which this theory was applied is *Hudspeth v. McDonald*,[151] a 1941 Tenth Circuit case. The *Hudspeth* court held the following:

> The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. *But what of it*? Appellee employed him; he paid him a substantial fee, *and had a right to his services if he desired them*, even though he

146. *See* notes 110-111 & accompanying text *supra*.
147. Strazzella, *supra* note 15, at 455.
148. *See, e.g.*, United States v. Childs, 571 F.2d 315 (5th Cir. 1978); Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir.), *cert. denied*, 422 U.S. 1011 (1975).
149. 557 F.2d 697 (10th Cir.), *cert. denied*, 434 U.S. 860 (1977).
150. *Id.* at 703.
151. 120 F.2d 962 (10th Cir. 1941).

might have been under the influence of intoxicants.[152]

The agency theory has been sharply criticized, and its total abandonment has been urged. The critics' main argument has been that the commercial law doctrine of agency is inappropriate in the criminal law area. It is inappropriate because the criminal principal (the client), unlike the commercial principal, is unlikely to be the knowledgeable director of the relationship.[153] Similarly, it has been argued that it is simply "unfair to impute the ineffectiveness of an attorney to a defendant who does not possess the knowledge necessary to understand or detect his attorney's derelictions."[154] Along these same lines, it is also arguable that the errors should not be imputed, for many individuals are not knowledgeable about the attorneys that they hired. Their unfamiliarity with the legal process also makes them unfamiliar with *what* constitutes a good criminal attorney, and therefore *who* is a good criminal attorney. The ABA restrictions on advertisement is one reason this unfamiliarity exists.[155]

An example of the lack of state action theory is presented in the Fifth Circuit's *Fitzgerald v. Estelle*[156] decision. The court held that in order to establish an ineffective assistance of counsel claim in a case involving retained counsel, the defendant must establish either that retained counsel performed so poorly as to render the proceedings fundamentally unfair, *or* that retained counsel's conduct fell short of reasonably effective assistance *and* some responsible government official connected with the criminal proceeding who could have remedied the conduct failed in this duty to accord justice to the accused.[157] The court held that state action could be found by either method since the right to counsel is guaranteed by the fourteenth as well as the sixth amendment.[158] The first test is directed toward the fourteenth amendment. The court has stated that "where a lawyer's ineffectiveness renders the trial fundamentally unfair, state action is present because the state's criminal justice system has failed and enforcement of the resultant judgment would violate due process regardless of whether counsel is retained or appointed."[159] The second test is directed at a sixth amendment claim. Because the court found that the sixth amendment covered a greater range of counsel errors than the four-

152. *Id.* at 967 (emphasis supplied).
153. Annot., 26 A.L.R. Fed. 218, 236 n.39 (1976).
154. 5 AM. JUR. PROOF OF FACTS 2D *Ineffective Assistance of Counsel* § 3 (1975).
155. *See generally* ABA CODE, *supra* note 81, Canon 2, DR 2-101.
156. 505 F.2d 1334 (5th Cir.), *cert. denied*, 422 U.S. 1011 (1975).
157. *Id.* at 1337.
158. *Id.* at 1336-37.
159. United States v. Alvarez, 580 F.2d 1251, 1255 (5th Cir. 1978) (discussing the holding of *Estelle*).

teenth, it ruled that the stricter test was needed.[160] The stricter standard was justified by noting that a lower burden would require the trial judge to question the tactics and strategy of retained counsel throughout the trial. This, the court reasoned, would place an intolerable burden on the court, and would often be counterproductive for the defendant.[161] Additionally, the court stated that it was fundamentally unfair to charge the state with responsibility for something which it had little chance to correct.[162]

A major criticism of the type of state action test announced in *Estelle* has been that it ignores the fact that the whole criminal trial and procedure is state action.[163] The dissent in *Estelle* noted that, "[w]here counsel is retained, the necessity of state action is satisfied because the state adjudicatory machinery is inextricably intertwined with the conduct of an accused person's retained attorney."[164] The dissenting opinion set forth the following examples: (1) the state provides for judges (pays them and sets their qualifications); (2) the state furnishes the physical facilities; (3) the state provides for the selection, summoning and paying of jurors; (4) the state retains controls over the accused from arrest to ultimate release; (5) the state selects the class of people from which the accused can retain an attorney; (6) the state has the power to bar and to disbar attorneys; (7) the form of an attorney's pleadings and orders are prescribed by the state; (8) the state court, within certain limits, may command the attorney's presence and may even direct his or her timetable by postponing or advancing a given trial date; and (9) most importantly, attorneys are essential to the judicial machinery, for unless an accused knowingly waives his right to counsel no critical stage of the criminal process can proceed until the accused retains counsel or counsel is appointed for him.[165]

The theory has also been criticized as constitutionally unsound. It has been argued that there should not be the distinction between the fourteenth and sixth amendments; since the sixth amendment is *totally* incorporated in the fourteenth amendment, the due process clause offers the *same* protection that the sixth amendment offers.[166] The issue is not whether the state deprived the defendant of the constitutional right to effective counsel, but whether the defendant was denied a fair trial because he or she

160. Fitzgerald v. Estelle, 505 F.2d at 1336-37.
161. *Id.* at 1337.
162. *Id.*
163. *Id.* at 1344-45 (Godbold, J., dissenting); Comment, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 311 (1973).
164. 505 F.2d at 1345 (Godbold, J., dissenting).
165. *Id.*
166. 89 HARV. L. REV. 593, 596-97 (1976).

did not have effective counsel.[167]

Other critics have argued that there is not sufficient distinction between retained and appointed counsel to justify the result that the same error for which relief *would not* be granted if committed by a retained counsel *would be* the basis for relief simply because the attorney was appointed.[168] The recent Supreme Court decision of *Ferri v. Ackerman*[169] underscores this criticism, at least where federal courts are involved. Although the decision deals with malpractice, much of the reasoning of the Court can easily be adopted to ineffectiveness claims.

In *Ferri*, a criminal defendant convicted in federal court brought a malpractice suit against his appointed attorney. The suit was brought in state court, where it was dismissed, originally and on appeal, because the attorney appointed was held to be immune from liability.[170] Since the first proceeding was in a federal court, the United States Supreme Court, reviewed federal statutory and common law and held that the attorney was not immune from liability.[171] The Court found that the legislative history of the federal criminal justice act, under which the attorney was appointed, revealed an attempt on the part of Congress to minimize the difference between retained and appointed counsel. It found that "Congress clearly wanted appointed counsel to share as much of retained counsel's characteristic independence from the government as was possible notwithstanding the government subsidy."[172] The Court also noted that many private citizens and organizations receive government monies, and that it was never the government's intention that these recipients be immune on the basis of actions taken in the course of expending those funds.[173]

With regard to federal common law on the issue of immunity, the Court held that the immunity which extended to various federal officers for claims arising out of the performance of their duties did not extend to lawyers appointed to represent indigent defendants.[174] The Court's rationale was that the appointed attor-

167. *Id.*
168. Comment, *supra* note 163, at 311.
169. 100 S. Ct. 402 (1979).
170. *Id.* at 405.
171. *Id.* at 410.
172. *Id.* at 407 n.16. The Court held that it was Congress' intent that all defense counsel would satisfy the *same standards and be subject to the same controls. Id.*
173. *Id.* at 408. The Court found that the government compensation was only to serve as an incentive for appointed counsel to be as diligent and as thorough as retained counsel. *Id.* at 406-07.
174. *Id.* at 409. The Court stated that although lawyers are often referred to as "officers of the court," they are not officers of the government, in the ordinary sense, who would be entitled to immunity.

ney's role more closely parallels the role of privately retained counsel than that of a judge who is given immunity. The Court indicated that the appointed attorney's duty, unlike that of a judge, is not to serve the public at large but to serve the individual interests of his client. An indispensable element of an appointed attorney's responsibility "is the ability to act independently of the government and to oppose it in adversary litigation."[175] Furthermore, the Court noted that "[t]he fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, *it provides the same incentive for appointed and retained counsel to perform that function competently.*"[176] It is important to note for the purposes of ineffectiveness claims that the Court found that Congress intended that *all* defense counsel satisfy the *same standards of professional responsibility* and be *subject to the same controls.* As authority the Court cited to the ABA Standards.[177]

The Nebraska Supreme Court has not specifically held that, for sixth amendment purposes, there is no distinction between retained and appointed counsel. However, none of the Nebraska cases have made the distinction, and in *State v. Moss*,[178] the court held that there was no merit to the argument that a court appointed attorney has a duty greater than or different from that of one who was retained.[179]

The Eighth Circuit has specifically held that the constitutional standard for determining whether counsel is effective is the same for both appointed and retained counsel.[180] However, the court in

> Unlike these officials [marshalls, bailiffs, court clerks or judges] a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term.

Id. at 408 n.19 (quoting from Cammer v. United States, 350 U.S. 399 (1956)).

175. *Id.* at 409.

176. *Id.* at 409 (emphasis added; footnote omitted).

177. *Id.* at 407 n.17. This decision might also have some impact on the use of 42 U.S.C. § 1983 by indigent criminal defendants to bring suits alleging ineffectiveness. *See generally*, Annot., 36 A.L.R. FED. 594 (1976). The trend in the cases involving section 1983 had been to hold that the mere appointment of counsel was not enough to establish the requisite state action needed to bring suit under that section. The Court's *Ferri* opinion appears to be supportive of this trend.

178. 185 Neb. 536, 177 N.W.2d 284 (1970).

179. *Id.* at 539, 177 N.W.2d at 286.

180. Crismon v. United States, 510 F.2d 356, 357 n.2 (8th Cir. 1975); Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974); Cross v. United States, 392 F.2d 360 (8th Cir. 1968).

Garton v. Swenson,[181] indicated that there were two practical factors which should be kept in mind:

> While the *constitutional* standards for retained and appointed counsel may well be the same, other practical factors need be considered. We are not unmindful that the layman has little expertise in choosing a lawyer and should not be held completely responsible for the professional competency of his retained attorney. On the other hand, the trial court prior to or during trial is in a difficult position if it chooses to question the competency of a defendant's retained attorney. The defendant might well claim that the court was prejudiced or unduly interfering with trial strategy.[182]

VI. AUTOMATIC REVERSAL v. HARMLESS ERROR

Another controversial topic in the area of ineffectiveness claims is whether, once ineffectiveness has been established, the petitioner is entitled to automatic reversal or whether the petitioner must in addition show that he or she has been prejudiced by the constitutional violation. The harmless error rule was first adopted by the United States Supreme Court in 1967 in the decision of *Chapman v. California*.[183] Under the doctrine, unless the constitutional violation is one which involves a substantial right of the parties, the mere violation of a constitutional right does not guarantee reversal.[184] There will not be a reversal if the government can demonstrate that the violation did not in any way contribute to the conviction.[185] The rule was adopted because the Court felt that it was unnecessary to set aside convictions for "small errors or defects that have little, if any, likelihood of having changed the result of trial."[186]

The controversy with regard to ineffectiveness of counsel claims has arisen because there has been a disagreement in the federal courts as to whether the right to effective counsel is a "substantial" right of the parties. The Third and Sixth Circuits have held that it is,[187] pointing to the Supreme Court decisions in *Glasser v. United States*[188] and *Chapman v. California*, which held that the right to counsel is a fundamental right essential to a fair

181. 497 F.2d 1137 (8th Cir. 1974).
182. *Id.* at 1139 n.4. In that same decision the court suggested that claims raised on collateral attack might require a different constitutional standard than those raised on direct appeal, the rationale being that the nature of the past conviction procedure requires a stricter standard.
183. 386 U.S. 18 (1967).
184. *Id.* at 22.
185. *Id.* at 23.
186. *Id.* at 22.
187. *See, e.g.*, Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970).
188. 315 U.S. 60 (1942).

trial.[189] The remaining circuit courts have held that ineffective counsel falls into the harmless error category, on the theory that there is a distinction between the right to counsel and the right to *effective* counsel.[190] They have argued that because the advice of counsel is essential to exercise the defendant's other rights, "a total absence of counsel cannot but be harmful."[191] Yet when counsel is present, the presumption is not justified, and, thus, the seriousness of the violation must be examined in terms of the facts of the case.[192]

The advocates of the automatic reversal rule have responded that the Supreme Court has held that the right to counsel *is* the right to effective counsel. Further, they have emphasized that the incompetent counsel may in a given situation be no better or worse than no representation at all: "After all, the purpose of *Gideon* was not merely to supply criminal defendants with warm bodies but rather to guarantee reasonably competent representation."[193] The proponents of the automatic reversal rule have also argued that such a rule is more in line with the most recent Supreme Court cases which dealt specifically with *ineffectiveness*[194] of counsel: *Herring v. New York*[195] (ineffectiveness found when an attorney was prevented from making a closing argument) and *Holloway v. Arkansas*[196] (ineffectiveness found in the appointment of one attorney for two codefendants with conflicting interests). In both cases the Court held that in instances of counsel's ineffectiveness like those presented, no prejudice need be shown.[197]

VII. BURDEN OF PROOF

In those circuits which have followed the harmless error rule, there is further controversy over which party should bear the burden of establishing that the criminal defendant was prejudiced be-

189. Chapman v. California, 386 U.S. at 23 n.8; Glasser v. United States, 315 U.S. at 72.

190. The Fourth Circuit has not specifically adopted the automatic reversal rule, but the circuit has reversed cases once ineffectiveness has been proved, without going into whether or not the defendant was prejudiced. *See, e.g.*, Tolliver v. United States, 563 F.2d 1117 (4th Cir. 1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

191. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

192. *Id.*

193. Cooper v. Fitzharris, 586 F.2d 1325, 1338 n.11 (9th Cir. 1978) (Huffstedler, J., dissenting); *see also* Note, *Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman*, 43 GEO. WASH. L. REV. 1384, 1398 (1975).

194. 586 F.2d at 1335 (Huffstedler, J., dissenting).

195. 422 U.S. 853 (1975).

196. 435 U.S. 475 (1978).

197. *Id.* at 489; 422 U.S. at 858.

cause he or she was denied effective assistance of counsel. Some of the circuits have held that the burden falls on the government, while others have held that it falls on the defendant. Still others have taken an intermediary position.

Those circuits which place the burden on the defendant[198] do so for four reasons: First, many of the errors caused by counsel's ineffectiveness do not appear in the trial record. Thus, it is difficult for the government to determine which witness should or could have been called, which defenses could or should have been raised, and what investigations should or could have been performed. Since it is the defendant who possesses the greatest access to this kind of evidence the burden should fall to him or her.[199] Second, the defendant could purposefully frustrate or hinder the government's efforts in ascertaining the needed facts by asserting his or her privilege against self-incrimination.[200] Third, if the burden were placed on the government, it would, in effect, be penalized for something over which it had no control.[201] Finally, if the government had the burden of proof, it would force it into a "big brother" position. The government would be forced into monitoring defense counsel's handling of the case from beginning to end to ensure that he or she did not commit any prejudicial errors. Additionally, both the defendant and the defense counsel would have to be interviewed to determine why defense counsel chose to act in a particular manner, which would wreak havoc on the adversary system: "The attorney-client privilege would be breached; the fifth amendment privilege against self-incrimination would be eliminated, and the sixth amendment right to counsel would be rendered a nullity by virtue of the restrictions placed on the attorney's freedom of action."[202]

The circuit courts and critics that have advocated that the burden should be on the government have made the following supportive arguments: (1) It is the government which in the first instance (the trial) has the burden of proving beyond a reasonable doubt that the defendant is guilty. Placing the burden to show prejudice on the defendant unfairly shifts the initial burden, because the defendant, to show prejudice, must establish his or her innocence. It is no answer to say that the appellant has already

198. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975); United States v. Ingram, 477 F.2d 236 (7th Cir. 1973).

199. Note, *supra* note 193, at 1404.

200. *Id.*

201. United States v. Decoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).

202. Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?* 29 BAYLOR L. REV. 29, 53 (1977).

had a trial in which the government was put to proof, because the heart of the ineffective claim is that the effectiveness deprived him or her of a full adversary hearing.[203] (2) It is not always clear that the defendant has the greatest access to the evidence. It is also doubtful that the indigent criminal defendant will have the resources available to him to establish prejudice, *e.g.*, conduct the necessary investigations. (3) Placing the burden on the defendant will discourage the bringing of ineffectiveness claims, because the benefit of the doubt is with the government.[204] "This result is perhaps salutary where the claim is frivolous or marginally debatable, but it also may chill the invocation of one of the defendant's fundamental rights."[205]

The Eighth Circuit has adopted an intermediary position which has recently been followed in Nebraska.[206] The circuit court has required that the defendant bear the initial burden of proof by

> showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt.[207]

Furthermore, the Eighth Circuit has held that if the defendant can show that circumstances beyond his or her control have made it impossible to produce any helpful evidence, the burden shifts to the government.[208] When it established this rule, the court indicated that to do otherwise would be to penalize the government for something which it could not control. In addition, it noted that the defendants usually have greater access to the type of evidence needed.

The critics of this standard are the proponents of the doctrine that the government has the burden. They have argued that this position, as well as the one that places the burden on the defendant, completely ignores the Supreme Court mandate in *Chapman v. California*:[209]

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone *other than the person prejudiced by it* a *burden* to show that it was harmless. It is for this reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to

203. Cooper v. Fitzharris, 586 F.2d 1325, 1334 (9th Cir. 1978) (Huffstedler, J., dissenting).
204. Comment, *supra* note 61, at 196.
205. *Id.*
206. *See* State v. Lang, 202 Neb. 12, 272 N.W.2d 775 (1978).
207. McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974).
208. *Id.* at 220.
209. *Id.* at 218.

suffer a reversal of his erroneously obtained judgment.[210]

VIII. CONCLUSION

It is apparent that there needs to be a major overhaul of the present law on ineffective representation. Since 1932, the Supreme Court has recognized that the sixth amendment guarantees the right to effective counsel to a criminal defendant in those situations in which the defendant has the right to counsel. However, the Court has given little substance to the right. It has opted to leave the development of the amendment to the discretion of the trial courts.

The trial courts have begun to establish criteria for the determination of whether representation was effective. However, courts other than the District of Columbia Circuit Court of Appeals and the Fourth Circuit Court of Appeals, have made the determination on a haphazard, case-by-case basis. Authorities like the ABA Defense Function Standards and the Code of Professional Responsibility have been sparingly used by the courts in establishing the criteria. This is true despite the fact that all attorneys are, or should be, aware of the duties and responsibilities enumerated in them, and are expected to abide by them. The right to effective counsel is also weakened by the fact that many courts have refused to employ the automatic reversal rule once ineffective counsel has been found. Some courts have gone even further by requiring the defendant to show that he was prejudiced by the error. As a result, the right to effective counsel is a hollow right.

Because of the way the standards function, it is the defendant's attorney who is protected, not the defendant. The attorney is presumed to have acted competently. The fact that the attorney may have been ill, intoxicated or inexperienced generally or in the criminal law is given little significance. The attorney does not have

210. 386 U.S. 18, 24 (1967) (emphasis supplied; footnote omitted). The Eighth Circuit has argued

> that it is not the sort of error envisioned in *Chapman* which automatically puts a burden on the 'beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment'. . . . Unlike a constitutional voliation actually caused by the state, such as an illegal search and seizure or a coerced confession, ineffective assistance of counsel is a result of the violational acts of one charged with representing the defendant. It is, in this sense, not a product of an adversary, but a flaw in the adversary process. To impose automatically the initial burden of proof on the state as described in *Chapman* would penalize the prosecution for acts over which it can have no control. In such circumstances, a more equitable sharing of the burden of proof seems appropriate.

McQueen v. Swenson, 498 F.2d at 218-19 (citations & footnote omitted). Once again, it is back to the state action argument.

to aim for perfection. Instead, he or she is given a broad leeway in choosing trial strategy and is given the benefit of the doubt as to whether an intelligent and reasonable choice was made, even when hindsight shows that the choice was catastrophic.

Greater emphasis needs to be placed on whether an attorney has lived up to the expectations and duties enunciated in the ABA Code and the ABA Standards. Moreover, greater recognition must be given to the fact the right to counsel is meaningless without the right to effective counsel. Thus, procedurally, the right to effective counsel should be on the same level as the right to counsel.

> The adversary system cannot operate without the services of highly trained advocates for each side as well as a judge skilled in advocacy. Although our law recognizes the right of a defendant to defend himself without the assistance of counsel if he so chooses, judges, prosecutors and defense counsel are unanimous in the opinion that justice is undetermined when any party proceeds without a professional advocate. The accused lacks the knowledge which would permit him to take full advantage of his legal rights and demonstrate his position if he elects a trial. It seems amply clear today that a professional advocate for the accused is indispensable to the system. . . .[211]

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211. ABA STANDARDS, *supra* note 81, at 145.