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Criminal Law--Lawyers--Fees--Attorney's Fees for Indigent Criminal Defendants

David Emerson
University of Kentucky

haps the time is ripe for the Supreme Court to grant certiorari to an insanity case. By adopting a standard, the Court could put an end to the divergence of opinion existing among the federal courts as to which best satisfies justice. Many state courts would also be persuaded by a Supreme Court decision. Until the Court adopts a position on this issue, the confusion and complexity will continue to intensify.

Joe Bill Campbell

CRIMINAL LAW—LAWYERS—FEES—ATTORNEY'S FEES FOR INDIGENT CRIMINAL DEFENDANTS.—The circuit court appointed counsel to represent a defendant in a Kentucky Rules of Criminal Procedure 11.42 motion proceeding. The motion was denied. Counsel moved the court for allowance of a fee, to be paid by the county or other public source, for his services in the proceeding. The motion of counsel was denied. Both motions were appealed together. *Held*: Affirmed. While there is merit in the proposition that assigned counsel should be compensated, in the absence of legislation providing funds for this purpose, attorneys will be required to devote their time and knowledge to the representation of indigents in criminal cases as a fulfillment of a professional duty. *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

Appellant-counsel, relying on a decision of the United States District Court for the District of Oregon,[1] argued that the public use of his services and knowledge by the court was an unlawful deprivation of property without just compensation under the fifth amendment of the United States Constitution. The Oregon federal court said that while, historically, the privileges of the attorney in society once required him to represent the indigent without compensation, the special privileges of his position no longer exist.

> The production of witnesses for an indigent defendant is a phase of due process—the supplying of a transcript of proceedings to an indigent defendant through services, expertise, and facilities of the court reporter is a phase of due process, as is the supplying of mental and physical examination through the services and expertise of a physician, and so must also be a supplying of a license, time, expertise, office facilities and expense of an attorney for the indigent. The supplying [of an attorney at every stage] . . . is a public purpose.[2]

(Footnote continued from preceding page)
man, 141 N.W.2d 39 (Mich. 1966) (citing *Freeman*); Commonwealth v. Ahearn, 218 A.2d 561, 572 (Pa. 1966) (dissenting opinion).

[1] Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964).
[2] *Id.* at 493.

The federal district court's decision was subsequently reversed by the Ninth Circuit Court of Appeals.[3] That court rejected the argument that the public was "taking" an attorney's expertise without due process; it referred first to the tradition of free legal services to indigents accused of crimes and second to the special position of lawyers in society.

The common law practice of free legal services for the indigent accused finds its contemporary statement in the canons of legal ethics.[4] The canons provide that a lawyer assigned by the court to assist an indigent ought not ask to be excused for any trivial reason and "should always exert his best efforts in [the client's] . . . behalf."[5] The canon, however, is not the basis of the argument, but a reflection. Traditionally every member of the bar in his oath of admission agrees to be bound by certain general rules, including representing without compensation any defendant in a criminal case assigned by the court.[6] Except when otherwise directed, such services of assigned counsel have always been free.[7] It is arguable that this theory of obligation is not peculiar to our legal system; it has characterized the lawyer's position in all civilized communities from the earliest times. "No statute has ever been necessary to give the court the right to call upon the bar, its power is inherent, and statutes only declare it."[8] This concept is predicated upon the questionable assumption that the attorney's conscience, his respect for his profession, "his love of freedom and liberty guaranteed to every American by the Constitution, and for a square deal will spur him on to see that" the indigent shall have effective assistance and a fair trial, regardless of personal consequences.[9]

The notion of special privileges existing for lawyers, however, has been significantly altered by several court rulings. Illustrative of the change was the Supreme Court's pronouncement that if one meets the prescribed qualifications he must be admitted to practice as a matter of right, and once having acquired the license he cannot be deprived of it except through the judicial exercise of due process.[10] The right to follow a profession has carried with it the right to be compensated by the court independent of the will of the legislature.[11]

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[3] United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).
[4] AMERICAN BAR ASSOCIATION, CANON OF PROFESSIONAL ETHICS (1948).
[5] *Id.*, Canon 4, at 8.
[6] State v. Rush, 87 N.J. Super. 49, 207 A.2d 724 (1965).
[7] People v. Fernandez, 109 N.Y.S.2d 561 (1951).
[8] DRINKER, LEGAL ETHICS 62 (1953).
[9] Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511, 518 (1955).
[10] Konigsberg v. State Bar, 353 U.S. 252 (1956); Schware v. Board of Bar Examiners, 353 U.S. 232 (1956).
[11] Knox County Council v. State, 29 N.E.2d 405 (Ind. 1940).

While it may appear that such a position is new and radical, the Indiana court announced in 1854 that:

> the idea of one calling enjoying peculiar privileges and therefore being more honorable than any other is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.[12]

This view has been restated in several jurisdictions to the effect that attorneys cannot be compelled to perform services for an indigent, even where statutes provide for compensation.[13] Definitive statements such as these have manifested themselves in provisions in forty-four states for payment of private or public counsel appointed by the court in a criminal action.[14] Kentucky is one of only six states which do not pay assigned counsel under any circumstances.[15] Since compensation is also provided by the federal government for court-appointed counsel in federal criminal cases,[16] it is clear that the traditional concept has changed. The question now is whether there is a rational basis for change.

A former Attorney General of the United States, Robert F. Kennedy, has said:

> To date we have responded to the need for representation by assigning private lawyers to take cases free. We have proceeded on the assumption that society's obligation to the accused can be redeemed not by society or by the Government, but simply by telling private lawyers: "Defend this man. Give him your time and your advice. Protect his rights—and then pay for it out of your own pocket."
>
> How wrong this system is was pointed up by a recent study conducted for the Department of Justice. The study concluded (1) that "present practices sometimes induce a plea of guilty because appointed counsel recognizes the futility of electing a contest in the absence of resources to litigate effectively"; and (2) that "deficiencies of the present system adversely affect the quality of the defense made."

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[12] Webb v. Baird, 6 Ind. 13, 16 (1854).

[13] State *ex rel.* Old Underwriters, Inc. v. Bell, 195 N.E.2d 464 (Ind. 1964); Sandoval v. Tarrikin, 395 S.W.2d 889 (Tex. 1965).

[14] Grove, *Gideon's Trumpet: Taps for an Antiquated System? A Proposal for Kentucky*, 54 KY. L.J. 527 (1966). It is interesting to note that three days after the Kentucky decision in the instant case the New Jersey court decided substantially the same issue for the appellant, but gave the legislature one year to find the financial means before the ruling would take effect. State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

[15] Those states in which there is no compensation for attorneys are as follows: Kentucky, Louisiana, Missouri, South Carolina, Tennessee, and Utah. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 253–67 (1965).

[16] Criminal Justice Act of 1964, 78 Stat. 552 (1964), 18 U.S.C. § 3006A (1964). While legal services are provided under the Economic Opportunity Act of 1964, 78 Stat. 508 (1964), 42 U.S.C. § 2781 (1964), these services are limited at present to civil matters within the meaning of a "community action project."

> The study showed that pleas of guilty are entered much more frequently—in some areas three times as often—by defendants with assigned counsel than those represented by paid private counsel who have both the facilities and the incentive to make independent investigations. Defendants with appointed counsel, the study showed, had less chance to get charges against them dismissed, less chance of acquittal when they went to trial, and greater chance, if convicted, of being sent to jail instead of being placed on probation.[17]

Under the system of court-appointed counsel without compensation, a small segment of the legal profession is forced to bear the total cost of providing protection for the rights of the indigent criminal defendant.[18] Likewise, this system makes a mockery of constitutional guarantees when young inexperienced lawyers are asked to match skills against the prosecuting attorney's highly trained staff with modern devices of detection and investigation at their disposal.[19]

In response to these legal problems, the American Bar Association has suggested programs to assure adequate representation for indigents. As John W. Cummiskey, Chairman of the American Bar Association's Standing Committee of Legal Aid Work, has said: "One of the six major objectives of the American Bar Association is 'Promotion and establishment within the legal profession of organized facilities for the furnishing of legal services to all citizens at a cost within their means.' "[20]

Pursuant the goals of the Committee on Legal Aid Work, the National Legal Aid and Defender Association and the American Bar Association adopted the recommendations of the committee and formulated the following guidelines:

> (1) Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction. . . .
> (7) Maintain in each county in which the volume of criminal cases requiring assignment of counsel is such as to justify the employment of at least one full-time lawyer to handle the work effectively, a defender office, either as a public officer or as a quasi-public or private organization.[21]

Forty-four states have made these guidelines a reality by adopting various programs. Some states have purely public defender systems, others have only private counsel compensated by the court, and still others have combinations of the two. Regardless of the type program,

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[17] *Hearings on S. 63 and S. 1057 Before the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 8 (1963).
[18] *Hearings on S. 63 and S. 1057, supra* note 17, at 52.
[19] *Hearings on S. 63 and S. 1057, supra* note 17, at 76.
[20] *Hearings on S. 63 and S. 1057, supra* note 17, at 93.
[21] NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 8 (1964).

the legislatures have been able to find the means for the compensation. While the cost per criminal trial of representation varies from district-to-district and state-to-state, it appears that the range is from forty to fifty dollars per case.[22] Other states have found the means to assure adequate representation, and there is nothing peculiar to Kentucky which would indicate that similar programs could not be adopted. The social value of a comprehensive program would outweigh its initial cost, in any event, in that better attorneys would be attracted into the field of representing all criminal defendants.

However, in spite of the need for effective counsel for indigents in criminal actions, the Kentucky Court refused to take action. Instead the Court relied heavily upon the United States Court of Appeals for the Ninth Circuit holding in the *Dillon* case[23] to say that the common law practice should be sustained. However, neither the federal court nor the Kentucky Court mentioned that when the *Dillon* case was ultimately decided the provisions for compensation in federal courts were in effect. The absence of judicial treatment of the statutory provisions made for compensation in the federal system was conspicious. It would be reasonable to assume that, while the federal court did not mention the legislation, it must have significantly influenced the case; compensation was not provided at the time the case was first tried, and as a practical matter, the court did not wish to have two systems of compensation in the federal court structure. This reasoning, however, is not applicable to Kentucky law, as no such legislation presently exists.

The Kentucky Court in the instant case also indicated that it thought compensation for court-appointed counsel might be feasible for this state, but that it was not the Court's duty to initiate it. However, while the Legislature could appropriate funds for this purpose, political pressures require the budget to be spent for more vote-acquiring projects such as roads, teachers' salaries, and welfare. As it appears that court-appointed counsel can wait a while longer, the Legislature will not make the first move, but will defer to someone else. Waiting, however, will not solve the legal problems of indigents. Even advocates of the tradition of unpaid court-appointed counsel recognize the problem and express hope that some system will be found to facilitate effective representation.[24]

The question is not academic or one of philosophical honor, but a

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[22] Grove, *supra* note 14, at 560, 575.

[23] United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).

[24] Christensen, *Requiem for an Abandoned Commitment*, 51 A.B.A.J. 741 (1965); Palmore, *Counsel for the Indigent in Criminal Cases*, 29(3) Ky. S.B.J. 21 (1965).

matter of realistic ethics. It is well established that an accused is entitled to representation regardless of the offense.[25] This right is not superficial, but one of substance.[26] If such a right exists for the accused, a duty falls upon the attorney appointed by the court to represent the accused in a capable manner. In the past, decisions have been reversed where either the trial court or the court-appointed counsel was delinquent in executing its duties.[27] Such action tends to indicate that the Supreme Court of the United States and the highest courts in the several states are concerned with adequate representation of the indigent accused. This process without compensation may, however, be economically burdensome, at times so great as to endanger the lawyer's career.[28]

A comprehensive program which would afford adequate representation in criminal actions is overdue in this state. We must be realistic in our appraisal of the legal profession. While it may be that every member of the bar proclaims his readiness to serve as counsel for indigents, the courts, for various reasons, tend to appoint recent graduates. Such experience is good for the young attorney, but it does not always give the best protection to the accused. In relation to the magnitude of the problem of representing indigents in criminal proceedings, few law students are inclined to enter the area of criminal law when a livelihood is not available in such a practice. Thus, we find ourselves in a vicious circle; recent graduates with little interest in criminal law are appointed to represent the indigents; due to their superficial interest, the defense is inadequate. In some moral sense, this situation may be deplorable, but in reality it exists and will continue until action is taken either by the Court or the Legislature to provide stimulus for lawyers to take a personal interest in representing the indigent accused.

David Emerson

CRIMINAL LAW — HOMICIDE — MURDER — MANSLAUGHTER — RETRIAL FOR MANSLAUGHTER ON EVIDENCE OF MURDER.—At the first trial for murder of his wife, defendant was convicted of voluntary manslaughter. The evidence, while possibly supporting defendant's theory of suicide, did not show any mitigating circumstances which would have allowed a

[25] Miranda v. Arizona, 384 U.S. 436 (1966).
[26] Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940).
[27] Curry v. Commonwealth, 390 S.W.2d 891 (Ky. 1965); Rayon v. State, 267 S.W.2d 153 (Tex. 1954).
[28] Comment, 16 HASTINGS L.J. 274 (1964).