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Court-Appointed Attorneys: Old Problems and New Solutions

by H. Patrick Furman

On October 27, 1989, the Chief Justice of the Colorado Supreme Court issued two directives relating to the appointment of counsel for indigent persons who have a constitutional or statutory right to counsel [published in 19 *The Colorado Lawyer* 85 (Jan. 1990)]. These directives may change substantially the way in which counsel are appointed in these cases and may affect all lawyers who practice in Colorado.

The need for court-appointed counsel often arises in criminal cases where the Office of Public Defender has a conflict of interest. The Criminal Law Section of the Colorado Bar Association ("CBA"), along with other interested parties, currently is trying to determine the best way to implement these changes. This article gives a brief history of the right to counsel in criminal cases, outlines the current situation and the changes announced in the new directives and offers some suggestions for implementation.

The Right to Counsel

A 1932 case, *Powell v. Alabama*,¹ stated the origin of court-appointed counsel in this way:

Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions. . . . At the same time parties in civil cases and

persons accused of misdemeanors were entitled to the full assistance of counsel.

The English rule of only partial right to legal counsel came under fire in virtually all the American colonies² and eventually was nullified by the Sixth Amendment to the U.S. Constitution. By 1836, England, too, recognized the right to counsel in all criminal cases.³

However, until relatively recent times, the right to counsel benefited only those who could afford to hire their own attorneys. In 1938, the U.S. Supreme Court established the right of indigent criminal defendants in federal cases to have the assistance of counsel appointed at state expense.⁴ In 1963, *Gideon v. Wainwright*⁵ extended the right to court-appointed counsel to defendants in state courts.

Developments in Colorado

While some state courts and legislatures had established a right to counsel before *Gideon*, Colorado was not among them. In the 1949 case of *Kelley v. People*,⁶ the Colorado Supreme Court held that the Sixth Amendment right to counsel did not apply to state prosecutions. However, after *Gideon*, the court amended the Colorado Rules of Criminal Procedure ("Crim.P.") Rule 44 so that, by the end of 1963, Colorado trial courts were required to appoint counsel to represent indigent criminal defendants in felony cases and could appoint counsel in misdemeanor cases.

In a 1965 case, *Allen v. People*,⁷ the court recognized that *Gideon* had changed

the rules. The *Allen* decision noted that the holding in *Kelley* had been nullified by the amended Crim.P. Rule 44. It also stated that "the right of a person accused of a crime to be represented by an attorney can no longer be challenged."⁸ It is now clearly recognized that the Sixth Amendment and Article II, § 16 of the Colorado Constitution provide that criminal defendants have the right to counsel regardless of their ability to pay.⁹

The requirement that all criminal defendants receive the benefit of counsel originally was fulfilled in Colorado by the appointment of private attorneys. As the demand for appointed counsel grew, some of the larger counties set up their own public defender offices. Finally, in 1970, the Colorado General Assembly established the Office of Public Defender. That Office now has twenty branches around the state, as well as an appellate division in Denver. The Office of Public Defender presently employs approximately 150 attorneys and 100 support staff throughout Colorado.

The Current Situation

Despite the existence of the Office of Public Defender, there remains a need

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for court-appointed attorneys any time the Public Defender has a conflict of interest in a specific case. Conflicts arise most frequently when two or more people are charged in connection with one criminal episode. The Public Defender generally can represent only one of the individuals and asks the court to appoint counsel for the remaining defendants. Other conflicts arise when the Public Defender represents a witness or a victim in a case and is precluded from representing the individual charged. The monies appropriated to pay court-appointed counsel currently are administered by the Public Defender.

In most of Colorado's more populated counties it is not difficult to find attorneys with experience in criminal law who are willing to accept such appointments. Some of these counties, such as Boulder and Pueblo, have successful systems for determining which private attorneys are willing and able to accept appointments. They require interested lawyers to register with the court administrator and to inform the court of their experience.

In other counties, the appointment system is not as formal. Judges or clerks maintain lists of attorneys who will accept appointments, then appoint these attorneys more or less at random. For example, Denver does not have a formal system, but currently is reviewing its informal system to ensure that it is being administered equitably and efficiently.

In less populated counties where there are far fewer attorneys, sometimes there is a problem finding attorneys who are willing and able to accept court appointments in criminal cases. This problem was highlighted in a recent Colorado Supreme Court holding¹⁰ and was addressed in the Chief Justice's new directives.

Recently, a problem also has arisen in connection with providing appellate counsel in criminal cases. The Appellate Division of the Office of Public Defender has announced that it will no longer accept court appointments to handle the appeals of criminal defendants who had retained counsel at trial but who cannot afford to do so for appeal. According to the Office of Public Defender, its existing appellate caseload is so large that it cannot meet the requirement from the appellate courts that appeals be handled in a timely fashion.

The impact of this decision will be felt by (1) trial judges, who now will need to appoint appellate counsel and (2) attor-

neys accepting trial-level court appointments, who also may find themselves being appointed to handle appeals. It remains to be seen how difficult it will be to fill this need, but the outlook is not promising. The Public Defender has money available to pay private attorneys to handle criminal appeals, but is unable to find enough attorneys to fill the existing need.

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The Effect of Stern

A recent Colorado Supreme Court case, *Stern v. Grand County Court*,¹¹ may have been the catalyst for the Chief Justice's new directives. Stern, an attorney in Montrose, had been licensed for twelve years in Colorado when he was appointed to a criminal case by the county court in Grand County. The defendant in the case was charged with second degree assault—a class four felony—and two misdemeanors. Stern moved to withdraw from the case, asserting that he was not competent to represent the defendant and that Code of Professional Responsibility DR6-101(A) prevented him from doing so. According to Stern, eleven years had passed since he had voluntarily represented a criminal defendant and, in that time, he had not read cases, rules or other materials concerning criminal law or procedure. He also asserted that his representation of the defendant would constitute malpractice and would deny the defendant the effective assistance of counsel guaranteed by the Sixth Amendment.¹²

The court denied Stern's motion to withdraw, with the Colorado Supreme Court affirming. Stern's argument of incompetency was rejected by the Supreme Court for two reasons. First, the court found that Stern had not met the burden of proving his own incompetency. A mere assertion was deemed insufficient. Second, the court noted that, even if Stern had met this burden, the trial court had found that he was capable of becoming competent. Thus, the trial court's denial of Stern's motion to withdraw was not an abuse of discretion.

The Supreme Court rejected as premature Stern's claim that he could not render effective assistance of counsel. The test for effective assistance asks two questions: (1) whether counsel's performance was substandard and (2) whether the defendant was prejudiced by the performance.¹³ Stern had not yet done anything in the case; it was, therefore, too early to determine whether his representation would be substandard. For the same reason, it was premature to determine whether the defendant had suffered any harm.¹⁴

Inconsistent Guidelines

The court in *Stern* discussed a number of principles relevant to the appointment of counsel. Noting that the power of a trial court to appoint counsel is no longer open to question, the court said that attorneys, as officers of the court, are bound to accept such appointments.¹⁵ Quoting at length from the Code of Professional Responsibility ("Code") and the American Bar Association Standards for Criminal Justice ("Standards"), the court placed the duty of providing legal representation for indigent criminal defendants squarely on the bar.

Both the Code and the Standards give mixed signals in their treatment of the duty of counsel to accept court appointments. The Code suggests that every lawyer has a duty to provide legal services to the disadvantaged.¹⁶ At the same time, the Code prohibits lawyers from handling cases which they know, or should know, they are not competent to handle except in association with competent counsel.¹⁷ Thus, while attorneys should accept pro bono cases and court appointments, they should not accept cases they are not competent to handle.

The Standards contain similarly inconsistent guidelines. They suggest that "the responsibility for providing legal representation is shared by the bar with society as a whole."¹⁸ However, the Standards then note that, because of the increasingly specialized nature of criminal law, even experienced attorneys should not be appointed in criminal cases unless they have "[f]amiliarity with the practice and procedure of the criminal courts and knowledge in the art of criminal defense."¹⁹

The Standards attempt to address the problem of the competency of lawyers receiving court appointments:

Where interested attorneys lack sufficient experience and skill in criminal defense, there are a variety of proce-

dures that can help them qualify for assigned cases.²⁰

Specific procedures mentioned are (1) continuing legal education ("CLE") programs and (2) the assignment of inexperienced lawyers as associate counsel to more experienced lawyers.²¹ While these procedures appear excellent in theory, they may be hard for attorneys to implement. First, CLE programs, no matter how good, do not substitute for actual experience. Second, it is extremely difficult not only to find an experienced attorney to act as a mentor and to find the time to associate with that mentor, but also to make a living while doing so. These shortcomings are most obvious precisely where the problem is greatest: Colorado's rural areas have less access to CLE programs, fewer attorneys who qualify as mentors and fewer opportunities for inexperienced attorneys to learn.

Findings of the CBA Task Force

In 1987, the CBA Court-Appointed Counsel Task Force ("Task Force") was created. The Task Force issued a report in December 1988²² based on an examination of court appointments in all types of cases: mental health, domestic relations and juvenile matters, as well as criminal cases. The Task Force noted three major issues in providing counsel to indigent persons: (1) the compensation of those who accept appointments, (2) the fairness of the appointment system to the members of the bar and (3) the competency of those who are appointed. Directive 89-2 (discussed below) deals with the compensation issue. However, the issues of fairness and competency remain difficult to resolve.

Regarding fairness to the attorneys who accept appointments, the Task Force found that attorneys outside the metro area sometimes felt forced to accept appointments and were asked to accept more appointments than their metro area counterparts. Additionally, the Task Force found that there was a large segment of the bar that was not bearing any of the burden of court appointments.

The Task Force also found that ensuring the competency of court-appointed counsel was a major issue. Its report noted that court appointments in criminal cases affect not only an attorney's ability to meet his or her responsibilities to the client and the profession under the Code, but also the availability and price of malpractice insurance.

Directives 89-2 and 89-3

Directive 89-2 deals with the hourly rates which court-appointed attorneys can charge the state. Between January 1, 1990, and January 1, 1991, those fees will be raised incrementally to \$50 per hour for in-court time and \$40 per hour for out-of-court time. Directive 89-2 also raises the maximum fee which can be paid in the various types of criminal cases.

The increase is a welcome and overdue action in light of the fact that the fees were last raised in 1977 and had become inadequate to cover even the overhead of many attorneys. However, the Chief Justice does not have the power either to raise or appropriate money. If the state legislature does not appropriate adequate funds to cover this increase, it may turn out to be a Pyrrhic victory.

This increased pay may attract some attorneys who previously avoided court appointments because of the low fees. If this proves to be true, the problem of finding qualified attorneys to accept appointments will be somewhat ameliorated. However, in this author's opinion, most attorneys who accept such appointments are motivated by a commitment to the constitutional right to counsel and the enjoyment of trial work. Therefore, it is unlikely that the fee increase will attract a significant number of qualified, but previously recalcitrant, attorneys.

The second measure, Directive 89-3, changes the manner in which attorneys are selected for appointment in criminal cases. The thrust of this change is in Section V of the Directive, which says that the

name of any attorney who practices in the judicial district, or who appears periodically in its courts, including non-resident attorneys, shall be maintained on a list from which a judge will make appointments.

Directive 89-3 meets the goal of ensuring that all attorneys—or at least attorneys who go to court—share in the burden of court appointments in criminal cases. However, it does not address the need to ensure that appointed attorneys are competent to handle criminal cases. Directive 89-3 may even exacerbate that problem because it broadens the pool of appointees to include many attorneys who have never handled a criminal case.

Possible Solutions

The Task Force recommended the creation of a centralized Office of Appointed

Counsel to administer the funds appropriated for court-appointed counsel, set standards for court appointees and assist judges in finding qualified counsel to accept appointments in their districts. The proposed office would have responsibility for ensuring the availability of attorneys in criminal, as well as guardian *ad litem*, mental health, delinquency, dependency and neglect and all other types of cases where court appointments are necessary. The CBA Criminal Law Section unanimously endorsed this proposal at its January meeting.

Other suggestions were considered, such as a proposal to establish a state-funded, statewide conflicts branch of the Office of Public Defender. Such a branch would accept primary responsibility for providing representation to indigent defendants who cannot currently be represented by the Public Defender. However, this proposal was rejected by the Task Force because of "the desire of the criminal bar to continue to have the opportunity to represent criminal defendants."²³ As mentioned in the Task Force report, most lawyers who accept appointments enjoy criminal defense work. Because

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there is a limited number of criminal defendants with the financial ability to hire counsel, these lawyers see court appointments as the best opportunity to continue to practice criminal defense. In addition, as a practical matter, it is unlikely that a conflicts office would solve the problem in rural areas where the current problem is most acute.

Another change that might ease the shortage of competent court appointees is to make it explicit that the travel time of appointed counsel will be compensated. Payment for travel time might make those who do accept court-appointed cases more willing to travel to less populated areas.

The CBA recently developed the "Lend-a-Lawyer" program at the urging of CBA President Chris Brauchli. The program, in which metropolitan firms "loan" associates (with pay) to rural areas to accept *pro bono* and court-appointed cases, was highlighted in a recent bar journal article.²⁴ At this writing, a Denver firm has "loaned" one of its employees, and two retired attorneys have agreed to participate in the program.

Conclusion

American society has accepted a moral and constitutional obligation to ensure that every person who is entitled to counsel receives effective representation regardless of ability to pay. Under the law, lawyers bear the primary responsibility for meeting this obligation. While individual attorneys should be given discretion in determining how they fulfill their obligation, court appointments are one of the most important and visible ways in which the obligation is met. The legal community must ensure that legal services are efficiently delivered, that they are available everywhere in the state and that the burden of providing these services is shared equitably.

NOTES

1. 287 U.S. 45, 60 (1932).
2. *Id.* at 60-65.
3. *Id.*
4. *Johnson v. Zerbst*, 304 U.S. 458 (1938).
5. 372 U.S. 335 (1963).
6. 206 P.2d 337 (1949).
7. 404 P.2d 266 (1965).
8. *Id.* at 271.
9. *Martinez v. People*, 480 P.2d 843 (1971).
10. *Stern v. Grand County Court*, 773 P.2d 1074 (Colo. 1989).
11. *Id.*
12. *Id.* at 1075.
13. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Norman*, 703 P.2d 1261 (Colo. 1985).
14. *People v. District Court*, 761 P.2d 206 (Colo. 1988).
15. *Id.* at 1076, quoting, *Powell, supra*, note 1.
16. EC2-25.
17. DR6-101(A)(1).
18. *Stern, supra*, note 10 at 1077, quoting, ABA Standard § 5-1.2 commentary at 10.
19. *Stern, supra*, note 10 at 1077, quoting, ABA Standard § 5-2.2.
20. ABA Standard § 5-2.2 commentary at 27-28.
21. ABA Standard § 4-1.5 commentary at 19-21.
22. Report of the Colorado Bar Association Task Force on Court-Appointed Counsel, Dec. 9, 1988.
23. *Id.* at 8.
24. 18 *The Colorado Lawyer* 2297 (Dec. 1989).

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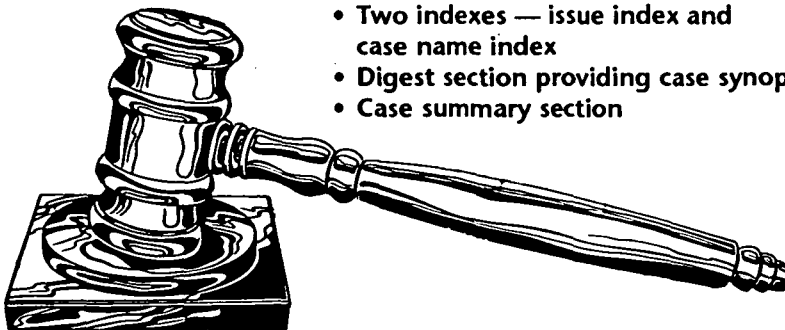
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