



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Resident Judge Richard R. Cooch
1020 N. King Street
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Dear Sirs,

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we write to express our concern about current funding of counsel for indigent criminal defendants in Delaware. A number of issues have come to our attention and our initial observations have led us to conclude that private assigned counsel in at least some parts

of Delaware do not have the resources necessary to provide minimally adequate indigent defense services as required by the Sixth and Fourteenth Amendments to the United States Constitution.

Specifically, universal pro bono appointment in conflict cases in Sussex and Kent Counties is problematic for three primary reasons: first, lawyers inexperienced and untrained in criminal law are not competent to handle criminal cases; second, lawyers cannot provide effective representation without adequate resources or where there is a conflict between the lawyer's livelihood and the client's case; and third, lawyers are ethically bound to refuse appointment if they are unqualified to handle a case or have a conflict of interest. We ask you to eliminate the practice of universal pro bono appointment for conflict cases and implement a system that will provide effective representation to all accused persons in Delaware.

For several years, NACDL has been working to improve public defense services around the country. Gideon v. Wainwright, 372 U.S. 335 (1963), and its progeny require that lawyers for accused persons who cannot afford to hire counsel must be provided with the time and resources necessary to prepare an adequate defense. Where traditional legislative initiatives fail, enforcement of Gideon's mandate has occasionally required litigation. Such cases have led to significant systemic improvements in Connecticut; Allegheny County, Pennsylvania; Coweta County, Georgia, and elsewhere. Lawsuits or settlement negotiations are ongoing in places such as Mississippi; Wayne County, Michigan; New York City, and Montana. NACDL is committed to promoting reform of inadequate public defense systems through litigation, legislation, or other means.

It is our understanding that both the legislature and the courts in Delaware have declared that they have run out of funds to pay for indigent defense services. As a consequence, for indigent cases where the Public Defender Office and conflict counsel have a conflict, the courts in Sussex and Kent Counties have been appointing members of the bar pro bono. And appointments have not been limited to experienced criminal defense lawyers — real estate lawyers, for example, have been appointed to handle complex felony cases.

This “emergency” measure, as it has been characterized by the courts, has serious consequences not only for the individual defendant and his lawyer, but also for the entire system of justice. First, the constitutional right to effective assistance of counsel is not met by lawyers who are not experienced or trained in criminal law. See Jewell v. Maynard, 383 S.E.2d 536, 542 (W.Va. 1989). Criminal defense practice demands an understanding of unique procedural and substantive laws that cannot be learned “on the fly.” It appears that the courts in Sussex County, at least, have been unsympathetic to the pleas of civil lawyers who protest their appointments on the basis that they are not qualified to handle criminal cases. Appointments to unqualified lawyers undermines the integrity of the criminal justice system and public confidence in case outcomes, not to mention wasting taxpayer dollars on endless appeals, overturned convictions, and

retrials. The recent wave of exonerations across the United States has exposed the risk of wrongful convictions due to incompetent representation.

Second, even the most experienced and talented criminal defense lawyer cannot provide competent representation without adequate resources. We are told that nearly all cases in which the Public Defender or contract counsel has a conflict are being assigned to lawyers from small private law firms. Simply maintaining a legal practice today is expensive, not to mention the cost of completing those tasks basic to representation in a criminal case: meeting and conferring with the client, conducting pre-trial investigation, researching relevant legal issues, pursuing pre-trial motions, employing necessary and appropriate expert witnesses, seeking bond reductions, exploring pre-trial alternatives to incarceration, evaluating sentencing options, preparing for trial, and prosecuting appeals and motions for post-conviction relief. A system that denies counsel payment for legal services creates a conflict of interest between the attorney and the client. See *Cunningham v. Superior Court of Ventura County*, 177 Cal.App.3d 336, 355 (1986). Attorneys have an incentive to seek early guilty pleas and a disincentive to conduct pretrial investigation or argue substantive motions. In addition, attorneys may find it difficult to devote significant time to court-appointed cases when there is work to be done for paying clients. And while members of the bar may have a responsibility to do some pro bono work, lawyers who are inexperienced or lack necessary resources should not be pressed into service. Some courts have found that requiring attorneys to subsidize the state's responsibility to provide indigent defense services constitutes an unconstitutional taking under the Fifth Amendment, see, e.g., *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 44203 (1987), or a violation of Equal Protection, see, e.g., *Cunningham*, 177 Cal.App.3d at 348, especially when the burden falls unequally on lawyers in different parts of the state.

Finally, the ethical obligations of counsel are implicated when an attorney is forced to provide incompetent representation either because of inexperience or lack of resources. Rule 1.16 of the American Bar Association Model Rules of Professional Conduct provides that any attorney should decline appointment if the representation will result in violation of the Rules of Professional Conduct or law, and commentary states, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion." The Performance Guidelines for Criminal Defense Representation of the National Legal Aid and Defender Association state that "[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter." Guideline 1.3.

We are aware that Delaware has various financial pressures, as do most states these days, but the provision of indigent defense services, as a core function of ensuring a fair and equitable justice system, is mandated by the Constitution. As the Supreme Court stated in *Gideon*, "lawyers in criminal courts are necessities, not luxuries." We are also

aware that stopgap measures have been taken across the state, not just in Sussex and Kent Counties, and affect contract counsel as well as private assigned counsel. We trust that you will take immediate and appropriate steps to correct the existing problems both in the short- and long-term. NACDL's staff Indigent Defense Counsel, Kate Jones, has a great deal of information and resources about how indigent defense systems should be constituted. Her number is (202) 872-8600 x224. Please feel free to call on her or us for assistance.

Sincerely,

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