

*The Need for Uniform Standards in Death Penalty Cases 2 – What Does the “Right to Counsel” Provide and Who’s Paying For It?*

February 23, 2010 by [Terry Lenamon’s Death Penalty Blog](#)

---

With the continuing expansion of the 6<sup>th</sup> Amendment’s guaranteed right to counsel by the U.S. Supreme Court, the issue becomes what exactly does a defendant get with that right? It’s clear that an indigent accused is legally entitled to more than just a lawyer by his or her side; the court has also defined the constitutional rights to due process and equal protection to encompass support of the defense, such as transcripts being made available to the indigent accused filing a direct appeal ([Griffin v. Illinois, 351 U.S. 12 \(1956\)](#)) and in some instances, the right to gather expert opinion (and testimony) beneficial to the defense.

Ignoring the elephant in the room – which is how all of these expenses and fees are to be paid -- precedent exists and is growing that allows U.S. citizens who cannot afford to hire their own attorney to have legal counsel provided to them, along with certain assistance in the preparation and pursuit of that indigent’s defense. This cannot continue; the system is at its breaking point.

*Indigent Counsel’s Duties – Ethically and Legally*

Attorneys that are appointed to represent the indigent accused, as well as those who voluntarily undertake their representation on a *pro bono* basis, do not assume a secondary set of ethical conditions or legal responsibilities in representing their new client. Organizations dedicated to representing indigents garner no special treatment, either.

The same duties, legally and ethically, apply to every case undertaken by an attorney. It does not matter who is paying the legal fees and expenses, or if they are being paid at all. Many could argue that this attitude survives from the historical perception of lawyers pursuing a profession, somehow distinguished from a business endeavor. Even today, for lawyers to speak of money – who’s going to pay for this? -- may seem crass to some.

Still, while they incur expense and spend countless hours on a case, every criminal defense attorney must conform to the ethical standards established in [Florida’s Rules of Professional Conduct](#). These attorneys must simultaneously maintain a standard of excellence in their legal work, or face appellate review of their work where their papers are graded for “ineffective assistance of counsel.” [Strickland v. Washington, 466 U.S. 668 \(1984\)](#).

*Lawyer’s Duties Create a Minimum Level of Expense and Fees*

To properly defend any individual means that a certain amount of time and a minimum amount of expense must be incurred. This would be accurate for even the most minor misdemeanor; it is especially true for those facing the possibility of a sentence of death.

Attorneys undertaking the representation of someone accused of a capital crime (which will vary from state to state) must provide a certain quality and quantity of legal service to the client, as

well as incurring expenses that can become very extensive over the course of the case. Experts in a capital case are especially high in cost: not only will expert testimony be needed in the guilt phase of the case, if the defendant is convicted, and then the experts necessary to provide opinion testimony regarding mitigating factors (mental retardation issues, psychological issues, etc.) must be provided. Psychiatric and psychological testimony is not cheap. Nor should it be.

Travel expenses to interview witnesses may be high, as well as the technological costs. Legal research on Westlaw or Lexis is not free, and usually necessary. Investigators, paralegals, and other support staff are typically a vital part of any capital defense case. There are the little things, too: faxing charges; e-filing fees; even photocopying can add up. Fixed costs, including office lease payments, computer costs, and the like also factor into the bottom line of a capital defense case.

### *Attempts to Streamline the Costs of Right to Counsel*

One attempted solution to the expense issue was for governments to establish organizations dedicated to indigent defense. Rather than private attorneys being appointed, there would be centralized, hired employees acting in the role of Public Defender. This would be more efficient, it would save tax dollars. Except it hasn't worked. Public Defenders' offices are failing.

Another attempted solution to the expense issue was to have certain attorneys in the private sector agree to accept indigent appointments, and within that group, have a select few of those lawyers join an elite group who met requirements to act as counsel for death penalty defendants. Appointed attorneys would be better prepared to deal with the financial issues of indigent representation, they'd be ready to handle the financial delays and burdens it entails.

Except this, too, hasn't worked. The lowball fees and lack of reimbursement have forced many lawyers to quit taking appointments, because they could not afford to keep their doors open at the small amount of money that is being offered. Additionally, many counties are suffering such shortages on their elite appointment lists (*e.g.*, death penalty qualified), that judges are being forced to scour the state, trying to find a lawyer who meets the qualifications regardless of the distance between the county and the lawyer's residence, or his desire to accept the case. Death penalty qualified attorneys in Florida, for example, are essentially being drafted into service at their own financial peril, so judges can meet the constitutional right to counsel in a death case.

### *What's the Solution?*

How much is available to financially provide for an indigent's right to counsel, especially in a death case, varies from state to state. Some states provide more monies here because they can; others simply do not have the budget available, leaving indigent defense in particular crisis there.

There have been several studies done regarding this dilemma. They include:

1. [Report by ABA Standing Committee on Legal Aid and Indigent Defendants, \*Gideon's Broken Promise: America's Continuing Quest for Equal Justice\* \(2004\)](#);

2. [Formal Opinion 06-441 by ABA Standing Committee on Ethics and Professional Responsibility, \*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation\* \(May 13, 2006\);](#)
3. [Steven Yermich's Article in Champion Magazine, \*Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads\* \(June 2009\);](#) and
4. [\*Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel\* by the National Right to Counsel Committee of the National Legal Aid and Defender Association \(The Constitution Project\) \(2009\).](#)

However, today there is still no clear solution to this crisis. The right to counsel requires a lawyer to do his or her best, ethically and legally, for his indigent client. Attorneys continue to meet these duties, often at great personal sacrifice.

How that lawyer is compensated for his or her effort – and importantly, how mandatory expenses are covered -- has not been answered. In its myopic focus upon the *indigent's* right to counsel, the U.S. Supreme Court has blatantly failed to recognize the *counsel's* right to be reasonably compensated, including coverage of representation expense.