

Terry Lenamon on the Death Penalty

Sidebar with a Board Certified Expert Criminal Trial Attorney



Terence M. Lenamon is a Florida Bar certified expert in the area of criminal trial law. With over 17 years experience he has built a reputation as one of Florida's most respected criminal defense lawyers. His defense has been sought by many high-profile clients and has led him through 20 first-degree murder trials and eight death penalty cases. That experience has brought him national recognition as a go-to commentator on death penalty issues. He is the force behind both deathpenaltyblog.com and Florida Capital Resource Center (floridacapitalresourcecenter.org), and can be reached at terry@lenamonlaw.com.

Here's the Problem: There Just Isn't Enough Money to pay for Constitutionally-Required Indigent Defense. And So Far, There's No Solution.

At this juncture, the right to legal counsel guaranteed to American citizens in the U.S. Constitution -- first considered as necessary in death penalty cases -- is now applied not only as a requirement for a lawyer to be present very early on in the criminal process, but also as required for citizens in a growing number of situations. For example, a lawyer must even be provided for those facing misdemeanor charges -- in certain circumstances.

Who Pays For This? State and Local Government

Just because the highest federal court in the land determines that an individual who cannot afford to hire an attorney must be provided with a lawyer, the federal system does not then take the next step and actually participate in the funding of constitutional right to counsel. That is left to the individual states, and each state must determine on its own how best to meet the constitutional mandate.

1. The Three Basic State and Local Systems for Indigent Defense

Over time, state governments (after bringing local governments into the mix) have honed indigent defense into three schemes. They are not mutually exclusive, and most jurisdictions use a combination of the three in an attempt to meet the constitutional mandate as cost-efficiently as possible:

- A. Public Defender Programs;
- B. Court Assigned Attorneys (Appointment Lists); and
- C. Contracts with Private Lawyers and Legal Organizations.

Public Defender Programs

Financially, it seems very cost-effective to have an organization dedicated to defending the indigent. Having attorneys on staff at a set salary, with support staff expense and fixed overhead costs spread over the entire fiscal year seems to make good economic sense. Accordingly, public defender programs -- otherwise known as legal aid organizations -- have been established throughout the country for over a century. These are not necessarily state-run organizations; oftentimes, public defender programs can be established by a non-profit corporation that then receives governmental assistance.

Court Assigned Attorneys – Appointment Lists

Another idea in providing lawyers for the poor was to ask the criminal defense attorneys in the area to voluntarily undertake the representations at a set hourly rate or flat fee. This allowed lawyers already experienced – or seeking to build expertise – in criminal law to take cases in their chosen legal area. This helped the state because it allows the lawyer to absorb the fixed overhead expenses, etc., that allocate to the individual indigent case, as he or she uses his own office or practice resources instead of the state paying for it. In other words, the lawyer's law firm or law office pays the office electric bill instead of the public defender system.

In an Assignment System, criminal courts request attorneys to sign up for court appointments, as well as providing confirmation that they meet the court's requirements for assignment. These lists are then used by judges to assign lawyers to defendants as the accused appear before them with some kind of random selection process to prevent favoritism in judicial appointments.

Contracting with Private Attorneys or Groups

A third approach involves the state or local government entering into a contract with a bar association, nonprofit corporation, group of attorneys, or an individual lawyer to represent indigent defendants in a specific area, or in a specific type of matter (such as death penalty cases). These contracts may be for a number of years, and will be detailed regarding the rates that will be charged, expenses that will be paid for or reimbursed, etc. In many ways, this is a scheme that tries to take the advantages of the prior two alternatives in an attempt to find an even more cost-effective result.

2. The Systems Are Failing

The growing crisis in providing effective criminal defense to indigents has been recognized by the legal profession for years. Research has been done across the country, with [a number of reports on what the research has revealed – state by state -- published by the American Bar Association](#).

Specifically, the [ABA's Standing Committee on Legal Aid and Indigent Defendants](#) has done an admirable job of gathering data and revealing to all who will stop to consider the dire and abject failures of various states in their provisions for effective indigent defense. Across the country, [the ABA](#) has discovered the following crises within the various indigent defense systems:

1. *Inadequate compensation for lawyers.* Fees are set so low that lawyers simply cannot afford to take the criminal case, no matter how morally and ethically desirable they may be – the state's hourly rate would drive them out of business.
2. *Lack of funding for essential expert assistance.* Professional help is needed in any substantive criminal case. Expert witnesses must be had. Investigations must be undertaken. These professionals must be paid a reasonable fee for their efforts, as well as being compensated for the expenses they incur.
3. *Dumping of cases upon attorneys, causing excessive caseloads.* Without enough attorneys volunteering to take criminal cases, those that are left on the lists are given more and more assignments, moving them into financial crisis. It's one thing to burden a practice with a small percentage of criminal appointments; it's dooming a profitable practice to have a majority of these cases on its docket.

Lack of Adequate Financing Is the Cause: What about Federal Funding?

Just as no one with knowledge of the indigent defense system debates it is in crisis, there is no real controversy that the answer to the problem is *money*. More money is needed to pay for the requirements of meeting an indigent's right to counsel than is currently allocated in state and local budgets.

[The ABA](#) has suggested that the federal government step into this gap and provide the necessary funding¹. By passing legislation, Congress could provide a federal solution to a problem begun with a federal decision (*Gideon v. Wainwright*, 372 U.S. 335 (1963)). Obviously, this hasn't happened.

Why not? One argument is fairness: why should the federal government step in and help states that have failed to fund their indigent defense programs, when other states are not in as dire straits as they are? In other words, which state gets what?

More powerful is the federal argument of federalism. From this perspective, states should not want the federal government to pay for its own indigent defense systems because their rights as sovereign are also constitutionally protected. The federal government does not have a police power, for example. State budgets are, quite simply, constitutionally a state problem.

Whatever the argument – and truth be told, budgeting for indigent defense is not ever at the top of any government budget consideration – the federal government is not moving in to fund state indigent defense programs. The current economy is only making things tighter for the state and local governments as they attempt to meet indigent defense costs in their traditionally inept manner.

Things are getting worse. There's no easy solution.

More and more ineffective assistance of counsel appeals are making their way through the system, and they more and more may well be valid. Attorneys are leaving the criminal defense practice because they simply cannot afford to practice any longer.

The legal profession is a for-profit enterprise, however dedicated the professional may be. Fees must be earned to pay the expenses of doing business. The extremely low rates of indigent defense, coupled by rising costs, are driving more and more good and honorable criminal defense attorneys out of business. Public defender's offices simply cannot handle the economic burdens placed upon them without the assistance of private practice criminal attorneys to fill in the gaps.

The reality is that there is not enough money to provide the constitutional right to counsel, in an effective and reasonable way, in this country. And while the situation is getting worse, the solutions are not being found. The crisis continues.

¹ See ABA Standing Committee On Legal Aid And Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest For Equal Justice: A Report On The American Bar Association's Hearings On The Right To Counsel In Criminal Proceedings*, pp.41-42 (Dec. 2004).

