

# **THE IOWA STATE BAR ASSOCIATION**

## **Presentation Re: Indigent Defense**

**J.C. Salvo, ISBA President**

**Harlan, Iowa**

**Alfred Willett, ISBA Criminal Law Section Chair**

**Cedar Rapids, Iowa**

**Jim Carney, ISBA Lobbyist**

**Des Moines Iowa**

On behalf of the 6,000-plus members of The Iowa State Bar Association, thank you for the opportunity to address the Justice Appropriations Sub-Committee on the importance of maintaining experienced, competent and efficient legal counsel for the provision of indigent defense as constitutionally guaranteed by Gideon v. Wainwright, 372 U.S. 335 (1963).

## Blow the Horn

Winston Churchill observed that the true measure of a civilized society is how it treats people accused of crimes.

Justice Black opined that appointment of counsel for an indigent criminal defendant is a fundamental right, essential to a fair trial:

*"Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon v. Wainwright, 372 U.S. 335 (1963).*

For more than 30 years, Iowa lawyers who have been willing to provide legal defense to the poor have been paid no more than \$50 per hour. In fact, for a brief time, it was even reduced to \$45 per hour, then later "increased" by \$5.

For a moment, think about where we all were 30 years ago, in terms of income and expenses. In 1975, Cincinnati beat Boston in the World Series, the Steelers beat the Cowboys in the Super Bowl, Star Wars was the top movie, and All In the Family the top TV show. Gerald Ford was in the White House, the Watergate clan was headed for jail while Richard Nixon returned to California, and Donald Rumsfeld was appointed Secretary of Defense.

The minimum hourly wage in 1975 was \$2.10 per hour - by October 2005 it has grown to \$6.50 per hour, an increase of more than 300 percent. Without checking, I'm reasonably sure that the salaries of all legislators, judges, state employees and all others who receive compensation for services rendered to the State of Iowa, save for lawyers representing indigent defendants, have increased.

Little wonder how this happens when you view the constituency that needs representation. It is the poor who can ill afford to hire lobbyists to speak for their needs. It is the poor who are ill-equipped to form an alliance to march on the capitol. It is the poor who are left on the side of the road or pushed to the back of the line when state funds are distributed.

I wonder if part of the problem is labeling. Calling this "legal fees for indigent defense" is a fine euphemism for what it really is . . . addressing the constitutional right of providing legal assistance to the poor who face deprivation of life and liberty.

Advocates seeking fees for legal assistance to the poor need to stand in line with other well deserving recipients of state funding like health, education and public safety. When you don't have enough paint to cover the entire barn, you leave the back of the barn unpainted. Unfortunately, the poor individual charged with a crime is often left behind the barn.

This year, I have adopted as our theme "Lawyer Pride." In each of my letters thus far I have attempted to focus on what we do to show our pride. However, it is difficult to be proud of the way we have allowed the poor to be represented in this state.

To some extent, we all share the blame for not convincing the Iowa legislature to take seriously the needs of the poor as it relates to their right to counsel. Obviously, we have failed to demonstrate a "sky is falling" attitude to what truly is now reaching crisis proportion. Ask any judge in any district to share with you their difficulties in finding lawyers to take cases at \$50 per hour; this stipend barely covers their overhead. What will happen when all criminal defendants are pro se, when criminals are set free because the system can't handle the overload, or more tragically, when the innocent are locked up because they are unable to adequately represent themselves?

It is casually quipped that he who represents himself has a fool for a client. So what do you have when innocent defendants, with no legal training, are forced to represent themselves because there are no lawyers willing to represent them at 1975 wages? A tragedy.

Nobody expects the legislature to raise legal fees for the poor to a level of the fees charged by the attorney for the wealthy. However, we should expect at the very least an increase of \$10 per hour to compensate those wonderful and compassionate lawyers who are willing to step into the breach for the poor. Bar leadership has now met with the Governor, Senate and House Leadership and the Chief of the Iowa Supreme Court to let them know this will be a priority in the upcoming legislative year. We now need each of you to do likewise.

As members of this honorable and noble profession, we have a few choices. All of us must be willing to represent the poor charged with crimes at \$50 per hour. Or we must use our well-trained and well-compensated legal skills to advocate the cause of the poor. Or we can do nothing.

Surely we, the 7,600 members of the best bar association in the land, if we truly focus our skills and energies to the cause, will be able to persuade and convince a majority of the Iowa House and Senate as to the fairness of this argument. When we do so, it will be our best day in court and we can walk with pride to the sound of Gideon's trumpet.

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## IOWA STATE BAR ASSOCIATION



### INDIGENT DEFENSE

**James W. Carney**

Legislative Counsel

**Troy A. Skinner**

**Jennifer A. Tyler**

Assistant Legislative Counsel

303 Locust Street, Suite 400

Des Moines IA 50309

Telephone: 515/282-6803

Facsimile: 515/282-4700

carney@carneylawfirmiowa.com

skinner@carneylawfirmiowa.com

tyler@carneylawfirmiowa.com

**ISSUE:** Indigent Defense is a program designed to provide constitutionally required legal representation at state expense to low income persons accused of a crime that could result in incarceration. In recent years, the cost of indigent defense has increased dramatically, due to the Legislature getting tough on crime and increased criminalization.

**ISBA POSITION:** The Iowa State Bar Association supports adequate compensation of court appointed counsel, in order to ensure that the state meets its constitutional obligation to provide competent assistance of counsel to poor persons accused of crimes. Specifically, the ISBA supports a \$10.00 per hour increase in court appointed fees during the 2006 legislative session.

The 6th Amendment to the United States Constitution guarantees to all persons accused of crime the right to counsel in their defense. The U.S. Supreme Court has interpreted the 6th and 14th Amendments to the U.S. Constitution as requiring States to provide counsel to all indigents who are accused of crime in their jurisdictions. In addition, the Iowa Constitution guarantees that in all criminal prosecutions, the accused shall have a right to the assistance of counsel. The Iowa Supreme Court has interpreted this constitutional provision as meaning the right to effective assistance of counsel.

Under Iowa's current system there are three (3) ways of providing legal representation to indigents. Legal representation is provided by Public Defenders, who are lawyers employed by the State Public Defenders Office, contract attorneys who are private attorneys who contract with the Public Defender to provide legal representation to indigents, or court appointed attorneys in private practice who are not employed by or under contract with the Public Defender, but are appointed to represent an indigent person on a case-by-case basis.

A recent ISBA survey of Iowa lawyers who do criminal defense work found that on average, criminal law practitioners providing these services have practiced law for 13.4 years. 75% of Iowa lawyers who do criminal defense work practice on their own as solo practitioners or in an office with only one other lawyer. 97% of Iowa

lawyers doing criminal defense work practice in a firm with five or fewer lawyers. On the average, 29% of their total law practice involves criminal work. According to the most current ISBA economic survey, the average overhead costs of operating a law office in Iowa is approximately \$45 per hour.

The state's cost of providing indigent defense is increasing because the number of criminal cases is increasing. In the past decade, the total number of indictable criminal filings has more than doubled. In addition, a large percentage of criminal cases involve indigent criminal defendants. Estimates indicate that approximately 63% of all criminal cases involved indigent defendants. Whenever the number of indictable criminal filings increases, the number of indigent criminal defendant appointments will correspondingly increase.

The increase in indigent defense costs has been limited somewhat because the State has limited by law who is considered legitimately "indigent" for purposes of appointing counsel at state expense. In addition, the state dramatically cut payments to private attorneys who provide representation to indigent criminal defendants in 1996 by actually reducing rates. Legislation adopted in 1999 partially restored this cut in pay by increasing pay rates by \$5 per hour. As a result, attorneys handling class A felony cases may now be paid \$60 per hour; attorneys handling class B felony cases may be paid \$55 per hour, and attorneys in all other cases will be paid \$50 per hour. Over a decade ago, in 1986, the Iowa Supreme Court adopted guidelines for costs of court appointed counsel, which authorized payment of \$40.00 to \$60.00 per hour. Many attorneys who began practice in the 1970's remember being paid \$50 per hour to handle indigent defense cases in the 1970's.

Iowa attorneys are proud of their continuing tradition of providing low cost or pro bono services to those who cannot otherwise afford legal representation. However, all attorneys are entitled to fair compensation for services provided. A system that pays those who represent the poor less than one third the usual and customary rate charged those who are not indigent runs the risk of providing a lower quality of justice for the poor.

There are many cost savings that can be explored and implemented in order to more efficiently utilize State resources. **We believe retaining experienced and efficient lawyers in the program by increasing the hourly rate will result in significant cost savings.** In addition, one must recognize that the cost of indigent defense is quite simply a cost of getting tough on crime. If the public wishes to get tough on criminals, it must also pay for getting tough on crime.

Finally, the federal indigent defense program currently pays \$92 per hour.