THE ADVOCATE

The Magazine of the Kentucky Department of Public Advocacy

Subsidized in Part by Private Donations, KRS 31.080

Representing 70,000 Poor Kentucky Citizens *Volume 14, #1 December, 1991*

COURT QUESTIONS CONSTITUTIONALITY AND FUNDING OF KRS CHAPTER 31

This is not to say that we do not have serious doubts about the constitutionality of the statutory scheme of fees and, in particular, the caps. We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases, with the meager limits of compensation it is authorized to pay.

Additionally, we have serious doubts concerning the constitutionality of the total defender scheme under KRS Chapter 31 because of its lack of uniformity, lack of adequate state funding, and the special legislation of some of the statutes. However, in this regard there were no findings by the trial judge, although a certain amount of the arguments on appeal addressed the constitutionality of these statutes. It is our impression that, if there is going to be a constitutional attack upon the present defender system, the procedure would have to follow the path of the school reform case, *Rose v. Council for Better Education, Inc.*, Ky., 790 S.W. 2d 186 (1989).

***Lavit v. Brady*, Ky App., ___S.W. 2d ___ (Nov. 8,1991).**

Celebrating the 200th anniversary of our U.S. Bill of Rights on December 15, 1991
Celebrating the 100th anniversary of our KY Bill of Rights on September 28, 1991

FROM THE EDITOR: The 5% cut for DPA has hit us hard as this has been a lean decade for DPA. With an underfunded budget each year, we already operated no frills in order to conduct business as usual. The cutback has affected essential services such as *The Advocate*. *The Advocate*'s special October *Bill of Rights* issue, while complete, has been tabled until funds are found to publish it. This issue is being funded by donations, not state funds.

The information and legal thinking contained in this magazine are essential to the competent representation of indigent defendants, and our overworked public defenders in the field, as well as other criminal justice officials, members of the bar, *etc.*, who do not have the time or the neccessary resources to develop this information independently and have come to rely on *The Advocate* to do this for them.

A legislator who called for an investigation into the publication because of its supposed propaganda in 1984, in later years sent a letter thanking the Department for the help he'd received from *The Advocate* in his representation of a capital defendant. We have received many letters of this nature over the years.

This issue is very truncated and xeroxed instead of being printed due to the 5% cut back. There will be no February, 1992, or April, 1992 issues unless there is a change in the decision or unless sufficient money is raised via donations. It takes $750 to print, publish and distribute an issue of this nature. If we receive sufficient donations, we promise a February issue focused on our General Assembly's work in the criminal justice areas. We hope to have a June, 1992 issue and to resume our regular schedule thereafter.

Hoping tomorrow brings adequate resources.

- Ed Monahan

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Printed with State Funds KRS 57.375

IN THIS ISSUE

Kentucky allocated $10.2 million general fund dollars to fund its indigent defense in 1990, and in 1991. That amount would build but 4 miles of two lane road in Kentucky.

Just Compensation Of Legal Service For Indigent Defendants In Criminal Cases

LAVIT V. BRADY (89-CA-2360- MR) and DEPARTMENT OF PUBLIC ADVOCACY V. PILLERSDORF (90-CA-1302-MR)

REVERSING AND REMANDING WITH DIRECTIONS - NO. 89-CA-2360-MR
REVERSING - NO. 90-CA-1302-MR

*****

BEFORE: McDONALD, MILLER and WILHOIT, Judges.

McDONALD, JUDGE. These appeals have been joined for resolution because of their common subject matter, namely, "just compensation" of legal service for indigent defendants in criminal cases.

The factual background of the Lavit and Abell appeal is that Michael Dean, an indigent, was charged with murder, a capital offense, and armed robbery by the Washington County Grand Jury.

Lawyers Theodore H. Lavit and James H. Abell were appointed by the trial court to defend Dean, an African-American and life-long resident of Washington County, who, it is charged, robbed and murdered the victim, a white man.

The jury acquitted Dean in a trial which started on January 20, 1988, and ended on January 30, 1988. The lawyers logged 186 in-court hours and 89.3 out-of-court hours, with 530 miles of travel. The in-court time was valued, pursuant to statute, at $35 per hour and out-of-court hours were valued at $25 per hour. The mileage was valued at 21 cents per mile. The trial court examined the value of the services and expenses rendered and approved them in the sum of $8,854. The court found the services and expenses to be necessary, fair and reasonable.

Lavit and Abell submitted the trial court's approval of the services and expenses to the Kentucky Department of Public Advocacy, which refused payment.

Subsequently, the trial court ordered the Washington County Public Defender's Association to pay Lavit and Abell $1,250 each, totalling $2,500. The claim against the Washington County Fiscal Court was dismissed on the ground that it had no obligation for the fee.

The Washington County Public Defender's Association, an unincorporated association, had on hand $7,450, and it was to receive in the near future additional funds from the Kentucky Department of Public Advocacy. Its annual allotment as fixed by the Department was $8,500. The association has made it clear that it in no way approves of fees, and under all circumstances the association does as directed by the order of the circuit court. The association, although lacking sufficient funds at the time, said they probably would have been able to make full payment from the additional annual allotment, but the trial court directed them to pay only $2,500.

Lavit and Abell appealed the denial of their remaining fee, which was in the sum of $6,354. The sole issue on appeal as asserted by Lavit and Abell is that:

> The trial court abused its discretion to limiting appointed counsel fees to $1,250.00 per attorney in a fee petition previously approved by the court for $8,854.00 as a result of counsel's efforts resulting in an acquittal of the defendant in the underlying criminal action for capital murder and first-degree armed robbery, tried before a petit jury for 10 days and nights.

First, we will dispose of the constitutional questions. The constitutional questions raised under both federal and state constitutions will not be addressed by us. Those issues and arguments were not presented to the circuit court and are raised for the first time in this appeal.[1] With those procedural defects apparent, we are not permitted to review the issues. *See Kentucky Milk Marketing Inc. v. Kroger*, Ky., 691 S.W.2d 893 (1985), and *Payne v. Hall*, Ky., 423 S.W.2d 530 (1968).

Also, we do not reach the constitutional issues because the question before us can be resolved on simple application of statutory direction.

The statute to be construed is KRS 31.170(4):

> An attorney under subsection (3) shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. However, he may be compensated at a rate no higher than thirty-five dollars ($35.00) an hour for time spent in court and no higher than twenty-five dollars ($25.00) an hour for time spent out of court subject in each case to a maximum total fee of one thousand two hundred fifty dollars ($1,250) in case of a felony and five hundred dollars ($500) in any other case, *unless the court concerned finds that special circumstances warrant a higher total fee*. (Emphasis added).

The trial court refused to find that the defense of Michael Dean was "special circumstances" which would warrant a higher fee in excess of the statutory cap of $1,250 for each lawyer. In this regard, the trial court abused its discretion and erred as a matter of law. Our reasoning is that a statute is to be construed as it is written to give it force and effect. *Thieman v. Hancock*, 296 Ky. 223, 176 S.W.2d 418 (1944).

We have no reluctance in holding that a capital murder case is "*ipso facto*" a special circumstance within the meaning of the statute so as to allow for additional legal defense compensation. Failure to so construe renders the "special circumstances" exception meaningless.

While the statutory hourly rates are not in question on appeal, it behooves us to comment that the sums are not commensurate with professional services of the kind demanded by the nature of a capital murder case.

Bradshaw v. Ball, Ky., 487 S.W.2d 294 (1972), is the landmark case in this field. The *Bradshaw* reasoning is important to the case at hand, although it was decided prior to KRS Chapter 31 being adopted and before the constitutional judicial amendment of 1976. It resounds the principles that (1) the accused in criminal cases is entitled to effective representation by counsel; (2) that both federal and state constitutions prohibit an indigent defendant from being tried

without counsel; and (3) that the state is left with the choice of not prosecuting an indigent defendant without counsel or of providing compensation for appointed counsel. The *Bradshaw* opinion gets very pointed with this statement at pg. 298:

> It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently. Therefore, it appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring *the state* to furnish the indigent a competent attorney whose services does not unconstitutionally deprive him of his property without *just* compensation. (Emphasis added).

It is clear that *Bradshaw* mandates two things: the state must furnish indigents competent counsel; and, counsel so furnished must be paid just compensation.

The circuit court's order herein failed to provide for the "just compensation" directive of *Bradshaw* by applying the fee limitation of KRS 31.170(4), and by failing to construe a capital murder case as "special circumstances."

Next, argument is made that because the Washington Public Defender's Association has inadequate funds, that fact requires the lawyers to accept an amount which is less than just compensation. The solution is simple. If the association's funds are depleted, then the respective fiscal court must make up the difference.

It is plain from reading KRS Chapter 31 that, if a fiscal court elects to participate in a statutory plan, then it must see that the plan is effective. This is so not only by legislative directive but also from the standpoint of a necessary governmental expense. This was our holding in *Boyle County Fiscal Court v. Shewmaker*, Ky. App., 666 S.W.2d 759 (1984). Keep in mind that fiscal courts are not required by statute to participate in a plan to provide services or funds for the defense of indigent defendants in criminal cases. However, once a fiscal court adopts a plan and gets the benefits of participation, it cannot leave the program stranded without funds.

If the respective fiscal court elects to participate in a plan but cannot financially meet the funding requests required from the current budget, it then must so provide in future budgets. Ultimately, it is the state's financial responsibility as pointed out in *Bradshaw*, but for purposes herein the fiscal court is responsible. We consequentially conclude that the circuit court erred in dismissing the Washington County Fiscal Court based on our understanding of KRS Chapter 31 and *Boyle County Fiscal Court, supra.*

Therefore, the circuit court's order is reversed and upon remand the circuit court is directed to enter an order in the sum of $6,354 for Lavit and Abell against the Washington County Fiscal Court, jointly and severally.

Consolidated with the above is the appeal by the Department of Public Advocacy of the judgment in favor of Attorneys Ned Pillersdorf, Derek G. Gordon and Jerry Anderson. In the Department's appeal we are saddled with a similar question of just compensation for legal defense. In this case the Department provided two public advocates to represent Clawvern Jacobs in a capital murder trial in Knott County. Both assigned counsel were staff employees of the Department. Neither was able to try the case; one because of health reasons; the other, Neal Walker, was removed by the circuit court over objection.[2] Regardless, Jacobs was without counsel, except on paper, and the commonwealth attorney moved to hold the Department in contempt if new counsel was not appointed in ten days after October 25, 1988.[3] This motion was later withdrawn at a hearing.

Being unable to get acceptable staff counsel and unable to get counsel with the statutory case cap limiting counsel fees, the circuit court on its own appointed appellees, Ned Pillersdorf and Derek Gordon for the defense, with unlimited compensation. The circuit court's order held that the $2,500 (for both counsel) cap was "arbitrary" and unconstitutional. It further ordered the Department and the Kentucky State Treasury to compensate counsel at the rate of $35 per hour for in-court work and $25 per hour for out-of-court work, along with all reasonable and necessary expenses. The circuit court's authority to make such an appointment and enter such an order forms the issue in this appeal.

Subsequently, Pillersdorf withdrew from the defense and Anderson replaced him by order of the circuit court. On April 20, 1989, Pillersdorf submitted a claim of $962 to the Department. On September 20, 1989, Anderson submitted a claim of $7,231.25 and Gordon submitted a claim of $10,234.01. None of these claims were approved by the circuit court prior to being presented to the Department. The Department refused payment.

By order of June 7, 1990, the circuit court ordered the Department to pay the claims within twenty days. It is from this final order that the Department has appealed.

The Department of Public Advocacy frames the issue as follows:

> THE CIRCUIT COURT BELOW LACKED BOTH STATUTORY AUTHORITY AND JURISDICTION TO APPOINT VOLUNTEER COUNSEL, THE APPELLEES, AND TO ORDER THE DEPARTMENT OF PUBLIC ADVOCACY TO COMPENSATE THE APPELLEES AT THE STATUTORY HOURLY RATES WITH NO LIMITATION ON THE MAXIMUM LEGAL FEES AND EXPENSES.

First we must struggle with the numerous plans offered in KRS Chapter 31 which provide for the legal defense to indigents. Basically, if a county through its fiscal court desires to have some input into operation of a program and the appointment of counsel, it may do so by selecting a plan. Otherwise, a county may wash its hands of any involvement of delivering such services to the needy and leave it to the Department of Public Advocacy.

A review of the various plans under KRS Chapter 31 shows the complexity of the problem. The Department of Public Advocacy is charged with the duty to see that services are provided to indigents in all 120 counties of the Commonwealth. KRS 31.030(5) and (6). All plans must be approved by the Department of Public Advocacy. Among the various plans are:

a) KRS 31.030(5), services rendered by full-time staff of Department, no fiscal court involvement;

b) KRS 31.060, a separate defender office now limited to Louisville and Jefferson County because it is a district with more than ten circuit judges;

c) KRS 31.065, public advocate establishes branch offices either by full-time staff or contract, no fiscal court involvement;

d) KRS 31.070, contract lawyers with public advocate within a judicial circuit appointed by public advocate, $1,000 fee limitation, no statutory "special circumstances" exception, and no fiscal court involvement;

e) KRS 31.160, contract lawyers with the fiscal court of a county or counties establishing an office to provide the services. *i.e.*, Fayette County Legal Aid;

f) KRS 31.170(1), public advocate's office established, maintained and staffed by fiscal court;

g) KRS 31.170(2) fiscal court arranges for the services with a non-profit organization of county, *i.e.*, Washington

County Public Defenders Association. The association gets an allotment annually from the Department of Public Advocacy paid to the fiscal court and then passed on to the association.

In the consolidated Lavit and Abell appeal, the plan chosen by that respective fiscal court was under KRS 31.170(2). In this case, Knott County has opted out of any involvement for indigent services by not adopting a plan under KRS 31.160, and therefore requires the Department of Public Advocacy to provided the services under KRS 31.065.

We are confronted with a legitimate question concerning the authority and jurisdiction of the circuit court to support its actions. For the sake of this argument we do not treat the appellees as volunteers in the context that they were offering their services free of charge. It is clear they volunteered services in a sense of willingness to perform, if a certain condition was met, namely, no cap on the total amount of their fee. So, classifying the appellees as volunteers does not impede our consideration of the merits of this appeal.

The appellees argue that the Department is estopped from taking this appeal because it did not appeal the circuit court's original order appointing the appellees. It is our opinion that the original order of appointment was purely interlocutory in nature. True, it could have been attacked in an original action in this Court on the basis that the circuit court was acting without jurisdiction, but the Department's failure to seek that relief in no way prevents it making such argument on appeal.

Now, to address the merits of the issues before us. The circuit court, in order to be upheld, must have acted within some recognized authority and jurisdiction, be it by case law, statute or constitution.

...[I]t is the duty of the legislature to appropriate money for the adequate enforcement of criminal laws. [that includes] that the state furnish counsel whose appointment does not constitutionally deprive counsel of his property without just compensation.

As previously discussed herein, *Bradshaw v. Ball, supra*, sets the pace on this subject and establishes that both Federal and State Constitutions require that effective and competent counsel be afforded the indigent for their defense in criminal cases; that it is the duty of the legislature to appropriate money for the adequate enforcement of the criminal laws. Pertinent to this appeal *Bradshaw* further requires that the state furnish counsel whose appointment for service "does not unconstitutionally deprive" counsel of his property without just compensation. *Id.* at 298.

In the case before us, counsel was initially furnished by the state through the public advocate pursuant to KRS 31.030(5) and KRS 31.065. It is not clear from the record why counsel was not acceptable to the circuit court. The defendant, Jacobs, made many delusional complaints about the staff attorneys assigned from the public advocate's office, such as, counsel was involved in an assassination plot with the state police against him; counsel as an agent of the devil; counsel tried to make him insane; counsel served one God, he another; counsel was trying to get him to deny his faith, *etc.* [Ed. Note: Yet he was found competent to stand trial.]

Then the circuit court entered an order of December 19, 1988, relating, "... and the Department of Public Advocacy being unable to provide counsel; The Court is informed that the Hon. Ned Pillersdorf or Prestonsburg is willing to accept appointment to the case, if he is assured of adequate compensation ...." The circuit court ordered no "cap" on the compensation and found "that said cap is arbitrary and in violation of appointed counsel's involuntary servitude rights ...."

We hold that the circuit court failed to make findings of fact sufficient to sustain the order. There was no finding that substitute counsel was necessary as contemplated under KRS 31.130. Furthermore, if substitution of counsel was indicated, it is the public advocate that is charged with the duty of obtaining substitute counsel, not the circuit court. *Id.* We have been shown no statutory or other authority for the circuit court to intrude as it did into the appointment or assignment process of the Department. Certainly the record before us does not support the conclusion that the Department was "unable to provide counsel."[4] It must be remembered that one represented by appointed counsel "does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel ... except for adequate reasons or a clear abuse by counsel." *Henderson v. Commonwealth*, Ky., 636 S.W.2d 648 (1982).[5] It has not been found nor shown that the Department was derelict in any way or obstinate to the extent that it refused to comply with the statutes. Only then, when the Department fails or refused to act, and all other means are exhausted, may the circuit court go outside of the statutory framework to make such appointments.

We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases witht the meager limits of compensation it is authorized to pay.

This is not to say that we do not have serious doubts about the constitutionality of the statutory scheme of fees and, in particular, the caps. We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases, with the meager limits of compensation it is authorized to pay.

Additionally, we have serious doubts concerning the constitutionality of the total defender scheme under KRS Chapter 31 because of its lack of uniformity, lack of adequate state funding, and the special legislation of some of the statutes. However, in this regard there were no findings by the trial judge, although a certain amount of the arguments on appeal addressed the constitutionality of these statutes. It is our impression that, if there is going to be a constitutional attack upon the present defender system, the procedure would have to follow the path of the school reform case, *Rose v. Council for Better Education, Inc.*, Ky., 790 S.W.2d 186 (1989). This path was not followed; so therefore, we cannot address those issues.

For the reasons we have addressed, we are compelled to hold that the circuit court was without authority to enter the order of appointment on the findings of fact presented. The order is reversed.

WILHOIT, JUDGE, CONCURS IN RESULT AND FILES A SEPARATE OPINION.

WILHOIT, JUDGE, CONCURRING. I concur in the result reached by Judge McDonald, but express no opinion as to the constitutionality of KRS Chapter 31 or any particular statute within that Chapter. I also express no opinion as to whether a proceeding similar to that followed in *Rose v. Council for Better Education, Inc.*, Ky., 700 S.W.2d 186 (1989), would be an appropriate vehicle for a "constitutional attack upon the present defender system." This court should refrain from giving advisory opinions as to constitutional questions not before us and from suggesting legal strategy to be used in a possible future lawsuit.

It seems to me that the real problem with the present statutory fee limitation is that in those cases where the limitation applies, fewer and fewer lawyers will be willing to undertake the heavy burden of defending a capital murder charge for the meager compensation allowed. Since *Bradshaw v. Ball*, Ky., 487 S.W.2d 294 (1972), attorneys of this Commonwealth can "no longer be required to accept court appointments to represent indigent criminal defendants." *Id.* at 300. Unless the legislative and executive branches make provision to insure that indigent defendants charged with capital murder have effective legal counsel, then, of course, such defendants cannot be prosecuted. This budding problem presented by the cases before us needs prompt attention by those branches lest a full-blown crisis develops in criminal prosecution.

MILLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

MILLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in Appeal No. 89-CA-2360-MR. I dissent in Appeal No. 90-CA-1302-MR and express my views as follows.

Our Constitution, of course, requires that a citizen subjected to prosecution be afforded competent counsel, and this implies paid counsel, *See Bradshaw v. Ball*, Ky., 487 S.W.2d 294 (1972). It is peculiarly within the province of the judiciary to insure that every prosecution conforms to this constitutional mandate, just as all constitutional mandates derive their protection from the judiciary. I do not view the enactment of Kentucky Revised Statute (KRS) Chapter 31 ("Department of Public Advocacy") as abridging this inherent power and responsibility of the judiciary. At best, I view the creation of the Department of Public Advocacy (department) as a statutory measure to assure a reservoir of counsel and perhaps a more limited reservoir of money from which judges may draw upon in dealing with the burgeoning increase of indigent defendants. The enactment is supplementary to and not in lieu of time-honored precedent of requiring service of members of the bar. For that matter, the legislature could not constitutionally encroach upon this inherent function of the judiciary. Kentucky Constitution 27 and 28.

I conclude the trial judge was squarely within his authority in appointing Ned Pillersdorf and Derek Gordon to undertake the defense of Clawvern Jacobs and directing payment of their reasonable fee by the department. It is, of course, the responsibility of the Executive Branch to see that counsel are adequately paid. In this regard, the Executive Branch is clothed with both the power to prosecute and the purse from which to assure payment of indigent defense. Whether the Executive Branch fulfills this responsibility through the department or extraneous means is of no concern of the judiciary; the fact is, it must be fulfilled. In this case, where the department failed to offer a defense of Jacobs, the trial judge was within his power in directing that competent paid counsel be afforded at the expense of the Executive Branch. Moreover, the court was at liberty to utilize all reasonably appropriate means to compel payment. I would affirm on this appeal (No. 90-CA-1302-MR).

[EMPHASIS ADDED.]

FOOTNOTES

[1]As an aside but for added information, an objection was withdrawn concerning the circuit court's appointing Lavit and Abell, although Lavit was hired by the defendant's mother and paid $1,000. No party to the original action or in this action has objected to the circuit court's appointment of Lavit and Abell on the grounds of any disqualification they have possessed either by statute or case law. Therefore, for the purposes of this appeal, Lavit and Abell were legally entitled and qualified to accept the circuit court's appointment for the defense.

[2]It appears from the record that the defendant, Jacobs, refused to cooperate with various other staff lawyers assigned to his case. One staff lawyer had defended Jacobs successfully in the past but was now considered unacceptable to him.

[3]It would have been more forthright for the commonwealth's attorney to move for dismissal of the indictment on the grounds that the state had not provided Jacobs with counsel.

[4]The trial court ordered the public advocate to provide new counsel for Jacobs at a time when Jacobs was still represented by Attorney Walker from the Department. Walker was not removed as counsel until November 23, 1988. Walker's motion for reconsideration of the order removing him was denied on December 13, 1988. Six days later the trial court entered its order appointing Pillersdorf and Gordon.

[5]*Cf. Morton v. Commonwealth*, Ky., ___ S.W.2d ___ (rendered August 29, 1991).

CHOOSING LAWYERS...

Inconceivable as it may seem, imagine that a Kentucky Supreme Court justice is charged with a capital crime. Would he settle for a lawyer who gave out a tavern's phone number for his business number? Would he accept an attorney who had been suspended for neglecting client's matters? Would he stand still for an attorney who forgot it was a death penalty case?

It's unthinkable that any justice would accept such an attorney. But if the shoe is on another fellow's foot, the script changes. Kentucky's justices have taken few measures to keep lawyers fitting those descriptions from representing people who face the death penalty. Indeed, five men on Kentucky's death row were represented by lawyers who were disbarred or suspended or resigned under terms of disbarment.

Furthermore, Chief Justice Robert F. Stephens contends there is no correlation between the lawyers' unethical conduct and their death penalty work. He even says, "There's a lot of quality lawyers that get disbarred." That's an extraordinary claim considering that discipline of lawyers is rare in Kentucky, and last year only six were forced to stop practicing law.

The problem of inadequate representation in capital cases is a costly one that raises serious ethical questions. Too poor to pay for top-flight counsel, many defendants are represented by inexperienced or even incompetent lawyers. That regularly leads to costly petitions for retrials.

Kentucky's record in capital cases argues for the adoption of standards that would require defense counsel in such cases to have substantial prior trial experience in serious felony cases. Ohio has adopted standards along those lines and Tennessee has similar ones under consideration. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are even more comprehensive.

The failure of many states, including Kentucky, to address the problem is an argument in favor of a federal competency standard. One that appeared briefly in this year's federal crime bill would have required a lawyer assigned to represent someone charged with a capital crime to have practiced felony criminal law for five years and to have participated in at least two homicide cases.

Even though the provision failed, there's nothing keeping the Kentucky Supreme Court from establishing a similar standard. Nothing, that is, except apathy.

Courier-Journal Editorial, Nov. 18, 1990

Catching Up With Current Realities

Chapter 31 Needs Revision and Full Funding

A. IN 1972 STATEWIDE SYSTEM REPLACED FORMER COERCED REPRESENTATION

Kentucky's statewide public defender effort began in 1972 after significant legal challenges to the coercion of members of the bar to represent indigents charged with a crime without being compensated.

B. LITIGATION WHICH PRECEDED THE 1972 STATEWIDE SYSTEM

In 1948 it was determined that indigents accused of a crime could not be prosecuted without representation from counsel. From then on, the Kentucky Bar was forced to represent indigents without receiving any compensation. Attorneys who felt it unfair for a court to force them to work for free began to litigate challenges to this system of coerced, uncompensated appointments. After a series of litigation efforts, *Bradshaw v. Ball* decided this issue in Kentucky. A summary of the significant cases follows in chronological order.

1948 Kentucky's highest court held that an attorney must be appointed for a person charged with a felony and too poor to hire his or her own counsel. *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948).

March 1966 In *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966) the Court refused an appeal for compensation by an attorney who was appointed to represent an indigent in an Rcr 11.42 proceeding in Mason County. It was recognized that the burden on attorneys to provide legal representation to indigents without compensation was approaching being so unfair as to be onerous. The Court did note that the Kentucky Governor's Task Force on Criminal Justice "has studied the problem of legal representation for the indigent and has given consideration to a plan of state-paid compensation for assigned counsel." *Id.* The Court thought there was merit in this concept, and said "We think it appropriate for the time to defer to legislative action." *Id.* at 212.

January 1967 In *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967) the appointed counsel for the defendant in his Jefferson County Rcr 11.42 proceeding requested the appellate court to order the state to "reimburse him for his out-of-pocket expense in the typing and duplicating of the brief for Jones on this appeal." *Id.* at 38. The court saw this request the same as a request for a fee, and said it was "disposed to defer to legislative action." *Id.*

March 1968 In *Commonwealth, Department of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968) the state appealed an award of $1500 to attorney Francis Burke for representing Walter Hammershoy, an indigent criminal defendant, in Pike County. The Department of Corrections acknowledged the reasonableness of the amount but argued there was no statutory authority for such fees. The Court noted that in 1966 the legislature made a base appropriation of $50,000 for FY 67 and $50,000 for FY 68 for public defenders without further direction so the Court held it could not be ordered used for attorney fees. The Court observed that increasing demands were being placed on the Bar to represent indigent criminal defendants, and requested the General Assembly to address this essential constitutional obligation:

> We recognize the merit in appellee's position and that of many other attorneys who are performing an absolutely essential and valuable public service. They are being compelled to perform work for the government without compensation. We cannot refrain from expressing the wish that other departments of government recognize this grave problem and take appropriate steps, as has been done in other states, to rectify the situation. *Id.* at 451.

May 1970 In *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970) two attorneys were appointed to separately represent 2 indigent co-defendants in Jefferson County. After the trial, the two attorneys unsuccessfully requested the trial court to order the county to pay them attorney fees.

Frustrated, the court reviewed its patient encouragement of the legislature to act. The 1970 legislature had passed SB 261 which "made a limited approach to a solution." However, Governor Nunn vetoed it since it was believed "to fall short of providing a satisfactory solution."

According to the Court, "since the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the payment of reasonable compensation to such counsel would be in the category of a essential governmental expense. If so, the lack of an appropriation would not be a bar to a judicial order for payment." *Id.* at 632.

The court urged the Bar to protect the interests of its members:

> Chief Justice Stephens in his March 14, 1990 speech to the General Assembly said:
>
> [There] is the need for more full-time public defenders and a generous increase in the compensation of these dedicated and hard working men and women. While theirs is not a "popular" cause, the Department of Public Advocacy truely serves as a champion and sentinel of our most cherished legal principle- innocent until proven guilty. Theirs is an invaluable dedication to public service without which many would be denied access to justice.

It occurs to us also that the Kentucky Bar Association should be the most interested in protecting its members from the burdens and sacrifices of oppressive demands upon them to represent indigents. Hopeful that the Bar Association will take action and that acceptable solutions to the problem may be forthcoming, we shall continue for the present to defer any judicial action. *Id.*

June 1972 In *Slavens v. Commonwealth*, 481 S.W.2d 650 (Ky. 1972), a Madison County indigent criminal defendant case where counsel was appointed, the court reiterated its 1970 *Jones* viewpoint.

September 1972 In *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972) the court had reached its limit. Two cases involving attorney fees for attorneys forced to represent indigent defendants in Campbell and Jefferson counties were consolidated and the court termed the issue, "the intolerable condition that developed by the past failure of the state to compensate attorneys who are directed to represent indigent criminal defendants." *Id.* at 296. After entry of judgment by the lower court, Chapter 31 was enacted by the 1972 General Assembly. No longer could attorneys be forced to represent indigents uncompensated.

The "duty to appropriate money for the adequate enforcement of the criminal laws rests upon the legislative department." *Id.* at 297.

Two decades later the litigation continues as the compensation remains obscenely inadequate.

November 1991 Lavit *v. Brady*, Ky.App., ___ S.W.2d ___ (Nov. 8, 1991). Two appointed counsel fee cases were consolidated. The Court of Appeals found that a capital case was by necessity a special circumstance warranty a higher statutory fee under KRS 31.170(4). The Court commented that the statutory hourly rates "are not commensurate with professional services of the kind demanded by the nature of a capital case."

"It is clear that *Bradshaw* mandates two things: the state must furnish indigents competent counsel; and, counsel so furnished must be paid just compensation." When a fiscal court establishes a public defender program under KRS Chapter 31, it must fund it above the state funding so that the system is adequately funded.

"This is not to say that we do not have serious doubts about the constitutionality of the statutory scheme of fees and, in particular, the caps. We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases, with the meager limits of compensation it is authorized to pay.

"Additionally, we have serious doubts concerning the constitutionality of the total defender scheme under KRS Chapter 31 because of its lack of uniformity, lack of adequate state funding, and the special legislation of some of the statutes. However, in this regard there were no findings by the trial judge, although a certain amount of the arguments on appeal addressed the constitutionality of these statutes. It is our impression that, if there is going to be a constitutional attack upon the present defender system, the procedure would have to follow the path of the school reform case, *Rose v. Council for Better Education, Inc.*, Ky., 790 S.W.2d 186 (1989).

C. PIECEMEAL AMENDING OF KRS CHAPTER 31 SINCE 1972

Chapter 31 has been amended 12 times in a piecemeal fashion since its 1972 enactment. A summary of the changes, the sponsors, and the votes of those changes over the years are as follows:

1. **1972** Chapter 31, HB 461 with Kenton, Graves and Swinford sponsors, was enacted by the following vote: House 60-18; Senate 26-5

2. **1974** SB 256, sponsored by Gentry, amending Chapter 31, passed by the following vote: House 67-5; Senate 31-1. The major changes were:

   a) the Secretary of Justice rather than the Governor appoints the Public Advocate.

   b) funding for county programs was changed from $14,000 per circuit judge to $.40 *per capita*.

3. **1976** SB 266 sponsored by Garret & Prather passed with the following vote: House 74-6; Senate 24-1. Its changes included:

   a) added responsibility of those accused of a mental state which could cause incarceration.

   b) suit for recovery of money from a defendant must be brought in 5 years instead of within 10 years.

4. **1976** HB 370 sponsored by Givhan passed by a vote in the House of 72-2 and in the Senate of 36-0. It added an affidavit of indigency to KRS 31.120.

5. **1978** SB 289 sponsored by Garrett passed 82-15 in the House and 34-1 in the Senate. Its changes included:

   a) adding P & A responsibilities;

   b) changing the name to public advocacy.

6. **1978** SB 207 sponsored by Garrett passed the House 60-24 and the Senate 29-0. It raised the hourly rates from $20 to $25 and from $30 to $35 and the maximum amount for a felony case from $1000 to $1250; and it created a new section crediting recouped money to the Department.

7. **1980** HB 609 sponsored by Richardson passed the House 87-5 and the Senate 21-0 did minor housecleaning.

8. **1980** SB 376 sponsored by Berry passed the House by 69-20 and the Senate by 29-1. It created a P & A Advisory Board; permitted the purchase of malpractice insurance.

9. **1980** HB 424 sponsored by Williams, DeFalaise, Guenthner, Helringer, Holbrook, Van Horn passed the House 64-8 and the Senate 24-5. It added into KRS 31.120 the *prima facie* evidence standards for when a person is not indigent, and created a new section to make parents of juveniles liable for attorney fees.

10. **1982** HB 770 sponsored by Thomason and Kenton passed the House

> While candidates and elected officials promise and deliver increased budgets for prosecutorial and law enforcement efforts, support for public defenders is waning. Salaries for full and part-time public defenders are low.
>
> ...
>
> We recognize the importance of prosecutors, law enforcement officials and others in furthering the cause of justice. However, in the final analysis, the task of protecting the accused usually falls upon appointed defense counsel. They shoulder the burden of seeing that, in the criminal justice system, individual liberties and dignity are not side-stepped or cheapened. This burden has often been shouldered in the face of overwhelming caseloads, public abuse and meager pay.
>
> - United States District Judge Edward H. Johnstone, in the August, 1991 *Advocate* p. 6.

69-2 and the Senate 30-2. Its changes included:

a) created a public advocacy commission

b) governor, not Secretary of Justice, appoints Public Advocate.

c) took the Department out of the Justice Cabinet.

11. 1984 HB 583 sponsored by LeMaster passed the House 89-2 and the Senate 28-1.

12. 1984 SB 159 sponsored by Wright passed the House 72-20 and the Senate 30-6. It placed DPA in the Public Protection and Regulation Cabinet.

13. 1986 HB 346 sponsored by Scorsone and Cowan passed the House 92-1 and the Senate 33-0-1. It added "any legal action which could result in the detainment of a defendant" to the definition of a serious crime, and it added unemancipated minor and custodial parent language.

D. 20 YEARS OF DRASTIC CHANGE SINCE ENACTMENT OF KRS CHAPTER 31 IN 1972

The last two decades have seen many significant changes which have affected Kentucky's delivery of legal services to poor criminal defendants. These significant changes demand recognition.

1. INCREASING INFLATION

Some of the changes are readily apparent. Inflation over the last 20 years has been significant. Between 1972 and 1990 the Consumer Price Index has increased 213%. This level of inflation makes the statutory rates and maximums of 1972 and the 1978 increases out of step with current economic realities.

In 1972 the statutory rates were $20 in court and $30 out of court. In 1991 dollars, these would be $62.50 and $93.90 respectively.

2. INCREASING CAPITAL CASELOAD AND CAPITAL-DEFENSE PERFORMANCE DUTIES

The death penalty responsibilities of the Department have continuously exploded at all litigation levels without ever being funded by the General Assembly.

To meet this life and death defense responsibility, the Department has had two decades of robbing the funding for non-capital litigation resources.

At the same time, death penalty law, especially the constitutional pronouncements of the United States Supreme Court, have created a constantly changing set of substantive and procedural rules which are increasingly complex and burdensome on the individual defender and the state public defender system. In 1972, the funding levels of Chapter 31 did not contemplate capital cases, and funding has never been allotted to account for the harsh capital reality.

See *The Death Penalty Costs More Than Life*, referring to a New York study among others that states life imprisonment costs $600,000 per person while the death penalty/execution costs $1.8 million. *The Advocate* August, 1988 p.7.

In a Northern Kentucky University article entitled *The Cost of Killing Criminals*, Alan F. Blakely, 18 Vol.1 N.KY Law Review 61, (1990), it is estimated that the total cost to prosecute a Kentucky capital case runs between $946,000 and $7,354,000.

The ABA Standards for Criminal Justice, *The Defense Function* (1991) set out demanding duties of capital defense counsel and call for compliance with the ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases":

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Standard 4.1.2(c).

For a discussion of the need for the adoption of Capital Case Standards as it applies to Kentucky. See *The Advocate*, Vol 10 #5 February 1989 p. 14.

When a public defender system is set up and funded, it must deliberately be done with consideration of the enormous consequences of capital litigation responsibilities. As the ABA Standards for Criminal Justice *Providing Defense Services* (1990) state:

> Where capital punishment is permitted in the jurisdiction, the plan should take into account the unique and time-consuming demands of appointed representation in capital cases. The plan should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. 5-1.1(d).

3. COUNTIES NOT MEETING THEIR OBLIGATION

"Government has the responsibility to fund the full cost of quality legal representation for eligible persons...." ABA Standards for Criminal Justice, *Providing Defense Services*, 5-1.6 (1990).

From its inception in 1972, the statewide public defender system has never been adequately funded by the legislature's twin funding sources of the state and county governments. Counties, with perhaps the exceptions of Jefferson, Fayette and a few other counties, have not met their responsibilities under Chapter 31 to fund the county public defender systems above the state's contribution for attorney fees or for expert witness fees.

> The reality is that money to hire experts in criminal cases is available to the Commonwealth virtually at will.
>
> -Prosecutors Obtain Money to Hire Experts, *The Advocate*, April, 1988 p.6.

At the same time, no one can expect counties ever to do this with Kentucky's criminal justice system now primarily a state-run and state-funded system.

4. EVOLUTION OF STATEWIDE CRIMINAL JUSTICE SYSTEM

With some exceptions, the state in the last 2 decades has assumed responsibility for the Kentucky criminal justice system. The judicial system is financed by the state, not the counties. The judiciary is not expected to fund itself from fines. Judging is considered essential and so is funded by the general

> [I]t is an accepted fact that [public defenders] are woefully underpaid, substantially less... than your colleagues in surrounding states.
>
> ...Many of you struggle with a caseload which exceeds any reasonable level of work which could be expected of an attorney.
>
> And worst of all...many of you feel that your work...is condemned by many as amounting to an interference with the judicial process rather than an integral part of the process.
>
> Kentucky Supreme Court Justice Joseph E. Lambert in *The Advocate*, August 1989.

fund of the state. *The county and commonwealth attorneys are largely funded by the state, not the counties.*

This state funding mechanism exists for good reason. It is not economically realistic for counties to fund a state-run criminal justice system.

This state-run, state-funded effort is the trend in Kentucky and nationwide. No one is urging that Kentucky's judicial system return to the days of county funding or of being run in whole or part by the counties.

5. LEGISLATING HIGHER CASELOADS WITHOUT ADDITIONAL FUNDING

Not only has the public defender system never been adequately funded, it has faced the additional burden of having to handle a wide variety of increased cases with increasingly harsher penalties as a result of constant penal changes by the legislature. This has occurred with no additional funding with the exception of additional funding provided when the Juvenile Code was enacted.

For instance, the so called truth-in-sentencing phase created by the legislature creates more work for the defense. It came without anymore funding. Stricter DUI laws have been created. They have increased DPA's workload with no new funding for DPA.

The Department now is handling in excess of 70,000 cases and receiving on average but $162 funding per case. This level of funding is near the bottom nationally.

A direct result of underfunding is that many DPA attorneys are handling an unethical number of cases. The ABA Standards for Criminal Justice, *The Defense Function*, prohibit this:

> Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.
> Standard 4-1.3(d). *See also Providing Defense Services*, Standard 5-5.3.

6. FULL-TIME DEFENSE

Some changes in full-time defense the last 20 years are less obvious.

Nationally, the trend has been towards delivering indigent defense services by the full-time office method. Kentucky has not kept up with this evolution.

While full-time offices have been established in many counties in the last 20 years, that has not occurred to the extent necessary to keep pace with delivering quality representation to fellow citizens accused of a crime. 80 of the 120 counties still remain contract, non full-time efforts.

In Kentucky the trend has likewise been providing criminal justice service with full-time professionals. The judicial article brought Kentucky's court system into the 20th Century. Chief Justice Stephens has called for full-time prosecutors throughout Kentucky. Full-time public defender offices serving all Kentucky counties are the inevitable future.

The ABA Criminal Justice Standards have called for full-time public defense:

> The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas. *Providing Defense Services*, 5-1.2(a).

7. LEGAL AND PROFESSIONAL CHANGES

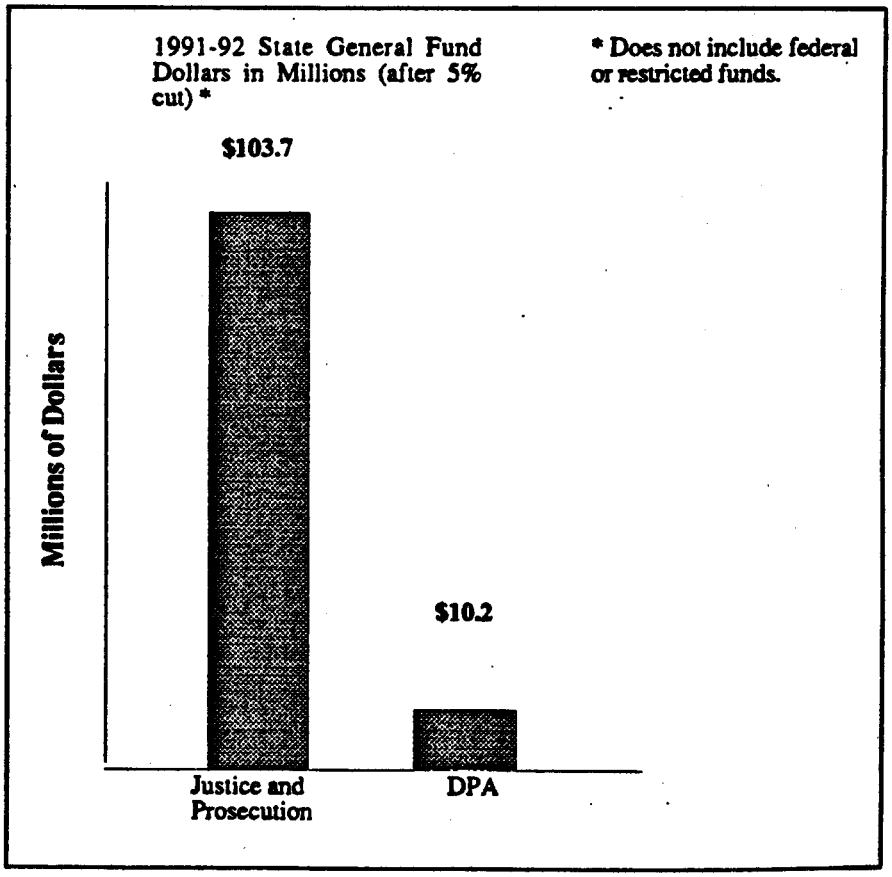
The constitutional right to counsel has continued to expand over these many years since 1972. The level of practice necessary to afford clients effective assistance within national standards has continued to appropriately rise. Doctoring requires much, much more today than in 1972. So does criminal defending. Today, more criminal defendants must be represented more thoroughly and more competently.

The ABA Criminal Justice Standards, *The Defense Function* (1991) and *Providing Defense Services* (1990) have been substantially revised, and Chapter 31 must be changed to keep pace with this national legal thought and direction.

8. POLICY TRENDS

As we progress as a people in this state, the methods for organizing and appointing leaders has changed. Just as there has been progress towards independent Lottery Boards, less political appointment of University Trustees, and quality leadership unaffected by politics in our essential educational system, so too the essential and constitutionally-required right to counsel effort in Kentucky demands like improvements in independence and quality.

The American Bar Association, the largest voluntary professional organization in the world, has called for as much:



5-1.3. *Professional independence*
(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defense, assigned-counsel and contract-for-service programs.

(b) An effective means of securing professional independence for defender organizations is to *place responsibility for governance in a board of trustees.* Assigned-counsel and contract-for-service components of defender system should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.
ABA Standards for Criminal Justice, *Providing Defense Services*, (1990).

CURRENT UNDERFUNDING

The state of Kentucky's 1991-92 budget after the 5% cutback is $8.896 billion. All of Kentucky's criminal justice agencies received $377 million of the total state general fund dollars. This is but 4.2% of the total state budget.

Under the Northern Kentucky Public Defender System we authorize $15 per hour out of court and $25 per hour in-court. However due to inadequate funding, we routinely prorate down to 75% of the amount billed (that reduces the hourly rates to $11.25 out of court and $18.75 in-court). In the past we have prorated as low as 50% of the amount billed.

- Bob Carran, *The Advocate*, April, 1989 p.3

Kentucky indigent criminal defense efforts received a paltry .1% of the total state budget and an embarrassing 2.6% of the funding for Kentucky criminal justice agencies.

Kentucky prosecutors receive a 3-1 funding advantage over public defenders.

Is the right to counsel furthered by this kind of division of the available money? Not when this means that public defenders and appointed attorneys in Kentucky are underpaid and overworked. Full-time public defenders in Louisville start at $17,500. An appointed attorney handling a Kentucky capital case receives a $2,500 fee.

The statutory rate which is $25/$35 out-of-court/in-court is much lower than the rate set by the Kentucky Finance Cabinet attorney rates of $75 hourly(partner)/$40 hourly (staff attorney).

At best, the public defender rate is minimum wage. It is what we pay people who flip hamburgers. Yet, Kentucky funds its Corrections Cabinet an average of $12,901 to house each state prisoner.

Kentucky has recently built a state prison at a cost of $89,900 per cell. The money spent for one cell is literally more money than the funding 70 of Kentucky's 120 counties receive for all indigent cases in their county for an entire year.

The Kentucky Corrections Cabinet received a 53% increase in its 1990-91 state funding. Their budget jumped $76 million from $147 million to $219 million. Apparently, we stand ready to fund our security but not our liberty.

In 1986 the national *average* funding for indigent defense was $223 per case. At that time Kentucky ranked 47th in the nation with funding at $118 per case. In 1990, Kentucky's average funding for the more than 70,000 indigent cases and led is but $162 per case. That includes major felony cases, murder cases, and capital cases.

Nationally, Kentucky ranks at the bottom in its money allocated to counsel for the poor. Kentucky is woefully underfunding its indigent accused responsibilities, especially in contrast to the funding for the prosecutors, police and corrections.

On top of the inadequate and imbalanced funding for Kentucky's public defender system within the criminal justice system funding, the underfunding and imbalance are exacerbated by the one-sided federal drug money grants and federal confiscation and forfeiture proceedings. See "One Million Dollars Given to State and Local Police," *The Advocate*, April, 1991, p.50.

Every Defendant a Public Defender Represents is Innocent.

No one can argue that an innocent person does not have the right to be defended well. The "Get Tough on Crime" movement forgets that citizens that are accused are innocent until proven guilty.

Public defenders do not defend the guilty. Public defenders protect the rights of men and women who are, to a person, innocent, unless proven guilty against the wave of public sentiment that criminals have more rights than "regular citizens." They forget that the criminal is a regular citizen until proven guilty.

In our adversary system of justice, if the public is willing to pay to prosecute and incarcerate, and legislators enact laws to that end, public defenders must be equally funded to defend the innocent citizen of charges brought against them.

In fiscal year 1990, Kentucky police and prosecutors received $4,614,190.64 from civil seizures and forfeitures in drug cases. Kentucky public defenders received none of this money.

In fiscal year 1990, police and prosecutors received $6,080,000 from drug grants under the Federal Comprehensive Crime Control Act. Kentucky public defenders received but $100,000 of this money. Kentucky prosecutors and police receive $10 for every $1 provided public defense. Does that make for a fair fight?

As a result of these vast new resources, drug arrests in Kentucky have skyrocketed since 1987 - a full 114%. Not only have the drug grants and the confiscations increased the funding imbalance, these new funding sources for the police and prosecution have put greater demands on the underfunded Kentucky public defender system. *See* "Drug Arrests Have Skyrocketed," *The Advocate*, February, 1991, p. 60.

LAW ENFORCERS

WE [as public defenders] are the conservators of the ***Constitution***. We are the law enforcement officers as we protect those rights and guarantees.

- John Delgado, 1988 DPA Trial Practice Institute

IS THE RIGHT TO COUNSEL AS VALUABLE AS SEVERAL MILES OF ROAD?

The right to counsel, which is crucial to our two most fundamental values, our life and liberty, is further affronted when we put indigent criminal funding in context.

Nationally, in 1986 but $1 billion was spent on the defense of indigents in criminal cases. One B-2 Stealth bomber costs $1.1 billion. We spend $36 billion a year on tobacco products, and $3.3 billion each year to attend spectators sports.

Kentucky allocated $10.2 million general fund dollars to fund its indigent defense in 1990, and in 1991. *That amount would build but 4 miles of two lane road in Kentucky.* The University of Kentucky's athletic budget of $15.9 million is $5 million more than our funding for counsel. The 9 baseball players with the highest 1991 salaries at each position totalled $29,608,333 - more than 2-1/2 times the Kentucky funding for indigent defense.

The chief prosecutor in a Kentucky county is paid a salary of $67,378. The chief public defender in the county starts at $35,220.

Kentucky's criminal justice system is funded at $377 million in 1991. At the same time, the federal government spent $557 million just in Kentucky on military contracts.

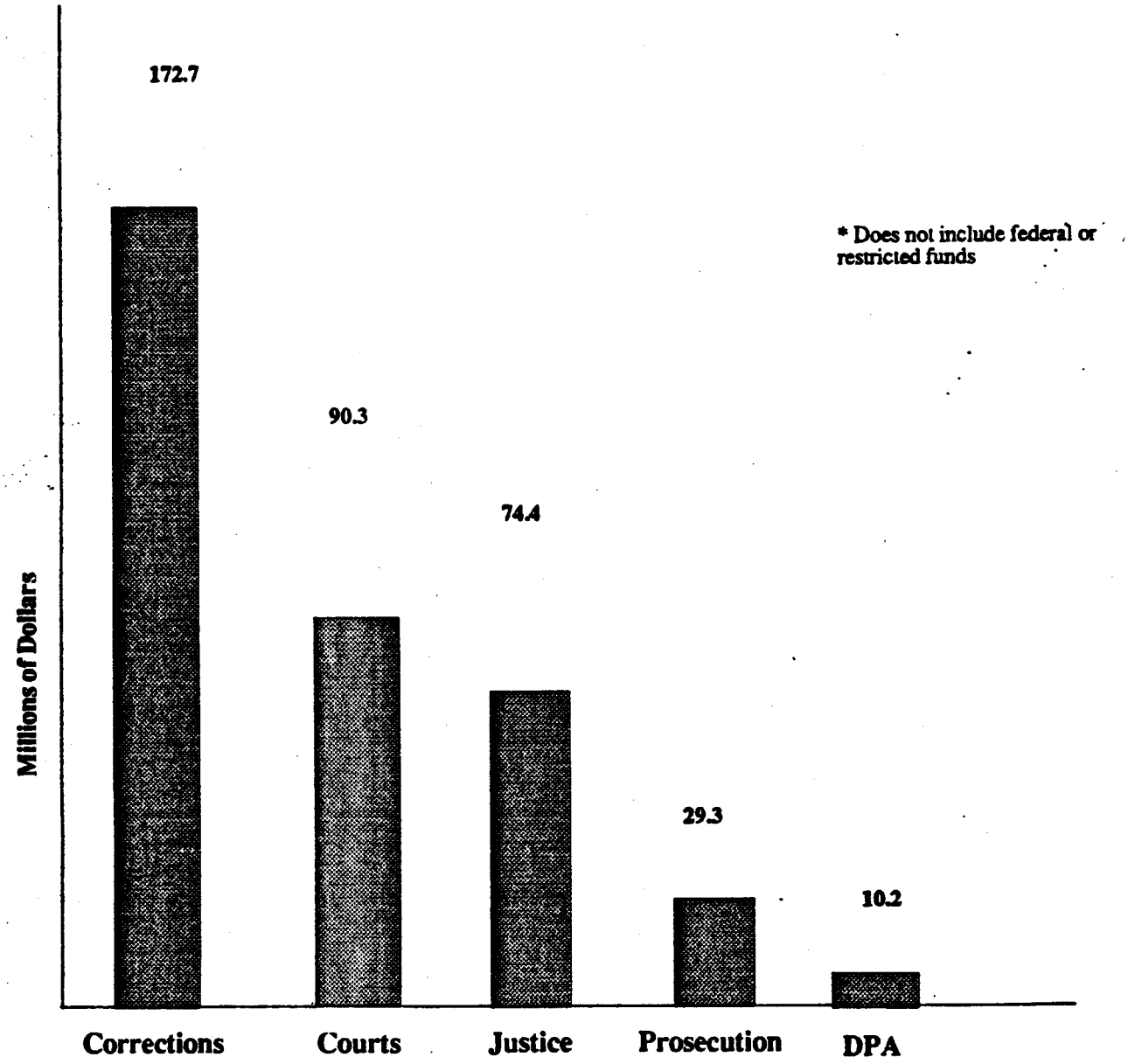
CONCLUSION

Chapter 31 has never been looked at as a whole to account for these years of substantial economic, policy and legal changes.

The 200th Anniversary of the 6th Amendment right to counsel and the 100th Anniversary of the Kentucky Constitution's Section 11 right to counsel is a fitting time for a comprehensive review of the substance of Chapter 31 and the funding for counsel for the poor.

ED MONAHAN
Assistant Public Advocate
Director of Training
Frankfort, KY

1991-92 State General Fund Dollars in Millions (after 5% cut) *



PUBLIC ADVOCACY: THE STEP-CHILD OF STATE GOVERNMENT

STARTING ATTORNEY SALARIES ARE $3,294 BEHIND REGIONAL AVERAGE

Recruiting quality committed people to do public defender work can be a challenge. Keeping those people when the pay is low and the workload heavy is an additional challenge. Our recruiting task in Kentucky has been made that much more difficult when we must compete for our applicant pool with neighboring state public defender systems whose salaries are significantly higher.

In 1989 Roy Collins, DPA Personnel Director, published *A Comparison of Salaries for Government Employees in the Legal Profession.* His study compared the salary of Kentucky public defenders with their counterparts in other states. As we approach a new biennium with an opportunity for legislative review of our salary structure, we are without the aid of an updated salary study.

However, a comparison of our 1991 entry level salary for attorneys with that offered new attorneys in 1991 in five nearby states reveals a continuing deficit in the funding of our new attorneys. The average starting salary for these five states is $24,894. Kentucky is $3,294 behind.

Kentucky	21,600
Ohio	29,141
Tennessee	25,752
Indiana	24,648
Illinois	25,000
Missouri	23,220

DPA attorney salaries also fall below the salaries paid other *state government attorneys in Kentucky.*

Collins' 1989 study looked at salaries in 16 state public defender programs. The group average for entry level attorneys among those 16 states was $23,657. Kentucky's salary is still $2,057 behind that 1989 average.

	DPA Attorney	All Other Attorneys in Kentucky Agencies
Starting Salary	21,600	22,272
After One Year	26,200	29,800
After Two Years	31,944	32,916

There is no justifiable reason for this discrepancy, though of course there is an explanation. When the Department of Personnel raised the salaries of all attorney classes state-wide, the DPA, being, as always underfunded, had no means to provide the increases to its employees.

The five percent budget cut, recently levied on the Department by the Governor's Office, ensures that we will continue to be underfunded unless the legislature responds to our agency's need for adequate funding.

Lawyers are not the only ones to suffer salary disparity at DPA. DPA secretaries have also been denied salary increases over the last several years.

In 1985, the Collins' administration instituted a "reallocation" for secretaries, moving most DPA secretaries from a "Senior" level to a "Principal." Though every other agency in state government gave its secretaries a pay raise with this reallocation, the DPA did not.

On May 1, 1991 the Wilkinson administration instituted a grade change for all state secretaries, moving most DPA secretaries from Grade 9 to 10. Again, DPA secretaries experienced *no* benefit from this reclassification.

This chronic underfunding of DPA also means lower salaries for those non-DPA public defenders working out of Fayette County Legal Aid and Jefferson County Public Defender's Office. *In Louisville the starting salary for public defenders is $17,500. In Lexington, it is $18,500.*

In addition, private attorneys who contract with the Department to do public defender work are not being paid the statutorily mandated $25 out-of-court, and $35 in-court, because the money simply is not there.

If the right to counsel under our state and federal constitution stands for anything, it must stand for an adequately funded program for the representation of the indigent accused. This representation cannot be provided free of cost.

Public defenders and their support staff are not asking to be well paid, only to be fairly paid. While 1990 University of Kentucky College of Law graduates had a median salary of $42,256, UK graduates working for the DPA made $21,600. 1990 Chase graduates had a reported median salary of $33,000 and the 1990 median salary for University of Cincinnati graduates was $30,159.

In the face of a faltering economy we may have no right to expect more than that which would bring our agency to parity with other agencies in state government, but we at least have a right to expect that.

For too long this agency has been funded as though it were the step-child of state government. Unlike other agencies in state government, the DPA does not permit its attorneys or investigators to be remunerated for overtime work. At least half of our attorney work force is over the 199 hour limit for compensatory time. Yet unlike the rest of state government, whose employees are paid for overtime in 50 hour blocks after 150 hours of compensatory time is earned, our agency does not remunerate its lawyers and investigators for compensatory time. The reason - years of underfunding.

Work as a public defender has its rewards, a respectable salary is not one of them.

As noted recently by the Court of Appeals in *Lavit v. Brady* and *Department of Public Advocacy v. Pillersdorf*, Ky. App., __ S.W.2d ___ (November 8, 1991), "[I]t is the duty of the legislature to appropriate money for the adequate enforcement of the criminal laws." Adequate enforcement requires adequate representation. For the DPA to provide such representation it must both attract and keep quality staff. We simply cannot meet our constitutional mandate without sufficient funding. We hope it is forthcoming.

REBECCA DILORETO
Assistant Public Advocate
Recruitment Coordinator
Frankfort, Kentucky

SORRY! THE ERROR IS NOT PRESERVED

This article speaks "lawyer to lawyer." The Kentucky Supreme court speaks only through its opinions, and nothing in this article purports to suggest the view of the Court, or of the author, in any pending or future case.

"Any case worth trying is worth trying for the record."

Thus taught the late, great Judge Lawrence S. Grauman of the Jefferson Circuit Court. His message is the theme of this article. *In my experience more cases have failed for lack of a contemporaneous objection (as required in criminal cases by RCr 9.22) than from any other cause.*

During my tenure as a trial judge, to the edification of some and the amusement of others, I kept on counsel table two plastic placards: one was styled "How To Make An Objection," and the second was a "List of 25 Proper Objections." Occasionally a lawyer, when asked to explain his grounds, would look down and call our "No. 17" or "No. 23." One would think that any lawyer sufficiently advanced in his profession to be entrusted with trial of a circuit court case would need no such prompting. If that is what one would think, one would be wrong, which is the reason the placards were there. So I start this article dedicated to the many cases lost through failure to make a proper objection by reproducing

"HOW TO MAKE AN OBJECTION':

"A) *In Open Court*: State only that you 'object,' and, if you can do so in one or two words, the reason why -- the limit of what you should say is on our list.

B) *Approaching the Bench*:

1) If you wish to explain why you are objecting, ask to approach the bench. Explain *out of* the jury's hearing.

2) If the court is in doubt about the objection, you will be asked to approach the bench.

3) If you disagree with the court's ruling and need to explain your reasons, ask to approach the bench.

4) Lower your voice at the bench. Bench conferences must be out of the hearing of the jury.

5) No colloquy with your opponent is ever permissible. Address your remarks *only* to the court.

6) *Explain* your position and stop. Don't *argue* with the judge. Don't show your irritation with the judge by such devices as demanding 'exceptions' to the court's ruling."

RCr 9.22 is the contemporaneous objection rule. It requires "that a party, at the time the ruling...is made or sought, makes known to the court...his objection...and on request of the court, his grounds therefor." The rule further specifies that "if a party has no opportunity to object...at the time..., the absence of an objection does not thereafter prejudice him"; *but*, the cases hold the party must make known his objection within a reasonable time, which means at the *first* reasonable opportunity. *See, e.g., Bowers v. Commonwealth*, 555 S.W.2d 241 (Ky. 1977).

A contemporaneous objection must be:

1) *Sufficient.* This means sufficiently clear to advise the trial court of the reason for the objection, and to advise the appellate courts of the grounds for the objection. If there is more than one ground, it is important that all be stated to avoid the complaint that the appellant is trying "to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1977).

2) *Timely.* A party cannot await the verdict of the jury before presenting an objection to matters that occurred during the trial. *Patrick v. Commonwealth*, 436 S.W.2d 69 (Ky. 1969). And, certainly, raising the question for the first time in a motion and grounds for a new trial is too late. *Hood v. Commonwealth*, 448 S.W.2d 388 (Ky. 1969).

3) *Complete.* The objection is not properly preserved unless counsel gets a ruling. *Blanton v. Commonwealth*, 429 S.W.2d 407 (Ky. 1968). If the ruling is favorable, counsel must seek whatever further relief the situation calls for, whether an admonition (*Reeves v. Commonwealth*, 462 S.W.2d 926 (Ky. 1971)) or a mistrial (*Jenkins v. Commonwealth*, 477 S.W.2d 795 (Ky. 1972)).

Johnson v. Commonwealth, 505 S.W.2d 470 (Ky. 1974), illustrates the problem: the judge erred in his remarks to the jury, but we held the error was not preserved for review because counsel failed to make the nature of his objection sufficiently clear, failed to get a ruling on his objection, and failed to specify what action he wished the trial court to take to cure the problem.

4) *Avoid Waiver.* Once an objection is made, counsel must insist upon a ruling or else it is waived. *Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971). And, unless a different arrangement has been stipulated, every time the proffer of improper evidence or argument is repeated, even if counsel has previously been overruled regarding the same subject matter, counsel must be prepared to renew his objections or face the prospect of waiver.

THE DUTY TO OBJECT

Granted, it is not always easy to make a record. The point where proper objection crosses the line to become argumentative and disrespectful to the court is a difficult one. If the trial judge does not want to hear the grounds for the objection, that is his prerogative under RCr 9.22. At times trial judges make it difficult to object, but, difficult or not, a proper objection is essential unless the trial court squarely prevents it. Counsel must be polite, con-

siderate, and respectful, and still persistent where the situation requires. It is not easy to be a good trial lawyer. *Unless you have the skill and fortitude to confront the trial judge when the situation calls for it, you should be looking for some easier line of work.*

THE 10 OBJECTION COMMANDMENTS

The areas where "failure to object" problems occur and recur are far too numerous to cover in this article. So I have decided upon a laundry list of ten, with hopefully helpful citations on the subject, to illustrate areas where the reader should be sensitive to the problem. Since there are Ten Commandments, ten has always been a good number to make memorable lists.

1) Proof of collateral criminal activity, or other instances of misconduct. *See Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990); *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986), both sexual abuse cases.

2) Proof of statements by the alleged victim inculpating the defendant, made to other persons. *See Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986), a sexual abuse case involving statements to mother, grandmother, and a social worker.

3) Proof going to the ultimate question of guilt or innocence rather than respecting the limitations on professional opinions regarding mental condition. *See Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984); *Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985).

4) Testimony which fails the "*Frye*" test (*Frye v. United States*, 293 F.1013 (D.C. Cir. 1923)) of scientific reliability. *See e.g.*, the child sexual abuse syndrome: *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986), *Mitchell v. Commonwealth*, 777 S.W.2d 930 (Ky. 1989); testimony about lie detector testing: *Stallings v. Commonwealth*, 556 S.W.2d 4 (Ky. 1977), *Baril v. Commonwealth*, 612 S.W.2d 739 (Ky. 1981).

5) Bolstering testimony that an investigating police officer or social worker believes the story told by the victim. *See Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990); *Nugent v. Commonwealth*, 639 S.W.2d 761 (Ky. 1982); *Koester v. Commonwealth*, 449 S.W.2d 213 (Ky. 1969).

6) Investigative hearsay provided by police officers and prosecutors. "[H]earsay is no less hearsay because a police officer supplies the evidence." *See Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988).

7) Pretrial statements used under the *Jett* rule (*Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969)) when such use violates the confrontation clause. *See Mayes v. Sowders*, 621 F.2d 850 (6th Cir. 1980).

8) Perfunctory examination of child witnesses regarding competency. *See Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987); *Bussey v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985); and *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky. 1986).

9) Joint trials where the out-of-court statements of a co-defendant will be used as evidence. *See Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989).

10) Comments by prosecutors in argument, where not supported by admissible evidence. *See Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988).

CONCLUSION

The practice of law is an art form in which the quality of the results is directly proportionate to the knowledge and skill, and, above all, the intense creative effort, of the lawyer involved. The evidence admitted or excluded paints the picture from which the jury extracts the relative truth.

The skill of the artist is exhibited in knowing when evidence is admissible and when it is not. This includes knowing when and how to make appropriate objections. The lawyer knows he has failed his task when the appellate court tells him, "*Sorry! The error is not preserved.*"

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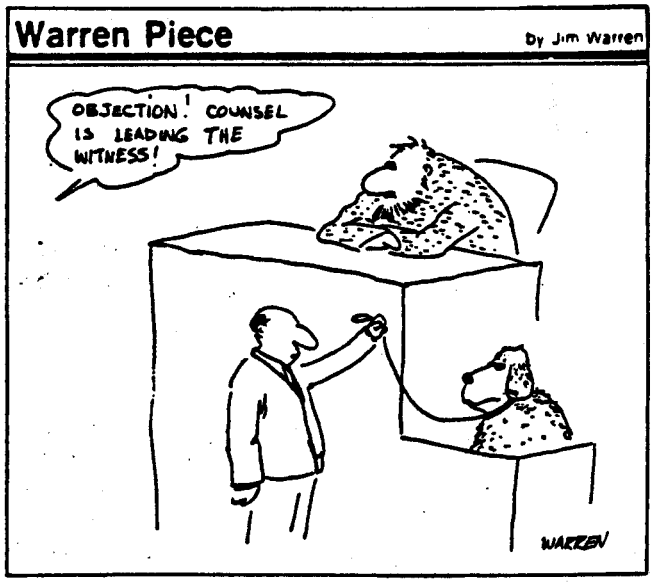
Hon. Charles M. Leibson has been a Justice of the Supreme Court of Kentucky since 1983. This followed seven years on the Jefferson Circuit Court. He has been an adjunct professor at the University of Louisville School of Law since 1969, teaching Kentucky Constitutional Law and, before that, Courtroom Law and Technique. He was in private practice for more than 20 years before taking the bench, and also served in the Judge Advocate General Corps.

Justice Leibson earned his law degree Cum Laude from the University of Louisville, and more recently he has earned an LLM at the University of Virginia School of Law in the Judicial Process.

He has been honored by the Association of Trial Lawyers of America (having received awards both as Outstanding State Appellate Judge in America and as Outstanding State Trial Judge in America), and he has been recognized by election to the American Law Institute and the International Academy of Trial Judges, among others.

In 1979 he was named Judge of the Year by the Louisville Bar Association, and in 1990 Kentucky's Outstanding Judge by the Kentucky Bar Association.



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