

MAINE STATE LEGISLATURE

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The Report of the Judicial Council to the 103rd Legislature on the Subject
of Defense Systems for Indigent Persons Accused of
Criminal Offenses

To the Legislature of the State of Maine:

Herewith report from the Judicial Council of Maine as requested by an order passed by both houses of the 102nd Legislature as follows: "That the Judicial Council is requested to study the comparative merits of the Public Defender System and Assigned Legal Counsel for Indigent Defendants and the desirability of introducing either into the judicial system of the State and to report the results of its study to the 103rd Legislature."

The background leading to the Judicial Council study may be summarized as follows: The 102nd Legislature in 1965 considered the passage of "an act to create the office of public defender" which was printed as Legislative Document No. 1005. This act read as follows: "Be it enacted by the People of the State of Maine, as follows:

R.S., T. 30, part 1, c. 1, sub-c. III-A, additional. Chapter 1 of Title 30 of the Revised Statutes is amended by adding a new subchapter to read as follows: 'Subchapter III-A Public Defenders.

§ 581. Office created. The county commissioners of any county, upon request of the majority of the members of the bar of such county in attendance at a meeting duly and legally called therefor, shall establish the office of public defender for the county. Any county may join with one or more counties to establish and maintain the office of public defender to serve such county.

§ 582. Appointment. After the office of public defender is established the Governor, with the advice and consent of the Council, shall appoint a member of the bar in said county or counties who has been admitted to practice law to fill the office of public defender.

§ 583. Duty. It shall be the duty of the public defender to represent and act as attorney for indigent defendants or respondents in such appropriate cases as shall be referred to him by the Superior or District Courts.

§ 584. Office expenses. In each county the county commissioners shall provide suitable rooms for the use of the public defender and office furniture and supplies with which to properly conduct the business of his office. Such expenses are a charge upon the county or counties in which the public defender is employed.

§ 585. Printing briefs. The expenses of printing the briefs on appeal on behalf of a defendant represented by a public defender is a county charge.

§ 586. Salary. The annual salary of each public defender shall be such as may be fixed by the county or counties. ¹

During the course of debate in both Houses on this Act, it became apparent that the members of the Legislature felt that further study of the problem of defense of indigent people accused of criminal offenses should be made by someone before such a complete change in our present system was instituted. The Order referred to above requesting the Judicial Council to make such a study was therefore passed, and the Act to create a public defender office was defeated. The Judicial Council unanimously accepted the request of the Legislature to conduct the study and the better part of the Council's time in the ensuing two years has been devoted to this problem. This report encompasses in brief form the results of that study.

At the outset it should be pointed out that the Legislative Order contains a possible misconception. The order indicates that a study should be made of the public defender system and the assigned counsel system to determine whether either should be incorporated into our judicial system. The fact is that at the time of the passage of this Order, and at present, we do have incorporated in our judicial system the assigned counsel procedure. The study by the Judicial Council therefore was aimed at considering fully our present system to see what changes and

improvements could be made, and, once that had been accomplished, going forward to study other possible systems to determine whether or not their inclusion in our judicial process would bring about the necessary improvements in the present system. This report will be divided into sections as follows: I, a brief outline of the assigned legal counsel system as it presently exists in the State of Maine; II, a brief description of a typical public defender system; III, problems inherent in each system; IV, a brief description of a so-called administered or coordinated assigned counsel system; V, the recommendations of the Judicial Council of Maine for legislative and other types of improvement to assure that all citizens of the State will be adequately represented when accused of a criminal offense; VI, Conclusion.

I. Description of the present assigned counsel system in the State of Maine.

By force of statutes now in effect, representation is afforded all persons who cannot afford to employ private counsel by appointment of the presiding judge of the court considering the offense. Ch. 15, § 810 of the Revised Statutes of Maine 1964 provides in part that "the superior or district court may, in any criminal case, appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel. The district court shall order reasonable compensation to be paid to counsel out of the district court fund for such services in the district court. The superior court shall order reasonable compensation to be paid to counsel out of the county treasury for such services in the superior court."

It is to be noted that the latest amendment to this section of the statutes

provides that counsel may be appointed at the discretion of the presiding justice in either the district or superior court, not only in felonies, i. e. crimes punishable by imprisonment in the state's prison, but also in misdemeanors cases where the court deems it advisable. The amendment also provides, as a change from the former statute, that the district court shall order compensation paid to such counsel out of the district court fund. It is fair to say, however, that at present a vast majority of assigned counsel cases are at the felony level.

Briefly, the system operates as follows: If an accused person is brought into the district court for arraignment on a felony or a serious misdemeanor charge and is, at the time he is brought in, unrepresented by counsel, the presiding judge inquires of him whether or not he desires counsel. If the answer is affirmative, the judge then inquires as to his ability to employ counsel on a private retained basis. If the judge determines that the accused person is without sufficient means to employ counsel, he will then explain to the accused his right to have the court appoint counsel for him. In practically every case the accused indicates that he desires that such appointment be made. In most courts the practice is that the accused will be asked whether or not he has employed counsel in the past or whether he has a particular attorney whom he would like to represent him and the court generally speaking makes every effort to obtain counsel of the accused's own choosing. If this cannot be done, of course, the court will then appoint other counsel. When and if the case reaches the superior court level, the same procedure is once again undertaken by the presiding justice. Again, in a vast majority of cases, the accused will indicate that he would like the

same counsel appointed for him as represented him at the district court level and in most cases this appointment is made. If the accused is convicted, he again has the right to have counsel appointed for post-conviction proceedings and as before it will usually be the same attorney who previously represented him who will be appointed for these proceedings.

The procedure as to actual appointment of counsel varies from court to court and from county to county. In some counties a list of the members of the Bar is maintained by the Clerk of Courts and the presiding justice makes his appointments from this list and attempts not to overburden one or two attorneys with more than their share of appointed cases. In other counties there is no list maintained and the presiding justice must utilize his own knowledge of the abilities of the various attorneys or depend on other people connected with the court process to inform him as to who is capable in the criminal field. Again, an attempt is made to distribute the assigned case load among as many attorneys as possible but the Judicial Council's study of the system revealed that one of the definite problems is that in many counties a small number of attorneys are in fact being called upon with increasing frequency to represent indigent persons. It should be stated emphatically, however, that the Council's study also convinced the Council members that the indigent accused in Maine receives, under our system, diligent and competent assistance of counsel. Indeed it was found that it is an extremely rare instance where assigned counsel does not perform services for indigent people on exactly the same level as he would for those persons who privately retained him. It should also be stated with equal emphasis that the present assigned counsel system in

Maine meets every requirement set forth by the Supreme Court of the United States in its recent decisions dealing with providing counsel for indigent persons accused of crime.

II. The Public Defender System.

Just as assigned counsel systems differ from state to state or jurisdiction to jurisdiction, so too do public defender systems differ in so far as the details of the operation of the system are concerned. A general description, however, of this type of defense system would fit all public defender offices. In many ways the public defender system is a simpler and less complex operation than the assigned counsel system. Consider, for instance, a state-wide public defender system such as exists in many states, most notably Minnesota. Under this system, each county or district in the state has a public defender office which might be likened or compared to the office of county attorney or district attorney. These offices are supervised by an overall state public defender whose duties are mainly administrative, although he may be called upon to assist in actual defense in particularly serious cases. The local public defender offices are staffed in a fashion similar to that of a county or district attorney. Typically there will be one public defender and one or more assistant public defenders. The office will also include a clerical staff consistent with the workload of the office. Also on the public defender's staff, both at a local level and usually at the state level, will be found investigators. It is the job of the investigators, of course, to gather the facts necessary for the public defender to present an adequate defense of his clients. In operation the system works as follows: In each court within the jurisdiction a public defender

or one of his assistants appears at every court session where the judge feels their presence may be necessary because of his knowledge of cases on the docket involving possible indigent defendants. The accused person has no choice as to who represents him. If he is found to be indigent, the public defender is designated as his counsel and represents him through all stages of the proceedings, district court, superior court and post-conviction. Under this system the state or central public defender office also acts as a clearing house for statistical information, briefs, and other matters which will be of assistance to the local public defenders. Basically, the state public defender's office may be said to operate in much the same manner as the attorney general's office does with regard to local prosecutors. The salary of the public defenders and their office staff is generally paid from the same source as are the salaries of the attorney general and local prosecutors. In most cases, of course, this is by state appropriation.

III. Problems and Disadvantage of each of the two main types of Defender Systems.

A. The Assigned Counsel System (Maine)

As stated above the members of the Judicial Council concluded that the present assigned counsel system in Maine does fulfill the State's responsibility for providing adequate counsel to persons lacking the means to employ private attorneys. The Council did find, however, some rather serious problems connected with our system. At this point in the report the problems will be stated without recommendations for their solution. Recommendations will be included in a later paragraph of this report.

1. Because of the almost complete decentralization of the system, the manner and method of appointing counsel and the amount of compensation paid to counsel varies considerably from court to court and jurisdiction to jurisdiction.

2. In many counties the caseload of appointments to defend indigent persons falls on a relatively few attorneys rather than being distributed throughout the Bar membership.

3. Investigative assistance is not made available to counsel appointed for indigent persons and generally speaking no attempt is made to compensate counsel who must employ private investigators. As a result in nine cases out of ten appointed defense counsel must rely for investigative information on the county attorney's office and therefore indirectly on law enforcement investigators. It should be noted that this practice sounds worse than it actually is. As a practical matter the Council found that most county attorney offices freely provide complete investigative information to appointed counsel. Nonetheless, it is obvious that some of this information, coming as it does from law enforcement investigators, is directed toward a prosecution point of view and therefore cannot be considered adequate to prepare the best possible defense.

4. Under the present system compensation for counsel appointed at the district court level is paid from the district court fund; compensation for counsel appointed at the superior court level and for appeals from murder convictions is paid by the county treasury; compensation for counsel for all other post-conviction proceedings is paid from a state appropriation. This system of providing compensation makes for increased paper

work, puts an added burden on the district court budget, and in some cases, particularly with small counties, can be extremely disruptive of budgetary planning. Almost any murder case, for instance, will call for a fee ranging from \$1,000 to \$2,000. The effect of three or four murder cases in a small county in one year can readily be seen.

B. The Public Defender System.

1. In essence the establishment of this system creates a "separate but equal" situation already frowned upon by the courts in other areas of human relations. By this is meant the fact that when a public defender system is established the indigent person has nowhere to go but to the public defender. His choice of counsel is completely done away with. There is therefore one particular set of attorneys for poor people and another set of attorneys for those who can afford them. Though the qualifications of each may be equal, there is no question as to their separateness.

2. The expense of this system would be by the best estimate of the Council at least double that of our present system. Attached to this report as Appendix A is a tabulation showing the amounts expended by the counties for defense of the indigent at the superior court level for the years 1964, 1965 and 1966, as well as the amounts spent for salaries of county attorneys and assistants. It would be contemplated, of course, that a public defender in a county would be paid on a comparable scale with that of the county attorney in that county. A glance at these tables will therefore illustrate the point that the adoption of a public defender system would add greatly to the expense now being incurred.

3. The traditional and honorable responsibility of the Bar as a whole for defense of poor people accused of crime would be completely eliminated.

The surveys undertaken by the Council indicate that this fact disturbed the individual members of the Bar more than any other as being a disadvantage of the public defender system. It is apparent, in other words, that the members of the Bar not only accept individual responsibility for defending indigent people when called upon to do so but indeed welcome this responsibility as fulfilling one of the cherished traditions of the practice of law.

4. Improvement in the caliber of defense offered under this system is questionable. At present the court may call upon the most competent, experienced and qualified members of the Bar to defend particular criminal cases. It is the feeling of the Council that it is at least debatable whether adoption of a public defender system would increase to any measurable degree the caliber of defense now being offered to people who cannot afford to employ their own attorneys and the Council therefore questions severely whether it is worthwhile for the State to expend twice as much money to provide the same service now being offered.

5. In many of the smaller counties the need for a public defender type of system simply cannot be demonstrated. In reply to a questionnaire sent out by the Council, many county attorneys indicated that there simply was not the volume of business in their particular county such as would in any way justify the creation of a public defender office. In these instances it would appear to be a matter of spending a considerable sum of money to create a function which is simply not needed.

IV. The Administrated or Coordinated Assigned Counsel System.

By the time the above conclusions were reached about the two main types of defender systems, the Council had arrived at approximately a

mid-point in their study as directed by the Legislature. It was then determined by the membership of the Council that the next step should be an examination of other possible systems which would improve our present system while not encompassing the disadvantages of the public defender system. At this point the assistance of the National Defender Project, A Ford Foundation grant organization, was enlisted. After studying the problems presented by the geography and population distribution of the State of Maine, the National Defender Project suggested that Maine consider the adoption of a so-called Administrated or Coordinated Assigned Counsel System. This system does not now exist on a state-wide basis anywhere in the United States. For that reason, among others, the National Defender Project indicated that if the State wished to adopt this system by statute, the Project would be willing to contribute financially for a period of two or three years while the program was organized and initiated. As planned by the National Defender Project the Legislature would have to do the following by the passage of appropriate legislation:

1. Create the office of Defense Administrator consisting of one Chief Administrator and two assistant administrators to be located in three separate parts of the State. These offices would also include clerical staff and investigative staff.

2. Provide by statute a minimum compensation to be paid to appointed counsel leaving the actual final amount to the presiding justice's discretion, said minimum to be at least the federal standard (\$15.00 per hr. out of court, \$25.00 per hr. in court).

3. Allow the defendant to choose the attorney he wishes to defend him, subject however to review of the attorney's past or present assigned case-load.

4. Provide for payment of assigned counsel as well as the administrators and staff through state appropriation.

5. Provide for appointment of associate counsel at a reduced rate of compensation in certain cases.

6. Provide for partial payment by the defendant of his counsel fee at the judge's discretion in those cases where the presiding justice determines that some payment would not work an undue hardship upon the defendant.

7. Provide for the use of experts in medicine, psychiatry, social work and criminal law upon a showing of necessity for same to the presiding justice.

8. Provide "full scope" representation.

a. From moment of detention.

b. Misdemeanor cases where statute provides a jail sentence.

c. In all felony cases.

d. In post-conviction proceedings.

e. All juvenile cases at least where there is a possibility of incarceration of some type.

f. In matters involving possible revocation of probation or parole.

g. In all involuntary mental commitment cases.

9. Provide for the use of law school students to assist in handling misdemeanor cases at the district court level with permission of the

defendant and under the supervision of appointed counsel.

Under this system the duties of the administrator and his assistants would be as follows:

1. Provide assistance to justices and judges in appointment of counsel by:
 - a. Maintaining a roster of attorneys which would include age, years of practice, type of practice, criminal case experience and other pertinent data.
 - b. Maintaining said roster in such a manner as to indicate those attorneys considered competent to handle felony cases and those competent to handle misdemeanor cases with a system for constant review to change the placing of attorneys with regard to these rosters.
2. Provide assistance for appointed counsel by:
 - a. Providing investigative assistance in certain cases.
 - b. Maintaining a library of briefs, cases and other defense helps.
 - c. Providing clerical help.
 - d. Assisting in the defense of certain cases where necessary.
3. Conduct continuing studies of the defense system and other aspects of the administration of criminal justice.
4. Render annual reports to the Judicial Council with suggestions and recommendations for legislative and administrative changes where warranted.
5. Study and suggest programs which would result in more efficient and economical administration of criminal justice, such as:
 - a. Police training and cooperation

- b. Prosecutor training and cooperation
- c. Summons program
- d. Defferred prosecution under supervision
- e. Pretrial conference
- f. Job finding assistance
- g. Medical assistance
- h. Job training
- i. Defense counsel training
- j. Work release program

This system was considered in detail by a committee of the Judicial Council consisting of the Chief Justice, Justice Delehanty of the Superior Court, Chief Judge Chapman of the District Court and the Attorney General. It is not recommended that this program be adopted for the State of Maine for the following reasons:

1. It does not appear that this program would add to the competency or adequacy of defense now available to indigent citizens of Maine.
2. The administrator and his staff would be performing functions, particularly in the fields of the administration of criminal justice, which are now capably carried on by other offices or organizations.
3. The advantages of such a program would be almost completely lost because of the geographic layout of the State of Maine and the wide disbursement of population.
4. The cost of this program would be at least equal to that of a public defender program.

V. Recommendations. Its study of various types of defender programs being now complete, the Judicial Council of Maine makes the following

recommendation to the 103rd Legislature:

1. That the present assigned counsel system for indigent persons accused of crime be continued in the State of Maine.

2. That compensation for counsel assigned to defend indigent persons be paid from a fund appropriated by the State of Maine rather than piecemeal as outlined above from the district court budget, the county treasuries and state appropriation. The Council strongly endorses legislation in this regard with the feeling that such legislation will materially aid in bringing uniformity and efficiency into the system.

3. That the remainder of the problems and disadvantages of this system as outlined above be solved by the courts through their rule-making powers and functions and on a more informal basis by the individual presiding justices in conference with each other. The Council feels that the most important problems inherent in our present system revolve around the matter of decentralization and the Council further feels that these problems can most satisfactorily be solved by agreement on such matters as amount of compensation and selection of attorneys for appointment by agreement between the individual presiding judges. The one problem which the Council feels cannot be resolved in this way involves the matter of investigative assistance for assigned counsel. It is the feeling of the Judicial Council, however, that at least at present the defense of indigent persons is not hindered by this lack of investigative help to such a degree as to require legislation to correct it.

VI. Conclusion.

At the conclusion of its study the Judicial Council was convinced that

any defender system must meet the following standards:

1. Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony or a serious misdemeanor, particularly where incarceration of one kind or another is possible.

2. Provide standards of eligibility that do not extend assistance to one having sufficient funds or resources to secure competent private counsel but at the same time be not so stringent as to create a class of unrepresented accused.

3. Provide representation at the first and every subsequent court appearance and at every stage of the proceeding, including appeal or other post-conviction proceedings to remedy error or injustice.

4. Provide experienced, competent and zealous counsel independent and free from political and economic influence resulting in a relationship between client and counsel whereby the client will receive counsel's undivided loyalty consistent with the highest standards of professional ethics and ability.

5. Provide for appointed counsel compensation that is adequate and in keeping with his experience and ability.

6. Provide effectual notice of the available legal services to all persons who may be in need thereof.

7. Enlist the support of the community, the bar associations and the agencies oriented to rehabilitation.

The Judicial Council of Maine expresses to the 103rd Legislature in this report its unanimous feeling that our present system with the changes

herein proposed meets fully these standards of excellence. It is not the position of the Council that no further changes in our system will ever be necessary. It is the Council's feeling that under the present system an indigent person accused of a crime in the State of Maine receives a dedicated, zealous defense equal to the defense received by any person who can afford to employ his own attorney. The Council urges not only that our present assigned counsel system be maintained but further, that the system be subject to constant study and review in order that the State of Maine may never lose its present position of progressive leadership in the administration of criminal justice.

Respectfully submitted,

Bruce W. Chandler
Executive Secretary for
The Judicial Council

Appendix A

Amounts Spent For Defense of the Indigent and County Attorneys
By County 1964-1965-1966

County	Defense of the Indigent			County Attorney Salary
	1964	1965	1966	
Androscoggin	2,554.25	3,260.00	3,378.10	5,000.00 3,500.00 8,500.00
Aroostook	4,606.51	3,276.03	6,179.96	6,500.00 4,500.00 11,000.00
Cumberland	6,350.00	5,125.00	3,275.00	6,500.00 5,000.00 4,500.00 16,000.00
Franklin	300.00	566.40	2,918.21	4,000.00
Hancock	2,285.00	575.00	922.15	4,500.00
Kennebec	3,905.59	5,027.00	8,105.64	5,000.00 3,500.00 8,500.00
Knox	1,148.52	1,525.00	2,900.00	4,000.00
Lincoln	525.00	2,200.00	2,385.00	4,000.00
Oxford			1,968.00	4,500.00
Penobscot	5,689.00	16,508.00	3,085.00	5,500.00 4,250.00 9,750.00
Piscataquis			635.00	4,000.00
Sagadahoc	975.00	635.00	2,300.00	4,000.00
Somerset	1,963.20	3,044.77	2,193.29	4,500.00
Waldo	1,035.00	6,709.80	2,310.00	4,000.00
Washington	3,491.02	630.00	1,209.30	4,500.00
York	6,840.00	4,170.50	1,970.00	5,000.00 3,500.00 8,500.00
Totals	\$42,128.09	\$52,252.50	\$50,452.65	\$103,250.00