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Counties should not shoulder states' Sixth Amendment duties

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(Note: This is the first in a two-part series)

The fear of government unduly taking an individual's liberty led the U.S. Supreme Court, in 1963, to unanimously declare it to be an "obvious truth" that the accused indigent cannot receive a fair trial unless a lawyer is provided to him at no cost.

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries," the court announced in *Gideon v. Wainwright*, "but it is in ours." Accordingly, *Gideon* made it incumbent upon states — not county or local governments — through the 14th Amendment to provide Sixth Amendment right-to-counsel services to any person of limited means facing a possible loss of liberty at the hands of the criminal justice system. Despite this, more than half the states have passed along all or part of their constitutional right-to-counsel obligations to their counties and local governments.



Photo by Bev Schlotterbeck

Idaho Association of Counties Executive Director Dan Chadwick discusses Idaho's efforts to reform indigent defense systems at a WIR workshop.

This two-part series explores why counties should not be shouldering the states' Sixth Amendment responsibilities, discusses counties' exposure to litigation when placing a primacy on cost-savings over due process, and details how the Idaho Association of Counties emerged as a leader when it comes to the process of shifting the funding and administration of indigent defense services from the county to state government.

Why indigent defense is a state — not a county— responsibility

There are a number of reasons why counties should not be in a position to fund and administer the states' constitutional duties to provide lawyers to the poor. First, most counties have significant revenue-raising restrictions placed on them by state government while generally being prohibited from deficit spending. Therefore, local governments must rely more heavily on unpredictable revenue streams, such as court fees and assessments, to pay for their criminal justice priorities.

Unfortunately, there is no correlation between what a county can raise through such alternative revenue streams and the amount of revenue needed to provide constitutionally adequate defender services.

For example, the counties that are often most in need of indigent defense services are the ones that are least likely to be able to pay for it. That is, in many instances, the same indicators of limited revenues — low property values, high unemployment, high poverty rates, limited household incomes, and limited higher education, etc. — are often the exact same indicators of high crime.

Higher crime rates and a higher percentage of people qualifying for public counsel will quickly drain a county's limited resources.

Those same counties have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted.

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Second, county policymakers often are not constitutional scholars trained in the nuances of perpetually changing Sixth Amendment case law. Because the right to counsel is an issue of government tyranny vs. individual liberty, the U. S. Supreme Court has been consistent on the right to counsel, regardless of whether the court has been perceived at any one time as either liberal or conservative.

So even though it was the Warren Court (1953-1969) that first determined that states were responsible for administering and funding the right to counsel in Gideon, it was the current Roberts Court that most recently: a) extended the right to counsel to its earliest point in the adversarial process; b) required counsel to explain the collateral consequences of guilty pleas, including immigration consequences; and c) determined that an indigent defense attorney must be constitutionally "effective," not only at trials, but also in plea bargaining as well.

Because the Sixth Amendment transcends the traditional divide of partisan politics, it is predicted that the U.S. Supreme Court will require more of both the attorneys defending the accused, and the systems in which those attorneys work. County policymakers simply cannot keep up.

The combination of an ever-expanding constitutional obligation and restricted revenue is a recipe for a constitutional crisis. In too many instances, county policymakers choose the least expensive form of indigent defense services without regard to constitutional-adequacy: contracts in which a lawyer agrees to take an unlimited number of cases for a single flat fee.

In Idaho, for example, where the state requires its counties to pay for all trial-level indigent defense services, flat-fee contractual arrangements are the predominant form of indigent defense services (38 of 44 counties, or 86 percent).

Attorneys working under fixed-rate contracts are generally not reimbursed for overhead or for out-of-pocket case expenses, such as mileage, experts, investigators, etc. This means that the more work an attorney does on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible. Such contractual arrangements are banned under standards promulgated by the American Bar Association.

In a speech on Aug. 15, 2013, Idaho Chief Justice Roger Burdick called Idaho's county-based indigent defense services "broken" and called for the "eradication" of flat-fee contracts.

Many counties employing flat-fee indigent defense contracts believe that they are not placing cost savings above constitutional due process because they do not see a lot of cases being overturned on ineffective assistance of counsel claims. But it is difficult, at best, for a complicated appeals process to rectify broken trial-level indigent defense services.

First, broken systems result in very few trials (less than one of every 10 cases in most jurisdictions), meaning there are even fewer appeals. And second, in many counties the same financially conflicted trial attorney handles the direct appeal; the chances of an attorney arguing at appeal that he performed inadequately are slim.

This means the first chance a defendant has to challenge the fairness of their trial is at the post-conviction phase where there is no federal right to a lawyer and where many states similarly do not make attorneys available.

But low rates of overturned cases on appeal should not lull counties into thinking that they are safe from litigation. The American Civil Liberties Union has already challenged services in Connecticut, Montana, Michigan, Washington and New York. More noteworthy, on Dec. 18, 2012, the U.S. Department of Justice (DOJ) announced an agreement with Shelby County, Tenn. to usher in sweeping — and costly — reforms of the county's juvenile court system and the method for representing children in delinquency proceedings. But the DOJ is not stopping at Tennessee.

It is similarly engaged in Meridian, Miss. and announced in mid-November 2013 that it is turning its attention to St. Louis, Mo. Finally, the DOJ entered a statement of interest in a lawsuit in Washington State that a federal court relied upon to remedy flat-fee services there.

So what is a county to do that is strapped for financial resources, has a high need for defender services, but cannot provide services other than under a flat-fee structure? The answer is to follow the lead of the Idaho Association of Counties in helping a state move from county-based to state-based indigent defense services.