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THE CRIMINAL JUSTICE ACT OF 1964

JOHN S. HASTINGS

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Judge Hastings is Chairman of the United States Judicial Conference Committee to Implement the Criminal Justice Act of 1964. He is in a unique position, therefore, to author an article upon this particular subject.—EDITOR.

In 1964 the United States Code was amended by adding to Title 18, immediately after Section 3006, a new section, 3006A, entitled "Adequate Representation of Defendants." This amendment was enacted and approved on August 20 of 1964.¹ It is referred to as *The Criminal Justice Act of 1964*.

The purpose of the legislation, as stated in the title to the Act, is "To promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."

The final draft of the bill was the culmination of many years of study, investigation and proposals by the Congress, the Judicial Conference of the United States, the Department of Justice, the American Bar Association and other groups of the organized bar, law schools and legal scholars throughout the country.

The bill (S. 1057) was introduced in the Senate on March 11, 1963, and in the House of Representatives (as H.R. 7457) on March 13, 1963. Hearings on the proposed legislation were held before a subcommittee of the Senate Judiciary Committee on May 13, 20 and 27, 1963, and before a subcommittee of the House Judiciary Committee on May 22, 1963. The printed reports of such hearings provide interesting highlights of the legislative history of the Act.

The proposed bill passed the Senate on August 6, 1963, substantially in the form in which it was introduced. In September, 1963, the Senate bill was endorsed by the Judicial Conference of the United States.

On October 24, 1963, the House Judiciary Committee reported favorably on a similar bill, but eliminated any provision authorizing a system

of public defenders as provided in the Senate bill. The House version of the bill was passed on January 15, 1964.

Thus, the basic difference between the two versions of the proposed Criminal Justice Act was the Senate provision authorizing the use of public defenders and the rejection of this provision in the House bill. This required the appointment of appropriate conference committees.

It was not until August 7, 1964, when the conferees of the Senate and House agreed upon a report, that it was clear there would be no provision for public defenders in the legislation and that sole reliance would be placed on a system of compensating counsel on an individual assignment, on a case by case basis, supplemented by provisions for authorizing the services of attorneys furnished by a bar association or a legal aid agency.

As a result of inquiries received from the Department of Justice, the Administrative Office of the United States Courts became aware of the need for statistical information concerning probable costs as well as a plan for administering an assigned counsel system. Preliminary data was obtained through the use of experimental forms in the Seventh, Eighth, and Tenth Circuits, beginning in July, 1963.

Realizing the probability of the enactment of legislation of some sort in this field, the Judicial Conference of the United States considered various aspects of the problem of administration at its March, 1964 meeting. In particular, the Conference discussed recommendations of a Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association. The Conference further authorized the appointment of an ad hoc Committee to study the proposed legislation then pending in conference with reference to developing rules,

¹ Public Law 84-455, 88th Congress, 78 U.S. Stat. 552.

procedures, and guidelines for an assigned counsel system.

Immediately thereafter, the Chief Justice appointed such an ad hoc Committee consisting of Chief Judge Harvey M. Johnsen, of the Eighth Circuit; Chief Judge Alfred P. Murrah, of the Tenth Circuit; and Chief Judge John S. Hastings, of the Seventh Circuit, as chairman. In cooperation with the Administrative Office, extensive preliminary inquiries were made, various problems were presented and studied, conferences were undertaken with interested agencies, a number of basic tentative conclusions were reached and a list of fundamental recommendations were made to the Judicial Conference at its September, 1964 meeting. These recommendations were approved by the Conference. Thus, the preliminary research was completed about thirty days after the enactment and approval of the Criminal Justice Act of 1964.

The ad hoc Committee recommended that it be discharged and that a permanent Committee of the Conference to Implement the Criminal Justice Act of 1964 be established, and that there be representation thereon by district judges because of the important part to be played by the district courts under the Act. The Chief Justice appointed such a permanent committee. It is comprised of the three members of the ad hoc Committee, with the addition of six district judges, viz: Homer Thornberry, of Texas (now a judge of the Fifth Circuit); Robert A. Ainsworth, Jr., of Louisiana (now a judge of the Fifth Circuit); Dudley B. Bonsal, of New York City; James M. Carter, of San Diego, California; Wade H. McCree, Jr., of Detroit, Michigan (now a judge of the Sixth Circuit); and Roszel C. Thomsen, of Baltimore, Maryland.

The committee undertook a quick intensive study of the Act and submitted a comprehensive report and recommendations to the Judicial Conference at a special meeting in January, 1965, called for the sole and express purpose of considering such report. The report was approved.

Included in this initial report were six proposed forms of "district plans", each prepared by a district judge member of the committee. The purpose of suggesting six forms of plans, designed to meet the needs of widely varying districts, was to give assistance to the various district courts in preparing their own district plans, as required by the Act.

The committee has remained active and engages in a continuous study of the results of the opera-

tion of the Act and submits its reports and recommendations to the Judicial Conference at its semi-annual meetings.

The Act is broad and general in its provisions and leaves its basic implementation to the courts. Each of the ninety United States district courts, with the approval of its circuit judicial council, is required to place in operation throughout its district "a plan for furnishing representation for defendants charged with felonies or misdemeanors ... who are financially unable to obtain an adequate defense". Each circuit council is required to supplement the district plans with provisions for such representation on appeal.

Counsel to be appointed under the Act may be either private attorneys, attorneys furnished by a bar association or a legal aid agency, or there may be representation according to a plan containing a combination of the foregoing.

Counsel shall be appointed by the United States commissioner or by the district court in every criminal case in which the defendant is charged with a felony or misdemeanor, other than petty offenses, and who appears without counsel, after being advised of his right to counsel, if he is financially unable to obtain counsel.

A defendant for whom counsel is appointed shall be represented at every stage of the proceeding from his initial appearance before the United States commissioner or court through appeal.

Compensation is provided for an appointed attorney at a rate not to exceed \$15 per hour for time expended in court, and not to exceed \$10 per hour for time reasonably expended out of court. Counsel shall be reimbursed for expenses reasonably incurred. A separate claim for compensation and reimbursement shall be made for representation before the United States commissioner, the district court and to each appellate court before which the attorney represented the defendant. The court shall, in each instance, fix the compensation and amount of reimbursement.

For representation before the commissioner and the district court, the compensation to be paid the attorney shall not exceed \$500 in a felony case and \$300 in a misdemeanor case. However, in extraordinary circumstances, payment in excess of such limits may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation, and if the amount of the excess payment is approved by the chief judge of the circuit.

For services rendered in an appellate court, the

compensation to be paid to an attorney shall in no event exceed \$500 in a felony case and \$300 in a misdemeanor case. No provision is made for excess payment in extraordinary circumstances for services rendered on an appeal.

Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an *ex parte* application to the court. After appropriate inquiry, upon finding the services necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain such services. The court shall determine reasonable compensation for such services and direct payment in an amount not to exceed \$300 to a person for such services rendered, exclusive of reimbursement for expenses reasonably incurred.

Provision is made for a court to compel direct payment to an attorney or repayment to the United States by a defendant for services rendered for his benefit under the Act where the court finds such funds are available for this purpose.

The courts are required to submit reports of appointment of counsel to the Administrative Office of the United States Courts as may be required by the Judicial Conference of the United States. The Conference may, from time to time, issue rules and regulations governing the operation of plans formulated under the Act.

Congress is authorized to appropriate funds necessary to carry out the provisions of the Act, payments to be made therefrom under the supervision of the Director of the Administrative Office.

The Act provides that each of the ninety district courts file its proposed plan for administering and implementing the Act for consideration and approval with its judicial circuit council within six months of the effective date of the Act. It further provides that each judicial circuit council file the approved plan for each district within its circuit, with the Administrative Office, within nine months of the effective date of the Act. It finally provides that each district court and court of appeals plan be placed in operation within one year from the effective date of the Act. All such plans were timely presented, approved and filed and placed in operation on or before August 20, 1965. Thus, the Act and the plans approved thereunder have been in effect for approximately one year at the time of this writing in September, 1966.

Based on records through the first ten months of operation of the Act, it is expected that the number

of court-appointed attorneys will be in excess of 20,000 annually.

During this first ten months period, based on claims paid, the compensation of attorneys for services before commissioners and in district courts has averaged about \$100. On appeal, in the small number of claims paid to date, the average claim was about \$285. Attorneys have been reimbursed for out-of-pocket expenses on the average of \$2 per case in the district courts and \$25 per case on appeal. Such average payments for compensation and reimbursement are expected to increase substantially as claims are submitted for protracted and more serious litigation.

The district courts have authorized or approved investigative services, expert and other services estimated to cost about \$30,000. In addition, there has been paid about \$115,000 for transcripts both prior to and on appeal. These items may be expected to substantially increase in future months.

Approximately 40 claims have been approved for payment by the circuit chief judges in cases of protracted representation. Several have been denied.

It is interesting to note that during the first ten months period, 197 attorneys voluntarily waived all claims for compensation and reimbursement in cases closed.

Net reimbursement from funds available to defendants has been relatively small. However, appointments in about 75 cases were terminated where it was subsequently found that the defendant was financially able to obtain counsel or to make partial payment for representation.

It now appears that the appropriation of \$3,000,000 made for fiscal year 1966 (which ended June 30, 1966) will be adequate for that year.

One year's experience under the Act may justify a few general observations.

A determination of "indigency" is not a prerequisite to appointment of counsel under the Act. The word "indigent" does not appear in the Act. The statutory requirement for eligibility for appointment of counsel is that the defendant be "financially unable to obtain an adequate defense." This is a far cry from indigency. Thus, a defendant may be employed regularly at a substantial wage, but have a number of dependents who require substantially all his income for living purposes, and as a consequence have no income or surplus or property available for an adequate defense.

The Judicial Conference has required the use of approved forms, with other forms of inquiry, by

the courts in determining the financial ability of a defendant to obtain an adequate defense. Experience thus far would indicate that the courts have been careful to avoid abuses, and yet have remained within the spirit of the Act in applying it.

While courts have traditionally appointed members of the Bar to represent indigents in the past, the services required under the Act are more extensive. After advising a defendant of his rights at his initial appearance before a commissioner or court, in a proper case, representation must be provided at that level and continue throughout, including services on appeal.

An innovation in the federal statutory scheme is the provision for services other than representation by counsel. A defendant may now be eligible, on proper showing of necessity in an *ex parte* proceeding, to qualify for investigative, expert, or other services necessary to an adequate defense. While there was no federal precedent for this, the courts appear to have kept such requests and allowances under reasonable control, avoiding abuses.

The types of other services approved during the past year have been many and varied. They range from clinical, interpreter, investigator, appraiser, surveyor, on through experts in coins, handwriting, fingerprints, and include the services of psychiatrists, psychologists, neurologists, ophthalmologists, and general medical practitioners.

The reports indicate that the average time spent per case before United States commissioners was .2 hours; in open court, 3.3 hours; and in preparation out of court, 5.5 hours; for a total average time spent per case of 9.0 hours. The average time spent per case in courts of appeal was 36 hours, of which 1.1 hours were spent in open court. These time averages may be expected to increase in the future.

The compensation for services of attorneys provided in the Act was not intended to pay them at a rate comparable to fees charged in private practice. Rather, it has been to provide a modest reimbursement for professional services rendered by lawyers dedicated to serving the public interest. Those lawyers who could not make a decent living prior to the Act should not expect to be able to do so now in representing defendants thereunder. The Act does give opportunity to reimburse a lawyer for out-of-pocket expenses.

Thus far there has been little, if any, complaint concerning the implementation of the Act and the administration of the plans by the courts. There has been little evidence of nepotism, personal or political favoritism, or fiscal laxity on the part of

the courts. It is expected that the courts will continue to discharge their responsibilities with judicial fairness and discretion.

There is no provision for the appointment of counsel for prisoners in federal or state habeas corpus proceedings, in so-called Section 2255 (Title 28, U. S. C.) proceedings, or in other ancillary matters where there has been a trial, conviction, and final judgment. Representation under the Act is limited to a defendant charged with a federal crime, other than a petty offense. Courts will be required, in proper cases, to appoint counsel in such other matters as was done prior to the enactment of the Criminal Justice Act of 1964.

The Judicial Conference, in cooperation with the Department of Justice, is under a mandate to make a future report to the Congress on the advisability of providing for a public defender system. It is presently apparent that there has not been enough experience in one year's operation to warrant sound recommendations for amendments to the Act at this time. It is likewise clear that the Act will need technical amendments, as well as changes dictated by public policy, in future years.

The Judicial Conference has formulated a few general guidelines to date and has approved numerous required forms for use, almost all of which deal with administrative detail and procedures. It is obvious that the ninety district court plans and the eleven courts of appeal plans need to have a good testing period to determine their ultimate effectiveness.

It does seem fair to conclude, however, that the various court plans drawn to implement the Act have been adequate, with reasonably good administration by the courts, to carry out and accomplish the congressional purpose and intent in enacting this legislation. The goal seems to have been to provide an adequate defense to those financially unable to afford it, reasonably comparable in quality to that available to defendants who are financially able to obtain adequate services.

That this has been so for the first year's operation under the Act is a tribute to the high quality and dedication of the courts involved; and, equally so, to the unselfish devotion of lawyers of the organized Bar to their highest professional ideals and standards as officers of the courts. Without the complete and dedicated cooperation of the attorneys, the plans would fail. With their continued help, the plans will accomplish their intended purpose.