Marquette Law Review

Volume 47
Issue 1 *Summer 1963*

Article 9

Attorney-Client: Compensation of an Attorney Appointed to Defend an Indigent

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charge involving moral turpitude because the majority of the courts do not consider fraud an element of the charge.][16] They have sometimes approached the problem as being one of whether there had been conduct below the level of behavior of attorneys and, if so, to what extent, for the purpose of determining the gravity of the punishment.[17] (Material in parentheses has been added.)

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Attorney-Client: Compensation of an Attorney Appointed to Defend an Indigent—Appellant, an attorney, was assigned by the circuit court to defend one of three indigents charged with the murder of a Wisconsin law enforcement officer. The jury trial of these three Illinois residents, after a change of venue, consumed thirty-nine and one-half days and resulted in the conviction of all three and sentences of life imprisonment. After the trial, appellant applied to the court for allowance of attorney fees and disbursements in the amount of $18,486.55. This amount included $10,556.30 for services rendered prior to the trial, $6,810.00 for services rendered during the trial and $1,120.25 for disbursements. It was computed at $100 per day in trial and $15 per hour in preparation. The circuit court refused to pay the full amount requested on the grounds that the trial was unnecessarily protracted and the amount of time spent in preparation was not reasonably necessary. The trial court allowed appellant a total of $6,500 without specifying how the amount was computed according to the various services rendered and the disbursements. On the attorney's appeal from the order, the supreme court awarded $1,120.25 for expenses in addition to the $6,500 awarded by the trial court.[1]

This case presented the supreme court with the problem of interpreting section 957.26 of the Wisconsin Statutes as it was amended by Chapter 500 of the Laws of 1961. This statute provides for compensation for an attorney assigned to represent an indigent charged with any felony. The amendment to the statute eliminated provisions for fixed fees[2] and directed that compensation be made "pursuant to §256.49," which provides that when any attorney has been appointed by a court, the court shall

. . . fix the amount of his compensation for the services and provide for the repayment of disbursements in such sum as the

[16] 47 KY.L.J. 256 (1959).
[17] Annot., 59 A.L.R.2d 1398 (1958).
[1] Conway v. Sauk County, 19 Wis. 2d 599, 120 N.W. 2d 671 (1963).
[2] "The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding $25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions . . ." WIS. STAT. §957.26 (1959).

court shall deem proper, and which compensation shall be such as is customarily charged by attorneys in the state for comparable services.

In construing this language there is a wide range of possibilities: for example, the amount of compensation could be based on the minimum fee schedule of the State Bar, a determination by the trial court of what the average attorney would charge for the work done, a finding of the amount the appointed attorney—because of his skill, standing and experience—would charge, or perhaps on a percentage increase over the old fixed fees.

The Wisconsin Supreme Court did not specifically select one of these possible interpretations but rather indicated, in an opinion by Justice Fairchild, that the amendment to section 957.26 evidenced the dissatisfaction of the legislature with the adequacy of compensation provided for under the old fixed fee provisions and that "the legislature accordingly authorized the appointing court to fix a fee which would be fair and reasonable for the services reasonably necessary under the circumstances."[3]

The court further noted that in applying the statute it is necessary that two elements be considered: the services necessary for an adequate defense and the value of such services.[4]

In discussing these elements the court pointed out that the trial court, because of the unique opportunity the judge has to observe the trial and the circumstances surrounding it, is allowed great discretion in the determination of an allowance of fees. This allowance will stand unless it is clearly unreasonable.

In approving the trial court's allowance, at least as the proper fee for services rendered, the court rejected appellant's contention that the schedule of minimum fees adopted by the State Bar should be controlling in the determination of fees. Its only relevancy to the issue was held to be its value as some evidence of the reasonableness of the charge for services. Testing the award here by the fee schedule, the court found that the allowance was not clearly unreasonable.

The dissent, by Justice Hallows, expressed the opinion that the minimum fee schedule should be the standard applied, after the factors set forth in Canon 12 of the Canons of Professional Ethics of the American Bar Association were considered.[5]

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[3] Conway v. Sauk County, *supra* note 1, at 603, 120 N.W.2d at 674.

[4] *Ibid.*

[5] The relevant portion of Canon 12 reads: "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employ-

In contrast to the definite standard favored by the minority of the court, the fair and reasonable test that the majority advocates leaves the trial court, after it has determined what services are reasonably necessary, with the delicate task of determining what is a fair and reasonable amount to award in attorney fees.[6]

It is suggested that a reasonable fee would be one that is substantially more than a mere token payment, yet one that would be less than a solvent client would be able to pay a retained attorney This would divide the burden of providing counsel for indigents between the community and the Bar.[7] That such a sharing can be supported in Wisconsin is seen by combining the thinking which underlies the legislative amendments to section 957.26 increasing the compensation for assigned counsel and the provision of the attorney's oath that he will "never reject, from any consideration personal to [him-]self the cause of the defenseless or oppressed. . . ."[8]

This view is supported by recent decisions in two jurisdictions having "reasonable compensation" provisions in their statutes.[9]

The California decision emphasized the attorney's duty to the defenseless as the reason for not allowing the same compensation that would be charged to a solvent client. As an aid in determining what reasonable compensation would be, the California court said consideration should be given to the amounts awarded in other jurisdictions for comparable services[10] and the amount of money paid to public officials

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ment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service." AM. JUR. 2d DESK BOOK, Doc. No. 91, 225 (1962).

[6] Wisconsin in 1859 held that even in the absence of a statute, an appointed attorney defending an indigent is entitled to compensation from the county for services rendered. Carpenter v. County of Dane, 9 Wis. 274 (1859). The decision in that landmark case was grounded on the constitutional guaranty of the right to be heard by counsel (WIS. CONST. art. I, §87), the necessity of the guiding hand of counsel to utilize the other fundamentals of a fair trial, and that the people of the county have an interest in seeing fundamental rights protected. Subsequent to this decision the legislature provided fixed fees for compensation, and gradually increased the amount available and the scope of services for which compensation would be allowed, including, time in trial, time in preparation, time spent taking depositions and travel allowances.

[7] THE SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 90 (1959), recommends that such a sharing is desirable.

[8] WIS. STAT. §256.29(1) (1961).

[9] Hill v. Superior Court in and for the County of Humboldt, 46 Cal. (2d) 169, 293 P.2d 10 (1956); State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961).

[10] For a summary of the various state provisions see the appendix to EQUAL JUSTICE FOR THE ACCUSED, *supra* note 7. There has been much criticism of those jurisdictions that do not provide compensation for appointed attorneys.

charged with the duty of defending or prosecuting in criminal proceedings.[11]

The New Jersey court expressly approved of the reasoning and conclusions of the California decision. The court succinctly summarized the position suggested in this note:

> However, the very fact that our scheme of compensation is couched in indefinite terms rather than precise monetary figures leads us to find an intent that the amount awarded should be somewhat more than the mere token or *honorarium* appearing to be the result in many states, even though the recompense must be considerably less than what would be considered full compensation were the accused able to pay. While the philosophy of the assigned counsel system is founded on the basic obligation of the bar to render gratuitous services to the indigent, legislative authorization to make any recompense from public funds, especially where that authority prescribes a general standard keyed to reasonableness, must necessarily rest on recognition that the community too should assume some financial responsibility in the matter and that the bar should not have to carry the whole load.[12]

This sharing of the burden between the community and the Bar does present a problem when, as in the instant case, the community share of the burden must be borne entirely by one county. Here the defense of three non-resident indigents cost Sauk County, with its 36,179 residents as of 1960, a total of $15,743 or slightly more than forty cents per person.[13] It is suggested that, since a felony is actually a crime against the state, the amount that a county be called upon to supply in the form of compensation to appointed attorneys be limited and any excess beyond the limitation be borne by the State.

ROCH CARTER

Attorney-Client: Privilege as Applied to a Corporate Litigant Under the Federal Rules of Civil Procedure 43(a)—By virtue of *United States v. Becton Dickinson and Co.*,[1] a federal district court has added a new interpretation to the already confused problem of determining the availability of the attorney-client privilege to a corporate litigant in cases arising in federal courts. This case involves a civil

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In view of this sharp criticism, this writer does not feel that these jurisdictions should be included in a comparison.

[11] Hill v. Superior Court, *supra* note 9, at 14. It is interesting to note that the trial court in the *Conway* case "noted that the special assistant district attorney had been paid $6500 for his services and expenditures and concluded that $6500 was fair and reasonable compensation for each defense counsel's trial work, preparatory work and necessary expenditures." 19 Wis. 2d 599, 602, 120 N.W.2d 671, 673 (1963).

[12] Horton v. State, *supra* note 9, at 8.

[13] Brief for Appellant, pp. 118-119, Conway v. Sauk County, *supra* note 1.

[1] 212 F.Supp. 92 (D.N.J. 1962).