

EXPERT ACCESS

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Without appropriate resources, lawyers cannot provide an adequate defense.



Almost 40 years ago the U.S. Supreme Court declared in *Gideon v. Wainwright* that every indigent defendant accused of a felony has a constitutional right to an appointed lawyer. This law has been extended to those charged with misdemeanor and juvenile delinquency offenses. Recently the nation has been horrified by revelations of sleeping, drunk and otherwise incompetent appointed lawyers representing innocent indigent clients who were sentenced to prison or death. In contrast, the Los Angeles County public defender's office

maintains a staff of highly trained and dedicated criminal defense attorneys.

Unfortunately, high-quality appointed attorneys do not necessarily translate into equal justice. Why not? Because without appropriate experts, no attorney can be expected to provide an adequate defense. Expert witnesses can provide the only evidence which can avoid an unjust conviction. It is thus no surprise that expert witnesses have been called the fingers of the guiding hand of counsel.

The prosecution can call on a vast array of resources in its effort to secure convictions. Well-funded local, state and federal law enforcement agencies provide prosecutors with powerful investigative, technological and forensic resources. Moreover, the LA County district attorney has a trial support division, a graphics section and a photo lab, which supply everything from photo and poster enlargements to artistic presentations, computer graphics and diagrams to scale.

The district attorney's office also has an internal budget to hire outside experts as well as access to the courts' expert witness budget. In a recent homicide case the prosecution had, in addition to experts provided by law enforcement, at least 10 generously paid experts (\$500 per hour for some). Some of these experts were flown in from other states and outside the country.

In our adversarial system the defense requires parity in access to high-quality experts, or legitimate defenses will be overwhelmed and an unfair system perpetuated. This is especially true now that modern technology has placed so many matters beyond an average juror's general knowledge.

Experts can be obtained on behalf of indigent clients only by court appointment. The judge must approve the particular expert selected and the fees to be paid for examinations, procedures and courtroom testimony.

No person accused of a serious crime should be required to suffer from inferior expert assistance due simply to an inability to pay. If an expert with a particular area of competence, clinical experience or specialized knowledge is needed, the accused should have access to such an expert.

In practice, however, the effort to reduce the cost of litigation has erected substantial barriers for defendants in search of quality expert assistance. Many courts resort to a list or panel of "approved experts" in commonly used forensic areas such as psychiatry, firearms and toxicology, who have generally agreed to accept reduced fees in return for the business generated by being on the panel. Some of them rely on court appointments for most or all of their income.

This high-volume, low-cost method of providing criminal defendants with expert assistance too often fails to deliver the quality of expertise actually needed. A defendant may be forced to accept the appointment of an expert on the panel who lacks the special knowledge or skills required in the particular case. Such an expert is ineffective and is little more than window dressing. In addition, sometimes the only panel expert available has a strong pro-prosecution bias, or has serious credibility problems because of prior performance or testimony.

Also, judges may "negotiate" fees with panel experts in an effort to find the cheapest rate possible. This does not encourage highly-qualified experts to join the panel, nor does it promote a high level of quality by those who are on the panel. In addition to limiting defense attorneys to panel experts, some judges even insist on the selection of a particular favored expert, or on selecting an expert at random. A judge may disfavor some particular expert and refuse to appoint that expert. Moreover, judges often place strict constraints

on the amount of work the expert will perform. This is done by restricting either the number of hours allowed or the total fees authorized, causing the expert to choose between an inadequate evaluation or working for free.

Most often a psychiatrist on the panel is limited to a fee of \$250 for traveling to a jail facility, performing a mental health evaluation of a defendant (seen only once), reviewing all the police reports, court documents and other history provided, and then writing a report of findings and conclusions. The value of this sort of "drive-by" diagnosis is dubious.

In addition, some judges have refused to order full payment of previously authorized fees on completion of the expert's work or testimony. More than one well-qualified expert has refused any further appointments after having been denied full payment for services rendered.

Finally, even when the defense succeeds in obtaining needed expert services, it may be only after substantial delay. In one case a developmentally disabled woman was charged with a murder in which a witness videotaped the perpetrator while her hands were around the victim's throat. The defendant looked very similar to the suspect in the videotape and was in fact identified by two eyewitnesses. However, she was missing the fingertips on her left hand. Since the suspect's left fingers could be seen in the videotape but without sufficient clarity to determine if they had tips, the public defender sought to have a computer enhancement of the tape. However, no video production company could be located that would agree to do the enhancement without delay at the panel rate of payment for reproduction.

Eventually, the public defender located an expert who did agree to a reduced rate of payment, and the enhancement produced showed that the actual perpetrator did have fingertips and that the defendant therefore could not have committed the crime. However, it transpired that this expert's credibility had just recently been called into question and the prosecution would not agree to dismiss based on his reproduction. Eventually, a local university agreed to recreate another enhancement, more out of public interest than for the reduced fee. By the time the case was dismissed and the innocent woman released, she had languished in jail for a year.

As this unfortunate case proves, access to high-quality resources and experts can be as important as the right to counsel itself. The presumption of innocence becomes an empty slogan if an accused person lacks adequate resources and experts to prepare a defense. Only by making these resources available to the poor can we mitigate the risk of unjust convictions.