New York Law Journal

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Q&A: William J. Leahy

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06-10-2011
Nearly a half-century ago, the U.S. Supreme Court ruled that the right to counsel is so fundamental that an attorney must be provided at state expense for a poor defendant who cannot afford his own lawyer. William J. Leahy, 64, has spent his entire legal career striving to give reality to the promise of *Gideon v. Wainwright*, 372 U.S. 335.

A 1974 graduate of Harvard Law School, Mr. Leahy worked as a public defender, deputy chief counsel and, for 20 years, as the chief counsel of the Massachusetts Committee for Public Counsel Services, a state agency providing representation to 265,000 indigent clients annually through 265 state attorneys and 2,900 assigned public lawyers. The agency had a $202 million budget last year.

Three months ago, Mr. Leahy became the director of New York's nascent Office of Indigent Legal Services. In contrast to Massachusetts, the new agency does not oversee or administer legal services, responsibilities that have been assigned to New York City and 57 upstate counties. In its advisory role the state office has a budget of $1.5 million and distributes $25 million in state grants to local defender services. Mr. Leahy makes $135,000 a year, a pay cut from the just under $149,000 he received in Massachusetts.

But the challenges faced by the agency and its first head may dwarf its resources and powers.

A commission appointed by then-Chief Judge Judith S. Kaye concluded in 2006 that New York's patchwork system of public defense was denying effective assistance of counsel to "a large portion" of poor defendants (NYLJ, June 29, 2006). To deal with this "crisis," the commission proposed creating a statewide public defender agency but was rebuffed (See the commission's final report).

Chief Judge Jonathan Lippman, who heads a board that develops policy for Mr. Leahy's office, declared in his Law Day speech last month that "there is a disturbing disconnect between the promise of 'Gideon' and what is sometimes the reality of our criminal justice system." He declared that the "basic fairness" of the system "is being compromised by the reality—in New York and around the country—of chronically overburdened public defenders who have little time to investigate the facts, get to know a client or build a competent legal defense in each case."

Meanwhile, a challenge to New York's public defender system is vending its way through the courts (NYLJ, May 7, 2010).

Here, Mr. Leahy discusses how he will work with the courts, county governments and local public defender agencies to help meet state and federal constitutional mandates for a right to counsel.

Q: You recently became the director of a new state Office of Indigent Legal Services. What is its function?

A: The purpose and mandate of the Office of Indigent Legal Services, and the Indigent Legal Services Board to which the office reports, is "to monitor, study and make efforts to improve the quality of services provided pursuant to article 18-B of the county law." Executive Law Article 30, sections 832(1) 833(1). I should clarify at the outset that these services include not just criminal defense representation, but also the representation of parents in various Family Court proceedings.

Q: In Massachusetts, you served for 20 years as chief counsel of a statewide public defender agency with a much larger budget and staff. Why did you leave Massachusetts for New York? How will your job differ here?

A: I left Massachusetts after 19 years as chief counsel of the Committee for Public Counsel Services (CPCS) and 36 years as a public defender because I wanted to take on another right-to-counsel challenge; and because CPCS was at an ideal stage in its development for a new, yet experienced generation of leaders to carry on its work.

A big part of my job in New York is to advocate for and to foster a meaningful governmental response to the scathing assessment of New York's statewide implementation of the right to counsel reported five years ago by the Commission on the Future of Indigent Defense Services (Kaye Commission) in its June 18, 2006, final report.

The jobs in Massachusetts and New York are at once totally different, and exactly the same. They are totally different in that CPCS is an independent, statewide agency that is responsible for providing representation to every person who is legally entitled to counsel and cannot pay for a lawyer. In every case, the buck stops at the chief counsel's door. The Office of Indigent Legal Services represents no clients; it neither hires staff attorneys to represent clients, nor assigns private lawyers to advocate for them. They are exactly the same, because each job requires an assessment of how well or how poorly the state is fulfilling its responsibility under the federal and state constitutions to provide effective assistance of counsel to those who are legally entitled to it, and each job carries with it the responsibility to do what one can to achieve or to sustain compliance with that fundamental constitutional mandate.

Q: Does New York do a good or, at least, an adequate job of providing effective legal representation to poor people facing criminal charges?

A: During my three months in New York, I have met many lawyers who do an effective job of defending their clients with competence, integrity and zeal, and I have met many of the state's defender leaders who work effectively despite inadequate resources and crushing caseloads to provide a decent level of representation to the poor. There are many areas of competence and pockets of excellence. But there is no statewide uniformity, and therefore no statewide compliance with constitutional norms. In 2011, the first and most devastating of the Kaye Commission's unanimous five-year-old findings remains unchallenged: 'New York's current fragmented system of county-operated and largely county-financed

indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.'

It cannot be right or just that whether a person charged with a crime is afforded excellent representation, competent representation, poor representation or no representation depends on the happenstance of where that person is brought in to court.

Q: Where does the system fall short?

A: The system falls short in many ways, including but not limited to excessive caseloads; minimal client contact; inadequate or non-existent investigative and expert services; lack of protection against severe collateral consequences of minor criminal convictions; lack of adequate training; inability to hire full-time as opposed to part-time defenders; and a lack of statewide standards or measures of performance. (All of these deficiencies were identified in the Kaye Commission report). Most importantly, it falls short in the absence of uniform statewide enforcement of the effective assistance of counsel, which is the state's responsibility under the seminal case of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Q: Chief Judge Jonathan Lippman has stated that your agency's first major policy initiative would be to ensure that all defendants arraigned before New York courts are represented by counsel at their first court appearance. Why do you think this is so important? Is it common for representation not to be provided?

A: Chief Judge Lippman's Law Day address sounded a clarion call for New York to live up to the status it was afforded by the U.S. Supreme Court in *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008), as one of the "overwhelming majority of American jurisdictions" which recognize that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." 554 U.S. at 213.

Counsel's presence and assistance at a defendant's first court appearance is vital for a host of reasons. For example, it is the moment when counsel begins to build a trusting attorney-client relationship; it is the moment when the defense has its first chance to assess the strength of the state's case; it is the moment when investigation can begin while physical evidence and witnesses' memories are still fresh; and it is the moment where the client faces the loss of his or her liberty in the form of an order denying or setting bail in an amount beyond the client's capacity to meet. Providing lawyers at first court appearance builds that essential trust, enables investigation and case assessment to begin, and improves the client's chance for release; in a word, counsel's active presence affords equal justice to the poor as to the affluent. An excellent article on the subject is 'Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,' by Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, 23 Cardozo Law Review 1719 (May 2002).

How widespread is the problem? While there is no hard data, our conversations reveal that the absence of counsel is a frequent occurrence in the state's rural areas. The comprehensive Kaye Commission report concluded that 'there is a widespread denial of the right to counsel' in the state's Town and Village courts.

Q: What steps will you take to achieve this goal? Will it require significant additional resources? How long do you think it will take?

A: Can New York answer Chief Judge Lippman' challenge? Of course we can. In 36 years of public defender experience in Massachusetts, I never once heard of a person charged with a criminal offense going unrepresented at his or her first court appearance. If Massachusetts can provide counsel in its rural as well as its urban courts, so can New York.

We are already working with chief defenders, judges and county officials to brainstorm means of providing counsel at the initial court appearance in ways that are cost-effective and workable. This summer, with the approval of the Indigent Legal Services Board, we will draft requests for proposals inviting counties to apply for grant assistance in order to remedy this deficiency. Our aim is to establish success stories which other counties may emulate and to assemble information that may inform future legislative and gubernatorial attention. We will be working as hard as we can to fulfill the chief judge's goal that the provision of counsel at first court appearance become the norm in New York within a year.

Q: What are some of your other priorities?

A: One of our most important priorities is to establish a relationship based upon clear communication and mutual respect with county governments; to listen to their concerns and avoid dictating from Albany. That is why our first fiscal initiative was to invite county leaders, in consultation with their indigent defense service providers, to identify deficiencies in their delivery of services which could be addressed by a modest additional infusion of state funding.

Likewise, we have built and we will continue to sustain a clear and mutually respectful relationship with the New York State Association of Counties (NYSAC), whose executive director, Stephen Acquario, has consistently and accurately pointed out that the counties on their own cannot fulfill the state's unfunded constitutional obligation to guarantee adequate and uniform delivery of legal services to the poor.

Recently, former Senator John Dunne, who is a member of the Indigent Legal Services Board, led me on a two-day visit to Nassau and Suffolk counties, during which we met with Criminal and Family Court judges, bar association leaders, chief defenders, county executives and prosecutors. I have had productive meetings with area chief defenders in the Seventh and Eighth judicial districts in the western part of the state. This month, board member and Tompkins County Chief Executive Joe Mareane will be hosting a meeting of Southern Tier representatives with me and agency counsel Joe Wierschem in Ithaca. These meetings will be occurring in all parts of New York as we continue to listen and to learn.

Another important priority is to encourage creative thinking and consistent communication among defender leaders—of public defender, conflict defender and assigned counsel programs—throughout the state. The New York State Defenders Association has done yeoman's work over many years in this area, and we intend to work cooperatively with NYSDA as we undertake our own statutory responsibilities. Those responsibilities are found in Executive Law Article 30 §§832 (3)(a) through (m). They include the duty to evaluate services; to collect comprehensive data; to evaluate that data and recommend enhancements designed to improve the quality of representation; to make recommendations to the Indigent Legal Services Board for distributing funds to the counties; to target grants in support of innovative and cost effective solutions that enhance the quality of indigent legal services; to establish measures of performance for programs and counties to report to the office; to present findings and make recommendations to the board; and finally to execute decisions made by the board.

We have also made it a priority to establish effective relationships with key personnel in all branches of state government. The right to counsel, enshrined in our Constitution, is not a Republican or a Democratic or an upstate or a downstate issue. Its enforcement is the responsibility of every New Yorker and every American. Therefore we have been in close communication with both branches of the Legislature and with the Governor's Office as we undertake our quality-enhancing efforts.

We have also reached out to the state, city and county bar associations and the New York State Magistrates' Association seeking the cooperation of each.

Q: Do you think there is significant support for your agency's goals?

A: I do believe that there is significant support for our goals. For example, it was heartening to read Governor Cuomo's positive response to Chief Judge Lippman's goal to provide counsel at first court appearance.

It is a truism that New York is a complicated state, and solutions to statewide problems do not come as easily or as quickly as I or the board would prefer. What is most encouraging is that important public officials in all three branches of government—including both the Assembly and the Senate—as well as the bar association and NYSAC have communicated with the office and with me in a respectful and straightforward manner.

At the moment, Governor Cuomo's top staff members are working with us to facilitate the employment of persons whom I have appointed or will appoint as employees of the office under §832 (2)(d), and the distribution of funding to the counties for the improvement of legal representation in their jurisdictions. The leadership of the Assembly has been fully supportive and engaged on these issues. In the coming weeks and months, we will continue to communicate with all branches of government and all segments of the bar.

Q: What can members of the private bar do to improve the representation of the poor?

A: Members of the private bar can support us through their voices in local and state bar associations, which are of invaluable assistance. For example, in my meeting with the incoming president of the New York State Bar Association and in my recent appearance before the Council on Criminal Justice of the New York City Bar, I have emphasized the importance of mainstream bar association and lawyer support for compliance with the constitutional provisions for equal justice under law and the assistance of counsel. I encourage every member of the New York Bar to actively support our efforts to improve the quality of representation for those persons who are legally entitled to the assistance of counsel, but who cannot afford to hire an attorney.