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Ethics Forum: Questions and Answers on Professional Responsibility

I am an assistant public defender and I am concerned that both the court and Public Defender's Office are not properly reviewing the financial status of potential clients. They do not require clients to sign an affidavit that they do not have sufficient funds or assets to retain legal counsel. As a result, many of the defender clients in my office do not really qualify for defender representation. Is my ethical obligation to reveal the fact that they do not qualify or continue to represent these clients?

By **Samuel C. Stretton** | April 22, 2021 at 01:33 PM

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Samuel C. Stretton.

The question is an interesting one. This writer has observed many clients who do not qualify. Yet, they are still appointed counsel or a defender. Many times, courts will appoint clients who do not qualify as a convenience to the court to keep moving cases. That practice used to be a bone of contention with the private bar since paying private clients are difficult to find. The

question raises valid concerns. The concern is, if persons are being represented who can afford private counsel, why are public funds being used for them as opposed to people who truly need a public defender or court-appointed counsel? As a result, there are less monies available and available resources are being depleted. The second concern is, of course, the private bar. Though the private criminal defense bar often gets little respect and very little public support, the private bar is seeing cases being diverted into the public defender or court-appointed system.

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Any private defense lawyer knows how difficult it is to get private paying cases anymore. In addition to massive advertising campaigns by certain firms, many private clients will attempt to go the public defender or court-appointed route, and are approved despite the fact they really don't qualify. That practice means less money to support the private defense bar. This is particularly hard on small firms and young lawyers who are trying to get started. In a profession where these small firms have traditionally been the backbone, this is a major issue. The way small firms get started is through representation, often in criminal defense. If that is taken away, there might be less and less small firms available. Though small criminal defense firms sometimes blossom over the years into good general practice firms, one has to get their foot in the door to do so.

The Public Defender Act, found at 16 P.S. Section 9960.6(b), requires the public defender to determine the qualification as to whether a person is unable to procure sufficient funds to retain private counsel. There is a decision out of Dauphin County, *Dauphin County Public Defender's Office v. Dauphin County Court of Common Pleas*, 849 A.2d 1145 (P.a., 2004), which states the court did not have the authority to dictate to the Defender's Office the level of income for a person to qualify. Certain rules of criminal procedure are also applicable. Pennsylvania Rules of Criminal Procedure Rule 122 speaks of court appointments. The same standard applies when the court can appoint counsel. Under Rule 122, counsel is required to represent the person all the way up through the highest court in Pennsylvania. Under Pennsylvania Rules of Criminal Procedure Rule 123, a person has to verify in an application that they are without resources. Under a later case, *Public Defender's Office of Venango County v. Venango County Court of Common Pleas*, 893 A.2d 1275 (P.a., 2006), the Pennsylvania Supreme Court said the Common Pleas court has the power to appoint a public defender to act as a standby for pro se defendants who had been found previously to be financially ineligible for a public defender. This power was under the interest of justice exception.

The question appears to not necessarily be a problem with the courts, but with the Public Defender's Office not having proper screening procedures. The statute is very clear there has to be a verification and there are penalties under the various sections of the statute if the verification is done falsely.

What can an individual defender or a court-appointed counsel do if they discover the client does not qualify for free counsel? Obviously, an internal complaint can be made in the Public Defender's Office about the screening process or the failure to comply with statutory requirements and use a proper affidavit. On the other hand, making a complaint sometimes results in retaliation.

Perhaps, the public defender could go to the private bar or to the Criminal Defense Association and point out the problems. Going to the county solicitor or county commissioners may be another way. One could, of course, report the chief public defender for not complying with the above statutory requirements to the Disciplinary Board for violations of various rules such as 8.4(d) in terms of conduct prejudicial to the administration of justice, or 8.4(c), misrepresentation or fraud.

From an individual standpoint, there is very little the assistant public defender who is now representing the client can do. As part of the representation, if the lawyer discovers the client does not qualify and has sufficient assets, the assistant public defender cannot reveal that to the court or to anyone else because the fact was learned during the representation. This would be confidential information under

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Rule 1.6 of the Pennsylvania Rules of Professional Conduct, which provides confidentiality to anything pertaining to the representation. It would most likely not fall under the exceptions of 1.6(c) since the lawyer was not being used to perpetuate a fraud at that point.

The situation would be arguably compatible to a lawyer doing insurance defense and in the process of representing the insured in an automobile accident discovers that there is no coverage. If the lawyer discovered that from his client, they could not go back to the insurance company and reveal the information because, again, the confidentiality rules under Rule 1.6 would prohibit revealing that information.

Obviously, no one wants to hurt their client. On the other hand, it is very upsetting when one is representing someone who lied or did not fully reveal the extent of their assets and is now getting free legal services when they should not be the recipient of the same.

Despite one's distaste for using public resources when persons truly don't qualify, every lawyer must remember they can't hurt their client. But the problem could be cured by complying with the Public Defender Act and having each client sign an affidavit stating they do not have sufficient funds.

The days of a district judge believing they are a free agent and king of their local hill are long gone.

I am running for the district judge position and I am curious if elected, will I be able to set the hours of my office and have hiring and firing abilities of staff?

The answer is no. At one time, when district judges were called justices of the peace, they ran their own show, but that has long since changed. Now, the president judge of each county has very strong supervisory authority. In fact, the supervisory authority of the president judge in each county has been strengthened by an amendment effective immediately. The rule is found in Pennsylvania Rules of Judicial Administration, Rule 605. The old rule has been deleted entirely. The new rule sets a more stringent standard. The rule notes that the president judge exercises general supervision and administrative authority over district judges within their district. The rule then sets forth what the president judge can do, but notes that the president judge's authority is not limited to the rules and perhaps could be broader.

Now, the president judge will determine how the records ought to be maintained in each district judge's office. The president judge retains the final authority to hire, supervise and fire staff for each judicial office. The president judge will establish qualifications. If there is going to be a reassignment of staff, except for in extraordinary circumstances, the president judge would do so with the consent of the magisterial district judge, but the president judge can assign temporary or floater staff. The president judge can establish performance evaluation and training for the staff.

The district judge can select one authorized staff member as a personal staff and assign the duties to that person. This person will have day-to-day supervising authority, and coordination with the county administrative staff and human resources department. The district judge shall have general day-to-day supervising authority, and consultation with the county court administrative office and human resources office. The district judge is responsible for the daily operation of the court