Unauthorized Practice of Law--Cleveland Public Defender--Authorized

Dale T. Evans

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Dale T. Evans, Unauthorized Practice of Law--Cleveland Public Defender--Authorized, 14 Cas. W. Res. L. Rev. 826 (1963)
Available at: http://scholarlycommons.law.case.edu/caselrev/vol14/iss4/14
In the instant case, the tax court could have sustained the petitioner’s claim for travel and living expenses on at least two bases: (1) the court could have defined the term “home” to mean domicile and held that the exigencies of business prompted the petitioner’s trip, or (2) it could have determined that the employment accepted away from the petitioner’s home was of a temporary nature, and, therefore, should have fallen under the Peurifoy exception to the Flowers rule.

There is, as previously stated, a conflict among the circuits relating to the correct interpretation of “home” as used in section 162(a)(2) of the Internal Revenue Code. Thus, the tax court in Suzanne Waggener was merely following its circuit’s interpretation of that statutory term. Under the Flowers decision, however, even if the tax court had defined home as meaning domicile, the petitioner’s claims would still not have been allowed as the court found that these expenses were neither necessitated by her employer’s business, nor through the exigencies of her own business as a clerk-typist.

The application of Peurifoy to cases falling under section 162(a)(2) of the Internal Revenue Code is unclear and probably will not be settled until the Supreme Court further interprets this doctrine.

However, once the tax court had determined that the petitioner had no set tax home from which to move, the Peurifoy exception to the Flowers case was no longer applicable in Suzanne Waggener. Thus, if the petitioner had no home to move from, the fact that she accepted employment of a temporary nature, as opposed to employment of an indefinite nature, was immaterial.20

Leonard R. Steinsapir

Azzarello v. Legal Aid Soc’y, 185 N.E.2d 566 (Ohio App. 1962)

In two recent cases,1 the Legal Aid Society of Cleveland was alleged to be engaged in the unauthorized practice of law in the operation of its newly-organized Legal Aid Defender office. Under a plan put into effect on March 1, 1960, the Society makes available its charitable funds to support the Defender’s office. By contract with the Legal Aid Society, the Defender exclusively represents indigent persons in the courts of Cuyahoga County when called upon to do so by lawful authority or by an

20. In Suzanne Waggener, the court stated that the petitioner’s claim had “an air of unreality.” It also said: “since the entire record of the case is not before us in the reported opinion, it is impossible to determine the soundness of the court’s observation.” Ibid. Perhaps this is the underlying reason for the court denying the petitioner’s claim.
Unauthorized Practice of Law

indigent party. Salaried by the Society, the Defender may accept no compensation from indigent clients. The statutory fee payable to assigned counsel in the court of common pleas is, according to the contract, endorsed over to the Society and placed in a fund for support of the Defender's office.

The question presented in both cases was whether the contractual relationship thus established, together with the Society's referral function, constituted the unlawful practice of law.

For performing this service, the Legal Aid Society received no benefit and did not serve as an intermediary between the Defender and his client. The court found that the Defender serves as the personal counsel of the accused and is not an appendage of the Society. Citing a Massachusetts Supreme Court opinion on unauthorized practice legislation, the court held that the Society was not engaged in unauthorized practice, either in the operation of the Defender's office or in referral of indigents involved in civil and criminal cases to its salaried attorneys.

The opinion is based principally upon considerations of public policy. The court noted that providing counsel to indigents is a necessary public service, and that under the Cleveland system, which embodies several departures from the usual public defender plan, the Defender must await appointment by the court or the request of a party. He receives public funds only indirectly through the statutory fee system.

The Legal Aid concept was adopted in the United States in 1876 with the opening of facilities dedicated to the provision of gratuitous legal aid to German immigrants in New York City. Following its inception, the idea spread rapidly. A "Bureau of Justice," which undertook to give legal assistance to all, "regardless of nationality, race, or sex," was opened in Chicago shortly thereafter. The concept of a public defender, though established in Europe in the early nineteenth century,

2. In re Opinion of The Justices, 289 Mass. 607, 194 N.E. 313 (1935). In answer to questions submitted by the Massachusetts Senate concerning unauthorized practice legislation, this court excluded from "practice of law" the furnishing of gratuitous legal aid to the poor in the pursuit of any civil remedy, as a matter of charity. Yet, the court points out in a subsequent statement that such activities lie close to the borderline and may easily become or be accompanied by "practice of law."
5. BROWNELL, LEGAL AID IN THE UNITED STATES 7 (1951).
6. Ibid.
did not crystallize in the United States until 1913, when the first office was created by charter provision in Los Angeles County, California. Since 1913, a network of Legal Aid and Defender offices has developed throughout the country. Figures from the 1960 Census show 132 offices with salaried attorneys rendering aid in civil cases and ninety-six defenders offering services to indigents in the criminal area.

As the necessity for some method of administering legal services to indigents became increasingly apparent, a variety of systems were developed to cope with the problem. The predominant forms were in operation in several areas by 1916. Generally, six different forms existed: (1) charitable societies and voluntary associations; (2) departments of privately supported social welfare agencies; (3) tax supported public bureaus; (4) facilities offered and controlled by local bar associations; (5) legal aid clinics affiliated with law schools; and (6) the voluntary and public defender organizations.

The necessity for providing beneficial, yet practical service to meet the needs of the indigent in this important area led to extensive research and studies to evaluate the variety of plans presented. Most of these studies have indicated that the public defender plan is superior in nearly all respects to other methods of extending aid to the indigent.

The public defender system has both advantages and disadvantages which are usually widely espoused by legal scholars and practitioners when a defender plan is proposed. These arguments were undoubtedly considered by the court in the instant cases in reaching the decision that public policy favors the public defender concept.

Generally, the defender system has the advantage of offering a higher

8. There is some dispute among authorities as to what constituted the first true public defender in the United States. An Oklahoma Public Defender office was opened in 1911, but its services were limited to representation of minors, delinquents, orphans, and mental defectives. See Smith, Justice and the Poor 117 (1919). Most historical works treat the Los Angeles County Defender office as the initiator of the system in this country. Commencing operations on January 9, 1914, it has offered continuous service since that date.
11. Id. at 14.
13. Id. at 9-11.
14. See Special Committee of the Assn. of the Bar of the City of New York and the National Legal Aid and Defender Assn. Rept., Equal Justice for the Accused (1959). This study applied six distinct standards to each of the major systems for furnishing legal aid to the indigent. These criteria demanded that (1) the system provide counsel to every indigent person; (2) experienced and competent representation; (3) investigatory facilities; (4) counsel at a sufficiently early stage to insure proper protection; (5) undivided loyalty to the client; and (6) for support by community participation and responsibility.
quality of legal assistance to indigents because of its superior facilities for investigation and the Defender's greater opportunity for specialization. The Defender is present and available at all times, and the system has proven more efficient and economical, particularly in large urban areas.\(^\text{17}\) On the other hand, it is often urged that the large volume of cases necessarily flowing through the Defender's office may cause him to become either hardened and indifferent to the merits of individual situations or, conversely, sentimental toward criminals.\(^\text{18}\) Also, opponents assert that the Defender would not be as enthusiastic as other appointed counsel and would in fact evolve into another bureaucratic political officer.\(^\text{19}\)

Given the proposition that no existing plan perfectly fulfills the needs of all indigents, the facts seem to indicate that this system can be fairly evaluated only within the context of the problem which it was designed to meet — the provision of legal counsel to any individual who is unable to retain an attorney.

Since clarification by the United States Supreme Court of the guarantees embodied in the sixth and fourteenth amendments,\(^\text{20}\) the problem of practicability in supplying representation to indigent parties has received greater attention in legal circles. Legal aid and public defender facilities are offered as one solution to this problem. In deciding the instant cases, the court of appeals carefully weighed the extent to which the plan existing in Cleveland fulfills this constitutional need. The decision reached by the Cuyahoga County Court of Appeals should clear the shadow of illegality from similarly orientated defender systems, and thus offer another plausible answer to the practical problems engendered by the mandates of the sixth and fourteenth amendments.

DALE T. EVANS

17. BROWNELL, op. cit. supra note 5, at 144.
19. Ibid.
20. The United States Supreme Court first approached this problem of the extent to which the Constitutional guarantees of right to counsel were to encompass indigents unable to retain a paid attorney in Powell v. Alabama, 287 U.S. 45 (1932). The Court held that where special circumstances existed, counsel must be assigned in capital cases. In 1938, the Court asserted that the sixth amendment constitutionally entitles every indigent criminal defendant in the federal court system to the assignment of counsel. Johnson v. Zerbst, 304 U.S. 458 (1938). This concept has recently been assimilated into the proposed amendments to the Federal Rules of Criminal Procedure. See Preliminary Draft of Proposed Amendments to FED. R. CRIM. P. (Dec. 1962). The rule of the Johnson case, however, was not applicable to the states. Thereafter, Betts v. Brady, 316 U.S. 455 (1942), established a precedent which was to control assignment of counsel by state courts for twenty-one years. In the Betts case, the Court held that mere failure of state courts to assign counsel to indigent defendants in non-capital cases did not alone constitute denial of a fundamental right as guaranteed by the due process clause of the fourteenth amendment. In the spring of 1963, the United States Supreme Court reversed the Betts decision, holding that the right to the assistance of counsel was a fundamental right available to all indigent criminals accused in state courts. See Gideon v. Wainwright, 372 U.S. 335 (1963).
Try **LAW WEEK**

for three months

at $\frac{1}{2}$ the regular rate

**LAW WEEK** safeguards you against missing a single point of legal importance . . . saves your time by greatly reducing your reading load!

WHAT YOU GET — each week

- **SIGNIFICANT FEDERAL AND STATE DECISIONS** — all the precedent-setting cases establishing new principles of law. Typical headings: Antitrust, Taxation, Insurance, Public Contracts, Labor, Transportation, Trade Regulation, Criminal Law, Public Utilities, Railroads.

- **IMMEDIATE NOTICE OF IMPORTANT NEW FEDERAL AGENCY RULINGS** — among them rulings in the fields of Money and Finance, Aeronautics, Taxation, Public Contracts, Shipping, Labor.

- **SUPREME COURT OPINIONS, IN FULL TEXT** — mailed to you the same day they are handed down — plus Supreme Court Orders, Journals, Docket, Arguments.

- **SUMMARY AND ANALYSIS** — a five minute review of new law, including an incisive analysis of the leading cases of the week.

For further information on the Special **LAW WEEK** introductory offer, write:

**THE BUREAU OF NATIONAL AFFAIRS, INC.**

1231 — 24th Street, N.W., Washington 7, D.C.