The Supreme Court *of* Ohio

Report *and* Recommendations *of the*

Advisory Committee on Case Management Subcommittee on Court Appointments

August 2015

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I. EXECUTIVE SUMMARY.

In January 2015, the Chief Justice appointed a diverse group of experienced lawyers and judges from across Ohio to examine existing Rule 8 of the Rules of Superintendence for the Courts of Ohio governing court appointments.[1] Court appointments are most frequently made for indigent criminal defendants; accordingly, that was the primary focus of our study.

The subcommittee reviewed background material and input from a variety of sources. It conducted a public meeting on February 13, 2015, at which extended comments were received in person from a county prosecutor, several prominent criminal defense lawyers, and the administrative judge of one Common Pleas Court. The subcommittee considered written comments from other active judges and lawyers and a lengthy report submitted by David C. Steelman (Managing Director, Global Justice Management Consulting, LLC), who has consulted on this subject for the National Center for State Courts. With the assistance of Supreme Court of Ohio staff, all active Ohio trial and appellate judges were polled relative to their views on appointment of counsel. Fifty-five percent of the judges polled responded; a summary of findings is an attachment to this report. (See Appendix B, p. 13.)

The subcommittee now recommends some amendment of Sup.R. 8. While a minority of members of the subcommittee would prefer to see more far-reaching changes – essentially to a blind "rotational" system yielding more or less equal numbers of appointments among all persons prequalified for appointments of a particular type – in the view of the majority such a system has significant drawbacks and would be difficult to implement in all 88 Ohio counties. The subcommittee sees no readily apparent evidence of abuse in the current system. Thus, consistent with longstanding practice, each court (or division of a court) should be able to use an appointment system that best fits its needs, its pool of available appointees, and local budget priorities.

To be sure, some input received was critical of the existing system, which generally allows direct appointments by judges or at least appointments made at their direction.[2] Some appear to equate exercises of judicial discretion in making appointments with improper favoritism or a patronage system that encourages corruption. The majority of the subcommittee neither agrees with that assessment, nor sees significant risk to public confidence in the judicial system if modest changes are made to Sup.R. 8 and judicial discretion is preserved.

The training of lawyers and judges teaches that simplistic comparisons and generalizations are a poor substitute for hard evidence. Thus, merely showing that not all lawyers on a court's

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[1] For organizational purposes, our group was a denominated subcommittee of the Court's ongoing Advisory Committee on Case Management. And consistent with the guidelines establishing the advisory committee, the subcommittee included a number of judges and lawyers who do not serve on the Case Management Committee.

[2] Some suggested that appointments ought to be made by court staff, or outside agencies like the public defender's office, in order to further insulate the appointment process from "inappropriate" judicial pressure. Leaving aside the extra cost that adding staff to a court or to a public defender's office would entail, the subcommittee believes it is difficult to see how a judicial officer truly intent on abusing his or her appointment authority would be deterred by an added layer in the process. Conversely, as explained in this report, the appropriate use of judicial experience and discretion in the appointment process would be diminished by such a change.

appointment list receive equivalent numbers of appointments is not meaningful evidence of inappropriate favoritism when other legitimate explanations may explain such an outcome. For instance, such a disparity may indicate nothing more than that better lawyers receive more court appointments. Furthermore, critics of the current system gloss over stringent Ohio ethics rules that restrict the gifts and campaign contributions that judges may accept and which require public reporting of financial contributions from persons appointed by a court. At least as identified for the subcommittee, problems with the current system in Ohio have been isolated and quickly addressed by administrators responsible for those courts. However, the subcommittee has identified some areas where the current appointment system can be improved.

A key premise for any justice system is that one-size does not fit all; all court cases – and all potential court appointees – are not fungible or blindly interchangeable. Individualized judgments are required to operate a justice system, and that is no less true in making court appointments. Consistent with that, the subcommittee recommends that Ohio judges retain discretion to tailor appointments in individual cases to meet the needs of each individual case, the litigant for whom an appointee will work, local resources available to compensate appointees, and similar intangible but proper factors. A criminal defendant challenged in their understanding of the English language is no doubt much better served by appointment of an attorney fluent in their foreign language than by rote appointment of the next person whose name appears on a rotational list, even if an unbalanced number of appointments result over time with a more discretionary system.

The subcommittee does recommend that Sup.R. 8 be amended to affirmatively encourage, as a "best practice," distribution of court appointments as widely as reasonably possible among available candidates (See line 181 of Appendix A, p. 12). A broader appointment system allows newer lawyers to be included on a court's master list more easily after they pass the bar; minimizes pre-screening work for courts; and allows newer practitioners actual experience from the outset of their careers with the promise of more complicated appointments as professional skills are enhanced over time. Broader distribution also minimizes the potential for concern over the fairness of a court's appointment process. However, the subcommittee does not recommend going beyond that and requiring each court to pay close attention to record-keeping of appointments by all individual judicial officers, much less judicial ethics rules to punish judges when appointment statistics appear to be disproportionately distributed among the bar as is the system in Texas[3].

The foremost goals in making court appointments must always be to assure that clients are well-represented, that the appearance of justice is preserved, and that each judicial officer is seen to act in an objectively rational, fair, neutral, and nondiscriminatory manner. The subcommittee believes the recommendations accomplish those goals.

[3] In Texas, the State Commission on Judicial Conduct publicly admonished a judge for failing to comply with the Texas Fair Defense Act and the Hidalgo County Indigent Defense Plan, which requires all courts in the county to appoint attorneys to represent indigent defendants from a rotational public appointment list. The Commission found that Judge Gonzalez had given a disproportionately high percentage of indigent court appointments to attorney Jeanne Holmes over a six-year period. Under the administrative rules of the Texas Indigent Defense Commission, if the top ten percent of appointed attorneys receive more than three times their representative share of appointments, there is a presumption that the appointment system being used is neither fair, neutral, nor nondiscriminatory.

II. ISSUES PRESENTED TO THE COMMITTEE.

The focus of virtually all comments received has been on the process for appointment of counsel for indigent criminal defendants. There are, however, other types of court appointments. Discussion in this report focused upon the criminal field is, in most respects, also applicable to appointments in other areas. Sup.R. 8 (entitled "Court Appointments") applies in all contexts.

The primary questions addressed were: 1) whether a different, blind rotational system that appoints more or less equally from a pre-selected master list should be adopted across Ohio to limit judicial discretion in making appointments in individual cases; and 2) whether other changes in the appointment process are needed, such as whether elected judges should retain any role in making appointments, or instead have court staff, local public defender commissions, or others make all appointments.

III. EXISTING PRACTICE IN OHIO.

Since last amended in 1997, Sup.R. 8 has required appointments by local courts (or divisions of local courts) to be done under a procedure set out publicly in each local court's written rules. Appointments are to be made from a master list maintained by each court of all those willing to accept appointments and who are deemed qualified to serve in a particular capacity or category of cases. This basic process is sound.

Currently, Sup.R. 8 provides that the appointment "procedure shall ensure an ***equitable distribution*** of appointments ***among all persons on the appointment list***." (Emphasis added.) However, "equitable distribution" is not defined in the current rule. Further, the current rule permits a court to consider the "skill and expertise of the appointee" and "the management by the appointee of his or her current caseload." This language already recognizes judicial discretion, and the value of informed consideration of subjective factors in making appointments.

Critics of the current practice encourage the adoption of a system using multiple lists tailored to the various levels of criminal cases to distribute court appointments more or less equally, on a rotating basis. Others approach the subject a bit differently and urge that the optimal system would be one in which individual appointments are done by court staff, or outsiders completely separated from a judge.[4]

Frequently, the subcommittee found the current assignment system is criticized because a relatively small number of lawyers get the lion's share of a court's appointments. However,

[4] A few courts use court magistrates to hold initial arraignments and, in doing so, simultaneously appoint criminal defense counsel. Other courts appoint counsel when charges are first filed, and the defense attorney follows the case after a bind-over to common pleas court. Practically speaking, removing the appointment process completely from any control by the elected judiciary would be impossible in some cases, such as where conflicts appear and the trial judge must appoint new, replacement counsel. More fundamentally, public defender commissions or other "outsiders" would also seem susceptible to the same hypothetical "abuse" by an unscrupulous judge even if control were exercised more indirectly than under the current process. The real protection, as identified by the subcommittee, lies in a conscientious judiciary and appropriate ethics rules, both of which are already in place.

simplistic comparisons between raw numbers of cases given to one lawyer versus another, or between the dollar amount of legal fees paid to one lawyer or another are misleading. Such comparisons may suggest that judges play favorites for improper reasons. However, virtually all of the input received demonstrates that the lawyers appointed most frequently are those perceived to be the best and brightest criminal lawyers available; and that dollar totals of fees paid over a year or more may well reflect only that higher fees necessarily are paid to lawyers handling more complicated cases.[5]

Not only did the majority of commentators assert to the subcommittee that the appointment process was operating appropriately across Ohio, but some pointed out that longstanding ethical rules control exactly how Ohio judges may exercise their appointing authority, accept political contributions in limited amounts, and otherwise interact with the bar. Rules require public disclosure of contributions by court appointees.

Among the rules of importance here are Ohio Code of Judicial Conduct Rules 2.4(B),[6] 2.13(A),[7] and 4.4(C)(2).[8] To the extent political contributions are made by lawyers to judges appointing them – which are of course restricted to only those years in which the judge actually is on the ballot, and which are restricted in total dollar amount – the subcommittee sees no "pay to play" system in force. So, while some court appointees assuredly do respond during election seasons with contributions to judges, relationships between lawyers and judges seem merely inherent in an election-based judicial selection process.

The importance of ethical rules and election-based rules governing the judiciary was highlighted in the very recent decision in *Williams-Yulee v. The Florida Bar*, 575 U.S. ___, 135 S.Ct. 1656, 191 L.Ed.2d 570 (April 29, 2015). The Court cautioned that wholesale changes in judicial conduct rules may trigger unexpected collateral consequences, and hurt the legal system. "A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions," and that seems particularly likely in some of Ohio's smallest counties in which relatively few local lawyers are available to accept court appointments. Similarly, the Court cautioned that changes to judicial conduct rules "could create a perverse inventive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal – a form of peremptory strike against a judge that would

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[5] In 2014 in Franklin County, for instance, the lawyer who received the most court appointments (69 of 2043 cases) was a woman who received at least one appointment from all 17 local Common Pleas Court judges; the next five most frequently appointed defense lawyers received assignments from either 15 or 16 (of 17) separate judges.

[6] Rule 2.4(B) provides: "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

[7] Rule 2.13(A) provides: "In making administrative appointments, a judge shall do both of the following: (1) Exercise the power of appointment *impartially* and on the basis of merit; (2) Avoid nepotism, favoritism, and unnecessary appointments."

[8] Rule 4.4(C)(2) provides: "A *contribution* from any appointee of the court unless the campaign committee, on its campaign *contribution* and expenditure statement, reports the name, address, occupation, and employer of the appointee, identifies the person as an appointee of the court, and indicates whether the appointee, in the current year or in any of the previous six calendar years, received *aggregate* compensation from court appointments in excess of two hundred fifty dollars."

enable transparent forum shopping." (*Williams-Yulee,* Slip Op. at p. 19.) The subcommittee suggests that unintended consequences are avoided by limiting changes made to Sup.R. 8.

Finally, survey results from judges across Ohio are attached as Appendix B. In a surprisingly uniform fashion, they express reservations about changes to the existing appointment system, particularly if changes imposed additional financial cost. As it is, many Ohio counties struggle to find adequate funds to compensate appointed counsel. Demanding structural changes to the appointment process, or even adding new record-keeping obligations to assure that a rotational system of appointments was in fact operating more equally – without a clear need to do so – might only exacerbate financial pressure on many local courts.

IV. ALTERNATIVES CONSIDERED.

Essentially three types of appointment systems are used across America. For simplicity they may be described as a "small pool" system, which undeniably permits rotation among everyone on a preapproved list; a rotational process using a larger list; and some hybrid of the two. The subcommittee believes the best practice for Ohio remains the latter system.

A. Small Pool System

In a "small pool" appointment system, a court closely screens all available candidates for inclusion on a master appointment list. Marginal or less experienced candidates are excluded or removed from the list. Such a system has the benefit that appointments can thereafter rotate more or less equally across the small pool of potential appointees, because all on the list are presumed to be of uniform quality with all others on the list. In theory at least, such a system should result in a relatively equal number of court appointments for each person on the master list over time.

One commentator suggested to our committee that with this process "[j]udges can still control the quality of the many lists by developing strict requirements of experience, skill, and continued education for who gets on and stays on each specialty list." However, the specification of attorney qualifications for representation of indigent felony defendants must be set at a level that promotes quality representation in individual cases, without narrowing the pool of "eligible" public or private criminal defense attorneys so much that the capacity of the indigent defense system to meet the requirements of due process at a constitutionally satisfactory level is critically undermined.[9] It seems overly optimistic to suggest that most local courts have time, staff, or inclination to develop and enforce "strict requirements of experience, skill, and continued education" as one commentator urged. To the contrary, experience teaches that many courts perform only a cursory pre-screening before admitting lawyers to their appointment list, knowing that they retain discretion to limit assignments later if they sense a lawyer is not appropriate for a particular case, is inattentive to their cases, or lacks the experience to deal with particular types of clients or cases. Admitting lawyers freely to an appointment list that

[9] David Steelman, *Felony Indigent Defense Assignments in Cuyahoga County, Ohio* (July 2013).

does not guarantee actual appointments opens the door for newer lawyers, without tying a court's hands.

Another concern is with the risk that due process hearings may be required when a lawyer is not added to or is removed from a small pool list. (The law around the country is unclear as to whether a lawyer being removed from a court appointment list is entitled to some due process hearing, but that risk is avoided when a lawyer is merely passed over in a more subjective appointment system.)

Finally, the subcommittee cautions against the risk inherent in a "small pool" process because the final appointment list may appear to favor appointees bringing certain favored characteristics. For instance, a tight selection process yielding a small pool of potential lawyers may be perceived as favoring those more often producing settlements or guilty pleas rather than those actually trying their cases.

B. Rotational System

At the opposite end of the conceptual scale is a large master list, to which virtually any lawyer in good standing can be added fairly readily. Historically Ohio's practice has been that once admission to the bar is granted by the Supreme Court of Ohio that local courts are obligated to be receptive to all lawyers, unless disciplinary rules can be shown to have been violated. But, for indigent criminal cases – particularly involving felony level crimes – generously distributing appointments among a large group of lawyers with a rotation system may well tie inexperienced lawyers to complex cases, resulting in greater cost to the system and harm to individual defendants who had no role in selecting counsel.

The benefit of rotating assignments among those on a larger master list is that it avoids some of the difficulties with the "small pool" system.[10] However, simply "pairing the defendant's level of offense with an attorney who meets the qualifications of assignment" often proves to be more art than science, because cases are not fungible. The "level of offense" approach is helpful, but used without oversight it can overlook an individual defendant's lack of education or mental health challenges. English language may tax some, while others may simply be antagonistic toward the legal system. Some criminal defendants mistrust lawyers of another race or gender, defense lawyers employed by a public defender, or those who are former prosecutors. Odd things like past representation sometimes create subtle issues, such as when a particular lawyer previously represented the person now charged with a new crime or represented one of their family members – perhaps in the view of the prospective client quite unsuccessfully. So, although most

[10] Local Rule 3.09 of the Montgomery County Common Pleas Court is one example of a system that appears to function well. It provides that "[a]s far as is practical, assignment [of counsel] shall be independent from individual influence or choice by any member of the judiciary, prosecution, or other elected official and distributed as widely as possible among attorneys on the Appointed Counsel list on a rotating basis, designed to pair the defendant's level of offense with an attorney who meets the qualifications of assignment." This is an often-cited example of how a best practice system might function statewide consistent with "equitable distribution" of court appointments.

courts find it useful to assign counsel based in part upon the "level of offense," because, as a generality, a level-one felony is more complex than a level-four or level-five criminal charge, that is not a completely foolproof method of analysis. Even lower-level charges can prove complicated in individual cases involving cell phone tower logs, DNA evidence, ballistics, or other unusual evidentiary issues.[11]

More importantly, not every lawyer has the patience or skill to overcome difficulties in dealing with every individual defendant. Judicial officers operating from experience can often avoid undue delay in managing cases, and assist disagreeable defendants by appointing a more experienced lawyer bringing special skill and understanding to their work. A pure rotational system, even one categorizing cases by level of offense, lacks this flexibility.

C. Hybrid System

A third way to approach the appointment of counsel is to use a blend of the foregoing approaches. Local courts should always make a genuine effort to share assignment of cases as widely as reasonably possible. This best serves the public interest. Yet, using too small a pool for assignments or blind assignments without applying individual judgment from a larger pool is not appropriate.

Based upon all the input received, the vast majority of Ohio judges do distribute court appointments equitably, in part because existing ethics rules deter abuse. When specific appointment systems are identified as not operating equitably and in accordance with Sup.R. 8, they should be brought to the attention of either the Administrative Judge in the specific court or, if necessary, the Case Management Section of the Supreme Court of Ohio. This should trigger expedient and meaningful resolution of any perceived difficulties. The Case Management Section is highly professional and well versed in working with local courts so that they operate equitably and efficiently. We deem it unnecessary to add to existing court bureaucracy by instituting tighter oversight rules or a much more formalized statewide system for monitoring court appointments, despite the fact that some other states have done exactly that. Presentation made to the committee made it clear that individual courts and administrative judges are able and willing to implement immediate changes to rectify inequitable appointment processes, and prevent recurrence when such matters are brought to their attention.

Yet, to reiterate what has been said before, a variety of factors must properly be considered in making court appointments. Local resources available to compensate appointees and the pool of people available to accept appointment vary widely across all 88 counties. The anticipated complexity of each individual case, not merely the numerical level of the crime charged, should be open to consideration, along with mental health, language, or other challenges facing the party for whom someone is being appointed.

[11] No one disputes that any appointment list should attempt to categorize lawyers by their experience handling different types of cases. A lawyer qualified for defense in a murder case should ordinarily have greater experience than someone appointed in an F-4 or F-5 case. However, the reverse is not always true.

Conflicts of interest must be avoided in making appointments. Properly exercised, therefore, there is no substitute for an individual judge balancing many factors in making an appointment in an individual case. This best guarantees that appointees will offer timely, cost-effective, quality representation to each prospective client, and that the public will continue to have individualized justice.

V. THE COMMITTEE'S RECOMMENDED AMENDMENTS TO SUP.R. 8.

The subcommittee recommends that courts (and individual judicial officers) use some system of "equitable distribution" for appointments among persons pre-qualified for particular types of cases or appointments, but that Sup.R. 8 recommend each court's system distribute appointments as widely as reasonably possible. However, no single system for making appointments, or which seeks to assure a substantially equal number of appointments to everyone on a list should be required statewide. Individual courts should remain free to adopt appointment systems. One-size-fits-all is not required.

The subcommittee's recommended language (consistent with language used earlier this year for appointment of counsel in capital cases under the Rules for Appointment of Counsel in Capital Cases, Rule 5.05) seeks to encourage local courts to distribute appointments widely. As has been true for nearly two decades, individual courts remain obligated to define their appointment system by local rule. In addition, the recommended amendment of Sup.R. 8 *explicitly* clarifies that all appointments must be made in an objectively rational, fair, neutral and nondiscriminatory manner.

APPENDIX A

RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO

RULE 8. Court Appointments.

(A) Definitions

As used in this rule:

(1) "Appointment" means the selection by a court or judicial officer of any person or entity designated pursuant to constitutional or statutory authority, rule of court, or the inherent authority of the court to represent, act on behalf or in the interests of another, or perform any services in a court proceeding. The term "appointment" does not include the selection by a court or judicial officer of the following:

(a) An acting judge pursuant to R.C. 1901.121(A)(2)(a), (B)(1), or (C)(1) or 1907.141(A)(2)(a), (B)(1), or (C)(1);

(b) A receiver pursuant to R.C. 2735.01;

(c) An arbitrator, mediator, investigator, psychologist, interpreter, or other expert in a case following independent formal or informal recommendations to the court or judicial officer by litigants;

(d) Any individual who is appointed by any court pursuant to the Revised Code or the inherent authority of the court to serve in a non-judicial public office for a full or unexpired term or to perform any function of an elected or appointed public official for a specific matter as set forth in the entry of appointment.

(2) "Appointee" means any person, other than a court employee, receiving ~~a court~~ an appointment ~~who is selected~~ by ~~the~~ a court or judicial officer. ~~"Appointee" does not include a person or entity who is selected by someone other than the court.~~

(3) "Equitable distribution" means a system through which appointments are made in an objectively rational, fair, neutral, and nondiscriminatory manner and are widely distributed among substantially all persons from the list maintained by the court or division of persons pre-qualified for appointment.

(4) "Judicial officer" means a judge or magistrate.

(B) Local rule

(1) Each court or division of a court shall adopt a local rule ~~of court~~ governing appointments made ~~by~~ in the court or division. ~~The~~

(2) The local rule required by division (B)(1) of this rule shall include all of the following:

~~(1)~~(a) ~~A~~ For appointments frequently made in the court or division, a procedure for selecting appointees from a list maintained by the court or division of persons ~~qualified~~ pre-qualified to serve in the capacity designated by the court or division. The procedure shall ensure an equitable distribution of appointments ~~among all persons on the appointment list~~. ~~The~~ To ensure an equitable distribution of appointments, the court or division may ~~consider the skill and expertise of the appointee in the designated area of the appointment and the management by the appointee of his or her current caseload~~ utilize a rotary system from a graduated list that pairs the seriousness and complexity of the case with the qualifications and experience of the person to be appointed. The court or division may maintain separate lists for different types of appointments.

~~(2)~~(b) A procedure by which all appointments made ~~by~~ in the court or division are reviewed periodically to ensure the equitable distribution of appointments ~~among persons on each list maintained by the court or division.~~;

~~(3)~~(c) The ~~manner of~~ compensation ~~and rate at which persons appointed~~ appointees will ~~be compensated~~ receive for services provided and expenses incurred as a result of the appointment, including, if applicable, a fee schedule.

~~(C)~~(3) The local rule required by division (B)(1) of this rule may include ~~qualifications~~ the following:

(a) Qualifications established by the court or division for inclusion on the appointment list~~, the~~;

(b) The process by which persons are added to or removed from the appointment list~~, and other~~;

(c) Other provisions considered appropriate by the court or division.

(C) Factors in making appointments

In making appointments, a court or judicial officer shall take into account all of the following:

(1) The anticipated complexity of the case in which appointment will be made;

92 (2) Any educational, mental health, language, or other challenges facing the
93 party for whom the appointment is made;
94
95 (3) The relevant experience of those persons available to accept the
96 appointment, including proficiency in a foreign language, familiarity with mental
97 health issues, and scientific or other evidence issues;
98
99 (4) The avoidance of conflicts of interest or other situations that may
100 potentially delay timely completion of the case;
101
102 (5) Intangible factors, including the court or judicial officer's view of a
103 potential appointee's commitment to providing timely, cost-effective, quality
104 representation to each prospective client.
105
106 **(D)** ~~If~~ **Payment of fees**
107
108 (1) Except as provided in division (D)(2) of this rule, if a party or other person is
109 required to pay all or a portion of the fees payable to an appointee, the appointee
110 promptly shall notify that party or person of the appointment and the applicable fee
111 schedule. The court or division shall require the appointee to file with the court or
112 division and serve upon any the party or other person required to pay all or a portion of
113 the fees itemized fee and expense statements on a regular basis as determined by the
114 court or division. If the party or other person required to pay all or a portion of the fees
115 claims that the fees are excessive or unreasonable, the burden of proving the
116 reasonableness of the fees is on the appointee.
117
118 (2) Division (D)(1) of this rule shall not apply to the repayment of all or part of the
119 costs of indigent defense by a criminal defendant as a condition of probation.
120
121 (3) The notification requirement of division (D)(1) of this rule may be satisfied with
122 service upon counsel of record as provided in the applicable rules of procedure.
123
124 **(E) Code of Judicial Conduct**
125
126 In making appointments, a court or judicial officer shall conform to all applicable ethical
127 and campaign finance restrictions and requirements of the Ohio Code of Judicial
128 Conduct.
129
130 **(F) Effect of inclusion on appointment list**
131
132 Persons on a list maintained by the court or division of persons pre-qualified to serve are
133 not assured a substantially equal number of appointments. No person is granted a legal
134 right or claim by virtue of this rule.
135
136
137
138

Commentary (July 1, 1997)

Rule 8 requires each court or division of a court to adopt a local rule outlining the procedures to be followed within the court or division for making court appointments. Division (B)(2) of the rule specifies three general items that must be included in each local appointment rule. Together with division ~~(C)~~(B)(3), division (B) provides courts and divisions with flexibility as to the specific content of the local rule in recognition of the different types of appointments that are made in various courts and divisions.

The rule contemplates that each court or division will maintain a list from which appointments will be made. Lists of potential appointees would be required only for appointments frequently made ~~by~~ in a court or division, such as the appointment of counsel in criminal cases. However, a list would not be required for appointments rarely made ~~by~~ in the court or division, such as the appointment by a probate court of an appraiser for a rare art collection.

~~Division (D) requires that a notice of appointment and regular fee and expense statements be provided to a party or other person who is required to pay all or a portion of an appointee's fees. This requirement may be satisfied with service upon counsel of record as provided in the applicable rules of procedure. If a criminal defendant is required, as a condition of probation, to repay all or part of the costs of indigent defense, notice under this division is not required.~~

~~The rule does not apply to the appointment of "acting judges" pursuant to R.C. 1901.10, 1901.12, or 1907.14 or to the appointment of attorneys pursuant to a contractual arrangement, such as with a multi-county public defender program.~~

Commentary (XXXX, 2015)

The 2015 amendments to this rule primarily address questions that have arisen about appointment of counsel for indigent criminal defendants, but in key respects also apply to all court appointments. The amendments are intended to make the following clarifications:

- The rule does not apply to appointments made by a public defender office or other entity outside the control of a court or judicial officer;

- The rule applies to post-sentencing selection by a court or judicial officer;

- That all applicable ethical and campaign finance restrictions and requirements in Ohio's Judicial Conduct Rules apply to every appointment made by a court or judicial officer;

- That the appointment system used by courts or divisions ensures the equitable distribution of appointments, but does not require a blind rotation system among all those available for appointment or a substantially equal number of appointments to everyone on an appointment list. The goal of equitable distribution is to distribute appointments as widely as reasonably possible among available appointees, but without limiting the discretion used in individual courts and individual cases. Studies show the availability of potential appointees across the state varies widely and that a large majority of responding judges seek to maintain their discretion in making appointments. As has been true for nearly two decades, individual courts remain obligated to adopt an appointment system by local rule. In addition, this amendment clarifies that all appointments are to be made in an objectively rational, fair, neutral and nondiscriminatory manner even though judicial officers may take into account many factors including the complexity of individual cases, special needs of a party, avoidance of conflicts of interest, time constraints in a case, and the judicial officer's experience with a potential appointee and perception of their commitment to providing quality representation to each client.

APPENDIX B

ASSIGNMENT OF COUNSEL TO INDIGENT DEFENDANTS AND ALLEGED JUVENILE OFFENDERS

Survey Results Summary

Background

Emails were sent to individual judges on April 7, 2015, with a link to a survey designed for the particular judge's jurisdiction. The deadline to complete the survey was indicated in the email as April 20, 2015. A reminder was sent on April 15, 2015.

Response Rate

Court	Judges Who Received Survey	Number of Responses
Appellate Courts	68	26
Common Pleas General Division	238	135
Common Pleas Juvenile Division	104	67
Municipal and County Courts	233	123

Who Appoints Counsel?

Slightly more than half of the responders indicated that the judge is the person typically responsible for appointing counsel to indigent persons. Responders from the Common Pleas Juvenile Division reported the lowest rate at 40 percent.

Court	Judge	Magistrate	Public Defender's Office	Independent Entity or Court Staff
Appellate Courts	42%	12%	0%	7%
Common Pleas General Division	53%	12%	11%	12%
Common Pleas Juvenile Division	40%	15%	6%	7%
Municipal and County Courts	65%	0%	19%	8%
Overall	**54%**	**8%**	**9%**	**13%**

How are Cases Assigned?

Few responders reported randomly selecting counsel through a computer algorithm or otherwise by chance. Instead, responses were mixed among rotating basis, selectively assigned, and other.

Court	Random Selection	Rotating Basis	Selectively Assigned	Other
Appellate Courts	0%	30%	35%	35%
Common Pleas General Division	2%	21%	56%	22%
Common Pleas Juvenile Division	6%	32%	28%	35%
Municipal and County Courts	2%	31%	27%	40%
Overall	**2%**	**27%**	**38%**	**31%**

Some examples of the other responses included:

- "On a rotating basis but only among qualified attorneys for that level of offense."
- "Attempt to rotate; appoint more experienced counsel to complex cases."
- "Contract public defenders are appointed on a rotating basis. Other additional appointments are chosen by the judge."

Do You Prefer to Keep Your Present Court Appointment System?

Overall, 83 percent of responders preferred to keep their present court appointment system, while 10 percent would favor a change to their system, provided it had no material budget impact.

Court	Change Regardless of Cost	Change if No Budget Impact	Prefer to Keep Present
Appellate Courts	12%	12%	76%
Common Pleas General Division	9%	8%	83%
Common Pleas Juvenile Division	2%	11%	88%
Municipal and County Courts	6%	13%	82%
Overall	**7%**	**10%**	**83%**

For those responders who preferred to keep their present court appointment system, 35 percent indicated they selectively assign counsel (assigned as deemed appropriate / person appointing is free to select any lawyer on the list), while 28 percent indicated they assign counsel on a rotating basis (every attorney on the list receives an appointment before receiving a second).

Is Your Court's Appointed List Graduated?

Whether a court's appointed list was considered graduated – meaning some lawyers were deemed qualified only for F4 and F5 appointments or some lawyers were qualified to represent persons with mental health issues – varied widely among courts.

Court	Graduated	Not Graduated
Appellate Courts	12%	88%
Common Pleas General Division	72%	28%
Common Pleas Juvenile Division	39%	61%
Municipal and County Courts	41%	59%
Overall	**50%**	**50%**

The majority (58 percent) of responders who maintained a graduated list indicated that they used a lawyer's actual trial experience, their own personal knowledge (or court personnel's knowledge), or an interview to determine which category(ies) a lawyer is qualified for.

What Indigent Defense System Best Describes Your Court?

Ohio's indigent defense system consists of County Public Defenders, which includes County offices and also agreements with Non-Profit Corporations, Court-Appointed Counsel, and the Office of the Ohio Public Defender. Most responders indicated they would describe their indigent defense system as using court appointed counsel only (36 percent) or a combination of court appointed counsel and the county public defender's office (30 percent).

Court	Court Appt. Only	County Public Defender	County Contract w/Non-Profit	Contract w/ State PD	Combo County PD & Court Appt.
Common Pleas General Division	36%	19%	1%	4%	40%
Common Pleas Juvenile Division	45%	22%	3%	1%	28%
Municipal and County Courts	34%	35%	4%	5%	22%
Overall	**36%**	**13%**	**2%**	**4%**	**30%**

The Supreme Court *of* Ohio

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