

A View from the Trenches:

A Preliminary Report on the Status of Indigent Criminal Defense in Texas*

Allan K. Butcher, Ph.D
Co-Chair, State Bar of Texas Committee on the Provision
of Legal Services to the Poor in Criminal Matters
201 Main Street, Suite 1300
Ft. Worth, TX 76012
817-336-3600 (voice)
817-877-3928 (fax)
email: allan@why.net

Michael K. Moore, Ph.D
Department of Political Science
University of Texas at Arlington
Arlington, TX 76015
817-272-3996 (voice)
817-272-2525 (fax)
email: mmoore@uta.edu

Do not cite, quote, or distribute without the authors' permission.

*The authors wish to acknowledge the assistance of Heather Heaton, Ellen Lazuras, Leah Cook, and Kathy Winans. We would especially like to thank Marjorie Asturias, Robin Baldwin, J. Thomas Pearce, Marcia Rachofsky, and Heather Robison who provided invaluable assistance in gathering and preparing the data. Support for this project was provided by the State Bar of Texas Committee on the Provision of Legal Services to the Poor in Criminal Matters.

In 1994, the State Bar of Texas established a standing committee on the provision of legal services to the poor in criminal law matters. The charge or mission of the committee was:

. . . to study the system of defense of indigent persons in criminal law matters in Texas, collect data and other information relevant to their defense and to develop recommendations for action by the State Bar of Texas, the Texas Legislature, and all other entities that are or should be involved in the provision of quality representation to indigent persons involved in criminal law matters.

The committee was initially composed of 40 members selected by the President of the State Bar. These members were all practicing attorneys and included trial court judges, prosecutors, defense attorneys, and both state and federal public defenders. At the first meeting of the group, a consensus developed around the recognition that before doing anything else, we had to learn what was presently being done with regard to meeting the needs of the poor in criminal law matters. As a result, the Committee agreed that its first task would be to gather information which it could then use to determine its goals and the paths to those goals.

Gathering Data

The Survey. In Texas, the counties are responsible for providing indigents with counsel and the other requisites for defending against criminal charges. Yet, the Committee noted, there had never been a systematic study of how the poor in this State are given representation in criminal matters. Given that there are some 254 counties in Texas, each of which has devised its own system for responding to this need, there was an obvious need to learn what was being done in this area before the Committee could intelligently discuss what changes or improvements should be made.¹

¹ While the overwhelming number of counties have opted for a version of the court appointed counsel system, one county uses a public defender system (Wichita County) and a few

Not only did the committee not know how the counties were handling this responsibility, there was nothing but anecdotal information that could be used to evaluate the current system: Were attorneys generally satisfied with the current system? Was the system in need of major reform or minor modifications? Did these assessments vary by jurisdiction? These, and a host of other questions, needed to be answered before the committee could proceed with policy recommendations to the entire Bar. Equally important, if ultimate policy recommendations are to have a chance of success with the Texas Legislature, it was essential that the Bar be armed with appropriate data to defend its positions.

While some information, such as the number of indigent cases per jurisdiction, could be gleaned from existing public records, much of the information we required was only available from the people who were actually involved in these tasks and filing this role. To gain this information, the Committee decided to design and administer a survey to a sample of the criminal defense bar. Over a period of several months, therefore, a sub-committee worked to develop and refine an appropriate survey instrument which was then taken back to the whole committee and approved.

The final version of the questionnaire consisted of over 60 questions of both a closed-ended and open-ended format. These questions were grouped in five broad categories:

First, respondents were asked to provide information regarding the current method used to provide representation for indigents in their jurisdictions. Questions in this section include queries to determine how attorneys are appointed and how indigent status is typically determined

(e.g., Dallas, Tarrant, El Paso counties) use a combination of public defenders and court appointed attorneys.

in the various counties. Given the large number and the diversity of these counties, we were interested in determining the different means used and the degree of consistency that existed for these fundamental decisions throughout the state.

Second, respondents were asked to evaluate the level of support, both as to attorney remuneration and the provision of support services provided by the courts. Based on anecdotal comments and the experience of the committee members, we had reason to believe that court-appointed attorneys in many areas of the state were not adequately compensated, that they were frequently denied (or deterred from seeking) essential support services, and that these circumstances adversely affected their ability to provide appropriate defense. Specifically, respondents were asked about their experiences and observations regarding whether current compensation and support levels attracted qualified counsel and whether these affected the quality of representation provided by counsel.

Third, to determine the "real wages" or the "effective rate" of the attorneys' fees and thereby the reasonableness of the fees being ordered by the courts, the respondents were queried about costs associated with a criminal defense practice in their counties. One of the Committee's chief concerns was that in many areas of the state, members of the criminal defense bar were actually subsidizing the counties. It was believed that instead of being a burden equally shared by all members of the community, or even all members of the bar, criminal defense attorneys were being asked to provide their professional services for compensation that barely covered - - or even failed to cover - - their overhead costs. Thus, relative to the rest of the community - - and particularly relative to the rest of the bar - - criminal defense attorneys were thought to be carrying an unfair share of the costs associated with the communities' responsibility for defending

indigents charged with criminal offenses. To evaluate this issue, respondents were asked to provide us with an evaluation of their costs and other economic factors of their practices. We also asked respondents to characterize the size and nature of their practice so that we could get a sense of the type of attorney who typically represents indigent defendants in Texas.

Fourth, the survey asked several questions that required the respondent to evaluate the quality of representation provided by retained and court-appointed counsel. Specific questions focused on possible differential disposition trends, plea offers, and treatment by judges. Respondents were also asked to compare their *own* efforts at representing retained and appointed defendants as well as evaluating a variety of suggested reforms.

Finally, respondents were asked a variety of demographic questions. In addition to traditional questions on gender and ethnicity, questions in this section were designed to determine the respondents' level of experience in trial and appellate courts, as well as the distribution of their cases between retained and appointed defendants.

The Sample and Survey Administration. To determine the appropriate sample, staff members of the State of Bar of Texas sought to identify the attorneys who regularly practice criminal defense law in Texas. Three sources of information were finally chosen and used to prepare the sampling frame: (1) all those Board Certified in criminal law; (2) all subscribers to the State Bar's *Criminal Law Digest*; and (3) all members of the Texas Criminal Defense Lawyers Association. After removing duplicate names and the names of all prosecutors and judges, these sources yielded a population of roughly 6,000 criminal defense lawyers. Using this list, 3,000 names were randomly selected to compose our sample.

The survey instrument was administered by the Research Division of the State Bar of

Texas employing a variation of the Total Design Method (Dillman 1978).² This method has routinely secured 50 to 60 percent response rates in mail surveys of general population samples and even higher response rates for more specialized populations. Don Dillman explains the goal of his method as follows:

The appeal of the TDM is based on convincing people first that a problem exists that is of importance to a group with which they identify, and second, that their help is needed to find a solution. The researcher is portrayed as a reasonable person who, in light of the complexity of the problem, is making a reasonable request for help, and, if forthcoming, such help will contribute to the solution of that problem. The exchange the researcher seeks to establish is broader than that between him or herself and the questionnaire recipient, that is, if you do something for me, I'll do something for you. Rather, the researcher is identified as an intermediary between the person asked to contribute to the solution of an important problem and certain steps that might help solve it. Thus the reward to the respondents derives from the feeling that they have done something important to help solve a problem faced by them, their friends, or members of a group including community, state, or nation, whose activities are important to them. (1978: 162-3)

To this end, the assistance of Judge Michael McCormick, the Presiding Judge of the Court of Criminal Appeals (the court of last resort in Texas), was secured. About two weeks before the survey was mailed, a letter written by Judge McCormick was mailed to each member of the sample stressing the importance of the study and urging the respondents to participate. The actual questionnaires were then sent with a cover letter signed by the President of the State Bar requesting that respondents complete and return the surveys. About a month after the mailing of the questionnaires, a follow-up letter was sent to those in the sample who had not yet responded.

The response rate for the survey was 46 percent (n=1,376) reaching attorneys in 88

² Don Dillman, 1978. *Mail and Telephone Surveys: The Total Design Method*. New York, NY: Wiley Press.

percent of the 254 counties. The five most populous counties were adequately represented (Harris [Houston] n=249, Dallas n=155, Bexar [San Antonio] n=149, Tarrant [Fort Worth] n=110), and Travis [Austin] n=65]. Male respondents constituted 83.5 percent of the sample. Over 80 percent of the respondents were white (81 percent); the rest of the sample was comprised of 11.7 percent Hispanic, 5.0 percent black, 1.4 percent Native American, and 0.9 percent Pacific Islander. The typical respondent had been practicing criminal defense law for 12 years. Nearly a majority of the sample (48 percent) reported that the number of court-appointed cases they handle each year has declined as their careers progressed. This finding would seem to support the conventional wisdom that court-appointments are used by young attorneys to gain experience and as a source of income in the early stages of their careers. Perhaps more importantly, this finding suggests that a large percentage of indigent criminal cases are handled by young, less experienced members of the bar.

Some Preliminary Findings

The large number of respondents from almost every corner of Texas provides the Committee with a wealth of information related to the status of indigent criminal defense in the various counties. While all the findings and conclusions are too numerous to detail here, we would like to report some preliminary findings in each of the areas noted above.

Appointment Method. To say that respondents have mixed evaluations of the current court-appointment system would be a considerable understatement. The tone of overall responses to our survey ran the gamut from complete satisfaction with the entire system to a belief that the system was rotten to the core. An indication of this diversity of opinions occurred at the very outset of the survey where respondents were asked how satisfied they were with the

current method of appointing counsel in indigent cases in their jurisdiction. Of those responding, 46.7 percent indicated they were either somewhat satisfied or very satisfied. In contrast, 37.7 percent of the respondents indicated they were either somewhat dissatisfied or very dissatisfied with the remaining respondents expressing neither satisfaction or dissatisfaction.

In appointing counsel, the court must first determine whether the defendant is indigent. The process of determining indigence is quite varied across the counties and presents the court with a difficult decision. As stewards of the county's money, the court has a responsibility to provide counsel only to defendants who are truly indigent. At the same time, the court has a responsibility to ensure that everyone so entitled receives appropriate legal representation. Texas law does not provide criteria to be used in determining indigence, instead leaving the decision to each jurisdiction. The result is a system that appears to require, for most defendants, that the defendant remain in jail in order to qualify for court-appointed counsel. A clear majority of our respondents (64.8 percent) report that if the defendant is in jail and unable to make bail, the court considers them indigent and eligible for court appointed counsel. The criteria used in various jurisdictions for determining indigence are presented in Table 1.

Table 1
Criteria Used For Determining Indigence Status

<u>Method</u>	<u>Percent</u>
In Jail/Unable to Make Bail	64.8
Ability to Pay Determined	13.3
Formal Evaluation	9.4
Judge Decides	5.2
Defendant Requests Counsel	4.8
Other	1.4
Food Stamp Eligibility	1.2
(n = 1192)	

If the defendant is judged to be indigent, arguably the most critical decision in the

representation of indigent defendants is the act of appointing counsel. While almost all jurisdictions in Texas use a court-appointed system, a variety of methods of appointing counsel exist. The marginals from the question which asked respondents to describe the appointment process in their jurisdiction are presented in Table 2.

Table 2
Methods of Appointing Counsel in Indigent Cases in Texas

<u>Method</u>	<u>Percent</u>
Judge appoints	53.2
Clerk or court personnel appoints	29.3
Judge appoints and/or volunteer	12.7
Other	2.5
Affirmatively volunteer	1.5
Rotating list of attorneys	0.6
District Attorney appoints	0.1
(n=1,333)	

Two findings are worthy of special attention. First, a majority of respondents report that the judge makes the appointment decision. This is particularly important given that judges in Texas are elected on partisan ballots. In open-ended answers, respondents noted that politics frequently influence the appointment process.³ Second, two respondents report that the district attorneys in their jurisdictions make the appointments which are then confirmed by the judges. While the number of respondents making this observation is small, these responses are very troubling since it appears that the prosecution is selecting the attorneys, and thereby the quality of

³ The "politics" influencing the process were quite varied. Some respondents indicated that friends of the judge and political allies were rewarded with court appointments. These appointments might be understood as "positive politics." At times, however, appointments may be seen as a punitive action. Some respondents report that judges give difficult and problematic cases to attorneys they dislike. These appointments might be understood as "negative politics."

defense, they wish to argue against.

The process of appointing defense counsel seems to vary little by the type of case. Only 22.4 percent of the respondents indicate that special procedures exist for selecting counsel in difficult or complex cases (e.g., mentally ill, death penalty).

Level of Support and "Effective Rate." As noted above, the Committee had reason to believe that in many cases the criminal defense bar was not adequately supported by the court and was, in effect, subsidizing the legal expenses of indigent defendants. The picture painted by respondents is quite clear. Consider the following:

- 63.7 percent of the respondents report that they are either somewhat or very dissatisfied with the current system of compensation.
- 72.8 percent of the respondents report that they have spent their own money on indigent related litigation expenses.
- 76.4 percent of the respondents indicate that current compensation rates are not sufficient to attract and retain qualified private counsel.
- 39.4 percent of the respondents report that support staff (e.g., investigator, criminalist) frequently or always receive higher levels of compensation than court-appointed counsel.
- Respondents report that the level of compensation provided by the court is, on average, 27.5 percent of their normal fee.

Quality of Representation. Given these responses, it should not be surprising that nearly three-quarters of all respondents (74.5 percent) report that retained counsel usually or always provide better representation than court-appointed counsel. Specifically, 39.5 percent of the respondents indicate that plea offers are better for clients with retained counsel and 26.2 percent report that clients with retained counsel usually or always receive more favorable sentencing decisions. Surprisingly, in response to a query that asked respondents to evaluate their *own* effort

in representing indigent clients, 39.2 percent report that they spend less time on their court-appointed clients relative to their retained clients and 25.6 percent concede that their retained clients usually or always receive better representation.

Finally, with an eye toward reforming the current system, respondents were asked to evaluate a variety of proposals ranging from no changes whatsoever to increasing compensation levels for the court-appointed system to developing a statewide public defender system. The option preferred by a clear majority of the respondents (62.5 percent) was to retain the current court-appointed system while increasing attorney fees. The second most popular reform was the implementation of a centrally coordinated and regulated assigned-counsel system to replace the judge-appointed system. Little support for either a county-based or statewide public defender system was found among the respondents. In fact, more respondents indicated their preference for "no changes necessary" than for either form of a public defender system.

Taking the Next Steps

A project that began nearly two years ago is nearing completion of its first phase. With data from the criminal defense bar in hand, the Committee plans to proceed with four additional steps. First, the survey data will be analyzed and the results distributed in variety of venues. A brief executive summary of the results will be provided to interested respondents and an article summarizing our major findings is planned for the State Bar's monthly journal. Additionally, we plan to present our findings at academic conferences and publish the results in appropriate academic and law journals. To this end, a paper entitled "An Insider's View of a Broken System? Attorney Perspectives on the Status of Indigent Criminal Defense in Texas" will be presented at

the annual meeting of the Southwestern Political Science Association in March 1997.

Second, the Committee plans to gather data from additional perspectives. As noted at the outset, the Committee consists of members from the criminal defense bar, prosecutors, and judges. Having gathered the perspectives of the defense bar, it is important that we now gather information from judges and prosecutors. Collecting data from these sources will serve two important functions. First, it will afford us the opportunity to gather different perspectives to some of the more disturbing trends noted by respondents to the defense attorneys' survey. For example, one impression created by the current survey's findings is of a system of young, inexperienced attorneys who are frequently appointed for political reasons and who are hamstrung in their efforts to represent their clients by low levels of support services. Are these merely the impressions of a self-serving defense bar or are these perceptions also held by prosecutors and judges? If responses from defense attorneys can be confirmed by information gathered from judges and prosecutors, the Committee will have more compelling and convincing evidence. Second, and related to the previous point, recommendations from the Committee are likely to have a greater chance of success if they are based on complete information. When making the case to policy-makers, it seems reasonable to expect a request for data from judges and prosecutors. By completing surveys of these two groups we will be better armed to defend our proposals.

Third, we will propose that the Committee host a symposium on the status of indigent defense to be held in Spring 1997. The aim of this conference will be to bring together national experts to discuss various systems of delivery of indigent defense and related issues. We hope to be able to attract academics, policy-makers, and practitioners concerned with indigent defense.

Finally, to complete the Committee charge, the Committee will work on recommendations for the State Bar to present to its membership and to the Texas Legislature. Once data have been gathered and analyzed, we should be in a position to make informed and reasoned recommendations for consideration in the next biennium.

To date, the work of the State Bar of Texas Committee on the Provision of Legal Services to the Poor in Criminal Matters has resulted in an unprecedented gathering of information related to the status of indigent defense in Texas. As a result of this and future efforts, the Committee and the State Bar are now in a position to make a valuable contribution to improving the quality of the indigent defense system in Texas.