

STATE BAR OF TEXAS
COMMITTEE ON THE PROVISION OF LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS
EXECUTIVE SUMMARY

THE STATUS OF INDIGENT DEFENSE IN TEXAS: THE CRIMINAL DEFENSE BAR'S PERSPECTIVE

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January 10, 1997

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

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.

The Sample. 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 chosen 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 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 response rate for the survey was 46 percent (n=1,376) reaching attorneys in 88 percent of Texas' 254 counties. The five most populace counties were adequately represented (Harris [Houston] n=249, Dallas n=155, Bexar

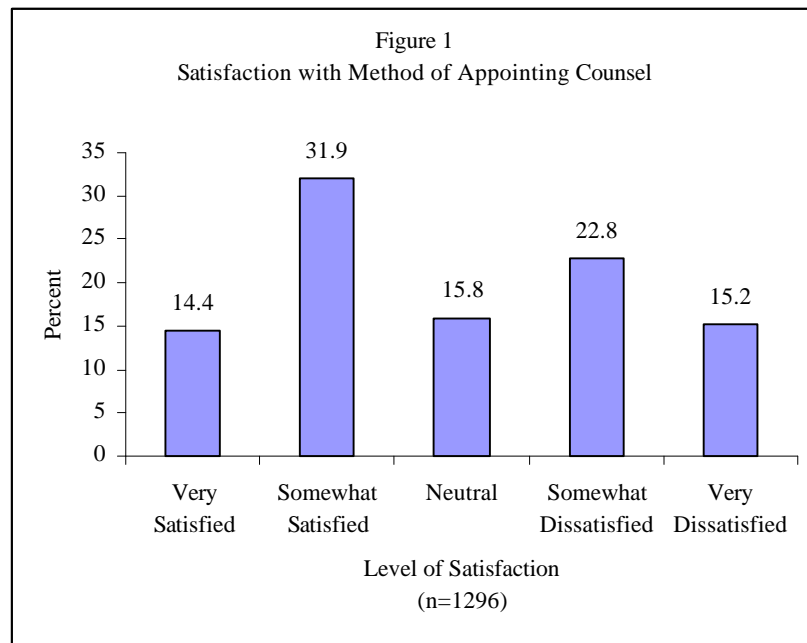
¹ While the overwhelming number of counties have opted for a version of the court appointed counsel system, one county uses a public defender system (Wichita County) and a few (e.g., Dallas, Tarrant, El Paso counties) use a combination of public defenders and court appointed attorneys.

[San Antonio] n=149, Tarrant [Fort Worth] n=109, 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.² 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 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.

AN EVALUATION OF THE APPOINTMENT PROCESS

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 the survey ran the gamut from complete satisfaction with the system to a belief that the system was rotten to the core. An indication of the diversity of opinions occurred at the very outset of the survey where respondents were asked "how satisfied are you with the current method of appointing counsel in indigent criminal cases in your jurisdiction?"

Of those responding, 46.4 percent indicated they were either somewhat satisfied or very satisfied (see Figure 1). In contrast, 37.8 percent of the respondents indicated they were either somewhat dissatisfied or very dissatisfied, with the remaining respondents expressing neither satisfaction or dissatisfaction.



Since each county has devised its own system for responding to the needs of indigents, it is not surprising that there is a great deal of variety in how defense counsel are selected in indigent criminal cases. As a practical matter, just over half (53.1 percent) of the respondents indicated that the judge is responsible for making the appointment while 29.4 percent indicate that a clerk, court coordinator, or other administrative personnel of the court is responsible for making the appointment. The remaining respondents indicated they are appointed because they volunteer or are on a rotating list. Perhaps most shocking, a very small number of respondents noted that the district attorney in their jurisdiction

² These numbers are just slightly different than those reported by Cynthia L. Spanhel and Leah V. Shimatsu in "A Profile of Minority Lawyers In Texas" (Texas Bar Journal, October 1996). Spanhel and Shimatsu examine the entire bar, both civil and criminal, and report that the Texas Bar is composed of 4.8 percent Hispanic/Latinos, 3.2 percent Africa-Americans, and 0.2 percent Native-Americans.

selects the defense counsel. Finally, fewer than half of the respondents (40.9 percent) indicated that the court uses formal criteria for selecting court appointed counsel in complex, serious, or special cases (e.g., mentally ill).

Respondents overwhelmingly (79.5 percent) indicated that most courts maintain a list from which to select court appointed attorneys. There is, however, tremendous variety in how lawyers are included on the list. For example, in Bexar County attorneys may opt off the list by paying a fee to the court. A detailed listing of various methods used in maintaining the list are presented in Table 1. The responses ranged from simply volunteering, to being deemed qualified by the court, to being politically connected. The role "politics" plays in the process is particularly disturbing. One respondent noted that "El Paso County has long practiced a system whereby lawyers are appointed based on political favors and paybacks. You're talking about judges who appointed large number of cases to attorneys who ran plea-mills in exchange for kickbacks." Another attorney wrote "I have been refused appointments because I cannot afford to give money to the judge's reelection campaign."

Table 1
Methods Used to Maintain Lawyer List

Method	Percent
Volunteer and be deemed qualified by court	32.0
Volunteer	30.5
All lawyers included	15.6
Volunteer and participate in CLE	5.1
Volunteer, be qualified by court, and CLE	3.5
All included unless opt out	2.8
Be politically connected	2.8
Other	1.3
Don't Know	6.5
(n=1084)	

Once appointed to represent an indigent defendant, there appear to be very few efforts to formally monitor the quality of the representation provided by defense counsel. Of those responding, 4.4 percent of the respondents indicated that formal monitoring provisions existed, 26.3 percent noted that informal provisions existed, and 42.7 percent indicated that no provisions existed. The belief that monitoring procedures (either formal or informal) are not in place in most jurisdictions places a great deal of importance on the quality of the initial appointment. Given the general lack of oversight, it would seem that great care should be placed in the appointment process. This conclusion is a bit disconcerting in light of the fact that nearly half of the respondents indicated that all attorneys in their jurisdiction are included on a list or can be appointed by simply volunteering.

Determining Indigent Status. In appointing counsel, the court must first determine whether the defendant is indigent. 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. The process of determining indigence is quite varied across the counties and tends toward 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 other criteria used in various jurisdictions for determining indigence are presented in Table 2. Overall, 40.8 percent of the respondents indicate that they are either very dissatisfied or somewhat dissatisfied with the current method of determining indigence. Finally, just under a one-third (32.5 percent) of the respondents indicated that their jurisdiction had written criteria for determining indigence.

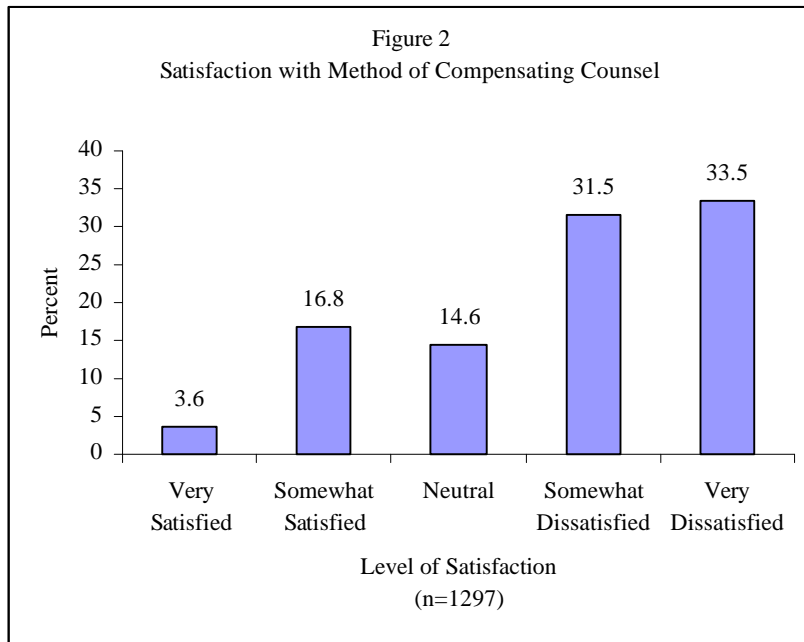
Table 2
Criteria Used For Determining Indigence Status

Method	Percent
In Jail/Unable to Make Bail	64.8
Ability to Pay Determined	13.1
Formal Evaluation	9.4
Judge Decides	5.1
Defendant Requests Counsel	4.6
Food Stamp Eligibility	1.0
Other	1.5

(n=1161)

AN EXAMINATION OF THE LEVEL OF SUPPORT

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. The findings from the survey would seem to support these anecdotal impressions. Overall, respondents are quite dissatisfied with the current system for compensating appointed counsel in indigent cases. As Figure 2 reveals, nearly two-thirds of the sample are either somewhat dissatisfied or very dissatisfied with the current compensation system.



Several causes for the low levels of satisfaction are evident from the survey responses. Respondents indicate that they recoup less than one-third (29.3 percent) of their normal fee (the fee they would receive if they were defended the same case on retainer) when they do court appointed work. One respondent noted "I sometimes cringe when I get appointed to a felony cases that will go to trial. I know that it will not be a financially viable endeavor for me. As such, I try to balance minimizing the work with ensuring that the defendant receives a fair trial. An attorney can't afford to neglect the rest of his practice to focus on any one case when he knows that the one case will barely cover his overhead." An overwhelming number of respondents (76.6 percent) noted that the level of compensation was not sufficient to attract and retain qualified private counsel. Moreover, respondents (67.2 percent) indicated that the level of compensation affects the quality of representation provided to indigent defendants in their county. One respondent observed "Practicing in a small rural county (approx. 6,000 population) indigent defendants normally get the best defense I can afford. Unfortunately this is not always the best available or even the best I am capable of. Economics of survival

dictate that you do what pays the bills first - - occasionally at the expense of indigents."

Respondents also indicate that in addition to compensation levels being low, they are frequently placed in a position of absorbing the costs associated with indigent criminal defense. Nearly three-quarters (72.9 percent) of all respondents indicated that they have spent money out of their own pocket for litigation related expenses for which they were not reimbursed in court appointed cases. Having to spend their own money is not a rare occurrence since respondents indicate that this practice happens in over one in four cases (27.5 percent).

Finally, respondents were asked to access the level of special support services (e.g., investigator, criminalist, forensic expert) provided in court appointed cases. A clear majority of respondents (60.4 percent) believe they do not receive the support services necessary to represent their indigent clients. The picture painted by respondents is one where the nature of the defense may very well be shaped by the court's decisions. Over ninety percent (91.2 percent) of the respondents indicate that they must always obtain prior approval before using special services, that about one-third (31.6 percent) of the requests are denied, and that in a nearly four in 10 cases (39.4 percent) the support staff either frequently or always receive more compensation than the appointed counsel. One respondent observed that "It is a disgrace when a court reporter makes more for preparation of the statement of facts than the lawyer makes for representing a defendant."

The difficulty in obtaining appropriate support services appears to have a wide range of influences on the representation provided by court appointed counsel. Some respondents indicated that if they requested support services they would be denied future appointments, while others appear so frustrated with the process that they no longer request support services. A detailed listing of the consequences of denying or restricting services is presented in Table 3. Perhaps most disturbing is that the denial of services appears to impair the attorneys ability to put on a quality defense. One respondent noted "The lack of investigative resources is a constant problem. Lawyers don't win cases, investigators do." Another noted, "The hoops counsel must jump through - and the fee juggling to sell certain expenses to the bean counters and politician judges - always is a chilling influence on criminal defense."

Table 3
Consequences of Denial of Special Services on Representation of Indigents

<u>Consequence</u>	<u>Percent</u>
Denied Services or Receive Only Poor Services	42.3
Reduced Quality of Defense	30.9
Attorney Pays For Services	7.8
Makes Representation More Difficult	4.6
Denial Has Minimal Effect	4.3
Request for Services Leads to Denial of Future Appointments	3.0
Forces Attorney to Plea Case	1.5
Varies By Case	1.2
Services Are Always Granted	0.9
Other	1.8

(n=669)

DETERMINING REAL WAGES

To determine the "real wages" or the "effective rate" of the attorney's fees and thereby the reasonableness of the fees being ordered by the courts, respondents were queried about costs associated with a criminal defense practice in their counties. Respondents were asked to provide an evaluation of their costs and other economic factors of their practices. We also asked respondents to characterize the nature of their practice so that we could get a sense of the type of attorney who typically represents indigent defendants in Texas.

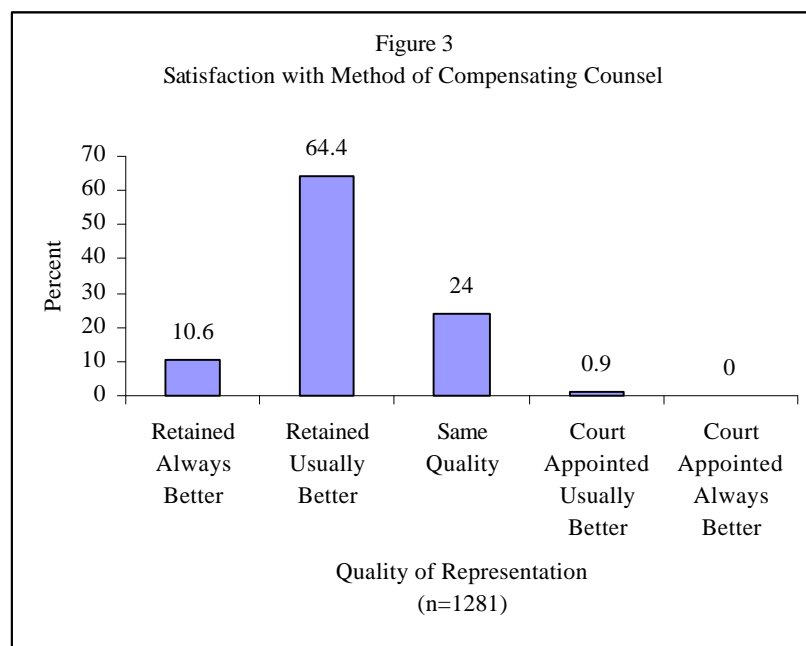
Two-thirds of the respondents indicated that they were sole practitioners. Of those in offices with more than one attorney, 47.2 percent of the respondents indicate they are in an office sharing arrangement. When asked to estimate their approximate total monthly overhead, the mean response was \$6,114.79 (the median response was somewhat less at \$3,500.00). Respondents also indicated that roughly half (52.4 percent) of their normal fee goes to cover overhead expense.

Perhaps most helpful in determining the cost of doing business are responses to a series of questions which asked respondents to tell us how much they receive for certain types of representation. For respondents who bill by the hour, the average hourly rate in criminal cases was \$135.68. For those who billed a flat fee per case, respondents

charge, on average, \$629.89 for a misdemeanor plea; \$1,704.23 for a misdemeanor trial; \$1,5803 for a felony (non-capital) plea; and \$4,588.47 for a felony (non-capital) trial. A few respondents indicated that they bill on a flat fee per appearance basis and the average rate charged per appearance was \$306.03. This information should prove a valuable assist as the committee compares the costs of doing business to the fees provided to attorneys in court appointed cases.

ASSESSING THE QUALITY OF REPRESENTATION IN COURT APPOINTED CASES

Finally, the survey asked several questions that required respondents to evaluate the quality of representation provided by retained and court-appointed counsel. Given the low level of satisfaction related to compensation, it is perhaps not surprising that respondents tend to believe that retained counsel provide better representation than court appointed counsel. In fact, as Figure 3 notes, nearly three-quarters of all respondents (74.6 percent) report that retained counsel usually or always provide better representation than court-appointed counsel. When asked to evaluate themselves, respondents typically reported that they provide the same level of representation for their retained and court appointed clients (74.1 percent). However, a quarter of respondents (25.7 percent) did volunteer that, in their own work, they provide better representation to their retained clients.



Having a court appointed lawyer can, according to the respondents, have real consequences in the disposition of the case. Roughly four in ten respondents (39.6 percent) report that clients with retained counsel receive better plea offers and one in four respondents (26.2 percent) report that retained clients tend to receive more favorable sentencing decisions.

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 most preferred option was to retain the current court-appointed system while increasing attorney fees.

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 similar surveys of the prosecutors and judges. Collecting data from these sources will serve two important functions. First, it will afford us the opportunity to gather different perspectives on 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 the 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, policy 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.

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. Once again, we thank you for your contribution to this important effort.