

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

**THE STATUS OF INDIGENT DEFENSE IN TEXAS: THE JUDICIARY'S PERSPECTIVE**

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In 1994, the State Bar of Texas established a standing committee on Legal Services to the Poor in Criminal Matters. The charge 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 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 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 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.<sup>1</sup>

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 those working in the courts generally satisfied with the current system? Was the system in need of major reform or minor modifications? Did these assessments vary by jurisdiction or the size of the county? 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 armed with appropriate data to defend its positions.

While some information 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 surveys to samples of the criminal defense bar, prosecutors and judges.

*The Sample.* Using a list of judges supplied by the Texas Judicial Council, all judges having criminal jurisdiction were mailed a survey and various follow-up reminders by the State Bar of Texas under the supervision of Marcia Rachofsky. A total of 846 surveys were mailed and 494 were returned for a response rate of 58.4 percent. Just over 85 percent of the responding judges were white (85.9 percent); the rest of the sample was comprised of 8.6 percent Hispanic, 1.9 percent black, 0.4 percent Native American, and 3.2 percent who classified themselves as Other.® The

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<sup>1</sup> 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 Falls) and a few (e.g., Dallas, Tarrant, and El Paso counties) use a combination of public defenders and court appointed attorneys.

sample was 84 percent male, 54.5 percent Democratic, and the typical respondent fell into the 41-50 years of age category. Two-thirds of the judges responding (66.8 percent) were District Judges, had been associated with criminal law for 23.8 years, and had been in their present judgeship for 10.2 years. An overwhelming majority of the sample reported attending continuing legal education courses sponsored by the Texas Center for the Judiciary (93.1 percent) and the State Bar of Texas (81.8 percent), however, relatively few members of the sample attend CLE courses sponsored by the TCDLA (24.3 percent) or the TDCAA (10.5 percent). Only 7.5 percent of the judges in this sample report being Board Certified in criminal law. The typical judge in our sample hears cases in a county with a population of 606,137, however, judges in our sample report being from counties as small as 3,750 residents and as large as 5,000,000 residents.

#### AN ASSESSMENT OF THE APPOINTMENT PROCESS

One of the Committee's goals in conducting this survey was to gain a better understanding of the process used to provide legal services to indigents charged in criminal matters. Not only were we interested in the actual procedures used to appoint counsel, but also the procedures used to determine whether an individual is indigent, what factors influence these decisions, and how satisfied members of the judiciary were with the current procedures. As noted earlier, the counties in Texas are responsible for providing legal services to indigents and, not surprisingly, counties have adopted a variety of methods of providing these services. Twenty-six percent of the respondents indicate that their county is authorized to use a public defender, however, only 49.1 percent of these respondents report that their county actually makes use of the public defender even though they are authorized by statute to do so. Given that the prevailing model of providing legal services is the court appointed counsel system, it should come as little surprise that a majority (54.5 percent) of judges in this sample prefer this model (Slightly or Strongly) to the public defender model (see Table 1).

TABLE 1

#### PREFERENCES FOR ASSIGNED COUNSEL AND PUBLIC DEFENDER SYSTEMS COMPARED

Strongly prefer the public defender system over the court appoint counsel system	12.2%
Slightly favor a public defender system instead of a court appointed counsel system, but not strongly	11.9%
Do not have a preference for either system	21.2%
Slightly favor a court appointed counsel system instead of a public defender system, but not strongly	19.6%
Strongly prefer the court appointed counsel system over the public defender system (n=444)	34.9%

Over three-quarters (77.2 percent) of all judges responding to the survey report that they (or someone else using their criteria) make the determination that an individual is indigent and, therefore, entitled to legal services provided by the court. In making this determination, just over half (51.9 percent) of the responding judges report that they make use of formal written criteria and 72.4 percent report that they are satisfied with the current method utilized for determining a defendant's indigent status.

Once a defendant has been certified as indigent, the court must provide the accused with legal services, which in Texas most often will mean assigning private defense counsel. Sixty-five percent of judges responding to this survey reported that they are responsible for assigning counsel, while 10.5 percent indicate that a court clerk or other administrative personnel makes the appointment. While the majority of judges claim responsibility for the final appointment decision, they also note that other people influence the appointment decision. Most judges indicate that court reporters (88.5 percent), court clerks (86.5 percent), and the District Attorney (88.7 percent) have no influence over the appointment process, but 55.3 percent of the respondents indicate that the Court Coordinator has at least some influence in the appointment process.

Results from our earlier surveys of defense attorneys and prosecutors suggested that several additional factors, might play a role in a judge's decision of whom to appoint as counsel. Our earlier results suggested that factors such as the nature of the case, the speed with which an attorney disposes of a case, and even political and personal factors might influence the appointment decision. To determine the veracity of these claims, we asked judges to evaluate how much weight a variety of factors played in their appointment decision. The results of this inquiry are presented in Table 2. As

you can see, all of the factors played at least some role with some of respondents. Clearly, factors such as the difficulty of the case, an attorney's expertise and experience, and an attorney's ability to move a case quickly and in a quality fashion played important roles in the decision to appoint counsel. However, nearly half of the judges report that simply being able to move the case quickly, regardless of the quality of defense and whether the attorney is a friend of the judge also play a role. Roughly one-quarter of judges report that they consider whether the attorney is a political supporter or contributed to their campaign and nearly 40 percent report that they may use appointments as a means to supplement a retired or semi-retired attorney's retirement funds. Finally, it is interesting to note that nearly nine of ten judges (89.1 percent) report that they are "somewhat" or "very" satisfied with their method of appointing counsel, but only 60.7 percent believe their method would be a good model for other members of judiciary to follow.

TABLE 2

FACTORS WHICH INFLUENCE A JUDGE'S DECISION TO APPOINT COUNSEL

	<u>Always</u>	<u>Usually</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>	
Difficulty of the case	44.7%	38.7%	15.1%	0.7%	0.9%	(n=450)
Defendant's need for specialized knowledge or skill (e.g., a mental illness or retardation issue or a similar unusual need)	31.9%	43.8%	20.7%	2.2%	1.3%	(n=445)
Attorney's degree of knowledge and experience	34.5%	49.0%	15.4%	0.4%	0.7%	(n=449)
Attorney's reputation for moving cases, regardless of the quality of defense	2.5%	7.9%	13.1%	25.5%	51.1%	(n=444)
Attorney's reputation for moving cases, but consistent with a quality defense	10.8%	37.1%	33.7%	10.3%	8.1%	(n=445)
The attorney is your friend	0.0%	0.9%	20.5%	23.5%	54.9%	(n=448)
The attorney is one of your political supporters	0.0%	0.7%	12.8%	14.9%	71.6%	(n=444)
The attorney contributed to your campaign	0.0%	0.7%	10.6%	13.1%	75.7%	(n=444)
Attorney's expressed desire to be appointed	14.1%	33.0%	38.6%	8.3%	6.1%	(n=446)
To give attorney courtroom experience	0.9%	4.2%	48.7%	25.0%	21.2%	(n=448)
Attorney's need for income	0.9%	1.8%	39.5%	25.1%	32.7%	(n=446)
A retired or semi-retired attorney who uses appointments to supplement retirement funds	0.4%	0.2%	15.0%	22.8%	61.5%	(n=447)

ASSESSING FINANCING MATTERS

Another Committee objective has been to evaluate financial issues related to the indigent criminal defense system. This broad rubric of issues includes everything from whether defense counsel have access to the necessary special support services they require to properly litigate their case to how well defense counsel are compensated for their work to budgetary pressures felt by the court.

One perception created by responses to our Committee's survey of defense lawyers was a view that compensation was substantially below that normally paid for similar retained work and this level of compensation had deleterious effects on the quality of their work. To some extent, this perception was confirmed by results from our survey of prosecutors (the results from both of these surveys may be viewed at [www.uta.edu/pols/moore/indigent/indigentdefense.htm](http://www.uta.edu/pols/moore/indigent/indigentdefense.htm)). Naturally, we were curious to discover the perceptions judges would have of this situation. Sixty-eight percent of the judges report that they have paid more than the fee schedule allows and 59 percent report that they never pay less than allowed by the schedule. This stands in stark contrast to the

findings from our survey of defense attorneys. Over three-quarters (77.0 percent) of the judges also note that they vary the fees they pay by the complexity of the case.

When asked to comment on the consequences of the current level of compensation, 49.1 percent believe that current rates are sufficient to attract qualified counsel to represent indigent defendants and 62.4 percent report that the level of pay does not in any way affect the quality of the assigned counsel's work. Finally, a clear majority of judges in our sample (65.1 percent) believe that defense counsel generally receive the special services (e.g., investigator, criminalist, forensic experts) they need to represent their indigent client.

The monies used to compensate assigned defense counsel and special service providers necessarily comes from county revenues distributed through the court's budget. As a strictly legal matter, judges can order the payment of any and all expenses related to the provision of indigent legal services. The reality of that matter, however, is quite different as judges may feel constrained by their budget or by political pressure from county commissioners when making financial decisions. Indeed, two-thirds of judges report that budget considerations have influenced their decision to compensate appointed counsel (68.0 percent) and their decision to approve special services (66.6 percent). Roughly one-quarter of the judges in this sample report that they have been approached by county commissioners about controlling their court's general budget (27.6%) and their indigent defense budget specifically (28.0 percent). Finally, 33.5 percent of judges report that they feel their indigent defense budget is not sufficient and they would like it increased by an average of 47 percent.

#### ASSESSING THE QUALITY OF REPRESENTATION

A final area of concern for our Committee is the quality of legal representation received by indigent criminal defendants. Respondents were asked to evaluate the work performed by court appointed counsel and the quality of representation provided to indigent defendants. The general perception seems to be that court appointed counsel may not be as prepared or experienced as retained counsel, however, judges feel there is no evidence that indigent defendants receive different treatment from the judge.

Specifically, a majority of our sample report that court appointed counsel and prosecutors are equally prepared (55.7 percent) and equally experienced (53.2 percent). However, in sharp contrast, 42.7 percent of the judges report that they believe prosecutors are typically better prepared than their court appointed counterparts and 31.2 percent report that retained clines are more experienced. In a similar fashion, 52.2 percent of judges report that retained and court appointed counsel provide the same quality of representation, while 42.0 percent report that retained counsel usually or always provide better representation than court appointed counsel.

Judges responding to our survey also indicate that there may be some reason to believe that retained and court appointed counsel approach their cases differently. While 48.1 percent report retained and court appointed counsel appear to devote equal amounts of time to preparing, 48.7 percent of the judges indicate that retained counsel spend more time in preparation than court appointed counsel. Nearly four in ten of the judges (39.8 percent) report that they have noticed an individual defense counsel behave differently depending on whether counsel is representing a retained or indigent client. Judges who noticed this different behavior report that the defense counsel devotes less time, is less well prepared, and puts on a less vigorous defense when he or she represents an indigent client. Despite behavior which would raise concerns among many observers, judges overwhelmingly report that they treat all defendants equally (92.2 percent) and that clients with retained and court appointed counsel receive similar sentencing decisions (92.2 percent).

#### TAKING THE NEXT STEPS

A project that began several years ago has now completed its final stage of gathering information. With data from criminal defense attorneys, prosecutors, and judges now in hand, the Committee will proceed to examine the results from these three perspectives of the criminal justice process. As the report above makes clear, while there are many areas of agreement among the three surveys, there are also many areas of stark disagreement. One common ground that does emerge from all three surveys is a commitment by all parties to provide quality legal representation to our state's poor.

To date, the work of the State Bar Committee on 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.