

**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 PROSECUTOR'S PERSPECTIVE**

Prepared by Michael K. Moore, Ph.D.

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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.<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 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 surveys to samples of the criminal defense bar, prosecutors, and judges

*The Sample.* Using a list provided by the Texas District and County Attorneys Association (TDCAA), all criminal prosecutors were mailed a survey and various follow-up reminders. A total of 1,942 surveys were mailed and 1,113 were completed and returned for a response rate of 57 percent. Over 85 percent of the respondents were white (86.1 percent); the rest of the sample was comprised of 9.6 percent Hispanic, 2.8 percent black, 0.7 percent Native

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

American, and 0.5 percent Pacific Islander.<sup>2</sup> The typical respondent had practiced law for 10.3 years and been a prosecutor for 7.3 years. Twenty-eight percent of the respondents indicated that they are permitted under statute to engage in the private practice of law and these respondents devote an average of 20 percent of their time to their private practice. Sixty-seven percent of the respondents attend continuing criminal legal education (CLE) courses sponsored by the State Bar of Texas while nearly all (90 percent) report attending TCDAA CLE courses. Finally, roughly a quarter (27.5 percent) of the respondents subscribe to the *Criminal Law Digest* and only 6.6% of the prosecutors responding are Board certified in criminal law.

## AN EVALUATION OF THE APPOINTMENT PROCESS

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 when respondents were asked "how satisfied are you with the current method of appointing counsel in indigent criminal cases in your jurisdiction?" Of those responding, 53.3 percent indicated they were either somewhat satisfied or very satisfied. In contrast, 20.7 percent of the respondents indicated they were either somewhat dissatisfied or very dissatisfied, with the remaining respondents expressing neither satisfaction or dissatisfaction.

In nearly three-quarters of the cases (72.2 percent), respondents report that the judge makes the appointment. Respondents also indicate that court personal such as court reporters, individual court clerks, district attorneys, and court coordinator play a minimal role in the appointment decision. While prosecutors are of the collective opinion that judges typically act alone in making the appointment of assigned counsel, they also believe that judges are influenced by a variety of factors. As the data in Table 1 indicate, prosecutors believe that decisions to appoint counsel are influenced by factors such as the attorneys reputation for moving cases quickly and in a quality manner (71.1 percent *A*moderate@or *A*some), being friends with the judge (47.5 percent *A*moderate@or *A*some@), being a political supporter of the judge (37.4 percent *A*moderate@or *A*some@), and being a campaign contributor (29.5 percent *A*moderate@or *A*some@). What is perhaps most disturbing about the data presented in Table 1 is that 23.4 percent of the respondents report that appointments are made simply because the attorney has a reputation for moving the case, *regardless of the quality of defense* (only 37.5 percent reported this was never a factor).

TABLE 1

### FACTORS THAT INFLUENCE THE APPOINTMENT DECISION

	<u>None</u>	<u>Some</u>	<u>Moderate</u>	<u>Substantial</u>
Attorney reputation for moving cases, but consistent with a quality defense	10.7%	17.9%	27.7%	43.7%
Being friends with the judge	26.5	25.9	23.8	23.7
Being a political supporter of the judge	37.4	25.3	19.5	17.9
Being a campaign contributor	45.4	25.1	16.8	12.7
Attorney reputation for moving cases, regardless of the quality of defense	37.5	39.0	17.5	5.9

## AN EXAMINATION OF THE LEVEL OF SUPPORT

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<sup>2</sup> 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.

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 our survey of members of the defense bar supported this view. Additional support can be found for only some of these points among the respondents to the prosecutors survey.

Nearly two-thirds (62.2 percent) of the prosecutors responding indicated that the judge's personal relationship with the appointed attorney can affect the amount of compensation the attorney receives. The level of compensation is also perceived, by some, to affect the quality of representation provided by some court appointed counsel. Over one-third (37.4 percent) believe the current levels of compensation are not sufficient to attract quality private counsel and 38.3% believe that the compensation levels affect the quality of indigent representation in their county. There is little support among prosecutors responding to this survey that court appointed defense counsel are denied special services or that such denials are of any substantial consequence. Sixty percent of the respondents indicate that they believe that defense counsel generally receive the necessary support services and 66.5 percent report that the denial of services rarely or never affect the quality of representation.

Perhaps the most interesting set of responses pertains to how attorneys change their behavior depending on whether their client is indigent or non-indigent. Sixty percent of those responding indicate that they have observed an attorney treat their retained and court appointed cases differently. As the data in Table 2 indicates, these attorneys devote less time, are less prepared, and put on a less vigorous defense for their indigent clients. When asked to speculate as to the cause of the behavioral change for these attorneys, 73.6 percent responded that money or lack of compensation was at the root.

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TABLE 2

CHANGES IN ATTORNEY BEHAVIOR WHEN REPRESENTING INDIGENT AND NON-INDIGENT CLIENTS

	<u>Yes</u>	<u>No</u>
Do attorneys devote less time to their indigent clients?	90.2%	9.7%
Are attorneys less prepared to defend their indigent clients?	76.1	23.9
Do these attorneys put on a less vigorous defense of their indigent clients?	65.7	33.9

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ASSESSING THE QUALITY OF REPRESENTATION IN COURT APPOINTED CASES

To better gauge the possible differences between court appointed and retained counsel, prosecutors were asked a number of questions about the behavior and treatment of the two types of attorneys. When defense attorneys were surveyed, many reported that court appointed defense attorneys devoted less time to their cases, were offered different pleas, and were treated differently by the judge. The responses from our survey of prosecutors provide limited support for many of these claims. For example, of the prosecutors responding, 89.2 percent report that plea offers are the same for defendants with court appointed or retained counsel, 89.7 percent report that judges treat both classes of defendants equally, and 89.7 percent believe the sentencing decisions are similar for both groups.

Prosecutors do, however, provide some evidence that indigent defendants may be treated differently than their non-indigent counterparts. While 54.4 percent of those responding indicate that the attorneys representing the two classes of defendants are equally experienced over one-quarter (27.6 percent) report that defendants who retain counsel usually or always have more experienced representation. Similarly, 57.2 percent report that retained and court appointed counsel provide equitable representation for their clients, while 38.7 percent report that retained counsel usually or always provide better representation and 56.4 percent indicate retained counsel usually or always spend more time preparing. What is somewhat surprising about these responses is that better representation, additional preparation time, and more experience does not translate into noticeable differences in judicial outcomes.

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 three years ago is nearing completion of its second phase. With data from the criminal defense bar and prosecutors in hand, the Committee plans to proceed with similar survey of judges with criminal jurisdiction. Collecting data from this final source will serve two important functions. First, it will afford us the opportunity to gather a final perspective on some of the more disturbing trends noted by respondents to the first two surveys. For example, one impression created by the survey of the defense bar 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. In contrast, prosecutors responses create an interesting paradox by suggesting that some defense attorneys behave differently when representing indigent clients, but then suggest that the lack of effort and experience does not translate into noticeable difference in judicial outcomes. These are clearly two very different perspectives on the current system. If responses from defense attorneys and prosecutors can be confirmed by information gathered from judges, 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 all participants in the judicial process -- defense attorneys, prosecutors and judges. By gathering surveys from all these 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.