

❖ **THE FAIR DEFENSE REPORT** ❖

**ANALYSIS OF
INDIGENT DEFENSE PRACTICES IN TEXAS**

A REFERENCE REPORT BY THE
TEXAS APPLESEED FAIR DEFENSE PROJECT

DECEMBER 2000

❖ **THE FAIR DEFENSE REPORT** ❖

**ANALYSIS OF
INDIGENT DEFENSE PRACTICES IN TEXAS**

A REFERENCE REPORT BY THE

TEXAS APPLESEED FAIR DEFENSE PROJECT

DECEMBER 2000

TEXAS APPLESEED is a nonprofit, nonpartisan public interest law center organized to build social and economic fairness in Texas by providing an effective voice for individuals and groups that otherwise are unable to obtain adequate representation in the legal process. Texas Appleseed works through attorneys and community leaders to achieve systemic improvements that promote the equal administration of justice, ensure the fair allocation of public resources, and advance the interests of social, economic and political equity.

Gregory Huffman, *Administrative Chair*
Thompson & Knight, P.C.*, Dallas

Annette LoVoi, *Executive Director*

J. Chrys Dougherty, *Administrative Vice Chair*
Graves, Dougherty, Hearon & Moody, P.C.*, Austin

Bill Beardall, *Legal Director*

Allan Van Fleet, *Administrative Vice Chair*
Vinson & Elkins, LLP.*, Houston

Dominic Gonzales, *Community
Involvement Director*

*affiliations listed for purpose of identification

TEXAS APPLESEED
512 E. Riverside Drive, Suite 212
Austin, Texas 78704
tel. (512) 804-1633
fax (512) 804-1634
www.appleseeds.net/tx

© 2000, Texas Appleseed. All rights reserved. Any reproduction of the material herein must credit Texas Appleseed. The Fair Defense Report is available for free from Texas Appleseed at www.appleseeds.net/tx

This report and the analysis of indigent defense systems in Texas being conducted by the Texas Appleseed Fair Defense Project are supported by a grant from the Center on Crime, Communities and Culture and the Program on Law & Society of the Open Society Institute. Additional generous support has been provided by The Arca Foundation, the Hogg Foundation for Mental Health, the National Mental Health Association, the Public Welfare Foundation, the Southern Poverty Law Center, the State Commissions Project (a project of the American Bar Association Bar Information Program and the U.S. Department of Justice, Bureau of Justice Assistance), and the Appleseed Foundation. Special thanks are also due to the Texas Appleseed officers and board of directors who have given their time and legal expertise to the project.

TABLE OF CONTENTS

About This Report

The Movement for Indigent Defense Improvement In Texas and the Nation	1
Why This Research By the Fair Defense Project Was Necessary	3
Overall Methodology	4
Table: Counties in the On-Site Research Sample	5

Part I

Indigent Defense Practices in Non-Capital Felonies and Misdemeanors

CHAPTER 1: INTRODUCTION	9
Methodology for Research on Representation in Non-Capital Felonies and Misdemeanors	10
CHAPTER 2: THE PROVISION OF INDIGENT DEFENSE SERVICES IN TEXAS	12
A. Introduction	12
B. Texas Has No Centralized Source for Indigent Defense Data	13
C. Overview of the Sample Counties' Indigent Defense Systems	15
1. Assigned Counsel Programs	15
2. "Buy-Out" or "Opt-Out" Plans	16
3. Public Defender Programs	17
4. Contract Defender Programs	19
D. Defense Counsel's Independence from the Judge	21
E. Texas Court Structure's Effect on Indigent Defense	22

F. Qualifications for a Lawyer to Represent Indigent Criminal Defendants	24
G. Appointment of Counsel Process	25
1. Indigency Determination	25
2. Counsel Not Appointed for Those Out on Bond	26
3. Uncounseled Guilty Pleas	28
4. Timing of Appointment of Counsel	29
5. No Pre-indictment Counsel for Those Felony Defendants Out on Bond . . .	31
H. Role of Pre-trial Services Agencies	31
I. Case Processing and Early Entry of Counsel for Defendants	32
J. Examining Trials	33
K. Trial Rate	33
L. Funding for Indigent Defense Services	34
1. Low Compensation for Court-Appointed Counsel	35
2. Investigators and Experts	36
3. Pressure From County Commissioners to Cap Costs	37
M. Imbalance of Resources for Prosecution and Defense	38
N. Attorney Training Opportunities	38
O. Issues Related to Texas' Diverse Population	39
P. Immigration Consequences of Criminal Convictions	40
Q. Problems Unique to Rural Areas	41
R. Case-Tracking Technology Underutilized	42

CHAPTER 3: FINDINGS ON INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL FELONIES AND MISDEMEANORS	43
1. There is a complete absence of uniformity in standards and quality of representation among the indigent defense systems in the 23 Texas counties we studied.	43

2.	Lack of judicial accountability is a major problem in most of Texas' indigent defense systems.	43
3.	Texas counties are not accountable for the quality or structure of their indigent defense systems.	43
4.	In most of Texas' indigent defense systems, there are few mechanisms to guarantee that defense lawyers are consistently held accountable for the quality of representation they provide to indigent defendants.	43
5.	Lack of consistency and accountability result in wide and unjustifiable disparities in the treatment received by indigent defendants and their defense counsel, from county to county and court to court.	43
6.	The wide and uncontrolled discretion given to judges over attorney selection and compensation at the very least creates the potential for conflicts of interest and the appearance of conflicts of interest.	44
7.	The majority of judges we spoke with firmly believe that judges should have the exclusive authority to select attorneys for appointment to individual cases and to determine their compensation.	44
8.	District and county courts in Travis County and district courts in Denton County have addressed the problem of attorney selection in a way which tends to both preserve the defense counsel's independence from the judge and allow for judicial supervision of attorney qualifications.	44
9.	Delay in appointing counsel soon after arrest is a pervasive and serious problem in a number of counties we visited, particularly in more rural counties.	45
10.	Some defendants are urged to forego counsel.	45
11.	The process for setting the indigent defense budget varies widely from county to county and is often characterized as a tug of war between the judges and the county commissioners courts.	45
12.	A 1999 survey of county indigent defense expenditures by the Office of Court Administration (OCA) provides the basis for a reasonable estimate of the cost of indigent defense in the state.	46
13.	Judges in some counties have adopted local rules concerning indigent defense that exceed the requirements of the Texas Constitution or Texas Code of Criminal Procedure.	46

14.	Major problems were found surrounding requests for investigators or expert witnesses.	47
15.	Based upon the above OCA data, the cost per capita for indigent defense in Texas for FY 1999 is approximately \$4.65, placing Texas near the bottom level of funding for indigent defense in all 50 states.	47
16.	None of the 23 counties we visited provide sufficient funds to assure quality representation to all indigent defendants.	47
17.	The vast majority of county officials, judges, defense counsel and court administrators agreed that state funding is acutely needed to supplement county indigent defense funding.	48
18.	There is an imbalance of resources between prosecution and indigent defense in Texas.	48
19.	Texas counties rely overwhelmingly on ad hoc assigned counsel systems and there are very few public defender programs.	48
20.	Although there is considerable interest in many parts of the state in greater use of public defender programs, there are reservations about the logistics of creating additional public defender offices.	48
21.	In some counties, there is a slow but sure movement toward replacing ad hoc assigned counsel systems with contract lawyer defense systems.	48
22.	In most of the counties we visited, there are no minimum eligibility criteria for attorneys who wish to accept court-appointed cases.	49
23.	In the majority of counties we visited, there are no requirements that attorneys taking court-appointed cases participate in continuing legal education programs in criminal law.	49
24.	Defendants who have legally emigrated into the United States need to be advised by counsel familiar with the very serious and specialized immigration consequences of criminal convictions.	49
25.	Many indigent defendants in Texas do not speak English; thus, access to trained, professional interpreters is crucial.	49

26	In considering improvements to indigent defense in Texas, it is important to recognize that some problems facing the indigent defense systems in predominantly rural counties differ from those in predominantly metropolitan counties.	49
27.	Prosecutors’ open file policies vary significantly.	50
28.	While we found many indigent defense practices that concern us, we found a number of practices that deserve favorable mention.	50
CHAPTER 4: RECOMMENDATIONS		52
CHAPTER 5: THE TEXAS COURT SYSTEM FOR CRIMINAL CASES		58
CHAPTER 6: THE LEGAL FRAMEWORK FOR INDIGENT DEFENSE IN TEXAS		63
CHAPTER 7: INDIGENT DEFENSE DELIVERY SYSTEMS IN THE UNITED STATES		72

Part II
Representation of Indigent Defendants
Charged with Capital Offenses

CHAPTER 1: INTRODUCTION		78
CHAPTER 2: METHODOLOGY		80
CHAPTER 3: THE STRUCTURE OF INDIGENT CAPITAL DEFENSE REPRESENTATION IN TEXAS		85
CHAPTER 4: THE UNIQUE DEMANDS OF DEFENSE REPRESENTATION IN CAPITAL CASES		89
CHAPTER 5: FINDINGS ON REPRESENTATION OF INDIGENT DEFENDANTS CHARGED WITH CAPITAL OFFENSES		93
A.	Findings Regarding Appointment of Counsel.	93
1.	Texas’ regional qualification standards for appointment of counsel fail to screen out counsel who lack the necessary advocacy skill and experience.	93

2.	Even after the adoption of regional qualification standards, some Texas courts continue to appoint attorneys who are not on the regional list of “qualified” counsel.	96
3.	Texas courts refuse to appoint second chair counsel until the state has announced its intention to seek the death penalty.	96
B.	Findings Regarding Compensation of Counsel	97
1.	The adequacy of compensation varies dramatically from county to county with the vast majority of counties failing to compensate counsel sufficiently to cover basic overhead expenses	97
2.	“Fixed fee” or “flat fee” compensation arrangements - expressly disapproved by the ABA - fail to provide adequate compensation for the amount of time typically involved in defending a capital case and create financial incentives for appointed counsel to “cut corners” in the representation.	99
3.	Individual trial judges exercise virtually unreviewable discretion to impose <i>ad hoc</i> caps on fees or to reduce fee requests.	102
4.	Adequate funding is not available for capital appeals, and the general quality of representation in Texas death penalty appeals falls far below national norms.	103
C.	Findings Regarding Performance of Counsel	104
1.	Counsel appointed in Texas capital cases spend a significantly sub-average amount of time preparing for trial, relative to national benchmarks.	104
D.	Findings Concerning Expert and Investigative Assistance	106
1.	Investigative assistance is seriously underfunded and underutilized particularly for the purpose of developing mitigating evidence at the punishment phase	106
2.	Use of experts does not comport with applicable national standards of practice	114
CHAPTER 6: RECOMMENDATIONS		122

Part III
Representation of Indigent Defendants
with Mental Illness

CHAPTER 1: INTRODUCTION	133
Methodology	135
CHAPTER 2: RESEARCH FINDINGS	136
CHAPTER 3: DISCUSSION OF FINDINGS	138
A. Identification of Mentally Ill Defendants	138
B. Attorney Qualifications and Training	142
C. Competency Issues	144
D. Expert Witnesses	151
E. Mitigation and Sentencing	153
CHAPTER 4: RECOMMENDATIONS	160

Part IV
Representation of Indigent Children
in the Juvenile Courts

CHAPTER 1: INTRODUCTION	162
Texas Appleseed Fair Defense Project	165
Methodology	167
CHAPTER 2: RESEARCH FINDINGS	169
A. The Role of Counsel	169

B. The Appointment of Counsel in Juvenile Cases	173
C. Disincentives to Legal Advocacy	179
D. Attorney-Client Contact	190
E. Other Institutional Barriers	192
F. Conclusion	197
CHAPTER 3: RECOMMENDATIONS	198

Appendices

APPENDIX A:	Indigent Defense in Texas Compared to Selected Other States
APPENDIX B:	Summary of Survey Results on County Indigent Defense Expenditures: Texas Office of Court Administration (OCA)
APPENDIX C:	Cost per Capita Comparison for 34 States' Indigent Defense Spending
APPENDIX D:	IJA - ABA Juvenile Justice Standards Relating to Counsel for Private Parties

Fair Defense Investigative Team:

Robert Spangenberg, Principal Investigator
The Spangenberg Group

Marea Beeman, Vice President
The Spangenberg Group

Bill Beardall, Fair Defense Project Director
Texas Appleseed

Catherine Schaefer
The Spangenberg Group

Rangita de Silva
The Spangenberg Group

Jenny Carroll
Texas Appleseed

Amy Chen
Texas Appleseed

Community Involvement Team:

Dominic Gonzales, Director
Texas Appleseed

Capital Defense Investigative Team:

Raoul D. Schonemann, Principal Investigator
Schonemann, Rountree & Owen

Robert C. Owen
Schonemann, Rountree & Owen

John Niland
Texas Defender Service

Meredith M. Rountree
Schonemann, Rountree & Owen

Mental Health Investigative Team:

Chris Siegfried, Principal Investigator
National Mental Health Association

Juvenile Investigative Team:

Cathryn E. Stewart, Principal Investigator
Northwestern University School of Law

Gabriella Celeste
Juvenile Justice Project of Louisiana

Ellen Marrus
Southwest Juvenile Defender Center

Ilona Picou
Southern Juvenile Defender Center

Patricia Puritz
American Bar Association Juvenile Justice
Center

David Utter
Juvenile Justice Project of Louisiana

Forrest Deegan
Texas Appleseed

Jessica Chapman
Texas Appleseed

With Additional Assistance From:

Annette LoVoi, Executive Director
Texas Appleseed

Malikah Gourrier
Southwest Juvenile Defender Center

Stephanie Paul
University of Houston Law Center

Jelpi Picou
Louisiana Indigent Defense Assistance Board

Rosie Smith
Southern Poverty Law Center

ABOUT THIS REPORT

This report contains analysis, findings and recommendations from the most comprehensive study ever conducted of county-level indigent defense practices in Texas. Previous research and investigation by others have demonstrated that serious indigent defense failures occur in the state with alarming frequency. Where these previous reports can be viewed as identifying the symptoms of the malady affecting many Texas indigent defense systems, the research done by the Texas Appleseed Fair Defense Project diagnoses the underlying causes of those symptoms and identifies potential cures. By comparing and evaluating the many different indigent defense systems found across the state, we have been able to clarify many of the structural weaknesses which result in substandard indigent defense. Just as important, we have been able to identify strengths within some Texas indigent defense systems. These strengths can serve as one basis for building a healthier approach to indigent defense throughout the state.

Most important of all, we have encountered a large body of individual lawyers, judges, administrators, county commissioners, legislators, reform advocates and organizations representing the affected communities all willing to take part in an ongoing process to improve indigent defense in Texas. In particular, throughout the course of our extensive site work in connection with this study, we met with cooperative and dedicated professionals, many of whom are doing their best to see that justice is served, under less than ideal circumstances. We are optimistic that these individuals will join an emerging groundswell of support for improving indigent defense in Texas. The recommendations outlined in this report are concrete steps which we believe should be considered by Texas policy makers and criminal justice advocates in order to fashion a better system of indigent defense.¹

THE MOVEMENT FOR INDIGENT DEFENSE IMPROVEMENT IN TEXAS AND THE NATION

During the 1999-2000 period, the procedures used in Texas to provide defense counsel to indigent criminal defendants became the subject of vastly increased attention from the judiciary, the bar, the legislature, the media, researchers and the general public. In part this attention was driven by court decisions and media reports which spotlighted severe examples of inadequate indigent defense counsel appointed to represent certain defendants in Texas trial proceedings.² But in

¹ The findings and recommendations contained in this report have been released previously in a separate volume. This Reference Report contains further specific examples and technical detail to accompany the findings and recommendations which are also reproduced in this report.

² *E.g.*, *Burdine v. Johnson*, 66 F.Supp.2d 854 (N.D. Tex. 1999), *vacated and remanded* 231 F.3d 950 (5th Cir., October 27, 2000), *petition for rehearing en banc granted* 2000 WL 1785536 (5th Cir., December 5, 2000); *Judge Says Inmate Wrongly Convicted*, Howard Swindle and Dan Malone, DALLAS MORNING NEWS (September 10, 2000); *Texas Case Highlights Defense Gap*, Steve Mills, CHICAGO TRIBUNE (June 19, 2000) at p.

addition to this anecdotal evidence there have been a growing number of reports which have raised serious questions about the overall quality of indigent defense procedures in Texas.³ These developments have led to calls for indigent defense reform from many diverse quarters.⁴

Another factor giving impetus to the current scrutiny of indigent defense practices in Texas is a larger nationwide movement to improve indigent defense, especially in states where indigent defense procedures have not received adequate attention in many years. States which in just the last few years have started or completed programs to improve and modernize their indigent defense systems include: Alabama, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, Oregon, Tennessee, Vermont and West Virginia. Many other states have upgraded their indigent defense systems over the last 15 years. These upgrades involve an infusion of state funds, as well as the promulgation and enforcement of attorney qualification, performance, training, and other standards. As of 2000, indigent defense costs in 23 states are 100% state-funded at the trial level; counties in these 23 states have no indigent defense funding responsibility at all. In another five states, the states provide at least 75% of all indigent funds at the trial level. Nationwide, with very few exceptions, states with 100% state funding or predominant state funding have sustained stronger overall indigent defense budgets over time, than those states with lower levels of state funding. This is due to several factors, including the greater authority and flexibility states have in their taxing policies, the wider variety of state revenue sources, and the state's ability to fund programs in both rich and poor counties to assure greater uniformity in services. In addition most of the states which have moved to state funding have accompanied that move with the development of some form of state oversight and accountability through state agencies responsible for assuring the efficiency and quality of representation.

The national scope of the movement to improve indigent defense was emphasized in 1999 and again in 2000, when the U.S. Department of Justice, Office of Justice Programs convened two national symposiums on indigent defense. The symposiums brought together delegations of criminal justice leaders and policy makers from states across the nation to explore innovations and trends affecting the provision of legal services to poor people facing criminal charges. The program at both symposiums highlighted ways in which indigent defense providers and criminal justice agencies throughout the country are actively improving the fairness, reliability and integrity of their varied indigent defense systems. This national assessment of indigent defense practices can be expected to advance further when the U.S. Department of Justice publishes its forthcoming Compendium of

1; *Judge Frees Texas Inmate Whose Lawyer Slept at Trial*, NEW YORK TIMES (March 2, 2000); *Man Freed After 13 Months in Jail*, DALLAS MORNING NEWS (August 8, 2000); *Death Penalty in Texas Case is Overturned, Citing Lawyer*, NEW YORK TIMES (August 31, 2000).

³ E.g., *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas*, STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS (September 22, 2000), *A State of Denial: Texas Justice and the Death Penalty*, TEXAS DEFENDER SERVICE (October 2000) (Chapter Six: The Right to Counsel in Texas: You Get What You Pay For).

⁴ E.g. *Judges' Resolution Seeks Upgrade of Legal Defense for the Poor in Texas*, FORT WORTH STAR-TELEGRAM (September 27, 2000); *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas*, STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS (September 22, 2000); *Texas Needs to Provide More Competent Lawyers*, Editorial - DALLAS MORNING NEWS (September 12, 2000); *The Cost of Poor Advice*, TIME at 36 (July 5, 1999).

State Indigent Defense Standards. This state-by-state comparison of indigent defense procedures will help states assess where they stand in relation to the rest of the country and enable them to build upon one another's efforts.

WHY THIS RESEARCH BY THE FAIR DEFENSE PROJECT WAS NECESSARY

There is a widespread impression that Texas has one of the least fair and least efficient approaches to indigent defense in the nation. While many might contest this view, it is uncontested that the state of Texas does not conduct the kind of oversight, monitoring or systematic data collection which would enable anyone definitively to refute the claim. Indeed this very lack of information and self-assessment is itself a serious flaw in the Texas approach to indigent defense.

The problems caused by this information vacuum are compounded by the fact that Texas does not have a single "indigent defense system" in the sense of a coherent and consistent scheme built around unifying standards or principles. Rather legal representation for indigent criminal defendants in Texas is provided under independent systems that have evolved separately in each county, with little oversight or guidance from the state – and with no State funding. As a result there is an extraordinary variety of *different* indigent defense procedures utilized in the 254 different counties in Texas - including even differences among courts within the same county. With more than 800 criminal courts in the state, there are potentially 800+ different indigent defense "systems" in Texas. We found that judges, administrators and practitioners in one county rarely have much familiarity with the local indigent defense procedures used in other counties. In fact they often have little or no familiarity with the practices in other courts within their own county, outside of those courts where they sit or practice. Without comprehensive, systematic information available about all these different local procedures it is not possible for anyone to fully evaluate the operation of indigent defense in Texas. Until now, the lack of information has made it difficult not only to assess the weaknesses in Texas indigent defense systems, but also to assess strengths where they exist. This in turn has been a serious obstacle to efforts to improve indigent defense in the state.

This study of Texas' indigent defense systems is important not only as a vehicle for improving the system, but also as a step toward establishing greater public accountability for the efficient expenditure of indigent defense funds in the state. It is estimated that Texas taxpayers pay between \$90 million and \$100 million dollars a year to support the current patchwork of indigent defense systems across the state.⁵ While this is a low expenditure compared to what most other states spend per capita on indigent defense, it still represents a very large sum of public funds. The public has a right and need to know precisely how these monies are being spent, whether they are

⁵ Even this figure was not available until this year, when the Texas Office of Court Administration undertook a special *ad hoc* survey of individual county expenditures on indigent defense. The Texas Applesed Fair Defense Project provided advice and consultation to OCA on the scope and methodology of this survey. It is hoped that this survey will prove to be a first step in regular and systematic collection of county indigent defense data by OCA or a similar agency.

being spent efficiently and whether they are purchasing the kind of effective defense representation needed to ensure that the resulting outcome is both fair and accurate.

The research conducted by the Texas Appleseed Fair Defense Project was designed as an important next step to assemble a more complete picture of indigent defense systems in Texas counties and to use that information to foster a broad public dialogue aimed at building on the strengths of the current systems while improving on the weaknesses. We do not contend that the findings and recommendations in this report are the last word on the subject. Rather we hope and expect that this report will stimulate additional proposals and recommendations and a vigorous and continuous movement toward potential solutions.

At this moment in time, we have a unique, once-in-a-generation opportunity to modernize indigent defense in Texas. Interest in improving indigent defense is higher now than it has been in decades. The State Bar of Texas Judicial Section recently approved a series of resolutions recommending indigent defense improvements in a number of key areas. The State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters is now working on recommendations after shedding new light on a range of indigent defense problems as reported by the state's criminal defense attorneys, criminal court judges, and prosecutors in extensive statewide surveys conducted by the committee. At the national symposium on indigent defense convened by the U.S. Department of Justice in June of 2000, the Texas delegation was the largest to attend from any state and included representatives from the judiciary, county commissions, the private criminal defense bar, juvenile defense bar, public defender offices and the prosecution. In December of 2000 a statewide Symposium on Indigent Defense in Texas convened in Austin to discuss specific ways to improve indigent defense in the state. The information generated by the research of the Texas Appleseed Fair Defense Project and contained in this report was compiled precisely in order to make the most of discussions like these.

OVERALL METHODOLOGY

With funding from the Open Society Institute, the Public Welfare Foundation, the State Commissions Project (a project of the Bar Information Program supported by the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance), the Arca Foundation, the Southern Poverty Law Center, the Hogg Foundation and numerous individual donors, the Texas Appleseed Fair Defense Project has undertaken systematic information gathering and analysis in a representative sample of 23 Texas counties, containing 61% of the state's population. The sample counties used in this research are shown in the table 1 on the following page.

Texas Appleseed Fair Defense Project
Counties in the On-Site Research Sample⁶

	County	Population (1999)	Comptroller Region	Administrative Judicial Region	Principal City
500,000+	Harris	3,229,026	Gulf Coast	2	Houston
	Dallas	2,069,094	Metroplex	1	Dallas
	Tarrant	1,368,734	Metroplex	8	Fort Worth
	Bexar	1,359,993	Central Texas	4	San Antonio
	Travis	717,925	Central Texas	3	Austin
	El Paso	694,666	Upper Rio Grande	6	El Paso
	Hidalgo	527,726	South Texas	5	McAllen
200-500,000	Denton	400,878	Metroplex	8	Denton, sub.-DFW
	Nueces	311,978	South Texas	5	Corpus Christi
	Jefferson	247,354	South East Texas	2	Beaumont
	Lubbock	234,689	High Plains	9	Lubbock
	Brazoria	228,166	Gulf Coast	2	Lk. Jackson, sub.-Houston
	McLennan	204,589	Central Texas	3	Waco
	Smith	168,888	Upper East Texas	1	Tyler
50-200,000	Tom Green	105,648	West Texas	7	San Angelo
	Comal	74,308	South Texas	3	New Braunfels
	Hunt	70,265	Metroplex	1	Greenville
	Bastrop	52,516	Central Texas	2	Bastrop
	Brown	37,187	Northwest Texas	7	Brownwood
25-50,000	Titus	26,703	Upper East Texas	1	Mount Pleasant
	Shelby	22,528	South East Texas	1	Center
	Grimes	22,434	Central Texas	2	Navasota
	Terry	13,406	High Plains	9	Brownfield
0-25,000					

⁶ The sample was constructed to (1) include the seven most populous counties in the state, and (2) add other smaller counties to produce an overall sample representative of the state as a whole. The methodology to achieve this was designed by Dr. Steve Murdock, Director of the Texas State Data Center at Texas A&M. The methodology creates a stratified random sample, proportionate to population and to geographic distribution among the standard economic regions defined by the state Comptroller's office. The sample counties include 61% of the state's total population.

The Project studied indigent defense representation in four distinct but related categories of criminal cases:

- Non-capital adult felony and Class A and Class B misdemeanor⁷
- Capital felony
- Case involving mentally ill defendants
- Juvenile delinquency

To collect this information, the Project spent time in each of the sample counties in order to speak directly with the people who best know the indigent defense system there - the judges, court administrators, county officials, defense counsel and prosecutors who are responsible for the day to day operation of indigent defense in that county and representatives of the affected communities. The researchers conducted hundreds of interviews, reviewed county auditors' data on indigent cases and expenditures, and observed relevant court proceedings. In addition to the principal focus on overall indigent procedures for all adult felonies and misdemeanors, specialized research teams examined capital defense procedures, juvenile defense practices, and the treatment of indigent defendants who are mentally ill. For example, the capital defense research team collected and examined data on all cases from the 23 counties in which the death penalty has been imposed since 1995. The specifics of the approach taken by each team is described in each separate part of this report. On the basis of all this research, the Project has produced a report containing objective description and analysis which will clarify Texas' multifaceted approach to indigent defense and will contribute to a thoughtful self-assessment.

At the same time, the Project has also launched public education efforts which will increase the public's understanding of how indigent defense works in Texas, why indigent defense is so central to the effectiveness of our criminal justice system, and how the public can become more involved in making indigent defense work fairly and efficiently.

Finally, the Project is actively promoting and participating in a collaborative public dialogue among the various stakeholders in Texas indigent defense. Included among these stakeholders are the judges, prosecutors, defense lawyers and criminal justice administrators who are charged with direct responsibility for processing criminal cases through the Texas criminal justice system. In addition, Texas Appleseed is working with other important stakeholders to make sure they are involved as well, including: county commissioners courts, public office holders, state bar members, community organizations and members of the public who have an indirect, but no less vital, interest in the fairness and effectiveness of indigent defense systems. Through a conscientious assessment of the many variations among systems, this dialogue may identify and promote some existing models which could be useful to other local communities while also meeting the requirements of the U.S. and Texas Constitutions and Texas state law. Such a

⁷ This study did not consider indigent defense representation in Class C misdemeanors for which defendants found guilty face a maximum penalty of \$500 and there is no possibility of a jail sentence. Under federal and state law, indigent defendants charged with Class C misdemeanors are not entitled to appointed counsel.

dialogue can also encourage innovations which will enable indigent defense to function more efficiently and equitably throughout the state.

The ultimate objective of this research and of the overall Fair Defense Project is to ensure that our adversarial system of criminal justice fairly and efficiently enforces the law, without being skewed to disadvantage the poor. Our entire society benefits when a defendant who cannot afford a lawyer is provided counsel who assures adequate participation in the adversarial system. Not only does this safeguard our collective ideal of equal justice, it also ensures that both the verdict and any sentence are just, final and respected.

PART I

INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL FELONIES AND MISDEMEANORS

CHAPTER 1

INTRODUCTION

Year 2000 saw extensive media coverage of indigent defense in Texas. Much of the coverage focused on capital case representation, which makes up a very small percentage of the total criminal caseload in Texas. Often the same anecdotes of court-appointed lawyers who were asleep or inebriated during their clients' death penalty trials were repeatedly recounted. These examples, while damning, are not exhaustive explanations of the way in which indigent defense is delivered throughout Texas. Broader analysis is needed to inform policymakers of precisely what structural problems confront indigent defense in Texas, including defense in non-capital cases, and how those problems might be solved.

The Texas Appleseed Fair Defense Project was formed to fill the information vacuum surrounding indigent defense practices throughout Texas. Texas Appleseed assembled teams of experts to catalogue, for the first time ever, information on indigent defense practices throughout the counties, point out deficiencies where they were found, highlight examples of where and why the system works best, provide comparison information on indigent defense systems in other states, and present a study with findings and recommendations. The Spangenberg Group, a nationally recognized consulting firm based in West Newton, Massachusetts that conducts research and provides technical assistance to improve indigent defense services in the United States, was contracted to design and lead the primary portion of the inquiry, focusing especially on representation of indigent defendants in misdemeanor and non-capital felony cases.¹ Other individuals, firms and organizations were employed to study in greater detail systems for representing indigent defendants facing the death penalty, children accused of being juvenile offenders, and indigent individuals with mental health problems who are going through the criminal justice system.

Until now, very little has been known or documented about the way in which indigent defense services differ from county to county in Texas. Even though Texas has delegated to each of its 254 counties virtually all responsibility for structuring and financing indigent defense services, no information has been collected on how counties handle key aspects of criminal process throughout the state. This study aimed to answer fundamental questions such as:

- Are the practices used in conformity with the Texas Constitution and Criminal Code?
- What are the various processing times from arrest to appointment of counsel in misdemeanors and felonies, and time from arrest to indictment in felony cases?
- What are the mechanisms used to appoint attorneys to indigent defendant cases in various counties?
- How are counsel paid?

¹ This study did not consider indigent defense representation in Class C misdemeanors for which defendants found guilty face a maximum penalty of \$500 and there is no possibility of a jail sentence. Under federal and state law, indigent defendants charged with Class C misdemeanors are not entitled to appointed counsel.

- How are experts and investigators obtained and paid?
- How do the procedures adopted affect the adequacy of the representation provided?
- Does the adequacy of representation differ between misdemeanor and felony defendants?
- Does the adequacy of representation differ between pre-trial detainees and those individuals out on bond?
- Have counties developed individual approaches to solving problems?

It is hoped this document - together with the State Bar of Texas' recently-released report² - will be an important part of the dialog surrounding development of indigent defense legislation in Texas in the 2001 Legislative Session, as well as in continued efforts by citizens to produce changes to the current system.

Financial support for the Fair Defense Project was provided by a grant from the Center on Crime, Communities and Culture and the Program on Law & Society of the Open Society Institute. The American Bar Association and U.S. Department Bureau of Justice Assistance joint venture, the State Commissions Project, provided funding for the collection of comparative caseload and expenditure data from other states. *See* Appendix A.

Methodology for Research on Representation in Non-capital Felonies and Misdemeanors

Methodology for the non-capital felony and misdemeanor portion of the Fair Defense Project consisted of:

- On-site visits to a representative sample of 23 counties.³ In the site visits, teams of researchers headed up by The Spangenberg Group conducted interviews with hundreds of people who are involved first-hand with the indigent defense system in each county, including judges, private attorneys, public defenders, prosecutors, county officials, defendants, community leaders, and court and jail personnel. While on-site, researchers collected information from the sample counties concerning indigent defendant caseload and expenditure, mechanisms for appointment of counsel, compensation schedules for court-appointed attorneys, and other relevant materials.
- A statewide survey of county indigent defense expenditures. In consultation with the Office of Court Administration (OCA), a survey instrument was developed to collect baseline,

² On September 22, 2000, the State Bar of Texas' Committee on Legal Services to the Poor in Criminal Matters released a long anticipated report on its six-year, three-part survey of the delivery of indigent defense services in Texas. *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas* highlights the results of the comprehensive mail survey conducted by Judge Allan K. Butcher and Michael K. Moore, Ph.D. The report is available at www.uta.edu/pols/moore/indigent/whitepaper.htm.

³ Use of a sample was necessary because of the prohibitive time and financial requirements a detailed study of Texas' 254 counties would require. As detailed below, the sample was designed to be representative of the state as a whole.

indigent defense expenditure data from the counties. The OCA fielded the survey and received information on FY 1999 indigent defense expenditure from all 254 counties.

- Collection and review of pertinent statewide criminal justice system reports and materials.
- Collection and analysis of indigent defense comparison information from ten states.

The sample of 23 counties was constructed to: 1) include the seven most populous counties in the state and 2) add other smaller counties to produce an overall sample representative of the state as whole. The 23 sample counties represents over sixty percent of the state's total population. The sampling methodology was designed by Steve Murdock, Ph.D., Director of the Texas State Data Center at Texas A&M University. The methodology creates a stratified random sample, proportionate to population and geographic distribution among the standard economic regions defined by the State Comptroller's office. The 23 sample counties are listed in the table on page five.

CHAPTER 2

THE PROVISION OF INDIGENT DEFENSE SERVICES IN TEXAS

This chapter contains the research team's primary observations from our site work. We report here on our meetings with a wide variety of individuals in each of the 23 sample counties: defense attorneys, prosecutors, judges, magistrates, county officials, probation officers, court staff, private attorneys, defendants, community leaders and others. We also reference quantitative data, such as indigent defense budgets and caseloads, where available. Throughout the course of our extensive site work in connection with this study, we met with cooperative and dedicated professionals, many of whom are doing their best to see that justice is served, under less than ideal circumstances. We are optimistic that these individuals will join in efforts to improve indigent defense both at the local county level and at the state level.

Wherever possible, we attempted to validate statements and impressions interviewees shared with us. However, this was not always possible. In forming our conclusions of the sample counties' indigent defense programs, we have erred on the side of caution and included only those interviewee statements or conclusions that we believe - based on our experience both in Texas and throughout the nation - to be accurate and representative.

A. Introduction

The system for providing and compensating counsel to represent indigent defendants in criminal proceedings in Texas is almost exclusively a local responsibility.⁴ Each county is free to select the type of system it will use to represent indigent defendants, be it court-appointed counsel, public defender, contract counsel or some combination of these. (A county must obtain state legislative authorization to create a public defender program.) The vast majority of counties in Texas use the ad hoc assigned counsel model. A few counties make use of contract defenders or public defenders.

Each of the state's 254 counties is responsible for paying for all costs associated with indigent defendant representation in Class A and B misdemeanor and non-capital felony cases. Those costs include the cost of counsel, expert witnesses such as psychiatrists or DNA specialists, investigators and any other related services, such as transcripts, transportation costs, etc.

Our site visits to 23 counties in Texas confirmed that there is wide variation in the way in which indigent defense services are provided throughout the state. Although the majority of indigent defendants are represented by ad hoc court-appointed counsel, there is no uniformity from county to county, or even from courtroom to courtroom, on things such as the way in which indigency is determined, how counsel are selected to be placed on the list of court-appointed lawyers, how and when counsel are appointed, what counsel is paid, how interpreters, experts or investigators are provided, etc.

⁴ The exception is that the state pays for representation in capital post-conviction proceedings.

B. Texas Has No Centralized Source for Indigent Defense Data

Unlike many states, Texas does not collect centralized data on its 254 counties' different indigent defense systems. We know that the primary delivery model used throughout the state is ad hoc assigned counsel, but detailed information on the delivery method used by each county is unavailable. The same is true for indigent defense expenditure and caseload numbers in each county.⁵

This information vacuum has a number of consequences. For one thing, it thwarts efforts to evaluate whether the public's money is being used wisely in regard to indigent defense expenditures. While our overall impression is that the state's indigent defense system is severely under-resourced, we also learned of a number of attorneys in our sample who earn in the vicinity of \$100,000 per year through the acceptance of ad hoc appointments. Lack of information also prevents us from having a complete picture of each county's delivery model(s), caseload and expenditure. Such information is needed to place an individual county's indigent defense program in perspective, compared to other counties within the state, and, in the aggregate, to evaluate Texas' indigent defense systems in context with other states. Finally, access to this information would be useful in identifying innovative approaches to common issues (such as how and when counsel is appointed, indigency screening and determination, recoupment of costs, etc.) that each of the state's counties share.

As part of this study, the Texas Office of Court Administration (OCA) agreed to survey each of the 254 counties to determine FY 1999 indigent defense expenditures, including costs of ad hoc assigned counsel services, contract counsel services, public defender services and support services related to indigent defense representation. This is the first time that such a survey was undertaken in Texas and should, we believe, form the basis for a reasonable estimate of the cost of indigent defense in the state.

⁵ As noted below, the research team consulted with the Office of Court Administration (OCA), to design a survey instrument to collect baseline, indigent defense expenditure data from the counties. The OCA fielded the survey and received information on FY 1999 indigent defense expenditure from all 254 counties.

TEXAS COUNTY INDIGENT DEFENSE EXPENDITURES

Legal Representation:	
Assigned Counsel Systems	\$60,417,833
Contract Programs	\$ 4,529,685
Public Defender Programs	\$ 5,987,981
Harris County ⁶	<u>\$11,521,801</u>
TOTAL - LEGAL REPRESENTATION:	\$82,457,300

Other Services:	
Investigation	\$ 1,447,734
Interpreters	\$ 953,450
Transcripts	\$ 6,347,628
Experts	\$ 1,028,597
Other	<u>\$ 873,625</u>
TOTAL OTHER SERVICES:	\$10,651,034

**TOTAL LEGAL REPRESENTATION
& OTHER SERVICES: \$93,108,334**

Based upon the OCA data, the cost per capita for indigent defense in Texas for FY 1999 was approximately \$4.65,⁷ which places Texas near the bottom level of funding for indigent defense in all 50 states. The state's minimal expenditures on investigative services and expert witness services – each at one percent of total indigent defense expenditures – evidence a particularly alarming trend which was confirmed in our site work. Many attorneys representing indigent defendants in Texas are not requesting and/or not being given access to basic tools of effective lawyering.

Appendix A contains expenditure and cost per capita comparative information for indigent defense systems in Texas and 10 other states, as well as narrative descriptions of the organization of these states' indigent defense systems. Appendix B shows additional data from the OCA survey of Texas county expenditures on indigent defense. The tables in Appendix C compares cost-per-capita expenditures on indigent defense in most other states from which such information is readily available.

⁶ Harris County was not able to separate the three programs and instead reported an aggregate figure.

⁷ Based upon a 1999 population estimate of 20,044,141 by the Texas State Data Center at Texas A & M University.

C. Overview of the Sample Counties' Indigent Defense Systems

1. Assigned Counsel Programs

Among the 23 counties that we studied, 18 rely solely on assigned counsel to represent indigent defendants in non-capital adult cases and juvenile offender cases. There are two variations of assigned counsel programs: ad hoc and coordinated. Under ad hoc systems, which comprise the vast majority of assigned counsel programs in Texas, the judge has complete authority for selecting the attorneys to whom he or she assigns cases, without benefit of a formal list or rotation method, and without specific qualification criteria for attorneys.

Coordinated assigned counsel systems, in contrast, use some type of administrative body to screen attorney qualifications and assign cases. These coordinated programs generally require attorneys to meet minimal qualification standards in order to join the program. Qualified attorneys are typically assigned to individual cases using a neutral selection method such as an alphabetically rotating list. The coordinated assigned counsel programs provide a greater degree of supervision, training and support for the attorneys who are accepted.

This approach is not without support. A judge in El Paso recommended using someone appointed by the judges to execute most of the responsibilities related to appointing counsel: maintaining a master list of attorneys eligible for appointment; confirming that these attorneys have met their continuing legal education obligations; reviewing performance; making appointments; and approving payment vouchers. This approach would make substantial strides in relieving overworked judges of some of their administrative responsibility. Additionally, this approach would also serve to remove many of the political and ethical questions raised by the appointment process used in the vast majority of the state's courtrooms, by more clearly upholding the independence of defense counsel.

In the majority of counties in Texas, however, judges maintain individual lists of attorneys to whom they make ad hoc appointments of indigent defendant cases. Appointments are at the sole discretion of the judges, and the appointments are made in various ways. Some judges make appointments to attorneys who are present in the courtroom, for instance, at the time of arraignment. Some of the attorneys practicing in counties where judges only appoint attorneys who are in their courtroom found the system distasteful, describing it as "hustling cases" or "going up to the hog trough." Some judges share this discomfort, likening the process to "a soup line," "scavenger birds" or "baby birds with their mouths open." Other judges run down their lists and appoint attorneys in order, making occasional deviations for certain serious cases or in cases in which a Spanish-speaking lawyer is preferred. These lawyers are notified of the appointments by letter, fax or other means.

In Travis County District and County Criminal Courts and Denton County District courts, judges collectively develop a master list of attorneys whom the judges agree are qualified to accept court appointments. The lists are reviewed twice a year in Travis County and monthly in Denton County. Travis County's system is administered by the local Director of Court Management, who makes appointments in rotating alphabetical order. To ensure that the lawyer has the expertise to handle the cases to which he or she is appointed, the Criminal Courts Administration Office

maintains several lists, including a misdemeanor list, a felony list, and an appeals list. The felony list is divided into three tiers. Those attorneys on the A list are deemed qualified to accept first degree felonies. Those on the B list can accept second and third degree felonies, while those on the C list are eligible to accept state jail felonies and probation revocations. The Travis County system comes close to being a true coordinated assigned counsel program.

In some smaller counties, it is difficult to find lawyers willing and able to take court-appointed cases. Judges sometimes presume that all lawyers who practice criminal law in the county are on the list for court appointments, absent a conflict of interest (e.g., relation to a judge, or district attorney, etc.).

2. “Buy-Out” or “Opt-Out” Plans

In two of the counties we visited, all local attorneys are expected to accept court-appointed cases unless they are deemed ineligible (for example, they work as a law clerk or prosecutor). However, attorneys who do not wish to accept court-appointed cases can “opt out” by paying an annual fee to the local bar association.

In Bexar County, the names of all local attorneys are placed on a list from which appointments are made, in alphabetical order, in District Court cases. Some 5,000 attorneys are on the list. Under the San Antonio plan attorney may notify the San Antonio Bar that he or she does not want to accept appointed cases. Such attorneys must pay a \$500 annual fee to the bar. Alternatively, an attorney may wish to accept (and be paid for providing representation in) more than his or her allotted number of appointed cases. If the name of an attorney who has paid the fee comes up, the District Court Administrator notifies the San Antonio Bar Association. The Bar then notifies an attorney who has asked for extra appointments (known as bonus cases) and the case is assigned to that attorney. The Bar Association then pays that attorney on an hourly basis on top of what the attorney will receive from the county out of the funds contributed by attorneys who “opt out” of accepting appointments.

Those who fail to pay the fee and then receive an unwanted appointment have several options, although the plan is designed to leave only two. Under the plan, these attorneys are expected to either pay \$1,000 to the plan (the fee is doubled as an incentive for early participation) or take the case. As a practical matter, however, some judges may agree to appoint alternative counsel.

Every year, just over 20% of the attorneys in Bexar County reportedly elect to opt out of the plan and pay the \$500 fee. About 10% ask to either receive their regular assignments or both their regular appointments and “bonus cases.” About 25% of the attorneys fail either to pay the fee or request appointments (either regular or bonus) and so, by default, these attorneys are placed on the “regular” list and may receive appointments in turn. The remainder of the attorneys are exempt from accepting assigned cases, due to age (over 60), employment status (e.g., law clerk), or bar status (e.g., inactive).

In El Paso County, the jail magistrate makes appointments of counsel to indigent defendants charged with felonies who are unable to post bond. Half of the appointments go to the

El Paso Public Defender Office. The other half are made rotationally off of a computerized list of attorneys who are eligible for appointments in criminal cases under the El Paso plan. The list is developed by the El Paso Bar each year, and maintained by the District Court Office of Court Administration.

The general appointments list is comprised of all qualifying attorneys in the county (for example, prosecutors and public defenders do not qualify) except those who have paid a \$600 annual fee to the county bar association in order to have their name removed from the list. The El Paso “buy-out” plan was created by the County Bar Association in the late 1980s as a way to generate additional revenue for the county’s indigent defense system. The Bar collects funds from attorneys who wish to buy out from accepting court appointments. The Bar turns the funds over to the county, along with a list of which attorneys have contributed. This is used to create the master appointment list. The buyout plan nets roughly \$200,000 a year, and the county is free to use it in any way it chooses; however, the Bar’s intent was for the money to go toward the public defender’s office.

Bexar and El Paso counties are not the only counties in the state that have a buy-out program. For example, Midland County, which was not one of our sample counties, has had a buy-out plan since the early 1980s. Attorneys we interviewed in Bexar and El Paso counties expressed a broad range of opinions about the buy-out plans. Some felt the requirement for all attorneys to be on the court appointments list amounted to involuntary servitude. Others expressed concerns about expecting attorneys who don’t regularly practice criminal law to accept court-appointments. Others thought the buy-out plans were an appropriate way for the local bar to help support indigent defense.

3. Public Defender Programs

The Texas Code of Criminal Procedure permits the use of public defenders in eight judicial districts, one of which, the 33rd Judicial District, is multi-county. Wichita County, which was not included in the study sample, is the only county in which a public defender office is used to handle all cases except for conflict of interest cases. Of the study sample counties, two, Dallas and El Paso, have public defender offices that handle a percentage of the adult criminal and juvenile delinquency work. Another county, Travis, has a public defender program that handles just juvenile cases. In all counties that use public defender programs, additional representation is provided by court-appointed lawyers, lawyers of the month, or contract lawyers.

The scope of this study included reviews of the Dallas and El Paso County adult public defender offices, and both offices were found to be effective, both in and outside the county. One distinct advantage to public defender programs is the resources they can commit when they are appointed early in the life of a case. For example, in jurisdictions outside of Texas, public defenders typically represent their clients in bond reduction hearings and begin investigation – such as talking to witnesses and visiting the crime scene – well before indictment is returned. Moreover, as we note later, private appointed attorneys often face significant obstacles in getting full access to investigative services. Public defenders have staff investigators, and thus do not have to worry about obtaining court authorization for use of an investigator. Not unlike the prosecutor’s office,

the public defender's office can allocate their investigator resources in the way which is most appropriate to the public defender's workload requirements.

During our site work, many individuals whom we interviewed indicated that the possibility of creating a public defender office had been considered in their county. There has been talk of creating a public defender in Tarrant County, for example, in large part at one commissioner's urging. One Tarrant County district court judge stated that the biggest disadvantage as far as he was concerned is that the public defender would never really be funded comparably to the district attorney. Efforts to obtain comparable funding, he thought, would be opposed by the commissioners court. This judge said that he thought public defenders are more independent than court-appointed lawyers, who rely upon the judge for appointments and compensation.

In Nueces, Smith and other counties in the sample, judges and others expressed interest in adopting a public defender model for the delivery of indigent defense services. Their main reservation, however, is the cost of such a system, and concern that a public defender would require funds equal to those required for the prosecution. In response to this concern, it is important to point out that public defender programs handle only a portion of the total criminal cases prosecuted. Thus, when allocating resources, this fact should be considered. The provision of *comparable* rather than equal resources assures a level playing field between prosecution and defense. Throughout the country, many jurisdictions, including in Dallas County,⁸ have taken the approach of providing salary parity for prosecution and defense. However, in recognition of the varying caseloads of prosecution and defense, none of these jurisdictions provide an equal number of positions for each. Another attempt to assure comparable resources can be found in Tennessee, where statutory law permits counties to pass ordinances to assure comparable county resources are allocated to prosecution and indigent defense. In Knox County, Tennessee, for example, county ordinance requires that for every dollar of county money appropriated to the local district attorney's office, 75 cents must be appropriated to the public defender's office. We support this approach.

Justice system leaders in other counties are also receptive to the idea of creating public defender offices. One Tom Green County judge told us: "If the Commissioners Court funded a public defender office, I would use it, with discretion" to appoint attorneys in certain cases. A private attorney in Tom Green County supports the public defender model but fears that young, less experienced lawyers would staff the program. From an economic standpoint, he thinks a public defender program makes the most sense.

⁸ In the federal system, salary parity is an accepted practice between Chief Federal Public Defenders and U.S. Attorneys, and between the attorneys and support staff working in their offices. The classification and compensation levels are essentially the same for both programs, in recognition of the fact that the primary responsibilities of the positions involved are of equal importance, and to eliminate the appearance that the defense function is less valued than the prosecution function by the government. Public defenders in Connecticut, by statute, are paid comparably to state's attorneys. CONN. GEN. STAT. ANN. §51-293 (h) (West 2000). In certain California counties, such as Orange County, public defenders and district attorneys are part of the same bargaining unions, and are paid the same salaries for comparable positions. Other counties, such as Los Angeles County, pay public defenders and district attorneys comparably, regardless of joint bargaining units. In Wyoming and Maricopa County (Phoenix) Arizona, public defenders and prosecutors are paid according to the same pay scale.

3. Contract Defender Programs

One clear trend in Texas is growth of the use of contracts for indigent defense services. Eight of the 23 sample counties use some sort of contract program for the delivery of indigent defense services. None of the contracts we reviewed or learned of, however, comply with the American Bar Association's *Standards for Criminal Justice: Providing Defense Services*, Chapter 5 (1990) or the National Legal Aid and Defender Association's *Guidelines for Negotiating and Awarding Indigent Defense Contracts* (1984). These national guidelines are designed to assure that contracts include provisions regarding independence and performance of counsel, maximum caseload, and other aspects of quality representation.

Typically, the indigent defense contracts we encountered were between one or more attorneys and one judge. Rather than relying on counsel appointed on a case-by-case basis, judges with contract programs use attorneys who appear in the judge's courtroom on a regular basis - either for a day at a time, a week at a time, or, in some courts, on a permanent, salaried basis. These contract attorneys handle either the entire docket or as many cases as they are assigned. In Smith County, for example, one district court judge uses three lawyers to provide representation to indigent defendants and pays them on a monthly basis. If a case presents a conflict of interest for all three contract attorneys, the judge will appoint another lawyer to handle the case. The district court judges of Smith County entered an order that authorizes this system and sets out a monthly range of payment that is available. One attorney working under the contract said that pay averages out to roughly \$150 - \$175 per case. "It covers my overhead." The order also provides for month-to-month appointment of one or more investigators to service the indigent defendant cases in that particular courtroom.

One private attorney in Jefferson County has a contract with two of the district court judges. Each morning, this attorney interviews all newly arrested in-custody felony defendants to determine whether they want to enter a guilty plea. If a defendant indicates that he or she wishes to plead not guilty, the attorney advises the defendant that he or she cannot provide representation and that another attorney will be appointed. The contract attorney's only purpose seems to be to facilitate plea agreements, not to investigate the case and advise the client on the most advantageous course of action. This attorney's practice appears to be limited to his indigent defense contract. He is paid a fee for the cases in which he is able to manage a plea bargain, and is also paid a small fee for each defendant with whom he speaks. In 1999, this attorney earned almost \$100,000 on this contract.

A special statutory provision allows the Commissioners Court of Harris County to contract with an established bar association, a nonprofit corporation, and nonprofit trust association or any other nonprofit entity whose purpose is to provide timely and effective assistance of counsel for an indigent accused of crime.⁹ The use of contracts with individual attorneys is growing in Harris County, but not in accord with the statutory provision. Instead of contracting with the Commissioners Court, these attorneys contract with individual judges. The contracts, which are entered into without formal county approval, require that the attorney handle all or a portion of the indigent cases in a particular courtroom for a fixed period of time, or indefinitely.

⁹ See TEX. CODE CRIM. P., Art. 26.041.

Many district and county court judges in Harris County use the contract model to provide indigent defense services. In county court, many judges employ oral contracts to handle every new case that the court receives on a particular day, for a flat rate ranging from \$130 to \$200. For those cases in which a plea agreement is not reached (a very small number, as we were told that up to 90% plead at the initial appearance), the case is assigned to a new attorney for the day at the next setting.. A few of the county court judges we interviewed use instead an attorney for the week contract model. Compensation for these contracts, which again, tend to be oral rather than written, ranges from \$1,000 - \$1,100 per week.

In fact, the use of attorneys who are appointed to a judge's courtroom for the day is a fairly common practice we observed, particularly in county courts at law. The expectation for the attorney of the day is that he or she will negotiate pleas for a number of indigent defendants that day. In other counties that use the attorney of the day system, if the defendant refuses to enter a guilty plea that day and presses for a trial, the judge will assign a new lawyer. Lawyers for the day are paid a flat daily rate, as in Harris County, or a fee per disposition, as in Lubbock County.

Some Harris County district court judges use the attorney for the day model, and daily compensation rates are typically in the \$420 per day range. But many more Harris County district court judges prefer to use the attorney for the week contract model. Under these contracts -- again, most are oral -- attorneys are paid in the range of \$2,000 - \$2,100 per week. Some district court judges' arrangements with attorneys of the week are more accurately characterized as indefinite, at-will contracts. We learned of one district court, for example, that uses three contract attorneys exclusively. Each is paid a flat fee of \$2,100 per week. Two of the attorneys handle initial appearance proceedings, where many cases are disposed of; a third handles those cases that go to trial. These attorneys, who maintain a private office together, must pay for their own overhead, support services, investigative services and some expert witness fees out of their weekly flat fee. We were told that the court will only authorize expert witness fees for very expensive experts, such as DNA experts. This court's approach of including the cost of support services in the flat fee compensation amount creates, at the very least, a potential conflict of interest for an attorney who must decide whether to forego income in order to hire experts, investigators and other support staff.

There are several types of contract programs in Tarrant County's misdemeanor courts. Some judges use a "lawyer for the day" contract, and those defendants whose cases are not disposed of that day will be represented by another assigned attorney when their case is reset. Other judges use contractors to handle most of the appointed work. Some individuals we spoke to were concerned that these contract lawyers had too many cases and not enough time to do a competent job. One judge commented that the contract system had grown excessively in Tarrant County's misdemeanor courts.

Of the sample counties, we found that only one uses written contracts for the provision of indigent defense services. The contracts are between judges and attorneys.

D. Defense Counsel's Independence from the Judge

With any type of judicial private bar appointment – be it case-by-case appointments, an appointment of a “lawyer for the day,” or the use of a contract defender – there is a question of the attorney’s independence from the judge. This is why the American Bar Association recommends the use of coordinated indigent defense programs, where the selection of lawyers for specific cases is not made by the judiciary or elected officials, but is arranged for by an administrator of an assigned counsel program, a public defender organization or a contract-for-service program:

The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.¹⁰

Ethical standards governing Texas practice also allude to the potential for the appearance of impropriety or lack of independence. The Texas Code of Judicial Conduct, Avoiding Impropriety and the Appearance of Impropriety in All of the Judge’s Activities, Canon 2(B), states: “A judge shall not allow any relationships to influence judicial conduct or judgment. A judge shall not . . . convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 3C(4) states: “A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. . . .”

Despite American Bar Association guidelines and the Texas Code of Judicial Conduct, the fundamental structure of Texas’ system of appointing counsel raises precisely these issues of independence and favoritism. For one thing, the judges’ status as elected officials raises ethical questions. We were told that in Bexar County, for example, some attorneys seeking court appointments believe they must contribute to judges’ reelection campaigns if they are to receive appointments.¹¹

Another conflict arises because nearly all judges have sole discretion not only as to which type of indigent defense system to use (whether appointed counsel, contract attorney or public defender), they also have sole discretion to choose the individual attorneys who handle these cases in their courtrooms. In Dallas County, criminal court judges have the option to decide whether to

¹⁰ Standard 5-1.3 (a) - Professional Independence, *ABA Standards for Criminal Justice: Providing Defense Services*, Third Edition (1992)

¹¹ This sentiment echoes a practice found statewide in the Texas State Bar Survey. "It is not uncommon for judges to solicit campaign contributions from criminal defense attorneys and then imply that the attorney will recoup their contributions in the form of court appointed work. At the very least, attorneys feel pressured to contribute so that they can stay in good favor with the judge whom they depend on for favorable court assignments." (Judge Allan K. Butcher and Michael K. Moore, Ph.D., *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas*, September 2000, p. 20.)

permit a public defender to practice in the courts. Most judges have opted to have one full-time public defender assigned to their courtroom. One district court judge does not use any public defenders; another uses public defenders exclusively, except for conflict of interest cases. In El Paso County there is a similar arrangement giving individual judges discretion over whether and how much to use the public defender's office versus assigned private counsel. One interesting exception is that the most recent county court at law to be created was originally funded in 1997 by the Commissioners Court with a stipulation that the court must utilize the public defender's office for all appointments other than conflict cases. In practice, the court has made use of the public defender's office in roughly 60% of the court's caseload.

The conflict is only exacerbated by the pressure that judges face to move their dockets. This is a particular concern in the case of contract counsel who are employed by the judge on a regular or permanent at-will basis and are thus beholden to the judge for a substantial part of their livelihood. As one attorney familiar with contract lawyer arrangements put it, "They try to do an adequate job until they reach a certain line and don't step over that line for fear of alienating the judge." In addition, we were repeatedly told how ad hoc assigned counsel also feel caught in the tension between the need to respond to the judge's concerns about disposing of cases promptly and the demands of providing thorough defense representation for the client. As one private attorney told us, "It's on the judges' shoulders to police the quality of representation. There are a lot of attorneys who are assigned cases because [the judges] know they will not try the case [instead they will persuade their client to plead the case]." Another defense lawyer described the conflict this way: "Everything in this system is tempered by the symbiotic relationship between attorney and judge, where you have to weigh whether I'm going to defend the client or continue to get appointments." A different defense attorney voiced a concern expressed by many saying "An attorney who files a lot of motions and asks a lot of questions creates a problem for the judge. You tick off the judge and don't get any more appointments."

Judges, too, recognize this tension. One Dallas County district court judge told us, "I don't like appointing and paying attorneys. At the very least, it gives an appearance of impropriety, and probably more than that. There's too much self-interest for the attorney. How am I to know if the attorney worked ten hours or ten minutes on the case?" Echoing this concern, a judge in a rural East Texas county said, "I don't like making appointments. There's something inherently political about making appointments."

Even if judges recognize this tension, many seemed to believe there was no way around it. Except in Travis and Denton counties, the majority of judges we spoke with believe firmly that judges should have the exclusive authority to select attorneys for individual cases and to determine their compensation. These judges profess they alone can evaluate each attorney's level of experience and qualification to handle certain types of cases. However, in some counties where judges exercise complete authority over appointments, there is an undeniable appearance of favoritism or cronyism.

E. Texas Court Structure's Effect on Indigent Defense

In addition to the potential for conflicts of interest in the appointment process, the nature of Texas' court system also lends itself to each court becoming its own "fiefdom," where there is no

court-to-court uniformity and little court-to court-consultation regarding standard practices. One judge is elected to each of the state's district courts, constitutional county courts and county courts at law -- approximately one thousand in all. Our observation is that even within each county, there are very few efforts made to encourage uniform practice among the courts, and those efforts that are made are informal. As one judge in El Paso told us, "The real problem with the system is that every judge is a kingdom unto himself. That's the downside of elected judges." Many judges described their reluctance to consider how other judges choose to structure their indigent defense systems. Often these judges used phrases similar to the judge who stated simply, "We don't get into other people's business." In large and intermediate size counties, we encountered frequent skepticism among the judiciary about whether the judges could get together and agree on common standards or practices, such as the Travis County system for jointly screening attorney qualifications.

For all attorneys - including those who accept court appointments - this lack of uniformity further complicates defense counsel's job. Within a single county, judges take varying approaches towards motions practice; establish different requirements for counsel's requests for experts and investigators; and compensate counsel differently (within the highly varied limits allowed by established fee schedules).

A related problem is the state's significant size, which lends itself to further variance between practices in different counties, particularly in more rural parts of the state. One private attorney, who receives appointments from judges in a number of rural counties, commented: "You should be able to walk into [any court] and know how it works. Variation makes life tough on everybody. For example, we should handle pre-trial the same way, statewide." This attorney was paid the following rates for pleas for felony cases in the four counties in which he works: \$150 per plea in two counties; \$250 in another; and \$300 in the fourth.

We did find significant exceptions to the general lack of coordination and consultation among judges. As mentioned elsewhere, criminal court judges in Travis County meet twice a year to collectively assess the qualifications of attorneys seeking to get onto or remain on the county's master lists of court-appointed attorneys. The county court judges in Harris County have taken some initiative to build on the established Harris County attorney certification procedure by considering as a group further ways to improve their indigent defense procedures. At the time of our visit in Dallas County, district court judges were in the process of discussing criteria to adopt regarding qualifications of attorneys who wish to receive court-appointed cases. As part of their review process, the Dallas County judges invited the Staff Attorney for the county courts in Harris County to discuss with them the certification and education requirements adopted in Harris County. The Judicial Section of the State Bar of Texas and the College of New Judges have begun to devote specific sessions at their conferences to presentations and discussions regarding local indigent defense procedures and the sharing of information about best practices.

F. Qualifications for a Lawyer to Represent Indigent Criminal Defendants

Under Texas law, the sole qualification for a lawyer to be appointed to represent an indigent defendant is that “only licensed individuals may be appointed as counsel.”¹² In many of the counties we visited, there are no minimum eligibility criteria for attorneys who wish to accept court appointed cases. A newly minted attorney who has never before handled a criminal case, or any case for that matter, can request to be placed on a county or a judge’s list to receive court-appointed cases. Indeed, we were told by a number of judges that, while they make appointments in a rotational basis, they often give additional cases to new attorneys to help them build their practices.

Many of the lawyers in Texas who take court-appointed cases are experienced defense lawyers or former prosecutors who have prior criminal case experience. However, many are solo practitioners who, upon passing the bar, “hang out a shingle,” and try to build a law practice. Many of these lawyers have no previous experience working in a law firm or a district attorney’s office. Many seek out court-appointed cases as an important source of income in these early days of their practices. In some counties, such as Smith County, new lawyers are assigned to only relatively uncomplicated misdemeanor cases so they can gain experience before getting assigned to more serious cases. However, in a number of counties, it is very rare for lawyers to be appointed in any misdemeanor cases, unless a defendant is detained pre-trial. The result is that new lawyers “cut their teeth” on felony cases, the only ones available. Travis County presents an exception to this practice, as no lawyers are allowed to take even misdemeanor appointments unless they have at least one year of criminal law experience and have served as lead counsel in a minimum of three trials (experience as a second-chair in a felony case may substitute for one misdemeanor trial).

Harris and Travis counties have also established qualification requirements for counsel. In the early 1990s, Harris County adopted a certification program for capital,¹³ felony and misdemeanor cases. For the non-capital list, the certification program involves: 1) attendance at a three-day seminar (for which attorneys also receive CLE credits); 2) biennial attendance at a half-day seminar that reviews changes in common and statutory law; and 3) for the felony list only, passing a 100-question multiple choice test with a score of 70 or better. Using a “grandfather” affidavit, attorneys may be able to bypass these requirements. There are approximately 600 attorneys on the felony list and 650 attorneys on the misdemeanor list. To enforce the program, Harris County judges have passed a local rule prohibiting the county auditor from paying an appointed lawyer who is not certified.

In Travis County, all attorneys who wish to accept court appointments to non-capital cases of defendants who are detained pre-trial must meet certain minimum criteria and attend at least 10 hours of criminal CLE each year. In the vast majority of indigent defendant cases, counsel is not appointed by judges sitting in the individual cases. Rather, new appointments are made in alphabetical order off lists of qualified lawyers maintained by the Criminal Courts Administration Office. To ensure that the lawyer has the expertise to handle the cases to which he or she is appointed, the Criminal Courts Administration Office maintains several lists, including a

¹² *Ex parte Engle*, 418 S.W. 2d 671, 673 (Tex. Crim. App. 1967).

¹³ There is a separate test and qualification process for attorneys who wish to be appointed to represent indigent defendants who are facing a sentence of death. See Part II of this report for details.

misdemeanor list, a felony list, and an appeals list. The felony list is divided into three tiers. Those attorneys on the A list are deemed qualified to accept first degree felonies. Those on the B list can accept second and third degree felonies, while those on the C list are eligible to accept state jail felonies and probation revocations.

Faced with the prospect of a felony charge, it is hard to believe that a defendant who could afford to hire an attorney would choose to hire one with little to no previous criminal case experience. This situation presents a potentially grave disservice for indigent defendants who risk losing their liberty for lengthy periods of time as the price for being assigned to a new court appointed attorney gaining experience in criminal law. Also, attorneys who accept cases which are over their heads may be in violation of Rule 1.01(a) of the Texas Disciplinary Rules of Professional Conduct, which forbids a lawyer from undertaking a matter in which he or she is not competent.

G. Appointment of Counsel Process

1. Indigency Determination

Indigency screening for defendants seeking a court-appointed attorney is conducted by a variety of individuals in Texas, including justices of the peace, jail personnel, court administration staff, magistrates and judges. There is no uniform process (such as a single indigency determination form) used from county to county or from courtroom to courtroom. Typically defendants are required to fill out and sign an affidavit relating to their inability to hire an attorney.

While screening may be conducted by a range of court personnel, the actual determination of indigency is usually made by the judge. Nearly all judges presume that a person who remains in custody without retaining counsel is indigent. But for everyone else, the vast majority of the judges we interviewed make indigency determinations by considering an unspecified set of ad hoc criteria, without reference to objective formulas that are consistent from one defendant to the next. In fact, the most common standard used seems to be “I know it [indigency] when I see it.”

One consequence of this ad hoc approach is that sometimes defendants who are not indigent are appointed counsel because of poor screening. In fact, verification of information provided by defendants is very rarely done; we encountered verification being conducted in just one county -- El Paso -- and only for misdemeanor defendants who are not detained pre-trial. In El Paso's county courts, determination of indigency is done by case-workers with the Office of Court Administration. Out-of-custody defendants facing misdemeanor charges are sent a court notice informing them of an initial court appearance. Prior to that court date, they are asked to attend an initial appointment with the OCA for indigency determination and a second appointment for verification of the determination. Only after this process is complete will a defendant be designated by the OCA as eligible for appointment of counsel. The judge who will hear the case receives a motion from the OCA requesting counsel be appointed for the defendant on the date of his initial appearance. Appointment of counsel in misdemeanor cases is made exclusively by the judges.

A common explanation for not conducting verification is that it is not a cost effective endeavor. Interestingly, in El Paso County, the average monthly expenditure on assigned counsel for misdemeanor defendants declined significantly after implementing the verification process.¹⁴

2. Counsel Not Appointed for Those Out on Bond

Article 26.04 of the Texas Code of Criminal Procedure provides:

(B) in determining whether a defendant is indigent, the court shall consider such factors as the defendant's income, source of income, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, spousal income, and whether the defendant has posted or is capable of posting bail. *The court may not deny appointed counsel to a defendant solely because the defendant has posted or is capable of posting bail.* (emphasis supplied)

While we found little uniformity in indigent defense practices among the counties, one exception to this is the way in which the decision of whether to appoint counsel for defendants who are out on bond pre-trial is made. Article 26.04 clearly forbids denial of appointment of counsel "solely because the defendant has posted or is capable of posting bail." Yet in many counties we visited, we were told by judges and attorneys that if a defendant is out on bond there is a strong presumption that he or she is able to afford to hire an attorney and thus only in very rare circumstances will counsel be appointed.

As a substitute for a standardized method of determining a defendant's financial means using standardized criteria, many courts just reset the case and repeatedly send the defendants out to "test the market" to determine whether they can find counsel who will represent them for some unspecified fee the defendant agrees to pay. Some judges frankly acknowledge using this process to "pressure" defendants to hire counsel.

In extreme situations in more than one county, defendants are given their choice of constitutional rights: either they may remain in jail and receive a court-appointed counsel or they may post bail and remain out of jail pre-trial but forego any right to appointed counsel. We were told some judges revoke bond of defendants who repeatedly show up at court saying they cannot afford an attorney; then, once the defendant is returned to jail, the judge appoints counsel. In the absence of any independent, objective procedure for determining indigency under standards which treat similar defendants equally, this practice raises serious questions of due process and equal protection.

The goal of capping indigent defense costs is one of the factors driving the decision to use ability to post bond as an indigency evaluation litmus test that almost always results in denial of appointed counsel. One judge in a West Texas county promptly appoints counsel to represent

¹⁴ Before the verification program was introduced in 1997, the average monthly expenditure for court-appointed counsel was \$133,000. For the month of April, 2000 the expenditure was \$44,413.40. El Paso County Criminal Case Management Attorney Fees Report for bills submitted between 4/1/00 and 4/30/00.

indigent defendants who are detained pre-trial because he knows it will cost the county less to compensate the attorney \$250 - \$300 to resolve the case early than to keep him in jail detained pre-trial at a cost of \$50 a day. This same judge almost always refuses to appoint counsel for defendants who are out on bond and able to work. We were told in a number of places that if a defendant who has bonded out is working, but earning less than a poverty-level income according to federal poverty guidelines, it is likely that he or she will not be appointed counsel in a misdemeanor case on the presumption he or she can hire a lawyer. The result for defendants in such a position is that they go without counsel.

While a defendant's ability to post bond is one factor to be considered in deciding whether an individual should receive a court-appointed attorney, there are numerous other areas to probe. Besides violating the Texas Code, the human consequences of denying an indigent defendant an appointed attorney solely because he or she is able to post bond are great. Forcing a defendant to remain in jail in order to have access to counsel - as we were told occurs in a couple of counties - risks exacerbating his personal situation even further through possible loss of employment and housing, and strained family relations, particularly for defendants with children. The practice exerts unnecessary financial strain on the county, as well. The cost of housing an inmate pre-trial in county jail is about \$34 per day.¹⁵ If a defendant is released on bond and appointed counsel, the cost of counsel will in many cases be less than the expense of detaining the defendant for weeks or even months prior to his trial date.

In one county that has a pre-trial diversion program for first-time DWI offenders, those misdemeanor defendants who are indigent are effectively shut out of consideration for the program. The county has a policy of not appointing counsel in misdemeanor cases, while the county attorney's policy for considering defendants as candidates for the pre-trial diversion program requires that the defendant have an attorney. The county attorney expects defense counsel to write him to request consideration of clients for the program.

In the smallest counties, there is no county court at law, only a constitutional county court. In these counties, constitutional county court judges preside over juvenile cases, class A and B misdemeanors (where the fine exceeds \$500 or where a jail sentence maybe imposed), probate matters, and civil matters in which the matter in controversy falls between \$200 and \$5,000. The county judge, who presides over constitutional county court, is the same person who heads the commissioners court - the governing body of the county. There is no requirement for the county judge to be a lawyer and often he or she is not. It is up to the county judge to determine whether to appoint an attorney to indigent defendants in misdemeanor cases.

We were told it is very rare for counsel to be appointed in constitutional county court cases, especially in cases where defendants are able to post bond, but in some counties, even when the defendant remains in custody. One county judge told us that on average, only 1 in 150 misdemeanor defendants has an attorney. Many people - including prosecutors, attorneys and judges - told us that they feel there is an appearance of a conflict of interest for the head of the county's purse strings, the county judge, to have authority to appoint or deny counsel. Beyond that, some attorneys expressed

¹⁵ According to the most recent data collected by the Texas Commission on Jail Standards the average jail cost per day incurred by counties is \$34.79.

concern over a non-lawyer making a determination about a person's liberty without fully appreciating the law.

3. Uncounseled Guilty Pleas

In a number of the sample counties, we learned of a troubling practice whereby indigent defendants, particularly indigent misdemeanor defendants, are encouraged by the court to speak to the prosecutor, without the benefit of counsel to represent their interests, to determine if a plea agreement may be reached. For example:

- According to a Brazoria County court at law judge, the district attorney keeps track of the misdemeanor defendants in jail who cannot make bond. An assistant district attorney goes into the jail two to three mornings a week to talk to in-custody defendants who do not have lawyers to see if misdemeanor defendants will waive counsel and enter a plea of guilt and to see if felony defendants will waive indictment. (If a defendant waives indictment and the right to an attorney in a felony case, this must be done in open court on the record.) This practice is defended as a way to expedite cases where defendants are truly guilty and don't want an attorney. Defendants usually plea to a sentence of the time served and are given a fine, although in some cases they will also be given jail time.
- In an East Texas county, the county court at law judge advises defendants who have made bond that they have three options: 1) to hire an attorney; 2) to possibly have an attorney appointed, though they may have to repay the costs associated with this representation; or 3) to go talk directly to the prosecutor, to determine if an agreement can be reached. The vast majority of defendants choose the third option.
- In Smith County, misdemeanor defendants are told the morning of arraignment that they can talk with the county attorney before entering a plea. An assistant district attorney and a representative from probation sit in the central jury room and advise defendants -- all without benefit of counsel -- of the charges, offer sentences, and discuss any implications and obligations of the offers, such as probation requirements. Defendants make up their minds and enter pleas that afternoon. The prosecutors often recommend doing jail time, because probation costs can be expensive. Defendants can serve three for one sentences, e.g., serve 10 days in jail and get credit for 30 days, and apply \$100 per day toward the cost of fines and court costs.
- A similar system operates in Shelby County, where attorneys are rarely appointed and thus misdemeanor defendants are effectively required to talk directly to the county attorney about the charge and an offered plea. The county attorney inquires whether the defendant wishes to waive counsel, and the defendant signs a waiver of the right to an attorney and a stipulation of the evidence. The defendant talks to the judge only to enter a plea. Only a handful of misdemeanor defendants have appointed counsel in a given year.

We believe that each of these systems may have been initiated with the goal of expediting the process for the intended benefit of all of those involved, including defendants. There are certainly some defendants charged with minor offenses who are guilty and who may have no interest in involving an attorney. However, a defendant's constitutional right to counsel is seriously undermined where the court effectively requires defendants to forego their right to counsel, creates

strong incentives to confer with the prosecutor, or steers defendants toward uncounseled plea bargains.

In Tom Green County, one attorney said the local culture is: get it over with as quickly as possible and get on with your life. This attitude fails to recognize the long-term implications even minor criminal convictions can have on one's future. When asked if he thought an indigent misdemeanor defendant would be better off if he were represented by counsel, a district attorney in another county agreed and admitted some people don't understand the magnitude of what they are pleading to; for instance, they don't know if they plead guilty to theft, that is a crime of moral turpitude which will always follow them and preclude them from ever getting certain jobs. In addition, misdemeanor convictions may be used to enhance subsequent criminal convictions, or, for non-citizen legal permanent residents, can be used to deport them. Representation by counsel can make a very significant difference and should not be discouraged.

The practice of encouraging uncounseled misdemeanors is not followed in every courtroom. In Tarrant County, one county court judge expressed concern about indigent defendants going forward pro se. He said he does not permit this in his court. Defendants who wish to plead guilty are assigned counsel to ensure they understand the implications of their decision to plead guilty.

4. Timing of Appointment of Counsel

Article 26.04(a) of the Code of Criminal Procedure is the primary provision on when counsel is to be appointed for indigent defendants. A serious flaw in the provision is its lack of any bright line time standard regarding how soon after arrest an indigent defendant must be appointed an attorney. Delay in appointment of counsel is a major concern in many counties. For instance, in some counties, indictment triggers the appointment of counsel. Indictment can occur months after arrest, leaving the defendant in jail with no access to counsel during that period. Even in counties where it is not indictment that triggers appointment, but some other earlier appearance before the court, that might not occur for weeks after arrest. In either case, even for those defendants out on bond, the practice whereby counsel is appointed some or a considerable time after arrest works to the defendant's detriment in that counsel is impeded in pursuing witnesses and factual leads in a timely, expeditious fashion.

In a few counties we visited, concerted efforts are made to appoint counsel to indigent defendants in a timely fashion following arrest. For example, Harris County's direct filing system allows arresting officers, within hours of arrest, to transmit charging information to the district attorney, who is available 24 hours a day to screen charges to determine whether they will stand. Once a charge is established, bond is determined according to a set bail schedule. Pretrial Services interviews defendants (both those in jail and those who are able to make bail) for indigency and mental health screening and within 24 hours of arrest, the defendant has a probable cause hearing.

For in-custody defendants charged with both felonies and misdemeanors, as well as felony defendants who have made bail, within the next 24 hours, the defendant has an initial appearance, or preliminary initial appearance (PIA), at which counsel is appointed by the County and District court judges. For defendants charged with misdemeanors who have made bail, initial appearance is set for seven days after the probable cause hearing and the defendant can get an appointed lawyer there -

though often this does not happen because of the widespread presumption that defendants who are able to make bail are not entitled to counsel.

In Lubbock County, the courts recently enacted local rules for courts hearing criminal matters. One requires that an initial appearance be conducted pursuant to article 15.17 of the Code of Criminal Procedure for all defendants in jail within 24 - 48 hours of their arrest. Another rule provides that an indigent defendant in jail longer than 72 hours is to be appointed an attorney within the next 24 hours.

Compared to other Texas counties, Harris and Lubbock counties have an exceptionally expeditious process to shepherd defendants through the initial booking court appearances and to appoint counsel. For many counties, we learned that counsel is not appointed to indigent felony defendants, even those in custody, until an indictment is returned and the defendant is arraigned on those charges. This practice is most commonly found in -- although not restricted to -- smaller counties where district court judges serve in more than one county and there is not a continuous grand jury.

In Dallas County, the judiciary has recognized that delay in obtaining information from the charging agency can delay indictment, thereby slowing down the entire process. To address this problem, per local district court rule adopted in the early 1990s, if the charging agency fails to file charges within 72 hours of arrest, the defendant is released. Similarly, in Comal County, if a misdemeanor defendant has been detained for more than a week, the county court at law judge will grant them a personal recognizance bond.

The practice of not appointing counsel until after indictment in felony cases -- whether a defendant is out on bond or not -- works a great injustice to the defendant. Without counsel in the weeks and months leading up to indictment, there is little or no opportunity to conduct crucial investigatory work while the evidence trail is still fresh. Rudimentary steps that a competent retained lawyer will take as a matter of course include: meet with and interview the client, interview transitory witnesses, review the crime scene, and preserve evidence (such as 911 tapes, which are erased after 90 days). Nor is there an ability to timely review the police report, any search warrants or the charging instruments to see if there are facially fatal defects to the prosecution's case. An indigent defendant who is not appointed counsel until weeks after arrest will not have the same opportunities to preserve evidence. Additionally, a defendant whose counsel is not appointed in a timely fashion loses the ability to request and prepare for a bond reduction hearing and an examining trial. Early appointment, followed by a thorough investigation of the case, is crucial to defense counsel's achieving one of his most important goals: trying to avoid indictment or getting charges reduced.

We found that in many counties it is very uncommon to appoint counsel for indigent misdemeanor defendants. Detained misdemeanor defendants are appointed counsel, but subject to delays similar to those for detained felony defendants. The problem with delay, however, affects a very small portion of misdemeanor defendants. The vast majority -- those who are able to post bond -- often face a complete denial of counsel. As mentioned above, in many counties there is a strong presumption that if a defendant is out on bond, he or she is able to hire a lawyer and will not be appointed counsel.

5. No Pre-Indictment Counsel for Those Felony Defendants Out on Bond

In a number of counties we visited, including El Paso, Brazoria, Dallas, Denton, McClennan, Tarrant, Terry and Tom Green, counsel is appointed prior to indictment for felony defendants who are unable to post bond, but for defendants out on bond, counsel will not be appointed until after indictment.

In El Paso, a jail magistrate position was created as part of the settlement agreement in a federal lawsuit challenging over-crowding conditions at the jail. As part of an overall effort to prevent jail over-crowding, the Jail magistrate appoints counsel for indigent felony defendants who are detained pre-trial, thereby giving counsel an opportunity to begin work on the cases and, ideally, resolve them expeditiously. Appointment of counsel typically occurs within 10-30 days from arrest. There is no similar mechanism for early appointment of counsel for defendants out on bond. It typically takes between 30 and 60 days from arrest before an indictment is returned and counsel is appointed for a defendant out on bond, time that is lost to begin work on the case.

Reflecting on this disadvantage and noting it would not happen in a retained case, one attorney in Tom Green County told us he “definitely treats retained cases differently [than appointed cases]. If I get a case before indictment, I try to avoid indictment or try to get the charge reduced.” Another private attorney in Dallas strongly supports the county’s practice of appointing counsel at the preliminary hearing because he feels that cases are “more maneuverable” (in terms of trying to reach a favorable plea agreement) pre-indictment, and because in some cases, he is able to assemble witnesses to appear on defendant’s behalf before the grand jury. Additionally, he pointed out, the county saves money, because there are generally fewer settings once counsel is appointed.

H. Role of Pre-Trial Services Agencies

One of the striking features many Texas systems is that there appears to be no real mechanism in advance of trial for developing information about a suspect, screening for indigency, and monitoring his whereabouts prior to trial. There is no statewide pretrial program. Jefferson County has what we were told is one of only a handful of county pre-trial programs operating in the state. The program helps identify alternative sentencing programs for eligible defendants and secures low bonds or personal recognizance bonds for appropriate defendants. The pretrial services program plays an important part in controlling the jail population, and thus saves the county costs associated with housing those defendants appropriately released on bond or personal recognizance. Responsibilities of pretrial services agencies in other states also include: gathering and providing information about all arrestees charged with criminal offenses, providing judicial officers with verified information for bail setting purposes, monitoring defendants’ compliance with their conditions of release, notifying them of future court dates, and assisting them with court appearance matters.

In addition to pre-trial services agencies in counties such as Bexar, Jefferson and Travis, Texas counties may wish to look to Washington D.C.’s highly successful Pre-Trial Services Agency as a model. Washington D.C.’s Pre-Trial Services Agency is staffed by approximately ninety employees who are organized into a number of operational units. The “court services” units consist of the Pre-Release, Post-Release, Evening Division, Failure to Appear, Intensive Pretrial Supervision, Adult Drug Detection, Juvenile Drug Detection, and District court units. The

“administrative services” division includes a data processing component; computer support and research staff; clerical support; and budget, personnel, and procurement staff. Both divisions work together to gather, report, monitor, and manage crucial pretrial release information about defendants in the District of Columbia.

I. Case Processing and Early Entry of Counsel for Defendants

The ABA recommends that 90 percent of felonies should be disposed of within 90 days of arrest; 98 percent should be disposed of within 180 days of arrest. Section 2.52, Standards of Timely Disposition, Standards Relating to Trial Courts, American Bar Association, 1992, p. 87. The ABA recommends that 100 percent of misdemeanor cases should be disposed of within 90 days of arrest.

Failure to determine indigency early in the case process and to appoint counsel early in the life of a case works injustice to defendants and results in inefficiencies in the criminal court process. “Recall” dockets, for example, are an inefficient use of the court’s time. In these settings, which are also called “announcement dockets,” indigent defendants who are out on bond (typically on misdemeanor charges) return to court one or more times to state that they do not have an attorney. This practice was sharply criticized in an OCA report on the Lubbock County case management system. The report noted defendants often appear on a recall docket at least four times during a three to six month period before an attorney is appointed. The OCA report urged the County to conduct a cost/benefit analysis of appointing attorneys early in the case process rather than repeatedly calling back defendants to check on whether they had hired an attorney.¹⁶

An important structural problem which contributes to the over-reliance on these costly recall dockets is the absence of an objective and efficient procedure for determining indigency according to uniform standards. Lacking a standardized method for determining a defendant’s indigency, many courts just reset the case and repeatedly send the defendant out to “test the market” to determine whether they are able to find counsel who will represent them within their financial means.

Requiring defendants who are out on bond to test the market as a substitute for objectively examining their actual financial capacity results in another problem in certain counties. In at least three sample counties - Dallas, Harris and Tarrant - private attorneys actively solicit work from recently arrested individuals facing criminal charges, advertising that they will handle criminal cases for as little as \$50 - \$100. Some judges in these counties express grave doubts about the quality and thoroughness of work done by these attorneys. Yet some of these same judges justify requiring defendants who are out on bond to test the market regardless of their financial circumstances, by pointing out that attorneys can be hired for these low \$50 - \$100 rates.

Courts and county commissioners should recognize that if a defendant’s case is processed more quickly, the county will achieve jail cost savings because defendants will be released from jail sooner, and the county will benefit from increased revenues in fines and court costs required of

¹⁶ Texas Office of Court Administration, *Case Management Review: Lubbock County* (December 1999), at 3. In response to the OCA’s findings, Lubbock County implemented a Lawyer for the Day program to help expedite processing of indigent defendants. See Appendix A for a more complete description.

defendants while on community supervision. Increased case processing and containment of jail costs are directly related to early entry of appointed counsel.

We observed that at least one county that has taken such a pro-active approach. El Paso County's Criminal Law Magistrate Court at the county jail has jurisdiction over offenses allegedly committed in all parts of the county, save one town. The jail magistrate makes probable cause determinations for the issuance of arrest warrants and for individuals who have been detained following arrest without a warrant; sets bonds for individuals detained in the jail; appoints counsel for indigent defendants in the jail; informs defendants of their *Miranda* rights and other admonishments required under Texas laws; and conducts examining trials. The Jail magistrate is a central figure in the County's efforts to expedite the processing of cases in which defendants are detained pre-trial.

J. Examining Trials

The examining trial can be a highly effective tool for defendants in counties where the prosecution is slow to indict. An examining trial is akin to a preliminary hearing, where the prosecutor has to produce sufficient evidence to establish there is probable cause to believe that a crime has been committed and the defendant committed it. Prosecutors typically do not want to go to an examining trial, where they will have to "lay out their cards" and give the defense a sense of their strategy, legal theory and potential witnesses. Therefore, if a defense lawyer files a motion for an examining trial, the prosecution will often indict a defendant prior to the date for the examining trial.

There is another practical reason why many indigent defendants never get an opportunity to make use of this tool. In those counties where it would be most effective, counsel is often not appointed until after indictment, or at least until a lengthy time following arrest. With no counsel, defendants are not likely to know about their right to request an examining trial, and are typically ill-equipped to prepare for one, especially if they are detained.

In those counties where counsel is appointed prior to indictment, we heard wildly varying approaches to the use of examining trials. In one rural county, we were told that if a court-appointed attorney requests an examining trial, he or she will be off the list. "No need to play that card," we were told. On the other hand, in an urban county, we were told defense attorneys file for examining trials to get district attorneys to indict more quickly, particularly when a defendant is detained pre-trial. Even in counties where filing for an examining trial is not anathema to a lawyer's practice, some defense attorneys don't like to do it, assuming that any time a defendant serves in jail pre-trial will count against a later sentence. One attorney told us that his paying clients make use of examining trials more often than indigent defendants; paying clients don't want to wait 60-90 days to be indicted.

K. Trial Rate

The 23 sample counties were unable to provide us with comprehensive information on trial rates for the indigent misdemeanor and felony cases. However, based on the anecdotal information we gleaned during our site work, we are convinced that the trial rate is very, very low. For example, a Hidalgo County Court judge estimated they have one to two misdemeanor trials each year, for the

entire county. In Tom Green County, an estimated 85% - 90% of misdemeanor cases plead at arraignment. In Shelby County we were informed that misdemeanor trials are exceedingly rare and that counsel is almost never appointed for defendants charged with misdemeanors. Almost all indigent misdemeanor cases, we were told, are resolved by uncounseled guilty pleas.

Throughout the state, many county criminal justice systems are set up to discourage trials, and encourage plea agreements, even when meritorious issues may be in question. The reasons for this environment vary. In Lubbock County, we were told that lack of investigator support often leaves defense counsel in a position of advising their client to plead guilty on the basis of what is in the district attorney's file without any ability to conduct an independent investigation.

One District court judge in Dallas told us: "Attorneys want to be appointed to jail revocations and pleas. This is where the money is – it's not in trials." This was confirmed in our interview with a private attorney who accepts misdemeanor and felony appointments in Harris County: "If you're in custody, you can get a fairly quick trial, but pleading's the fastest way to go." In his five years of accepting court appointments, he has never gone to trial.

L Funding for Indigent Defense Services

One of the chief criticisms of the provision of indigent defense services in Texas is that the responsibility for funding this federal and state constitutional mandate is left to the counties. As mentioned above, Texas is one of only four states in the country¹⁷ that place total responsibility for funding trial-level indigent defense services entirely on the counties, without regard to the overall resources available in each county. Our site work revealed the pressure, sometimes extreme, under which counties operate to meet this burden. We believe this pressure is one reason for judges' reluctance to appoint counsel to those defendants who are able to make bond, which is most often true in misdemeanor cases. One judge told us that he believed you would have to double taxes to appoint attorneys to all indigent misdemeanor defendants. He encourages misdemeanor defendants out on bond to find a lawyer.

Over the past twenty years, there has been a strong trend towards states relieving counties of the responsibility of funding indigent defense services. According to the first 50-state study on indigent defense in the United States, *National Criminal Defense System Systems Study*, U.S. Department of Justice, Bureau of Justice Statistics (1986), in 1982, 20 states placed total responsibility for funding trial-level indigent defense services upon the counties and 16 states funded indigent criminal defense costs entirely at the county level. In 2000, just four states place total responsibility for funding trial-level indigent defense services at the county level. In 2000, trial-level indigent defense costs in 23 states are 100% state-funded; in another five states, the states provide at least 75% of all indigent funds at the trial level.

Nationwide, with very few exceptions, the indigent defense systems in states with 100% state funding or predominant state funding have been more adequately funded overall than those in states where counties provide most of the funds. This is due to several factors, including the greater authority and flexibility states have in their taxing policies and the wider variety of state revenue

¹⁷ The other three states are Pennsylvania, South Dakota and Utah.

sources. There tends to be greater overall uniformity of services provided statewide when the stability of local programs is not contingent on whether a county has a large or small tax base. In addition, most states that have moved to state funding have accompanied that move with the development of some form of state oversight and accountability through state agencies responsible for assuring the efficiency and quality of representation.

At the end of each interview, we asked interviewees what, if any, recommendations they had to improve indigent defense in Texas. Uniformly, whether respondents were county commissioners, court administrators, private attorneys, judges or public defenders, interviewees suggested that the state help counties with some of the costs of indigent defense representation.

1. Low Compensation for Court-Appointed Counsel

With few exceptions, compensation for court-appointed attorneys in Texas is very low. All counties are required by law to maintain a schedule of fees that include a fixed rate, minimum and maximum hourly rates, and daily rates that will be paid to assigned counsel. Fee schedules are established by each county's district and county court at law judges. In some counties, the schedules for district and county courts at law are combined. More commonly, there are separate schedules for district and county court cases. In some counties we visited, there was no printed fee schedule. Other counties use outdated fee schedules that may have been adopted ten or more years ago.

Art. 26.05 requires that for each case handled, counsel shall be paid "a reasonable attorney's fee . . . based on the time and labor required, the complexity of the case and the experience and ability of the appointed counsel" for all time spent in court on behalf of the defendant and for all reasonable and necessary time spent out of court on the case.

Despite the requirement that counsel be paid compensation that is reasonable for the work performed, the most common method of compensating ad hoc court-appointed attorneys in Texas is to pay flat fees for particular events. For example, the standard fee for entry of a guilty plea in felony cases ranges from \$50-\$350. If a defendant goes to trial, a few judges refuse to exceed one flat fee for the trial,¹⁸ while others will allow a daily fee for each day an attorney is in trial. In some counties, attorneys are permitted to submit vouchers itemizing their work, particularly in trial or otherwise complicated cases, and are paid an hourly fee, generally ranging from \$20-\$100 an hour, for all work performed on the case, both in and out of court. In some counties where counsel is allowed to submit itemized bills for work performed, it is not uncommon for the bills to be reduced by the judge, who has total authority over payment of counsel. In some counties, certain types of work performed by court-appointed attorneys are never compensated, such as visits to the client in jail or representation in the grand jury.¹⁹

Under the flat fee system, all felony cases are treated the same and all misdemeanor cases are treated the same. There is no consideration given to the actual time and labor required, or to the

¹⁸ For example, \$1,500 for a felony jury trial in Titus County, or \$750 for the same in Smith County.

¹⁹ In Harris County, for example, the official fee schedule categorically prohibits payments to attorneys for routine jail visits, interviews or telephone calls.

varying complexity of cases. For routine cases that can be resolved quickly, this system bodes well for attorneys. But for more complicated cases, the attorney must decide whether he or she will “go the extra mile” and put in whatever time and resources are necessary to zealously defend the client. While the flat fee system may not technically violate Article 26.05(a), we found that it can work as a disincentive for attorneys to effectively advocate for their clients.

Low fees can encourage experienced attorneys to opt out of the system. In Smith County, one attorney told us he typically puts in five to 15 hours for a felony case that is not going to trial, and an average of 60 to 70 hours per felony trial case. At flat fees of \$250 per plea and \$750 per trial, this attorney stopped accepting court-appointed cases. A private lawyer in Hidalgo County told us court-appointed lawyers generally don’t have the time and incentive to prepare and investigate cases given the low compensation rates.

A small percentage of court-appointed attorneys earn large sums off of indigent cases, ranging from \$80,000-\$100,000 a year. For some attorneys, these payments reflect a year in which they are paid for handling one or more capital cases. However, others attain these high levels of compensation from accepting large numbers (hundreds in some cases) of court-appointed cases a year and pleading them out as quickly as possible.

2. Investigators and Experts

Article 26.05(a) requires the court to provide reasonable reimbursement to assigned counsel for investigator and expert witness services that are approved by the court. We found that access to experts and investigators was generally not problematic in some counties, while it is a real problem in other counties. One judge told us that he will not appoint an investigator because, if he is going to pay attorneys \$50 an hour, he expects them to do a little legwork. In Hidalgo County, one County court at law judge said he doesn’t allow expenses for investigators or experts on misdemeanor cases. In some counties, court-appointed lawyers give up on asking for investigators or experts after their requests are repeatedly denied.

Frequently, we heard that judges grant requests for investigators and experts, but place strict caps, such as \$500, on the services. An attorney in Travis County commented that \$500 is simply not enough to hire a DNA expert, medical examiner or pathologist. He stated he felt the court needed to recognize the growing need for technical expertise in criminal cases and somehow address the problem.

Certainly, budget constraints impact the decisions judges make in regard to authorizing investigator and/or expert witness fees. A Harris County private attorney shared with us another reason for judges’ reluctance to authorize appropriate investigative and expert witness fees: “Judges are concerned about bad press for authorizing expert fees.”

Additionally, attorneys’ lack of training relates to the under-use of investigators and experts in two ways. First, during the course of our site work, we learned from appellate attorneys in many sample counties that trial counsel often fail to preserve the record when denied requests for investigators and/or experts. Second, we learned that trial counsel frequently fail to request authorization to hire investigators and/or experts when appropriate.

3. Pressure From County Commissioners to Cap Costs

A commonly heard theme in interviews with judges was that they felt pressure from county commissioners to cap indigent defense-related costs. In most counties, the budget for indigent defense is developed either by judges requesting what they will need for court-appointed counsel and related costs, or by commissioners working off of the previous year's budget. Some judges felt frustrated by the pressure to keep costs down, but some mentioned that as a matter of law, the county must pay an order signed by a judge. Some attorneys said they are aware of tension between judges and the commissioners court about the amount of money judges spend on court-appointed counsel.

There is no question that counties have limited funds for indigent defense. However, there is some question about the appropriateness of judges making the budget requests for indigent defense. Judges are elected officials, who must answer to the voters for their actions. There is little natural incentive for judges to become involved in advocating for adequate indigent defense system funding. The county judge who presides over the commissioners court in one large urban county told us that if the criminal court judges came to the commissioners court and said they needed an increase in court-appointed counsel compensation rates in order to attract more qualified attorneys, the county would likely approve that request. Another urban county commissioner noted that the judges do not attend budget hearings to discuss indigent defense.

The pressure which judges feel with regard to indigent defense expenditures is usually directed into efforts to hold down compensation paid to attorneys. In Harris County, for example, the district and county judges regularly receive computer printouts showing comparative caseloads and expenditures for all the individual district courts. While this reflects a commendable level of record keeping and reporting, we were told by judges and attorneys that the reports often end up stimulating a certain amount of competition among many judges to move cases faster in order not to be at the top of the caseload list and to cut indigent defense costs in order not to be at the top of the expenditure list. Without any counterbalancing measure for quality of representation, this competition can become a race to the bottom. One attorney described this imbalance saying: "Those docket reports can become more important to a judge than the U.S. Constitution." Another attorney expressed a concern repeatedly voiced by defense lawyers, that the local indigent defense system is "becoming more and more a system that processes people rather than provides a fair trial."

This points to a broader problem in Texas: the lack of a voice to advocate for indigent defense, whether it be for funding, for involvement in the development of new criminal justice system initiatives, such as a new drug court, or for input on criminal justice policy matters. In other states, this voice comes from a statewide indigent defense commission, a statewide public defender, or, on rare occasion, an active state or criminal defense bar association. We learned that the state planning agency that makes proposals for federal Edward Byrne Memorial State and Local Law Enforcement Assistance Program grants in Texas excludes indigent defense from the proposals, even though indigent defense programs are eligible for these federal grants, and most states takes advantage of this resource.

M. Imbalance of Resources for Prosecution and Defense

Our study did not examine the adequacy of prosecutorial resources but we can say with certainty that the State has more adequate resources to prosecute cases than indigent defense lawyers have to defend their clients. District attorneys have access to police reports, fingerprints and DNA and chemistry work-ups. Psychological and ballistic experts are at the prosecution's disposal, as are police officers for further investigation. In contrast, many court-appointed defense attorneys have a difficult time securing more than \$500 worth of expert and investigator time on individual cases. Further frustrating this imbalance was the very limited "open file" discovery policy of many prosecutors. Normally, an "open file" policy means that prosecutors make their files available to defense counsel. But in some of the sample counties, lawyers can only access the prosecutors' files if they sit at the prosecutor's office and copy – in long-hand, not with a photocopier – pertinent information from the file.

We learned of one positive practice regarding balanced resources: in Dallas County, pursuant to a recent County Commissioner decision, public defenders have salary parity with district attorneys. As mentioned previously in footnote 8, more and more jurisdictions around the country are beginning to require salary parity between local public defenders and prosecutors.

N. Attorney Training Opportunities

Despite mandatory continuing legal education requirements in Texas, with few exceptions, training for defense counsel who handle indigent defense cases is inadequate. Texas' patchwork of indigent defense systems, together with the predominant use of ad hoc assigned counsel programs in the majority of counties, only exacerbate this problem.

Criminal defense attorneys and judges handling criminal cases need training on substantive changes in state and federal law. They also need workshops to help them develop practice skills. We identified a serious gap in regard to the following facets of representation: recognizing the need for investigators and expert witnesses; preserving the record for appeal; and working with defendants with special needs, such as victims of domestic violence accused of crimes, persons with mental illness, juveniles and immigrants.

The ramifications of inadequate training are apparent in the shortfalls in quality of representation which we observed. For example, in Denton County, one private attorney said that some of the lawyers who accept court-appointed cases do not know how to preserve the trial record. One Smith County attorney suggests that counsel should be required to try state jail felony cases before taking on more serious felony cases.

Training can be done in different ways. For example, one judge in El Paso runs a monthly "brown bag" educational session attended by defense attorneys and covering such matters as new developments in criminal law. In Tom Green County, at least one judge assigns apprenticeships whereby brand new attorneys are appointed to work with an experienced attorney. Only one attorney is paid, and the two attorneys work out between themselves whether and, if so, how the fee will be split. The Texas Criminal Defense Lawyers Association has a mentoring program in El Paso. In Brazos County, the entire list of attorneys eligible for court appointments was reportedly sent to the Advanced Criminal Law seminar.

One Smith County judge recommended that counties with populations over 100,000 institute a CLE system to train new lawyers. The judge suggested attorneys could attend 10 hours of training covering, for example, what judges expect in the local courts, the district attorney's discovery plan and standing orders of the court. In addition, attendees could be given a copy of a practice manual containing all the forms for waiver and other routine motions used in the courts. She suggested that in both larger and smaller counties, there could be regional bench/bar training committees.

Local bar associations already provide some continuing legal education programs, but these programs should be expanded. More important, a comprehensive, statewide-approach to training criminal defense counsel and judges who work with indigent defendants is essential to improving the state's indigent defense system.

The most formalized and comprehensive CLE requirements we observed were in Harris and Travis counties, as described above in the discussion of attorney qualifications. In both instances, the advocates for these CLE requirements would generally like to see them improved further by making their existing CLE programs more comprehensive and rigorous. Most of the sample counties had no formalized CLE requirements and few CLE opportunities for court-appointed attorneys.

O. Issues Related to Texas' Diverse Population

Texas has an ethnically diverse population and many indigent defendants tend to be recent immigrants, particularly from Mexico and Central American countries. Despite this, we found that in some counties, there was a need for cultural awareness training. Aside from cultural and language barriers, one Harris County private attorney noted that immigrants are often completely unfamiliar with the way the American court system works. Having an interpreter available is insufficient to educate them about the overall process.

Related to this is the need for trained interpreters, particularly Spanish interpreters. In Harris County, for example, we were told that there is a very limited pool of bilingual attorneys who will take appointed cases, and they are in very high demand. Similarly, in Denton County, because of high demand for their services, there is an exception for Spanish-speaking attorneys to the rule that assigned counsel must live in the county. In some counties, there are few Spanish-speaking attorneys, and in some counties, there are none.

Some counties had extensive interpreter services available for indigent defendants appearing in court. Others relied on a variety of non-professionals to come "pinch hit" when a non-English speaking defendant appeared in court: the local bail bondsman, a clerk in a bank near the courthouse, the local Spanish teacher, and even a probation department staff member. While it was helpful for these individuals to agree to come serve as translators, none was trained as a court translator, and their translation cannot be guaranteed to be accurate, especially when no one else in the courtroom can verify the translation.

In a number of counties, Spanish-speaking attorneys were in high demand, and efforts were made to assign Spanish-speaking defendants to Spanish-speaking attorneys. One Harris County district court judge told us: "I have had concerns regarding Spanish speaking defendants with

retained counsel who don't speak Spanish. [These] attorneys often ask for help from Spanish-speaking court-appointed attorneys, and I reset the case, asking them to return to court with an interpreter.”

P. Immigration Consequences of Criminal Convictions

Defendants who have legally emigrated in to the U.S. need to be fully apprized of the serious and complex immigration consequences of criminal convictions. It was felt by some interviewees that judges, prosecutors and attorneys do not fully understand these consequences, or at least do not convey them to defendants.

Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-U.S. citizen defendants. Before 1996, an immigrant accused of a crime could avoid deportation even if he or she pleaded guilty to a deportable offense. This was the case if the immigrant was a “green card” holder which is the popularly used term for a Lawful Permanent Resident (LPR) of the United States. Until 1996, a long term LPR who became deportable based on a criminal conviction was usually eligible to apply to an immigration judge for a waiver of deportation, known as a 212(c) waiver.²⁰

Since 1996, many criminally convicted LPR’s are ineligible to have equities under the 212 (c) waivers considered by an immigration judge prior to entry of a removal order. This was the result of two Congressional enactments in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA), which came into effect on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which generally came into effect on April 1, 1997. These two enactments substantially expanded the types of crimes and dispositions that trigger deportability and at the same time restricted LPR eligibility for relief from deportation.

The new laws place a higher burden on the criminal defense lawyer to investigate and counsel an LPR client about potential immigration consequences that he or she will face during criminal proceedings. Decisions taken in criminal court that appear innocuous or even favorable to the defendant may have disastrous and irrevocable consequences in immigration proceedings.

The standard admonitions which, by law, must be given by the judge to a defendant before entering a guilty plea include the warning that guilty pleas by a non-citizen “may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.” CCR, Article 26.13. However, it was our observation that many attorneys and judges had little training or knowledge about the specific immigration consequences involved beyond this general statement that there are some such consequences. A district judge in Harris County voiced a “great fear” that vulnerable immigrants may be pleading guilty “after the lawyer told them there would be no problem. I have started asking the lawyers if they have consulted an immigration lawyer.”

²⁰ An immigration judge had the discretion to grant a 212 (c) waiver if the LPR could demonstrate factors such as: long-term residence in the United States, close family with lawful status in the United States, evidence of hardship to the individual and family if deportation occurred, service in the armed forces, a history of employment, the existence of property or business ties in the United States, evidence of value and service to the community, and proof of genuine rehabilitation.

Q. Problems Unique to Rural Areas

County populations in Texas range from roughly 5,000 to over 3 million inhabitants. Rural counties have the same obligations to provide representation, investigation and appropriate expenses of litigation to indigent defendants as do the large urban counties. However, there are several issues that can make it more difficult for smaller counties to meet their indigent defense obligations.

In counties with district court judges who ride circuit to one or more other counties, district attorney and/or county attorney offices where the only staff is the part-time elected official and may be a secretary, and multiple, tiny law enforcement offices, the processing of criminal cases can take longer than in urban counties, despite the fact the caseload is much lower. For indigent defendants, this can mean lengthy waits before counsel is appointed to represent them, and if they are detained, they will likely spend that entire time waiting behind bars.

In misdemeanor cases, some rural counties hold arraignments just once a month. Likewise, in felony cases, grand juries may only convene once every other month. In counties with a policy of appointing counsel only after indictment, defendants remain detained from three to six months before counsel is appointed. Another challenge in some small counties is finding enough lawyers who are willing and able to do court-appointed work. Interestingly, in a number of the smaller counties we visited, the compensation rate for court-appointed counsel was higher than that paid in larger counties.

One of the greatest worries in a small county can be that a capital case will be tried there. A capital case, where both defense and prosecution costs skyrocket to unexpected levels, could exert great strain on a county's overall budget. Currently in counties where resources are limited, prosecutors can request assistance from the Prosecutor Assistance and Special Investigations Division of the Office of the Attorney General, which deploys investigative and prosecutorial support to county and district attorneys throughout Texas. No analogous assistance is available for the defense, leaving that significant burden still squarely on both the county and the local defense attorneys.

A number of judges and attorneys interviewed in rural areas felt that a public defender program, especially a regional public defender program, might address some of the problems presented by indigent defense requirements. One judge in a rural East Texas county thinks Texas needs a statewide public defender with regional offices in rural areas. He thinks this model would be less expensive than using assigned counsel. For example, he believes that one public defender could provide all indigent defense representation, except conflict of interest cases, in his county.

R. Case-Tracking Technology Underutilized

Statewide, we found that criminal justice system case-tracking technology was either unavailable or underutilized. While these technologies require some initial start-up costs to purchase and install hardware and software and to train users, they can be very useful in helping to track court schedules, access basic case information, track where defendants are (in jail, on bond, on probation), obtain prior criminal history information, etc. Compared to many other states, Texas counties are, overall, behind the curve in making use of criminal justice system case-tracking technology.

CHAPTER 3

FINDINGS ON INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL FELONIES AND MISDEMEANORS

The findings below reflect the research team's overall impressions of Texas' indigent defense system in adult felony and misdemeanor cases. These impressions are based upon our sitework in the 23 sample counties, including our interviews with hundreds of individuals whose work involves these categories of criminal cases. Additionally, in making the findings below, we used quantitative data, such as caseload and budget figures, fee schedules, OCA data, and other information, whenever possible. These findings form the basis for the recommendations made in Chapter 4 of this report.

1. **There is a complete absence of uniformity in standards and quality of representation among the indigent defense systems in the 23 Texas counties we studied.** We suspect this is equally true statewide among all of Texas' 254 counties. Disparities in indigent defense delivery systems are found not only from county to county but also from courtroom to courtroom in individual counties. Texas does not make counties or courts accountable for their indigent defense procedures either through reporting on their indigent defense programs or through any other form of state oversight.
2. **Lack of judicial accountability is a major problem in most of Texas' indigent defense systems.** The absence of consistent standards, guidelines or oversight means in most counties that each individual judge has largely unfettered discretion over the method for appointing defense counsel, the selection of the individual lawyers and the rate at which lawyers are paid for representing the defendant. Whether the judge uses that discretion wisely or poorly is subject to very little review, control or accountability.
3. **Texas counties are not accountable for the quality or structure of their indigent defense systems.** The absence of statutory requirements, or consistent standards, guidelines or oversight has allowed and encouraged most counties to leave critical decisions about the structure of their indigent defense systems to the discretion of individual judges. The result is a patchwork quilt of inconsistent indigent systems over which many county officials feel they have little authority or responsibility.
4. **In most of Texas' indigent defense systems, there are few mechanisms to guarantee that defense lawyers are consistently held accountable for the quality of representation they provide to indigent defendants.** In most counties there are no consistent standards, guidelines or oversight regarding training and experience, caseloads, performance or other facets of effective representation. A great many attorneys do work hard to provide high quality representation and many judges choose to exercise some discretionary oversight of attorneys in their courts. But in most counties this is entirely voluntary and there are no established procedures to guarantee that adequate representation is consistently provided in every case and in every court.
5. **Lack of consistency and accountability result in wide and unjustifiable disparities in the treatment received by indigent defendants and their defense counsel, from county to county and court to court.** The disparities include:

- Wide differences in how quickly defense counsel is appointed, ranging from a few days following arrest to six months or more.
 - Wide differences in the compensation rate paid to appointed attorneys and hence in the lawyers' incentive to fully represent their clients. For example, in the counties we visited, the standard fee for entry of a guilty plea typically ranges from \$50 to \$350.
 - Wide variations in how courts determine whether a defendant is indigent – and hence whether the defendant even gets appointed counsel at all – especially where the defendant has been able to post bond. Some judges follow the requirements of the law which state that court appointed counsel shall not be denied to a defendant solely because of his ability to post bond. Some judges refuse to appoint counsel for defendants who have bonded out, believing that a defendant who can afford to post bond can afford to hire counsel. Other judges pressure defendants to hire counsel if they are out on bond. In the most extreme situations, we were told some judges revoke bond of defendants who repeatedly show up at court saying they cannot afford an attorney; then, once the defendant is returned to jail, the judge appoints counsel.
6. **The wide and uncontrolled discretion given to judges over attorney selection and compensation at the very least creates the potential for conflicts of interest and the appearance of conflicts of interest.**
- Several court-appointed attorneys expressed concern that if they were viewed by some judges as zealous advocates – e.g., they filed several motions in one case or demanded trials – they ran the risk of being removed from the ad hoc counsel appointment list. Most judges denied these charges and said removal was usually because the attorneys were not competent or because they filed frivolous motions.
 - A number of court-appointed attorneys commented that making political contributions to judges' election campaigns was a requirement for getting on the appointment list. A larger number of attorneys stated that it was not clear to them that contributions were necessary, but they felt a need to make them “just in case.”
7. **The majority of judges we spoke with firmly believe that judges should have the exclusive authority to select attorneys for appointment to individual cases and to determine their compensation.** These judges profess they alone can evaluate each attorney's level of experience and qualification to handle certain types of cases. However, in some counties, where judges exercise complete authority over appointments, there is an undeniable appearance of favoritism or cronyism.
8. **District and county courts in Travis County and district courts in Denton County have addressed the problem of attorney selection in a way which tends to both preserve the defense counsel's independence from the judge and allow for judicial supervision of attorney qualifications.** The judges meet as a group to collectively decide which attorneys are qualified to accept certain types of cases, and appointments are ordinarily made in a blind rotating order from a master list of those qualified attorneys.

9. **Delay in appointing counsel soon after arrest is a pervasive and serious problem in a number of counties we visited, particularly in more rural counties.**
- In some counties defendants can wait in jail from two weeks to more than six months before counsel is appointed. This is a special problem in a few counties in our sample where some felony courts do not appoint counsel until after indictment, even for defendants who are in custody.
 - In some of the 23 counties in our sample, indigent felony defendants who are out on bond are not appointed counsel until after indictment which may take many weeks or months. This deprives the defendant of counsel during the critical initial period when an attorney's investigation is likely to be most productive because evidence is still fresh and witnesses are most easy to locate. In addition, prior to indictment a defense attorney often can provide important forms of representation which become more difficult or irrelevant after indictment.
 - In some counties the delay in appointing counsel for defendants who are in custody for minor felonies and misdemeanors but cannot make bail results in a wasteful expenditure of public tax dollars. These are not defendants who pose a threat to the community. For the most part, they are indigent defendants who will likely be released on personal bond almost immediately after they receive a court-appointed attorney. The county incurs a substantial cost each day to house and feed inmates in jail. A small investment in counsel after arrest could save counties thousands of dollars and may even avoid the prospect of building a new jail. We are certain that these positive fiscal results can be obtained since they have already been achieved in several counties.
 - A further problem was found in several counties where district attorneys are slow in filing cases with the grand jury. Indigent defendants who cannot make bond may ultimately give up their right to an appointed lawyer and plead guilty for time served just to get out of jail, sometimes with the belief that if they wait until they are finally indicted and get an appointed lawyer, they may be sentenced to less time than they have already served.
10. **Some defendants are urged to forego counsel.** We were told that in some counties, especially in misdemeanor cases, when an indigent out-of-custody defendant comes to court for a hearing, they are advised to speak with the district or county attorney to see if they can first "work out a deal" in the interest of "getting on with their lives" without the advice of counsel.
11. **The process for setting the indigent defense budget varies widely from county to county and is often characterized as a tug of war between the judges and the county commissioners courts.** Many commissioners and county judges feel they have little control over how much is spent and how it is spent by the judges. Many judges feel pressure from the county to maintain strict control over their indigent defense budget. Overall, because of the political and fiscal relationship between judges and commissioners courts, the judges

alone cannot be effective advocates for a reasonable indigent defense budget. The result is insufficient funds to adequately pay court appointed counsel their fees and other appropriate expenses.

12. **In conjunction with this study, the Office of Court Administration (OCA) agreed to survey each of the 254 counties to determine indigent defense expenditures for FY 1999.** Texas does not ordinarily collect data on indigent defense spending in the state. This is the first time that such a survey was undertaken in Texas. We believe it provides the basis for a reasonable estimate of the cost of indigent defense in the state. The sub-totals reported statewide were as follows:

TEXAS COUNTY INDIGENT DEFENSE EXPENDITURES

Legal Representation:

Assigned Counsel Systems	\$60,417,833
Contract Programs	\$ 4,529,685
Public Defender Programs	\$ 5,987,981
Harris County ²¹	<u>\$11,521,801</u>
TOTAL - LEGAL REPRESENTATION:	\$82,457,300

Other Services:

Investigation	\$ 1,447,734
Interpreters	\$ 953,450
Transcripts	\$ 6,347,628
Experts	\$ 1,028,597
Other	<u>\$ 873,625</u>
TOTAL OTHER SERVICES:	\$10,651,034

**TOTAL LEGAL REPRESENTATION
& OTHER SERVICES: \$93,108,334**

13. **Judges in some counties have adopted local rules concerning indigent defense that exceed the requirements of the Texas Constitution or Texas Code of Criminal Procedure.** For example, in Dallas County, if a complaint is not filed within 72 hours of a defendant's arrest, the case is dismissed and the defendant, if detained, is released. A prosecutor, of course, is free to reinstate charges once he or she is able to timely file a complaint. In Lubbock and Travis Counties, judges adopted minimum qualifications which attorneys must meet in order to receive court-appointed cases.
14. **Major problems were found surrounding requests for investigators or expert witnesses.** Some court appointed lawyers no longer ask for either because their requests have been denied so often in the past. In some instances, judges will only agree on experts if

²¹ Harris County was not able to separate the three programs and instead reported an aggregate figure.

selected from their own lists. Some requests can only be made in open court with the possibility that the district attorney may object. A common practice is for judges to approve requests for investigators or experts, but only up to a cap of \$500, which proves to be inadequate in cases, for example, involving a great deal of scientific evidence. Many judges say they will pay more if the attorneys can justify the added expense.

15. **Based upon the above OCA data, the cost per capita for indigent defense in Texas for FY 1999 is approximately \$4.65, placing Texas near the bottom level of funding for indigent defense in all 50 states.**²² The state's minimal expenditures on investigative services and expert witness services, each at one percent of total indigent defense expenditures evidence a particularly alarming trend which was confirmed in our site work. Too many attorneys representing indigent defendants in Texas are not requesting and/or not being given access in appropriate cases to basic tools of effective lawyering.

Lack of uniform data reporting methods among counties prevented the OCA survey from collecting indigent defendant caseload data, either statewide or by county.

16. **None of the 23 counties we visited provide sufficient funds to assure quality representation to all indigent defendants.** While some counties clearly are better off than others, we did not find any that were adequately funded. This funding shortfall manifests itself in the following ways:
- The majority of judges we spoke to pay counsel a flat fee for a particular type of case or event, e.g., \$200 for a guilty plea in a felony case. Others courts compensate attorneys based on a flat fee for each day in court, e.g. \$65 or \$130 per day. As a result, court-appointed counsel are often not paid for the work they perform out of court. Such uncompensated out of court activities include: visiting clients in jail, conducting legal research, and interviewing possible witnesses.²³
 - When authorized, counsel is frequently subject to a presumptive cap of \$500 for investigators and/or expert witnesses.
 - Many attorneys told us that when they are permitted to submit itemized vouchers for the actual amount of work performed, their compensation claims are routinely reduced without explanation.

17. **The vast majority of county officials, judges, defense counsel and court administrators agreed that state funding is acutely needed to supplement county indigent defense funding.** Some county commissioners courts in particular tend to feel that even though they would like to improve indigent defense systems, they lack the ability to raise additional

²² See Appendix B for additional for indigent defense expenditure data for other states.

²³ The Harris County fee schedule specifically *excludes* routine jail visits, interviews and telephone calls from attorney compensation.

revenues without state assistance. Texas is one of only four remaining states which still place the entire burden of trial-level indigent defense funding on the counties.²⁴

18. **There is an imbalance of resources between prosecution and indigent defense in Texas.** This imbalance is evident in both available support services, such as investigators and expert witnesses, and compensation paid to defense counsel. The imbalance in available support services limits defense counsel's ability to effectively represent clients. The imbalance in compensation serves as a disincentive to providing zealous representation. In many cases, it is simply not financially feasible for qualified counsel to handle court-appointed cases. The imbalance is most prominent when evaluating in-kind resources available to the prosecution, such as the investigatory services of all local law enforcement agencies and scientific data made available by state and federal governments.
19. **Texas counties rely overwhelmingly on ad hoc assigned counsel systems and there are very few public defender programs.** This stands in contrast to the majority of states which have a mixed system of public defenders and assigned counsel, with most of the large urban areas having a primary public defender system. Dallas County and El Paso County have the only large public defender programs in Texas with approximately 18 and 50 lawyers respectively. Both programs operate as part of mixed public defender and assigned counsel systems. On balance, our review of both the El Paso County and Dallas County public defender systems was positive. In both counties, we heard praise for the current chief public defenders from county commissioners, most judges and many private lawyers.
20. **Although there is considerable interest in many parts of the state in greater use of public defender programs, there are reservations about the logistics of creating additional public defender offices.** Reservations include worry that counties will not be able to adequately fund a public defender office and fears that salaries would be too low and caseloads too high. In small rural counties, there are questions about how to create a viable multi-county defender program. Some of these reservations in part stem from having so few public defender programs in Texas for counties to look to as models. Other counties are deterred by the necessity of obtaining specific legislative authorization to create a public defender system.
21. **In some counties, there is a slow but sure movement toward replacing ad hoc assigned counsel systems with contract lawyer defense systems.** At least eight of the 23 counties we visited have some form of contracting system, in addition to an assigned counsel system and, in a few counties, a public defender system. For many reasons, including the fact that the contracts are entered into by the judge and the attorneys rather than the county and the attorneys, the contracts we encountered do not conform to the American Bar Association's *Standards for Criminal Justice: Providing Defense Services*, Chapter 5 (1990) or the National Legal Aid and Defender Association's *Guidelines for Negotiating and Awarding Indigent Defense Contracts* (1984). Where the contract indigent defense attorney is beholden directly to the judge for his livelihood, it is very difficult to guarantee the attorney's independence or the appearance of independence.

²⁴ The others are North Dakota, Pennsylvania and Utah.

22. **In most of the counties we visited, there are no minimum eligibility criteria for attorneys who wish to accept court-appointed cases.** In some counties, new lawyers are only assigned to relatively uncomplicated misdemeanor cases so they can gain experience before getting assigned to more serious cases. In a number of counties, it is very rare for lawyers to be appointed in any misdemeanor cases unless the defendants are detained pre-trial. The result is that some new lawyers “cut their teeth” on felony cases, the only appointed cases that are available.
- Travis County presents an exception to this practice, as no lawyers are allowed to take even misdemeanor appointments unless they have at least one year of criminal law experience and have served as lead counsel in a minimum of three trials (experience as a second-chair in a felony case may substitute for one misdemeanor trial). Less extensive minimum requirements are found in Harris and Lubbock counties.
23. **In the majority of counties we visited, there are no requirements that attorneys taking court-appointed cases participate in continuing legal education programs in criminal law.** While there is an overall low participation rate in general skills training for defense lawyers, we found even fewer attorneys participate in training in specialty areas, such as working with defendants who have mental illnesses or on the immigration consequences of criminal convictions. Such CLE programs are not as widely available as attorneys need and want. Assigned counsel programs in Harris, Lubbock and Travis counties are exceptions to this.
24. **Defendants who have legally emigrated into the United States need to be advised by counsel familiar with the very serious and specialized immigration consequences of criminal convictions.** It was reported that some judges, prosecutors and attorneys do not fully understand these consequences themselves, or at least do not adequately convey them to defendants.
25. **Many indigent defendants in Texas do not speak English; thus, access to trained, professional interpreters is crucial.** Some counties had extensive interpreter services available for indigent defendants appearing in court. Many, however, rely on a variety of non-professionals to come “pinch hit” when a non-English speaking defendant appears in court.
26. **In considering improvements to indigent defense in Texas, it is important to recognize that some problems facing the indigent defense systems in predominantly rural counties differ from those in predominantly metropolitan counties.** For example, in general, delay in indictment and in appointment of counsel in indigent cases is more of a problem in smaller counties. Rural counties sometimes have a scarcity of attorneys who are qualified to handle certain types of cases. There is no one-size-fits-all solution to the problems in Texas indigent defense. However there is a great need for state assistance and technical support to help fashion solutions which are tailored to the needs of different size counties.
27. **Prosecutors’ open file policies vary significantly.** The open file policy is designed to streamline the discovery process, and encourage and expedite early disposal in appropriate

cases. Some prosecutors are very cooperative in regard to sharing their case files with defense counsel; others are less so with the consequence of hindering the efficiency and fairness of indigent defense representation.

28. **While we found many indigent defense practices that concern us, we found a number of practices that deserve favorable mention.** These practices – which are also described in Chapter 2 – should be reviewed by other counties and by the state to determine whether they form an appropriate basis for improving indigent defense, locally or statewide. Most of these practices were developed to address problems in the local indigent defense or criminal case processing systems.

- In Harris County, within 24 hours of arrest, a defendant charged with a felony or misdemeanor has a probable cause hearing before a hearing officer. Here, the defendant is read his statutory rights and bail is reviewed. Within the following 24 hours, an initial appearance takes place where counsel is appointed for indigent felony and misdemeanor defendants who are in custody, as well as for indigent felony defendants who have bonded out.
- In the early 1990s, Harris County adopted a certification program for attorneys seeking appointments in capital, felony and misdemeanor cases. To qualify for appointment to represent indigent misdemeanor defendants, an attorney must attend a three day seminar on criminal practice in Harris County. To qualify to take appointments for felony defendants, the attorney must attend the seminar and pass a test. An additional course and test on capital defense are required to qualify for appointment in capital cases.
- In Dallas County, pursuant to local district court rule adopted in the early 1990s, if the charging agency fails to file charges within 72 hours of arrest, the defendant is released.
- In Dallas County, a recent decision by the County Commissioners Court, set public defenders salaries at parity with those of district attorneys.
- In Lubbock County, the courts recently enacted local rules for courts hearing criminal matters. One requires that an initial appearance be conducted pursuant to article 15.17 of the Code of Criminal Procedure for all defendants in jail within 24 - 48 hours of their arrest. Another rule provides that an indigent defendant in jail longer than 72 hours is to be appointed an attorney within the next 24 hours.
- In Comal County, if a misdemeanor defendant has been detained for more than a week, the county court at law judge will grant a personal recognizance bond.
- Jefferson County has a very pro-active pre-trial services agency, which has been in place for over 25 years.
- In Travis County, all attorneys who wish to accept court appointments to non-capital cases of defendants who are detained pre-trial must meet certain minimum criteria

and attend at least 10 hours of criminal CLE each year. In the vast majority of indigent defendant cases, counsel is not appointed by judges sitting in the individual cases. Rather, new appointments are made in alphabetical order off lists of qualified lawyers maintained by the Criminal Courts Administration Office. To ensure that the lawyer has the expertise to handle the cases to which he or she is appointed, the Criminal Courts Administration Office maintains several lists, including a misdemeanor list, a felony list, and an appeals list. The felony list is divided into three tiers. Those attorneys on the A list are deemed qualified to accept first degree felonies. Those on the B list can accept second and third degree felonies, while those on the C list are eligible to accept state jail felonies and probation revocations.

The county and district criminal court judges meet twice a year to review attorney applications to be on one of the lists or to move up a category. The judges must agree that each attorney meets the qualifications and skill level to handle cases in the category for which he or she has applied. The judges may also remove an attorney from one of the qualification lists. The judges maintain the ability to make specific appointments for particular cases, but they only exercise it in about 10% of all indigent defendant cases. Typically appointments of attorneys are only made directly by judges in the uncommon cases where a defendant who has posted bond appears at court and requests appointed counsel.

- El Paso County's Criminal Law Magistrate Court at the county jail has jurisdiction over offenses allegedly committed in all parts of the county, save one town. The Jail magistrate is a central figure in the County's efforts to expedite the processing of cases in which defendants are detained pre-trial. The jail magistrate: makes probable cause determinations for the issuance of arrest warrants and for individuals who have been detained following arrest without a warrant; sets bonds for individuals detained in the jail; appoints counsel for indigent defendants in the jail; informs defendants of their *Miranda* rights and other admonishments required under Texas laws; and conducts examining trials. This procedure ensures prompt appointment of counsel for indigent defendants held in custody, typically within two to seven days.

CHAPTER 4

RECOMMENDATIONS

1. **In September, 2000, the Judicial Section of the State Bar of Texas adopted a resolution setting forth recommended policies and procedures to achieve the goal of quality representation to indigent persons involved in criminal matters. We support four of the Judicial Section's recommendations, which read:**
 - The appointment of criminal defense counsel for indigent defendants and the amounts paid to counsel should be reported to an appropriate state agency.
 - Appointment procedures should be reduced to writing and copies sent to an appropriate entity for dissemination.
 - Minimum standards for proficiency in criminal law should be established in each local jurisdiction as a prerequisite to eligibility for placement on a list of attorneys eligible for appointments.
 - Funding for appointed counsel and related services should be appropriated by the Texas Legislature from state funds, and the Legislature should adopt compensation standards.

We also support the Judicial Section's resolution that addresses timing of appointment of counsel for defendants in custody, except we believe the recommended 20 day maximum time-to-appointment should be reduced to three days from the time of arrest.

2. **The State Legislature should require that counsel be appointed to indigent defendants promptly following arrest.** Delay in appointment of counsel to indigent defendants has been recognized by a number of legal groups in the state, including the Committee for Indigent Defendant Representation of the Judicial Section of the State Bar of Texas, as a serious problem. We recommend that counsel be appointed to all indigent defendants within 72 hours of arrest or detention. We recognize that it may be difficult in smaller counties to meet this standard in the short term. Therefore, we urge that appointment be required within 72 hours, unless circumstances documented in writing show this to be impossible. In that case counsel should be appointed within at least three days of arrest or detention and affirmative steps should be taken by the state to assist the county in developing a process to ensure appointment of counsel within 72 hours. Counsel should be provided within this time frame to all indigent defendants, whether they are in custody or released on bond.

3. **A state-funded, statewide indigent defense oversight entity should be established during the 2001 Texas Legislative Session.** This entity should be a component of the judicial branch of Texas state government (possibly within the Office of Court Administration), and should be charged with the following responsibilities:
- Providing financial assistance and technical support to help counties improve their indigent defense systems.
 - Establishing statewide minimum qualification standards for ad hoc assigned counsel, contract counsel and public defenders in misdemeanor, non-capital felony, capital felony, mental health and juvenile cases. These standards should set minimum thresholds for the experience levels of appointed attorneys based upon the seriousness of the offense
 - Establishing statewide standards for contracting for indigent defense services. These standards should comply with the American Bar Association's *Standards for Criminal Justice: Providing Defense Services*, Chapter 5 (1990) and the National Legal Aid and Defender Association's *Guidelines for Negotiating and Awarding Indigent Defense Contracts* (1984).
 - Establishing statewide minimum standards for determining indigency of defendants and compensation of counsel.
 - Collecting standardized indigent defense data to from each county. In order to make informed decisions about structuring, funding and improving indigent defense services in Texas, it is critical that key data be collected from each county on an annual basis.
4. **The statewide indigent defense oversight entity should be appropriated sufficient funds to develop a state-funded indigent defense grant program.** Such a program would provide an incentive to counties that wish to make improvements to their local indigent defense system but find it difficult to do so because of budget constraints. Counties would have the option to apply for supplemental funds. Awards should be available to counties demonstrating the following factors (as developed by the commission):
- The independence of counsel;
 - Prompt appointment of counsel in misdemeanor and felony cases, whether defendants are in-custody or detained pre-trial;

- A consistent procedure to determine indigency of persons in custody and out on bond and appoint them counsel within 72 hours of incarceration;
- A procedure for determining that attorneys representing indigent defendants are competent in the practice of criminal law;
- An adequate rate of compensation and schedule of allowable expenses to be paid for indigent defense services; and
- Availability of and attorney participation in relevant training programs.

Georgia, Indiana and Louisiana offer excellent models for Texas to look to in developing a state grant program for county-funded indigent defense services.

5. **If Recommendation 3 is not feasible, each county should, in consultation with the judiciary, the defense bar and appropriate members of the community, move forward in trying to improve indigent defense services through the following initiatives.** We recognize that many Texas counties operate with very tight budgets, and we have every hope that the state will fund the following initiatives which will require additional funds.

- Adopt a consistent system or mix of systems for providing indigent defense in the county.
- Establish minimum qualification standards for *ad hoc* assigned counsel, contract counsel and public defenders in misdemeanor, non-capital felony, capital felony, and juvenile cases.
- If it elects to use a contract defense system as all or a part of its indigent defense services delivery system, a court should comply with the American Bar Association's *Standards for Criminal Justice: Providing Defense Services*, Chapter 5 (1990) and the National Legal Aid and Defender Association's *Guidelines for Negotiating and Awarding Indigent Defense Contracts* (1984).
- Review court-appointed fee schedules on a bi-annual basis.
- Offer incentives and opportunities to attend criminal practice continuing legal education training seminars, including topics such as criminal implications of immigration law, representation of mentally ill defendants and preserving the record

for appeal – three particularly weak practice spots we identified during our site work.

- Establish consistent, objective standards and procedures for determining whether defendants who are in custody or out on bond, are indigent and thus eligible for appointment of counsel.
6. **The state should provide technical assistance and financial support to help counties meet the objectives outlined in Recommendation 5.**
 7. **Efforts should be made to reduce the delay, sometimes extremely lengthy, in presenting criminal cases to the grand jury to secure an indictment.** If counties address the resource and scheduling issues surround timely indictments, this effort will result in significant cost saving in their county jail budgets.
 8. **In accordance with statutory law, a defendant’s ability to post bond should not serve as the litmus test for eligibility for appointed counsel.** Contrary to statutory law, in the vast majority of counties in the sample, judges and others given authority to make indigency determinations and appoint counsel do just this.
 9. **Counsel should be available at first appearance to advise indigent defendants in Class A and Class B misdemeanor and all felony cases who wish to enter a guilty plea.** Counties should be required to develop systems to ensure that indigent defendants are not encouraged to enter uncounseled pleas of guilt.
 10. **District and County Attorneys should make every effort to be fully cooperative in regard to their open file policy.** Prosecutors’ full-fledged cooperation – through, for example, providing defense counsel with access to a photocopier in addition to access to case files – will lead to resource savings for all.
 11. **Counsel should be compensated for both in-court and out-of-court time devoted to indigent defense representation.** The approach of only paying for counsel’s in-court time, employed in the majority of the sample counties, is both unfair and acts as a serious disincentive for counsel to visit their clients in jail, conduct legal research, interview potential witnesses, etc. Fee schedules should be modified to provide a reasonable, fair market rate of compensation for both in-court and out-of-court time.
 12. **State and county standard procedures should provide that where a trial court cuts a fee request, an explanation should be placed in the record and appointed counsel should be able to appeal to an indigent defense commission.**

13. **The \$500 presumptive cap for investigator and expert services contained in the vast majority of the counties' fee schedules should be increased to reflect the fair market value for provision of these services, which are both fundamental to the effective assistance of counsel and required, in appropriate cases, under state and federal law.** Additional funds should be provided by either the state (through the proposed indigent defense oversight entity, or possibly through a separate line item in the state budget), or, if necessary, through additional county funds.
14. **Each of Texas' 254 counties should establish a pre-trial services agency (PSA) to gather and provide information about all arrestees charged with criminal offenses in a particular county.** The PSA should provide judicial officers with verified information for bail setting purposes. In addition, the PSA should monitor defendants' compliance with their conditions of release, notify them of future court dates, and assist them with court appearance matters. This is particularly important in rural counties, where problems associated with delay are most serious. Some rural counties might consider creating regional or joint PSAs. We believe that the costs of expanding or establishing PSAs will pay for themselves through jail expenditure savings.
15. **There is a need for more structure, standards and guidelines to assist the judiciary in carrying out indigent defense responsibilities. There is also a need for additional judicial education and discussion about indigent defense standards and procedures.** The majority of judges have an awareness of the importance of assuring the fair and impartial adjudication of all cases in their courtroom. State statutory law establishes some general framework for processing indigent defense cases. However, this provides too little guidance on many very important issues.
16. **Judges should adopt rules to improve their local indigent defense systems, particularly those that do not require a state mandate or state funds.** Judges in Dallas, Lubbock and Travis Counties have adopted local rules that concern the timing of case processing and minimum qualifications for attorneys who accept court-appointed cases. Judges in all counties possess the ability to adopt certain local orders and rules to strengthen their indigent defense systems.
17. **Trial court judges should consider relinquishing primary responsibility for selecting, monitoring and compensating counsel who handle indigent defense representation in their courtrooms.** They should carefully consider alternate methods for ensuring attorney qualifications which are used successfully in Texas and in other jurisdictions. This approach would better ensure the independence of counsel and would make substantial strides in relieving overworked judges of some of their administrative responsibility. Additionally, this approach would reassure the public by removing many of the political and ethical questions raised by the appointment process used in the vast majority of the state's courtrooms. The imbalance is most prominent when evaluating the in-kind resources

available to the prosecution, such as the investigatory services of all local law enforcement agencies and scientific data made available by the state and federal government.

CHAPTER 5

THE TEXAS COURT SYSTEM FOR CRIMINAL CASES

The appellate courts of Texas include a Supreme Court, a Court of Criminal Appeals and fourteen intermediate courts of appeals.

The Texas Constitution establishes district courts as the state trial courts of general jurisdiction and provides for a single constitutional county court in each county, presided over by the county judge. In more populous counties, the Legislature has established statutory county courts to function as county courts at law and probate courts.

Also, the Constitution provides for justices of the peace courts in each county. These justices handle criminal misdemeanor cases and serve as small claims courts.

Finally, the Legislature has established municipal courts in each incorporated city of the State to handle certain Class C criminal misdemeanor cases and city ordinance violations.

With the exception of municipal court judges, who are appointed for two-year terms and serve at the will of the governing body of the city, all other judges are popularly elected.

State Highest Appellate Courts

Texas has a separate court of last resort for criminal and civil cases, the Court of Criminal Appeals and the Supreme Court of Texas, respectively.

The Court of Criminal Appeals has exclusive criminal jurisdiction and is the highest state court for appeals in criminal cases. The Court comprises nine members, a Presiding Judge and eight Judges. Decisions of the Courts of Appeals in criminal cases may be appealed to the Court of Criminal Appeals by petition for discretionary review, filed either by the state, or the defendant, or both. In addition, the Court may review a decision on its own motion. All cases that result in the death penalty are automatically directed to the Court of Criminal Appeals from the trial court level. The judges are elected by partisan, statewide election. Vacancies between elections are filled by gubernatorial appointment with the advice and consent of the Senate.

The Supreme Court of Texas possesses exclusively civil jurisdiction and is composed of a Chief Justice and eight justices. It has statewide, final appellate jurisdiction in all civil and juvenile cases. Most of the cases heard by this Court are appeals from an appellate ruling by one of the

intermediate Courts of Appeals. The justices are elected by partisan, statewide election. Vacancies between elections are filled by gubernatorial appointment with the advice and consent of the Senate.

State Intermediate Appellate Courts

The fourteen Courts of Appeals have intermediate appellate jurisdiction in both civil and criminal cases appealed from district or county courts. Each Court of Appeals has jurisdiction in a specific geographical region of the State. Each Court is presided over by a chief justice and has at least two other justices. The specific number of justices on each Court is set by statute and ranges from three to thirteen. In 2000, there were 80 justices authorized for these Courts. The judges are elected by partisan election within each court of appeals district. Vacancies between elections are filled by gubernatorial appointment with the advice and consent of the Senate.

State Trial Courts of General and Special Jurisdiction

The district courts are the trial courts of general jurisdiction of Texas. The geographical area served by each court is established by the Legislature, but each county must be served by at least one district court. In sparsely populated areas of the state, several counties may be served by a single district court, while an urban county may be served by many district courts. In 2000, there were 396 separate district courts. Each court is identified by separate number (e.g., 306th District Court), and one judge is elected specifically to each.

District courts have original jurisdiction in all felony criminal cases, divorce cases, cases involving title to land, election contest cases, civil matters in which the amount in controversy (the amount of money or damages involved) is \$200 or more, and any matters in which jurisdiction is not placed in another trial court. While most district courts try both criminal and civil cases, in the more densely populated counties the courts may specialize in civil, criminal, juvenile, or family law matters.

District court judges are elected by partisan, district wide election. Vacancies between elections are filled by gubernatorial appointment with the advice and consent of the Senate.

County Trial Courts of Limited Jurisdiction

Constitutional County Courts

As provided in the Texas Constitution, each of the 254 counties of the State has a single county court presided over by a county judge. The constitutional county judge also presides over the county's governing body, a non-judicial entity called the commissioners court, which comprises four additional elected officials.

The constitutional county courts have concurrent jurisdiction with justice courts and district courts in civil cases in which the amount in controversy is small. These courts generally hear the probate cases filed in the county. They have original jurisdiction over all Class A and Class B misdemeanor criminal cases. These courts usually have appellate jurisdiction in cases appealed from justice and municipal courts, except in counties where county courts at law have been established. Unless the appeal is one from a designated municipal court of record the appeal takes the form of a trial de novo.

Constitutional county court judges need not be lawyers. Constitutional county court judges are elected by partisan countywide election. Vacancies between elections are filled by county commissioners.

County Courts at Law

Because the Constitution limits each county to a single county court, the Legislature has created statutory county courts at law in the larger counties to aid the single county court in its judicial functions. As of October, 2000, the Legislature had established 187 statutory county courts at law in 74 counties, primarily in metropolitan areas, to relieve the constitutional county judge of all or a part of his or her judicial duties.

The legal jurisdiction of the special county-level trial courts varies considerably and is established by the statute which creates the particular court. Some county courts at law handle juvenile cases. County courts at law usually have appellate jurisdiction in cases appealed from justice and municipal courts.

County court at law judges are elected by partisan countywide election. Vacancies between elections are filled by county commissioners.

Local Trial Courts of Limited Jurisdiction

Under its authority to create such other courts as may be necessary, the Texas Legislature has created municipal courts in each of the incorporated cities of the State. Municipal courts operate in approximately 850 cities and towns. The larger cities are served by multiple courts, the number depending upon the population of the city and the needs of the public.

These courts have original and exclusive jurisdiction over violations of city ordinances and, within the city limits, have concurrent jurisdiction with justice courts over Class C misdemeanor criminal cases where the punishment upon conviction is by small fine only. (Thus, there is no right to counsel in municipal court cases.) When city ordinances relating to fire safety, zoning, public health, or sanitation are violated, fines of up to \$2,000 may be charged, when authorized by the governing body of the city. Municipal judges may issue search or arrest warrants. These courts do not have

jurisdiction in most civil cases but do have limited civil jurisdiction in cases which involve owners of dangerous dogs.

Municipal court judges are either elected or appointed by the governing body of the city as provided by city charter or ordinance. Municipal court judges do not necessarily have to be attorneys; their qualifications are determined by the governing body of the city.

Justice Courts

The Texas Constitution requires that each county in the State establish between one and eight justice court precincts, depending upon the population of the county. Also, depending on the population of the precinct, either one or two justice courts are to be established in each precinct.

Justice courts have original jurisdiction in Class C misdemeanor criminal cases, which are less serious minor offenses. These courts also have jurisdiction of minor civil matters. A justice of the peace may issue search or arrest warrants, and may serve as the coroner in counties where there is no provision for a medical examiner. These courts also function as small claims courts. Finally, by practice, many justices conduct indigency screening and/or set bail in criminal cases.

There are approximately 900 justice courts in Texas. Justices need not be lawyers. They are elected by partisan precinct-wide election.

Below is a table that summarizes the various classes of statutory criminal offenses in Texas.

Table: Classification of Criminal Offenses in Texas
Misdemeanors

Category	Punishment	Example(s)
Class A	up to 1 year in a county jail and/or a fine up to \$4,000	Assault (causes bodily injury); stalking (first offense); violating protective/magistrate's order (first offense); criminal trespass (habitation); burglary of a vehicle; DWI (one prior conviction); theft/criminal mischief of \$500 or more
Class B	up to 180 days in a county jail and/or a fine up to \$2,000	Terroristic threat; indecent exposure; harassment; disorderly conduct (discharge/ display firearm); DWI (first offense); theft/criminal mischief of \$50 or more
Class C	fine not to exceed \$500	Assault (threatens bodily in-jury or causes offensive or provocative contact); theft/criminal mischief of less than \$50

Felonies

Category	Punishment	Example(s)
Capital	death by lethal injection or life imprisonment	Capital murder (murder peace officer or fireman; murder in course of kidnaping, burglary, robbery, aggravated sexual assault, arson; for remuneration or hire; while incarcerated in or escaping from a penal institution; murder more than one person; or murder child younger than 6 years of age)
First Degree	5-99 year or life in prison; may also be fined up to \$10,000	Murder; aggravated sexual assault; aggravated kidnaping; aggravated robbery; arson (place of worship or causes bodily injury or death); burglary of a habitation (intent to commit felony other than felony theft); theft/criminal mischief of \$200,000 or more
Second Degree	2-20 years in prison; may also be fined up to \$10,000	Murder (sudden passion); manslaughter; indecency with a child (by sexual contact); sexual assault; robbery; aggravated assault; arson; theft/criminal mischief of \$100,000 or more
Third Degree	2-10 years in prison; may also be fined up to \$10,000	Intoxication; assault; kidnaping; stalking (subsequent conviction); violating protective/magistrate's order (third conviction or commits assault or stalking); DWI (two prior convictions); theft/criminal mischief of \$20,000 or more
State Jail (Fourth Degree)	180 days to 2 years in state jail, may also be fined up to \$10,000; or court may impose Class A misdemeanor punishment	Criminally negligent homicide; burglary of a building; criminal non-support; theft/criminal mischief of \$1,500 or more or criminal mischief of less than \$1,500 to a habitation with a firearm or explosive weapon; forgery (check or credit card)

Misdemeanor and felony drug offenses are classified in the Texas Health and Safety Code based on factors including: (1) the type and amount of drug; and (2) whether the defendant manufactured, delivered, or possessed the drug. Increased punishments are provided for certain drug offenses occurring in drug-free zones .

CHAPTER 6

THE LEGAL FRAMEWORK FOR INDIGENT DEFENSE IN TEXAS

“Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.”

- Justice Hugo Black in *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)

Like all of the states in the United States, Texas is obligated to follow U.S. Constitutional requirements regarding the rights of indigent defendants who are subject to criminal prosecutions. Over time, caselaw and statutory provisions in Texas have evolved to exceed federal requirements. In some situations, however, the ways in which Texas counties apply these requirements appear to constrain the due process rights of indigent defendants. This section lays out some of the primary caselaw and statutory provisions governing indigent defense in Texas.

The Right to Counsel Under Federal Constitutional Law and Texas Constitutional Law

Under both the Sixth Amendment to the U.S. Constitution and Section 10, Article 1 of the Bill of Rights of the Texas Constitution,²⁵ all defendants who are charged in criminal proceedings have the right to counsel. However, these constitutional rights did not originally include the right to free counsel for indigent defendants accused of crimes in state courts. During the 20th century, the right to counsel in criminal cases under federal constitutional law evolved through decisions of the U.S. Supreme Court. In the landmark *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court placed individual requirements on each of the 50 states to provide legal counsel to indigent persons facing felony charges. Nine years later in *Agersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended a defendant’s right to counsel in all criminal prosecutions, felony or misdemeanor, that carry a sentence of imprisonment.

Although the U.S. Constitution provides the minimum protection afforded to an individual, the states are free to protect individual rights further within the body of their state law. In fact, the constitutional history of Texas is one which greatly strengthens the rights of the accused, particularly indigent persons charged with crimes.²⁶ The Texas Penal Code guarantees the accused’s right to

²⁵ Article 1, section 10 of the Texas Constitution provides in part, “in all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel or both.”

²⁶ See Texas Constitutional Preamble interpretive commentary and also *Brown v. State*, 657 S.W. 2d 797, 799 (Tex. Crim.App. 1983) (Texas has more protective constitutional provisions than federal constitution).

counsel.²⁷ In Texas, the right to counsel extends to probation revocation proceedings,²⁸ extradition proceedings²⁹ and contempt proceedings addressing the failure to make court-ordered payments for her appointed appellate counsel.³⁰ Finally, the Court of Criminal Appeals, the state's highest criminal court, has held that an accused charged with a misdemeanor who has not waived the right to counsel and is not represented by an attorney is not subject to imprisonment.³¹

In Texas there is a presumption that the appellant is indigent for purposes of appeal when appellant is represented by appointed counsel at trial.³²

The Point at Which Right to Counsel Attaches

The U.S. Supreme Court has held that the right to counsel attaches only after the filing of formal charges, whether by indictment or information.³³ And in interpreting when the right to counsel attaches under Texas law, the Texas Court of Criminal Appeals has held that the framers of the Texas constitution intended the state and federal right to counsel provisions to be identical.³⁴

Requests For Experts

Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), the U.S. Supreme Court held that an indigent defendant is entitled to meaningful use of a psychiatrist at trial when the state has made the defendant's mental condition relevant to his criminal culpability and to his potential punishment, when the defendant's mental condition is seriously in question, or when the defendant's mental state at the time of the offense is a substantial factor in his defense.

²⁷ See TEX. PENAL CODE 1911, art.1046. The statute reads: "If any officer or other person having the custody of a prisoner in this state shall willfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be punished by imprisonment in the county jail not less than six months, and by fine not exceeding one thousand dollars."

²⁸ *Parker v. State*, 545 S.W. 2d 151, 155 (Tex. Crim. App. 1977).

²⁹ *Ex parte Taylor*, 531 S.W. 2d 333, 334 (Tex. Crim. App. 1975).

³⁰ *Ex parte Gonzales*, 945 S.W. 2d 830 (Tex. Crim. App. 1997).

³¹ 571 S.W. 2d 526, 528-529 (Tex. Crim. App. 1978).

³² *Bush v. State*, 557 S.W. 2d 772 (Tex. Crim. App. 1977).

³³ *See Kirby v. Illinois*, 406 U.S. 682 (1972).

³⁴ *McBride v. State*, 778 S.W. 2d 70 (Tex. Crim. App. 1989) (en banc).

In *Rodriguez v. State*,³⁵ the Court of Criminal Appeals noted three factors for the trial court to consider in determining whether to appoint an expert for an indigent defendant: the private interest that will be affected by the appointment; the government interest that will be affected by the appointment; and the probable value of the additional or substitutional procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court established a two part test to determine the effectiveness of counsel. The test essentially requires that counsel's representation fall below any objective standard of reasonableness and that, but for counsel's deficient performance, the proceeding would have led to a different result. Under this standard, ineffective assistance of counsel is very, very difficult to prove. Historically, for assistance of counsel to be considered inadequate, counsel's efforts and performance must have been so perfunctory as to render the proceedings a "farce and mockery of justice."³⁶

In a companion case to *Strickland*, *United States v. Cronin*, 466 U.S. 648 (1984), the Court's analysis focused not on the individual attorney's performance, but rather on the circumstances surrounding the representation and the system in which counsel represented the defendant. The Court pointed out in *Cronin* that the right to the effective assistance of counsel relates directly to the ability of defendants to receive a fair trial. In this regard, the Court found that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."³⁷

The Texas Court of Criminal Appeals has held that regardless of complications in a case, a lawyer is charged with making an independent investigation of the facts.³⁸ This view is consistent

³⁵ 906 S.W. 2d 70 (Tex. App., San Antonio 1995).

³⁶ Under the farce and mockery test courts had simply decide whether the trial had been outrageous. See *Cooper v. Fitzharris*, 586 F. 2d 1325, 1328 (9th Cir. 1978) (en banc).

³⁷ See 466 U.S. 648, 659. Among the examples the Court provides are the following: complete absence or denial of counsel at critical stages of the proceeding; defense counsel's failure to subject the prosecution's test to meaningful adversarial testing; denial of the right to cross-examination; defense counsel's actively representing conflicting interests; and defense counsel appointed so close to trial that it amounts to a denial of substantial and effective counsel.

³⁸ See *Ex parte Ewing*, 570 S.W. 2d 941, 947 (Tex. Crim. App 1978).

with the Fifth Circuit, which stresses that counsel has a duty to interview potential witnesses and “make an independent examination of the facts, circumstances, pleadings and laws involved.”³⁹

Conflict of Interest in Multiple Defendant Cases

In *Glasser v. United States*⁴⁰ the Supreme Court held that the representation was ineffective because a lawyer cannot operate properly when his loyalties are so divided as to create the need to make choices which may benefit one client, but which are to the detriment of the other. Subsequently, in *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978), the Court held that joint representation of conflicting interests among indigent co-defendants creates conflicts because of what it tends to prevent the attorney from doing.

Indigent Defense in Texas – Statutory Framework

The Texas Code of Criminal Procedure addresses many facets of representation in adult criminal cases. Among the most relevant are the following:

Right to Counsel

Section 10, Article 1 of the Bill of Rights of the Texas Constitution provides that “in all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel.” This right is further codified in Article 1.05 of the Texas Code of Criminal Procedure.

Article 1.051 (a) of the Code of Criminal Procedure provides, “a defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. *The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding.*” [Emphasis added.]

Article 1.051 (c) provides: “[a]n indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interest of justice requires representation. If an indigent defendant is entitled to and requests appointed counsel the court shall appoint counsel to represent the defendant *as soon as possible.*” [Emphasis added.] The statutory provision does not provide a specific numeric guideline for when “as soon as possible” is. “Indigent” is defined as “a person who is not financially able to employ counsel.”

³⁹ *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979).

⁴⁰ 315 U.S. 60 (1942).

Article 1.051(a) specifies the judicial proceedings for which a defendant is entitled to have a trial court appoint an attorney to represent him. These include: an appeal to the Court of Appeals; appeal to the Court of Criminal Appeals if made directly from the trial court or if a Court of Criminal Appeals grants a petition for discretionary review; *habeas corpus* proceeding if the court concludes that the interests of justice require representation; and other appellate proceedings if the court concludes that the interests of justice require representation.

Attorney Preparation Time and Defendant Waiver of Right to Counsel

Article 1.051 (e) provides “an appointed counsel is entitled to 10 days to prepare for a proceeding but may waive the preparation time with the consent of the defendant in writing or on the record in open court. If a non-indigent defendant or an indigent defendant who has refused appointed counsel in order to retain private counsel appears without counsel at a proceeding after having been given a reasonable opportunity to retain counsel, the court, on 10 days’ notice to the defendant of a dispositive setting, may proceed with the matter without securing a written waiver or appointing counsel.” This section goes on to provide circumstances under which a defendant may voluntarily and intelligently waive the right to counsel, as well as the circumstances under which a waiver may be withdrawn.

Procedure Following Arrest

Article 15.17 provides that all persons arrested without a warrant shall be taken “without unnecessary delay” before a local magistrate who shall inform the defendant of the charges and nature of the accusation against him and of the defendant’s right to retain counsel, of his right to have an attorney with him during any interview with peace officers or attorneys representing the state, of his right to terminate such interviews at any time and of his right to request counsel if he is indigent and cannot afford counsel. That section further provides that “the magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.”

Prosecution of a class A or B misdemeanor in a county court, county court at law or county criminal court is initiated by filing an information. An information is a written statement presented on behalf of the state by the prosecutor, charging the defendant with the commission of an offense. An information must be based on a proper complaint, which must be filed with the information.

Felonies are prosecuted in a district court or a criminal district court, and an indictment is required unless it is waived by the defendant. An indictment is a written statement of a grand jury presented to a court that accuses a person of an act or omission which, by law, is declared to be an offense.

Examining Trial

Article 16.01 of the Code of Criminal Procedure provides that, “the accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense whether he be in custody or on bail.” An examining trial is akin to a preliminary hearing, where the prosecutor has to produce sufficient evidence to establish there is probable cause to believe that a crime has been committed and the defendant committed it.

Arraignment and Determination of Indigency

Article 26.01 provides that in all felony cases after indictment and all misdemeanor cases punishable by imprisonment there shall be an arraignment.

Article 26.04 further provides the following:

(a) whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. An attorney appointed under this subsection shall represent the defendant until the charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties or replaced by other counsel.

(b) In determining whether a defendant is indigent the court shall consider such factors as the defendant’s income, source of income, property owned, outstanding obligations, necessary expenses, the number and ages of dependants, spousal income, and whether the defendant has posted or is capable of posting bail. The court may not deny appointed counsel to a defendant solely because a defendant has posted or is capable of posting bail.

The section goes on to provide that defendants who request determination of indigency and appointment of counsel are required to complete a questionnaire, under oath, concerning their financial resources, to respond to an examination regarding their financial resources by a judge or magistrate, and to execute a written oath.

Article 26.04 (e) provides that “If there is material change in circumstances after the determination of indigency or non-indigency is made, the defendant, the defendant’s counsel, or the attorney representing the state may move for reconsideration of the determination.”

The Release/Bail Bond Decision

Article 17.42 of the Code of Criminal Procedure provides that counties are permitted to establish, with the approval of the local commissioners court, a “personal bond office to gather and review information about an accused that may have a bearing on whether he will comply with the conditions of a personal bond and report its findings to the court before which the case is pending.”

Section 5 of Article 17.42 requires such a personal bond pretrial release office to collect information about the accused, to keep that information updated, and to prepare an annual report.

In addition to the provisions governing the setting of bail, other provisions of the Code of Criminal Procedure permit magistrates to order as conditions of release home curfews, electronic monitoring of the suspect and drug testing.

As previously stated, Article 26.04 of the Texas Code of Criminal Procedure provides that in determining indigency, “The court may not deny appointed counsel to a defendant solely because the defendant has posted or is capable of posting bail.”

Statutory Provisions Governing Public Defender Programs

Under current statutory law, any Texas county seeking to establish a public defender program must have statutory authority to do so. Article 26 authorizes public defender programs in the following counties: El Paso, Tarrant, Webb and Wichita, each of which has a public defender program; and Aransas, Colorado, Cherokee and Tom Green, along with the 33rd, 293rd and 365th Judicial Districts, each of which, despite statutory authorization, does not. Additionally, Article 26.044 governs public defender programs in counties with four county courts and four district courts. We did not learn of any counties other than Dallas County that have established a public defender program under this article.

Article 26.051 governs indigent inmate defense. This governs inmates charged with an offense committed while in the custody of the institutional division of the Texas Department of Criminal Justice. Under this provision a court, if it determines that the defendant is an inmate and indigent and charged with an offense committed while in custody, may request that the Texas Board of Criminal Justice provide legal representation for the inmate. Where there is a conflict of interest the court is empowered to provide another attorney.

Article 26.06 makes specific the provision that “No court may appoint an elected county, district or state official to represent a person accused of crime, unless the official has notified the court of his availability for appointment.”

Harris County: Contract Defenders - Indigency Determination

Article 26.041 allows the Commissioners Court of Harris County to contract with an established bar association, a nonprofit corporation, and nonprofit trust association or any other nonprofit entity whose purpose is to provide timely and effective assistance of counsel for an indigent accused of crime.

The section also allows the Harris County Commissioners Court to contract out the responsibilities relating to indigency determination, including interviewing defendants, verifying information provided, making recommendations to the judge of defendants who should be released on personal bond, and assisting the court in securing the presence of a defendant who is released on personal bond.

Speedy Trial

Article 32A.02 provides that a court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within: 180 days for defendants accused of felonies, 90 days for defendants accused of misdemeanors punishable by sentence of imprisonment for more than 180 days, and 60 days for defendants accused of misdemeanors punishable by sentence of imprisonment for 180 days or less.

Provisions Governing the Compensation of Appointed Counsel

Article 26.05(a) provides: “A counsel, other than an attorney with a public defender’s office appointed to represent a defendant in a criminal proceeding, including a *habeas corpus* hearing, shall be reimbursed for reasonable expenses incurred with prior court approval for purposes for investigation and expert testimony and shall be paid a reasonable attorney’s fee for performing the following services, based on the time and labor required, the complexity of the case and the experience and ability of the appointed counsel: (1) time spent in court on behalf of the defendant as evidenced by a docket entry, time spent in trial, or time spent in a proceeding in which sworn oral testimony is elicited; (2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires; and (3) preparation of an appellate brief to a court of appeals or the Court of Criminal Appeals.”

Article 26.05 (b) states: “All payments made under this article shall be paid in accordance with the schedule of fees adopted by formal action of the county and district criminal court judges within each county, except that in a county with only one judge with criminal jurisdiction the schedule will be adopted by the administrative judge for that judicial district.”

Article 26.05 (c) states: “Each fee schedule adopted will include a fixed rate, minimum and maximum hourly rates, and daily rates and will provide a form for reporting the types of services

performed in each one. No payment should be made under this section until the form for reporting the services performed are submitted and approved by the court and is in accordance with the fee schedule for that county.”

Article 26.05 (d) states: “All payments made under this article shall be made from the general fund of the county for which the prosecution was instituted or *habeas corpus* hearing held and may be included as costs of court.”

Article 26.05 (e) states: “If the court determines that a defendant has financial resources that will enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay the court the amount that it finds the defendant is able to pay.”

CHAPTER 7

INDIGENT DEFENSE DELIVERY SYSTEMS IN THE UNITED STATES⁴¹

There are three primary models for providing representation to those accused of crimes and unable to afford counsel in the United States: assigned counsel, contract and public defender programs.

- The ***assigned counsel model*** involves the assignment of indigent criminal cases to private attorneys on either a systematic or an ad hoc basis.
- The ***contract model*** involves a private bar contract with an attorney, a group of attorneys, a bar association, or a private non-profit organization which will provide representation in some or all of the indigent cases in the jurisdiction.
- The ***public defender model*** involves a public or private non-profit organization with full or part-time staff attorneys and support personnel.

From these three models for the appointment of counsel, states have developed indigent defense delivery systems, many of which employ some combination of these types. For example, even in states with a statewide public defender system, private attorneys will be appointed to conflict cases and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county.

Assigned Counsel Programs

Assigned counsel programs utilize private attorneys to represent indigent defendants. Many private practitioners, including less experienced lawyers, welcome the opportunity to participate in an assigned counsel program because of the courtroom and trial experience they can gain.

The Ad Hoc Assigned Counsel Program

The oldest and most common type of assigned counsel program is the ad hoc program, under which the appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys. Cases are sometimes assigned to attorneys on the basis of who is in the courtroom at a defendant's first appearance or

⁴¹ This section is adapted from Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW AND CONTEMP. PROBS. 31 (Winter 1995).

arraignment, the time when appointments are typically made. Attorneys are usually paid on an hourly basis (e.g., \$30/hour for work out-of-court and \$40/hour for work in-court). In some states, attorneys are provided a flat fee per case.

In most jurisdictions, private, court-appointed counsel must petition the court for funds for investigative services, expert witnesses and other necessary costs of litigation. It is common for such an expenditure to require prior approval of the court, and to be subject to a somewhat flexible, but court-controlled maximum amount.

While the ad hoc assigned counsel method remains the predominant indigent defense system used in the country, particularly in smaller, less populated counties, it is frequently criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed attorneys. It is not uncommon for many of the appointments to be taken by recent law school graduates looking for experience, and by more “experienced,” but marginally competent attorneys who need the income.

The Coordinated Assigned Counsel Program

The better type of assigned counsel program is one that has some type of administrative or oversight body. These coordinated programs generally require attorneys to meet minimal qualification standards in order to join the program, and provide a greater degree of supervision, training and support for the attorneys who are accepted. In the coordinated model, attorneys are usually assigned on a rotational basis according to their respective areas of expertise and the complexity of the cases. The American Bar Association recommends the use of coordinated assigned counsel programs over ad hoc programs to maintain independence from the judiciary and elected officials. Standard 5-1.3 of ABA's Standards for Criminal Justice, Providing Defense Services specifies that “[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators of the defender, assigned counsel programs and contract-for-service.”

Like counsel appointed in an ad hoc fashion, counsel appointed in a coordinated program are paid by the hour or by the case. The coordinated assigned counsel model is recognized by the American Bar Association as superior to the ad hoc assigned counsel model, as it more frequently ensures consistent and adequate representation, helps to eliminate patronage by judges in the assignment process, and avoids appointing cases to lawyers merely because they happen to be present in court at the time the assignment is made.

Contract Attorney Programs

In a “contract” program, the jurisdiction enters into contracts with private attorneys, law firms, bar associations or non-profit organizations to provide representation to indigent defendants. Often the contract is designated for a specific purpose within the indigent defense system, such as all

cases where the public defender has a conflict of interest, or for a certain category of cases (e.g., felonies, misdemeanors, juvenile dependencies).

The structure of these programs varies, but there are essentially two main types of contract programs.

Fixed Price Contracts

The defining characteristic of a fixed price contract program is that the contracting lawyer, law firm or bar association agrees to accept an undetermined number of cases within an agreed upon contract period, frequently one year, for a single flat fee. The contracting attorneys are usually responsible for the cost of support services, investigation and expert witnesses for all of the cases. Even if the caseload in the jurisdiction is higher than was projected, the contractor is responsible for providing representation in each of the cases for no additional compensation. This type of contract has been severely criticized by the courts and national organizations. The American Bar Association's House of Delegates approved a resolution in 1985 condemning the awarding of contracts for indigent defense services based on cost alone. In *State v. Smith*,⁴² the Arizona Supreme Court found this type of system, which was in use in several Arizona counties, unconstitutional because:

- 1) The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants;
- 2) The system does not provide for support costs for the attorney, such as investigators, paralegals and law clerks;
- 3) The system fails to take into account the competency of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned; and
- 4) The system does not take into account the complexity of each case.

The Fixed Fee-Per-Case Contract

The distinguishing feature of a fixed fee-per-case contract is that when a private lawyer, law firm or organization enters into a contract to provide indigent defense representation, the contract specifies a predetermined number of cases for a fixed fee *per case*. Frequently, funds for support

⁴² 681 P.2d 1374 (1984).

services, investigation, secretarial services, and expert witnesses will be included in the contract. The contracting attorney typically submits a monthly bill indicating the number of cases handled during the period. Once the predetermined number of cases has been reached, the option exists to re-negotiate or extend the contract. The fixed fee per-case system, is far less common than the fixed price contract system.

Unfortunately, too many jurisdictions have adopted the fixed price contract model solely as a means to cut costs, often at the expense of the quality of representation. An indigent defense system has a legal and ethical responsibility to guarantee the quality of representation it is providing. If that responsibility is not taken seriously, the jurisdiction makes itself vulnerable to expensive and damaging litigation from claims of ineffective assistance of counsel.

The ABA Standards have addressed the potential for “quality control” problems in a contract system. Part III of the revisions approved in August 1990 includes a new section, which addresses Contract Defense Services. Section 5-3.3(b), “Elements of the contract for services,” delineates 15 essential provisions that should be included in any contract with private attorneys or other lawyer groups.

Among the elements proscribed, the standards assert that the contract “should ensure quality legal representation,” and that the contract should not be awarded “primarily on the basis of cost.” The standards also stress that the contract include detailed information about how the cases will be handled by the contractor. Specifically, the standards require that contracts include, but not be limited to, the type and number of cases to be included, the fee per case, minimum attorney qualification standards, the attorneys who will be working on the cases, a policy for obtaining representation in the case of a conflict of interest, and other provisions. The key to a successful contract program is to ensure that the attorneys have appropriate experience, training and monitoring, and that the lawyers have access to the support and resources necessary for litigation.

The primary appeal of contract systems to funding bodies is the ability to accurately project the cost of conflict counsel for the upcoming year by limiting the total amount of money that is contracted out. With an appointed counsel system, it is impossible to predict the total cost for the upcoming year. Variables affecting the cost of an appointed counsel system include the total number of cases assigned, whether any death penalty or complicated cases are filed, and whether there are drug sweeps resulting in multiple defendants. Counties and states utilizing fixed price contracts are not subject to these variables, so they can project with certainty what their indigent defense expenditures will be at the beginning of the year.

Public Defender Programs

A public defender program is a public or private non-profit organization staffed by full or part-time attorneys and is designated by a given jurisdiction to provide representation to indigent defendants in criminal cases. While there are many variations among public defender programs, the

defining characteristic is the employment of staff attorneys to provide representation. Staff attorneys are assisted by investigators and support staff.

The public defender concept predates *Gideon v. Wainwright* by 50 years. The first defender program was established in Los Angeles in 1913. This early model was intended to provide a core group of experienced criminal lawyers who would improve upon the pro bono representation offered by members of the private bar. Besides the occasional local program, such as in Los Angeles or New York, the public defender model did not proliferate around the country until after the landmark Supreme Court decisions and the publication of several important national studies in the 1970s.

PART II

REPRESENTATION OF INDIGENT DEFENDANTS CHARGED WITH CAPITAL OFFENSES

CHAPTER 1

INTRODUCTION

Texas inflicts death as a punishment for homicide more often than any other state in the nation. More defendants are condemned to die, and actually executed, in Texas than anywhere else - about one of every three prisoners executed in the U.S. since the death penalty was reinstated in 1976. Almost all the accused persons Texas seeks to execute lack the financial means to retain counsel, and thus must be provided legal representation at public expense. Because no one can correct an erroneous execution, the rate at which Texas imposes such sentences alone would justify close scrutiny of the structures and practices the state relies upon to ensure that high-quality legal assistance - which is ultimately the best guarantor of a reliable result - is provided to the accused in such cases.

In recent months, however, a steady stream of stories about errors in the Texas capital trial system has brought national attention to the state's procedures for providing counsel to defendants in capital cases, even as executions have continued at a record rate.¹ A review of hundreds of Texas death penalty cases by the Dallas Morning News found that nearly one in four condemned prisoners was represented at trial or on appeal by court-appointed counsel who had been disciplined for professional misconduct at some point in their careers.² The Chicago Tribune's investigation into the trials of the Texas prisoners executed from 1994 to 2000 reported that in almost a third of those trials, defense attorneys presented "no evidence whatsoever or only one witness during the trial's sentencing phase."³ A seemingly endless number of variations on the theme of ineffective assistance of trial counsel in specific cases have emerged. Lawyers for Ernest Willis - whom a Pecos County judge, years later, would determine was probably innocent of the crime for which he was sent to Death Row - were shown to have spent a grand total of only three hours with Willis, preparing for trial.⁴ Joe Guy's attorney was revealed to have been using cocaine and abusing alcohol during Guy's

¹ See generally Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* (2000).

² *Defense Called Lacking For Death Row Indigents, But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A; see also *Judge Says Inmate Wrongly Convicted*, DALLAS MORNING NEWS, September 10, 2000 (hereinafter *Inmate Wrongly Convicted*); Steve McGonigle, *High Stakes On Death Row: Critics Say Lawyer Shouldn't Aid Man He Once Prosecuted*, DALLAS MORNING NEWS, July 6, 2000.

³ Steve Mills, Ken Armstrong, and Douglas Holt, *Flawed Trials Lead to Death Chamber*, CHICAGO TRIBUNE, June 11, 2000. The Tribune reporters also replicated the findings of the Dallas Morning News team concerning the high incidence of professional discipline among attorneys appointed to represent indigent capital defendants, concluding that "in 43 cases [of 131 in their sample], a defendant was represented at trial or on initial appeal by an attorney who had been or was later disbarred, suspended, or otherwise sanctioned."

⁴ *Inmate Wrongly Convicted*, supra note 2 (noting that "Visitor logs at the Pecos County Jail show that [Willis'] lawyers, neither of whom had ever defended a death penalty case, spent a total of three hours with Mr. Willis before his trial.").

capital murder trial.⁵ Houston attorney Ron Mock – a man who, by his own account, "drink[s] a lot of whiskey," has spent time in jail on contempt charges for failing to file legal briefs in a timely manner,⁶ and who had seen "16 or 17" of his own indigent clients sent down to Death Row,⁷ was back in the news when his former client Gary Graham, about whose guilt public doubts remain, was executed. And finally – and most notoriously – Mock's colleague Joe Cannon was posthumously criticized for having slept through large portions of the trials of at least two clients who were ultimately condemned to die.⁸

These numerous anecdotes, however have not prompted a thoroughgoing reevaluation of how Texas provides lawyers to indigent persons facing the death penalty. On the contrary, the reaction of most high Texas officials has been to assure the public that those incidents are isolated and aberrational, and bear no connection to any deeper structural flaws in the Texas criminal justice system.⁹ There has been little or no official scrutiny of the underlying structural causes which may be contributing to such examples of poor legal representation.

As part of its larger study of indigent defense practices in Texas, Texas Appleseed undertook to study whether these incidents are symptoms of widespread and serious flaws in the basic mechanisms for providing a fair defense to every indigent person on trial for his life. We sought to accept these anecdotes as valuable evidence, but to move beyond them in our inquiry. Our task now is to identify the structures and practices whose failure has led to these incidents, and to recommend improvements which can reliably prevent them in the future.

(...continued)

⁵ Linda Kane, *Death Row Inmate's Lubbock Attorney Used Drugs, Alcohol*, LUBBOCK AVALANCE-JOURNAL, Sept. 10, 2000, at 12A.

⁶ John Makeig, *Criminal Lawyer Wins One, Loses Another*, HOUSTON CHRONICLE, April 19, 1986, at A33; *Defense Attorney Surrenders to Jail Officials*, HOUSTON CHRONICLE, March 26, 1985, at A13.

⁷ Paul Duggan, *In Texas, Defense Lapses Fail to Halt Executions*, WASHINGTON POST, May 12, 2000 (hereinafter *Defense Lapses*).

⁸ Henry Weinstein, *Condemned Man Awaits Fate in Dozing Lawyer Case*, LOS ANGELES TIMES, June 6, 2000, at A1; *see also* Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, Wall Street Journal, Sept. 7, 1994, at A1; Henry Weinstein, *A Sleeping Lawyer And A Ticket To Death Row*, LOS ANGELES TIMES, July 15, 2000, at A1 (discussing additional Texas "sleeping lawyer" case).

⁹ Duggan, *Defense Lapses*, *supra* note 7.

CHAPTER 2

CAPITAL RESEARCH METHODOLOGY

For the past year, the Texas Appleseed Fair Defense Project has been conducting on-site research in a representative sample of 23 Texas counties to document local indigent defense practices and procedures for providing representation to indigent defendants in criminal cases. As an integral part of this study, the Fair Defense Project has systematically collected and compiled information and empirical data about indigent defense representation in capital cases. This research into capital defense procedures has been funded by a grant from the Arca Foundation. Our capital defense research has also been aided by the support provided for the overall research project by the Center on Crime, Communities and Culture and the Program on Law & Society of the Open Society Institute.

Most capital prosecutions in Texas take place in counties within the 23-county sample. According to data maintained by the Texas Department of Criminal Justice, 788 of the 859 inmates (91%) who have been sentenced to death in Texas since the reinstatement of the death penalty in 1976 have been prosecuted in the 23 counties in our sample.

To compile information about each of the 23 counties' procedures for appointing and compensating counsel, the capital research team initially interviewed criminal defense attorneys, prosecutors, district court judges, mental health experts, investigators, and court administrators in those counties. Through these interviews, the research team obtained information concerning, *inter alia*, the procedures for appointment of counsel in each county; the timeliness of appointment of first and second chair counsel; the fee schedules and practices employed by district courts in each of the counties for compensating defense counsel; and the resources available to defense counsel to retain investigative and expert assistance.

In addition to conducting on-site interviews, the research team attempted to compile and analyze empirical case-specific data about compensation of defense counsel, investigators, and experts; time spent by defense counsel and investigators in preparing for trial; duration of trial; and attorney workload. Only with such information can one evaluate and verify the anecdotal evidence provided by local participants in each county's system, and draw reliable conclusions about the quality of representation being afforded poor people facing the death penalty in Texas generally.

In order to make this case-specific inquiry feasible, the research team limited the scope of the case-specific investigation to capital prosecutions resulting in death sentences between 1995 and 2000. The research team identified 164 cases in which the death penalty was imposed in the sample counties during this period. *See* Table 1.

Table 1:

**NUMBER OF DEATH ROW INMATES SENTENCED TO DEATH
IN SAMPLE COUNTIES, 1995-2000**

<u>County (county seat)</u>	<u>Number</u>	<u>County (county seat)</u>	<u>Number</u>
Harris (Houston)	70	Bastrop (Bastrop)	1
Bexar (San Antonio)	25	Brazoria (Angleton)	1
Dallas (Dallas)	23	Brown (Brownwood)	1
Tarrant (Ft. Worth)	8	Grimes (Navasota)	1
Smith (Tyler)	7	Hunt (Greenville)	1
Travis (Austin)	4	Tom Green (San Angelo)	1
Hidalgo (McAllen)	4	Titus (Mt. Pleasant)	1
Nueces (Corpus Christi)	4	Comal (New Braunfels)	0
Lubbock (Lubbock)	4	Denton (Denton)	0
Jefferson (Beaumont)	4	Shelby (Center)	0
El Paso (El Paso)	2	Terry (Brownfield)	0
McLennan (Waco)	2		
		Total in 23-county sample:	164
		Total statewide (1995-2000):	233
		% of statewide in sample:	70.4%

[Numbers current as of 11/20/00]

The research team attempted to review the district court's file in each of the 164 cases in the relevant period. We obtained copies of attorney timesheets, vouchers, invoices, compensation requests, motions for expert and investigative assistance, and docket sheets. The team also gathered other available documentation, such as locally published attorney fee schedules, which cast light on these practices. To confirm compensation data gleaned from court files, the research team solicited additional official information from the county auditors' offices documenting all payments to defense counsel, experts, and investigators in capital cases from 1990 to 1995.

In pursuing these tasks, the research team discovered a major systemic flaw in Texas' mechanisms for providing defense services to indigent persons facing the death penalty. Namely, we

found that the very data upon which meaningful monitoring would necessarily rely were unavailable or in substantial disarray. It became clear that in the vast majority of the counties in our sample, information about capital cases is not compiled or maintained in any centralized or methodical fashion. For example, although many courts require counsel to submit claims for compensation on some type of pre-existing form, the forms themselves and the kind and quantity of information they contain vary enormously. In other courts, defense attorneys improvise the form of their bills and the amount and type of information provided to justify a request for fees and/or expenses. With respect to payments to defense investigators and experts, few courts employ any sort of form. In some courts, defense attorneys submit requests for payment to experts and investigators for services rendered, while in others the service providers themselves bill the court directly. Some courts require counsel to report in-court time and out-of-court time separately. Within that subset of courts, some judges measure in-court time in uniform “days” for which a flat fee per day is paid, while others do not. In other courts, counsel simply makes a global fee demand for the entire case and the court pays all or part of the sum requested. Although in many cases the amount of fees requested by counsel was reduced by the court, almost none of the files contained any indication why particular fee requests were reduced, or what justified the amount of a particular reduction. Reporting practices are not even consistent within case files, much less within particular district courts or between counties. Even information obtained from county auditors varied widely in form; some auditors were able to provide it on computer-generated spreadsheets, while others could only offer dozens of pages of copies of invoices, vouchers, and requisition forms submitted by defense counsel and/or investigators and experts.

In addition, the research team discovered that some of the information we obtained from the district courts and the county auditors' offices was incomplete or even unreliable. For example, documents in some court files reflected that defense counsel had obtained authorization to expend funds for investigation or expert assistance, yet the data obtained from the county auditors' offices did not confirm that any such payment was made in the course of the case. In some cases, names of attorneys appear of record for whom no payment information exists in any of the files we have been able to obtain. For all these reasons, the research team has been forced to spend a substantial amount of time attempting to cross-check data against other available sources in order to verify its accuracy.

As a consequence of the absence of consistent data-gathering or reporting practices¹⁰ which would permit organized and comprehensive analysis of all relevant information, our data set is not yet complete. That is, additional information may become available in some cases which will clarify our understanding of the work performed, or compensation provided, in those cases. We have obtained and reviewed enough solid data from different sources, however, to draw reliable inferences about the issues discussed *infra*. For example, because the total amounts which appear to have been paid for attorneys' fees in several different cases in Bexar County are within a few thousand dollars of one another, it is unlikely that a single lost or mis-filed voucher in one case would affect our overall conclusions about compensation as a general matter in that county. The same is true of other services (such as investigators or experts) and other potential measures of

¹⁰ The extraordinary variation in compensation schemes, both between and within counties, has also complicated the task of analyzing reported data.

attorney activity (such as the number of hours of work claimed in a request for fees).

One final comment is appropriate. Assessing the *quality* of defense counsel's performance in any given case, or across the entire sample, was beyond the scope of our inquiry. Grading counsel's performance on a case-by-case basis requires a far-reaching investigation into each case, because defense counsel's acts and omissions in the course of trial can only be meaningfully reviewed upon a detailed factual record. There was no way to undertake that sort of case-specific inquiry into each of the many cases in our sample. We expect, however, that future researchers will examine the record developed in post-conviction proceedings in some of those same cases, to assess how greatly the factors identified in our study undermined the fairness or reliability of those verdicts.

CHAPTER 3
THE STRUCTURE OF
INDIGENT CAPITAL DEFENSE REPRESENTATION IN TEXAS

In order to make meaningful comparisons between the data gathered by our research team concerning Texas capital cases and available data from other jurisdictions, it is necessary to appreciate the ways in which the structure of indigent capital defense representation in Texas differs from that in other states. Accordingly, we summarize below the ways in which states structure indigent defense representation.

More than half of the states in the nation have organized some form of statewide program to provide legal representation to indigent defendants (including, but not limited to, capital defendants). These statewide systems vary in terms of scope of authority and oversight, but they all provide some degree of uniformity to the delivery of indigent defense services statewide. In some of these states, a governmental agency with statewide authority may operate under the judiciary or the executive branch of government, or may be established as an independent public or private agency. Often, a governing body or a state commission is created to enact indigent defense policy and to select the state public defender or chief counsel of the agency.

Texas is virtually alone among the most active death penalty states (*see* Table 2) in failing to maintain any comprehensive statewide program for providing, funding, or supervising legal representation for indigent defendants. Instead, legal representation for indigent criminal defendants in Texas is provided under literally hundreds of independent sets of practices that have evolved separately in each county, with little oversight, data collection or guidance from the State – and with no state funding. This plethora of separate and variable county-based systems has led to “a lack of uniformity and a lack of control over the quality of representation provided throughout the state.”¹¹

¹¹ The Spangenberg Group, *A Study of Representation of Capital Cases in Texas* (1993) (report sponsored by the State Bar of Texas) at v.

Table 2

**INDIGENT DEFENSE REPRESENTATION IN CAPITAL TRIALS
A STATE-BY-STATE COMPARISON**

States Which Most Actively Impose the Death Penalty
(Measured by number of post-1976 executions)

STATE (# of post-1976 executions as of November 30, 2000)	State Funding (full or partial)	Statewide Oversight Commission	Statewide or County Public Defender Agencies	Statewide Capital Trial Unit
TEXAS (236)	NO	NO	NO	NO
VIRGINIA (80)	YES	NO	YES	NO
FLORIDA (49)	YES	NO	YES	NO
MISSOURI (46)	YES	NO	YES	YES
OKLAHOMA (30)	YES	YES	YES	YES
LOUISIANA (26)	YES	YES	YES	NO
SOUTH CAROLINA	YES	YES	YES	NO
GEORGIA (23)	YES	YES	YES	YES
ALABAMA (23)	YES	NO	YES	NO
ARKANSAS (22)	YES	YES	YES	YES
ARIZONA (22)	NO	NO	YES	NO
NORTH CAROLINA (16)	YES	YES	YES	NO

note: A few states, *e.g.*, Georgia, Louisiana, provide partial funding as a supplement to county funding.

Twenty four states plus the District of Columbia have established a statewide agency or commission with authority to oversee and monitor the state's trial level indigent defense system.¹² The scope of the commission's authority varies from state to state. In some states, the commission has responsibility for establishing statewide standards and procedures for appointment and compensation of counsel in criminal cases, maintaining a list of qualified counsel to accept appointments in capital cases, monitoring performance of counsel, and reviewing disputed fee decisions of judges. In states with a public defender system, the commission may be responsible for appointing the chief public defender and overseeing the public defender office's budget.

In contrast to these states, Texas does not provide oversight of the counties' administration of their independent systems for appointment of counsel in death penalty cases, and has no statewide agency responsible for developing standards and guidelines for capital representation throughout the state and for monitoring county compliance with these standards.

A clear trend among death penalty states is the creation of specialized statewide capital trial units. Ten states – Arkansas, Connecticut, Georgia, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New York, and Oklahoma – along with a number of regional public defender offices in Florida, have separate units which handle and/or provide support for private counsel handling death penalty cases by court appointment. In addition, nine death penalty states operate indigent defense programs utilizing a state public defender with full authority for the provision of defense services statewide: Colorado, Connecticut, Delaware, Maryland, Missouri, New Hampshire, New Jersey, New Mexico, and Wyoming. Most of these statewide programs provide public defender representation in every county in the state.

In contrast, capital cases in Texas are defended almost exclusively by members of the private bar, appointed on an *ad hoc* basis, rather than by public defender programs or some combination of private counsel and public defenders. The absence of such programs, at least as an adjunct to private appointed counsel, has several far-reaching consequences. Even in states where private attorneys continue to handle many capital cases by court appointment, specialized capital defender programs exist alongside them to provide those lawyers invaluable assistance and support. For example, the Capital Trial Unit of Kentucky's Department of Public Advocacy conducts high-quality training programs for appointed counsel, as well as producing useful training manuals, practice guides, etc. While organizations of private attorneys (such as a the local criminal defense lawyers' association) may conduct occasional death-penalty defense trainings, these are no substitute for in-depth, comprehensive courses which may span several days. The logistical demands of organizing large-scale specialized trainings on a regular basis, and the ability to bring in nationally prominent attorneys to lead them, are often beyond the resources available to such organizations, which must balance the need for capital defense training with the competing need to offer other types of skill development.

Public defender programs can also make experienced attorneys available to consult with appointed private counsel on a formal or informal basis. As a result, these programs can serve as

¹² These states include Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee. All but North Dakota have the death penalty.

clearinghouses to disseminate different types of essential information for appointed counsel, such as recent developments in the law or references for appropriately qualified experts and investigators (especially mitigation investigators). Equally important, economies of scale often allow public defender agencies to undertake the type of time-consuming, systematic data gathering necessary to support, for example, challenges to jury composition practices that minimize the participation of racial minorities. And, of course, public defender agencies themselves constitute an essential training ground for developing young attorneys, who may then move into private practice and enlarge the pool of attorneys appropriately qualified to handle capital cases. Thus, the absence of public defender organizations in Texas deprives the private defense bar of the institutional support, resources, and training that such organizations provide to appointed counsel in other states.

While Texas relies entirely on improvised, *ad hoc* appointment of private attorneys to represent defendants in capital cases, Texas has no statewide minimum standards for qualifications of appointed counsel. In 1995, the Legislature passed a law that, for the first time, required the development of *regional* standards for the qualifications of appointed counsel in each of Texas' nine "administrative judicial regions."¹³ That statute, however, established no statewide minimum standards to guide the regions or to set any floor below which each region's standards could not fall. As we discuss in further detail below, the absence of statewide minimum standards has allowed each administrative judicial region to establish standards that are so low that they fail to screen out lawyers who lack the knowledge, skill, or expertise to defend death penalty cases.

Similarly, Texas law provides little guidance to counties concerning compensation of defense counsel in capital cases. For example, Texas requires counties to pay "a reasonable attorney's fee" to court-appointed counsel in criminal cases according to a schedule of fees adopted by the county.¹⁴ The law, however, fails to define or clarify what constitutes a "reasonable" fee or to provide any other direction to counties in establishing fee schedules. Nor does Texas law provide any means for appeal or review of a trial court's fee decision to ensure public accountability. As we discuss at greater length below, compensation rates vary dramatically between counties in Texas, with compensation in the vast majority of counties below the threshold necessary to provide competent death penalty representation.

Finally, and perhaps most important, Texas is virtually alone among the most active death penalty states in providing no funds or other support or assistance for indigent defense representation in capital trials or appeals. Instead, Texas has shifted the burden of funding this constitutionally-mandated function to each of its 254 counties. Because of vast socio-economic disparities between counties, the financial resources for indigent defense representation vary widely across the State. Smaller, rural counties generally have less money to compensate attorneys, fewer qualified counsel, and scarce resources for expert and investigate assistance. At the same time, we found that several larger metropolitan counties that seek the death penalty more often – particularly Bexar and Harris counties – impose severe limitations and constraints on defense compensation and investigative resources that adversely affect the quality of representation and the reliability of verdicts.

¹³ See TEX. CODE CRIM. PROC. art. 26.052 (West 2000).

¹⁴ See TEX. CODE CRIM. PROC. art. 26.05 (West 2000).

CHAPTER 4 THE UNIQUE DEMANDS OF DEFENSE REPRESENTATION IN CAPITAL CASES

In 1963, the Supreme Court declared for the first time that the Sixth Amendment guarantees an indigent person facing felony criminal charges in state court the right to the assistance of counsel at public expense.¹⁵ As long ago as 1932, however, the Supreme Court had recognized the particular importance of effective representation in *capital* cases, holding that due process entitles an indigent person on trial for his life to “the guiding hand of counsel at every step in the proceedings against him.”¹⁶ Even in that early case, the Court distinguished between the appearance of legal assistance and the reality of effective representation, noting that there was no dispute that the defendants had been nominally represented by counsel, but emphasizing that the central inquiry was “whether the defendants were *in substance* denied the right [to] counsel.”¹⁷ Today, it is universally accepted that the demands upon defense counsel in a death penalty case are uniquely heavy, both in the legal expertise which counsel must possess and in the extra-legal subjects she must master. As to the former, the American Bar Association has stated that

[D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. . . . At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.¹⁸

Nor is legal expertise alone sufficient to equip counsel to defend a capital case. Counsel must have a working knowledge of the best current scientific understanding of the antecedents of violent behavior and how those theories might potentially account for her client's actions in the

¹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶ *Powell v. Alabama*, 287 U.S. 56 (1932).

¹⁷ *Powell*, 287 U.S. at 57; see also Dan T. Carter, *Scottsboro: A Tragedy of the American South* (1979) at 160-63.

¹⁸ American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Commentary to Guideline 1.1, at 31 (1989) (hereinafter *ABA Death Penalty Guidelines*). See also Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 696 (1991) (describing the punishment phase of a capital trial as “the most emotionally and intellectually difficult trial there is”); Anthony Paduano and Clive Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 Rutgers L. Rev. 281, 292-300 (1991) (contrasting demands placed on counsel in capital versus non-capital cases).

capital offense.¹⁹

Courts have unanimously agreed that an attorney representing the accused in a death penalty case must fully investigate the facts relevant to the case.²⁰ Because death penalty cases really involve two trials – a trial to determine guilt and, at least potentially, a separate trial to determine whether the defendant should be sentenced to death – the Supreme Court has recognized that reasonable investigation and pre-trial preparation in a capital case must have a correspondingly wide scope.²¹

With respect to the guilt phase, competent defense counsel must conduct an independent investigation of the crime, not simply accept at face value whatever information the prosecutor may share through formal or informal discovery. This requires counsel to locate, interview, and check the backgrounds of not only the witnesses she expects the State to call at trial, but any other potential witnesses who might tell a different story. Further, although the State of course bears the ultimate burden of proving its capital murder charge, defense counsel in a capital case may well need to investigate facts which might support an affirmative defense – either an absolute defense from liability, such as self-defense or insanity, or an imperfect defense that could result in a verdict convicting the accused of a lesser offense than capital murder (and thus bar a death sentence in the penalty phase). In addition to investigating facts surrounding the homicide itself, competent counsel must also conduct a thorough investigation into all *post-arrest* events if the State intends to rely on alleged waivers of rights by the defendant to support the admission of certain evidence (such as formal statements by the defendant, or items recovered in searches of, *e.g.*, the accused’s home).

With respect to the penalty phase, defense counsel likewise must shoulder two distinct, if interrelated, obligations: to meet the State’s case *for* the death penalty, and to develop and present the best possible affirmative case *against* the death penalty. The former task is especially important because Texas directs the jury at the penalty phase to answer factual questions called “special issues.” One such “special issue” asks the jury whether there is “a probability that the

¹⁹ See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Defense Sentences*, 43 Buff. L. Rev. 329, 357-360 (hereinafter *Poorhouse Justice*); see also, *e.g.*, *ABA Death Penalty Guidelines*, *supra* note 18, Guideline 5.1.A.v (defense counsel in a capital trial must be familiar with and experienced in the utilization of expert witnesses and evidence).

²⁰ *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1515 (2000) (“trial counsel [in a capital case have an] obligation to conduct a thorough investigation of the defendant’s background,” citing *ABA Standards for Criminal Justice* 4-4.1, commentary p. 4-55 (2nd ed. 1980)); *id.* at 1524-25 (O’Connor, J., concurring) (counsel performed deficiently in failing to conduct a “diligent investigation into his client’s troubling background and unique personal characteristics”).

²¹ *Williams*, 529 U.S. at ____, 120 S. Ct. at 1515; see also *id.* at 1524-25 (O’Connor, J., concurring).

defendant would commit criminal acts of violence that would constitute a continuing threat to society.”²² An affirmative finding to this “future dangerousness” inquiry is a prerequisite to a death sentence under state law; if the jury concludes that the answer to this question is “no,” the defendant may not receive the death penalty for his crime.²³ The State commonly offers the defendant’s prior criminal record as evidence in support of a “yes” answer. Anticipating such evidence, competent capital defense counsel accordingly must undertake a comprehensive investigation into the defendant’s prior convictions, if any - both into the facts underlying the prior charges, and the circumstances surrounding the conviction itself. This is necessary because the accused has an absolute Fourteenth Amendment right to deny or rebut factual allegations made by the State in support of a death sentence,²⁴ and because the constitution forbids basing a death sentence on prior convictions obtained in violation of the defendant’s constitutional rights.²⁵ Texas law also permits the State to present evidence of *unadjudicated* prior bad acts by the defendant as support for an affirmative answer to the “continuing threat” special issue, without giving any prior notice to defense counsel.²⁶ In other words, even if the defendant was never formally charged with or convicted of any crime in connection with some alleged prior misconduct, defense counsel must assume that the State will attempt to introduce those allegations into evidence, and accordingly must thoroughly investigate any such events as an integral part of preparing for the penalty phase.

Along with preparing to counter the State’s case for the death penalty, of course, defense counsel must investigate in order to develop an affirmative case for sparing the defendant’s life. The Eighth Amendment gives a capital defendant the right to present to the jury any facet of his character, background, or record that might call for a sentence less than death.²⁷ Although the federal constitution makes no express demands on counsel in this regard, the Eighth Amendment right to offer mitigating evidence “does nothing to fulfill its purpose unless it is understood to

²² TEX. CODE CRIM. PROC., art. 37.071, Sec. 2(b)(1) (WEST 2000).

²³ TEX. CODE CRIM. PROC., art. 37.071, Sec. 2(g) (WEST 2000).

²⁴ *Gardner v. Florida*, 430 U.S. 349 (1977); *Simmons v. South Carolina*, 512 U.S. 154 (1994).

²⁵ *Johnson v. Mississippi*, 486 U.S. 578 (1988).

²⁶ *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000) (“This Court has held on a number of occasions that Article 37.071, which controls the sentencing phase of a capital murder trial, allows the admission of unadjudicated extraneous offenses at punishment”) (citation omitted); *Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000) (nothing in the law requires the State to give the defendant notice in a capital case of its intent to introduce evidence of unadjudicated extraneous offenses at punishment).

²⁷ *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

presuppose the defense lawyer will unearth, develop, present and insist on consideration of those ‘compassionate or mitigating factors stemming from the diverse frailties of humankind.’”²⁸

For the reasons described in detail above, defending a death penalty case imposes extraordinary responsibilities on defense counsel *outside the courtroom*. Thus, the out-of-court hours of work performed by defense counsel in a capital case, as well as the amount of time spent in trial, should be expected to be substantial. For example, an in-depth examination of federal capital trials from 1990 to 1997, conducted by three federal district judges acting on behalf of the Judicial Conference of the United States, found that, on average, approximately 78 percent of appointed counsel's time in capital cases that went to trial was spent working out-of-court.²⁹

Research from other jurisdictions is consistent with this surmise. For example, a study of completed capital trials in Indiana from 1989-1995 found that the average number of hours devoted to these cases was 1,051 hours per attorney.³⁰ Earlier surveys consistently found that defending capital cases required vastly more time and effort by counsel than non-capital matters. A study of the California State Public Defender, for example, revealed that attorneys there spent, on average, four times as much time on capital representation as on cases with any other penalty, including those involving life imprisonment without parole.³¹ Although capital trials are generally longer than non-capital ones, it is plain that the vast majority of the additional hours of labor invested by competent counsel in a capital case are spent on *out-of-court* tasks.

In recent years, the number of hours spent on death penalty cases by defense counsel in jurisdictions outside Texas appears to have trended upward. In federal capital trials from 1990 to 1997, the total attorney hours per representation in capital cases which actually proceeded to trial averaged 1,889.³² This number is more consistent with the expectations of standards such as the

²⁸ Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 Tex. L. Rev. 1301, 1316-17 (1997) (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

²⁹ See Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) (hereinafter *Federal Death Penalty Report*) at 14.

³⁰ Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 Ind. L. Rev. 495, 516 (1996) (hereinafter *Indiana Experience*).

³¹ See Richard J. Wilson and Robert L. Spangenberg *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 Judicature 331, 336-337 (1989) (hereinafter *State Post-Conviction*) (collecting and reviewing studies).

³² See *Federal Death Penalty Report*, *supra* note 29, at 14.

American Bar Association's recommendations concerning the defense of death penalty cases than some of the averages cited in studies from the mid to late 1980's.³³ It is likely that the increasing sophistication of the capital defense bar in other jurisdictions has contributed to this significant increase in the number of hours viewed as necessary to properly prepare a capital case for trial. As attorneys have acquired a better understanding of the performance demanded of competent counsel, they have been obliged to work a correspondingly higher number of hours to discharge their professional responsibilities.³⁴

³³ See, e.g., Lefstein, *Indiana Experience*, *supra* note 30, at 516 (noting a study which found in 1988 that the hours worked by defense counsel in most capital cases ranged from 300-500 hours); Wilson & Spangenberg, *State Post-Conviction*, *supra* note 31, at 336-337 (citing a 1989 national survey of attorneys working on capital cases, who reported spending an average of 400 to 500 hours to prepare and try a typical death penalty case).

³⁴ See, e.g., Lefstein, *Indiana Experience*, *supra* note 30, at 509-510 (attributing some of the increase in the time spent preparing for trial, particularly for the punishment phase, to the death-penalty specific training which defense attorneys are obliged to complete in order to remain eligible for appointment in capital cases, which has "raised their consciousness" about investigating and developing mitigation).

CHAPTER 5
FINDINGS ON REPRESENTATION OF INDIGENT
DEFENDANTS CHARGED WITH CAPITAL OFFENSES

A. Findings Regarding Appointment of Counsel.

1. Texas’ regional qualification standards for appointment of counsel fail to screen out counsel who lack the necessary advocacy skill and experience.

In 1995, the Texas legislature adopted a law that requires each “administrative judicial region” in the state to adopt procedures for appointment of counsel in death penalty trials and appeals.³⁵ That statute required each of Texas’ nine “administrative judicial regions” to create a “local selection committee” to formulate standards for the appointment of counsel in that region. Trial judges must appoint lead counsel from a list of attorneys who have been found qualified for appointment consistent with the regional standards.³⁶ Further, a second attorney must also be appointed to assist in the defense, “unless reasons against the appointment of two counsel are stated in the record.”³⁷

In response to the adoption of Article 26.052, each of Texas’ nine “administrative judicial regions” established a local selection committee which in turn adopted local qualification standards for appointment of counsel in capital cases in the region. Because the Legislature failed to establish any statewide *minimum* standards, however, each regional committee was free to adopt whatever standards it felt appropriate.

From our review of the standards in each region, we believe that the regional standards are generally not sufficiently rigorous to ensure that attorneys with the requisite skill, knowledge, and expertise will consistently be appointed in death penalty cases.

In seven of the nine regions, lead counsel may have as few as five years of experience as a criminal defense lawyer to be considered qualified to defend a death penalty case. It is difficult to imagine many attorneys with as few as five years of criminal defense experience who possess the skill, knowledge, and expertise to serve as lead counsel in a capital trial. Indeed, because the minimum level of experience is so low, large numbers of attorneys in each judicial region – approximately 1,000 statewide – are considered qualified to be appointed in death penalty cases. Our impression that the regional qualification standards are insufficiently strict was confirmed by the candid remarks of a number of trial judges and experienced defense lawyers who told us that the lists include the names of attorneys who do not have the levels of experience and skill to provide competent representation in death penalty cases.

³⁵ TEX. CODE CRIM. PROC., art. 26.052 (WEST 2000).

³⁶ The statute is silent about how counsel is to get on the list in the first place (*i.e.*, by application, by nomination, etc.).

³⁷ The statute likewise says nothing about whether second-chair counsel must be appointed from the list of qualified attorneys.

In those regions that have established separate standards for appointment of second chair counsel, the standards are so lax that almost any criminal defense lawyer with minimal professional experience will qualify. In the First and Fifth administrative regions, second chair counsel may have as little as three years experience practicing criminal law. In the Seventh region, second chair counsel simply must be a licensed member of the bar, have “familiarity with the requisite court system,” prior experience of unspecified length in criminal law, and a “reasonable degree of continuing education in the area of criminal law.”

Another structural shortcoming of the regional qualification standards is that all of them focus almost exclusively on quantitative measures of an attorney’s professional experience (*e.g.*, the number of years as a member of the Bar, the number of years in criminal defense practice, and the number of prior felony jury trials). As one experienced death penalty defense lawyer has observed:

Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.³⁸

As a result, both the American Bar Association and the National Legal Aid and Defender Association suggest that fulfillment of experiential criteria should be a “necessary, but not a sufficient prerequisite” for attorney eligibility, and that counsel should also be required to demonstrate “the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.”³⁹

Unlike a number of other death penalty jurisdictions, however, such as Washington State and the federal system, Texas’ qualification process does not involve peer review or other procedures for qualitative assessment of counsel’s advocacy ability or courtroom skills. According to our investigation, none of the regional selection committees undertakes a qualitative assessment of an attorney’s skill or expertise in determining whether an attorney is qualified to accept capital appointments. In the absence of a qualitative assessment of the advocacy skill of counsel, there is a substantial risk that an apparently experienced, but actually unskilled, attorney may be appointed in these cases.

The practice mandated by federal statute for appointment of counsel in capital trials provides a useful illustration of how such qualitative assessment may be incorporated into the process of selection. Federal law provides that where a defendant has been indicted for a capital

³⁸ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1871 n.209 (1994).

³⁹ See *ABA Death Penalty Guidelines*, *supra* note 18, Guideline 5.1; National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 5.1 (1988) (hereinafter *NLADA Death Penalty Standards*).

crime and desires to have counsel appointed, the court “shall promptly, upon the defendant's request, assign [two] such counsel, of whom at least [one] shall be learned in the law applicable to capital cases In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts.”⁴⁰ A separate statute sets out objective experiential requirements for counsel seeking appointment in federal capital cases.⁴¹ In part to discharge its responsibility to provide guidance to the district courts in identifying and appointing “learned counsel,” the Administrative Office of the U.S. Courts (AO) has created a specialized capital defense assistance project, staffed by some of the nation's top death penalty defense lawyers. The statutory scheme thus ensures that any judge who faces a capital case will have the benefit of the informed views of the Federal Public Defender and/or the AO's death penalty experts about the skill and commitment of each candidate for appointment. This information enables judges to separate attorneys who meet the minimum objective requirements from those who, in the estimation of their most highly qualified peers, have appropriate training and experience to provide a defense that accords with the national standard of practice.

Although several of the regional standards make reference to “significant and continuous training in death penalty litigation” as a requirement for an attorney to be considered qualified, none of the regional selection committees conducts ongoing monitoring to ensure that “qualified” attorneys continue to attend relevant training programs as a condition to maintaining their qualified status. The American Bar Association suggests that within one year of their appointment both lead counsel and second chair counsel be required to attend and successfully complete “a training or educational program on criminal advocacy which focuse[s] on the trial of cases in which the death penalty is sought.”⁴² No judicial region in Texas requires, and then regularly monitors, attorney participation in specialized training or educational programs as a condition to remaining on the list of qualified counsel.

Finally, no judicial region in Texas engages in systematic continuing supervision of the performance of the attorneys appointed in death penalty cases. The absence of a meaningful review of actual attorney performance is especially problematic given that almost all of the judicial regions employ only objective criteria in rating attorneys as “qualified.” Exclusive reliance on such standards greatly increases the likelihood that at least some attorneys will be listed as “qualified,” and will receive appointments in capital cases, even though those attorneys may not, in fact, perform at an appropriately high level. The ABA Guidelines urge that appointed counsel “should be required to perform” with reasonable skill in the “specialized practice” of capital defense, and should demonstrate a “zealous” commitment to the client’s defense. Indeed, the national standard of practice in capital defense requires no less. These goals, however, can only be enforced by periodic review of counsel’s performance. Attorneys who do not consistently meet the exacting standards required of defense counsel in a capital case should be removed from the appointment list.

⁴⁰ 18 U.S.C. Sec. 3005.

⁴¹ 21 U.S.C. § 848(q)(4)(B).

⁴² *Id.*

2. Even after the adoption of regional qualification standards, some Texas courts continue to appoint attorneys who are not on the regional list of “qualified” counsel.

Notwithstanding the fact that Texas law now requires appointment of counsel from the list of “qualified” counsel, in a significant number of cases in our sample we found that trial courts appointed attorneys who were not on the regional list of “qualified” counsel. While we acknowledge that some or even many of these lawyers may well possess the level of experience and skill necessary to capably represent capital defendants, this practice severely undermines the efforts of the Texas Legislature to ensure that indigent defendants facing the death penalty are defended by skillful and experienced counsel.

Further, we found a significant number of cases in our sample where second chair trial counsel or appellate counsel was not on the list of qualified counsel in that region. In some counties (Harris County, for example), we were told that it is the practice of some judges to allow lead counsel to choose the second chair lawyer at trial. While the apparent rationale for this practice is to foster the development of a collegial defense team, that goal must take second place to the overriding public interest, as expressed in the statutory directive from the Legislature, in having both first and second chair counsel meet minimum qualification standards in every death penalty case.

Finally, appellate review does not appear to be functioning as an adequate enforcement tool for noncompliance with the statute. Thus, the Texas Court of Criminal Appeals has held that a trial court’s failure to appoint defense counsel from the list of regionally qualified counsel is not necessarily grounds for a new trial.⁴³ We are troubled that compliance with the statutory safeguard established by the Legislature to ensure minimally qualified defense representation is not being meaningfully monitored or enforced.

3. Trial courts refuse to appoint second-chair counsel until the state has announced its intention to seek the death penalty.

Texas law requires appointment of counsel “as soon as practicable after charges are filed, if the death penalty is sought in the case.”⁴⁴ In most counties in our sample, lead counsel was appointed within a few days to a couple of weeks from the arrest of the defendant. However, our research team found that most Texas trial courts failed to appoint second-chair counsel for defendants charged with capital murder until the state has announced its intention to seek the death penalty. Because no provision of the Code of Criminal Procedure identifies the point in the proceedings at which the prosecution must make such an election, the time when second-chair counsel was appointed may range from the same day that lead counsel was appointed to many months later.

Substantial delay in appointment of second chair counsel can effectively nullify the value

⁴³ See, *Wright v. State*, 28 S.W.3d 526, 530-531 (Tex. Crim. App. 2000).

⁴⁴ TEX. CODE CRIM. PROC., art. 26.052 (WEST 2000).

of having two lawyers appointed for the defense. As we have discussed above, preparation for a capital murder trial requires an extraordinary investment of time and effort that is far beyond the capabilities of any single attorney. Indeed, it is routine for the state to assign at least two prosecuting attorneys to a capital case from the earliest stages of the case. Given the state's access to investigative assistance from law enforcement agencies, the need for more than one attorney on the defense side is at least as great.

B. Findings Regarding Compensation of Counsel.

1. The adequacy of compensation varies dramatically from county to county, with the vast majority of counties failing to compensate counsel sufficiently to cover basic overhead expenses.

Texas law requires courts to pay “a reasonable attorney’s fee” for time spent in court on behalf of the defendant, for “reasonable and necessary” time spent out of court preparing the case, and for preparation of an appellate brief to the appeals court.⁴⁵ Other than this broad admonition, however, Texas law provides no further guidance to counties about what constitutes a “reasonable” fee, leaving it wholly within the discretion of each county to determine compensation rates. As a result, the adequacy of attorney compensation in Texas varies dramatically from county to county – and even from judge to judge within a given county – with the vast majority of counties failing to sufficiently compensate attorneys to cover basic overhead costs.

According to a recent study by the State Bar of Texas' Committee on Legal Services to the Poor in Criminal Matters, the average overhead expenses for Texas criminal defense lawyers is \$71.36 per hour.⁴⁶ Thus, the average criminal defense lawyer must be paid at or above that level just to “break even” for every hour that the lawyer works on a case. The vast majority of the counties in our study were compensating appointed counsel below the cost of hourly overhead expenses, meaning that appointed counsel was actually *losing* money for every hour that she worked on the case.

One of the counties in our sample where systemic under-compensation of appointed counsel appears to occur most frequently is Bexar County – the second most active death penalty

⁴⁵ TEX. CODE CRIM. PROC., art. 26.05 (WEST 2000).

⁴⁶ This is an aggregate figure; individual attorneys' actual overhead may vary somewhat by region and type of practice. At present, however, in the absence of an oversight body to study such rates and determine with greater precision the range of variation across the state, this number represents the best and most recent approximation based on available data. Even if actual hourly overhead costs are as much as one-third lower than this estimate (*i.e.*, about \$47), which is unlikely, that figure still exceeds or roughly equals the effective rate of compensation paid in numerous cases in our sample. Rates of compensation so close to the average cost of overhead are insufficient to attract the most highly skilled attorneys to take on the enormous challenge of defending capital cases.

jurisdiction in Texas. According to the current Bexar County fee schedule (adopted as amended April 11, 2000), appointed counsel in death penalty cases may agree to be paid on either a “fixed fee basis” or a “rate basis.” Under the rate basis, counsel is paid an hourly rate of compensation for out-of-court work and a daily rate for time spent in court. The current fee schedule limits each attorney to compensation for a maximum of 60 hours of out-of-court preparation, for which first chair counsel will be paid an hourly rate between \$30 and \$50 per hour and second chair counsel between \$25 and \$40 per hour. The daily in-court rate for first chair counsel is \$400/day (effectively \$50/hour) for first chair and \$300/day for second chair (effectively \$37.50/hour).

Imposition of the 60-hour limit on compensation for out-of-court attorney time has resulted in seriously inadequate compensation of counsel and has discouraged many lawyers from investing the time necessary to provide the minimum level of preparation for a death penalty trial, as measured by national benchmarks in this regard which routinely exceed 1,000 out-of-court attorney hours per case.⁴⁷ Although in some cases Bexar County judges have waived the 60-hour cap and paid appointed counsel for all the time counsel spent investigating and preparing for trial, in a substantial number of Bexar County cases the court has enforced the 60-hour cap, resulting in compensation at extremely low rates. For example, in a 1995 prosecution, second chair counsel performed 346 hours of out-of-court work, for which he was paid \$2400 – an hourly rate amounting to \$6.94 an hour. In another 1995 capital trial, one attorney requested compensation for 243.5 hours of out-of-court work; the judge, however, enforced the 60-hour cap and reduced the attorney’s out-of-court fees to \$2400, amounting to an hourly rate of \$9.86 an hour. In two other cases, enforcement of the 60-hour cap on out-of-court work resulted in out-of-court compensation rates of \$17.12 and \$17.55 an hour respectively.

While we have noted that in other Bexar County cases the trial judge paid counsel in excess of the 60-hour out-of-court limitation, the existence of a presumptive cap on out-of-court compensation often appears to have a “chilling effect” on the amount of out-of-court preparation invested by court-appointed counsel. Thus, in a number of Bexar County cases, appointed counsel reported out-of-court preparation time very closely approximating the 60-hour limit, suggesting that the amount of time counsel invested in the case was hampered by limits on funding. For example, in three cases attorneys reported out-of-court time of 57.5, 61.5, 63, and 64 hours, respectively.

We found a similar pattern in Nueces County. For example, in two Nueces County capital cases the combined compensation for first and second chair defense attorneys was less than \$20,000, and in another case, the combined compensation was less than \$23,000. By way of comparison, compensation for a *single* attorney in a Tarrant County capital case in our study was typically at least twice as much.⁴⁸ The rates of compensation in Tarrant County cases approach national norms; the rates in Bexar and Nueces Counties fall far short.

⁴⁷ See, e.g., *Federal Death Penalty Report*, *supra* note 29, at 14 (average of 1,889 total attorney hours per case, with more than 1,400 of those being out-of-court hours).

⁴⁸ For example, in three Tarrant County cases, both first and second chair counsel were *each* paid \$57,000, \$54,000; and \$45,000 respectively.

It is well accepted that low levels of compensation have a detrimental effect on the quality of legal representation and discourages many of the best lawyers from accepting appointments in these cases. As the American Bar Association has recognized:

[W]here payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.⁴⁹

Consistent with this observation, we found that in those counties where attorney compensation was systemically deficient – as in Bexar and Harris counties – many of the most highly regarded criminal defense attorneys were declining to accept court appointments in capital trials.⁵⁰ By contrast, in those counties where attorney compensation is reasonable – as in Tarrant County, in our study – the most highly regarded criminal defense lawyers were willing to accept appointments.

2. “Fixed fee” or “flat fee” compensation arrangements – expressly disapproved by the ABA – fail to provide adequate compensation for the amount of time typically involved in defending a capital case and create financial incentives for appointed counsel to “cut corners” in the representation.

Instead of compensating appointed counsel by paying a daily or hourly rate for actual attorney time involved in the representation, some counties in Texas pay appointed counsel pursuant to a fixed rate, *i.e.*, counsel is paid a pre-determined fee for the case regardless of the number of hours of work actually performed by counsel. Such fixed fee arrangements have been strongly discouraged by the American Bar Association because of the risk that appointed counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. As the ABA has argued:

Since a primary objective of the payment system should be to encourage vigorous defense representation, flat payment rates should be discouraged. The possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment.⁵¹

⁴⁹American Bar Association, *Standards for Criminal Justice Providing Defense Services* (3d ed. 1992) (hereinafter *ABA Criminal Justice Standards*), at 42.

⁵⁰ See also Mary Flood, *Gary Graham Case Fuels Debate Over Appointed Attorneys*, HOUSTON CHRONICLE, June 30, 2000 (“Houston’s best criminal lawyers, including those like [Stanley] Schneider, Mike Ramsey, and George Tyson, said they can’t afford the loss of time and money in accepting appointments in capital murder cases”).

(continued...)

We found flat fee arrangements in Harris County and Grimes County. In both counties the pre-established fixed fee was grossly inadequate to compensate defense counsel for the labor ordinarily invested in the defense of a death penalty case.

The most common fee structure we found in Harris County called for the county to pay lead counsel \$20,000 and co-counsel \$15,000, *i.e.*, for the county to spend a total of \$35,000 per case in attorneys' fees. Similarly, in a recent Grimes County prosecution, both defense attorneys were paid a \$15,000 flat fee for a trial that lasted six weeks.

Because defense counsel in the Harris County cases were not required to document or submit to the court an itemized accounting of their time, it is impossible to determine exactly how much work is performed by appointed attorneys under this system. However, one can reckon the likely range of hours worked in those flat-fee cases as follows. Using the “break-even” rate of \$71.36 per hour, it is fair to describe Harris County's \$35,000 per case flat fee as purchasing about 490 hours of attorney labor (or 245 hours per attorney), and Grimes County's \$30,000 per case flat fee as purchasing about 420 hours of work (or 210 hours per attorney). When one takes into account that the average capital trial lasts approximately six to eight weeks, it is clear that these rates fail to adequately compensate counsel for the time spent in-court at trial alone, not to mention for time spent in any pretrial proceedings or any out-of-court time preparing for trial. These figures, like the actual per-case numbers reported from Nueces and Bexar counties, are far below the per-case averages from other jurisdictions.

Moreover, failing to require counsel to document their actual work undermines the vital goal of improving the mechanisms for maintaining accountability by all participants in the indigent defense system. Where counsel receives payment in the form of a flat fee, no one - not the courts, the Legislature, nor the public - can monitor what the taxpayers' dollars are paying for. Such circumstances make it more likely that both underpayment and overpayment of appointed counsel, neither of which is cost-effective or fair in the long run, will occur on a regular basis.

Attorneys in Harris County generally reported dissatisfaction with the flat fee arrangements. One Harris County attorney, who has been appointed in six cases in our study, termed the \$20,000/\$15,000 fixed fee arrangement “hopelessly inadequate” to cover the real costs of the representation.

Another problem we identified with Harris County's attorney compensation system is that attorney fees are structured in a way that may discourage resolution of the case without trial. As one attorney explained, if the case goes to trial, both attorneys are paid the fixed \$20,000/\$15,000 rates; on the other hand, if a plea bargain arrangement is negotiated and trial is averted, appointed counsel will receive a substantially smaller fee determined by the judge. In one case in which this attorney was involved, a guilty plea, in exchange for a life sentence was negotiated after months of work; the lawyers received only \$5000 for their efforts. Thus, dramatic disparities in flat rates for trial and pleas may have the effect of discouraging lawyers from aggressively seeking

(...continued)

⁵¹ *ABA Criminal Justice Standards*, *supra* note 51, at 40.

resolution of the case without trial.

One might suggest that these Harris County defense attorneys are simply doing this work at a financial loss for the sake of guaranteeing effective representation to the poor and thereby making real the promises of the Sixth Amendment. It is true that few lawyers get rich representing poor people in the American criminal justice system, and many fine defense lawyers in Texas and elsewhere do accept capital cases as a matter of principle despite knowing they will sustain a substantial financial loss. Given the disproportionate frequency with which the Harris County District Attorney's Office seeks the death penalty, however, one should be cautious about inferring that every defense attorney who accepts a capital case for a \$35,000 flat fee is performing twice as many hours as one might otherwise expect based on the rate of pay.

Finally and more important, even if that inference were true, it is unreasonable to ask defense counsel to perform high-quality work in intellectually demanding and emotionally exhausting cases for grossly inadequate pay. This is especially so where counsel's pay structure creates a tension between her duty to her client in the flat-fee case – who faces the death penalty – and her need to engage other, paying clients in order to make a decent living. And, as noted, any county which chooses not to require defense counsel to account for the number of hours of work actually spent on a given case makes it impossible for anyone other than the trial judge to monitor meaningfully the quantity of effort expended by defense counsel in the case. Even the trial judge, of course, can only fully evaluate counsel's in-court performance. This practice is illustrative of the overall absence of any constructive oversight of the performance of defense attorneys in Texas capital cases, and the system's general lack of accountability measures.

Our research team did not identify any cases in which unjustified and excessive overpayment of defense counsel (or their associated experts or investigators) appeared to be a problem. As a result, we have devoted relatively less attention to describing available mechanisms for imposing reasonable limits on the cost of defense services in capital cases. Of course, no American jurisdiction gives defense counsel a blank check in capital cases, and we do not suggest Texas should do so. Just as we urge increases in compensation for defense counsel and defense experts and investigators,⁵² we recognize it will be necessary to develop practices for ensuring accountability for the public funds put to that use. The procedures employed in federal capital cases, which include *ex parte* “case budgeting” conferences between defense counsel and the judge to identify anticipated expenses associated with all phases of the investigation and the trial, may provide a useful starting point.⁵³ For now, identifying particular processes for imposing

⁵² See Recommendations E, F, *infra*.

⁵³ See *Federal Death Penalty Report*, *supra* note 29, at 53-56 (detailed recommendations and commentary regarding case budgeting). At the federal level, case budgets of more than \$250,000 are subject to review by the Administrative Office of the U.S. Courts, with the goal of “determining whether the cost of representation is reasonable in light of experience in other similar cases and in identifying areas in which expenses might be reduced.” *Id.* at 56. This is
(continued...)

outside limits on the costs of defense services in capital cases is less important than understanding that any regularized practice permitting rational review would be preferable to the hundreds of unreviewable *ad hoc* judgments that characterize the existing system. Further, focusing on cost control mechanisms is premature; until Texas makes a genuine commitment to paying reasonable compensation, this is at best a future concern, not a present one.

3. Individual trial judges exercise virtually unreviewable discretion to impose ad hoc caps on fees or to reduce fee requests.

Under Texas law, appointed counsel is supposed to be paid a “reasonable attorney’s fee” in accordance with a “schedule of fees adopted by formal action” of the county or the district judges in the county.⁵⁴ By requiring payments according to formal, published fee schedules, this provision was intended to promote uniformity and predictability in attorney compensation, and to limit judicial discretion to wield the compensation power in an arbitrary or punitive fashion. In practice, however, Texas district judges retain essentially unqualified discretion to impose ad hoc caps on attorney fees and to cut requested attorney compensation, even when attorneys request payment according to the published fee schedules.

In some cases, judges have imposed fee caps or have dramatically cut requested attorney fees without explanation. In one particularly lengthy and difficult 1994 trial in Travis County, lead counsel and second chair counsel submitted bills to the trial court extensively documenting the 939.7 and 769.2 attorney hours they invested in the representation in the case. Although counsel had invested an exceptional amount of time and effort for which they expected to be compensated in full, the trial court cut their fee requests by 67% and 60%, effectively paying each attorney for only a third of the time he actually spent on the case.

When courts fail to fully compensate counsel for all of the time reasonably expended, counsel will be reluctant to accept future appointments. At the same time, the complete absence of any mechanism for reviewing or adjusting fee decisions by trial courts makes trial judges unaccountable for the degree of care they take to discharge this important duty fairly and impartially. To the extent that arbitrary judicial decisions to reduce reasonable fee requests adversely affect the quality of attorneys willing to accept appointment, they may contribute indirectly to eventual reversals of death verdicts in post-trial proceedings and constitute a proper subject for public concern.

(...continued)

another valuable function which a statewide oversight body could serve in Texas.

⁵⁴ TEX. CODE CRIM. PROC., art. 26.05 (WEST 2000).

4. Adequate funding is not available for capital appeals, and the general quality of representation in Texas death penalty appeals falls far below national norms.

As with our study of capital trials, we found that inadequate compensation for appeals impairs the quality of representation. A number of studies have estimated the average attorney hours required to properly pursue such an appeal at between 700 to 1000.⁵⁵ In California, lawyers were paid an average of \$110,000 per case for appellate work in death penalty cases, at an hourly rate (\$75) that was not sufficient to attract enough attorneys to represent all defendants appealing their death sentences.⁵⁶

The counties in our sample consistently fall below these national norms. Bexar County again had the lowest compensation rates in our sample. In Bexar County, the local fee schedule limits fees in capital direct appeals to a range of \$1000-\$5000, with the actual fee being set by the trial judge at her discretion. In the great majority of cases in Bexar County, direct appeal counsel was paid a fixed fee of \$1500. Because Bexar County does not require appellate counsel to provide the court with an itemized accounting of the actual time spent working on the appeal, no data was available to gauge how much time was expended on each case. However, at the “break-even” rate identified by the Texas Bar study referenced above, the \$1500 attorney fee most common in Bexar County corresponds to just over 20 hours of attorney labor.

No reasonably competent defense attorney can discharge all the responsibilities associated with representing a death-sentenced prisoner on direct appeal in such a short amount of time. The transcript of jury selection alone, which appellate counsel must review in full and with care, often spans several thousand pages. The testimony from the guilt and punishment phases typically adds hundreds more pages, as does the clerk's record, which contains pretrial motions, orders, jury instructions, and other essential documents. Once counsel has reviewed the record, she must conduct especially wide-ranging legal research before drafting her opening brief, canvassing not simply decisions from Texas but from other jurisdictions as well. Such unusual effort is necessary because the law governing the death penalty is fast-changing and always in flux, even though the basic constitutional contours of the Eighth Amendment have become much clearer since 1976. Then, of course, counsel must aggressively examine the State's brief and research its legal assertions in order to prepare an adequate reply. Preparing for and presenting oral argument requires counsel to invest still more hours.

⁵⁵ See Vick, *Poorhouse Justice*, *supra* note 19, at 375 and n.202-03 (citing studies estimating capital appeals requiring between 500-1000 hours, another estimating 800 to 900, and a third estimating 800 to 1000).

⁵⁶ Washington State provides another sharp contrast among Western states. In Washington, the amounts paid to counsel for capital direct appeals in approximately the past five years were \$37,560 (Benn); \$32,065.05 (Dodd); \$65,072.50 (Gentry); \$48,130 (Brett); \$45,187 (Pirtle); \$76,187 (Luvane); \$55,447.50 (Brown); and \$22,185 (Stenson). Advisory Committee, Office of Public Defense, *Report to the Supreme Court and the Legislature on Defense Fees and Costs In Washington State Appellate Death Penalty Cases* (1998) at Appendix B.

Fee caps on compensation for appellate representation resulted in unreasonably low hourly compensation in other counties, as well. In Lubbock County, appellate counsel in one case was paid \$5000 for 247.7 hours of work, amounting to an hourly rate of just \$20.18 per hour. In Nueces County, appellate counsel in another case was paid \$2946 for 116 hours of work, an hourly rate amounting to just \$25 an hour.

As with the trial data, generally low rates of compensation appeared to have a “chilling effect” on the amount of time expended by counsel on the appeal. Thus we found a number of cases where appellate counsel reported performing remarkably few hours in the representation. For example, in two Dallas County appeals, counsel only documented 19.8 and 40.4 hours of work, respectively.

Tarrant County again provided a positive basis for contrast. In Tarrant County, we found that appellate counsel was consistently compensated at an hourly rate of at least \$100 an hour, and in some cases as much as \$125 per hour. We also found that the amount of time expended by Tarrant County attorneys on appeal was approaching, though not yet meeting, national benchmarks for direct appeals in capital cases: Tarrant County appellate counsel typically performed in excess of 150 hours of work on a death penalty appeal, and in some cases as many as 400 or even 500 hours of work. Again, while Tarrant County was approaching national norms, the other Texas counties in our sample were generally far below them.

C. Findings Regarding Performance of Counsel.

1. Counsel appointed in Texas capital cases spend a significantly sub-average amount of time preparing for trial, relative to national benchmarks.

One meaningful basis for measuring the performance of appointed counsel in our sample of Texas capital cases is the number of hours of work put in by defense counsel handling the case. As we discussed above, recent studies of capital trials in other jurisdictions indicate that the total number of hours spent by counsel in capital cases ranges from an average of 1,051 per case in Indiana,⁵⁷ to an average of 1,889 per case in federal capital trials.⁵⁸ It is estimated that approximately 75% of this total amount of time is spent “out of court” investigating the case and preparing for trial. In the federal capital trial study, the average number of out-of-court hours spent by counsel was approximately 1200 hours per case (or 600 per attorney).

Because of the methodological challenges posed by the absence of regularized practices

⁵⁷ Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 Ind. L. Rev. 495, 516 (1996) (hereinafter *Indiana Experience*).

⁵⁸ See *Federal Death Penalty Report*, *supra* note 29, at 14.

for collecting and compiling data,⁵⁹ it is not easy to draw firm conclusions about the number of hours of work being performed by counsel in each case. In many of the cases in our sample, defense counsel were not required to maintain any detailed record of the hours they worked on the case and/or what tasks they performed. However, in some cases counsel did file itemized time records indicating the number of hours they had spent on the case, and in other cases estimates may be made based on the amount counsel were ultimately paid for their work.

No matter how one calculates the relevant numbers, however, the inescapable conclusion is that many Texas defense attorneys are performing significantly fewer hours of work on capital cases than their peers in similar cases elsewhere in the United States.

The cases from Bexar County provide a striking example. We were able to obtain attorney timesheets in 18 of the 25 capital cases from Bexar County in our study. The average number of out-of-court hours reported by defense counsel in these 18 cases was 122.17 hours per attorney. Fourteen of the 34 attorneys in these cases reported that they spent 100 or fewer “out-of-court” hours preparing for trial. Only two attorneys reported spending more than 200 hours preparing for trial. In three cases, the number of out-of-court hours spent by *two attorneys combined* were fewer than 120 hours.

We found similar numbers in other counties in the state. In the four cases from Nueces County in our study, the average number of reported out-of-court hours was 79.73 hours per attorney. Five of seven attorneys in Nueces County reported fewer than 100 out-of-court hours investigating and preparing for trial. One attorney reported only 20 hours of out-of-court preparation, including three hours interviewing witnesses and just two hours meeting with his client.

Our study indicates that the average number of hours of work spent by defense counsel in these Texas capital cases is dramatically lower than the averages reported in recent, reliable studies of capital cases in other jurisdictions. By comparison, the Indiana capital defense attorneys performed from *two to four times* as much work on each case as their Texas counterparts in these cases. Compared to the average time reported by defense counsel in the study of federal capital trials from 1990 to 1997, the disparity is even greater: the attorneys in the federal cases around the country invested between *three and six times* as many hours of work per case as appointed counsel in these Texas cases.

Based on the experience of competent counsel in hundreds of state and federal capital cases around the country since 1976, it is possible to draw at least some inferences about the quality of counsel's performance by comparing the number of hours of work claimed by counsel in a particular Texas case with the number reasonably expected to be necessary to defend a death penalty case at trial in other jurisdictions. Judged by that standard, a number of the cases we reviewed raise serious concerns about the quantity of work apparently being performed by defense counsel in many Texas capital cases. There is no reason to believe that Texas defense attorneys have found some magic formula that permits them to accomplish the same amount of necessary work in far fewer hours than their counterparts from around the country.

⁵⁹ See Section II, *supra*.

This inference is consistent with, for example, our observation that a substantial proportion of the pretrial motions filed by different defense attorneys in different cases in Dallas County appeared to be substantially identical. In other words, none of the motions had been adapted to the particular facts of the case. While some “form” motions may appropriately be filed in any case, no matter how complex, the absence of case-specific discovery motions or detailed motions for investigative or expert assistance raises serious questions about the quality of the representation being provided.⁶⁰

D. Findings Concerning Expert and Investigative Assistance.

1. Investigative assistance is seriously underfunded and under-utilized, particularly for the purpose of developing mitigating evidence at the punishment phase.

As described previously, preparing to defend a capital case at trial requires counsel to conduct simultaneously two conceptually distinct, though almost always related, investigations: one into the facts which may be relevant at the guilt phase of trial, and one into circumstances which may be relevant at the punishment phase. Both areas of investigation are equally important and both demand an extensive commitment of time and resources. Moreover, defense counsel's own efforts at investigation, however diligent and well-intentioned, cannot substitute for the assistance of a properly qualified professional investigator, especially where the development of mitigating evidence is concerned. While counsel's legal education, training, and experience may qualify her to present evidence persuasively in the courtroom, the assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that may ultimately form the basis of a compelling defense at both phases of trial. It is true that some tasks associated with investigation – inspecting physical evidence in the custody of the State, or requesting documents such as the client's school, medical, or military records – can be performed by counsel. Indeed, many such tasks, like interviewing important witnesses to assess their credibility, must be undertaken with defense counsel's direct involvement. The prevailing national standard of practice for capital defense, however, does not permit counsel to shoulder primary responsibility for the investigation herself, because counsel (1) lacks the special expertise required to accomplish an investigation of the quality to which a defendant facing the death penalty is entitled, and (2) simply has too many other duties.

⁶⁰ The law requires the defendant to justify a request for funds for expert or investigative assistance by explaining in detail to the trial court why he needs such services. If the trial court denies a generic “form” motion for expert or investigative assistance, the defendant has no grounds for an appeal. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (where defendant offered the trial court only “undeveloped assertions that the requested assistance would be beneficial,” denial of funds for expert assistance did not deprive the defendant of a fair trial). “While the [Supreme Court has] recognized that expert assistance is sometimes necessary to an effective defense, the burden rests squarely on trial counsel's shoulders to demonstrate why an expert is necessary in a particular case.” Equal Justice Initiative of Alabama, *Alabama Capital Defense Trial Manual* (3d ed. 1997) (hereinafter *Alabama Capital Defense Trial Manual*) at 81; *see also, id.* at 83 (motions for funds for expert assistance should “employ[] as many case-specific facts as possible”).

We will not address guilt-phase investigation in great detail in this report, except to note two things. First, the importance of guilt-phase investigation, and the extent of resources necessary to pursue it competently, are well illustrated by the practice of prosecutors' offices around Texas. While precise comparisons are impossible, it is plain that the state commits extraordinary resources, through its various law enforcement agencies, to investigation aimed solely at proving the defendant guilty of capital murder (as distinct from proving at the punishment phase that the death penalty is the appropriate penalty). It would be unreasonable to expect defense counsel to defend her client against capital murder charges without subjecting the State's evidence to at least comparable investigative scrutiny. Second, since we were not familiar with all of the facts of the cases we examined, it was generally impossible to determine what proportion of the typical court-appointed defense investigator's time was spent on guilt-phase investigation as opposed to punishment-phase investigation. That said, it was possible to conclude (as explained more fully below) that the total amount of resources being devoted per case to investigation does not appear sufficient to support a comprehensive investigation into the facts relevant to either phase, much less both phases.

To assess the adequacy of the funding apparently being provided for investigation by Texas trial courts, it is worthwhile to review the scope of counsel's legal and professional duties regarding punishment phase investigation. First, it is settled that the sweeping moral judgment the jury must make at the punishment phase – considering the whole of the defendant's life in determining whether to spare him from execution – demands a much farther-ranging investigation than in a non-capital case. As Jill Miller, M.S.W., a nationally prominent expert on developing mitigating evidence in capital cases, has put it, “defense counsel in a capital case must undertake 'the most extensive background investigation imaginable,' including looking at every aspect of the client's life from birth to the present, and talking to everyone who has ever had any contact with him.”⁶¹ Since at least the mid-1980's, the unanimous view of qualified capital defense attorneys across the nation has been that the likely success of the penalty phase depends on conducting the most extensive pretrial social history investigation possible.⁶²

⁶¹ Interview with Jill Miller, M.S.S.W., May 2000; *see also*, Jill Miller, Lee Norton, and Kathy Wayland, *Social History Investigations* (training materials distributed at National Legal Aid and Defender Association (NLADA)'s “Life in the Balance” capital defender training program, March 1996); Jill Miller, *Expanding the Spheres of Mitigation Evidence*, NLADA Capital Report (Sept./Oct. 1995) at 2. *See, e.g., Federal Death Penalty Report, supra* note 29, at 13-14 (“counsel must conduct a broad investigation of the defendant's life history;” “[t]he broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case”).

⁶² *See, e.g., ABA Death Penalty Guidelines, supra* note 18, Guideline 11.8.6 (identifying numerous areas of social history investigation which competent capital defense counsel must pursue); Welsh White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 2 U. Ill. L. Rev. 323 (1993); Kentucky Department of Public Advocacy, *Death Penalty Manual* (1990) at 155-168 (effective capital defense requires “an extensive

(continued...)

The role of the mitigation investigator in a capital murder case includes assisting defense counsel by conducting a thorough social history investigation; identifying factors in the client's background or circumstances that may require expert evaluations; assisting in locating appropriate experts; providing background materials and information to experts to enable them to perform competent and reliable evaluations; consulting with the attorney(s) regarding the development of the theory of the case and case strategy, to assure coordination of trial strategy at both phases; and working closely with the client and his or her family while the case is pending.

The applicable standard of legal practice for defending capital cases requires that counsel retain a mitigation investigator to begin work as early as possible in the case. This is because the results of the social history investigation are necessary to enable defense counsel to make informed decisions regarding such matters as the defendant's competency to proceed; the need for expert evaluations, medical treatment or other services while the case is pending; motion practice; and plea negotiations. It is vital that the mitigation investigator conduct sufficient social history investigation early in the process to assist counsel in determining the need for other expert assessments, including what type of assessments are indicated.

While the nature and extent of the investigation and assessment necessary to adequately prepare for a capital murder trial, including the penalty phase, varies from case to case, it very often requires as much as six months or longer.⁶³ A properly conducted social history investigation is also time-consuming because it inevitably involves eliciting personal information

(...continued)

social history" of the client, which must "focus on specifics, facts, incidents, experiences, not mere general conclusions," and "must be corroborated, documented [and] brought to life;" this effort is "the highest priority in the case"); *Alabama Capital Defense Trial Manual*, *supra* note 60, at 27 ("Extensive pretrial investigation is absolutely crucial in a capital case"); *id.*, at 28 ("The importance of a thorough investigation cannot be overemphasized"); *id.*, at 31 ("No capital case can be adequately litigated without your having first conducted a painstakingly thorough investigation into the underlying offense, the defendant's personal background and his or her life history").

⁶³ See *Alabama Capital Defense Trial Manual*, *supra* note 30, at 588 ("The process of [mitigation] investigation is extremely time-consuming: It cannot be done in the last few weeks before trial. It will take several months and may necessitate delay of the trial"). Factors affecting the amount of time necessary include, *inter alia*, the nature and complexity of the case; the age of the client; the client's prior history (including his criminal history, prior incarcerations, history of significant physical or mental health problems, military history, employment history, or frequent changes in residence and schools); the extent of records and documentation that exist, and difficulties in locating and obtaining records; the number of collateral interviews that must be conducted; the existence of special conditions, factors or issues that must be researched and considered; the need to address victim impact evidence; conditions of the defendant's pre-trial confinement; the time necessary to obtain, schedule, and complete expert assessments; and the extent of travel involved to investigate and interview the client and collateral sources.

from the client and others, particularly information of a private and sensitive nature. The person conducting the investigation must have the training, knowledge, and skill to detect the presence of significant factors.⁶⁴ Equally important, factors such as denial, repression, shame, and a sense of privacy all inhibit the ability to fully disclose critically important information. Where present, these factors increase the amount of time necessary to complete the investigation, since obtaining such sensitive information requires the investigator to build a relationship of genuine trust with the persons who are providing information.⁶⁵ Because such time demands cannot be artificially compressed to meet an external schedule, it is essential that the investigation be undertaken as early as possible.

An adequate social history investigation is also time-consuming because it requires the mitigation specialist to gather and review many documentary records concerning the client.⁶⁶ In addition, similar records must be obtained where appropriate for other significant persons in the client's life, including parents, siblings, grandparents, and so on.

⁶⁴ Such factors can include neurological impairments; cognitive disabilities; physical, sexual, or psychological abuse; substance abuse; mental disorders; and other influences on the development of the client's personality and behavior. See, e.g., Vick, *Poorhouse Justice*, *supra* note 20, at 364.

⁶⁵ Where a source is also a victim of trauma, it may be necessary to interview the source several times, or even to involve a consulting or treating expert to assist the source, so that the investigator may obtain information about traumatic experiences without overwhelming or re-traumatizing the subject. See Vick, *Poorhouse Justice*, *supra* note 20, at 366-67; Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 321 (1983) (hereinafter *The Trial for Life*); Lyon, *Defending the Death Penalty Case*, *supra* note 18, at 703-04.

⁶⁶ In order to verify or corroborate witness testimony about circumstances and events in the defendant's life, defense counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records " which might serve as sources of relevant facts. Vick, *Poorhouse Justice*, *supra* note 20, at 367; see also Lyon, *Defending the Death Penalty Case*, *supra* note 18, at 705-06. To appreciate the potential scope of such an investigation, and the resulting time and cost, one need only summarize the types of documents which a thorough investigation must pursue: charging documents; investigation reports relating to the offense; news media accounts of the offense; the coroner's report or autopsy report; FBI, state, and local criminal history reports on the client; jail booking records; police reports and court files related to the client's prior arrests and convictions, as well as juvenile adjudications; medical records; school records; employment records; social service agency records; military records; adult education records; prior jail and prison records; prior probation and/or parole records; treatment records; and jail records for the current incarceration.

In addition to gathering these documents, the mitigation specialist must also interview the client to obtain detailed and specific social history information, and to learn the identities of collateral sources of information. This information cannot be obtained in a few visits; numerous interviews are generally required to cover all necessary areas. The investigator must devote significant time to obtaining information from the client about his or her childhood.⁶⁷ At the same

⁶⁷ The national standard of practice in capital defense demands that defense counsel's mitigation investigation "[I]terally . . . begin[] with the onset of the client's life: prenatal care and birth," and follow chronologically from there. Vick, *Poorhouse Justice*, *supra* note 19, at 363; Lyon, *Defending the Death Penalty Case*, *supra* note 18, at 703. "[E]very aspect of the client's life from birth until the start of trial must be investigated." *Alabama Capital Defense Trial Manual*, *supra* note 60, at 588. "[P]enalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 63 (1990). The extraordinary difficulty of this task can be fully appreciated only by reviewing the breadth and variety of information which is relevant to a complete understanding of just the early part of the client's life: information regarding his or her birth (including any knowledge the client may have concerning the mother's pregnancy, the circumstances of the birth, any complications of delivery or birth trauma); early developmental history (including the age at which the client learned to walk and talk, and was toilet trained); makeup of the family unit (including background information on birth parents and other significant relatives, including date and place of birth, educational attainment, health history, date of marriage, ages at time of marriage, etc.), age and sex of siblings, prior marriages and other children of parents; early health of the client, including whether the client suffered any serious accidents, illnesses, or injuries; residential history of the family, including where they lived, for what periods of time, and under what conditions; employment history of parents; educational history, including activities in which the client participated, favorite subjects, and names of teachers that the client remembers; religious training, practices, and beliefs; discipline in the home, including the form of discipline, how administered, how often, by whom, and for what; family relationships, including the nature and quality of the client's relationship with each parent, siblings, and relatives or other significant persons, and the relationship between the parents; friends and leisure activities; other significant relationships; community activities, including such things as sports, scouting, music, and so on; jobs held as a youth, including lawn work, newspaper delivery, babysitting or other odd jobs; any significant childhood experiences, including such things as death or serious injury or illness of a family member or other significant person, divorce of parents, abandonment by parent; family violence; parental alcohol or drug use; abuse of the client, including physical, sexual, or emotional abuse; and exposure to violence in the community; history of any alcohol or drug use; history of running away; and juvenile record. In addition, the client should be interviewed concerning how he or she perceived him/herself as a child, in terms of personality, behavior, feelings, responses to different events in life, and relationships with others.

time, however, information must be obtained about the client's adult years.⁶⁸ Along with obtaining all relevant documents and spending long hours interviewing the client, the mitigation investigator must conduct collateral interviews with family members and others to supplement and corroborate the information obtained from the client.⁶⁹

⁶⁸ “Successful penalty phase litigation turns on proper preparation and investigation and on knowing the client *as well as anyone in his life ever has.*” *Alabama Capital Defense Trial Manual, supra* note 60, at 587 (emphasis added). Accomplishing that goal requires defense counsel to seek relevant information from a wide range of individuals who have known the client as an adult. The commitment of resources necessary to discharge this professional obligation is apparent from the following description of potentially relevant areas of inquiry: residential history; employment history (including name of businesses or persons for whom the client worked, dates of employment, description of job and duties, pay, performance on the job, names of persons familiar with his or her work, reasons for leaving the job, and any significant job experiences); adult education; military history; health; significant relationships (including marriages, children, and the nature and quality of these relationships); exposure to violence in the community (including experiences of traumatic loss, being the subject of violent assault, and witnessing violence); sexual development, practices and relationships; names of friends; leisure activities; legal history (including arrests, convictions, circumstances surrounding prior legal involvement; experiences in prison or on parole or probation, and experiences with the police). In addition, the client should be interviewed regarding how he or she perceived of him/herself as an adult, in terms of personality, behavior, and feelings, and how they perceived their relationships with others.

⁶⁹ “An attorney or investigator must interview all ‘witnesses familiar with aspects of the client's life history,’ including relatives, childhood friends, neighbors, teachers, ministers, and social workers. This is an enormous undertaking often complicated by the difficulty in locating such witnesses, many of whom may have not been in the defendant's life for years.” *Vick, Poorhouse Justice, supra* note 19, at 366 (footnotes omitted); *see also ABA Death Penalty Guidelines, supra* note 18, Guideline 11.4.1(A), 11.8.3(A), commentary to Guideline 1.1 at 32; Goodpaster, *The Trial for Life, supra* note 65, at 321 (“Counsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors, all of whom may be scattered like a diaspora of leaves along the tracks of defendant's travels”). That this task is indeed an “enormous undertaking,” and one which demands extensive resources to pursue, is apparent from the range of potential witnesses: parents, siblings, spouses or significant others; children; other relatives (such as grandparents, aunts, uncles, and cousins); childhood and adult friends and neighbors; school personnel (including teachers, principals, counselors, social workers, psychologists, or coaches); ministers or other church personnel; employers, job supervisors and co-workers; social service and court personnel; physicians or medical personnel who have treated the client; jail or correctional institution staff; law enforcement personnel; and mental health professionals who have assessed the client at any time in the past or for purposes of the present proceeding, or who have provided treatment to the client.

The mitigation investigator must expend significant time maintaining an ongoing consultation with defense counsel, to keep counsel informed of the results of the investigation, and to consult on the implications of the results for case strategy. Information obtained can affect considerations regarding competency to proceed or mental responsibility for the offense, plea negotiations, the manner in which the defense team relates to the client; decisions regarding jury selection; whether or not the client should testify, at either phase of trial; decisions regarding the need for expert evaluations, and selection of witnesses for the trial including penalty phase.⁷⁰ The mitigation investigator may also prepare a comprehensive social history report containing the information obtained in the investigation, which may be provided to experts performing evaluations so that they have adequate background information to conduct a competent evaluation.

Conducting this type of social history investigation requires specialized training and education which the vast majority of investigators available to appointed defense counsel in Texas capital cases do not possess. Simply put, most of the investigators who are in private (*i.e.*, non-governmental) employment in Texas are former law enforcement officers whose education and training are generally limited to the field of criminal justice. This may equip them adequately to investigate the type of factual issues which typically arise in the guilt phase, but it gives them very little understanding of the type of information they should pursue for purposes of the punishment phase, or of the practical skills for obtaining that information. By contrast, a qualified capital defense mitigation investigator (or “mitigation specialist”) must have a solid grounding in the human sciences along with a properly developed appreciation for the vast variety of influences which may have affected the defendant's development and behavior, and which may help mitigate his involvement in the capital offense. The research team's interviews with counsel confirmed that few such investigators are available in Texas. Several attorneys expressed frustration with that fact, and growing concern that the lack of such investigators makes it difficult even for experienced and properly trained counsel to do an effective job preparing for trial.

In light of the foregoing description of the many time-consuming and complex tasks which a proper mitigation investigation comprehends, however, our research also gives rise to more fundamental doubts whether most Texas attorneys defending capital cases appreciate the necessity of conducting such an investigation. Indeed, our research gives reason to question whether counsel are even adequately investigating the facts relevant to the guilt phase. This conclusion is compelled by the amounts which appear to have been paid by various courts in our 23-county sample for investigative services in most cases. A few examples follow.

In a recent Nueces County trial, for example, defense counsel's investigator billed the trial

⁷⁰“Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence . . . should influence everything the attorney does before and during trial: it should shape the relationship with the client, prosecutor, court personnel and jurors; it should determine how voir dire proceeds, how potential jurors are questioned, which potential jurors are challenged for cause and which peremptorily; and it should directly affect the nature of the defense presented during the guilt trial and the affirmative mitigating case put on at the penalty trial.” Goodpaster, *The Trial for Life*, *supra* note 65, at 320 (citation omitted).

court for a total of just 8 1/2 hours' work at \$45/hour. Counting expenses, the county spent a grand total of \$448.22 on investigation in this death penalty case. The research team's interviews with experienced capital defense investigators confirm that no conceivable case could be adequately investigated in what amounts to *one day's* time, for less than five hundred dollars. Moreover, the investigation in this case took place in early April for a trial that commenced just a month later. The national standard of practice in defending capital cases at trial, by contrast, requires counsel to undertake a timely investigation, which means starting as soon as counsel is appointed.⁷¹

This Nueces County case plainly does not represent the typical expenditure for investigation in a Texas capital case. However, the fees being paid for investigation in many cases total less than \$4000. Our research disclosed at least a dozen such cases. For example, in a Smith County prosecution in our sample, a total of \$3047.70 was spent on investigation. Defense counsel in one El Paso County case spent a total of just \$2467.50 on investigation; the investigator in that case logged a total of 56 hours of investigation from September 9, 1997, to the beginning of trial in June, 1998 - a period of nine months). Numerous Harris County cases reflected similarly substandard investment in investigation.⁷² In a half-dozen Bexar County cases and one Bastrop County case, the amount spent per case on investigation was less than \$1700 - and in three of the Bexar County cases, the total was less than \$700.⁷³ In the trial of another El Paso County case, investigation costs amounted to only \$1,335.07.

While there is no national standard of “minimum hours of investigation” against which to compare these figures, there is certainly a well-settled national standard of practice governing the extensive tasks which must be pursued in every professionally competent investigation.⁷⁴ Because it is simply not possible to compress those tasks artificially into a small number of hours, it is apparent that all the figures reflected in these documents represent significantly substandard expenditures for investigation in a capital case, and raise grave doubts as to whether counsel in these cases were adequately prepared for trial.

It is not clear whether appointed counsel in these cases simply lacked the appropriate

⁷¹ *Alabama Capital Defense Trial Manual*, *supra* note 60, at 588 (“The investigation for the penalty phase must start at the first client interview”).

⁷² Examples of investigation fees in Harris County cases in our sample include: \$2415 (1998); \$2250 (1997); \$2000 (1995); \$1912.64 (1997); \$1389.70 (1997); \$1119.40 (1995); \$1089.55 (1996); \$358.44 (1998); and *zero* (1996).

⁷³ The respective investigation costs for several Bexar County cases in our sample were: \$1179; \$1145.25; \$665; \$501.50; \$500; and \$500. In the latter case, it should be noted, the defense investigator actually performed work totalling \$774, but the trial court cut his bill to \$500 because he had not obtained approval *prior* to incurring the amount in excess of that sum. In the Bastrop County case, investigation costs totaled \$1620.

⁷⁴ *See supra* notes 70-73 (describing the many steps involved in a thorough life history investigation).

experience and training to appreciate the deficiency of a \$2500 investigation where the defendant's life was at stake, or whether counsel's advocacy was constrained by the real or perceived reluctance of trial courts to authorize expenditure of the funds necessary to conduct an adequate investigation. Either way, the conclusion is still the same: measured against the national standard of practice regarding the extraordinarily thorough life history investigation which must be conducted in every capital case, Texas capital defense attorneys conduct too little investigation. It appears that Texas courts contribute to the problem by not providing adequate funds for that purpose.

One other consequence of such inadequate funding for capital defense investigation became apparent to the research team in the course of its interviews: the shrinking pool of properly qualified investigators available for hire in such cases. As noted *supra*, there is already a notable shortage of appropriately trained capital defense investigators available for hire in Texas. At least two extensively experienced mitigation investigators told the research team that they had been forced to make substantial changes in their professional lives because of the generally low rates of pay and unpredictability of payment. One has ceased to work as a private investigator entirely, leaving Texas for a position as a staff investigator at a public defender office in another state. The other has significantly down-sized her investigation business, returning to working solo from her home in order to cut costs to a minimum. Both cited the continuous struggle to stay afloat financially which they had experienced doing defense investigation in court-appointed cases in Texas, caused by inadequate rates of pay and unpredictable compensation practices such as delay in payment, arbitrary reduction of fees, etc. The latter investigator, although she continues to live in Texas, now devotes an increasingly large proportion of her time to working on cases from other states, such as Nevada, where local courts are willing to authorize adequate funds for investigation and compensate investigators in a timely and consistent fashion.

2. Use of experts does not comport with applicable national standards of practice.

In order to present an adequate defense at either or both phases of a capital trial, defense counsel may need the assistance of appropriately qualified experts. The Supreme Court has held that where an indigent defendant is on trial for his life, due process requires the State to fund such expert assistance for the defense as may be reasonably necessary in the unique circumstances of the case.⁷⁵ Defense counsel must shoulder the burden of persuading the trial court in an *ex parte* hearing that the type and character of expert assistance requested is essential to a fair trial. Once such a showing is made, however, the trial court has no discretion to deny the requested assistance to the defense.

Given this legal landscape, which clearly favors defendants seeking reasonably necessary expert assistance, our findings strongly indicate that several serious problems exist with respect to defense counsel's use of experts and with compensation for such experts. While there is a need for further research, it is possible to identify certain areas of major concern and discuss the possible relationship among them. There is reason to believe, first, that the use of experts by

⁷⁵ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

appointed defense counsel in Texas does not comport with the applicable national standard of practice in defending capital cases. Second, it appears that Texas trial courts resist granting funds sufficient for counsel to obtain the character and extent of expert assistance which is demanded by that applicable national standard of practice. We explain the evidence supporting each of these conclusions more fully below.

One strong inference which can be drawn from the documentary records reviewed by the research team is that the frequency with which experts are used by defense counsel in preparing and presenting their case, and the manner in which defense counsel takes advantage of the expert's assistance, appear to deviate from the national standard of practice for defending capital cases. To explain why, it is necessary to consider briefly the role contemplated for such experts under the applicable standard of practice.

As noted previously, the scope of the jury's inquiry at the punishment phase is much broader than at the guilt phase. The most common contribution of a mental health expert at the guilt phase is to offer an opinion concerning the narrowly defined issue of whether the defendant was "sane," according to the applicable legal standard, at the time of the offense. At the punishment phase, however, the national standard of practice for capital defense comprehends presenting much more far-reaching opinions through the defense mental health expert. Such opinions generally relate to the nature and origin of any mental disease or defect from which the defendant may ever have suffered, and how that may have affected or influenced a myriad of events in his life, including but certainly not limited to the capital offense.⁷⁶ Accordingly, the contours of a minimally adequate mental health evaluation in a capital case differ significantly from the type of evaluation which might be appropriate in a non-capital matter. In a capital case, a reliable mental health evaluation must include:

- (1) the collection of an accurate medical, developmental, psychological and social history of the defendant, gathered from multiple sources;
- (2) a thorough physical and neurological examination;
- (3) a complete psychiatric and mental status examination;
- (4) diagnostic studies, including psychometrically based approaches to

⁷⁶ One mental health expert has usefully distinguished "three mental health evaluations that have use in forensic environments: psychiatric evaluations, psychological assessments, and biopsychosocial evaluations." Robert Walker, M.S.W., L.C.S.W., *Fundamentals of Biopsychosocial Evaluation in Forensic Cases*, *The Advocate*, Vol. 18, No. 6 (November 1996) at 11. A psychiatric evaluation "typically focuses on the diagnosis of mental disorder or mental state of a defendant." *Id.* The psychological assessment "uses various instruments to outline and define personality traits, emotional or psychological disorders and intellectual capacity." *Id.* The biopsychosocial evaluation is an "integrative assessment of an individual that brings medical, psychological, social, familial, educational, economic, and cultural factors into a comprehensible evaluation." *Id.*

personality assessment, neuropsychological testing, appropriate brain scans, and blood tests or genetic studies; and

- (5) the use of other specific specialists and additional appropriate tests as indicated.⁷⁷

The first item, a comprehensive medical and social history, has been called by one widely accepted reference work in psychiatry “the single most valuable element to help the clinician reach an accurate diagnosis.”⁷⁸ In order to ensure the reliability of information upon which the expert's ultimate opinion will be based, it is necessary to gather facts from a wide range of sources, including both documentary evidence (*e.g.*, birth and school records, prior psychological and psychiatric records, medical and social service records, military records, etc.) and interviews with such persons as “family members, neighbors, classmates, teachers, employers, friends, acquaintances, probation officers, and previous attorneys.”⁷⁹ These essential steps follow from the basic premise that “[I]t is impossible to base a reliable constructive or predictive opinion [about a subject's mental condition] solely on an interview with the subject.”⁸⁰

It is to be stressed that *defense counsel* has a professional duty, under the prevailing national standard of *legal practice* in defending capital cases, to ensure that such a reliable, thoroughgoing evaluation is completed. In other words, it is not simply a matter of the governing standard of professional practice for mental health experts themselves – the duty to guarantee that the expert conducts a properly wide-ranging inquiry rests on defense counsel.⁸¹

The authorities cited above demonstrate that a mental health expert conducting a minimally adequate evaluation in a capital case must expend many hours of effort beyond simply interviewing the defendant. Because attorneys interviewed by the research team confirm that appropriately qualified mental health experts often charge between one and two hundred dollars

⁷⁷ See Douglas S. Liebert, Ph.D., and David V. Foster, M.D., *The Mental Health Evaluation in Capital Cases: Standards of Practice*, American Journal of Forensic Psychiatry, Vol. 15, No. 4 (1994) at 43.

⁷⁸ Harold I. Kaplan and Benjamin J. Sadock, *Comprehensive Textbook of Psychiatry* 837 (4th ed. 1985).

⁷⁹ Liebert and Foster, *The Mental Health Evaluation in Capital Cases*, *supra* note 77, at 47.

⁸⁰ B. Slobogin, *The Role of Mental Health Professionals In the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980).

⁸¹ See, *e.g.*, *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (defense counsel in a capital case must investigate and develop relevant background information about the defendant for the use of mental health experts assisting the defense, even when those experts do not specifically request such information).

per hour for their services, the type of reliable mental health evaluation of the defendant demanded by the national standard of legal practice in defending capital cases frequently will demand sums in excess of five thousand dollars.⁸²

Almost none of the cases in our sample reflect expenses for expert assistance to the defense in comparable amounts. In the vast majority of cases in our sample in which defense counsel sought funds for the assistance of a mental health expert, records indicate that between five hundred (\$500) and twenty-five hundred (\$2500) dollars was spent.

Although further research will be necessary to confirm this hypothesis, our initial examination of the documentary evidence strongly indicates that these costs are artificially deflated because defense counsel, in a manner inconsistent with the national standard of practice described above, is simply asking the expert to interview the defendant and conduct a mental status examination, and then offer a “diagnosis” if any is indicated based on those limited inquiries. Defense counsel do not appear to be working with the expert to ensure that he conducts a wider-ranging inquiry into the defendant's mental health history and its implications for his social development.

If this inference is accurate, two possible explanations prominently suggest themselves. First, it may be that defense counsel in these cases are simply unaware of the prevailing national standard of practice governing how and when to use the assistance of mental health experts in preparing the penalty phase of a capital trial. Interviews conducted by the research team support this inference, as they indicate that few Texas capital defense attorneys regularly attend national trainings such as the capital trial seminar sponsored annually by the National Legal Aid and Defender Association, or the well-known death penalty trial college conducted each year in Santa Clara, California.⁸³

⁸² Estimating the probable cost of such services in cases defended in a manner consistent with the prevailing national standard of practice is a complex task. Nevertheless, the cost of comparable services in federal capital cases provides at least a rough comparison figure. From 1990 to 1997, the average sum spent per federal death penalty case on non-attorney compensation (a figure which represents expenditures for both investigative and expert assistance) was \$ 53,143. *Federal Death Penalty Report, supra* note 29, at 22. Thus, although our hypothetical “expected expert expense” total of \$5000 is probably low, it gives us a way conservatively to assess the sufficiency of the sums which appear to have been authorized for such services in the cases in our sample.

⁸³ While we are reluctant to conclude on the basis of the data presently available that the under-use of expert assistance ultimately results solely from a widespread lack of appropriate training and experience on the part of appointed defense counsel, that explanation is at least consistent with two other observable features of the case records we reviewed. First, almost none of the cases indicate counsel took advantage of perhaps the most important part of the Supreme Court's *Ake* ruling – the right to present requests for expert assistance *ex parte*, in order to preserve the confidentiality of defense counsel's strategic intentions about the precise use to which the

(continued...)

The second possibility is that members of the Texas capital defense bar know how much funding they should be seeking, but fail to persist in demanding it because judges have discouraged them from aggressively seeking funds for reasonably necessary expert assistance. This explanation is also supported by information obtained by the research team in its interviews. For example, one Harris County attorney confided that the county “does not want to pay what it takes to adequately prepare and try capital cases,” and specifically that the judges were unwilling to pay substantial sums for expert assistance for the defense. For example, in one of the highest-profile capital murder cases in years, the Harris County prosecution of Mexican immigrant Angel Maturino Resendiz (accused of involvement in numerous homicides around the United States, and in whose trial the prosecution presented evidence of eight different homicides), defense counsel made extensive use of a mental health expert at both phases of trial only to have the trial judge refuse to pay the bill when counsel presented it after trial.⁸⁴

Even outside the context of mental health experts specifically, several of the attorneys interviewed by the research team made comments suggesting that their aggressive pursuit of expert assistance was being “chilled” by the expectation that the judges would turn them down. Several Tarrant County attorneys indicated that the funds authorized for experts were rarely sufficient to enable defense counsel to meaningfully “compete” with the District Attorney’s office by, for example, bringing in experts from out of state. Instead, the defense must “make do” with locally available experts, even when those experts lack the specific expertise demanded by the facts of the case. Many of the experienced defense counsel interviewed by the research team emphasized that the defendant may be denied any meaningful expert assistance if the trial court forbids counsel to engage experts from out of state. This is especially true with respect to forensic scientists. Because very few forensic laboratories in Texas will perform work for

(...continued)

requested expert assistance will be put. Almost none of the case files showed any sign of such proceedings (*e.g.*, the filing of sealed documents or the scheduling of *ex parte* hearings). Second, only a handful of the cases we reviewed indicated that defense counsel had obtained more than one expert to assist the defense, despite the fact that the standard of practice for mental health examinations plainly contemplates the participation of additional specialists where appropriate. *See supra* note 80.

⁸⁴ The expert, Dr. Bruce Cohen, a forensic psychiatrist from the University of Virginia, was ordered by the trial judge to cut his bill from the \$63,100 he originally submitted. The Associated Press reported that defense counsel described Cohen’s efforts as “working on eight different murder cases at the same time;” defense counsel also stated that if the case had been “a private [retained] case, then the bill would probably be about triple this [much].” Dr. Cohen indicated that he had spent “about 300 hours” on the case, but charged for only 217. *See also* Mary Flood, *Gary Graham Case Fuels Debate Over Appointed Attorneys*, HOUSTON CHRONICLE, June 30, 2000, at 1 (noting the opinion of a prominent Houston criminal defense attorney that the amount sought by Dr. Cohen in Resendiz might have been “reasonable” in “the world of privately paid defense lawyers,” but was considered “staggering” in an appointed case).

criminal defendants, it is often necessary for defense counsel to seek such assistance out of state.⁸⁵ Nor are there, for example, many appropriately qualified African-American or Latino mental health experts in Texas. A number of attorneys noted their frustration at being limited to in-state experts when such an out-of-state expert might greatly increase the likelihood of a reliable evaluation of a particular defendant. An experienced Houston attorney likewise stated that although Harris County judges did not explicitly limit defense counsel to hiring experts from the Houston area, the limits imposed by the judges on compensation for experts accomplished the same result, because ancillary costs associated with travel, etc., would prohibit defense counsel from looking far afield for an expert. One negative consequence identified by this lawyer was that, as a result, Harris County prosecutors are able to take advantage of their repeated opportunities to cross-examine certain experts to build a “book” on such witnesses.

Some defense attorneys also expressed the view that resort to out-of-state experts may become necessary where the impartiality of local experts may fairly be questioned due to their ongoing relationship with the local prosecutors, law enforcement, or courts. For example, documents in a Tom Green County case reflected that a local forensic expert performed in one case what he described as services for which the “usual and customary fee [is] \$1355.00.” Yet, the expert billed the county just \$500 for those services, noting “This invoice reflects discounts for your county.” While such a “discount” might simply reflect a *pro bono* cost reduction, it may also suggest a desire on the expert's part to maintain a friendly working relationship with the court and the county. Where a particular expert feels herself beholden to local authorities for her future income, defense counsel may reasonably question the expert's ability to be completely independent and it may thus become necessary for defense counsel to seek expert assistance elsewhere. The public too needs to be confident that counsel have access to independent experts.

It should be emphasized that in both communities where a significant number of defense attorneys complained of this proscription (limiting the defense to choosing from among “local” experts), the same attorneys pointed out that the prosecutor's office operates under no such constraints, and regularly relies on experts from out-of-state, especially in cases involving advanced forensic technologies such as DNA analysis.

A number of attorneys in Tarrant County also expressed their belief that the trial judges are reluctant to authorize funding for more than one type of expert per case, *i.e.*, if defense counsel chose to pursue approval of payment for a psychologist, that foreclosed any possibility of also obtaining the services of a fingerprint examiner or a ballistics expert in the same case.

Given the frequency with which we encountered these perceptions among attorneys practicing in the counties in question, it is unlikely that they represent an idiosyncratic misunderstanding. Instead, it seems probable that such a widespread and firmly held belief must

⁸⁵ Such a policy also tends to discourage innovation in defense counsel's use of experts. To provide effective assistance, capital defense counsel need to be on the “cutting edge” of the sciences which may help explain human behavior – both “hard sciences” like neurology or psychopharmacology, and “human sciences” like psychology and psychiatry. Forcing counsel to engage only experts from Texas may well have the result of foreclosing defense counsel from pursuing a novel approach to the case.

be based on the attitude which the judges have manifested toward defense counsel's requests for funds in the past. There is a risk that such perceptions may exert a powerful “chilling effect” on defense counsel's zealous advocacy, discouraging attorneys from seeking funds for reasonably necessary assistance simply because the contemplated request involves an out-of-state expert, or more than one expert in a single case.⁸⁶

The attitudes expressed to the research team by these attorneys may be well-founded. Our research has documented incidents in which trial courts, though willing to pay more than a few hundred dollars for expert services, nevertheless display a troubling reluctance to compensate defense experts for the amount of time and effort actually expended on a case. Judges have enforced arbitrary caps on expert funding in some cases even in the face of a well-documented showing that the fee claimed was well within the range of fees charged for similar services in comparable capital cases. In a 1997 trial in East Texas, for example, the trial court authorized defense counsel to engage a nationally prominent psychologist to assist the defense at the penalty phase. The psychologist ultimately submitted a bill in 1998 for 91.5 hours of work, seeking payment of \$17,193.90 at the expert's normal rate of \$180/hour. The bill was supported by an itemized statement describing in detail the tasks performed by the expert, as well as a list of comparable experts in Texas, the cities where they practiced, and the rates they charged for comparable services (which ranged from \$160/hour to \$200/hour). Finally, the expert provided a list of nine capital cases, from Texas and elsewhere,⁸⁷ in which he had performed similar services between 1996 and 1998; he indicated the amount he had billed in each case, and the amount each court had ultimately paid. The amount billed in those cases ranged from \$13,947 to \$34,763.86; the courts paid from \$12,321.91 to \$34,763.86. None of those nine courts paid the expert less than eighty-six percent (86%) of what he billed; in six of the nine cases, he was paid between ninety-five and one hundred percent (95-100%) of what he charged. The expert attested to all this information under oath. Despite this detailed showing of the nature and extent of the expert's services, and the strong evidence that the fees and expenses he sought were reasonable, the trial court declined to pay more than \$5,000 in fees. Counting expenses, the county paid the expert \$5720.00 – amounting to just thirty-three percent (33%) of the cost of his services.

Such examples of under-payment to defense experts raise serious concerns. If appropriately qualified experts cannot depend on being fairly compensated for their work on behalf of indigent Texas capital defendants, they will likely decline to perform such work in the future. A Harris County attorney told our research team that defense attorneys sometimes pay their experts out of counsel's own pocket for the difference between the expert's bill and the

⁸⁶ Certainly, interviews conducted by the research team confirm that it will often be necessary to engage the assistance of more than one expert in order to present an effective defense in a capital case. Many of the individuals facing the death penalty suffer from multiple impairments. Defense counsel representing such an individual may well require the assistance of more than one expert to help the jury understand how the defendant's unique life experiences reduce his moral culpability for the offense.

⁸⁷ The cases included six federal capital prosecutions (in Louisiana, New Mexico, Arkansas, Virginia (2), and Illinois) and three state-court cases: one from Colorado, one from Oregon, and one from Ector County, Texas.

amount ultimately approved by the trial court, at least in part in order to preserve a working relationship with the expert for future cases. While trial judges have the right and the duty to scrutinize bills for reasonableness, setting arbitrary caps on the amount experts will be paid can only have destructive and far-reaching consequences for the reliability of capital verdicts in Texas.

Thus, while our research suggests that Texas defense attorneys seek the assistance of experts less frequently than one would expect, given the national standard of defense practice in capital cases, the origin of that failure should be investigated further. Our research suggests it comes from one or both of two sources: (1) the absence of appropriate training or adequate experience on counsel's part, and (2) the tendency of trial judges to set arbitrary limits on expert compensation or otherwise interfere unduly with defense counsel's choices about how to prepare and present her case.

CHAPTER 6

RECOMMENDATIONS

A. Develop Comprehensive Statewide Indigent Defense Representation System.

1. Establish Oversight Body with Statewide Mandate to Oversee Provision of Defense Services in Capital Cases.

The experience in other states strongly suggests that an oversight entity with statewide jurisdiction is needed to ensure consistently high-quality defense services in capital cases. Whether that oversight is provided by an indigent defense commission, a public defender's office, or an administrative agency which administers funding for indigent defense services, an essential feature of successful indigent capital defense systems is some mechanism for enforcing uniform practices and rigorous qualification and performance standards on a statewide basis. Texas lacks this essential feature. Until the state develops a comprehensive system for providing necessary funding, guidance, training, and oversight of defense representation in capital cases, its complicated patchwork of different practices and standards cannot be trusted to accurately and fairly resolve them.

Accordingly, we recommend that the state create some body with statewide jurisdiction to improve the quality of indigent defense representation in Texas. It is less important at this stage to identify the exact structure or composition of such an entity than to describe its range of potential functions, which should include:

- Establish appropriate qualifications for appointed counsel in capital cases at each stage of the process (trial, appeal, and post-conviction), including meaningful requirements for continuing legal education (CLE) specific to capital cases;
- Establish and maintain lists of attorneys in each administrative judicial region qualified to accept appointment in capital cases;
- Monitor compliance with the requirement that only counsel from the "qualified" list may be appointed in capital cases;
- Develop and administer procedures for incorporating peer review as an essential part of the process of determining whether an attorney applicant is "qualified;"
- Monitor attorney compliance with capital defense CLE requirements;
- Monitor attorney compliance with other provisions of the standards for qualification;
- Gather data concerning the provision of defense services in capital cases from all counties in Texas, and publish periodic reports of such data;

- Administer the provision of state funding for the defense of capital cases;
- Administer the funding for capital defense trial attorney training. and

2. Create a Source of State Funding for Indigent Capital Defense

Our research indicates that many of the decisions being made by Texas trial judges about funding for defense services in capital cases (whether for attorneys' fees, investigation, or experts) are affected by pressure they feel about costs. Under the current system, all costs associated with funding indigent defense services are borne exclusively by the local (county) government. This is true both in large urban counties (with large budgets), and in smaller counties with fewer resources. Making financial considerations dispositive in determining what services to provide a defendant on trial for his life is unfair and short-sighted. The only way to relieve the financial pressure on county governments is for the state to create a source of funding for indigent defense services in capital cases, to which all counties can have fair access. The Legislature has already chosen to provide supplemental funding to support capital *prosecutions* in counties where resources are limited, earmarking nearly \$2.5 million dollars for the current biennium for that purpose, and authorizing expenditures of up to \$100,000 per capital murder trial. It should do no less for indigent capital defense.

3. Establish Specialized Statewide Capital Defense Support Unit to Assist Appointed Counsel.

As one researcher has observed,

Currently, most attorneys who defend death cases are private attorneys with small practices, often solo practices, with no particular expertise in capital litigation at the outset of their representation. If death cases were handled solely by a cadre of trained specialists, certain costs (such as legal research) would be spread over a number of cases, and thus the cost of providing meaningful representation in death cases would probably decrease. A 1990 survey of capital trial lawyers in six Southern states [including Texas] found “near unanimity” supporting the use of specially trained lawyers to handle death penalty trials.⁸⁸

The practicality of this approach has been demonstrated in the jurisdictions, such as Georgia and Kentucky, which have created such specialized capital trial defense offices. Both those states employ what is essentially a “hybrid” model. Their capital trial units staff some cases in their entirety, but in many cases one lawyer from the statewide capital trial office serves as co-counsel, teaming up with local counsel from the community where the case will be tried. This permits the statewide office to play a role in a significantly larger number of cases than it could handle exclusively on its own without consuming substantially greater resources. The practice combines the benefit of having at least one attorney on each case with extensive specialized

⁸⁸ Vick, *Poorhouse Justice*, *supra* note 19, at 372 n. 181 (citation omitted).

knowledge and experience, with the advantages of having local counsel who is familiar with the community, the prosecutor's office and other law enforcement agencies, and the potential jury pool.

A somewhat comparable entity already exists in Texas – assisting in the prosecution of capital murder cases, among others. The Prosecutor Assistance and Special Investigations Division of the Office of the Attorney General, assists with the trial of cases around Texas where local authorities request assistance.⁸⁹ The existence of the Prosecutor Assistance Division reflects the state's recognition that the resources locally available for litigating complex criminal cases can vary dramatically from county to county. As our research has documented, this is nowhere truer than in the context of providing an adequate defense to indigent people facing the death penalty. Having chosen to target resources for the prosecution of certain classes of cases, including death penalty cases, through the Prosecutor Assistance Division, the state should likewise make a commitment to the fair defense of capital cases through funding a specialized capital defense office.

B. Develop Statewide Standards and Procedures for Appointment of Private Counsel.

As noted in our findings, Texas today has no statewide standards or procedures for appointment of private counsel to defend indigent persons facing capital charges. The standards maintained by each of the state's nine administrative judicial regions vary significantly in their rigor.⁹⁰ As a result, some defendants in regions with more relaxed standards for appointment may be represented by less experienced, less qualified attorneys, who are less prepared to defend the case vigorously. To promote reliability and fairness, the standards and procedures for appointment of counsel should be promulgated on a statewide basis and should be uniform throughout the state.

1. Mandate Prompt Appointment of First and Second-Chair Counsel.

Based on our examination of appointment policies and practices in capital cases in other jurisdictions (such as the federal courts), we view delay in the appointment of second-chair counsel as distinctly “penny wise and pound foolish.” The experience of other jurisdictions

⁸⁹ According to the official website maintained by the Attorney General's Office, www.oag.state.tx.us, “The Prosecutor Assistance and Special Investigations Division provides investigative and prosecutorial support to county and district attorneys across the state of Texas. The division will enter a case only at the request of a county or district attorney. In addition to traditional prosecutor assistance, the division also provides other services, including statewide child abuse and sexual assault investigation and prosecution, parental rights termination, and federal narcotics interdiction. Prosecutor Assistance also assists local law enforcement agencies with personnel and resources for criminal investigations.”

⁹⁰ See Chapter 5.A.1, *supra*.

indicates that having two defense attorneys on the case from the earliest practicable time helps ensure the prompt and full investigation and development of potential defenses and of essential mitigating evidence. Such early investigation and preparation by the defense often enables the parties to negotiate a non-death-penalty resolution to the case (*i.e.*, the prosecutor decides not to seek the death penalty at trial, or the defendant enters a plea agreement that precludes a death sentence). As a result, the practice of early appointment of second-chair counsel can ultimately lead to significant savings by avoiding the extremely high costs that are dictated by a full-blown death penalty trial and sentencing. The trial court, of course, would retain the power to terminate the appointment of second-chair counsel if, at any time, the prosecution announced it was not seeking the death penalty, or reduced the capital count(s) in the indictment to some lesser charge.

2. Develop Statewide Minimum Qualification Standards for Appointed Counsel.

Under Texas' current statutory scheme, there are no statewide minimum qualification standards for appointed counsel in capital cases. Instead, each administrative judicial region adopts its own standards; the standards vary substantially from region to region⁹¹

We recommend that Texas adopt uniform statewide standards for qualification of capital defense counsel. The statewide oversight entity described in Recommendation A.1 above should set those standards. Each administrative judicial region would enjoy the latitude to impose additional requirements for attorneys to accept appointments within that region, but the statewide standards would establish the minimum qualifications which all regions would be required to enforce. The statewide minimum standards should include training and experience which are particularized to capital defense, such as an annual requirement that counsel complete a minimum number of CLE hours in programs focusing primarily on capital defense.

3. Require Passing Score on Mandatory Statewide Qualification Test for Counsel to be Eligible to Accept Appointment in a Capital Case, and Require Periodic Renewal of Qualification.

The uniform statewide standards for qualification to accept appointment in capital cases should include, but not be limited to, a requirement that counsel attain a passing score on a written qualification test. The test should likewise be a statewide test, *i.e.*, the same test should be used in all administrative judicial regions. Counsel should also be required to renew their qualifications at periodic intervals.

4. Institute Peer Review and Qualitative Assessment of Advocacy Skill as Part of Attorney Qualification Process.

Each judicial region in Texas presently gauges attorney qualifications solely by reference

⁹¹ See Chapter 5.A.1, *supra*.

to quantitative measures of experience.⁹² In our view, in addition to taking account of such indices as the number of years an attorney has been in practice, or the number of serious felony cases she has tried to a jury verdict, the qualification process should entail a more qualitative assessment of counsel's trial advocacy skills, death penalty litigation expertise, and knowledge of death penalty law and procedure. Unless such a qualitative assessment is undertaken, nothing prevents a superficially experienced but substantively unqualified attorney from being appointed in a capital case.

It might be suggested that such an implicit qualitative assessment may explain the decision made by a trial judge to appoint one nominally qualified attorney rather than another in a particular case. We feel strongly that reliance on individual and potentially idiosyncratic intuition is an inadequate substitute for a substantive process in which a collegial body of judges and/or lawyers are accountable to one another and collectively to the public. The national standard of practice in defending capital cases is not a subject respecting which most Texas trial judges have appropriate expertise. First, few Texas trial judges have devoted years of practice to the area of criminal defense generally, much less to the highly specialized area of death penalty defense. It is equally unlikely that any Texas trial judges have regularly attended national capital defense training programs, to keep abreast both of trends in capital litigation across the country and of extra-legal subjects of special relevance to death penalty defense (such as PET scan technology, fetal alcohol syndrome, or cultural mitigation theories). Death penalty defense is as much a specialization with criminal law as brain surgery within medicine, and no reasonable family practitioner would lightly presume her own familiarity with the intricacies of neurosurgery. Due to their understandable lack of familiarity with the governing substantive standard of professional practice - a lack of familiarity it would be enormously time-consuming and difficult to attempt to remedy - trial judges are not the appropriate institutional actors to take on the role of assessing an attorney's qualitative skill as a death penalty defense advocate.

We recommend instead that the qualification process should include a stage of peer review in which a panel of appropriately qualified and experienced capital defense attorneys would review the submissions of attorneys applying for certification, and endorse or (temporarily) block placing them on the list.⁹³ Washington State employs such a process, in which a panel consisting of representatives from the criminal defense bar, plus one retired and inactive trial-court judge, has to reach an affirmative consensus on each applicant before that attorney can be found qualified for appointment in capital cases. Washington's system appears to have worked successfully; participants (both panel members and attorney applicants) report a high degree of confidence that the attorneys who have been found "qualified" reflect an appropriate combination of skill and experience, judged in light of prevailing national standards for defending capital cases.

⁹² See Chapter 5.A.1, *supra*.

⁹³ By this reference to "temporarily" blocking the approval of a particular applicant, we simply suggest that even if the peer review panel concluded upon a particular record that the applicant was "not qualified," that applicant would of course be free to reapply at a later date (for example, after completing additional appropriate specialized training, gaining additional courtroom experience, or otherwise manifesting the quality of representation warranted in capital cases).

5. Require Regular Continuing Legal Education in Capital Defense Representation as a Condition to Maintain Eligibility to Accept Court Appointments in Death Penalty Cases.

Capital defense is one of the most challenging areas of legal specialization in part because the legal landscape is constantly changing. As one scholar has put it, capital defense counsel must exhibit “constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.”⁹⁴ As a result, standards for the qualification of appointed counsel must incorporate a mandate for regular continuing legal education specifically focused on capital defense representation.

These requirements should include, but not be limited to, passing, within a specified number of attempts, a written examination on specific legal issues arising in the defense of capital cases. The examination currently employed in Harris County should be evaluated to determine whether it might, either in its current form or with substantial modifications, serve as a useful model in this regard. Results of such examinations should be made public and the examinations themselves made available for public examination.

Two other features of the continuing legal education requirement are equally important, however. First, counsel should be required to “renew” their qualifications periodically (*e.g.*, every two years) by passing the written examination again. This would ensure that attorneys who wanted to continue to accept appointments in capital cases would take care to keep up with changes in the law.

Second, counsel should also be required to complete a minimum number of hours of continuing legal education each year focusing specifically on capital defense. Because numerous CLE programs are now regularly conducted around the country to address different issues in death penalty defense, there is no question that an appropriate number and variety of courses will be available for counsel to choose from.

C. Develop Statewide Standards for Compensation of Appointed Counsel.

1. Establish Statewide Minimum Hourly Compensation Rate.

Our research demonstrated that in almost every county in our sample, overall low compensation creates powerful disincentives for the most experienced and able lawyers to take appointments in capital cases. To overcome this problem, it is essential that Texas establish a statewide minimum hourly compensation rate for appointed defense counsel in capital cases. Setting such a rate would be an appropriate responsibility of the statewide oversight entity described in Recommendation A.1 above.. The minimum hourly rate should be calculated to

⁹⁴ Vick, *Poorhouse Justice*, *supra* note 19, at 358; *see also id.* at n.110 (post-*Furman* death penalty jurisprudence is “notable for its sudden shifts in both fundamental assumptions and minor premises,” citing James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 *Law and Soc’y Rev.* 65 (1993)).

ensure that in all regions of the state, and in both rural and urban communities, counsel is paid enough to defray the average overhead costs associated with maintaining a law practice.

2. Eliminate Compensation by Flat Fee Contracts.

We found that a number of Texas counties routinely compensate defense counsel in capital cases by paying counsel a flat fee for the entire representation. In a system in which almost all capital defense representation is provided by appointed private counsel, flat fees create a strong disincentive for counsel to devote the hundreds of hours of out-of-court work which are typically necessary to provide an effective defense. To keep a private practice viable, counsel usually must, at a minimum, maintain a stream of income sufficient to cover office overhead expenses. As soon as the cost of overhead exceeds the effective hourly rate counsel is earning under a flat fee contract (*i.e.*, the amount of the contract divided by the number of hours worked by counsel), counsel faces a stark conflict of interest between her need to earn other income (to cover the difference between the effective hourly rate of payment on the capital case and the actual cost of office overhead) and her duty to continue devoting as many hours as necessary to her indigent capital client. It is reasonable to assume that even well-intentioned appointed attorneys may fail to provide zealous advocacy under such circumstances.

To avoid this destructive and unfair consequence, we recommend that defense counsel in capital cases should be paid exclusively on an hourly basis, with no cap on fees and expenses, at no less than a minimum rate which should be uniform throughout the State. As we have emphasized previously, we do not envision a system in which there will be no controls whatsoever on the costs of defense representation. Instead, we anticipate that mechanisms will be developed which, like those used in the federal system, will ensure that defense counsel is accountable for spending public funds responsibly. At present, our research indicates that the pernicious effect undermining the fairness and reliability of the system is *under*-funding, not *over*-funding, of the defense function.

3. Provide for Appeal by Appointed Counsel to Indigent Defense Commission Where Trial Court Cuts Fee Request.

Our research found that some trial courts arbitrarily reduce fee requests by appointed defense counsel, without providing any reason for their decision to do so. Some of our interviews even suggested that some trial courts may slash counsel's fee requests to punish counsel for litigating in what the trial court perceives as an “overly zealous” fashion. In any event, fee cuts by trial courts are essentially unappealable and the trial judges are unaccountable for them.

In order to improve the rationality of compensation practices and reduce the risk of retaliation against assertive defense counsel via fee-cutting, it is important that the state create a process for subjecting trial court decisions regarding fee requests to examination by an entity with statewide jurisdiction (described in Recommendation A.1 above) and the power to correct unjustified decisions to deny fees and/or expenses. Such a procedure would protect the interests of individual defendants by ensuring that their attorneys would not be “chilled” from providing zealous representation by a fear of having their fees arbitrarily reduced. Equally important, it would also serve as another mechanism for developing and enforcing uniform compensation policies and practices across the state. It is to be expected that, over time, such review (and,

where appropriate, correction) would educate trial courts about reasonable compensation for fees and expenses in capital cases, with the eventual result that fewer such appeals should be necessary.

D. Develop Procedures for Monitoring Attorney Performance.

1. Require Appointed Counsel to Submit to the Trial Court and Statewide Oversight Body an Itemized Accounting of Both In-Court and Out-of-Court Time.

To improve the quality of representation which is being provided to indigent defendants in capital cases, it will be necessary for the statewide oversight body described in Recommendation A.1, above, to monitor the performance of appointed counsel in all cases. An important first step toward the goal of monitoring attorney performance is requiring appointed counsel to provide, as a condition of compensation for their services in each case, an itemized accounting of the out-of-court time spent on the representation. Further, counsel should be required to report their hours on a standardized form employing categories comparable to those typically used by the federal courts in compensating counsel appointed under the Criminal Justice Act (*e.g.*, “Interviews and Conferences;” “Obtaining and Reviewing Records;” “Legal Research and Writing;” “Travel Time;” “Investigation;” and so on).

E. Provide Funding and Training Support for Investigative Assistance.

1. Provide Funds for Statewide Capital Trial Unit to Hire Investigators.

A large number of attorneys interviewed by our research team expressed the view that there are not enough appropriately trained and experienced capital defense investigators available for hire in Texas to accommodate the existing need. A statewide capital trial defense office could contribute greatly to solving this acute shortage of appropriately trained and experienced capital defense investigators in Texas. For example, the office could conduct specialized training programs across the state to help develop a corps of qualified investigators. Such an office could also hire its own staff of properly qualified investigators, and deploy those investigators on cases in which the office was serving as co-counsel. Either way, an adequately funded statewide capital trial defense office could help meet the unmet statewide need for investigators with specialized skills in these case.

2. Establish Statewide Minimum Hourly Compensation Rate for Private Investigators.

Our research indicated that the payment typically authorized for investigative services in almost all counties in our sample is too low to attract investigators with the specialized training and experience necessary to qualify them to work on capital cases. Reasonable rates of pay are necessary to encourage such properly qualified capital defense investigators to work on state-court trials in Texas, and to create an incentive for other private investigators to obtain the type of training necessary to become qualified to handle capital cases. The statewide oversight body described in Recommendation A.1 above, should establish a minimum hourly compensation rate for private investigators in capital cases, based on criteria comparable to those used to set

compensation rates for defense counsel and experts.

3. Ban Caps on Investigation Fees in County Fee Schedules.

The services of professional investigators are indispensable if defense counsel's duty to investigate is to be discharged properly. This conclusion is compelled by the national standard of practice in capital defense, which obliges counsel to conduct a thorough investigation of the defendant's background, both for purposes of identifying potential guilt-phase defenses and preparing a persuasive case in mitigation at the punishment phase. To develop mitigating evidence, counsel often must explore traumatic experiences in the defendant's life history. Interviewing witnesses to uncover such information requires specialized training and experience, as well as an extensive commitment of time. Where a trial court imposes an arbitrary cap on fees and expenses related to investigation, it may be impossible for defense counsel to obtain the assistance of an appropriately skilled investigator or for the investigator to conduct the type of wide-ranging inquiry demanded by the applicable standard of legal practice. Accordingly, arbitrary caps on fees and expenses related to investigation should be prohibited. Instead, investigators in capital cases should be paid on an hourly basis, with rates set by the statewide entity described in Recommendation A.1 above. As with expert services, this statewide entity should periodically collect and disseminate information about the range of costs typically associated with capital defense investigation, to educate trial courts about what constitutes a reasonable request for funding for such purposes.

A number of innovations could assist counties in paying for reasonably necessary investigative assistance in death penalty cases. For example, Texas could create a state fund for compensating qualified investigators in capital cases, administered by the statewide oversight body described in Recommendation A.1 above. Defense counsel could apply directly to this entity for funds for investigative assistance. Alternatively, a statewide capital trial defense unit could assume the responsibility to pay investigation costs in the cases in which its attorneys appeared, creating an additional incentive for local trial courts to welcome their involvement as co-counsel.

F. Provide Funding Support for Expert Assistance.

1. Capital Trial Unit Can Assist Private Bar by Maintaining Database of Experts.

A number of capital defense attorneys interviewed by the research team expressed frustration at the difficulty they had encountered in identifying appropriately skilled experts for consultation, testing, or other assistance. These problems could be ameliorated by a statewide capital trial defense office. Such an office could maintain a regularly updated database of experts of all types, to which local appointed defense counsel could have ready access. This could expedite the often time-consuming (and thus expensive) process of locating and vetting experts to find one with appropriate qualifications and skill, as well as ensuring that defense counsel would be able to call upon experts who have special training or are otherwise uniquely suited to meet the needs of the case.

2. Ban Caps on Expert Fees in County Fee Schedules.

Our research found that several counties place arbitrary caps on expert fees in county fee schedules. Other judges accomplish the same result by prohibiting defense counsel from engaging experts from outside Texas or even outside the local area. Convictions and death sentences obtained under such circumstances are vulnerable to constitutional challenge if the defendant was thereby denied the quantity and quality of expert assistance mandated by due process. Accordingly, caps on payments to experts in capital cases, whether *de jure* or *de facto*, should be prohibited. To assist trial courts in recognizing what constitutes a reasonable request for funding for such purposes, the statewide entity described in Recommendation A.1 above, might periodically collect and distribute information about the range of costs typically associated with the provision of particular expert services.

As we have noted with respect to investigative assistance, the state has many options for helping counties pay for reasonably necessary expert assistance in death penalty cases. For example, Texas could create a state fund for compensating experts in capital cases, administered by the statewide entity described in Recommendation A.1 above. Defense counsel could apply directly to this entity for funds for expert assistance. Alternatively, a statewide capital trial defense unit could assume the responsibility of paying for experts in the cases in which its attorneys appeared.

PART III

REPRESENTATION OF INDIGENT DEFENDANTS WITH MENTAL ILLNESS

CHAPTER 1 **INTRODUCTION**

This special chapter within the Fair Defense report looks at indigent defense issues as they relate to a special population of Texans – youth and adults with mental illness. Mentally ill defendants face a significant number of special barriers to fair indigent defense, in addition to those confronting other defendants. These unique problems pose special challenges for defense counsel, courts, counties and the state. How we deal with these issues has serious implications not only in terms of fairness to the defendant, but also in terms of the cost, efficiency and effectiveness of our criminal justice system. Many of the indigent defense issues discussed here overlap with issues of mental health policy. But the fact of the matter is that, whether we like it or not, our criminal justice system currently serves as an integral, if unsatisfactory, component of our mental health system.

States all across the country have experienced increasing numbers of youth and adults with mental disorders enter their criminal justice systems. In fact, more people with mental illness now reside in our nation's jails and prisons than reside in state mental institutions.¹ Numerous studies also show that the percentage of inmates in jails with mental illness exceeds the percentage in the general population.² The percentage of inmates with mental illness on Texas' death row likewise exceeds the expected.

According to a report released in February by the Texas Criminal Justice Policy Council, Texas now has 25,000 mentally ill individuals under some type of criminal justice supervision.³ The Texas prison system has almost as many inpatient psychiatric beds as the state mental health system, and the growth of the mentally ill prison population has exceeded the growth in the prison population generally over the last ten years. The same holds true for the juvenile justice system. The population of juveniles in the Texas Youth Commission increased 96% between 1995 and 1999, but the number assessed as emotionally disturbed increased by 152% in the same period. In fact, the Texas Youth Commission estimated last year that 42% of the youth in its custody were emotionally disturbed.⁴

Even at the county jail level in Texas, psychiatric treatment has now become common. Almost 6,000 adults in county jails received psychiatric medications in 1998. State officials presume this to be an undercount due to under-identification and under-reporting.

¹ Winetrip, Michael, "Bedlam on the Streets," *New York Times Magazine*, May 23, 1999.

² Steadman, Henry J., and Bonita Veysey, "Providing Services for Jail Inmates with Mental Disorders," National Institute of Justice, April 1997.

³ Fabelo, Tony, "The Public Mental Health System in Texas and Its Relation to Criminal Justice," Criminal Justice Policy Council, February, 2000.

⁴ Fabelo, Tony, "The Public Mental Health System in Texas and Its Relation to Criminal Justice," Criminal Justice Policy Council, February, 2000.

Why are so many youth and adults with mental illness in Texas jails and prisons? Research consistently finds people with mental illness to be no more likely to commit violence than other people, unless they also use drugs and alcohol.⁵ Some of the reasons for the dramatic growth in the jail population with mental illness nationwide include the downsizing of state psychiatric facilities, cuts in public assistance and low income housing, and the limited availability of mental health services in the community. It should be no surprise, then, that so many mentally ill Texans end up in trouble with the law. Texas has consistently ranked near the bottom of the 50 states in its per capita funding of mental health services. It serves only about a third of children and adults with the most severe illnesses who are indigent and eligible for publicly financed care.

Texas, unlike other states, has responded to law violations with an unprecedented growth in its rate of incarceration. This is not to imply that a majority of the people with mental illness who are in jail or prison have not committed one or more criminal offenses. The offenses may or may not be a product of or connected to their mental illness. However, many mentally ill people in Texas cities are arrested for relatively minor offenses such as shoplifting, vagrancy, or criminal trespassing that are often a function of both their untreated mental illness and their poverty. These minor offenders are often not identified as having a mental illness or treated while in jail and are then released back into their communities with no plan for treatment or aftercare. These minor offenders frequently re-offend and re-cycle through urban Texas courtrooms, often accumulating stiffer fines and penalties.

What can be done to stop this recycling of youth and adult with mental health problems through the Texas criminal justice system? Is this “just the way the system operates”? And more importantly, what is the role of the defense attorney in putting an end to this costly recycling of youth and adults and bringing about equal justice under the law for people with mental illness?

The responses and the other information presented below will tell part of the story of how mentally ill youth and adults end up in the system. This story illustrates lost opportunities to bring about better outcomes for mentally ill defendants, and gives a flavor of the special issues that surround legal representation of indigent people with mental illness in Texas.

METHODOLOGY

Chris Siegfried, the mental health researcher loaned to the project by the National Mental Health Association, conducted on-site interviews in seven major Texas counties (Bexar, Dallas, Harris, Hidalgo, McLennan, Tarrant, and Travis) throughout the summer of 2000. About 100 individuals were interviewed, including defense attorneys, public defenders and prosecutors; county, district court, and juvenile judges; probation officers; family members; jail psychiatrists and mental health officials; pre-trial program staff; and defendants. The researcher made numerous courtroom observations, toured jails and detention facilities, reviewed relevant studies and literature, and analyzed available data.

⁵ Streadman, H., E. Mulvey, J. Monahan, P. Robbins, P. Applebaum, T. Grisso, L. Roth, E. Silver. “Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods,” *Archives of General Psychiatry*, 55, May 1998.

The observations below point to the ways that policies and practices in Texas counties work together to systematically disadvantage defendants with mental illness within the criminal justice system and also many times deny them due process. In many cases, these same policies and practices disadvantage juvenile defendants and defendants with mental retardation. These issues are only touched on here and merit much more investigation. Because the Fair Defense Report focused on a variety of issues in addition to treatment of mentally ill defendants, the observations below should not be considered an exhaustive analysis of the quality of legal representation available to indigent Texans with mental illness. For example, the project did not have the time or resources to review case files and court transcripts. We believe that the issues that have been identified, however, point to needed improvements in the system.

Five issues have been singled out for discussion in this chapter of the Fair Defense Report: identification of mental illness; attorney qualifications and training; competency; expert witnesses; and mitigation and sentencing. There were poor defense practices and good practices alike in each of these areas for each of the jurisdictions surveyed.

CHAPTER 2

RESEARCH FINDINGS

A. Identification of Mentally Ill Defendants

1. Attorneys, prosecutors and judges lack familiarity with the variety of ways that a defendant's mental illness can impact the legal process and the fair administration of justice.
2. Often the pressure of moving cases off the court docket quickly supersedes efforts to get a defendant's mental illness identified.
3. Information collected on a defendant's mental illness during the arrest, incarceration and pre-trial phases of the justice process is not routinely shared with attorneys and judges. Texas law allows information to be shared between mental health professionals and officers of the court to benefit the defendant.
4. Attorneys appear to be doing little pre-trial work or work to reduce the length of stay of defendants with mental illness behind bars.

B. Attorney Qualifications and Training

1. Few attorneys have received any training or have any special qualifications for representing mentally ill or mentally retarded defendants.
2. Many attorneys lacked awareness of Texas statutes enacted in the last ten years to assist in identifying, diverting, and treating offenders with mental illness.
3. Most jurisdictions were not complying with the Texas law requiring magistrates to release on bond certain mentally ill detainees who have committed minor offenses.
4. Several jurisdictions are trying to improve the skills of attorneys and judges at recognizing and responding to mental illness.

C. Competency Issues

1. Many attorneys and judges believe that competence evaluations are too time consuming and expensive to do on misdemeanants. Some judges discourage the filing of motions for competency evaluations.
2. Some jurisdictions use the same mental health professionals who provide treatment in the jail to provide consultation and court testimony.
3. Only a small number of mental health professionals are being used for competency work in most jurisdictions. Some of these professionals have reputations and records of favoring the state, but few attorneys request other experts.

4. The quality of some competency reports to the court are incomplete and substandard.
5. Texas competency statutes are complex and cumbersome, especially for inexperienced attorneys and juries.
6. Some defendant's cycle back and forth for months or years between jails, courts and state hospitals trying to attain competence to stand trial on charges.

D. Expert Witnesses

1. In most jurisdictions, the only time a court appoints a mental health expert is for competence issues.
2. Many attorneys need help locating and evaluating mental health experts.

E. Mitigation and Sentencing

1. Few attorneys seem to work to develop appropriate mitigation evidence or sentencing alternatives for indigent defendants.
2. No jurisdiction studied had a centralized place to assist defense attorneys locate community programs, treatment, and residential alternatives that could serve as alternatives to incarceration.
3. Inappropriate court dispositions are commonly made for defendants with both a mental illness and substance abuse problem.
4. The fast-paced plea bargain process for misdemeanants may not serve the longer-term interests of the defendant and the state in keeping the defendant from re-offending.
5. There are some indications that mentally ill defendants spend longer lengths of time incarcerated than do other defendants.

CHAPTER 3
DISCUSSION OF FINDINGS

A. Identification of Mentally Ill Defendants

"I didn't really have contact with my lawyer. He never came to the jail to talk. I never got the chance to tell him I didn't know what I was doing. If I had my brain together I probably would have told him I didn't know what was going on. I was lost."

20-year-old mentally ill man on probation

Article 571.003(14) of the Texas Health and Safety Code (also known as the Mental Health Code) defines mental illness as:

an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that:

- (1) substantially impairs a person's thought, perception of reality, emotional process, or judgment or
- (2) grossly impairs behavior as demonstrated by recent disturbed behavior.

Mental illness is different from mere adjustment problems, problems of living, or blue moods. It refers to serious diseases of the brain such as schizophrenia, manic depressive illness, major depression, and obsessive-compulsive disorder. It is also different from mental retardation which refers to an individual with below-average intellectual functioning existing concurrently with deficits in adaptive behavior that developed during the developmental period, usually before age 21.

There are a variety of ways that a defendant's mental illness and/or mental retardation can impact his or her legal defense and the disposition of a case within the criminal justice process. For example, mental illness can impair a defendant's reasoning, volition, comprehension, memory, judgment, and emotions. It can interfere with the ability to work and function independently, to appropriately interpret and respond to situations, and to make decisions. Interviews conducted around the state revealed that defense attorneys, prosecutors, and judges seem to have a very limited interest in or awareness of the variety of ways that mental illness may impact legal proceedings or a defendant's ability to participate in his/her own defense. Most often when asked about mental illness, judges and attorneys refer solely to issues of competence to stand trial. Competence issues are relevant in only a very small number of criminal cases. Some attorneys and judges think mental illness is synonymous with mental retardation.

Of course, attorneys' lack of familiarity with mental illness just mirrors the lack of public understanding and awareness of mental illness generally. People who have mental illness are frequently thought to be untruthful, unpredictable, or more violent than others. Not only does this stereotype disadvantage people as defendants but also as witnesses in the courtroom. Defense attorneys in Fort Worth and San Antonio said that most juries think the use of mental illness as a defense or in mitigation of punishment is "hocus pocus." A judge who conducts competence hearings for other courts said, "A significant percentage of jurors have a problem with mental illness. They have a preconceived notion that people are just trying to 'get off.' It is difficult for them to understand. Lawyers need to go into the voir dire (interview of possible jurors) very carefully."

The chief problem is one of recognizing mental illness. All court officials need to understand ways early on in the criminal justice process to recognize signs and symptoms of mental illness if they are to avoid prosecuting, sentencing and incarcerating mentally ill people without consideration of their special needs, abilities and limitations. Failure to identify and respond to defendants with mental illness can bring about horrific consequences. Ways that attorneys and judges now use to identify mental illness and potential sources of mental health information that might be helpful to attorneys are discussed briefly below.

Incarceration actually contributes to the deterioration of many mentally ill youth and adults, sometimes to the point of rendering them incompetent, and studies show that over 90% of all jail suicides are related to mental illness.⁶ Jails and prisons frequently place mentally ill inmates or juveniles in single cells, isolation, or on "lock down," which numerous studies show worsen schizophrenia, depression and anxiety behind bars.⁷ Mentally ill and mentally retarded youth and adults are frequently victimized by other inmates or jail staff. (In fact, at the same time mental health professionals in one of the large urban jails were being interviewed for this report, other professionals were filing a complaint against detention officers for mistreating an inmate housed on the mental health unit in the jail.) For these reasons, it is imperative that counsel be appointed quickly, get all the information they can about their client's mental health, and meet with their clients quickly.

*"Appointed attorneys are very bad at recognizing mental illness."
Public defender*

When lawyers, prosecutors and judges around the state were asked for an estimate of the percentage of defendants who had serious mental illness, answers ranged from "minute, less than 1 percent" to "about 5 percent," to "15 to 20 percent with serious mental illness." This latter estimate is closer to the actual number. County officials in Dallas and Harris County jails said that between 12 and 15 percent of the inmates housed there were currently under psychiatric treatment

⁶ DuRand, C. J., G. J. Burtka, E. J. Federman, J.A. Haycox and J. W. Smith, "A Quarter Century of Suicide in a Major Urban Jail: Implications for Community Psychiatry," American Journal of Psychiatry, 1995.

⁷ Kupers, Terry, *Prison Madness: The Mental Health Crisis Behind Bars and What We Should Do About It* (San Francisco, Hossey-Bass, 1999).

or receiving medications. National studies show about 16% of the incarcerated population report themselves to be mentally ill.⁸

Of course formally identifying a defendant as mentally ill takes time and initiative and money – in the case of indigents, from the court. The fee for conducting court evaluations varied among jurisdictions but was usually around \$250-300. An additional \$250-300 was charged if the evaluator offered testimony. Often the pressure of moving cases off the court docket supersedes efforts to get the defendant's problems identified. All jurisdictions surveyed reported the need to move cases quickly, especially misdemeanors. County court judges in virtually all of these jurisdictions also reported feeling financial pressure from county officials both to move cases expeditiously and to control spending.

Many attorneys and judges questioned the wisdom of evaluating misdemeanants for mental illness because it might slow down the process of their release and because the consequences of pleading to the offense were fairly minor. It was clear that other officers of the court did not see a need to evaluate misdemeanants or minor offenders because they believed their mental illness seldom played any role in their committing the offense.

"Some attorneys and prosecutors understand mental illness, others don't. I don't think that (a particular judge) fully appreciates mental health. His position may be legally it doesn't matter, although he views missing appointments as a problem. Or he may think it's a bunch of hooey."

Public defender assigned to a district court

Many attorneys interviewed around the state had developed some informal methods for identifying potential mental illness. Attorneys have learned that certain types of offenses may signal an underlying mental illness. In part, these offenses are related to poverty, homelessness or a transient lifestyle common to indigent people with mental illness. Judges in Dallas and Houston said that criminal mischief, criminal trespass, prostitution, and failure to identify were frequent misdemeanor offenses committed by people with mental illness. These are often crimes committed by homeless people. Writing bad checks is a fairly common symptom of people with manic depressive illness. An attorney in Dallas who specializes in cases with mentally impaired defendants estimated that 50% of "assault of a public servant" cases involves defendants with mental illness. These defendants have usually scuffled with a police officer and frequently cycle through the misdemeanor courts. A judge in McLennan County has learned to ask defendants receiving monthly Social Security checks if they have a mental disability, if they take medication, and if they are seeing a doctor.

There are a variety of ways that defense attorneys in Texas can get data early in the process about a defendant's mental illness, yet virtually none of the attorneys or judges interviewed knew about these methods or was taking advantage of them. For example, all jails in

⁸ Ditton, Paula, "Mental Health and Treatment of Inmates and Probationers," U.S. Department of Justice Bureau of Justice Statistics, July 1999.

Texas are supposed to do preliminary screening for mental illness at jail booking. If mental illness is suspected, they are required by Texas law to do assessments within 72 hours.⁹ The larger jails have specialized housing units for the people who are the most ill, and information about where a defendant is housed is usually designated somewhere on the county's computers. Bexar, Dallas, Harris, Tarrant, and Travis counties all have pre-trial release programs that make a special effort to identify detainees with mental illness. These programs collect some information on a person's mental health status in the course of determining his or her eligibility for pre-trial bond. None of these counties, however, routinely routes this information to defense attorneys, and attorneys seldom if ever ask for it.

Pre-trial programs could be much more important mechanisms for gathering preliminary mental health information on detainees and making bond options available to indigent defendants with mental illness. Texas needs to look at ways to strengthen and standardize these types of programs across the state.

By the time cases get to court, especially felony cases, a body of information about the person's mental health status has been collected by a variety of sources – jail screeners, pre-trial staff, nurses, jail psychiatrists, and court probation officers. Changes in the Texas Health and Safety Code now allow mental health professionals to share information without a release with defense attorneys and other justice personnel working to assist “special needs offenders,” including individuals for whom criminal charges are pending (Texas Health and Safety Code, Ch. 614.017). Attorneys and judges around the state seem to be largely unaware of this helpful statute, saying repeatedly they had problems accessing records and other mental health information on defendants.

Of course, when attempting to identify mental illness and gather information early in the justice process, there is no substitute for visiting the defendant in jail. Investigation revealed that surprisingly few attorneys visit their clients, especially if they are misdemeanants, before the court hearing. In fact, attorneys, jail mental health professionals, and judges in the jurisdictions surveyed reported that attorneys representing misdemeanants see their clients for the first time at arraignment or plea; they seldom visit their clients in jail.

"Inmates don't know their attorneys. Attorneys scramble, trying to subpoena me and records at the last minute."

Jail psychiatric worker

Other chapters of the Fair Defense Report have illustrated the problems around the state in getting counsel appointed in a timely manner. This seems to be less of a problem in urban areas of the state. However, interviews around the state yielded little evidence that attorneys were doing much pre-trial work or work to get their mentally ill clients out of the jail environment. Many attorneys interviewed said they had never filed bond reduction motions or speedy trial motions or

⁹ TEX. CODE CRIM. P. Article 16.22.

asked for an examining trial. In fact, several attorneys and judges expressed the belief that mentally ill people are “better off” in jail or prison because they will get treatment.

Unfortunately, once mentally ill Texans become part of the formal criminal justice system, specialized mental health services are often lacking. A recent jail survey conducted by the Texas Criminal Justice Policy Council found that some Texas jails still do not perform routine mental health screening at booking, as required by the Texas Commission on Jail Standards since 1993.¹⁰ Fifteen percent of Texas jails have no suicide prevention plans. Less than two thirds provide any type of crisis intervention services. One quarter of Texas jails provide no psychiatric medication. Only 3% of Texas jails have a psychiatric nurse on site and only 16% have a psychiatrist or psychologist.¹¹

"Jail is a dim place. It was confusing. People in jail asked me, 'Why are you here?' I couldn't tell them. Some people tried to fight me."

Mentally ill man who was forcibly tattooed by other inmates in a county jail.

B. Attorney Qualifications and Training

The first line of defense against negligence, discriminatory or improper treatment of indigent mentally ill inmates is their defense attorney. Unfortunately, this investigation revealed that too few attorneys had received any training or had any special qualifications related to representing mentally ill or mentally retarded defendants. While some jurisdictions were taking action to remedy this, others were doing nothing to assure competent defense counsel.

Attorneys, judges, families and others must know the specialized procedures and laws that apply to mentally ill youth and adults in the justice system. The American Bar Association (ABA) has said that “judges and attorneys have ethical responsibilities to understand the proper roles of mental health and mental retardation professionals” and that “attorneys who appear on and judges who preside over criminal trials embracing issues of mental health or mental retardation law should have education and training necessary to understand the relevant issues and the proper uses of expert testimony.”¹² In fact, the ABA has recommended training both for attorneys and mental health professionals in a two-tiered approach: 1) a basic educational component designed to familiarize students in each discipline with these issues; and 2) an advanced educational component for professionals who anticipate participation in criminal justice activities.¹³

¹⁰ Texas Commission on Jail Standards, *Prison and Jail Standards and Regulations*.

¹¹ Fabelo, Tony, “Mentally Ill Offenders and County Jails: Survey Results and Policy Issues,” Criminal Justice Policy Council, February 2000.

¹² *ABA Criminal Justice Mental Health Standards*, at 21, (1989).

¹³ *ABA Criminal Justice Mental Health Standards*, at 19, (1989).

"This is a specialty, I think that only attorneys with mental illness training should be assigned to the mentally ill."

Mother of mentally ill offender

With a few exceptions, there were few attorneys and judges among those interviewed who had received any special training about mental illness or mental retardation or who appeared to understand mental health and mental retardation issues well.

Particularly disturbing was the lack of awareness on the part of many attorneys, prosecutors and judges of Texas statutes that have been enacted in the last ten years to assist in identifying, diverting, and treating offenders with mental illness. The example mentioned above of the statute that allows information to be shared between mental health professionals and attorneys without a release was unknown to virtually all of the attorneys interviewed. Attorney training is needed on how to access important mental health information.

In 1993, the Texas Legislature passed a special statute that requires magistrates to release on public recognizance bonds certain mentally ill offenders who have committed minor, non-violent offenses (Article 17.032, Texas Code of Criminal Procedure). San Antonio court officials were aware of the statute and were attempting to implement it, but court officials in Dallas, McLennan, and Tarrant County seemed unaware of the statute. One prosecutor even said "Any law supporting mandatory release of people with mental illness is a poorly written law."

There are several methods being tried in different jurisdictions to improve the skills of attorneys and judges at recognizing and responding to mentally ill defendants. Attorneys in Waco said that certain attorneys with mental health experience are more likely to be appointed to cases where a mental illness issue is involved. The director of court administration in Travis County who makes attorney appointments has asked attorneys to sign up on a special list if they are interested in being appointed to cases where mental illness is involved, and 35 attorneys have signed up. Neither of these jurisdictions, however, require attorneys to have special training in mental illness in order to take these cases.

Bexar County, on the other hand, uses attorneys that have done civil mental health commitment work on the mental health docket and who have taken at least eight hours of continuing legal education in mental illness. Harris County conducts routine training for attorneys taking court appointments, but mental illness is not a significant part of the training. Dallas County has offered an occasional training session for attorneys on mental illness and mental retardation. The Mental Health Association in Tarrant County conducts yearly training sessions for attorneys on mental illness and offers continuing legal education (CLE) credits for the courses. More systematic training on mental health and mental retardation issues is needed. This may be especially true for juvenile attorneys. No juvenile attorney interviewed had special training in

juvenile law, in basic child development or child mental health. There may even be some merit in establishing a regional training body or a resource center to assist attorneys who want to specialize in these types of cases or to encourage jurisdictions to establish a higher rate of pay for attorneys who get special training or certification and then agree to represent defendants with mental illness or retardation.

These issues and numerous others bear directly on the resources, skills, knowledge, and abilities an attorney must have if she or he is to provide good representation to an indigent, mentally ill defendant. Other areas where attorney training about mental disabilities would be helpful include competence, selection of mental health expert witnesses, diversion and sentencing alternatives. Competency and expert witnesses are discussed in some length in the section of this report on capital defense.

C. Competency Issues

Although most mentally ill defendants are not incompetent to stand trial, those who are place special demands on defense attorneys and other members of the court. The law demands that a defendant must have a fair opportunity to mount a defense against the charges brought by the state. When mental incapacities reduce the defendant's ability to understand what is happening or to participate in the defense, the basic fairness of the criminal trial process is threatened.

Mrs. D's 18-year-old son spent weeks in the house by himself. She knew something wasn't right. One evening he went out to go to his girlfriend's house, but ended up in a strange neighborhood knocking on a strange door. When the police came and confronted the young man, he scuffled with them. The police injured him and ended up taking him to a hospital where he remained for several days. He was then charged with assault on a public servant. When he was transferred to the jail, he was put in the infirmary to further recover and was then transferred into a cell with a number of other inmates. His appointed attorney could not communicate with the young man and requested a competency hearing. He was seen by a jail psychiatrist and ruled competent to stand trial. Eventually Mrs. D's son did not return her phone calls or go to see her during visiting hours. He didn't want to leave his cell, even to bathe. He stared for hours at the light in his cell. He didn't know where he was or why he was there.

Other inmates began to complain about his smell. They told Mrs. D over the phone they were "taking care of her son." Mrs. D pleaded with the detention officers and jail chaplain to tell her something about her son's condition. She pleaded to have a second doctor examine him. A second doctor examined her son and found that he was psychotic, had urinated on himself and remained soiled in his cell for many days. The second doctor communicated his findings to the jail psychiatrist. A second competency hearing found the defendant incompetent, and he was sent to the state hospital. All together, he had spent 6 months in the county jail.

Competence can be raised at a variety of different points in the criminal justice process, even at motions to revoke probation or parole. This section, however, will focus chiefly on indigent defense as it relates to competence to stand trial. The paragraphs below will define incompetence, briefly describe the defense attorney's role in competence proceedings and highlight some special problem areas in Texas jurisdictions. The problem areas include the time and cost of having evaluations done, especially for misdemeanants, the impartiality and independence of examining doctors, the paucity of qualified experts, and the complexity of competence statutes. Many court officials also lacked confidence in the procedures used by state hospitals to restore a defendant's competence to stand trial.

The fundamental test for incompetence to stand trial was established by the Supreme Court in 1960 in *Dusky v. United States*. The test is whether or not the defendant has "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."¹⁴ In Texas a defendant is "presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence" (Article 46.02, Texas Code of Criminal Procedure). Preponderance of the evidence means evidence which is of greater weight or more convincing than the evidence which is offered against it.

Competence proceedings usually are initiated by defense attorneys. After they are assigned to the case, they go to meet with their client and observe that something seems unusual about the client's behavior or mood or that they are unable to communicate with the client. They then file a motion with the court to have the defendant examined by a mental health expert. Defendants and families who have resources to pay for a private psychiatrist usually do.

Attorneys across the state said that they never had any problems filing motions requesting competence examinations and judges said they almost never refused them. Several attorneys and judges, especially in Bexar and McLennan Counties, said that they would rather err on the side of having a person evaluated than to release someone who shouldn't be released or arrive at a verdict and have a case reversed. Denial of access to mental health evaluation when indicated can be a violation of a defendant's Sixth Amendment right to effective assistance of counsel.

A competence evaluation is supposed to be ordered for the single purpose of assessing a person's competence to stand trial. Lawyers from several jurisdictions, however, said they routinely asked for a sanity evaluation at the same time. Some lawyers said they sometimes order a competency evaluation to get a better plea deal for their client. Some attorneys order an evaluation to delay trial or for other tactical reasons. The ABA considers it improper for either the defense attorney or prosecutor to use the incompetence process for purposes unrelated to incompetence to stand trial.

¹⁴ *Dusky v. United States*, 362 U. S. 402 (1960).

Indigent defendants can also be referred for competence evaluations by jail personnel, judges, and others involved with processing the defendant. Dallas County has worked out an arrangement whereby attorneys or judges are notified that a defendant is being held in a special observation tank in the jail. Similarly, the director of court administration in Austin has designed a form to send to attorneys saying that the client has been referred from the jail for having mental health problems and asking if they want to schedule an evaluation. If the attorney doesn't respond, the administrator will take the matter to the court. Ordinarily the court appoints an attorney to represent the client prior to having the client examined by a mental health professional; however, an Austin-based group studying competence procedures in Travis County found defendants who had been evaluated before they had the opportunity to consult with counsel.¹⁵ This practice is not recommended by either the American Bar Association or by the American Psychiatric Association.

Following a competence evaluation, the evaluator, usually a psychiatrist or psychologist, submits a report or reports back to the court and to the defense counsel and prosecutor. If the defendant appears to be incompetent, a hearing with a jury is scheduled. The vast majority of competence hearings are uncontested – that is, the prosecutor and defense attorney agree about the defendant's incompetence to stand trial. When the findings of the expert are uncontested by either the defense or the prosecutor, the hearings are short and perfunctory and usually present the testimony of only one expert. The defendant is sent to one of the state hospitals either to regain competence or for commitment. The court can allow the defendant to be released on bail if he or she can be adequately treated on an outpatient basis for the purpose of attaining competency, but no jurisdictions appeared to be using this option. Once the defendant regains competence, he or she is sent back to the county jail to await another competency hearing and court proceedings on the criminal charge.

A variety of problems surrounding competence proceedings were identified by attorneys and judges around the state. Taken together these call into question the basic accuracy, fairness, and soundness of the process. These issues are discussed below.

The problems related to getting competence evaluations done were most significant in county courts. Attorneys and county court judges around the state expressed concern that competence evaluations are too expensive to do on misdemeanants and usually work against the client's best interest to get out of jail quickly. Several county court judges also said that they feel pressure from county officials to keep costs down for mental health evaluations.

*"It is not common to get 'evals' done on misdemeanors. As long as the client can talk to you, they are competent. But all the tell-tale signs are there."
Defense attorney*

¹⁵ Capacity for Justice, "Competence to Stand Trial Evaluations in Travis County, Texas," unpublished manuscript (1999).

One district judge said that county commissioners want reductions in mental health expenses. County officials from that county confirmed that the county funds many mental health evaluations, especially on juveniles, and that the county was now looking at reducing costs by bidding out the work. There were also some district courts that would not pay for a competence evaluation to be done until after an indictment is made. This may leave defendants who are ill waiting for long periods of time in the jail without treatment.

Clearly some courts did not want to schedule competence hearings because they were time consuming, clogged their court dockets, and added to their number of “cases pending.” In one jurisdiction, for example, there were several county courts that scheduled no competency hearings while most of the others had scheduled 10 to 12 during the same time period. The investigator was told that attorneys are afraid to file motions in these courts for competence hearings because they will not get future appointments. Attorneys who start to file motions are stopped by the court coordinators.

Most jurisdictions surveyed were able to complete competency evaluations in about 30 days to six weeks. San Antonio has streamlined and centralized competency proceedings in a single court to cut down on delays. The biggest delay statewide seems to be getting the report back from the doctor to the court, although this may differ in rural areas of the state. Texas law requires that the competence hearing be scheduled no later than 30 days following the evaluation. Observations in several courtrooms, however, showed that even uncontested competence hearings frequently take place at least six weeks after the initial examination. In these cases the physician was asked to step into the holding cell outside of the courtroom and “re-evaluate” the defendant. In the cases observed for preparing this report, this “re-evaluation” took about 10 minutes.

The Code of Criminal Procedure states that competence exams are to be performed by disinterested or impartial professionals. In the counties surveyed however, some of the same doctors who provided treatment in the jails also provided consultation and court testimony. These practices present a conflict of interest and are discouraged by both the American Psychiatric Association and the American Bar Association, but many attorneys and judges interviewed see no problem with this practice. Harris County and Tarrant County seem to have done the best jobs of keeping these roles and functions separated.

Usually one or more mental health professionals are identified in each county to serve as consultants to the court. This means that only a few mental health professionals do the bulk of the competency evaluations for indigent defendants. For example, the Austin-based group Capacity for Justice studied the Travis County Auditor’s records for fiscal years 1997 and 1998 and found that two professionals completed over ninety percent of evaluations.

"The defense attorney can request another doctor. I can approve or deny the request. I frequently deny."

a district judge

Prosecutors and defense attorneys in most jurisdictions used the same few mental health professionals for all of their hearings, although these doctors were clearly acknowledged to be “the state’s doctors.” Even doctors who had developed reputations for consistently testifying in favor of the state were used frequently by defense attorneys. Although most of these doctors were independent contractors, they were frequently referred to as if they worked for the county. In most cases the judges had specified that these doctors be used because the judges knew them and were comfortable with them, but the law clearly allows defense attorneys to request other professionals. They seldom did.

All the counties surveyed appeared to be using qualified experts, either psychiatrists or licensed psychologists, although some experts had no specialized forensic training. Several counties also appeared to be using adult psychiatrists to conduct evaluations of juveniles. An analysis of the mental health provisions of the Juvenile Code (Chapter 55 of the Texas Family Code) and the way these are being implemented in Texas is beyond the scope of this report but need much more scrutiny.

Most attorneys interviewed around the state said they thought that the court-appointed experts were fair, although there were some exceptions. Some attorneys and judges complained about the quality of the reports submitted by the experts, but few of them were willing to hold the experts accountable to following the letter of the law. Texas law, for example, requires that the expert provide two separate reports to the court—one on the results of the competence evaluation and one on whether or not defendants meet the criteria for court-ordered civil commitment. Jurisdictions said they seldom, if ever, received two separate reports from the expert. Examination revealed the reports they received were sometimes quite minimal, only a paragraph or two in length, and contained very little factual information. Some attorneys said there needed to be a panel or pool of qualified experts for attorneys to choose from.

Studies have shown that courts have historically been reluctant to question the reported conclusions of experts relating to defendants’ mental competence. They tend to accept the evaluator’s conclusions at face value, and base competence rulings solely on them.¹

One forensic specialist said there is a tendency on the part of some doctors to find misdemeanants incompetent because this means that they will be sent to a mental institution for a long period of time and a tendency to find felons competent so they could be sent to the penitentiary. Much more study needs to be undertaken to confirm or refute this assertion. There may be a need for a watchdog body to review the quality of reports and testimony.

Unfortunately, some mental health professionals surveyed clearly understand that they are bucking the odds not to rule in favor of the prosecution.

"If you go against what the district attorney (DA) wants, you generally lose. I lost one I thought was incompetent. If the DA doesn't agree with you, he's right."

*Psychiatrist who frequently
testifies in competence hearings*

Court observation clearly showed that the current competency statutes are difficult for attorneys, prosecutors and judges who do not use them frequently. In several uncontested competency cases, it was apparent that the judge, attorney and prosecutor all were unfamiliar with the statutes. They borrowed copies of the statute from each other and read to the jury directly from the statute. In fact, the person most familiar with the proceeding in a number of cases was the examining doctor who had obviously participated in many such hearings. To remedy this and to cope with the volume of hearings, several counties have consolidated their competency hearings in a single courtroom or two with judges or magistrates who specialize in this part of the law.

Prior to the hearings, some attorneys seek out help from other attorneys or from judges or magistrates who conduct many competence hearings. There is no centralized place for attorneys to call when they need assistance with experts or competency matters, but one would be helpful.

Some magistrates said that attorneys do not like handling misdemeanor clients who have mental illness. These attorneys may let the prosecutors do the questioning during the hearing and let the client "hang himself."

"One appointed attorney had a woman client who was out of control. He brought her into the courtroom. She was vulgar and shouting. The attorney put her on the stand. He said he was 'trying to avoid a grievance.' He should not have put her through this. The attorney did not know what he was doing."

Magistrate

Competence to stand trial in Texas is determined by a jury. A number of attorneys and judges said they believe the jury system is cumbersome and unnecessary. Some attorneys and psychiatrists thought competence should be decided by a judge, not a jury, because it was more of an administrative matter. Several judges who specialize in competence hearings said they thought that the competence statute was too complex for a jury to understand. But other attorneys and judges said they believe that juries offered at least some protection to defendants from being "railroaded" into a psychiatric hospital.

"Juries are a safeguard. It hasn't happened very often, but it has happened that a jury goes against what the defense attorney wants and goes with a client who claims to be competent."

Magistrate

Some court officials thought the Legislature needs to amend the statute to forgo jury trials if all the attorneys agree. Others disagree with this idea, believing that this constitutes waiving a jury trial for someone who is not competent to make this decision for himself and lessens the protections for the defendant. This issue needs much more study.

Most attorneys, prosecutors and judges interviewed said they believe the competency restoration programs at the state hospitals to be virtually worthless. They said these programs have little to do with actually treating a person's mental condition and they release people too quickly back to the county jail to continue court proceedings on the alleged offense.

"State hospitals send people back way too quickly. They just give them a little competency course. They decompensate very quickly when they get back to the jail. It's horrible on clients."

Attorney

Many mentally ill defendants deteriorate quickly when they return from the hospital to the jail. Dallas has worked on methods to track the flow of defendants to and from the state hospitals, notify courts and attorneys when defendants return, and reschedule hearings quickly for people returning from state hospitals. Despite the best intentions, however, the complexity of the competency statutes, the backlog of cases, and the structure of the court system sometimes work to deny a mentally ill defendant his "fair day in court."

" Sometimes they bounce back and forth because they either haven't had enough time to stabilize or they decompensate. I had one gentleman on a murder case who went back and forth for five years between the jail and state hospital before proceeding with his case."

Psychologist

Some defendants never regain competence and stay for years at the state hospital or, in the case of mental retardation, at a state school. By law they periodically return to the jurisdiction where their hearing was held for recommitment hearings. These defendants are often appointed different attorneys. Some defendants charged with particularly serious offenses stay locked up in state facilities far longer than they would have if they had pleaded guilty to the offense and been sent to prison. The District and County Attorneys Association is now looking at both competency and insanity statutes.

"There are two guys who have been in the state hospital for 20 years; they just stay incompetent. These guys are so profoundly ill. They come in every year and sometimes testify. They're very grandiose."

District judge

D. Expert Witnesses

People interviewed for this part of the Fair Defense Report had surprisingly little to say about expert mental health witnesses. In fact, in all the jurisdictions surveyed, attorneys and judges repeatedly said that the only time a court will agree to appoint a mental health expert is for competence issues. The exception was for death penalty cases, which are discussed in other sections of the Fair Defense Report. Reasons for the scanty use of mental health experts seem to include attorneys' lack of expertise in finding experts, the lack of credible and impartial experts, and attorneys' lack of skill in knowing how to evaluate and question experts.

There are many occasions where it would be appropriate to use mental health experts for mitigation or sentencing work related to serious felonies, some kinds of sex offenses, non capital murder, other homicide offenses, and other violent offenses. It was apparent, however, that not many appointed attorneys request mental health experts for matters other than competence. In fact, a number of attorneys interviewed said that they had never requested a mental health expert. The fees paid by courts in Texas for experts may be part of the problem—most jurisdictions reported a cap of \$500 except in capital cases—but other factors are operating as well. Many attorneys believe, for example, that juries fear or would impose harsher punishment on persons who claim to be mentally ill, so they are reluctant to raise illness-related issues even though they have reason to believe that they may have played some role in the defendant's behavior.

"Attorneys have a hard time finding anyone new as experts. They have a very hard time finding doctors for expert witnesses. Doctors from the state hospitals don't want to testify."

Staff attorney to criminal courts

Many attorneys said they would need help finding a mental health expert. Consequently, they draw from the same small pool of professionals used regularly by the courts in competency matters, the pool also used by prosecutors. This is unfortunate because many of these doctors have records and reputations for favoring the prosecution. Additionally, the skills required of experts for other matters, such as mitigation, may be quite different from skills needed to evaluate competence or sanity, and indigent defendants may be better served by someone with more specialized knowledge and training than the traditional county psychiatrists.

Most attorneys interviewed appeared to get the names of experts by word of mouth, either from other attorneys or from mental health professionals used regularly for competency matters. Texas is now reviewing a case where the same professional who conducted a defendant's competency evaluation was later used by the prosecution in the defendant's trial and/or punishment proceedings. This practice appears to compromise a defendant's Fifth Amendment right to protection from self-incrimination. Attorneys and defendants would be better served if there was a centralized resource available for attorneys to use to get reliable information about experts and their specialities. This resource would aid attorneys by assisting with motions, giving them lists of credentialed experts, and advising attorneys about the appropriate sequencing of expert testimony.

One particular problem in Texas has been the use of mental health experts to predict a defendant's future dangerousness. Many court officials apparently believe that psychiatrists have the training and skill to predict a client's future dangerousness. One Texas psychiatrist in particular has gained a reputation for being able to establish a defendant's future dangerousness. Both the American Bar Association and the American Psychiatric Association (APA) say experts should not be permitted to predict an individual's future dangerousness. In fact, the APA has said that "even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases."² The APA expelled this particular psychiatrist from its membership because of his continued practice of predicting dangerousness and for testifying about clients he had not personally evaluated. But this doctor is still frequently used by both Texas prosecutors and defense attorneys on a variety of legal matters.

While a much more thorough review of case files is needed to evaluate the performance of expert witnesses, it was apparent from some files that court appointed attorneys did a poor job of questioning and cross-examining experts. Particularly troublesome was the extent to which defense attorneys left unchallenged inappropriately prejudicial statements and conclusory opinions made by mental health experts on legal matters. One frequently used psychiatrist commented on a defendant's "lack of guilt feelings or remorse" during his competency hearing. This comment would seem to be inappropriate for a competency hearing, but the prejudicial statement went unchallenged by the defendant's attorney.

Expert testimony should be based on facts and designed to assist the trier of fact, that is the jury or judge, not to usurp their role. The examples below from the transcript of a recent case in Dallas show how this is not always the case:

Q: (from the prosecutor) Now, did he volunteer any information during your interview?

A: (psychiatrist) He did.

Q: And was this appropriate?

A: It was appropriate in terms of establishing a defense to the charges.

Then later,

Q: What is your opinion as to whether or not (the defendant) is being truthful and honest about the symptoms he's claiming to have?

A: I think that after he got charged with a serious criminal offense, that then he started using his knowledge of his illness to justify, to explain his behavior, and therefore it's faking on his part to avoid responsibility and punishment.

These exchanges went unchallenged by the defense attorney. In fact, he allowed this expert to talk about his expertise in rooting out "fakers," which he said comprised one out of every seven defendants he's examined over the last 35 years.

E. Mitigation and Sentencing

Perhaps the most disappointing finding of the investigation was the apparent lack of work by appointed defense counsel to develop appropriate mitigation evidence and sentencing alternatives for mentally ill defendants. Defense attorneys have the responsibility to represent their clients through adequate preparation for sentencing hearings. This includes exploring evidence that may relate to mitigation as well as crafting sentences that will assist the defendant in avoiding future law violations. Very few attorneys interviewed seemed committed to this role. In fact, most attorneys interviewed said that they never used mental health professionals in the sentencing phase of their work.

"Once you say drugs, they don't hear mental illness anymore."

*Mother of young man with
dual diagnosis*

There are a variety of reasons why mitigation and sentencing work is not going on. These reasons include the attorneys' general lack of understanding of mental illness and treatment options, especially as they relate to individuals with co-occurring substance abuse disorders, the lack of available funding and mental health professionals to assist with this work, and the pressure of moving cases quickly, particularly in county courts. Unfortunately, these factors work together to relegate mentally ill defendants to harsher sentences, longer stays in jail, and frequent revocations of probation. They work to systematically deny mentally ill defendants equal justice under the law. These issues are discussed below.

Many attorneys, judges and prosecutors interviewed lacked a general understanding of mental illness and the options available to treat it. A few attorneys in each jurisdiction were known for developing an expertise in this area or handling cases with mentally ill defendants especially well. Sometimes other attorneys or even judges would go to them for assistance. But most attorneys had no one to turn to for assistance in developing mitigation evidence or sentencing alternatives. In fact, few attorneys interviewed, outside of those involved in capital cases, appeared to use psychiatric assistance of any type.

Few attorneys interviewed had adequate lists of community programs that might serve as alternatives to incarceration or knew who was eligible for community programs. Some attorneys depended heavily on the resources of the probation department for alternative dispositions, but often these resources were not available until after adjudication and a person had been put on probation. No jurisdiction had a centralized place to assist defense attorneys with locating community programs, treatment, and residential alternatives that could serve as alternatives to incarceration.

Particularly tragic was the way that all court officials handled mentally ill offenders who also had substance abuse problems. Studies show that over 50 percent of all mentally ill people within the criminal justice system have co-occurring substance abuse problems³ In fact, drug offenses are frequently the reason that many people with mental illness enter the criminal justice system. Adults and youth with mental illness frequently self-medicate by using drugs or alcohol to mask or cope with the symptoms of their illness, and many go on to develop addiction. Yet defense attorneys and other court officials interviewed were not sure how to handle offenders with dual disorders. In many cases, they appeared to ignore the defendants' mental illness and handle them the way they handle other drug offenses.

Many times inappropriate disposition decisions were made, sending mentally ill offenders to substance abuse facilities or programs that would not accept them due to their mental illness. Many of the state's own programs for substance abusing offenders will not accept people who are on medications for a mental illness. The best community-based programs most communities had were those funded by the Texas Council on Offenders with Mental Impairments (TCOMI). Only a small number of attorneys seem to know of these programs. TCOMI programs in Dallas, Harris, Tarrant, and Travis counties have very good success rates with offenders, although all of these programs are small and need expanding. Clearly more programs and alternatives for offenders with dual diagnoses are needed, but so is additional training for attorneys, prosecutors and judges about dual disorders and appropriate sentencing alternatives.

Mental health professionals who could help attorneys with mitigation work and crafting appropriate dispositions were also in short supply around the state. Pre-sentence investigations (PSIs) and other evaluations are available from probation departments, but many of these are not thorough enough or done in a timely enough manner to assist defense attorneys. The problem is probably more acute for misdemeanants. Dallas officials said that only about 25% of misdemeanants get PSIs because they are pled so quickly. A lot of people are pled out with or without screening or with or without conditions of probation.

Attorneys' access to mental health professionals in capital cases and in crafting insanity defenses is particularly important, even though these cases are few. The U.S. Supreme Court says that indigent defendants are entitled to independent "psychiatric assistance" at the state's expense where sanity is a factor at the trial or when future dangerousness of the defendant is a sentencing issue in capital cases.¹⁶ This consultative assistance includes help in evaluating, preparing and presenting a defense on the viability of the insanity defense and preparing the cross-examination of expert witnesses. Capital mitigation work is discussed in another chapter of the Fair Defense Report. Much more research into case files needs to be done to assess whether or not defense attorneys in Texas have access to sufficient resources for insanity pleas. Most appointed attorneys interviewed thought insanity was not a very successful defense strategy generally and that insanity is particularly poorly understood by juries.

"The general public does not understand mental illness nor do juries, and the legal definition for insanity is so much more narrow than the medical that it is difficult to ever get an insanity ruling."

Mother whose mentally ill son was

One attorney who specializes in mental health cases goes so far as to say that she normally doesn't take any felony cases of seriously mentally ill defendants to a jury. In fact, she gets her client to waive their right to a jury. Her belief is that punishment arguments are usually very ineffective with juries, and they do not respond well. She instead raises mitigating factors with the judge. She prefers to go to the judge with an open plea and a plan for putting the defendant on probation with a safe place to stay, supervision and support. This attorney does exceptional work in crafting sentencing alternatives for her clients and keeping them out of the criminal justice system.

Interviews revealed that many times family members of defendants help the appointed attorney get hospital files, clinic records and mental health professionals to testify. In some cases reviewed, the families of indigent defendants scraped together resources to hire mental health professionals to testify about their family members. One mother interviewed spent \$7,000 of her resources - virtually her life savings - to help a court-appointed attorney build a case so that her

¹⁶ Capacity for Justice, "Competence to Stand Trial Evaluations in Travis County, Texas," unpublished manuscript, (1999).

adult son would not be sent to the penitentiary. It was not clear why more public funds were not made available to the attorney to pay for these services.

Misdemeanants with mental illness are at a particular disadvantage when it comes to sentencing because their cases are moved so quickly. Attorneys and judges do not like to spend time on misdemeanors because the stakes are low and the client is usually sitting in jail. County court judges in several counties referred to competition among judges to dispose of cases quickly and to keep expenditures low. Attorneys who depend on court appointments frequently make decisions not to spend time getting misdemeanants evaluated for mental illness or taking cases to trial but rather to plead them. One jurisdiction said that prosecutors will pursue a stiffer penalty if an attorney decides to take a case to trial rather than pleading it.

In all of the jurisdictions surveyed, most attorneys and judges expected misdemeanants to plead and to plead quickly. Attorneys and prosecutors counsel clients, even those who have a good case, to plead guilty and take probation or a short jail sentence.

"One person sat in jail 45 days on a misdemeanor. I just let them sit until they see the wisdom of the guilty plea."

Indigent mentally ill misdemeanants in all jurisdictions surveyed commonly plead within a few days or weeks of their arrest, are awarded "back time" or "time served" for the days they have already spent in jail, and are released. If they have accumulated court fees or other fees which they cannot pay, they are sometimes allowed to pay off these fees by serving time in jail, in what amounts to "debtor's prison."

Every jurisdiction had some form of "jail chain," "jail call," "jail court," or "plea court" to facilitate quickly pleading out of misdemeanants. Attorneys are appointed to show up at these courts for the day. Many attorneys meet their clients for the first time only a few minutes before their hearings to dispose of the case. For plea bargaining to operate appropriately, there must be effective assistance of counsel and the defendant must enter the plea voluntarily and intelligently, understanding the rights being waived and the consequences of the plea. It is extremely doubtful that these conditions can be assured in the rapid-paced environment of the plea court. Most attorneys and judges express some reservations about this "cattle call" form of justice, but most accept it.

*"When I was in law school and thought about what justice was, it wasn't this."
County court judge*

Many attorneys and other court officials believe that pleading a client to "time served" or a short jail sentence or to probation is more efficient and humane than delaying the case to evaluate different options for the defendant. But in many ways it does a disservice to mentally ill

defendants who need more thoughtful and appropriate dispositions if they are to keep from re-offending.

One real disadvantage of moving misdemeanor cases quickly is that defendants are not able to be linked appropriately to services that help to keep them out of trouble. Court officials in all of the jurisdictions complained of repeat offenders with mental illness or “frequent flyers” who re-offend over and over again by committing the same petty offense. Many of these individuals are homeless or live on the streets. Their mental illness goes unidentified and unacknowledged in the courtroom, and they are seldom linked with services in the community that could interrupt their cycle of offending. Some attorneys and prosecutors may be unaware of the revolving door because they see so many defendants or do so little court appointed work. But the problem is frequently acknowledged by judges, jail staff, court administrators and others. The problem is so common in Dallas, that some attorneys and judges have taken it upon themselves to try to interrupt this cycle of recidivism. They have only been partially successful.

"We see the same people over and over and over again. I want to see some policies or procedures to stop the revolving door."

County court judge

Travis County officials studied this issue of recycling people with mental illness through the courts in order to comply with Article 16.22, Texas Code of Criminal Procedure, that provides for examination and transfer of defendants with mental illness and/or mental retardation out of the jail and into a mental health facility. Between January 1, 1998 and September 1, 1998, the total number of offenses referred to county and district courts involving defendants with mental illness or retardation was 1,283. Twenty four percent were repeat offenders during these eight months. This number is not overwhelming, but it points to a need for more effective and thoughtful case dispositions.

The result of an attorney’s lack of attention to mitigation and crafting an appropriate sentence is that mentally ill defendants frequently get stiff sentences. Much more study needs to be done to determine if mentally ill defendants routinely get stiffer sentences than their non-mentally ill counterparts. However, there are indications that this is the case.

For example, court officials in all jurisdictions said that mentally ill people are poor risks for probation and they tend to get jail time rather than probation. This may be due to the transient nature of the defendant’s lifestyle, but may also be due to the prejudicial belief that mentally ill people are more prone to violence and therefore need to be incarcerated.

The ABA says that “mentally ill or mentally retarded convicted offenders as a class cannot and should not be considered dangerous and hence subject to automatic sentences to imprisonment.”¹⁷ It maintains that mental illness or mental retardation should be considered as a mitigating factor,

¹⁷ ABA Criminal Justice Mental Health Standards, 473, (1989).

and that an offender should not be denied probation solely because the offender requires mental health or mental retardation treatment or services.¹⁸ This is not how the law is playing out in Texas.

Studies by the U.S. Department of Justice and others found that, on average, prison inmates with mental illness serve 15 months longer than their non-mentally ill counterparts. Likewise mentally ill defendants tend to sit longer in jails before going to court. A few defense attorneys interviewed said they believed that mentally ill defendants spent longer in jail than their non-mentally ill counterparts, but most said they didn't think so or didn't know. Only Bexar County had evaluated its system to see if this was true. Bexar County officials earlier this year looked at jail release statistics from November 1999 and found that 59% of inmates with mental illness are released from jail within 30 days compared to 80% of inmates who are not mentally ill. During a five-month period from October 1999 through January 2000, they found that inmates with serious mental illness spent on average 5 to 24 days longer in jail than other inmates.

Last year, Hidalgo County reached a settlement in a class action suit brought by a mentally ill inmate in the jail who had been continuously detained for almost four years awaiting disposition on a simple assault case against him while being denied treatment for his illness.¹⁹

Studies show that children with serious emotional disturbance likewise sit longer in detention settings and state correctional facilities than do youth who are not disturbed. In FY 1999, the Texas Youth Commission reported that youth diagnosed as having an emotional disturbance stayed an average of 1.4 months longer in their facilities than did youth who were not diagnosed as having a mental illness. Youth who were receiving specialized treatment stayed an average of 2.6 months longer.

"You know where mentally ill kids in Texas go, don't you? To TYC."

Director of a juvenile probation department

Of course, sometimes the long waits in jail or detention centers are beyond an attorney's control. Many times mentally ill inmates have to wait in jail for a professional to assess them or to finish a treatment program. Some mentally ill individuals distrust mental health professionals or fear being institutionalized, so they will not cooperate with mental health staff in the jail who may be trying to expedite their cases. Often, mentally ill youth and adults are unable to comply their behavior to the requirements of the jail or prison and so incur additional infractions that may prolong their stay.

"We have as many mentally ill people here as at the state hospital."

Jail psychiatric worker

¹⁸ *Id*

¹⁹ *Zuniga v. Hidalgo County*, No. M-95-034, (S.D. Tex.)

Mental illness also plays a role in whether or not a person's probation or parole is revoked. In fact, one state probation official said that mentally ill offenders are more likely both to get technical violations and to be revoked than are other offenders.²⁰ Of course, there is tremendous variability among judges regarding what guidelines they use for revocations. Some attorneys report that when defendants have a mental illness, some courts are hesitant to discuss revocations. They would rather leave clients on probation, because the threat of revocation is used to motivate or push the clients to stay out of trouble and to keep their clinic appointments. Some mental health professionals also said that the threat of revocation helps the client to stay compliant with treatment.

The work and diligence of some defense attorneys interviewed resulted in some mentally ill defendants being given special conditions of probation or being put on specialized probation caseloads at the time of sentencing. While some judges are more likely than others to impose special conditions, all jurisdictions said that judges were happy to add special conditions to probation when requested or to amend sentences. But interviews also revealed that defendants with mental illness are often given straight probation even when attorneys and judges know they cannot comply. They are set up to fail. This is particularly a problem, again, for defendants who have a substance abuse problem along with their mental illness or mental retardation. Both serious mental illness and addiction are chronic, relapsing illnesses.

"Some judges do not make allowances for this population and expect them to be clean from the date of probation forward. The same expectations are made of developmentally disabled as of regular clients."

Specialized probation officer

In the end, some defendants with mental illness are left on their own to advocate with probation officers and judges.

"When I first came out of jail I was given community work, but my medication was so unbalanced, I really couldn't do it. I had my doctor write me a note."

²⁰ Conversation with Bonita White of the Criminal Justice Assistance Division, Texas Department of Criminal Justice, October 16, 2000.

CHAPTER 4

RECOMMENDATIONS

1. Strengthen and standardize pre-trial release programs to achieve early identification of mental illness.
2. Develop a method for training attorneys around the state on mental illness and mental retardation. Training should include signs and symptoms of mental illness and mental retardation, skills for communicating effectively with defendants, dual diagnosis issues, and Texas statutes that relate to mentally ill and mentally retarded offenders.
3. Promote the development of a basic educational course to be offered in all Texas law schools and an advanced education course for attorneys who want to specialize in the representation of persons having mental illness.
4. Promote incentives for attorneys to accept cases of mentally ill and retarded defendants, including perhaps a higher rate of pay or free CLEs.
5. Establish a watchdog group to read and evaluate the quality of competency reports and expert witness testimony.
6. Establish a centralized place where attorneys could get assistance with competency issues, information about expert witnesses, assistance or referrals for mitigation work.
7. Develop a regional capacity to assist defense attorneys with locating diversion options, alternatives to incarceration and sentencing alternatives.
8. Encourage county probation departments and the state to develop facilities and programs for offenders with dual diagnoses.
9. Support expansion of the special needs offender programs of the Texas Council on Offenders with Mental Impairments.
10. Encourage the State of Texas to conduct further study into whether mentally ill defendants get harsher sentences than other defendants, ways to improve the competency statutes, the effectiveness of policies and practices for juveniles with mental health disorders, the resources available to defense attorneys for securing experts and mitigation help, and ways to expand the pool of mental health experts.
11. Encourage the State of Texas to enforce laws currently on the books related to jail screening for mental illness and mental retardation, jail assessment, initiation of public recognizance bonds, and the sharing of information between mental health professionals and court officers.

PART IV

REPRESENTATION OF INDIGENT CHILDREN IN JUVENILE COURT

CHAPTER 1

INTRODUCTION

There is a growing concern nationwide about the quality of legal representation afforded indigent defendants. Citizens are uneasy when they hear about a lawyer falling asleep at counsel's table during a capital case, lawyers who do not fully investigate a case or talk to witnesses, or lawyers who make no attempt to consult with an expert to sort out complex mental health issues. Concepts of fairness and justice are deeply rooted and fundamental to our democracy. People are troubled when presented with evidence that poor people don't get their fair and full day in court; they are shocked by the increasing reports of innocent people being incarcerated or sentenced to death. Equal access to justice is an important American value. Ensuring due process to all citizens, regardless of financial status, race, or age, requires constant assessment of our criminal and juvenile justice systems.

Concerns about indigent defense are greatly heightened when we examine the way in which children are processed through the justice system. In 1967, the United States Supreme Court held in the seminal case *In re Gault*¹ that children are guaranteed important due process rights under the United States Constitution. These due process rights include the right to a full and fair hearing in delinquency proceedings and the right to be represented by counsel. Recognizing the critical role that counsel plays for a child accused of a crime, the United States Supreme Court noted: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it."²

After *Gault*, the states, to varying degrees, began to address the concerns expressed in that opinion and numerous studies addressing the treatment of youth in the criminal justice system. On the national level, Congress, citing concerns about increases in juvenile delinquency and the need to safeguard children's rights, passed the Juvenile Justice and Delinquency Prevention (JJDP) Act in 1974. This Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, whose charge included development of national juvenile justice standards. These standards, published in 1980, requires that children are represented by counsel in all proceedings arising from a delinquency action, beginning at the earliest stage of the decision process.³ The Institute for Judicial Administration American Bar Association Joint Commission on Juvenile Justice Standards developed similar standards that same year.⁴

¹ 387 U. S. 1 (1967).

² 387 U. S. 1, 36 (1967).

³ National Advisory Committee for Juvenile Justice and Delinquency Prevention, July 1980, "3.132 Representation by Council—For the Juvenile," *Standards for the Administration of Juvenile Justice* (Washington D. C.: Office of Juvenile Justice and Delinquency Prevention, U. S. Dep. Of Justice).

⁴ IJA-ABA Juvenile Justice Standards for Relating to Counsel for Private Parties.

Studies concerning the legal representation of juveniles have found that, despite the constitutional requirements set forth in *Gault*, and the juvenile justice standards, juveniles in many regions of the country are receiving inadequate assistance of counsel in delinquency proceedings. When the JJDP Act was reauthorized in 1992, it re-emphasized the importance of lawyers in juvenile delinquency proceedings, specifically noting the inadequacy of publicly funded defenders to provide individualized justice. In that same year, in *America's Children at Risk: A National Agenda for Legal Action*, the ABA's Presidential Working Group on the Unmet Legal Needs of Children and Their Families also called for the juvenile justice system to fulfill children's right to competent counsel.

In 1995, the American Bar Association released a report that examines the severe gaps in the accessibility and quality of legal representation for children across the nation.⁵ This was the first systematic national assessment of current practices of juvenile defense attorneys. While the report notes that some attorneys vigorously and enthusiastically represent their clients, it also concludes that such representation is not widespread, or even common. Some of the problems facing juvenile defenders include: (1) excessive caseloads; (2) lack of resources for independent evaluations, expert witnesses, and investigatory support; (3) lack of computers, telephones, files, and adequate office space; (4) inexperience, lack of training, low morale, and salaries lower than those of their counterparts who defend adults or serve as prosecutors; and (5) inability to keep up with rapidly changing juvenile codes. The report raises serious concerns that the interests of many young people in the justice system are significantly compromised.⁶

The year 1999 marked the centennial of the Juvenile Court, inspiring judges, advocates and other stakeholders nationwide to reflect on the changes and challenges faced by the Juvenile Court over the past century. Stakeholders began taking a renewed look at the way in which legal services are provided to indigent children. For example, Colorado, Georgia, Illinois, Kentucky, Louisiana and Oklahoma have completed, or are in the process of conducting, statewide assessments of indigent defense services for juveniles. Preliminary reports reveal serious deficiencies and major systemic barriers that impede the delivery of justice for children.

Continued examination of the provision of legal services for children is especially urgent as states continue to emphasize punishment by incarceration rather than prevention and rehabilitation. Over the last few years, 47 states and the District of Columbia have amended their juvenile codes to enact more punitive sanctions, lengthen sentences and expand the requirements to send children to adult courts and prisons. Today in this country, it is not unheard of for children to receive life — and even death — sentences for acts committed while they were under the age of 18. Although children face higher stakes today in the justice system than ever before, sufficient resources have not been devoted to providing defense attorneys with the necessary tools to respond to the complexities of the cases before them and the changing landscape of juvenile law. This inequity has severe consequences for youth in the justice system and society as a whole.

⁵ See generally Puritz, et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, 1995.

⁶ See generally Puritz, et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, 1995.

One consequence of the systemic flaws is the pervasive disproportionate representation of non-white youth in the juvenile justice system. A recently released study reveals that the justice system responds more punitively to minority youth than to white youth charged with similar offenses.⁷ This occurs at every stage of the system, including the filing of charges, detention before trial, transfer to adult criminal court, commitment to juvenile facilities, and incarceration in adult prisons. The report further states that when racial/ethnic differences are found, they tend to aggregate as youth are processed through the justice system, so that minority youth have an enormous “cumulative disadvantage” when it comes to justice in this country.⁸

Another consequence of these systemic failures is that children are often treated like little adults, abandoning what we know about the universal principles of child and adolescent development. Adolescents think differently from adults.⁹ Research demonstrates that adolescents develop gradually and unevenly and that chronological age and physical maturity are unreliable indicators of development.¹⁰ Adolescence is a period of dramatic cognitive, emotional, physical and social development. The average teenager can exhibit mature and independent behavior one minute and an instant later behave in an emotionally childish and impulsive manner.¹¹ When it comes to cooperating with authority figures, children, unlike adults, are especially vulnerable, suggestible, irrational, and eager to please. Children are very susceptible, for example, to high-powered police interrogations, which can result in false confessions.¹² The challenges faced by children in the justice system are frequently compounded by mental health problems, disabilities and special education needs which often go untreated.

The juvenile defender plays an essential and expansive role in assuring justice for children. In addition to the responsibilities of presenting a defense to the delinquency charge, juvenile defenders must gather information regarding their clients’ individual histories, families, schooling, and community ties in order to assist courts in diverting appropriate cases out of court, preventing unnecessary pre-trial detention, avoiding unnecessary transfers to adult court, and ordering individualized dispositions. Juvenile defenders have a critical role in protecting their clients’ interests at every stage of the proceedings, from arrest and detention to pretrial proceedings, from adjudication and disposition to post-disposition matters.

⁷ Building Blocks for Youth, Youth Law Center, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*. April, 2000

⁸ *Id.*

⁹ D. Keating, *Adolescent Thinking*, in *At the Threshold*, 54-89 (S. Feldman et al. Eds., 1990); W. Overton, *Competence and Procedures*, in *Reasoning, Necessity and Logic* 1-32 (1990).

¹⁰ See Beyer, Marty Ph.D., *Kentucky Children’s Rights Journal/Vol. VII, No. 1*, Spring, 1999.

¹¹ *Id.*

¹² See Ceci, Stephen J. Ph.D., *Why Minors Accused of Serious Crimes Cannot Waive Counsel*, 8 *Court Review* - Winter 1999.

The provision of competent counsel and adequate defense services necessary to ensure fair treatment for children is essential to a fair and balanced justice system. There is currently a nationwide crisis in indigent defense for juveniles. Too many young people are churned through the system and are often left literally defenseless. More often than not, these youngsters are low income, children of color. The first step in remedying this crisis is to identify with specificity some of the institutional and systemic barriers that prevent children from receiving equal access to justice. We have an obligation to protect children from the harm caused by a defective system. Otherwise, we are selling justice short.

TEXAS APPLESEED FAIR DEFENSE PROJECT

Texas, unlike many other states, has no uniform system for the appointment of counsel for children in the justice system. The state, which consists of 254 counties, leaves to each county the burden of funding indigent juvenile defense systems. Although the state mandates the appointment of attorneys for children at certain stages of delinquency proceedings, the state does not provide regulation, oversight, or funding for indigent juvenile defense systems.

While some people contend that the Texas criminal justice is the least fair and most inefficient in the country, others argue that such criticisms are unjustified and anecdotal. The one point on which everyone agrees, however, is that there is not enough comprehensive, systemic information available to fully and fairly evaluate the delivery of indigent defense services in Texas. This study was designed to begin the process of filling the information vacuum on issues pertaining to the legal representation of indigent children in Texas. Specifically, the purpose of this report is to:

- Identify the ways in which the state of Texas provides legal representation to poor children in the justice system;
- Determine how this legal representation is funded;
- Pinpoint the characteristics of the system which encourage or impede lawyers' abilities to serve their juvenile clients; and
- Gauge the access children have to competent legal representation.

“ There hasn't been a trial in juvenile court in this county in over two years... ”

Texas juvenile court judge

Texas Appleseed, a not-for-profit non-partisan law center based in Austin, developed its overall Fair Defense Project to conduct the first comprehensive on-site study of the many different procedures under which indigent defendants receive counsel throughout Texas.

The ultimate objective of the Texas Appleseed Fair Defense Project is to ensure that our adversarial system of criminal justice fairly and efficiently enforces the law without being skewed to disadvantage the poor. Our entire society benefits when a defendant who cannot afford a lawyer is provided counsel who assures adequate participation in the criminal justice system. Not only does this safeguard society's collective ideal of equal justice, it also ensures that both the verdict and any sentence are just, definitive and respected.

Recently, the question of the adequacy of indigent defense in Texas has been raised in several contexts in the state. In 1999, a legislative effort to address the timing and method of appointing counsel failed. In September 2000, a report issued by the State Bar of Texas Committee on Indigent Legal Services to the Poor in Criminal Matters concluded that statewide, indigent defendants in Texas are not receiving adequate representation.¹³ The report identifies several barriers to effective representation of adult indigent defendants. These barriers include inadequate compensation, widespread pressure to plead cases quickly, and a failure to impose or enforce standards for representation. Like everywhere else in the country, the Texas juvenile justice system operates in the shadow of the overall criminal justice system. Failures in the adult criminal system are foreshadowed and even exacerbated in the juvenile justice system.

The juvenile justice system is our first and best line of defense to divert children away from a pattern of adult crime. In recognition of this, Texas Appleseed secured the collaboration of the American Bar Association Juvenile Justice Center and other child advocacy organizations to assist in this project. The need for a child-focused assessment was reinforced, in part, by the alarming number of complaints made to national legal and child advocacy organizations concerning the unfair treatment of children and abusive practices in the Texas justice system. Calls for help came from parents, children, relatives, juvenile and criminal justice professionals, teachers, corrections officers, mental health professionals, media, citizen advocates, clergy, medical doctors, and many others. Stories abound of children who never speak to, or even see, their lawyers save for moments immediately before a court hearing and of judges who prevent counsel from filing motions on behalf of children because it takes up too much court time.

An unfortunate, but concomitant fact to consider is that Texas leads the nation in imprisoning its citizens. According to a United States Department of Justice report, Texas now has the nation's largest incarcerated population under the jurisdiction of its prison system.¹⁴ Texas' penal system likewise leads the nation with an annual average growth rate of 11.8%, approximately twice the annual average growth rate of 6.1% documented for all state prison systems.¹⁵ Today there are more individuals in Texas under criminal justice control than the entire populations of Vermont, Wyoming, Alaska, or Washington, D.C. A recent article in the

¹³ Butcher, Allan K., Moore, Michael K., *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters (September 22, 2000).

¹⁴ Beck, Allen J., Ph.D., USDOJ, Bureau of Justice Statistics Bulletin, *Prisoners in 1999* (August 2000).

¹⁵ Beck, Allen J., Ph.D., USDOJ, Bureau of Justice Statistics Bulletin, *Prisoners in 1999* (August 2000).

Washington Post noted, “If Texas were a separate nation, it would have the world’s highest incarceration rate — well above the United States at 662 per 100,000 or Russia’s 685.”¹⁶

Juvenile incarceration rates are also high. In 1997, with 6,936 children committed to residential placements, Texas was second only to California for the number of children incarcerated in juvenile facilities.¹⁷ California, Florida, and Texas collectively account for over 30% of juveniles committed or detained.¹⁸ Over 75% percent of the children incarcerated in Texas in 1997 were children of color.¹⁹ More recent figures reflect similar patterns: of the 5,524²⁰ children in Texas Youth Commission (TYC) facilities in 1999, 75% were either Hispanic or African-American.²¹ Over 30% of all juvenile offenders on death row in the United States are in Texas.²² In 1999, the number of Texas juveniles in TYC facilities exceeded the adult prison populations of over a dozen states.²³ Most of the incarcerated youth in Texas are serving sentences for non-violent offenses.

Additional data of grave concern reflect an increase in incarceration of children due to probation violations or parole revocations. In 1999, there were 38,996 children under the supervision of probation departments in Texas.²⁴ According to the Texas Criminal Justice Policy Council, parole revocations resulting in commitment to TYC increased by 161% from 1994-1999.²⁵ Fifteen percent of the youth committed to TYC in 1999 were committed due to a parole revocation. Of those, 88% were due to technical violations or the commission of a misdemeanor offense.²⁶ TYC recently reported that 70% of children incarcerated in secure facilities are

¹⁶ Raspberry, William, Op-ed: *Texas True and False*, THE WASHINGTON POST (August 28 2000).

¹⁷ Sickmund, M. and Wan, Y., OJJDP, *Census of Juveniles in Residential Placement: 1997 Datebook* (1999).

¹⁸ Anyder, H. and Sickmund, M., OJJDP, *Juvenile Offenders and Victims: 1999 National Report*, p.189.

¹⁹ *Id.*, p. 194 (1999).

²⁰ Reichers, Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005*, p.6 (June 15, 1999).

²¹ TYC Commitment Profile Fiscal Years, 1995-1999.

²² Death Penalty Information Center, 1320 18th Street, NW, Washington, D. C. 20036.

²³ Beck Allen J., Ph.D., OSDPJ, Bureau of Justice Statistics Bulletin, *Prisoners in 1999* (August 2000).

²⁴ Reichers, Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005*, p. 6 (June 15, 1999).

²⁵ Reichers Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005*, p. 5 (June 15, 1999).

²⁶ *Id.*, at 9.

committed after probation violations.²⁷

Given the high stakes that children in Texas face today, access to counsel and quality of representation is more crucial than ever before. This study hopes to provide a starting point for new reforms and initiatives that will improve the quality of juvenile indigent defense.

METHODOLOGY

Texas Appleseed and the American Bar Association Juvenile Justice Center, with support from the Southern Poverty Law Center, convened a team of national experts to conduct an investigation of juvenile indigent defense in the state of Texas. The Juvenile Team consisted of practitioners, academics, clinicians, advocates, former public defenders, and managers of defender organizations.

The overall Texas Appleseed Fair Defense study is based on extensive on-site interviews, courtroom observations, comprehensive review of relevant literature, and an analysis of material data in a representative sample of 23 Texas counties. The 23 county sample, which covers over 60% of the state's population, was constructed to include a representative cross-section of large, medium and small counties, and a cross-section of the state's geographic regions. The juvenile investigative team concentrated its on-site work in a sub-sample of 14 of these 23 counties, with supplemental inquiry in the remaining 9. The 14 juvenile on-site counties include over 54% of the state's population and account for 60% of TYC commitments made in 1999.²⁸ The 23 counties (including the 14 juvenile on-site counties) are listed in the table below.

At each site, Juvenile Team members observed court proceedings, toured court and detention facilities and conducted interviews with juvenile defense attorneys, prosecutors, judges, probation officers, court coordinators, court administrators, court auditors, and court clerks. Juvenile Team members also interviewed children, parents, child advocates, detention center staff, social workers and juvenile board members. In some instances, there was follow-up through telephone interviews. The Texas Appleseed Fair Defense study is designed to examine the basic structure of Texas' wide variety of indigent defense systems rather than focus on specific individuals or counties. The ultimate goal is to identify systemic barriers to fair defense, describe consequences of those barriers and report ways in which judges, attorneys and counties have attempted to overcome them. All the information gathered has been compiled, synthesized and analyzed to produce the following findings and recommendations.

²⁷ TYC Commitment Profile Fiscal Years 1995-1999; Texas Juvenile Probation Statistical Report (1999), p. 17.

²⁸ See TYC Commitment Profile Fiscal Year 1995-1999.

CHAPTER 2

RESEARCH FINDINGS

The entire room was chaos. At about 9:15 a.m., the probation officer began calling out names and asked if the responding child had a lawyer. If not, he'd place the child's case folder in one of several stacks. The jury box was full of lawyers waiting to be appointed and the district attorney and several other lawyers milled around a large table in front of the bench. Once the probation officer finished the call, he and another man stood at the bench and reviewed each case with the judge; the judge then called a lawyer from the jury box. The lawyer picked up the file and reviewed it. About 5 or 10 minutes later, the appointed lawyer would yell out the child's name and go talk to him – usually in the hallway, but sometimes right in the courtroom. The lawyer would then return with his client and approach the far left side of the bench. There, a clerk would swear in the child, inform him of his rights and the child would enter a plea. The child would then move toward the right to another clerk and sign a form. The child would then move further right, stopping in front of the judge, at which time the judge would ask a few questions to determine whether he thought the child understood his rights; the judge would sometimes ask about the facts of the offense before accepting the plea. Lastly, the judge would sentence the child. Most "hearings" lasted between 2-10 minutes. A court appointed attorney came up to me at one point and said, "It may look like chaos in here but it's really a well-oiled machine."

Court observer in an urban county

A. THE ROLE OF COUNSEL

1. Arrest

Although children are issued warnings by a magistrate before police may take a formal statement from them, these warnings are routinely phrased in adult language that is difficult for a child to understand. Interviews confirm that few magistrates and justices of the peace (who are not required to be, and usually are not, lawyers) engage in any meaningful process to ensure that a child is aware of his right to counsel and right to remain silent. Most attorneys and some judges agree that the presence of a lawyer at this critical stage would better protect the children in the system.

Significant Stages of the Juvenile Justice Process

The Texas Family Code provides that children must be represented at most stages of delinquency proceedings. The following is a partial listing of significant stages of the juvenile justice process where representation by counsel is an issue.

Arrest: A child is not entitled to, nor does he receive, counsel when detained by police.

Detention: Following arrest, some children are taken to a probation officer who is charged with making the initial determination of whether the child should be detained. During this interview, the child is not represented by counsel.

Detention and Probable Cause Hearing: Texas law requires that a hearing be held within 48 hours if a child is detained and taken into custody. The law does not require representation at this hearing,; however, a minority of jurisdictions provides counsel at this hearing.

Review Hearing: If a child's custody is continued following the detention and probable cause hearing, the court is required to conduct a continued custody review hearing within ten days of the initial hearing. Children are entitled to a lawyer at this time. Judges in many of the counties visited made sure that every child was represented at the review hearing, even if it meant temporarily appointing an attorney other than the one assigned to the case. Team members observed review hearings in three courts at which children appeared without counsel. Attorneys in two additional jurisdictions stated that children are not always provided attorneys for these hearings.

The court must hold review hearings every ten days, unless the child and his attorney waive this judicial review. In at least two jurisdictions, probation officers routinely obtain waivers of these hearings from the children.

Filing of the Petition: The petition is the formal charge against the child. In some jurisdictions, the court waits until the prosecutor has filed a petition before assigning counsel. However, judges may impose pre-trial conditions, such as detention, curfew, counseling, assessments and drug tests before the petition has been filed.

Adjudicatory Hearing: A child is entitled to an adjudicatory hearing within ten days of the filing of the petition. Counsel can waive the ten-day requirement, but if there is a hearing, the child must be represented by counsel at that time. A child has a right to a jury trial.

Disposition: Dispositional (sentencing) hearings may occur on the same day as the adjudication. Children must be represented by counsel at this hearing. Waiver of counsel is not allowed.

Post-Disposition: Children are not entitled to an attorney post-disposition. A child has a right to an appellate lawyer if he has a "bona fide" claim on appeal.

2. Detention

An officer from the department of probation makes the initial detention determination. A probation officer, who then decides if the child should be released to the custody of his parents or guardians or held in the detention facility pending a detention and probable cause hearing before a magistrate or judge, interviews children and sometimes their parents.

3. Detention and Probable Cause Hearing

The detention and probable cause hearing is the first instance where a judge or magistrate reviews the decision of the probation officer. The initial detention decision can have significant consequences. A detained child is more likely to be placed out of home at disposition, in part because he is less able to assist in his defense, he may be viewed by successor judges as

“troublesome” and he is denied the opportunity to demonstrate positive behavior in his home environment.²⁹ In at least two jurisdictions the judge regularly asks the child to speak at the initial detention hearing, although an attorney is not appointed to counsel the child. In many instances the children make inculpatory admissions to the court. Uncounseled statements are generally avoided in the jurisdictions visited that have public defender systems; in these counties, all children are represented at the initial detention hearing. In another county, an “attorney of the day” is appointed to represent all children in detention hearings on a given day or in a given week.

4. Review Hearing

The review hearing provides the judge an opportunity to revisit the initial detention decision, although continued custody is typically the ruling of the court. To obtain release of his client, counsel must provide the court with information that demonstrates that release at this stage is in the interests of the child and the community. To meet this burden, the attorney must conduct an investigation into the child’s background and home life and advocate for release. As discussed later in this Report, attorneys are generally not compensated for such an investigation. Researchers conducting this study rarely witnessed the release of a detained child. However, it was reported in one county that the presiding judge almost uniformly orders the release of detained minors at either the first or second review hearing. Even when an attorney has filed an appearance, children sometimes appear at detention review hearings without an attorney present. In one jurisdiction where this is reported to be a common occurrence, the reasons given for this lack of counsel included, “the kid isn’t going to get out anyway” and “it’s not worth the fifty bucks to go all the way out there.”

5. Waiver of Hearings

A child and his attorney are permitted to waive the detention review hearings. A few counties make it a practice to hold review hearings every ten days, however it is common for the child and his attorney to waive these hearings. In some counties, probation officers routinely obtain waivers from children. The child is thus deprived the benefit of consulting with the lawyer at the time he is being asked or instructed to waive this important right. Sometimes the attorney actually requests that the probation officer obtain the waiver. Other times, the probation officer takes it upon himself to get the waiver and then forward it to the attorney for his signature.

In those counties where waiver is common, there usually is not in place a procedure to alert the judge when a child has been in custody for a long time. Thus a child can remain in custody for extended periods of time, without a petition on file, unbeknownst to the judge. In one county, the presiding juvenile judge avoids this by requiring the department of probation to give status reports on the children, informing him of how long a child has been in detention and the status of his case.

²⁹ Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative - Pathways to Detention Reform* (1997).

6. Filing of the Petition

It is difficult to discern the average length of time it takes for a petition to be filed. There are a few counties in which the court requires that the petition be filed within a certain number of days, however most do not have such a rule. The lack of a uniform, reasoned policy results in the imposition of pre-trial conditions—some of which can be quite onerous—for lengthy periods of time before a child is ever charged. Moreover, attorneys in at least two counties complained of children being held in custody indefinitely awaiting charges. One attorney commented, “Weeks can pass between the time that the kid gets detained and a petition is filed. The kids have no recourse because the attorneys that are purportedly appointed don’t show up at the review hearings and the kids don’t know that they can request release.” One child interviewed, who had not been charged, reported that he was told that he was being held for investigation. At the time of his interview, he had been in detention for forty-two days and had not been appointed an attorney, despite his repeated requests for one.

7. Adjudication

Guilt or innocence is determined at the adjudication hearing or trial. In an overwhelming majority of jurisdictions visited, attorneys report that they rarely, if ever, take a case to trial. Instead, the vast majority result in guilty pleas. One jurisdiction even reports that it has not had a juvenile trial in the county in two years. Unfortunately, it is not possible to determine the exact number or rates of guilty pleas in Texas juvenile courts, because there is no standardized official source that reliably collects or records that information. In the counties examined, estimates offered by judges, lawyers, and probation officers of the guilty plea rates ranged from 91% - 99%. The plea rate in one county was estimated to be considerably lower. These estimates are especially troubling because such guilty pleas are often entered into after little consultation with the client and minimal, if any, investigation or other representation. In many of the jurisdictions visited judges, lawyers and probation officers estimate that more than 75% of cases ended in guilty pleas at the first setting, often after the attorney had just met the child client that same morning.

8. Disposition

At the dispositional hearing, the judge is charged with making a determination as to whether public safety or the child’s need for rehabilitation requires the imposition of a disposition (sentence). The judge has the option of forgoing disposition and dismissing the child from the court’s jurisdiction; however, few attorneys ever make such a request of the judge. In making a dispositional decision, the judge is supposed to consider a number of factors, including the needs of the child, his particular circumstances and characteristics, and the nature of the offense. Possible dispositions include fines, community service, probation with various conditions, incarceration, and out-of-home placement. In a majority of jurisdictions, the dispositional hearing is held on the same day as the acceptance of the plea. Very few attorneys present additional evidence at this hearing, but instead the majority report that they rely on the recommendations of the probation officer. Cited reasons for this reliance include: 1) attorneys are not usually paid for work on dispositional issues; 2) attorneys believe that the probation officers know better than they

do what is appropriate for the child; and 3) attorneys complain that there are not enough dispositional alternatives available.

9. Post Disposition

Attorney appointments generally end at disposition. In contrast with prosecutors, defense attorneys rarely file Motions to Modify Disposition or Conditions of Probation. Attorneys have no incentive to track the progress of their former clients, as they are not paid for follow-up work. Attorneys readily agree to probation for a child, yet rarely participate when the conditions are set or monitor the child's progress to determine whether his needs are actually being met. Many attorneys report that they have never been to a juvenile prison or boot camp.³⁰ Juvenile investigators were disturbed by the conditions they witnessed in three detention centers. The failure of attorneys to visit children in secured facilities increases the likelihood that such facilities are operated in an illegal manner.

10. Judges and Magistrates

Depending on the county, the judge of the juvenile court may be a district judge, a county court at law judge or a constitutional county judge. In addition, magistrates, referees, and masters may also preside over certain juvenile proceedings. Justices of the peace are typically not licensed attorneys, but are charged with the responsibility of admonishing a child of his rights before he gives a statement to the police, as well as making a determination that the child has made a knowing and intelligent waiver of those rights. Constitutional county judges are not required to be licensed attorneys, but are permitted to make legal decisions in delinquency proceedings. In some counties, lawyers that accept appointments sometimes serve as referees in detention hearings.

While a child has a right to have a district judge preside over most hearings, those rights are uniformly waived. A child cannot, however, waive his right to have a judge preside over hearings that can potentially result in incarceration in adult facilities. Juveniles are entitled to jury trials in Texas.

B. THE APPOINTMENT OF COUNSEL IN JUVENILE CASES

1. Overview

The State of Texas does not have a uniform system for the appointment of counsel for children in the justice system. Each of its 254 counties essentially has unrestricted authority to develop and implement its own procedures for the appointment of counsel. There does not appear to be any state oversight - nor in most cases even local oversight - of the process. Different juvenile courts within a single county often have different appointment procedures in place. In

³⁰ Site visits provide initial confirmation of prior reports of institutional abuses of incarcerated children. Closer inspection of these facilities is critical.

fact, some judges are unaware of how their colleagues in nearby courtrooms select attorneys for assignment. Juvenile judges reported that they rarely consult one another on the process they employ or the attorneys they select. More often than not, the specifics of the appointment systems are not recorded and changes are made without notice. Perhaps the single most common characteristic among the varying procedures is that each judge has seemingly unlimited discretion in how he chooses and compensates counsel. Each judge has his own selection criteria, appointment procedures, and compensation rates and structures.

2. Qualifications

No county in the sample has established or imposed uniform qualifications for attorneys to represent juveniles in delinquency court; nor has any county set minimum performance standards for juvenile attorneys. Only a few of the counties demand a minimum level of experience as a prerequisite to appointment. In the overwhelming majority of jurisdictions, there is only one criterion to be placed on the appointment list: an active attorney's license. Although some judges purport to have additional requirements that ensure competence, little evidence was found to support this claim.

Of the counties studied, two jurisdictions have confirmed procedures by which the appointing judge interviews attorneys in depth to determine their competency and character. In one of these counties, the judge requires attorneys that are new to the jurisdiction to submit a resume, then appear for an interview that generally last forty-five minutes. At that time, the judge attempts to learn about the lawyer and outline to the attorney her expectations. The judge reports that she rarely, if ever, declines an application. However, she also reports that she first assigns attorneys to minor cases so as to have an opportunity to evaluate their advocacy skills.

The second county with a confirmed application procedure employs an attorney of the month to represent all non-detained children. The judge solicits attorneys to apply to serve as attorney of the month for a fixed sum. Attorneys are considered either because of their reputation as excellent defense lawyers or upon recommendation by another judge or attorney. The judge then interviews the attorney. Once an attorney is selected, the judge monitors his performance. These attorneys report much lower plea rates than the remainder of the counties. It was confirmed that one attorney was removed from the appointments list due to an excessive plea rate. Some of the attorneys that serve as the attorney of the month are capital litigators – their experience with issues relating to mitigation provides them with insight into dispositional issues, which is viewed by some as the most critical aspect of representation of a child.

Many judges state that an interview or formal selection process is unnecessary because they are able to assess an attorney's performance in court. Many judges and attorneys tend to view juvenile law as "easy law." One judge observed, "after all, it's not like these are capital cases or anything." Many see juvenile appointments as a way for new attorneys to "cut their teeth" and get some business. In numerous counties, juvenile court appointments are used as the training ground prior to criminal court appointments. However, not a single jurisdiction has either a training or formal mentoring program established to assist inexperienced lawyers.

One county requires all of its attorneys to be available for juvenile as well as adult appointments. Attorneys may avoid appointment by either paying a fee to a county fund or assigning the case to another attorney. Given this system, it is not uncommon for attorneys appointed from this general list to fail to appear in court when assigned to juvenile cases. For the most part, court coordinators simply use their own abbreviated list of the attorneys they believe want the appointments.

An additional “requirement” for appointment in at least two counties is making campaign contributions or attending judicial fundraisers. One attorney noted, “Giving to the campaign is a necessary part of the process,” while another stated, “If you want the appointment, you better make a contribution.” A third explained that the way to get on the appointment list is to “contribute to the judge’s campaign, go to fundraisers and schmooze the court coordinator—it’s a form of marketing yourself.” A former judge told of another judge running for reelection whose court coordinator took appointment attorneys to lunch to let them know how large a donation the judge expected, the implicit message being that continued appointments depended upon the attorney’s willingness to make the donation. One judge predicted that Texas judges would “never agree to relinquish their appointment powers,” in large part because, “it is kind of a way to build campaign support.”

One attorney explained how the process works in his urban county: “I would introduce you to the coordinator and she would make an appointment for us with the judge. The judge would interview you, then maybe assign you one case. He would watch how you handled the case. Then you would be contacted regarding the judge’s next fundraiser. If you give money, then you would begin to receive appointments. You have to contribute to the judge’s election campaigns. That’s it. I scratch his back, he scratches mine. Really, it works well. We all know what the judge expects and how to move the cases along.

3. Judicial Expectations

Although most juvenile judges do not have any discernible performance standards, they do appear to have certain expectations about the level of advocacy they want in their courtrooms. Some judges report that they will remove attorneys from the appointment list who are chronically late, absent from court, or do a bad job, but state that this is extremely uncommon. The view among many practitioners is that an attorney who “rocks the boat” risks losing appointments. Specifically, the investigation revealed the following:

- Several attorneys state that there is pressure exerted on them to get their clients to plead guilty.
- Lawyers who set too many cases for trial or who file too many motions are seen as “overly aggressive” or “overly adversarial” and may be removed from the appointment list.

- Some judges express impatience with attorneys who ask for continuances to prepare for trial or who fail to enter into plea agreements. One judge typically refuses these requests and forces the defense attorney to go to trial, ready or not.
- Exercising a client's statutory right to have his case heard by a district judge instead of a magistrate can subject an attorney to removal from the appointment list.

Judges in Texas appear to be overly concerned with keeping control of their budgets and their dockets. Many feel pressured by the county to minimize their expenditures for appointed counsel. As a result, with some few notable exceptions, there is a scarce amount of vigorous defense advocacy going on in the juvenile courts across the state. All too frequently, attorneys appointed in this system represent children for one court appearance and with one purpose: to facilitate a plea. This is reflected in the high rate of guilty pleas entered into on the first or second setting after very little consultation or investigation by the attorney.

4. Methods of Appointments

There are currently three principal systems for the delivery of defense services to children in Texas: appointment lists, contract services, and public defender programs. Under each system, the judge exercises control over who is appointed to the cases.

The most commonly used system is the appointment lists, whereby each judge maintains a list of attorneys from which he makes his appointments. The judges, and sometimes the court coordinators, control inclusion on and removal from these lists. The lists are not always printed or otherwise recorded and are rarely made public. However, in some counties, clerks provided a handwritten list of appointment attorneys on request. In addition, an effort was made to obtain reports from county auditors and clerks that listed the attorneys that received appointments, along with the amounts paid to each one. In addition to the composition of the appointment list, judges ultimately control the frequency with which an attorney receives appointments.

A second, less frequently used system is contract services. An attorney or group of attorneys receive a flat fee to handle either all or a percentage of the cases in a courtroom. The attorneys are not paid benefits. Again, there is no uniform method for selection or compensation.

Finally, the State Legislature has authorized the establishment of public defender programs in some select counties. Chief public defenders are county employees selected by the county commissioners to handle all or a percentage of the cases in a particular jurisdiction. These lawyers are salaried and receive benefits. The chief public defender may hire assistant public defenders to work full or part time. Frequently, the public defenders are appointed to represent detained youth because their offices are most accessible to the detention facilities. None of the jurisdictions rely solely upon the public defender for all representation, although one jurisdiction uses appointed private attorneys only in cases where a conflict precludes the appointment of a public defender.

The vast majority of counties use the system of appointment lists, with some jurisdictions using a hybrid of two of these three systems. Under all three models, the judge ultimately exercises almost exclusive control over which an attorney is appointed in an individual case.

5. Determining Indigency

A child's right to appointed counsel is not guaranteed in every county. Each county approaches the issue of indigency differently, with no apparent guiding principle common from one jurisdiction to the next. Some counties presume indigency based on the fact that the defendants are children and thus do not generally have income. Some judges instruct the parents to secure a lawyer, then appoint one if the parents are unsuccessful. Others make the indigency determination based on the financial status of the child's parents. While some courts use the federal poverty guidelines as a standard, others have developed their own criteria. Frequently, the indigency determination is performed by the probation department and in at least two counties the probation department is responsible for informing the court when a child needs an attorney appointed.

Even when a lawyer is appointed, the child or his parents are not necessarily relieved of the obligation to pay for defender services. In a number of counties, parents are assessed attorneys fees and other court costs at the conclusion of the case. One county even has a contempt call for parents who are delinquent in their payments to the court, which, according to a court administrator, "really brings in money for the court; sometimes we even have to put parents in jail."

6. Making the Appointment

Once indigency is determined, the court coordinator or clerk typically makes the "official" appointment from the judge's list. Judges and court coordinators in several jurisdictions report that the judge hand-picks each attorney according to the nature of the case and the characteristics of the client; however, this investigation found that such individualized attention occurs infrequently (typically in high profile or obviously complicated cases). The majority of coordinators and clerks maintain that the appointments are made randomly. Techniques employed include selecting attorneys from an alphabetical list by order, blindly pulling labels with names printed on them, and spinning a Rolodex. However, many lawyers report that it is common practice for a handful of attorneys to get most of the appointments, calling into question the actual randomness of the process. On site observations and a review of county auditor reports that list the fees paid in a given period confirm that in many counties a relatively small number of attorneys receive the bulk of the appointments.

Attorneys also receive appointments simply by being present in court. In several jurisdictions, attorneys sit in the jury box or gallery in the morning in hopes of being assigned cases. A few courts have a structured system whereby an attorney is selected in advance to be the "attorney of the day" and receives the bulk of appointments on that day. One county employs an "attorney of the month." In that jurisdiction, as well as a few others, the public defender is usually

appointed to represent the detained children, while the panel attorneys typically represent those that are not in custody.

At least one county has a policy of reappointing the same attorney each time a child is charged with a new offense or probation violation. This benefits the child in a number of ways. First, it gives the child familiarity with his advocate, which can enhance the representation. Second, it avoids duplication of efforts to learn important information about a child and his family. Third, the attorney is better able to explore, understand, and explain the child's history, background and needs to the court.

The majority of counties do not make any effort to establish continuity of representation. One county previously had a policy of keeping the same attorney for the child, but stopped with no explanation. In fact, some jurisdictions appoint different attorneys for different stages of the proceedings.

There are some jurisdictions in which the probation officer makes the appointment and notifies the court and the client of the appointment. In at least two of the surveyed jurisdictions, the prosecutor is sometimes consulted on attorney selection.

7. Timing of Appointment

Timing of appointments varies significantly across jurisdictions. Some children get counsel at the very first court appearance, however many have to wait several days or weeks before an attorney is provided. Only one jurisdiction consistently appoints attorneys before the first court appearance; however, the attorneys do not generally appear in the case until the second hearing.

Few jurisdictions have in place a procedure that allows for consistent, timely notification of an attorney appointment. The child and his parents are rarely informed of the identity of the child's lawyer before the court date. Except in those instances where the attorney is appointed in court, an attorney generally receives notification of appointment via mail or a phone call. Many attorneys complain that appointment letters are often sent late or are lost. One court attaches to the appointment letter a copy of the petition; however, in most counties, these letters fail to contain any information other than the child's name, petition number, and next court date. Significant attorney time is required to locate a child given this paucity of information, thereby making a meeting before the court date unlikely. In the vast majority of cases, the client and his attorney meet for the first time only minutes before they appear before the judge for the first time on the delinquency petition. This practice is most problematic in those jurisdictions in which it is common to enter a plea at this first court appearance. A few attorneys report that they often seek a second court date so as to allow them time to become familiar with the child and the facts of his case.

C. DISINCENTIVES TO LEGAL ADVOCACY

The appointment process in Texas is fraught with numerous disincentives to conscientious attorney advocacy. In addition to the expectations of judges that attorneys will help “move the docket along,” compensation rate structures encourage the quick disposition of cases. Fee structures are not uniform, consistent, or predictable. Most attorneys are not compensated for client visits, witness interviews, case reviews, or any other out-of-court consultation or preparation. Coupled with a lack of support services, defenders are systematically discouraged from providing adequate representation. While there are a number of judges and lawyers committed to providing quality counsel to children, there are several systemic barriers to realizing this goal.

1. Attorney compensation

Payment procedures for appointed counsel fall into two main categories: set or “flat” fees and hourly rates. Flat fees are based on the type of hearing or case handled. Hourly rates vary, depending upon the type and venue of the work performed. While the rate structures found in the state vary depending on the jurisdiction, they all share two pervasive characteristics: 1) the compensation is inadequate and 2) remuneration of out-of-court time is very limited. Too often, defense attorneys are placed in the position of having to make an untenable decision between failing to perform some of the most basic functions necessary to provide competent representation (i.e., meeting with a client or witness) and essentially subsidizing the system of representation. While there are a number of attorneys who professed a willingness to perform the necessary work, albeit uncompensated, many also expressed discomfort with a system that is dependant upon the good will of defense lawyers.

Flat fees are either based on the nature of the offense, the type of the hearing or the outcome of the case. An attorney may be paid a flat fee based on the charge filed (misdemeanor, felony, aggravated felony). The flat fee is intended to compensate the attorney for all client interviews, fact and dispositional investigation, legal research, and court appearances. The attorney is paid the same amount whether he spends one hour or twenty hours on a case, thus providing a clear disincentive to perform more than a minimal amount of work on a particular case. This structure also fails to take into account the unique characteristics and circumstances of a case, independent of the charges filed, and fails to consider the unique needs of the child being represented. Under this system, there is no additional compensation for work on dispositional or post-dispositional issues. Such a payment system creates a tension between the stated goals of the juvenile court and an attorney’s ability to pursue those goals.

An attorney may also be paid a flat fee based on the type of hearing he attends. The attorney receives a set sum regardless of what he does to prepare the case for the hearing. This also provides a disincentive to conduct any work outside the courtroom. Moreover, some jurisdictions progressively reduce the fees for the hearings, the stated purpose of this being to minimize the amount of time a child spends in the system (“if you penalize a lawyer for keeping a case in the system by reducing his fees, he’ll process the case more quickly.”). The most

commonly cited drawback of this structure is that it frustrates attorneys' efforts to conduct full investigations and encourages a "hurry-up" defense. Some jurisdictions allow attorneys to double up on fees for hearings, as such, an attorney who pleads a case out at a detention hearing is paid for two hearings in one court appearance.

Some courts pay a flat fee based on outcome, meaning that the attorney receives a fixed amount depending on whether the case is dismissed, a plea is entered to the charge, or a trial is conducted. One judge actually has a practice of refusing to pay the attorney if the case is dismissed. An attorney in that jurisdiction admitted, "You can bet that there are times when I have put a lot of work into getting the state to dismiss a case but am tempted to stop pushing so hard for dismissal so I can get paid." However, most judges compensate attorneys for work performed on cases that result in a dismissal.

"A court appointed attorney gets paid either way – if they win, if they lose. They don't care about the case because they don't feel for you. You're not their children. They get the money anyway that it goes. They look at it like, 'plead guilty, go to jail, I get my paycheck'."

Child in a detention facility

Several counties prefer to pay attorneys hourly fees that distinguish between in-court and out-of-court time. The range of fees is \$20-80 an hour for out-of-court time (with an average of \$30) and \$40-100 an hour for in-court time (with an average of \$50). Most jurisdictions that pay hourly rates have restrictively low caps—the average being \$300—which does not reflect the number of hours necessary to properly handle a case.

Many judges that have hourly fee schedules simply do not adhere to them. Despite the schedule, most judges have a standard fee they approve for particular types of cases or hearings – indeed, in two such jurisdictions, the attorneys do not even bother to submit fee applications. In those instances where the attorney does submit the fee petition outlining the number of hours spent on particular tasks, many judges will reduce the fees without explanation. Attorneys complain that this has a chilling effect on their out-of-court preparation.

Two experienced and well-respected lawyers worked extensive hours on a complicated case in which a teenage girl was accused of a highly publicized, violent crime. The jury's verdict was not guilty. When the attorneys submitted their billing documentation, the judge reduced the bills by half without a word. When asked why he did not pay the full amount, the judge told the attorneys that they had spent too much time on the case. Neither attorney now accepts appointments.

The study also found that many judges have multiple payment systems in place. For example, one judge pays attorneys \$125 for the first court appearance if the attorney concludes the case that day. Attorneys are then paid progressively less for each subsequent court

appearance. The attorneys in that county can opt for an hourly schedule of \$30 an hour out-of-court and \$50 an hour in-court, with a maximum of 10 hours total. The judge in that county reports that he has had attorneys turn in fee requests for more than 10 hours, but he will not, as a rule, pay the request. “Attorneys don’t really expect to get paid for all of their hours.” One of this judge’s “regular” attorneys confirmed this, “I don’t remember what the hourly fees are. I know there is a ten-hour max. I don’t remember because I rarely charge – you have to limit what you charge, be conscious that the court is on a budget.” Several other attorneys in that jurisdiction confirm that they never charge for more than 10 hours, because they know they won’t get it, “it’s just part of the deal,” says one attorney who receives approximately 100 appointments a year. Attorneys in one major urban area stated that although the cap is “recommended” the court has never paid more than the cap.

A former prosecutor stated that she frequently saw the same attorneys provide better representation when they were retained than when they were appointed. Said one appointed attorney, “the more money I get, the more dedication I have.”

2. Culture of the Courthouse

In every Texas county, lawyers (list attorneys, as well as public defenders) are ultimately dependent upon the local judges for appointments. This single fact has a tremendous impact on the actions of lawyers both in and out of the courtroom. Attorneys run the risk of making decisions based not on the client’s desires or needs, but on how their actions will affect re-appointment. One prosecutor commented that “it is obvious that the contract attorneys are beholden to the judge.”

A judge’s authority can either promote or prevent effective advocacy. Judges can and do use the power of appointment to control the behavior of the attorneys. The judge can use the power of appointment to the juvenile’s benefit, such as removing from the list those attorneys who are not performing well; however, this study revealed this to be a rare occurrence. More common are stories of attorneys being punished (either deliberately or unintentionally) for zealous advocacy, challenging a ruling, or spending what the judge perceives as too much time on a case. One court coordinator that makes the appointments in a large county noted, “If an attorney is charging a lot of money we can’t keep using him.” In one county, if a judge thinks that an attorney is taking too much time or intends to take a case to trial that the judge thinks should be pleaded, the judge will change the appointment from the appointed counsel to a public defender, with the expectation that the public defender (who also has to lobby to get cases) will resolve the case quickly.

"I don't like the lawyers that like to do dog and pony shows at the detention hearing. They drive me crazy....I get really impatient with private attorneys because they argue more and produce witnesses even though they know that they can't get the kid out. The PD's [public defender's] know better than to show up and argue if there is nothing that they can do to change things; the court appointed attorneys only come when they think they have a chance."

Associate juvenile judge

Numerous attorneys report feeling great pressure to plead cases quickly. While some attorneys believe this constrains them somewhat, others find this to be appropriate because "most of them are guilty anyway." In a typical Texas juvenile court there is an established routine with which many attorneys are comfortable: attorneys look at the court or prosecutor's file containing the petition and possibly a police report, talk to the prosecutor, talk to the probation officer, then talk to the children and parents. Because "most kids get probation anyway" the common perception in some counties is that a second court date is rarely needed. While some counties build two to three court dates into the process, the norm is for a case to be disposed of within one to two court dates.

Retained attorneys and parents who resist a guilty plea are sometimes viewed as being "contrary," "interfering," "incompetent," or "show offs." Said one prosecutor, "the problem with retained counsel is that they don't know how things work here. They file all sorts of motions and get all sorts of dates. They just don't get how we operate. Appointed counsel is much more cooperative." Some judges view retained attorneys with a jaundiced eye. One commented that "retained attorneys try to justify the fees to parents by talking a lot and filing a lot of motions."

One appointed attorney stated that, "it is the culture of the courthouse not to file pre-trial motions." Another attorney in that same jurisdiction confirmed this statement and added, "there is an unwritten rule that you don't request a jury except in murder or sexual assault cases. Some attorneys won't ask for juries at all because they are worried that they won't get appointments." In another jurisdiction, a judge gave an excessively high sentence to a child after he lost a jury trial. The attorneys in that jurisdiction agreed that the judge's imposition of the sentence was intended to drive home earlier admonitions to the lawyers not to request jury trials. Jury trials in that county are reportedly rare.

“The first thing that I ask is ‘did you do it’? I tell them that they can take it to trial to prove that they are innocent or plead guilty and accept the punishment. Most kids admit to what they have done. It’s just the kids trying to beat the system, trying to drag it out – you know that they are lying....If I feel that a client is innocent, I will take a jury. If I feel like he is just trying to prolong things, make it difficult for the court, I’ll take a judge.”

*Appointment attorney who reported that
97% of his cases plead on the first court date*

In some jurisdictions, there is a widespread belief that the primary purpose of advocacy is to “get the child services,” regardless of his guilt or innocence. Accordingly, there is little expectation by any of the court actors in those jurisdictions that the attorney will zealously defend his client against the charges brought by the State. This can in part be attributed to the fact that there is a long-standing debate amongst juvenile judges and lawyers regarding the appropriate role of the juvenile attorney. Some view the primary role of the child’s attorney as that of a traditional defense attorney, which means accepting client decisions even when they are not in what the attorney perceives to be the child’s best interest. On the opposite side are those who believe that the attorney’s primary function is to argue what is in the child’s best interest, regardless of what the child wants. The Texas Family Code governing attorney appointments for children fails to resolve this debate. The result is that the type of representation a child receives can depend upon the prevailing view of a particular judge or attorneys in that county.

3. Lack of Support Services

The majority of appointed attorneys are solo practitioners with no staff support. While they are expected to conduct investigations into their cases and present expert evidence where appropriate, the attorneys are not compensated for their time or expenses in these areas. Where funding is available for investigative and expert services, caps are imposed—regardless of the service requested or the characteristics of the particular case—in the range of \$300-\$500.

A critical component of competent representation is adequate support services, including investigative and expert services.³¹ Although a few Texas counties have a procedure in place for securing an investigator or a necessary expert, the procedure is rarely used. Attorneys state that such requests would either fall on the deaf ears of the judiciary or waste everyone’s time.

Several attorneys admit that they will always use an investigator in a retained case, but rarely if ever, in appointed cases “because the judge won’t pay.” One attorney asked for an investigator on one of his first appointment cases and was told, “we just don’t do that here.” A few attorneys will employ an investigator or expert with their own money in hopes that the judge will reimburse them for the expense once the value of the services are demonstrated.

³¹ IJA-ABA Juvenile Justice Standard 2.1 (c).

A second group of attorneys appear to have no use for investigative or expert services, holding that the police and probation officers do enough investigation of the charges. An all too common refrain is, “I don’t need an investigator — I get all of the information that I need from the probation officer and the DA.”

Experts are even more rarely requested and seldom provided. Many attorneys rely on the experts used by the county prosecutor. Said one attorney, “Why would I ask for an independent evaluation? Probation does all that for us.” Attorneys admit that the decision whether to employ an independent expert is dependent largely on the client’s financial resources. One attorney said that, although he could really use an investigator or mental health expert in about 50% of his cases, he stopped asking because he was routinely turned down.

“There is tremendous pressure to plead the case out; you want to keep getting appointments, you bow to that pressure. Most of the time I am explaining the deal to the kid in court, after meeting him for the first time and talking to him for a few minutes, tops.”

Appointment attorney

Despite the fact that expert appointment is uncommon, many judges and attorneys acknowledge that children in delinquency court often have a host of developmental issues, mental health problems and special education needs. According to the Austin American Statesmen, in 1999, 42% of all children incarcerated had mental health needs.³² Experts can be valuable at all stages of the proceedings. In addition to sorting out competency issues (the only purpose for which most Texas courts employ experts) experts can assist in determining whether a child had the mental ability to waive rights or understand his actions and in identifying whether a child has special needs or conditions that should be considered when making dispositional and placement decisions.

Summing up the feeling from the bench, one judge said that it would be helpful to be in a position to appoint investigators and experts more frequently, “but money is always going to be an issue whatever court you talk to.” Many courts do provide an investigator if the case is going to trial. But, as one attorney observed: “How do you know if you are going to trial unless you [first] get an investigator?”

³² Ball, Andrea, “Juvenile Jails Doubling as Mental Care Facilities,” AUSTIN AMERICAN STATESMAN (Oct. 1, 2000)

"I had one guy that always asked for an investigator. I gave him one a couple of times, but then stopped doing it. He was taking advantage. I told him, you gotta stop making these requests – you don't need an investigator, these are easy cases. He doesn't get appointments any more."

Juvenile court judge

All judges require attorneys to justify the appointment of an investigator or expert, with routine approvals being nonexistent. Some jurisdictions require an attorney to file a detailed motion on the record, thus putting him in the position of having to weigh disclosure of trial strategy and client confidences against the need for an investigator or expert. Other jurisdictions allow the attorney to make the request for an expert *ex parte*, which avoids disclosure to the prosecutor, but still presents the problem of having to make disclosures to the judge that may compromise the child's case

4. The Absence of Advocacy

One discernable result of the insufficient compensation of attorneys is that an excessive number of cases result in guilty pleas, with most of the pleas being entered on the first day the attorney appears in court on behalf of the child. This is usually the same day that the child meets his attorney for the first (and often last) time. Depending on the jurisdiction, this "first setting" is the day the petition is filed or an "announcement" of the charge is made (some jurisdictions have the announcement at the first or second detention review hearing).

Given the fact that very few attorneys are paid for work performed outside of the courtroom and have severely restricted access to investigative assistance, it is no small wonder that the majority of them do not perform the most basic functions that generally serve as a prerequisite to making an informed decision on whether to try a case or accept a plea. Attorney work on a case is generally confined to reviewing the court file and spending a few minutes with the client. Pre-trial investigations, mental health examinations and evaluations, and motions are the exception rather than the rule. The assessment revealed that:

- When pre-trial motions are filed, they are generally limited to Motions for Discovery. Even these are uncommon, as many jurisdictions have "open files" where the prosecution allows them to review (but not necessarily copy) portions of the state's file.
- Several prosecutors report that many attorneys do not review the file in advance of the hearing, some not at all. One appointed attorney stated, "I don't need to look at the prosecutor's file – the case is going to plead anyway. If they have something that they think will help me, they'll tell me."
- Attorneys rarely contact the prosecutor or the probation officer in advance of appearing to

facilitate a plea. One prosecutor reported, “Retained attorneys almost always call. An attorney who is retained on a case will call, but if that same attorney is appointed, he won’t.”

- Detention review hearings are often conducted informally, with the judge asking the unsworn probation officers questions from the bench. There is little cross-examination by the defense.
- Attorneys rarely present evidence at the detention hearings. Defense witnesses are usually limited to the parents of the child.
- The average length of time for a detention review hearing is approximately five minutes.
- Trials are a rarity in most jurisdictions; the average reported plea rate across most of the counties visited is 95%.
- Many attorneys surveyed said that they had tried fewer than five juvenile cases in their entire careers. Some had never taken a case to trial: “I’m a much better mediator than a trial lawyer.”
- Many of the jurisdictions visited reported a plea rate of in excess of 75% at the first setting, often after the attorney has just met the child client for the first time that morning.
- Dispositional hearings are usually informal; most jurisdictions rely on the report prepared by the probation officer, or an “informal conversation” between the judge, the probation officer, the district attorney and the appointed attorney.
- Appointed attorneys rarely present evidence at the dispositional hearing. Cross-examination of the probation officer is uncommon and then only limited in scope. One attorney commented, “since the recommended disposition is probation, its usually not necessary to draw out the flaws of the probation officer or his report.”
- The average dispositional hearing takes under ten minutes. A common occurrence in counties observed is for an attorney to be handed a case file immediately after appointment. He reviews the file, spends five to ten minutes talking to the child, then steps up to plead his client guilty. After accepting the guilty plea, the judge hears the recommendation from probation or the prosecutor. In most instances, the defense attorney stands mute, except to say that he is in agreement with the recommendation. It is rare for the attorney to present any evidence on his client’s behalf. The entire hearing lasts five to ten minutes.

Detention review hearings in one large county are held in the afternoon. The attorneys are seated in chairs at the side of the bench or in gallery. Across the room, the children are brought in single file to the jury box. Attorneys are not able to talk to the children beforehand, as the judge has imposed a "quiet rule" in the courtroom. Since the attorney is usually appointed right then and there, he knows nothing about the child when stepping up. When the child's case is called, he steps up to bench to meet his attorney for the first time. As this is a review hearing, the child has already met the associate judge, who admonishes him of his right to appear before a district judge, cautioning him that he will have to wait at least a day if he wants to exercise that right. The hearing lasts 1-5 minutes. At the conclusion of the hearing, the child is directed to stand to the left of the jury box, hands behind his back, and face to the wall until he is taken back to the detention center. The child has not spoken to his attorney and probably does not even know his name.

Court observer

Case Study: *A tiny child is brought into a crowded urban courtroom by a probation officer. He looks blankly over at his aunt, who is sitting across the aisle in a pew. File in hand, an attorney who has been moving in and out of the courtroom all morning rushes over to the aunt and calls across the two full pews, "Do you want him to come home?" The aunt begins to explain, "I was visiting friends here, we moved a few months back, and he went down the street. He...." The attorney raises his hand and says, "I am asking you one question, do you want him home or not?" The aunt says yes and the attorney spins around to have the case called. At the bench, the child, dwarfed by the adults milling around him, stands quietly while the judge reads the charge and the child's rights to him. When the judge asks a question of the child, he mumbles a response. "Speak up!" says the attorney, "just say yes sir!" The judge asks the child, "Did you commit the offense of theft?" and the child says, "No." The attorney whips towards the child with an exaggerated angry look, prompting the child to say meekly, "Yes." The judge responds, "I want to make sure that you did this." The attorney says hurriedly, "He understands judge, he did it. Say 'yes sir' to the judge." Within minutes, the child is placed on intensive probation, which includes drug tests, despite the fact that the child has no history of drug use. The entire process, from start to finish, takes approximately ten minutes, during which time, the attorney never speaks to his client, other than to order him to "speak up" and "say yes sir."*

Entering a plea to probation does not necessarily guarantee that the child is going to go home. Attorneys and probation officers in two counties state that a child on probation can be sent to boot camp or some other secured facility at the probation officer's request and without an additional hearing.

“In most of the cases, probation tells you what the kid is going to plead to – they have already made the deal with the state, they’ve already talked to the defendant. Probation does all of the work. We just advise and consent.”

Appointed attorney

In addition, with very few objections by the defense, multiple conditions are imposed on first-time offenders that are completely unrelated to the offense charged. Court observations and interviews confirm that in many cases little thought goes into the conditions of probation. The excessive plea rates with onerous and non-individualized conditions of probation contribute significantly to the court’s back-log — many jurisdictions report that 50% of their caseloads are violations of probation.

- A thirteen-year old child was placed on intensive supervision for stealing a pair of sneakers from another child. Some of the numerous conditions included a curfew, counseling, drug testing (no evidence of drug use), maintaining a “C” average in school (although the child had not had a stable school placement for a long time and was learning disabled), and an order not to interact with the friend from whom he had stolen the shoes. His attorney did not object to any of these conditions or offer any alternatives. In fact, his attorney did not say anything at all.
- A child pleaded guilty to trespassing and theft of a bicycle. This was his first offense. The child was placed on intensive probation for a year, which includes daily contact with the probation officer, drug counseling, individual counseling, family counseling, as well as parenting and English classes for the mother. The judge said that she was doing this because the mother didn’t speak English and worked at night. The judge then turned to the mother and said, “Can you work in the day and not at night? It would be better for your children.” During this entire exchange, the child’s attorney did not utter a single word.

One probation officer offered this explanation for the attorneys’ failure to participate significantly in the dispositional process, “Most of the time they trust us, they know that we are doing what is best for the kid.” Attorneys in his jurisdiction rarely ask for a copy of the probation report before the dispositional hearing.

Several attorneys see a child’s involvement in the juvenile court as a blessing – children get services that they would otherwise miss out on. Guilt or innocence is secondary to these attorneys, as they view their primary duty “to get these kids help. If they don’t agree with me, I don’t care. I know what is in their best interest better than their parents do.” One attorney stated that he doesn’t feel bad about pleading a child guilty to a case the state cannot prove “if the kid really needs services.” Another said, “if we had more resources and time, less kids would be found guilty. You can’t think, ‘they can’t prove that’, instead, think what is best for the child — most of the time, it’s services.” Since an overwhelming majority of attorneys report that they never follow a case (“my job ends when the dispo[sition] ends”) they do not know whether their

approach works or if it fails their clients. Seventy percent of the children in Texas Youth Commission secured facilities are on probation when committed.³³ In 1999, nearly 20% of all juvenile delinquency referrals were for probation violations or contempt of magistrate orders.³⁴

The problem is that they have all of these conditions imposed on them. Then every slight violation results in them being taken to detention. I spend too much time on these cases. I want to institute a policy that allows for probation to end rather than keeping the kid in the system due to some minor infraction.

New juvenile court judge

5. Certifications to Adult Court and Determinate Sentencing

Under Texas law, a child accused of certain offenses may be certified to adult court on motion by the prosecution.³⁵ The number of children certified to adult court decreased from 433 in 1998 to 236 in 1999. Researchers at the Texas Criminal Justice Policy Council found that African Americans, and to a lesser extent, Hispanics were more likely to be certified than their Anglo counterparts, even where they were adjudicated for the same offense, were the same age and had similar adjudication histories in the juvenile court.³⁶

Many attorneys state that the reason for the decline in certifications is the determinate sentencing provision of the Texas Family Code,³⁷ which permits a prosecutor to seek in juvenile court a sentence of up to forty years. Under determinate sentencing, a juvenile will first serve his sentence in TYC, but may later be transferred to adult prisons and become subjected to adult parole laws. The transfer occurs at the request of TYC and is rarely denied.

The unique challenges facing attorneys representing children in certification hearings, cases that are successfully certified to adult court, and determinate sentencing cases are beyond the scope of this report.

The investigation did reveal the following:

- Judges report that they attempt to assign more experienced attorneys to certification and determinate sentence cases.
- Some attorneys report that they do not fight certification too hard because they think that the child faces lower penalties in adult court than under the determinate hearing statute.

³³ TYC Commitment Profile Fiscal Years 1995-1999.

³⁴ Texas Juvenile Probation Statistical Report (1999) p.11.

³⁵ Texas Family Code, Section 54.02.

³⁶ Fabelo, Tony, Ph.D., et al, *An Overview of Juvenile Certification in Texas*, Texas Criminal Justice Policy Council (1999).

³⁷ Texas Family Code, Sec.5405.

- The few attorneys interviewed that had either participated in or observed a certification hearing report that experts are rarely requested or provided for these hearings.
- Attorneys that lose certification hearings typically do not continue to represent the child in adult court. However, one juvenile judge is instituting a rule in her courtroom that even after certification, the child's case will remain in her courtroom. The attorney who represented the child in the certification hearing will remain as counsel.
- One judge requires the prosecutor to bring the complaining witnesses to court for certification hearings, because "we may as well see if they even have a case before sending the kid to the adult court."
- Judges that appoint attorneys for juveniles who have been certified to adult court do not appear to factor the minor's age, background or circumstances into the appointment.

Given the increased reliance on determinate sentencing and the severity of the consequences of such convictions, detailed examination of attorney and judicial practices in these cases is critical.

"The courts incarcerate kids for help – it's so bad that they want them out of their homes. Judges think that incarcerating them is the only way to get them treatment. The judges cannot order CPS or mental health to do anything but they can order me to do it. It's so abusive right now that mid-year budget is two months away and we are already out of our budget. We get no money but we are responsible for all of it. Its inhumane."

chief of probation

D. ATTORNEY-CLIENT CONTACT

There was significant disparity with respect to attorney visits to the detention centers. In every jurisdiction visited, there were inconsistent reports about the frequency with which attorneys consult with their clients while they are in custody. Detention officers commonly report that retained attorneys "almost always come and see their clients" while most appointed attorneys do not. Interviews with children bore this out.

Many detention and probation officers can name a handful of appointed attorneys who "always come see the kids. You can look at the attorney visitation log and it is always the same people." Said one detention officer, "The kids here always complain about not hearing from their lawyers. We can call the lawyers for them, but most of the lawyers always say they're too busy or that they'll talk to them in court."

One judge makes visitation a requirement of appointment, but does not include it in recoverable fees. Another judge says that if the child complains, she will “call the attorney to the mat and ask him why he has not visited the child.” However, neither judge compensates the attorneys for client visits and both depend upon reporting by juveniles, who often are told to keep quiet when before the judge. Public defenders see clients more frequently, as they are on site, have immediate access to the children and do not lose money in doing so.

Interviews conducted with children reveal that attorneys spend little, if any, time explaining their basic rights to them and that many children do not have a grasp on what happens in court. Interviews revealed that:

- By and large, children do not know what a jury trial means.
- Many think that the “right to remain silent” means: “that you have to be quiet in court”, “that you don’t get to talk in court” and “that you don’t have to say nothing once you get to court.”
- Many children understand what the attorney’s role is supposed to be “he is supposed to help me, help prove my innocence”; “to talk to the judge and talk to me and object at trial.”
- However, most children think that their appointed attorneys are in cahoots with the judge and the prosecutor.

Juveniles in the detention centers report that they get most, if not all, information about their cases from their probation officers. The probation officers tell them if they are going to plead guilty and what is going to happen to them. One detention officer reports that when he calls an attorney on behalf of a child, “the attorneys say, ‘tell them to talk to their PO.’” Despite the fact that her office is in the same building as the juvenile detention center, one public defender reports that she sends a waiver form to the probation officer for her client’s signature. When asked why she did not do it herself, she responded, “it’s just a waiver, the PO can explain it. If you visit them, it takes too much time – they ask a lot of questions and want to talk to you. I don’t sign it before the child does because I don’t want them to think that I am agreeing with it.” Another attorney stated that probation officers send her signed waivers from her clients: “I don’t like it, but what can I do about it? What’s done is done.” A waiver is not valid, however, unless the attorney also signs it.

One attorney reports that over 50% of the time attorneys in his jurisdiction do not talk to clients before a hearing. It was observed that attorneys rarely talk to the children after the hearings. One child said that her lawyer, “stands next to me in court. He does not explain anything after except, ‘hang in there, see you next time in court.’” Observers of detention hearings noted that most of the children were taken back to the detention facility without talking to the lawyers. One child said, “they never talk to you after a hearing. They just shake your hand and say “good luck” and then you never see them again.”

“The only thing my lawyer ever said to me was ‘hush’ when I tried to tell the judge that we don’t have a phone because the lawyer was telling him to put me on electronic monitoring. My PO told me that my lawyer wants me to plead guilty and asked me what I was going to do. I want to get out of here so I am going to plead the case.”

17-year-old girl in detention

E. OTHER INSTITUTIONAL BARRIERS

1. Isolation of the Juvenile Court

Under the adult appointments system, one benefit is that an attorney can handle several cases in multiple courtrooms on a given day, thus enabling him to charge fees for multiple cases at once. In the larger counties, most juvenile courts are located far away from adult court. Quite often, an attorney in juvenile court is there for that one case and the several hours he may spend there take away additional income he could be earning elsewhere. A frequent complaint made by appointed attorneys is that the remoteness of the juvenile court makes practicing there costly to them.

In most counties, the detention facilities are also far removed from the adult court. In the smaller counties, detention facilities are several miles away. The remoteness of the court and detention facilities, combined with the fact that attorneys generally are not compensated for client visits, results in minimal out-of-court attorney-client contact.

2. Lack of Adequate Meeting Space

The majority of courts visited do not have adequate meeting space for private attorney-client interviews. In a significant majority of cases, the attorney and the juvenile meet one another for the first time in court. This initial meeting is a critical point in the child’s representation, as decisions are likely to be made that day regarding the child’s custodial status and whether to plead guilty. Lawyers need an opportunity to explain legal choices to the client; the client in turn needs to provide the lawyer with information that is pertinent to the impending hearing. In the majority of counties, this important consultation occurs either in the hallways of the courthouse or in the jury box of the courtroom, neither of which offers privacy nor is conducive to confidentiality, even though confidentiality is often viewed as the crux of an attorney-client relationship.

In instances where the attorney and client are able to meet beforehand, private space in the courthouse continues to be important, yet scarce. Once a child is in court, the attorney may need to discuss with him the recommendations of the probation department, details of the petition and offers by the State, and possible defenses, all of which are being presented for the first time in court. The juvenile will be asked if he wants to plead guilty to the charge or contest the

recommendations of the probation officer. A separate meeting space for attorneys and clients is imperative to the child's ability to make an informed choice.

3. Provision of Interpreters

Given the large Hispanic population in Texas, interpreters are often necessary to assist children or their parents in understanding the most basic aspects of the juvenile justice process. However, there is no continuity or standard procedure regarding who gets an interpreter and when. A few jurisdictions have interpreters on sight to interpret for the children or their parents, while one jurisdiction provides an interpreter only at trial. Another jurisdiction provides an interpreter for the child, but not the parent. In response to an inquiry from a clerk, one judge said, "tell the attorney that is not our problem. If the mom wants to understand what is going on, she'll get someone here to help her." At least two jurisdictions have the child interpret for his parents. Another jurisdiction uses a probation officer to interpret.

Language issues also affect appointments. Some jurisdictions appoint attorneys solely because they are bilingual. Within those counties, there is often an expectation that the attorney will act as the translator for the child or parent in court.

4. Lack of Sufficient Resources for Attorneys

The funding available for the juvenile defense function is woefully inadequate and fails to make available to appointed attorneys those resources necessary to competently represent a child throughout the justice process. The vast majority of appointed attorneys are solo practitioners with no support staff, other than a shared secretary. Defenders receive inadequate local funding and no state funding at all. Where the prosecutors have full-time investigators available to them on every case (in addition to the police), most defenders do not. In one large county, every juvenile assistant prosecutor recently received a computer; the assistant public defenders in that county use their secretary's computer.

5. Lack of Sufficient Resources for Juveniles

In every jurisdiction visited, judges, attorneys and probation officers agree that there are not sufficient services and programs in place to meet the varying needs of children both before and after disposition. A common refrain in interviews was the need for community-based programs, placement options or mental health programs. In addition, several people cited the fact that there are not sufficient programs and services to serve the children in the county as a cause of probation violations. In addition, some attorneys admit that once a child is on probation, there are few assurances that the conditions imposed are adapted to the needs and abilities of an individual child and thus violation is likely. The high numbers of delinquency referrals and TYC commitments due to probation violations underscores the need for additional and individually tailored services before, during and after disposition. The preventative and rehabilitative goals of the juvenile justice system cannot be met without sufficient community based programs, services and opportunities for the children committed to its care.

6. Lack of Training

Legal training, a cornerstone to any juvenile defender system, is almost non-existent in the State of Texas. Only one jurisdiction has training seminars or sessions. In that county, the juvenile judge hosts a luncheon twice a year where specific topics relating to juvenile delinquency and child protection cases are discussed. Attendance is optional, and few of the defenders interviewed reported having attended one of these sessions. In the overwhelming majority of jurisdictions, there are no training opportunities available to defenders. Some defenders state that they attend an annual juvenile law conference in Austin, Texas, but that more frequent, local workshops and training opportunities would enhance their representation.

7. Lack of Mentoring Programs

Judges and lawyers in almost every county report that new attorneys are encouraged and allowed to accept juvenile appointments. However, with one exception, no county has a formal mentoring program. In the county in which a mentorship program is purportedly in place, attempts at identifying and locating the coordinator of this program failed. One county previously required that new attorneys serve as second chair to an experienced attorney, but no longer does so. Lawyers and judges in a few counties report that informal mentoring happens naturally. One prosecutor said that she frequently gets calls from new attorneys asking questions concerning procedure and process.

8. Lack of Oversight and Assessment

No county has established review procedures to determine the efficacy of their appointments system. None of the counties have any supervision of attorneys, other than observations by the judge. Attorneys are not rated or evaluated. There are no systems in place to track in any detailed way the plea rates or efficacy of treatment. Only one judge interviewed could point to a confirmed process by which he kept, albeit informal, data on the plea rates and performance of appointed attorneys in his jurisdiction. No statewide review system appears to be in place.

9. The Hyper-Role of Probation

An unexpected consequence of the failures of the juvenile indigent defense appointment system is that the probation officers play a larger role in the juvenile process than is appropriate. The traditional role of the probation officer is to function as a neutral party that provides information to the court. Though many Texas probation officers do work appropriately within that role, in many jurisdictions the probation officer's role is much more expansive. One attorney,

summing up this assessment's conclusion, commented, "The probation officer is an advocate and an adversary at the same time. It's confusing for the kid. It's confusing for me." Probation officers, while not lawyers or police officers, sometimes assume these roles. In an overwhelming majority of the jurisdictions in the sample, members of the departments of probation play significantly active roles from the very beginning of a case. In court, probation officers exert great influence: judges adopt their detention, certification and dispositional recommendations in excess of 90% of the time; many report a 97-99% acceptance rate. Probation officers have substantially more contact with the children and their families than do the attorneys. To varying degrees, children and their parents rely on the probation officers for information about the proceedings. Prosecutors rely on them for information, investigation, and filing and dispositional recommendations. Clerks and court coordinators rely on them for indigency determinations, case setting and even attorney selection. Judges rely on them for detention and dispositional recommendations and, in some cases, advocacy. Defense attorneys rely on them for information: about the case, about their client, about dispositional recommendations and alternatives, and sometimes for communications from their clients. In short, they appear to be the most active and powerful actors in the juvenile justice system.

a. Probation Officers as Investigators

When the police arrest a person, they are required to issue *Miranda* warnings before asking him questions relating to the purported offense. Texas law requires that the police take a juvenile before a magistrate before taking his statement. These requirements do not extend to probation officers. With the exception of a few jurisdictions, probation officers statewide routinely take statements concerning the purported events for which the children are, or may be, charged. In one jurisdiction, an intake officer stated that he does not read the children their rights, but "I tell them, if you want to talk to me about the case, go ahead." One probation chief reported that the "great majority of attorneys allow their clients to speak freely with us. A few will tell them not to talk about the facts of the case." A child reported that when she came into the detention center, the probation officer "handed me a paper and told me to sign it. Then she asked me what happened and I told her because she needed to know." The young lady did not know what the paper was (it was a waiver of rights) and she did not know that the probation officer could testify against her.

Prosecutors and probation officers describe the range of duties of the probation officer before the filing of a petition to include:

- Gathering and providing information about the child;
- Making filing recommendations;
- Filling out the petition; and,
- Setting the first court date.

In at least three counties, the prosecutor does not appear for the detention hearings. Instead, the probation officer performs the role of the State's advocate. One prosecutor reports that the probation department makes the initial determination of whether to file charges against a child. "When probation says file, unless it is obvious that there is no PC [probable cause], we file." The general feeling among both attorneys and the children is one of confusion concerning the precise role of the probation officer.

b. Probation Officers at Adjudications

In most counties, probation officers rarely take the stand during adjudication. One attorney stated that this was because, "by the time we get the case, it's over. We know that he could take the stand." One judge, upon being informed that it is standard procedure in his jurisdiction for probation to question children about the offenses for which they are charged, marveled, "no wonder everyone pleads guilty."

Probation officers are often active participants in plea negotiations. There are instances where the probation officer negotiates a plea before an attorney has been assigned to the case. The probation officer will discuss the agreement with the child, encourage him to accept it, then present it to the attorney when he appears in court.

c. Probation Officers as Counselors

In most, but not all jurisdictions, the probation officers visit with children on a regular basis. It appears that probation officers often perform what are commonly considered to be attorney functions. Many children report that probation officers are the only ones who will talk to them about what is happening with their cases. Probation officers frequently tell children what is going to happen to them. In a few jurisdictions, probation officers are in the position of explaining the legal significance of waivers and plea agreements, as they routinely obtain waivers from children and discuss plea options with them.

d. Probation Officers as Assistants to the Court

In some jurisdictions, probation officers make referrals to the court, make indigency determinations, assist in making attorney appointments, notify the attorneys and the parents of the appointments, and set cases.

e. Probation Officers as Witness at Disposition

Probation officers make dispositional recommendations to the judge. The judges adopt these recommendations in greater than 90% of the cases.

f. Probation Officer Contact with the Child's Attorney

Despite the significant role that the probation officer assumes, few report any outside contact with the attorneys. One probation officer said, "the only usual contact between the attorney and the PO before the hearing is behavioral, if the kid is acting up. The PO will call the attorney to try to get him to convince the kid that it is within his best interest to stop being difficult."

F. CONCLUSION

Currently, an indigent child facing charges in many Texas juvenile courts has little chance of receiving meaningful representation. Many attorneys are not performing the most basic functions commonly recognized as essential to effective representation. Attorneys routinely fail to have meaningful client interviews, conduct pre-trial investigations, conduct witness interviews, file pre-trial motions, request mental health and educational reviews or prepare for trial and disposition.

In many cases, Texas juvenile courts have become "plea mills" with attorneys serving as facilitators rather than advocates. Judges have unlimited discretion concerning which attorneys they appoint and how much the attorneys are compensated. In many counties visited, attorneys who process cases through the system quickly and smoothly are rewarded with appointments; attorneys who request continuances, ask for investigators, and set cases for trial are punished with reduced fees and fewer appointments. The courtroom culture, fee structures and an over-reliance on the probation department all provide disincentives for advocacy. Texas courts are selling justice short, leaving her children utterly defenseless.

CHAPTER 3

RECOMMENDATIONS

A. SYSTEMIC CHANGES MUST BE MADE

The state has a special and unique obligation to ensure that a child's right to due process is honored and that a child has meaningful access to competent counsel at all stages of the justice process. To this end, the following recommendations are made:

1. Independent oversight and monitoring of the juvenile indigent defense system should be established, supported, and maintained.
2. The appointment of attorneys to assist children should be guided by standardized, fair, and uniform procedures that consider both the nature of the case and the expertise of the attorney. Judges, who should continue to play an important judicial role in the selection and appointment of qualified counsel, should not have unlimited control over the selection process.
3. The State of Texas should develop an independent indigent juvenile defense oversight body to structure an appointment process and compensation structure that will ensure the independence of the defense counsel. There should be safeguards that protect the integrity of the attorney's representation of the juvenile against political pressures, financial disincentives, and conflicts of interest with the judge.
4. The inequitable funding structure of the justice system has directly contributed to the poor defense practices uncovered in this assessment. The State of Texas should provide adequate funding for the juvenile defense function as a whole—based not on present practice, but best practice.
5. Statewide guidelines and objective criteria should be developed that establish minimum qualifications and standards of representation for children in the justice system.
6. All children should be presumed indigent for purposes of the appointment of counsel.
7. Standards should be adopted to ensure that probation officers should serve as neutral parties and provide information to the court, without assuming the duties of the police, prosecutor and defense attorneys. It should be the duty of the judge to ensure that defense counsel and probation officers are fulfilling their appropriate role.

B. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL MUST BE GUARANTEED

1. The State of Texas must ensure that children have access to competent counsel and all of the necessary resources that effective assistance of counsel requires.
2. Attorneys should be appointed as early as possible in all juvenile cases.
3. Attorneys should have meaningful access to independent, qualified investigators, experts and other support.
4. Attorneys should have access to training and professional development opportunities.
5. Client consultation should be private, immediate, and ongoing throughout the judicial process.
6. Attorneys should be compensated for all reasonable work including - but not limited to - client meetings, pre-trial investigation, legal research, motions practice, and dispositional planning.
7. Continuity of representation should be encouraged where feasible or appropriate.
8. Further systemic study should be conducted regarding the representation of children in the adult system.

APPENDICES

APPENDIX A

INDIGENT DEFENSE IN TEXAS COMPARED TO SELECTED OTHER STATES

Table 1 provides recent indigent defense expenditure and cost-per-capita comparison information for Texas and 10 other states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, North Carolina, Oklahoma and South Carolina. These ten states were selected for comparison with Texas for various reasons, including: their use of different types of indigent defense delivery systems; the different types of funding; and the availability of comparison data. Except for Missouri and North Carolina, all of the comparison states are contiguous to Texas or located in the southern part of the United States. Also, all 10 states have the death penalty, which generally drives up overall indigent defense costs in a state. The hope is that this information places Texas' indigent defense system in context with other states.¹

Data on indigent defense expenditure in Texas for FY 1999 was collected by the Office of Court Administration (OCA). In the summer of 2000, the OCA volunteered to collect indigent defense expenditure and type of delivery system information from each of Texas' 254 counties. After consulting with The Spangenberg Group over the design of the survey instrument, OCA sent the survey to each of the state's local administrative judges. The judges were asked to forward the survey to their county auditor, county treasurer, or any other appropriate individual for completion. The OCA then followed up with letters and telephone calls to ensure completion of the survey by each county. The expenditure data collected by the OCA represents the first such statewide collection of indigent defense data in Texas of which we are aware.

Characteristics of the Comparison States

A detailed description of each comparison state's indigent defense system follows. Table 2 provides a profile of the comparison states, including:

- the primary source of funding for indigent defense;
- the primary provider or delivery system for indigent defense;
- whether the states have a statewide indigent defense oversight commission;
- whether the states have a statewide public defender program at the trial level; and
- compensation rates for court-appointed counsel in non-capital felony and misdemeanor cases.

Table 2 shows that among the sample states, both Alabama and Florida, like Texas, currently operate with neither a statewide public defender agency nor a state oversight committee. Arkansas, Kentucky and Missouri all have both an oversight committee and a statewide public defender system. Georgia, Louisiana, North Carolina, Oklahoma and South Carolina all have a statewide commission but lack a statewide, trial-level public defender agency.

¹ Collection of the comparison data in this section was made possible by the State Commissions Project, which is a joint project of the American Bar Association Bar Information Program and the U.S Department of Justice Bureau of Justice Assistance.

Table 1: Indigent Defense Cost-per-Capita of Texas and 10 Selected States

State	Population	Most Recent Statewide Expenditure	Fiscal Year	Cost-per-Capita
Alabama	4,369,862	\$29,886,452	2000	\$6.84
Arkansas	2,551,373	\$12,333,561 ²	2001	\$4.83
Florida	15,111,244	\$176,797,462	2000	\$11.70
Georgia	7,788,240	\$45,481,423	1999	\$5.84
Kentucky	3,960,825	\$28,832,330	2000	\$7.28
Louisiana	4,372,035	\$37,017,000	2000	\$10.18
Missouri	5,468,338	\$28,202,699	1999	\$5.16
North Carolina	7,650,789	\$62,680,384	1999	\$8.19
Oklahoma	3,358,044	\$21,943,916	2000	\$6.53
South Carolina	3,885,736	\$23,098,152 ³	2000/2001	\$5.94
Texas	20,044,141 ⁴	\$93,108,334	1999	\$4.65

1999 population estimates from www.census.gov.

Statewide Indigent Defense Cost-per-Capita Among the Comparison States

In FY 1999, it is estimated that Texas counties spent \$93,108,334 on indigent defense, including costs of counsel, investigators, experts, transcripts and other related costs. The average cost-per-capita spent on indigent defense among the sample states is \$7.12 (see Table 1). At \$4.65, Texas ranks last among the comparison states in indigent defense expenditure cost per capita. Arkansas, with a cost-per-capita figure of \$4.83, ranks 10th out of the 11 states in indigent defense cost-per-capita expenditure, while Florida, at \$11.70, has the highest cost-per-capita expenditure of the group.

There are numerous reasons why indigent defense cost-per capita figures vary from state to state. Some of those reasons include:

1. The percentage of defendants found to be indigent may range significantly from state to

² Arkansas FY 20001 budget information.

³ South Carolina expenditure figure is a combination of FY 2000 estimated county budget information and FY 2001 state budget information.

⁴ Based upon a 1999 population estimate by the Texas State Data Center at Texas A&M University.

- state.
2. Some states - e.g., Oregon - have expanded the right to counsel substantially beyond the requirements of the U.S. Constitution as interpreted by the U.S. Supreme Court, creating more cases that require court-appointed counsel.
 3. Some states include costs for cases that are civil proceedings - e.g., representation of adults accused of abuse or neglect of children or in termination of parental rights proceedings - in the budget for indigent defense
 4. Some states limit the right to counsel in misdemeanor cases by legislation that permits a judge to indicate on the record at the commencement of a case that the sentence will not include a jail sentence. In these cases, appointment of counsel is not required. Other states require appointment of counsel in all misdemeanor cases where a possibility of a jail sentence exists, regardless of a judge's preliminary sentencing evaluation.
 5. Some states have a large number of death penalty cases, which are extremely costly compared to other types of cases.⁵
 6. Some states differ substantially in the rate of compensation permitted for court-appointed counsel. States impose compensation caps on individual cases.
 7. A few states - e.g., Connecticut and California - that are predominantly served by public defender programs have higher public defender salaries compared to other states. In some states this is because they have adopted - by statutory or other authority - salary parity for prosecutors and public defenders.
 8. Some states are substantially more generous than others in allocating funds for investigators and expert witnesses.
 9. Some states have several large urban areas that tend to be more expensive on a cost-per-capita basis than rural areas.
 10. Most states that fund their indigent defense system entirely with state funds have a higher cost-per-capita than states where counties provide all or a majority of funding. California, where indigent defense funding at the trial level is a county responsibility, is an exception to this rule.
 11. Some states have a significantly higher number of indigent direct appeal and state post-conviction cases than other states.
 12. In some states, it is very difficult to get accurate data on total indigent defense costs, including not just assigned counsel compensation or public defender office budgets, but also, costs for transcripts, investigators, expert witnesses and other costs relating to indigent defense.

Some of the characteristics leading to the varying cost-per-capita expenditures among the comparison states are discussed in the following section.

⁵ As of Fall 2000, the following states have the highest populations of death row inmates: Alabama (185), Florida (385), Georgia (136), North Carolina (237), Oklahoma (137) and Texas (448).

Table 2: Indigent Defense Overview of 11 Selected States

State	Primary Funding Source	Primary Provider of Indigent Defense Services	State Oversight Commission		Statewide Trial Public Defender Agency		Assigned Counsel Hourly Compensation Rates at Trial ⁶						
			Yes	No	Yes	No	Non-Capital Felony and Misdemeanor ⁷		Capital		Maximum		
							Out-of-court	In-court	Out-of-court	In-court			
Alabama	Fair Trial Tax Fund/State	Assigned Counsel and Contract Defenders		X		X		\$40 per hour	\$60 per hour	\$3,500 A felonies, \$2,500 B felonies, \$1,500 C felonies*	\$40 per hour	\$60 per hour	None
Arkansas	State	Public Defender	X		X			\$60-\$100 per hour		Varies*	Rates are established by the trial court judge and vary		None
Florida	State	Public Defender		X		X		Varies	Varies	Varies*	Rates vary from circuit to circuit, ranging from \$40 to \$100		\$3,500*
Georgia	County	Assigned Counsel and Contract Defenders	X			X		\$45 per hour	\$60 per hour	None	NA	NA	None
Kentucky	State	Public Defenders and Contract Defenders	X		X			Non-violent felonies:\$40 Violent felonies subject to 85% parole eligibility:\$50**		Non-violent felonies:\$1,800 Violent felonies subject to 85% parole eligibility:\$3,000	\$50 per hour	\$50 per hour	\$12,500 plus reasonable expenses
Louisiana	District	Contract Defenders and Public Defenders	X			X		Varies: \$42 per hour is a typical rate		None	\$57.65 per hour	\$57.65 per hour	\$78,000 for two attorneys (includes an automatic \$6,000 for investigator fees)*
Missouri	State	Public Defender	X		X			In the rare event assigned counsel are used, payment is by flat fee per case**		A/B Felony: \$400-\$500; C/D Felony: \$300; Trial: \$1,000*	N/A	N/A	Flat-fee contracts of \$10,000-\$13,000 for lead counsel and \$5,000 to \$8,000 for co-counsel
North Carolina	State	Assigned Counsel	X			X		Varies		None	\$85 per hour	\$85 per hour	None
Oklahoma ⁸	State	Contract Defenders	X		X			\$40 per hour	\$60 per hour	\$3,500 for felony; \$800 for misdemeanor*	\$60 per hour for lead counsel; \$50 per hour for co-counsel	\$80 per hour for lead counsel; \$70 per hour for co-counsel	\$20,000*
South Carolina	County and State	Public Defender	X			X		\$40 per hour	\$60 per hour	\$3,500* In/out-of court hourly rate may be exceeded.	\$50 per hour	\$75 per hour	\$25,000* In/out-of court hourly rate may be exceeded.
Texas	County	Assigned Counsel		X		X		Varies	Varies	Varies	Varies from county to county	Varies from county to county	None

⁶ Information excerpted from *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-by-State Overview*, November 1999 by The Spangenberg Group on behalf of the American Bar Association Bar Information Program and *Rates of Compensation for Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, November 1999 by The Spangenberg Group on behalf of the American Bar Association Bar Information Program.

⁷ A 1993 Alabama Court of Criminal Appeals decision authorized court appointed counsel to charge overhead costs in both capital and non-capital cases in addition to hourly fees. *May v. State*, 672 So.2d 1307 (1993). Overhead costs are generally \$25-\$35 an hour.

⁸ This information reflects the 75 out of the 77 counties in Oklahoma under the jurisdiction of the Oklahoma Indigent Defense System (OIDS). Tulsa and Oklahoma counties both operate independent full-time public defender offices. No information is available from these two programs.

Descriptions of Indigent Defense Delivery and Funding Systems in 14 States

The following section describes the way in which the indigent defense systems in the 10 comparison states in Table 2⁹ are organized and funded. Texas is one of the six most populous states in the United States, including California, Florida, Illinois, New York and Pennsylvania.¹⁰ Expenditure data was not collected on the indigent defense systems in California, Illinois, New York, or Pennsylvania as part of this survey because none of these states has a centralized source of data and time did not permit contacting each county for information. However, we have included descriptions of the indigent defense systems of these states in this narrative to place Texas in greater context.

Alabama

As in Texas, the provision of indigent defense services in Alabama varies from county to county. While three of the state's 67 counties operate public defender offices, the rest rely upon either appointed counsel or contract attorneys. Alabama does not sponsor a separate program for representing indigent capital trial cases.¹¹ Alabama ranks fifth in per capita indigent defense expenditure (\$6.84) among the 11 comparison states in Table 2.

Funding for indigent defense in Alabama is provided by the state through the Fair Trial Tax Fund, which is comprised of fees that are added to the filing fee in civil cases and costs in criminal cases. The Fair Trial Tax Fund is designed to reimburse counties for all indigent defendant representation costs. However, if revenues from the Fair Trial Tax Fund are insufficient to cover the counties' costs, the state authorizes transfer of funds from the state General Fund to cover the deficit. In recent years, this deficit has grown substantially, and the state has been required to contribute greater amounts to cover indigent defense funding shortfalls.

These shortfalls, together with increased compensation rates for court-appointed attorneys,¹² have prompted Alabama policy makers to consider the creation of a statewide indigent defense system. In April 2000, The Chief Justice of the Alabama Supreme Court formed a Committee on Indigent Defense under the purview of the Alabama Judicial System Study Commission, a statutorily created body that addresses systemic justice issues. The Committee on Indigent Defender Services is charged with studying the state's current system for providing defense services in the trial and appellate courts, and then making recommendations as to what

⁹ Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, North Carolina, Oklahoma and South Carolina.

¹⁰ With a 1999 population estimated at 20,044,141, Texas ranks as the second most populous state in the United States. According to 1999 Census figures, California has the largest population (33,145,121) while New York comes in third with 18,196,601 residents. The fourth most populous largest state is Florida (15,111,244), while Illinois ranks fifth (12,128,370). Pennsylvania, with 11,994,016 residents, ranks sixth.

¹¹ However, the Equal Justice Initiative of Alabama, a small, nonprofit organization funded by individuals and private foundations, provides representation in capital post-conviction cases.

¹² The rates increased in 1999 from \$40/\$20 for in/out-of-court work to \$50/\$30 for in/out-of-court work. These rates increased again on October 1, 2000 to \$60/\$40 for in/out-of-court work. Also, in 1994, the Alabama Supreme Court authorized court appointed counsel to charge reasonably incurred overhead costs in addition to hourly fees. *May v. State*, 672 So. 2^d 1310 (Ala. 1993).

direction the state should take in providing future indigent defense services. Staff from the Administrative Office of Courts were requested to draft legislation based upon the Committee's deliberations and conclusions. The legislation proposes creation of new statewide commission on indigent defense, modeled closely on the commission in North Carolina (discussed below). The Committee submitted its proposed legislation to the Judicial Study Commission, which approved it, and the legislation will be introduced in the 2001 session.

Arkansas

Trial-level public defender offices throughout Arkansas represent indigent defendants in felony, misdemeanor, juvenile, guardianship and mental health cases, as well as traffic offenses punishable by incarceration. Court-appointed attorneys handle conflict of interest cases. In the five years between 1993 and 1998, the major responsibility for funding and organizing indigent defense services in Arkansas shifted from the counties to the state. Arkansas ranks tenth in per capita indigent defense expenditure (\$4.83) among the 11 comparison states in Table 2.

On July 1, 1993, the Arkansas Public Defender Commission (APDC) was established. The APDC is responsible for selecting local public defenders, developing budgets and setting standards and guidelines. The APDC also houses the Capital, Conflicts and Appellate Office. This office handles capital cases in which a public defender has a conflict of interest, and acts as a resource for public defenders by providing court opinions, sample briefs, statutes, and other materials. As of January 1, 1998, the APDC is responsible for the payment of public defender and support staff salaries as well as fees of court-appointed counsel while counties remain responsible for the cost of facilities, equipment, supplies and other office expenses of public defender offices.

California

In California, by statute, trial representation is funded on a county-by-county basis. Each county selects a primary provider of services: public defender, assigned counsel or contract defender. With the exception of San Mateo County, all of the state's larger counties have elected to establish a county public defender. Conflict of interest cases are handled by assigned counsel, contract counsel, and in some counties with a primary public defender, by an "alternate" defender office.

The state-funded Office of the State Public Defender (OSPD), which was created in 1976, represents indigent criminal defendants on appeal. With the steady increase of inmates sitting on death row awaiting appointment of counsel in California, in the 1990s the focus of OSPD shifted from handling complex, non-capital felony appeals to an exclusive concentration on death penalty cases on direct appeal, habeas corpus in the California Supreme Court and certiorari petitions in the United States Supreme Court. In an effort to address long-standing problems associated with finding counsel to handle direct appeals and state post-conviction proceedings in capital cases in California, in 1997 the legislature created the California Habeas Resource Center. The Center handles state and federal habeas corpus proceedings for capital defendants. The Center also evaluates and recruits private counsel to handle capital cases, and assists those who receive appointments. Since January 1998, the OSPD has been assigned solely to direct appeals in capital cases.

Additionally, the California Appellate Project (CAP), created by the State Bar of California in 1983 as a non-profit entity to recruit, evaluate, train and assist counsel appointed by the California Supreme Court in direct appeal and state post-conviction capital cases, serves as a resource center for private counsel handling capital cases.

Florida

In Florida, 20 publicly elected judicial circuit public defenders provide representation to indigent defendants at the trial level. The 20 elected public defenders, as well as the assistant public defenders, investigators, and administrators in their circuits, are members of the Florida Public Defender Association (FPDA). The FPDA is governed by a Board of Directors which is comprised of 24 board members: the 20 elected public defenders; two representatives of the assistant public defender staff; one representative of the investigative staff; and one representative of the administrative staff.

The Florida Public Defender Coordination Office (FPDCO) works closely with the FPDA to coordinate meetings, collect caseload and budget information and work with the legislative, judicial and executive branches of Florida's government.

Five of the 20 judicial circuit public defenders have appellate offices that handle appellate cases on a regional basis. Three state-funded Florida Capital Collateral Regional Counsel offices represent indigent prisoners in state and federal capital post-conviction proceedings. By legislation, the three offices function independently and operate as separate budget entities.

By statute, the state of Florida is responsible for public defender salaries and “the necessary expenses of office.” Florida has an Indigent Criminal Defense Trust Fund to supplement the general revenue funds appropriated by the Legislature to the public defenders. Individuals who complete an application declaring indigency and request representation by the public defender must pay a \$40 application fee when filing the affidavit. Collected fees are deposited into the Indigent Criminal Defense Trust Fund, which is administered by the state Judicial Administration Commission (JAC). The JAC is required to return these funds to the 20 circuit public defender's offices proportionally to each circuit's collections. Counties pay for office overhead expenses and court-appointed counsel costs.

All 20 of the judicial circuit public defenders utilize private, court-appointed counsel to handle conflict of interest cases. A constitutional amendment, effective July 1, 2004, will transfer the responsibility for court-appointed counsel payments from the counties to the state. In addition, some counties provide supplemental funds for indigent defense. Florida ranks first in per capita indigent defense expenditure (\$11.70) among the 11 comparison states in Table 2.

Georgia

By statute, each county in Georgia is responsible for selecting one of three delivery methods for indigent defense: county public defender program, assigned counsel program, or contract defender program.

Counties have the primary responsibility for funding indigent defense representation. Counties may apply for supplemental state funds from the Georgia Indigent Defense Council (GIDC), a state oversight commission for indigent defense created by the state legislature in 1979. GIDC provides technical, clinical and administrative support to local indigent defense programs.

GIDC distributes state funds to counties that meet its standards and guidelines for the operation of local indigent defense programs. Funds are allocated based on criteria including county population, prior year caseload and prior fiscal or calendar year indigent defense expenditures. Of Georgia's 159 counties, 140 received funding assistance from GIDC for FY 2000. Of these 140 counties, 19 utilize full-time public defender offices, 56 use contract defenders and 65 depend on court-appointed counsel. Information on the other 19 counties is unavailable, although GIDC estimates that four use a contract defender program and the other 15 use a court-appointed counsel system.

GIDC also has a separate, state-funded capital trial and direct appeal program. Established in 1992, the Multi-County Public Defender program monitors every death penalty case in Georgia from trial through direct appeal, provides consultation to public defenders and court-appointed attorneys on death penalty cases, and acts as lead counsel in a number of capital cases.

Besides the state funds it received for its "grants to counties" program and for the Multi-County Public Defender, GIDC received revenue from three other sources for FY 2000: the Clerks and Sheriff's Trust Account, which contains interest accrued on accounts holding cash bonds or funds paid for in security or judicial dispositions; a 40% share of the Georgia Bar Foundation IOLTA funds; and a small amount from the Governor's Children and Youth Coordinating Council contract to continue GIDC's "seven deadly sins" tracking project. In addition, some counties implement up-front processing fees, usually on a sliding scale with a maximum fee of approximately \$50. It is estimated that about 60 of Georgia's 140 counties assess a processing fee for defendants seeking appointed counsel. Georgia ranks eighth in per capita indigent defense expenditure (\$5.84) among the 11 comparison states in Table 2.

On November 9, 2000, the Governor and Chief Justice of the Georgia Supreme Court held an all-day symposium in Atlanta entitled, "Developing a Statewide Vision of Indigent Defense." The symposium was attended by over 300 judges, legislators, private attorneys, community activists and criminal justice leaders. Modeled after the June 2000 National Symposium on Indigent Defense sponsored by Attorney General Janet Reno, the Georgia symposium was intended to be a "kick-off" for the Chief Justice's Commission on Indigent Defense.

The Chief Justice formally appointed the Commission on November 29, 2000 and directed Commission members to study the status of indigent defense in Georgia. The Commission will develop a strategic plan for the future and provide a timetable and method of implementation for the strategic plan.

Illinois

The majority of Illinois' 102 counties have county-funded trial public defender offices.¹³ The balance use either contract defenders or assigned counsel. In conflict cases, the local judge appoints counsel and sets the compensation rate, which cannot exceed a statutory cap.

The state funds the Office of State Appellate Defender, which has five regional offices throughout the state and handles all direct appeals, except those from Cook County. In Cook County, the State Appellate Defender handles roughly 35% of the direct appeals, while the county-funded Cook County Public Defender handles the other 65 percent. The State Appellate Defender also represents inmates in post-conviction cases.

In May, 2000, the legislatively-created Task Force on Professional Practice in the Illinois Justice System released a report with recommendations for change in the state's criminal and juvenile systems. The number one recommendation was that "The State of Illinois and its 102 counties. . .develop a partnership in which counties will be assisted in providing competent counsel at the trial level. Until last year, Illinois was one of only five states in which no state money was used to fund indigent defense at the trial level. Now some state funding is available in capital cases."

Kentucky

The Kentucky Department of Public Advocacy (DPA) is a statewide entity that oversees and/or provides delivery of indigent defense services in each of Kentucky's 120 counties. The DPA has full-time public defender offices in 80 of the state's counties and contracts with private counsel to provide part-time services in the remaining 40 counties. The DPA also has a central appellate unit in its administrative office. In Louisville/Jefferson County and Lexington/Fayette County, public defender representation is provided by private, non-profit corporations outside of the DPA and funded with both county and state funds.

By statute, the state is responsible for funding indigent defense in Kentucky with the expectation that the counties will contribute local funds to augment the state appropriation. However, other than Louisville and Lexington counties, very few counties contribute local funds. The DPA receives revenue from three of the forty different fees assessed against defendants that Kentucky relies on to supplement state funding of various agencies. The DPA's three revenue sources are: a \$52.50 administrative fee assessed against any indigent person who is assigned a public defender or court-appointed counsel in a criminal case; 25% of the \$200 service fee assessed against individuals convicted of drunk driving; and 12.5 cents per capita from each county with less than ten circuit judges for expert witnesses and other comparable expenses. (The states' two largest counties, Jefferson and Fayette, are exempt from this requirement.) Aside from the supplemental revenue sources, the DPA receives some federal and foundation grants. Kentucky ranks fourth in per capita indigent defense expenditure (\$7.28) among the 11 comparison states in Table 2.

¹³ By statute, Illinois counties with populations of 35,000 or more are required to have a public defender program.

Louisiana

Louisiana's statewide commission, the Louisiana Indigent Defense Assistance Board (LIDAB), oversees indigent defense in each of the state's 41 judicial circuits. LIDAB was created in 1994 by State Supreme Court rule to directly supplement the budgets of local indigent defender boards that comply with LIDAB qualifications and performance guidelines, defray the costs of court-ordered defense experts and tests throughout the local boards, and more adequately fund counsel representing indigent defendants charged with capital crimes. The LIDAB oversees selection and compensation of counsel in conflict and overload situations, and contracts with a number of private attorneys to provide back-up and consultation to attorneys handling capital cases. LIDAB's statewide appellate project handles 95% of all indigent non-capital felony appeals in the state's districts. LIDAB's organizational structure was modified by statute in 1997 and the program became a separate agency within the executive branch.

Louisiana's 64 parishes (which are akin to counties) are divided into 41 judicial circuits, and each judicial circuit has an indigent defender board that selects the indigent defense system for the circuit. Each board can select a contract defender, public defender or court appointed attorney system, or a combination of these models. Thirty-eight districts have a contract system; the remaining three have a public defender, with contract and court-appointed attorneys handling conflict cases. Most districts use contract attorneys for conflicts.

Parishes are primarily responsible for funding indigent defense through court conviction costs at the district level.¹⁴ To supplement revenue from the court costs, each local indigent defense board may apply for limited state assistance from LIDAB. The LIDAB contributes monies towards trial-level indigent defense representation through its District Assistance Fund, available to Louisiana indigent defense boards which comply with LIDAB qualification and performance guidelines. Louisiana ranks second in per capita indigent defense expenditure (\$10.18) among the 11 comparison states in Table 2.

During the 1999 regular legislative session, a statute passed requiring counsel in state post-conviction capital cases. Administration of this newly established right to counsel, including responsibility for paying attorneys' fees and other costs of representation, was turned over to LIDAB.

Missouri

The state-funded Missouri State Public Defender has three divisions that provide representation to indigent defendants at trial, appeal and capital proceedings in all counties within the state. There are 35 district public defender trial offices, six appellate offices, and three capital offices. Most conflict of interest cases are handled by transferring the conflict case to another office in the state. When it is not practical to transfer a conflict case to another district office, it is assigned to private court-appointed counsel.

¹⁴ Though the state has been reluctant to allocate additional general-revenue funds for indigent defense, an amendment effective August 1998 increased the maximum court conviction charge of a felony or misdemeanor to \$35, making the previous maximum amount of \$25 the new minimum charge.

The State of Missouri funds the State Public Defender system through general revenue monies. The state currently does not receive any federal funds; promissory notes and liens from indigent defendants supplement the appropriations. Missouri ranks ninth in per capita indigent defense expenditure ((\$5.16) among the 11 comparison states in Table 2.

New York

New York's indigent defense system is primarily funded by its 62 counties, which, by statute, may utilize a public defender, assigned counsel and/or a private legal aid society model to provide indigent defense services. The state provides limited monies to counties through its Aid to Indigent Defense Fund. Of the state's 62 counties, 12 use court-appointed counsel as the sole means of indigent defense representation, 36 have a public defender office and use assigned counsel for conflict of interest cases, and 14 have a mixed system including a legal aid society with assigned counsel and/or a public defender program.

In recent years, New York City has experienced noteworthy changes in the way it delivers indigent defense services. Until 1995, the Legal Aid Society of New York provided all primary representation for trial, appeal and juvenile cases (as well as civil legal representation) in New York's five boroughs, or counties. Since 1995, the city has diversified its primary providers of indigent defense services by contracting with a number of non-profit organizations which now handle a portion of the City's primary adult indigent defendant cases in four of the five boroughs and all such cases in Staten Island.

Unlike other indigent defense services in New York, all attorneys' fees and expenses associated with the defense of indigent defendants accused of capital crimes in New York are funded by the state. The Capital Defender Office (CDO) was created by statute to provide representation and to support and assist at all stages of capital litigation. The CDO has contracted with attorneys and other indigent defense organizations (e.g., the New York Legal Aid Society Capital Defense Unit) for representation in capital cases. Compensation for counsel appointed to capital cases is \$125/hour for lead counsel and \$100/hour for co-counsel services rendered after the prosecution gives notice of intent to seek the death penalty. In addition, capital defense counsel may procure "reasonably necessary additional legal assistance" at a rate of \$40/hour, and paralegal assistance at \$25/hour.

Compensation for court-appointed counsel in New York handling non-capital cases is among the lowest in the nation. Last increased in 1986, the current rates, which are set by statute, are \$25 per hour for out-of-court work and \$40 per hour for in-court work, with caps of \$800 for non-felony cases and \$1,200 for felony cases.

North Carolina

In July 2000, the North Carolina General Assembly enacted the Indigent Defense Services Act of 2000, which provides, for the first time, oversight of the indigent defense system at the state level. The Act created the Office of Indigent Defense Services (the "Office"), an independent agency within the state's Judicial Department, which includes a 13-member Commission on Indigent Defense Services (the "Commission"). The main responsibilities of the

Commission are to: develop and improve programs by which the Office of Indigent Defense Services provides legal representation to indigent persons; develop standards governing the provision of services under the Indigent Defense Act, such as minimum experience, training and other qualifications for appointed counsel; determine the methods for delivering legal services to indigent persons in each district; and establish policies and procedures in regards to the distribution of funds under the Act, such as rates of compensation for appointed counsel.

Currently, each county in North Carolina has the responsibility of organizing its own indigent defense delivery system, though the state funds all indigent defense expenditures. Eleven counties use a public defender program as the primary delivery system; the remaining 89 use court-appointed counsel. In counties with public defender programs, court-appointed attorneys handle the conflict of interest cases. Appellate representation is provided by the State Appellate Defender. North Carolina ranks third in per capita indigent defense expenditure (\$8.19) among the 11 comparison states in Table 2.

Oklahoma

In 1991, the Oklahoma legislature created and funded a state agency, the Oklahoma Indigent Defense System (OIDS), to provide statewide indigent defense services. The impetus for the new statewide system was a 1990 Oklahoma Supreme Court decision that invalidated the seriously under-funded court-appointed counsel system then in place. *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). The legislature gave OIDS the responsibility of state oversight and appropriated state funds for both trial and appellate services. The legislation creating the new system excluded counties with populations over 200,000, thus Tulsa and Oklahoma counties are not part of OIDS. These two counties operate full-time, county-funded public defender programs.

OIDS, with its five-member Board of Directors, is responsible for providing indigent defense services in 75 of Oklahoma's 77 counties. OIDS has separate, staffed divisions for capital trial, capital direct appeal, non-capital direct appeal and capital state post-conviction cases. The majority of non-capital trial cases are handled by attorneys working in various counties under contract with OIDS, although OIDS has five regional trial offices. The vast majority of funding for OIDS is from appropriations by the Oklahoma Legislature, although OIDS receives 90% of any costs of representation assessed against a convicted defendant and collected by the district court clerks. Oklahoma ranks sixth in per capita indigent defense expenditure (\$6.53) among the 11 comparison states in Table 2.

Pennsylvania

Each of Pennsylvania's 67 counties organizes and funds its own indigent defense delivery system. By statute, each county must have a local public defender.

South Carolina

South Carolina has 39 public defender corporations serving its 46 counties. The defender corporations handle felony, misdemeanor and juvenile trial cases. The defender corporations are independent organizations created by the local bar associations, and are independent of county government. For conflict cases, thirty-three corporations use court-appointed counsel; the rest use a contract system. South Carolina sponsors a separate, state-funded appellate program for capital and non-capital appeals.

Each defender corporation receives county funding; additional state funds are provided based on population within the defender corporation districts. This funding formula results in some corporations receiving more county funds than state funds, while some receive more state funds than county funds. In 1992 a statewide commission, the South Carolina Office of Indigent Defense (OID), was created to oversee the allocation of funds to local trial programs from two new revenue sources: an up-front public defender application fee of \$25, and a percentage of a criminal conviction surcharge levied against every defendant who is convicted of, pleads guilty or nolo contendere to, or forfeits bond for, an offense tried in general sessions, magistrate and municipal courts. The South Carolina OID distributes revenue from the surcharge and application fee into three accounts: (1) capital case representation and expenses, (2) conflict case representation and non-capital case expenses, and (3) local public defender offices.¹⁵ For FY 2000, 50% of the collected revenue was appropriated to the capital case account, 15% to the conflict case account and 35% to the local public defender account. If there are extra funds remaining from the capital and conflict accounts, the public defender account receives the surplus. However, for the past two years the high volume of capital and conflict cases has prevented the public defender account from receiving any surplus. South Carolina ranks seventh in per capita indigent defense expenditure (\$5.94) among the 11 comparison states in Table 2.

¹⁵ The percentage of the surcharge allocated to the Office of Indigent Defense varies among the three court levels, however, on average, OID receives approximately 10% of the surcharge assessed on cases from the three courts.

APPENDIX B

Texas Office of Court Administration Indigent Criminal Defense Expenditure Survey for County Fiscal Year 1999 (Includes Actual and Estimated Expenditures)

SUMMARY of SURVEY RESULTS

Total Expenditures by County Population

	Small Counties (Under 50,000 Population)	Medium Counties (50,000 - 200,000 Population)	Large Counties (Over 200,000 Population)	All Counties
Total Number of Counties	203	36	15	254
Total Indigent Criminal Defense Expenditures (Percent of Total)	\$13,339,008 (14.3%)	\$19,025,915 (20.4%)	\$60,743,419 (65.2%)	\$93,108,342 (100%)

Top Ten Counties by Total Expenditures

County (Population)	Indigent Criminal Defense Expenditures			Percent of State Total
	Legal Representation	Other Services	Total	
Dallas (1,852,810)	\$16,125,794	\$1,297,810	\$17,423,604	18.7%
Harris (2,818,199)	11,521,801	1,026,000	12,547,801	13.5%
Tarrant (1,170,103)	5,629,555	672,985	6,302,540	6.8%
Bexar (1,185,394)	4,637,046	834,364	5,471,410	5.9%
El Paso (591,610)	3,644,168	472,187	4,116,355	4.4%
Travis (576,407)	3,263,991	467,471	3,731,462	4.0%
Hidalgo (383,545)	1,847,546	175,774	2,023,319	2.2%
Galveston (217,399)	1,545,582	27,980	1,573,562	1.7%
Potter (97,874)	1,142,404	298,275	1,440,678	1.5%
Nueces (291,145)	1,269,738	169,656	1,439,394	1.5%
Totals	\$50,627,625	\$5,442,502	\$56,070,125	60.2%

Notes: 1. Population estimates per 1990 U.S. Census.
2. Some numbers may not total due to rounding.

APPENDIX C

Table 1 Cost-Per-Capita Comparison for States that Fund 100% of Indigent Defense Services¹⁶				
State	Population (1999)	Most Recent State Expenditure or Budget*	Fiscal Year	Cost-Per-Capita
Oregon	3,316,154	\$76,556,738 (E)	2000	\$23.09
Alaska ¹⁷	619,500	\$9,500,000 (B)	2001	\$15.33 ¹⁸
New Mexico	1,739,844	\$26,606,000 (B)	2001	\$15.29
Massachusetts	6,175,169	\$90,848,761(E)	2000	\$14.71
West Virginia	1,806,928	\$27,498,806 (E)	2000	\$15.22
Wisconsin	5,250,446	\$66,000,000 (B)	2001	\$12.57
Vermont	593,740	\$6,906,675 (E)	2000	\$11.63
New Hampshire	1,201,134	\$13,019,891(B)	2001	\$10.84
Delaware	753,538	\$7,169,400 (E)	2000	\$9.51
Iowa	2,869,413	\$29,373,684 (E)	1998	\$10.24
Minnesota	4,775,508	\$50,000,000 (E)	2000	\$10.47
Maryland	5,171,634	\$49,500,000 (B)	2001	\$9.57
Colorado	4,056,133	\$37,980,369 (B)	2001	\$9.36
Connecticut	3,282,031	\$29,985,492 (E)	2000	\$9.14
Virginia	6,872,912	\$61,900,000 (B)	2001	\$9.00
New Jersey	8,143,412	\$70,460,000 (E)	2000	\$8.65
North Carolina	7,650,789	\$62,680,384 (E)	1999	\$8.19
Maine	1,253,040	\$9,563,326 (B)	2001	\$7.63
Hawaii	1,185,497	\$6,917,000 (E)	1999	\$5.83
Rhode Island	990,819	\$5,753,818 (E)	2000	\$5.81
Missouri	5,468,338	\$28,202,699 (E)	1999	\$5.16
Alabama	4,369,862	\$29,886,452 (E)	2000	\$6.84
Arkansas	2,551,373	\$12,333,561 (B)	2001	\$4.83
North Dakota	633,666	\$1,704,742 (E)	2000	\$2.69

* E: Expenditure; B: Budget

Prepared by The Spangenberg Group on behalf of the American Bar Association Bar Information Program
© November 2000 The Spangenberg Group, 1001 Watertown Street, West Newton, MA 02465 (617) 969-3820

¹⁶ Though Alabama relies on a fair trial tax in addition to state funds, the state has been included on this list because no county funds are used for indigent defense services.

¹⁷ Alaska's state expenditure does not include monies budgeted for the Office of Public Advocacy. The Office of Public Advocacy handles criminal conflict of interest cases, domestic violence, termination of parental right and juvenile dependency cases.

¹⁸ The state indigent defense expenditure and cost-per-capita would rise substantially if the budget were available for the Office of Public Advocacy.

APPENDIX C (cont.)

Table 2 Cost-Per-Capita Comparison for States that Fund Less than 100% of Indigent Defense Services							
State	Population (1999)	State Expenditure	County Expenditure	Total Expenditure	Fiscal Year	Total Expenditure- Per-Capita	Percentage of State Funds
Florida	15,111,244	\$141,797,462	\$35,000,000	\$176,797,462	2000	\$11.70	80.2%
Kentucky	3,960,825	\$25,845,330	\$2,987,000	\$28,832,330	2000	\$7.28	89.6%
Kansas	2,654,052	\$14,438,502	\$3,859,625	\$18,298,127	2000	\$6.89	78.9%
Tennessee	5,483,535	\$30,597,541	\$4,788,783	\$35,386,324	2000	\$6.45	86.5%
Ohio	11,256,654	\$26,382,690	\$29,362,262	\$55,744,952	2000	\$4.95	47.3%
Oklahoma	3,358,044	\$15,917,390	\$6,026,526	\$21,943,916	2000	\$6.53	72.5%
South Carolina	3,885,736	\$16,609,790 ¹⁹	\$6,488,362 ²⁰	\$23,098,152	2000/ 2001	\$5.94	71.9%
Louisiana	4,372,035	\$7,500,000	\$37,017,000	\$44,517,000	2000	\$10.18	16.9%
Georgia	7,788,240	\$4,900,000	\$40,581,423	\$45,481,423	1999	\$5.84	10.8%
Nevada	1,809,253	\$541,885	\$22,930,543	\$23,472,428	1999	\$12.97	2.3%

¹⁹ South Carolina FY 2001 state budget information.

²⁰ South Carolina FY 2000 estimated county budget.

APPENDIX D

IJA-ABA Juvenile Justice Standards Relating To Counsel For Private Parties

PART I. GENERAL STANDARDS

Standard 1.1. Counsel in Juvenile Proceedings, Generally.

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

Standard 1.2. Standards in Juvenile Proceedings, Generally.

As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

As used in these standards, the term “unprofessional conduct” denotes conduct which is now or should be subject to disciplinary sanction. Where other terms are used, the standard is intended as a guide to honorable and competent professional conduct or as a model for institutional organization..

Standard 1.3. Misrepresentation of Factual Propositions or Legal Authority.

It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discussions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client’s responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense is a statement of the party’s posture with respect to the proceeding and is not a representation of fact or of legal authority.

Standard 1.4. Relations with Probation and Social Work Personnel.

A lawyer engaged in juvenile court practice typically deals with social work and probation department personnel throughout the course of handling a case. In general, the lawyer should cooperate with these agencies and should instruct the client to do so, except to the extent such cooperation is or will likely become inconsistent with protection of the client’s legitimate interests in the proceeding or of any other rights of the client under the law.

Standard 1.5. Punctuality.

A lawyer should be prompt in all dealings with the court, including attendance, submissions of motions, briefs and other papers, and in dealings with clients and other interested persons. It is unprofessional conduct for counsel intentionally to use procedural devices for which there is no legitimate basis, to misrepresent facts to the court or to accept conflicting responsibilities for the purpose of delaying court proceedings. The lawyer should also emphasize the importance of punctuality in attendance in court to the client and to witnesses to be called, and, to the extent feasible, facilitate their prompt attendance.

Standard 1.6. Public Statements.

The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.

Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA Standards Relating to Fair Trial and Free Press.

Standard 1.7. Improvement in The Juvenile Justice System.

In each jurisdiction, lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court.

PART II. PROVISIONS AND ORGANIZATION OF LEGAL SERVICES

Standard 2.1. General Principles.

Responsibility for provision of legal services. Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.

Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

Careful and candid evaluation of representation in cases involving children should be undertaken

by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel-whether public or private-appears.

Compensation for services. Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.

As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.

Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

Supporting services. Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.

Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.

Where a defender system is involved, adequate supporting services should be available within the organization itself.

Independence. Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

Standard 2.2. Organization of Services.

In general. Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

Defender systems. Application of general defender standards. A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

Facilities. If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

Specialization. While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

Caseload. It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

Assigned counsel systems. An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

Standard 2.3. Types of Proceedings.

Delinquency and in need of supervision proceedings. Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.

Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect

the juvenile's custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

Child protective, custody and adoption proceedings. Counsel should be available to the respondent parents, including the father of an illegitimate child, or other guardian or legal custodian in a neglect or dependency proceeding. Independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody. Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters, except where temporary emergency action is involved and immediate participation of counsel is not practicable.

Standard 2.4. Stages Of Proceedings.

Initial provision of counsel. When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

Duration of representation and withdrawal of counsel. Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.

Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.

If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

PART III. THE LAWYER-CLIENT RELATIONSHIP

Standard 3.1. The Nature Of The Relationship.

Client's interests paramount. However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

Determination of client's interests. Generally. In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

Counsel for the juvenile. Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel.

In delinquency and in need of supervision proceedings, where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

Where a guardian *ad litem* has been appointed, primary responsibility for determination of the posture of the case rests with the guardian and the juvenile.

Where a guardian *ad litem* has not been appointed, the attorney should ask that one be appointed.

Where a guardian *ad litem* has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's), and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.

Counsel for the parent. It is appropriate and desirable for an attorney to consider all circumstances, including the apparent interests of the juvenile, when counseling and advising a parent who is charged in a child protective proceeding or who is seeking representation during a delinquency or in need of supervision proceeding. The posture to be adopted with respect to the facts and conditions alleged in the proceeding, however, remains ultimately the responsibility of the client.

Standard 3.2 Adversity of Interests.

Adversity of interests defined. For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:

Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.

Formally represent more than one client and it is their duty to contend in behalf of one client that which may prejudice the other client's interests at any point in the proceeding. Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.

Resolution of adversity. At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

Standard 3.3. Confidentiality.

Establishment of confidential relationship. Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

Preservation of client's confidences and secrets. Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.

Except as permitted by 3.3(d), below, an attorney should not knowingly use a confidence or secret of a client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.

Preservation of secrets of a juvenile client's parent or guardian. The attorney should not reveal information gained from or concerning the parent or guardian of a juvenile client in the course of representation with respect to a delinquency or in need of supervision proceeding against the client, where (1) the parent or guardian has requested the information be held inviolate, or (2) disclosure of the information would likely be embarrassing or detrimental to the parent or guardian and (3) preservation would not conflict with the attorney's primary responsibility to the interests of the client. The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.

Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.

Disclosure of confidential communications. In addition to circumstances specifically mentioned above, a lawyer may reveal:

Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.

Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.

The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm. If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan. Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

Standard 3.4. Advice and Service with Respect to Anticipated Unlawful Conduct.

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

Standard 3.5. Duty to Keep Client Informed.

The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation. This duty may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of confidentiality set forth in 3.3, above.

PART IV. INITIAL STAGES OF REPRESENTATION

Standard 4.1. Prompt Action to Protect the Client.

Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests.

Standard 4.2. Interviewing the Client.

The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.

In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

Standard 4.3. Investigation and Preparation.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.

It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

Standard 4.4. Relations with Prospective Witnesses.

The ethical and legal rules concerning counsel's relations with lay and expert witnesses generally govern lawyers engaged in juvenile court representation.

PART V. ADVISING AND COUNSELING THE CLIENT

Standard 5.1. Advising the Client Concerning the Case.

After counsel is fully informed on the facts and the law, he or she should with complete candor advise the client involved in juvenile court proceedings concerning all aspects of the case, including counsel's frank estimate of the probable outcome. It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case in order unduly or improperly to influence the client's determination of his or her posture in the matter.

The lawyer should caution the client to avoid communication about the case with witnesses where such communication would constitute, apparently or in reality, improper activity. Where the right to jury trial exists and has been exercised, the lawyer should further caution the client with regard to communication with prospective or selected jurors.

Standard 5.2. Control and Direction of the Case.

Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:

- the plea to be entered at adjudication;
- whether to cooperate in consent judgment or early disposition plans;
- whether to be tried as a juvenile or an adult, where the client has that choice;
- whether to waive jury trial;
- whether to testify on his or her own behalf.

Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.

If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached.

This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Standard 5.3. Counseling.

A lawyer engaged in juvenile court representation often has occasion to counsel the client and, in some cases, the client's family with respect to nonlegal matters. This responsibility is generally appropriate to the lawyer's role and should be discharged, as any other, to the best of the lawyer's training and ability.

PART VI. INTAKE, EARLY DISPOSITION AND DETENTION

Standard 6.1. Intake and Early Disposition Generally.

Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client's rights.

Standard 6.2. Intake Hearings.

In jurisdictions where intake hearings are held prior to reference of a juvenile court matter for judicial proceedings, the lawyer should be familiar with and explain to the client and, if the client is a minor, to the client's parents, the nature of the hearing, the procedures to be followed, the several dispositions available and their probable consequences. The lawyer should further advise the client of his or her rights at the intake hearing, including the privilege against self-incrimination where appropriate, and of the use that may be made of the client's statements.

The lawyer should be prepared to make to the intake hearing officer arguments concerning the jurisdictional sufficiency of the allegations made and to present facts and circumstances relating to the occurrence of and the client's responsibility for the acts or conditions charged or to the necessity for official treatment of the matter.

Standard 6.3. Early Disposition.

When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

A lawyer should not participate in an admission of responsibility by the client for purposes of securing informal or early disposition when the client denies responsibility for the acts or conditions alleged.

Standard 6.4. Detention.

If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody. Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

PART VII. ADJUDICATION

Standard 7.1. Adjudication without Trial.

Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

Standard 7.2. Formality, In General.

While the traditional formality and procedure of criminal trials may not in every respect be necessary to the proper conduct of juvenile court proceedings, it is the lawyer's duty to make all motions, objections or requests necessary to protection of the client's rights in such form and at such time as will best serve the client's legitimate interests at trial or on appeal.

Standard 7.3. Discovery and Motion Practice.

Discovery. Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

In seeking discovery, the lawyer may find that rules specifically applicable to juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

Other motions. Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

Standard 7.4. Compliance with Orders.

Control of proceedings is principally the responsibility of the court, and the lawyer should comply promptly with all rules, orders and decisions of the judge. Counsel has the right to make respectful requests for reconsideration of adverse rulings and has the duty to set forth on the record adverse rulings or judicial conduct which counsel considers prejudicial to the client's legitimate interests.

The lawyer should be prepared to object to the introduction of any evidence damaging to the client's interest if counsel has any legitimate doubt concerning its admissibility under constitutional or local rules of evidence.

Standard 7.5. Relations with Court and Participants.

The lawyer should at all times support the authority of the court by preserving professional decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors

When court is in session, the lawyer should address the court and not the prosecutor directly on

any matter relating to the case unless the person acting as prosecutor is giving evidence in the proceeding

It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court, the prosecutor or probation department personnel.

When in the company of clients or clients' parents, the attorney should maintain a professional demeanor in all associations with opposing counsel and with court or probation personnel.

Standard 7.7. Presentation of Evidence.

It is unprofessional conduct for a lawyer knowingly to offer false evidence or to bring inadmissible evidence to the attention of the trier of fact, to ask questions or display demonstrative evidence known to be improper or inadmissible, or intentionally to make impermissible comments or arguments in the presence of the trier of fact. When a jury is empaneled, if the lawyer has substantial doubt concerning the admissibility of evidence, he or she should tender it by an offer of proof and obtain a ruling on its admissibility prior to presentation.

Standard 7.8. Examination of Witnesses.

The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.

It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

Standard 7.9. Testimony by the Respondent.

It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.

If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.

If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.

If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

Standard 7.10. Argument.

The lawyer in juvenile court representation should comply with the rules generally governing argument in civil and criminal proceedings.

PART VIII. TRANSFER PROCEEDINGS

Standard 8.1. In General.

A proceeding to transfer a respondent from the jurisdiction of the juvenile court to a criminal court is a critical stage in both juvenile and criminal justice processes. Competent representation by counsel is essential to the protection of the juvenile's rights in such a proceeding.

Standard 8.2. Investigation and Preparation.

In any case where transfer is likely, counsel should seek to discover at the earliest opportunity

whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

Standard 8.3. Advising and Counseling the Client Concerning Transfer.

Upon learning that transfer will be sought or may be elected, counsel should fully explain the nature of the proceeding and the consequences of transfer to the client and the client's parents. In so doing, counsel may further advise the client concerning participation in diagnostic and treatment programs which may provide information material to the transfer decision.

Standard 8.4. Transfer Hearings.

If a transfer hearing is held, the rules set forth in Part VII of these standards shall generally apply to counsel's conduct of that hearing.

Standard 8.5. Post-Hearing Remedies.

If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for post-transfer relief.

PART IX. DISPOSITION

Standard 9.1. In General.

The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

Standard 9.2. Investigation and Preparation.

Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

The lawyer should promptly investigate all sources of evidence including any reports or other

information that will be brought to the court's attention and interview all witnesses material to the disposition decision.

If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

Standard 9.3. Counseling Prior to Disposition.

The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.

The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

Standard 9.4. Disposition Hearing.

It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.

Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the

lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

Standard 9.5. Counseling After Disposition.

When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and his or her family and to urge upon the client the need for accepting and cooperating with the dispositional order. If appeal from either the adjudicative or dispositional decree is contemplated, the client should be advised of that possibility, but the attorney must counsel compliance with the court's decision during the interim..

PART X. REPRESENTATION AFTER DISPOSITION

Standard 10.1. Relations with the Client After Disposition.

The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.

If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

Standard 10.2. Post-Dispositional Hearings Before the Juvenile Court.

The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

Standard 10.3. Counsel on Appeal.

Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.

Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit.

Standard 10.4. Conduct of the Appeal.

The rules generally governing conduct of appeals in criminal and civil cases govern conduct of appeals in juvenile court matters.

Standard 10.5. Post-Dispositional Remedies: Protection of the Client's Right to Treatment.

A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post-dispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

Counsel representing a client in post-dispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

The lawyer engaged in post-dispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

Standard 10.6. Probation Revocation; Parole Revocation.

Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.

Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.

Standard 10.7. Challenges to the Effectiveness of Counsel.

A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.

A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.