

Muting Gideon's Trumpet:
The Crisis in Indigent Criminal Defense in Texas

A Report Received by the State Bar of Texas From the
Committee on Legal Services to the Poor in Criminal Matters

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In 1963, the United States Supreme Court ruled in *Gideon v. Wainwright*, 372 U.S. 335, that the Constitution required the appointment of an attorney to represent any indigent person charged with a felony level offense. As the Court explained, "In our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crimes. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries" (372 U.S. at 344).

The *Gideon* case, while a landmark, merely extended the reasoning of *Powell v. Alabama*, 287 U.S. 45 (1932), which had earlier ruled that the Constitution required legal counsel be appointed or otherwise provided for indigents accused in capital cases. Later cases such as *In re Gault*, 387 U.S. 1 (1967), *Argersinger v. Hamlin*, 407 U.S. 24 (1972), and *Ake v. Oklahoma* 470 U.S. 68 (1985) continued to extend the right to counsel and provide additional protections for indigents accused in criminal matters. Today, there is little question that indigents accused of criminal offenses that carry a possible punishment of confinement are entitled to an attorney and the other material requisites for mounting a defense to those charges. What is questionable, however, is whether the current system of delivering legal services in Texas to indigent defendants fosters - - or even permits-- effective representation. Fundamentally, the right to have legal counsel is hollow unless it is *effective* legal counsel.

For the right to an attorney to be meaningful, the system of representing indigents should meet several criteria. First, legal counsel appointed to represent indigent clients in criminal matters should be competent and assigned in a fashion that encourages vigorous defense of their assigned clients. The assigned attorneys should, at all times, be seen as independent advocates for their clients and adhere to the highest ethical and professional standards. Moreover, the counsel should be assigned within a reasonable number of hours or days and not a matter of weeks or months after the arrest. Waiting until indictment to provide an attorney, which is not an uncommon occurrence in many jurisdictions, is not unlike waiting until the autopsy to provide a physician. Second, attorneys representing indigent clients should have the necessary incentives to provide their clients with their best defense. Third, legal counsel representing indigent clients should have access to the resources necessary to properly defend their clients. Fourth, indigent defendants should have access to the same quality of justice as defendants who retain their own counsel. Stated differently, judicial outcomes for similarly situated cases should not differ based on whether counsel is appointed or retained, that is, on the financial resources of the defendant. Finally, the system of representing indigent defendants should be void of political considerations. Political party preference, electoral considerations, and financial pressures should have no place in determining judicial outcomes.

In discussing indigent defense in Texas it must be realized that Texas is a large state with many cultural, economic and other differences. As a result of that diversity, any generalization about the state is fraught with danger. East Texas is known for its "southern style" of life, lush gardens and huge trees, while west Texas is characterized by "western culture," cactus and vast deserts. The metropolitan centers of Houston and Dallas have single apartment buildings with more residents than some rural Texas counties (Loving County on the New Mexico border has a 110 people in the entire county). The counties reflect vastly different cultures and heritages (Hispanics make up 81.6 percent of the population of Presidio County [along the Mexican border] while Afro-Americans constitute only one-tenth of one percent of that county--on the other hand, over 31 percent of the population of Jefferson County is Afro-American and 5.3 percent is Hispanic). There are counties identified with oil production, ranching or commerce and trade, and having fine schools and a solid tax base; other Texas counties are best described as "hard scrabble" with some of the poorest school districts in the nation and little in the way of a tax base.

Just as with the differences noted above, there is similar variety in the delivery of legal services to the poor in criminal matters. Within Texas there are areas where the system of indigent defense is working reasonably well. . . . and there are other areas where it is working, but not very well . . . and then there are portions of the state where the system does not work well at all. Recognizing that there are exceptions, we have nevertheless concluded that there are large portions of Texas that fall short of meeting each of the above criteria for meaningful systems of indigent defense. To the extent of that shortfall, Gideon's trumpet in Texas has been effectively muted.

A Brief Overview of Indigent Criminal Defense in Texas

The revolutionary effects of *Gideon* were not nearly as dramatic in Texas as was the case in many other states. This is due in large measure to the fact that as early as 1857, the Texas Code of Criminal Procedure provided, "(w)hen the defendant is brought into Court, for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him." This guarantee of legal counsel in criminal cases, regardless of ability to pay, has therefore been the law in Texas for some 140 years and over 100 years before *Gideon*. In addition to the Texas Code of Criminal Procedure, Article 1, Section 10 of the present (1876) Texas Constitution guarantees the right of counsel and this provision has been found in every Texas Constitution since Texas became a Republic in 1836. (See, *Foster v. State*, 767 S.W. 2d 89 [Tex. Crim. App. 1990]).¹

¹ It appears that there are some slight differences between the U.S. Constitution's Sixth Amendment and Article 1, Section 10 of the Texas Constitution which would permit Texas courts to provide a more expansive interpretation of the right to counsel. As of this date, these differences have not been used, but such a possibility certainly exists. For example, in *Ramirez v. State*, 721 S.W. 2d 490, 492 (Tex. App. - Houston [1st Dist] 1988) Justice Levy argued for an expanded view of the Texas right of counsel provision and wrote in dissent that, "(t)he right to counsel clause (in the Texas Constitution), having been earned by our forefathers only through much blood and agony, should correspondingly be accorded liberal construction in favor of the right it was intended to secure." If this view were to attract support from other appellate courts, it may well be that Texas could take a national leadership role in right to counsel questions such as the threshold showing required to secure legal assistance, the establishment of minimum levels of experience, training and overall competency of the counsel providing this representation, and the

Criminal cases in Texas are tried in the counties in which the offenses occur. Given that as of September 1, 1999, there were 405 district courts and 457 county courts operating in the 254 counties of Texas, with each court having the authority to develop its own delivery system, to say that there has been diversity in the provision of legal services to indigent defendants is, no doubt, a gross understatement. Years ago, many of the counties merely assigned local attorneys to handle these cases with little or no compensation or funds for expenses. Because receiving these appointments was so unpopular, the bar associations in some counties developed a system whereby they assessed their membership and established a pool of funds from which attorneys who were willing to take these cases would be paid or have their county pay supplemented. Indeed, it was such an arrangement that resulted in a statute creating the first public defender effort in Texas. In 1969, the Tarrant County Bar Association (Fort Worth), which had been assessing its members for these funds, succeeded in transferring that financial burden to the county by persuading the legislature to provide one county-paid public defender position for each Tarrant County district court that handled criminal matters. Even at present, some county bar associations continue to assess members who do not want to take court appointments and use these funds to “sweeten” the pool of funds from which remuneration is paid to those attorneys who are willing to handle them (e.g. Bexar and El Paso counties).²

Despite Texas’ lengthy history of requiring indigent defense in criminal matters, there have been few attempts to examine the appropriateness and effectiveness of the systems used to carry this into effect. In 1994, the State Bar of Texas formed the Committee on Legal Services to the Poor in Criminal Matters and charged it with the responsibility to “study the system of defense of indigent persons in criminal law matters in Texas, collect data and other information relevant to their defense and to develop recommendations for action by the State Bar of Texas, the Texas Legislature, and all other entities that are or should be involved in the provision of quality representation to indigent persons involved in criminal law matters.” The need for this committee and the importance of its charge can not be overstated. A report commissioned by the Department of Justice (Spangenberg 1986) found that Texas ranked fortieth in the nation in indigent defense expenditures and one observer has gone so far as to pronounce the situation in Texas a “crisis” (Long 1994). One commentator, Elisa Long, noted that “Texas’ indigent defense system is in a state of crisis. In Texas, thirty years after the Supreme Court’s mandates, constitutional safeguards for indigent criminal defendants remain illusory in practice” (Long 1994, 54). Given that no report exists which details the current situation in Texas, the need for the work of this Committee is obvious. This matter is also of increasing political importance as more and more national attention is focused on the circumstances in Texas.³

implementation of better standards for compensation and other financial requisites of effective assistance of counsel. To date, however, the political and judicial leaders in Texas have failed to take the lead in reforming what is now being reported to be one the nation’s worst systems for representing indigent criminal defendants (Long 1994).

² In El Paso County, each attorney must either accept criminal appointments or pay a \$600 assessment which is deposited in the county’s Indigent Criminal Defense Fund.

³ See , Hentoff 1999, Herbert 1999, and Novak 1999.

To determine the status of indigent criminal defense in Texas, the State Bar Committee conducted three mail surveys over a four year period using the total design method (Dillman 1978, see Appendix A). The initial survey, using both open and closed ended questions, gathered the opinions of criminal defense attorneys in the state. The State Bar of Texas identified approximately 6,000 individuals who practiced criminal defense law as all or part of their law practice.⁴ In 1995, questionnaires were sent to a random sample of 3,000 attorneys from this population and we received 1,376 usable responses (46 percent response rate). A second survey was sent to every prosecutor (n=1942) in the state in 1997 and we received 1,113 usable surveys (57 percent response rate). Our final questionnaire was mailed to every judge having criminal jurisdiction (n=846). This survey yielded 494 usable responses for a response rate of 58.4 percent. It is our aim here to offer a collective assessment of the status of indigent criminal defense in Texas. While it may be impossible to evaluate every aspect of such a large and diverse state as Texas, we intend for this report to provide a comprehensive lay of the land as it pertains to legal representation of the poor.

The Participants in the Judicial Process

By definition, those who are defendants in indigent criminal matters are deemed, by the court, to be too poor to afford an attorney (see below for specific difficulties in this area). Aside from this obvious observation, we know very little about the defendants in these matters and, unfortunately, our surveys shed little light on this question.⁵ It is worth noting at this point that Texas, unlike many states, does not currently require counties (or other jurisdictions) to report the number of indigent cases processed during a given year or the amount of money spent on those cases.

Our surveys do permit us to learn a fair amount about those involved in the delivery of legal services to our state's poor. Those responding to our surveys were more likely to be male (although prosecutors were less so) and white (See Table 1). Judges, not surprisingly, have had substantially more combined years of experience in criminal law (mean = 23.81 years) than defense attorneys (mean = 13.63 years), or prosecutors (mean = 9.18 years). Defense attorneys, by contrast, tend to have more prior experience in their current position (12.12 years) than either prosecutors (7.37 years) or judges (10.04 years). Finally, most respondents to the three surveys regularly attend continuing legal education courses sponsored by the State Bar of Texas or by their professional organization (Texas Criminal Defense Lawyers Association [TCDLA], Texas District and County Attorneys Association [TDCAA], or the Texas Center for the Judiciary).

(Table 1 about here)

Defense Attorneys. It is tempting for many to think of lawyers as working in large firms, driving expensive cars, and wearing finely tailored clothes. While that perception may be true for a

⁴ The sampling frame included all those who were Board Certified in criminal law, all subscribers to the State Bar's *Criminal Law Digest*, and all members of the Texas Criminal Defense Lawyers Association.

⁵ A survey of the actual consumers of indigent legal services -- indigents charged with crimes-- would be interesting and potentially very important. Such an effort, however, would be fraught with problems and is beyond the scope of our current work.

few select criminal defense lawyers, the reality is starkly different for the vast majority. Two-thirds (66.0 percent) of the respondents to our survey report that they are sole practitioners and another 28.9 percent report that they share an office with five or fewer attorneys. Of the third who do not office by themselves, nearly half (47.4%) are in a simple office sharing arrangement. In short, criminal defense attorneys are largely isolated entrepreneurs who may occasionally come together to share office expenses (more on the costs of doing business will be presented below).

Defense lawyers responding to our survey report that they spend roughly half (mean = 49.16 percent, s.d. = 30.40) of their time doing criminal defense work. It should be noted that many parts of the state are quite sparsely populated and, as such, lawyers in these areas may practice various kinds of law.⁶ Lawyers who are not full-time criminal defense lawyers are most likely to also practice civil law and family law. The typical respondent to our defense bar survey reports disposing of 72.46 (s.d = 97.68) state trial level cases per year and 5.30 (s.d. = 13.80) appellate cases per year, of these, 35.22 (s.d. = 53.14) trial cases and 4.17 (s.d. = 5.27) appellate cases are matters involving indigent clients. Virtually all of our respondents (95.0 percent) report that they have been appointed to represent indigent clients and nearly four in ten (39.9 percent) indicate that they actively seek such appointments. It is also worth noting that a similar number (39.6 percent) report that they have refused court appointments, most often because of a conflict of interest (33.1 percent), but also because they were too busy to take the appointment (15.4 percent), the pay was too low (13.6 percent), or other reasons.

One of the concerns that some have with the assigned counsel system is that it often results in a revolving door of young or beginning attorneys who accept appointed cases only to gain needed experience and establish themselves in the community. Once their skills become polished and their positions secure, the young attorneys then refuse further appointments, leaving the representation of the poor to the next batch of young and inexperienced lawyers. This view is supported by our finding that it is not uncommon for lawyers, prosecutors, and judges to view assigned matters as a training ground for new criminal attorneys. Almost half (48.3 percent) of the defense attorney respondents report that the number of indigent cases they handle each year has declined over the course of their career (see Table 2). More importantly, a majority (59.2 percent) of defense attorneys, and to a lesser extent prosecutors (27.6 percent) and judges (31.2 percent), feel that counsel in retained matters are more experienced than those in assigned matters. It is worth noting that nearly one-third of the judges, the very folks statutorily responsible for assigning the counsel (either actually or by overseeing the assignment), recognize that court appointed counsel are not as experienced as those in retained matters.

The use of court appointments as a means by which young lawyers learn their trade is not necessarily bad. It does, however, spotlight the need for adequate standards to be in place to serve as a form of "quality control" or a monitoring of the system to be sure the purpose of the system is

⁶ This raises some interesting questions. For example, do lawyers in rural areas who practice both criminal and civil law have different perspectives of the system than those who practice criminal law on a full-time basis? Are those in rural areas less jaded by the workings of the current system of indigent criminal defense given their less frequent encounters with the system? These questions, and others related to urban and rural differences merit further exploration.

achieved: adequate representation of indigents accused of crimes. This will be discussed more fully below.

(Table 2 about here)

Prosecutors and Judges. The typical prosecutor responding to our survey works in an office with 65.27 prosecutors (s.d. = 78.97), handles 482.96 (s.d.=951.86) state trial level cases per year (54.39% involving indigents), and 7.49 (s.d.=20.79) appellate cases per year (35.24% involving indigents).⁷ In some rural counties, prosecutors may, by statute, practice private law in addition to performing their duties for the county and district attorney's office. Just over one-quarter (28.9%) report they practice private law and that it consumes just 7.70 (s.d.= 17.70) percent of their time.

Judges in our survey represented counties with an average population of 606,137 residents (the range was 3,750 to 5,000,000 residents) and were more likely to be district judges (66.8 percent) than county judges (25.1 percent). Judges indicate that they dispose of, on average, 1,271.66 state trial level cases per year (of which 59.21 percent involve indigents) and that 43.03 of these cases will be contested trials (58.85 percent of which will involve indigents). The judges who responded to our survey were likely to have had varied experiences before arriving on the bench with most serving stints as prosecutors, criminal defense lawyers, and civil lawyers (see Table 3).

(Table 3 about here)

Assigning Counsel in Indigent Criminal Matters

Three methods of assigning counsel in indigent criminal matters are used throughout the country. In some jurisdictions, public defenders (either elected or appointed) handle cases involving indigent defendants. The public defender's office, under the best circumstances, is funded and staffed at a level similar to the district attorney's office and acts as an independent advocate for their clients. Attorneys working in public defender offices are not typically engaged in private practice and are considered public employees. Other jurisdictions "contract" with an individual attorney or group of attorneys to provide legal representation in all indigent matters. Just as a county takes bids for road construction, a judge may also take bids for the provision of legal services. Finally, the most common method of providing legal services to the poor is the judge-assigned counsel system. Under this system the judge, or his or her designee, appoints private counsel to represent indigent clients.⁸

⁷Averages or means, as measures of central tendency, are sensitive to extreme scores and thus these findings reflect the influence of the very large offices, e.g., Harris and Dallas counties.

⁸ In two counties, Bexar and El Paso, all of the lawyers are initially put on the appointment lists, but then are allowed to "buy out" of service by paying the county a fee to *not* receive court appointments. Thus, all of the Bexar and El Paso lawyers who do not wish to handle criminal cases or who at least do not want to handle indigent defendants, simply pay an additional "tax" to the county to have their names removed from the appointment lists.

Assigned Counsel Systems. While all three methods of providing legal representation are used in Texas, the assigned counsel system is by far the most prevalent. These "appointed" or "assigned" counsel systems, however, vary significantly throughout the state. Some judges assign attorneys from a list of all the licensed attorneys in the county, while other judges only assign attorneys from pools of those who have volunteered for such service. Other judges restrict their appointments to attorneys who have met certain standards, such as years of practice, minimum trial experience or proof of continuing legal education. Harris County has by far the most rigorous formal requirements for appointments. In that county, any attorney who wishes to be appointed to represent indigents in criminal cases must first be "certified" as competent by passing an exam or by showing proof of his or her trial or appellate experience, attendance at continuing legal education programs or Board Certification by the State Bar of Texas. All of the Harris County judges have agreed to limit their appointments to "certified" lawyers and the county auditor has been instructed not to pay any voucher submitted for a lawyer who is not on the approved list.

One of the most interesting and innovative methods by which counsel are selected for appointment is that found in Travis County. There attorneys wishing appointments make formal application and must be approved by the judges who, for felonies, then place each attorney in one of three categories ("A", "B" or "C" plus a capital murder group and an appellate group) based on his or her experience, years of practice, and other criteria indicating legal skills. This is not unlike "flights" of players at a golf tournament. Each new indigent case is categorized as an "A", "B" or "C" offense based on the applicable punishment range and then an administrator appoints the next lawyer, alphabetically, on that respective list. This allows the judges to control which lawyers are on the list and what list they are on, but the actual appointment of a particular attorney to a particular case is done by someone else. This provides some "distance" between the trial judge and the attorney and removes even an appearance of favoritism or cronyism.

The Travis County system also provides machinery, at least at the county courts level, by which a trial judge can sanction an attorney if that is deemed necessary. These sanctions include requiring the attorney to work with a mentor, placing the attorney on probation, requiring the attorney to take additional training or removal of the attorney from the appointment list. By this means, Travis County seeks to ensure that appointed counsel ". . . are competent and are providing the highest quality legal services to their clients."(Travis County Courts At Law Appointment System: Requirements for Attorneys" page 2).

In short, the reality is that each of the over 800 criminal judges in Texas determines the method of by which attorneys will be appointed to criminal cases in his or her court. As a result, there is no single "appointed counsel" system, but rather there is a great number of such systems, many with their own particular twists.

Public Defender Systems. The Texas Code of Criminal Procedure provides for public defenders in eight judicial districts, only one of which is multi-county (The 33rd Judicial District composed of Blanco, Burnett, San Saba, Mason and Llano counties), with the rest all single-county offices (e.g., Dallas and Wichita counties). There are, however, great differences in the organizations and the scope of their operations. Wichita County (population 122,378) is the only county which seeks to have the public defender office handle all cases, other than those having a conflict of interest or other impediment. This translates into that office representing about 85 percent of all indigent defendants. At the other end of the spectrum, Tarrant County (Fort Worth)

has a single "public defender" appointed in each of that county's eight district courts that handle criminal matters. The judge of each of these courts makes this appointment and then assigns to this "public defender" such cases as the judge deems appropriate. Commonly these amount to only a small percentage of the total indigent cases in that court and are often restricted to matters that can be disposed of quickly (e.g., obvious probation cases [young person caught joy riding], probation revocations and the like). See, Article 26.042, Texas Code of Criminal Procedure. The Tarrant County "public defenders" are usually considered to be half-time employees, having no central office, secretaries, investigators or other staff or resources. When support services are needed, the Tarrant County public defenders must petition the judge in each individual case, just as does any court appointed counsel.

Between Wichita County in which the public defenders office represents almost all of the indigents accused of crime and Tarrant County where the public defenders handle only a very small percent of the cases, are other public defender offices such as those found in Dallas and El Paso counties. The Dallas County Public Defender office has an annual budget of over \$3.5 million and, as of May 2000, employed 49 attorneys. These lawyers work in all but two of Dallas County's felony and misdemeanor courts and they handle between 43-45 percent of the county's indigent defense requirements. The individual courts vary in the manner and degree to which they utilize the public defender office, but that office has represented indigent clients in cases ranging from minor misdemeanors to death penalty trials. The El Paso County Public Defenders Office has approximately 18 lawyers on the staff and operates under a budget of about \$1.2 million. That office reportedly represents about half of the indigent persons prosecuted in that county.

While many reformers nationwide believe strongly in an independent and well funded public defender system, generally speaking, judges in Texas do not share that opinion. (See Table 4). Our surveys of judges reveal that nearly twice as many judges (44.5 percent) prefer the court appointed system to the public defender system (24.1 percent).

(Table 4 about here)

The Contract Systems. A few counties use a contract system by which the county (e.g., Young County, population 18,126) or an individual court (e.g., Harris County, See Texas Code of Criminal Procedure, Article 26.041) contracts with an attorney or group of attorneys to represent all or a portion of the indigent criminal defendants over a given period of time.

Determining Indigent Status. Once arrested and charged in a criminal matter, the accused is faced with the prospect of finding legal representation. For those with the necessary financial resources, the decision is a fairly simple one of retaining private counsel to represent their legal interests. However, for the growing number of the nation's and the state's poor⁹, the decision is more complex. For example, a poor defendant may be able to scrape together the resources to post bail, but then not have the necessary financial resources to retain counsel. Many trial judges take the position that the county should not provide an attorney to a person who is on bond and they refuse to make such appointments. When a judge persists in this, the defendant is forced to either

⁹ Long reports that "approximately 75 percent of all felony defendants today are found to be indigent, and virtually 100 percent of the people on death row are indigent" (1994, 44).

scrape up the money necessary to retain a lawyer or he must go to jail. If the person is confined because he has not retained an attorney, it is likely to result in the defendant's loss of his job and the inevitable strains that are placed on family and personal relations.

The process of determining whether the defendant is indigent or not is arguably one of the most important decisions the courts will make in resolving the issue of representation. It is important since quite often it literally determines, as we shall see below, the quality of representation the defendant will receive. It is also important because it is at this juncture that the county makes a decision to expend substantial financial resources on behalf of the defendant. This decision is typically made by the judge, or a clerk or a court administrator, acting under the judge's authority. Given the significance of this decision, it is surprising to learn that many jurisdictions in Texas do not provide formal criteria for determining whether or not a defendant is indigent. In fact, just over half (51.9 percent) of the judges report that they have formal written criteria for determining indigent status.¹⁰

While the lack of formal written criteria to determine indigency may not be inherently problematic, what is disturbing is that in many areas the *de facto* criterion seems to be whether or not the defendant was able to post bail. Almost two-thirds of criminal defense attorneys (65.4 percent) report that this standard is typically used for determining a defendant's eligibility to receive a court appointed attorney. This practice, while perhaps expedient and accurate in most cases, is troubling for a number of reasons. Perhaps most notable is that, if the decision is based on that one factor alone, it is in direct conflict with Article 26.04 of the Texas Code of Criminal Procedure which states that "(t)he court may not deny appointed counsel solely because the defendant has posted or is capable of posting bail."

Posting bail should not preclude a defendant from obtaining an appointed attorney. Indeed, it is not unlikely that it is because the individual has paid a bondsman to secure the defendant's release from jail, he or she no longer has adequate funds with which to hire an attorney. If that person must return to jail in order to get the needed appointed counsel, there will be important ramifications that will affect not only that individual, but also his or her family and the community. Going to jail will mean loss of income and possible -- if not probable -- inability to make house payments, car payments, child support payments and so on. While these have an immediate effect on the defendant, they also have an inexorable effect on the community in additional welfare and other costs. Not surprisingly, judges (72.4 percent) have a far more favorable view of the current method of determining indigent status than do prosecutors (47.2 percent) or defense attorneys (35.8 percent) (see Figure 1).

(Figure 1 about here)

As with so many things, people accused of criminal offenses cannot be neatly divided into two categories: those who can afford legal representation and those who cannot. Often there are

¹⁰ Prosecutors and criminal defense attorneys have a different perspective. Only 32.3% of the defense attorneys are aware of formal written criteria for determining indigent status. A similar percentage (36.9 percent) of prosecutors hold the same opinion. It is possible that judges have criteria which are used in their office that are not shared with defense attorneys or prosecutors.

people between these two extremes and so the courts are faced with defendants who have some funds that can be allocated to a bond and other defense efforts, but not enough to pay for all of it. Article 26.05(d) of the Texas Code of Criminal Procedure provides that under these circumstances the trial court can appoint an attorney or provide experts or other needed resources and then have the defendant reimburse the county for those expenditures as a condition of probation or parole, even if he is found not guilty. See *Curry v. Wilson*, 853 S.W.2d 40 (Tex. Crim. App. 1993). There is no information as to how often this statute is used or with what results. In the abstract, however, it would appear to offer a very useful alternative to confinement as a condition precedent to the appointment of counsel.

In some jurisdictions it is also quite common that the appointment of counsel will not occur until after an indictment from the grand jury. In these instances, defendants languish in jail for considerable periods of time without the benefit of legal representation. The Committee has been told the story of a woman who sat in jail for 27 days before an attorney was assigned to her matter. Within 45 minutes after receiving the case, her court appointed attorney determined the case lacked merit, he approached the prosecutor who agreed, and the judge ordered her release. The effect of this is quite clear - - the timely appointment of counsel would have resulted in this woman's near immediate release instead of costing her nearly one month in jail.¹¹

Assigning Counsel. Criminal matters in Texas, other than the most minor of misdemeanors, are first heard in county and district courts of the state and the judges of these courts are responsible for developing systems for providing representation for indigent criminal defendants. While most jurisdictions rely on judges to make the appointment,¹² there is, as noted above, tremendous variation in how this is done.¹³

Overall, judges are the most satisfied of the three groups with the method currently used to assign counsel in indigent criminal matters (see Figure 2). Respondents to all three surveys agree that the judge typically makes the appointment, although, some courts rely on a clerk or court administrator to make the appointment. While there is agreement on who makes the appointment, there is less agreement on how judges make the decision. For example, only 32.0 percent of defense attorneys and a similar proportion of prosecutors (39.5 percent) report that being deemed

¹¹ It should be noted that the county bears the unwanted costs of confinement in this situation - - a point well taken with some rural county judges and commissioners.

¹² Our survey of judges indicates that 65.7 percent appoint counsel directly or from a schedule they have established. Another 10.5 percent of judges indicate that a clerk or court coordinator is responsible for making the appointment. This view of the process is similar to the one reported in our surveys of criminal defense attorneys and prosecutors. One judge indicated that lawyers are "drafted" (Judge 418).

¹³ It is worth noting that most judges (50.8 percent) report that they do not have formal criteria for selecting attorneys in complex or special cases (e.g., mental illness, DNA, etc.). Only 22.6 percent of the defense attorneys and 29.2 percent of the prosecutors report being aware of such criteria. One of the major problems, of course, is that at the time a particular appointment is made, the judge usually has no idea whether the case will require special skills or experience or will turn out to have complex or sophisticated issues. If an error is made, however, and an inappropriate person appointed, that can be corrected when later information becomes available. Whether a trial judge will continue to monitor his appointed cases so as to be able to make such later interventions, is another matter.

qualified is a criteria used by the court. In contrast, 65.0 percent of judges report that qualifications are considered. Even this higher percentage is shocking since it implies that 35.0 percent of the judges responding to the survey do not consider the attorney's qualifications when making the assignment.

(Figure 2 about here)

It appears that the decision to appoint a particular lawyer to a particular case is often determined by more than simply whether an attorney's name appears on a list. That, however, is not always the case. Our surveys of prosecutors and judges asked respondents to describe the role that various factors and actors play in the appointment process. The resulting picture is quite illuminating. Respondents to the prosecutor survey indicate that court reporters (12.6 percent), court clerks (21.7 percent), and court coordinators (67.8 percent) have at least some influence in the appointment decisions in the courts in which they work (see Table 5). Further, nearly one-third (32 percent) of prosecutors indicate that judges consult with them, or someone from their office, before appointing counsel.¹⁴ While at first blush it may seem odd that a judge would consult with the prosecutor when appointing defense counsel, the utility of such consultation quickly becomes apparent. At the time of the appointment, the trial judge commonly has no information about the case and, indeed, the prosecutor is the only person in the courtroom who is likely to have been able to review the facts and only he will know if the case is likely to involve a mental health issue or some other matter important to the appointment decision. This type of consultation creates the perception that the defense counsel may not be entirely independent of the prosecution or that the prosecution is perhaps offering suggestions for defense counsel they feel comfortable opposing, such conclusions, however, are likely to be off the mark. Suggestions from the court reporter on appointments of appellate counsel also have a logical base since it is the court reporter who is most likely to have good information about the various appellate attorneys and their capabilities. Similar insights are likely to be available from the court clerks and the coordinators who interact with the attorneys on a daily basis. Thus, while an observer might initially raise an eyebrow at finding that various courtroom personnel have an influence in the appointment process, it is likely that no alarm need be sounded. At the same time, it should be recognized that consultations of this nature are likely to appear suspect and merit close observation.

(Table 5 about here)

Judges responding to the survey indicate that factors related to the complexity of the case, the defendant's need for specialized knowledge, and the attorney's degree of experience, not surprisingly, influence their appointment decisions. Judges, however, also reveal that factors that most would consider to be inappropriate in the judicial arena influence their appointments decisions (See Table 6). Nearly half of the judges (46.4 percent) report that their peers sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of the defense they provide* and a comparable number (52.4 percent) indicate that the attorney's need for income influences the appointment decision.

¹⁴ Judges also report being influenced by these factors, although to a lesser extent. Judges indicate that court reporters (11.5 percent), court clerks (13.5 percent), court coordinators (54.7 percent) and district attorneys (11.1 percent) have at least some influence in their appointment decisions.

(Table 6 about here)

Personal and political factors also play a role in the appointment process. Nearly four in ten (39.5 percent) judges indicate that their peers occasionally appoint an attorney because he or she is a friend, while roughly one-third of judges sometimes consider whether the attorney is a political supporter (35.1 percent) or has contributed to their campaign (30.3 percent). As a defense attorney from Harris County noted, “I have been refused appointments because I cannot afford to give money to the judge’s reelection campaign. . . those attorneys who contribute the most money receive the most work. Surely, this is a conflict of interest situation and an appearance of impropriety, at the very least” (Defense Attorney 616). While it is comforting to learn that judges consider the complexity of the case and the experience of the attorney, it is equally unsettling to learn that personal, political, and expediency factors are determining, in part, the decision to appoint legal counsel to indigent criminal defendants.

Once appointed to represent an indigent defendant, the attorney seems to be subject to little supervision. A majority of judges (50.8 percent) indicate that there are no formal provisions for monitoring the quality of legal representation in their court.¹⁵ Even in cases where informal standards are in place there is reason to be concerned about the quality of legal representation that may be provided by those attorneys who were friends, political supporters, or appointed because of their reputation to move the docket. One prosecutor noted that when he or she observed ineffective representation they “mention it to the judge who usually does nothing” (Prosecutor 553). Another commented that they “bring it to the attention of the coordinator who does the appointment - always to no avail” (Prosecutor 509). Other prosecutors only call attention to the poor representation if it will not harm their case. This sentiment was expressed by a prosecutor who observed that “sometimes I tell them (defense attorneys) where they have missed an important point; but only if I know I can effectively counter it” (Prosecutor 621). This situation is complicated by the fact that what is deemed “competent” may depend on the vantage point you take of the judicial system. A defense attorney from Galveston County noted that “some judges will not appoint lawyers who they don’t think are competent. The problem is that for at least one judge competence means pleading the case out quickly” (Defense attorney 630).

Financial Disincentives

Scholars who examine employee behaviors long ago determined that individual performance increases when it is linked to financial reward. Indeed, virtually every employer understands the value of a meritocracy where financial gain serves as an incentive to encourage employee productivity. It should come as no surprise that lawyers are similarly influenced by financial considerations when determining how much effort they will devote to their assigned and retained cases.

State law (Article 26.05, Texas Code of Criminal Procedure) requires each county to maintain a fee schedule which specifies how much money an attorney will be paid for performing

¹⁵ Substantial numbers of defense lawyers (42.4 percent) and prosecutors (39.2 percent) concur in this assessment.

specific legal services. However, these fee schedules are not always followed as some judges may arbitrarily reduce the amount paid to the defense attorney. In other cases, it may have been some time since the schedule was adjusted for inflation. The consequences of under compensating defense attorneys are very real. As Dean Norman Lefstein observed, “Unfortunately, when compensation for assigned counsel is inadequate, private attorneys are sometimes unwilling to accept appointments or unwilling to put forth all necessary efforts on behalf of their clients” (1982, 19).¹⁶ While each of us would like to believe that professional standards would result in every assigned counsel providing his or her best efforts in every assigned case, the reality is that lawyers are human and will respond to the very same economic realities that affect those employed in other lines of work.

What are those realities? For starters, there is a fundamental issue of fairness. Defense counsel assigned to represent indigent clients quite correctly feel as if they are uniquely subsidizing the county’s obligation to provide legal representation to indigents charged in criminal matters. Members of the civil bar, judges, police, and prosecutors would likely bristle at the notion that they should work for less money when the defendant is indigent. Yet, that is precisely what happens to defense counsel who are assigned to represent indigent clients. As Dallas attorney Vincent Perini noted after defending an indigent client in a capital case, “(n)o group [other than court-appointed defense attorneys] is called upon to forego salaries and to pay the cost of their office overhead. Not prosecuting attorneys, not judges, not attorneys for the Texas Department of Corrections, the Board of Pardons and Paroles, the Dallas County Sheriff’s Office, the Dallas Police Department, or deputy attorneys general. Criminal defense lawyers in private practice alone are called upon to make such sacrifices...” (1983, 423). A respondent to our survey of defense attorneys echoed this sentiment when she wrote “Although I acknowledge that every person is entitled to legal representation in criminal cases, I strongly disagree that the financial burden of criminal defense is imposed on attorneys. If society believes that legal representation must be provided, then society should pay for that representation” (Defense Attorney 537). When the Supreme Court established the right to counsel in *Gideon*, it made that right a matter of constitutional dimension. In other words, the right to counsel is part of the fundamental agreement that established this nation of states and to which each state has agreed to be bound. As a result, the obligation to carry the right to counsel into effect falls on not the criminal defense bar, not the bar as a whole, but rather on the people of the state as a whole.

There is, however, another view as to the seat of the obligation to provide counsel to indigents accused of crimes. The bar of this state --and many other states-- is a "closed shop" and only licensed attorneys can represent others in court. Since the attorneys have sought to keep the monopoly they enjoy in the courts, the burden to ensure that everyone gets the needed representation in court should properly fall on the bar and its members. In the past, the courts have recognized this view and held that a lawyer is an officer of the court and, as such, he or she is obligated to represent indigents for little or no compensation upon court order. The courts have noted that this is a long established obligation and each lawyer is presumed to have known of it and

¹⁶ Nationally this has been found on a number of occasions. In a West Virginia case (*State v. Pelfry*, 256 S.E.2d 438 (W. Va. 1979)) the West Virginia Supreme Court ruled that the defendant received ineffective assistance of counsel because his attorney would not move for a mistrial solely for personal economic reasons.

accepted it when he or she joined the bar. See, *United States v. Dillon*, 346 F. 2d 633 (9th Cir. 1965); *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965).

Many argue that this view is "a mockingbird around the neck of the criminal defense bar" that can no longer be supported.¹⁷ This concept of indigent defense being a matter of *noblesse oblige*, which all members of the bar are duty-bound to perform, is based on premises no longer applicable. For one thing, it presumes that the burden of indigent defense will fall equally on all members of the bar. Given the nature of criminal defense practice and the demand for specialized skills and experience in the trial and appeal of these cases, the burden does not fall on all members equally, but rather it falls disproportionately --and in many areas of the state, entirely-- on the criminal defense portion of the profession.¹⁸ Even in the two Texas counties in which the other elements of the bar pay a fee to get out of criminal appointments, (El Paso and Bexar counties), that fee does not equate to the burden carried by the criminal defense bar. The commitment that is required of a lawyer representing an indigent defendant, that is in hours and skills devoted and the loss of other income producing work because of that appointed responsibility, far exceeds the payment of any token amount by the other members of the bar. Further, it must be recognized that many people feel the provision of legal counsel to indigents accused of crimes is a constitutional obligation and, as such, it is a responsibility of the entire community and not merely those members of the community who happen to practice law --civil or criminal-- for a living.

Another reality of appointed counsel revolves around the economics of the modern law practice. Recent national reports indicate that it costs roughly \$60 per hour to operate a modern law practice. This includes the expense for office space, secretaries, a law library and other expenditures that could reasonably be considered overhead. Yet, the fees provided in Texas often fall well short of covering overhead expenses, let alone allowing the defense attorney to earn a living for his or her work. The survey of defense attorneys reveals that the average hourly rate for retained criminal legal work in Texas is \$135.98 per hour. Defense attorneys further report that overhead expenses consume \$71.36 of this hourly rate, leaving a profit of \$64.62 per hour in retained matters. However, when defense counsel are assigned to represent indigent clients, they report that they receive, on average, \$39.81 per hour. Not only does the rate paid by the counties fall 55 percent short of covering their overhead expenses, but it means that the attorney fails to earn any profit whatsoever and is subsidizing the county at a rate of \$96.17 per hour!¹⁹

Not surprisingly, this low level of compensation often translates into a disincentive to provide maximum performance on the part of the defense counsel. One consequence is a perceived

¹⁷This statement has been attributed to Vincent Perini, a Dallas attorney long active in the interests of indigent defense in general and in death penalty matters in particular.

¹⁸For example, defense counsel in federal capital cases during the period FY 1992 to FY 1997 worked an average of 1,889 hours, resulting in average total attorney's fees of \$269,139 per case. "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation". The Judicial Conference of the United States, September 15, 1998, pages 14, 23.

¹⁹ Judges report that they pay defense counsel an average of \$71.91 per hour for in-court work and \$58.41 for out-of-court work. Using the compensation figures provided by judges improves the situation some, but still results in attorneys falling short of covering their overhead expenses and subsidizing the county's legal obligations.

incentive to quickly plead the case. As a defense attorney who practices in Bexar County observed “The pay scale is so low compared to the average hourly rate (legal fee) charged for representing a defendant that I believe the majority of court appointed attorneys look for the best plea bargain, settle it, and move on” (Defense Attorney 646). Another potential consequence is that the attorney may not work as hard as necessary simply because there is a need to meet economic obligations. A respondent from Bastrop noted that “I sometimes cringe when I get appointed to a felony case that will go to trial. I know that it will not be a financially viable endeavor for me. As such, I try to balance minimizing the work with ensuring that the defendant receives a fair trial. An attorney can’t afford to neglect the rest of his practice to focus on any one case when he knows that the one case will barely cover his overhead” (Defense Attorney 563). Yet another attorney from Blanco County noted that indigents, perhaps ironically, suffer the consequences of the defense attorneys having to meet their own financial obligations. The attorney commented that “Practicing in a small rural county (approx 6,000 population) indigent defendants normally get the best defense I can afford. Unfortunately this is not always the best available or even the best I am capable of. Economics of survival dictate that you do what pays the bills first - - occasionally at the expense of indigents. Fees for court appointments (\$50-60 per hour) would not fully reimburse overhead in my office in most cases and are not received until after the case is complete. The last two court appointed cases I tried each required over 100 hours reimbursed at \$40.00 per hour with 6 - 18 months from appointment until verdict. This certainly created a hardship for me and likely would for many sole practitioners or small firms” (Defense Attorney 514).

Prosecutors also recognize the economic realities and the effect that low pay has on the defense attorney’s incentive to work. When asked to comment why defense counsel may behave differently in assigned and retained cases one prosecutor simply stated “money” (Prosecutor 791). Another prosecutor elaborated on this reasoning and noted that “the amount of money received will directly affect the lawyers’ interest in the case. Lawyers, like plumbers, carpenters, and others have bills to pay and need to know where and when their pay is to be received” (Prosecutor 604). Yet another prosecutor explained why defense attorneys may feel frustration when representing indigent clients when they noted that “They (defense attorneys) don’t see Wal-Mart giving away their products just because a customer is poor” (Prosecutor 520).

The stark reality is that current rates of compensation may not be sufficient to attract competent legal counsel and may, in turn, adversely affect the quality of legal representation. Three in four (77.1 percent) defense attorneys do not believe current rates of compensation are sufficient²⁰ and a similar number (73.1 percent) report spending money out of their own pocket on litigation related expenses in indigent criminal matters. Perhaps more shocking is the observation that 39.6 percent of defense attorneys report that support staff (e.g., investigators, criminalists) receive more money from the court than the assigned counsel. Given this situation, it is not surprising that 65.0 percent of defense lawyers report being unsatisfied with current levels of compensation, while 20.4 percent indicate they are satisfied.

²⁰ The numbers are slightly lower for prosecutors (37.6 percent) and judges (40.9 percent). Despite these lower numbers there is compelling evidence that compensation rates are too low.

Resource Scarcity and the Provision of Legal Services to the Poor

With the exception of the most routine cases, there is often a need for defense counsel to receive the assistance of experts who provide support services. Sometimes the service may be as basic as investigating the facts of the case. At other times, the case may be quite complicated and require the services of an expert in such matters as DNA, psychology, criminalistics, or other matters. Without these services it is nearly impossible for a defense attorney to provide effective representation of their client. As a defense lawyer who practices in Denton County put it “The lack of investigative resources is a constant problem. Lawyers don’t win cases, investigators do” (Defense Attorney 667). Indeed, the Supreme Court recognized the critical role of experts and the need for the state to provide indigents with experts in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Our surveys of criminal defense attorneys, prosecutors, and judges attempted to ascertain to what extent defense attorneys had access to the necessary resources and how these resources (or lack thereof) affected their ability to provide effective representation. Respondents to all three surveys indicated that defense attorneys almost always were required to obtain prior approval before committing to using support services. In some cases, not only must defense attorneys obtain prior approval, but they are occasionally required to reveal which experts they plan to use.²¹ One defense attorney noted that in “Galveston County there is a judge that will not follow *Ake v. Oklahoma* and its progeny and makes defense counsel reveal to the state the names of investigators and experts” (Defense Attorney 630).²²

While there is no question that the judge has a responsibility to contain costs of indigent defense where possible and he or she, therefore, has the duty to oversee the expenditure of county funds for this purpose, there are problems when the judge insists on one particular expert or rules out the use of other experts, on grounds other than monetary. The statute requires the defense attorney to request in writing all expert services, thus allowing the court to monitor both the individual and the total expenditures. The expert, however, is the agent of the defense attorney and, once it is determined that the costs are reasonable, the expert’s ability to work well with that attorney should be the critical consideration. There were defense attorney survey returns that indicate that some judges use the appointment of experts as a means of rewarding their investigator or psychologist friends and supporters, and the wishes of the attorney are not given much weight. To the extent that this practice exists, it needs to be corrected.

The importance of providing the necessary support services should not be underestimated. If one views the court room as a contest between adversaries, justice requires that each advocate

²¹ Article 26.05(a), Texas Code of Criminal Procedure actually requires prior approval for such services. Despite what appears to be a specific requirement of this statute, many judges apparently recognize the need for attorneys to act quickly sometimes and will approve such expenditures “after the fact.”

²² Judges were specifically asked whether they required approval of the specific person providing the support services or whether the defense attorney was free to select anyone once the service had been approved. Twenty-nine percent of the judges indicate that they require prior approval of the specific person providing the service.

have sufficient resources to put forth his or her best effort. It is quite obvious that the district attorney's office is well equipped in their efforts to put together their case. The county aids the district attorney's office by providing police, investigators, forensics experts, and a host of others necessary to assist every aspect of the prosecutor's case. Defense attorneys, who are typically sole practitioners²³, are not similarly blessed. Therefore, if the judge denies a request to approve support services they may very well create an unequal playing field. Defense attorneys, and to some extent prosecutors and judges, believe that defense attorneys are not provided with the necessary resources. A clear majority of defense attorneys (61 percent) feel they generally do not receive the support services necessary to represent their indigent clients (see Figure 3). Surprisingly, 22.5 percent of prosecutors and 26.7 percent of judges - - those who must approve the services - - concur in the assessment of the defense attorneys. Defense attorneys indicate that the denial of support services is quite common since they report that, on average, 31.78 percent of their requests are denied.

(Figure 3 about here)

The denial of support services has very real consequences for the representation of indigents charged in criminal matters. A defense attorney who practices in Walker County noted that "The hoop counsel must jump through - - and the fee juggling to sell certain expenses to the bean counters and politician judges - always is a chilling influence on criminal defense" (Defense Attorney 360). Another defense attorney from Dallas County observed that "I don't take appointments any more because of the pay rate and the inability to get experts to testify for what the court pays. It is tantamount to malpractice to accept appointments in Dallas County when the lawyer pays out of his or her pocket the expenses" (Defense Attorney 664). Substantial numbers of prosecutors and judges acknowledge that this situation is dire. Nearly 30 percent of the prosecutors and the judges note that denial of support services adversely affects the quality of representation provided by defense counsel. As one prosecutor noted, "An investigator was not approved in the case, the defense had to proceed without the witness. The defendant was found guilty. After trial the witness was found, the defense appealed the case and it was overturned. Now it has to be tried again. If the witness had been found by an investigator, all this time and expense could have been avoided. An investigator probably would have found the witness. The defense attorney didn't have the time and resources to do the investigation alone" (Prosecutor 374). What makes accessing the impact of the denial of services so difficult is that some attorneys no longer request support services because they simply assume they will be denied. In short, previous denials have had a chilling effect on future requests. A defense attorney from Travis County echoed this view when he commented that "Formal denials of specific requests are rare. But this is because of an unwritten understanding that requests will only be made in cases of extraordinary need. Hence, although virtually every case requires some sort of investigation, the attorney himself must perform these tasks in an uncompensated or under compensated capacity" (Defense Attorney 859).

²³ Sixty-six percent of defense attorneys responding to our survey indicate that they are sole practitioners and another 28.9 percent report that they are in an office with five or fewer attorneys. It is also worth noting that respondents from all three surveys are more likely to believe that those assigned to represent indigents are less experienced than those likely to represent retained clients.

Evaluating the Quality of Legal Representation of the Poor

Shortcomings in the appointment process, deficient compensation for defense attorneys, and lack of access to appropriate resources indicate serious flaws in the system of legal representation of the state's indigent population. Despite these areas of concern, one might reasonably argue that while the system has room for improvement, a crisis state does not exist so long as judicial outcomes are similar for defendants with retained and assigned counsel. Unfortunately, the evidence gleaned from our surveys of participants in the criminal justice process indicates that there is reason to believe that judicial outcomes vary by the type of counsel (retained or appointed) and that those assigned to represent indigent criminal defendants may not be providing "effective" representation. In short, as the evidence below indicates, not only does the system have its shortcomings, it is indeed in a state of crisis.

One of the supposed advantages of a system of assigned counsel is that members of the private defense bar will only occasionally be called into service to represent indigent defendants. It is assumed that these attorneys will work diligently and provide the same quality of legal representation for their assigned indigent clients as they do for their retained clients. As noted above when discussing the disincentives that naturally result from current levels of compensation, the evidence gleaned from our surveys of defense attorneys, prosecutors, and judges calls this fundamental assumption into question. When asked whether "clients with retained counsel receive better representation than clients who have received court appointed attorneys," three out of four defense attorneys responded that retained counsel "always" or "usually" provide better representation (see Figure 4). This is a damning critique since it is a response offered by the very folks providing that representation. Even substantial numbers of prosecutors (38.8 percent) and judges (42 percent) concur in this assessment indicating that they are able to observe a difference in the quality of work provided by assigned counsel. It is worth emphasizing that this means that an attorney is likely to represent their retained clients in one fashion, and then provide a lower level of representation for their indigent clients. In fact, when queried, 60.7 percent of the prosecutors indicate that they have observed individual defense counsel behave differently depending simply on the nature of their client's financial resources. Commenting from a national perspective, Stephen Bright, Director of the Southern Center for Human Rights, recently noted that "You are better off in the system today to be rich and guilty, than to be poor and innocent" (Nightline Transcript February 3, 2000).

(Figure 4 about here)

When asked to comment on how representation of indigent clients varied from representation of retained clients, our respondents offered a number of observations. Prosecutors and judges who indicated they had noticed individual defense attorneys behaving differently depending on the financial resources of their client were asked to comment on the nature of that changed behavior. Nearly all the prosecutors (90.3 percent) and judges (87.3 percent) answering this question report that counsel in assigned matters devote less time to their indigent clients (see Figure 5). Additionally, three out of four prosecutors (76 percent) and judges (72.7 percent) responded that counsel in assigned matters are less prepared than when representing retained clients. While these responses alone should be a source of concern, the most disturbing observation

is that substantial numbers of prosecutors (65.6 percent) and judges (66.0 percent) notice that counsel in assigned criminal matters “put on a less vigorous defense” than they do in similar retained matters. Taken together, attorneys in assigned matters spend less time developing their case, are less prepared to defend their client, and argue less vigorously on their client’s behalf. One judge commented that there is a “reluctance to take a case to trial because of the time involved and the rate of compensation” (Judge 425). Stated simply, indigent clients do not receive the same level of legal representation as defendants who can afford to retain counsel - - even if they are represented by the same attorney.

(Figure 5 about here)

The surveys of defense attorneys, prosecutors, and judges also provide some evidence that indigent defendants receive a different standard of justice than those who can afford to retain counsel. Just over half (51.3 percent) of the defense attorneys report that they have observed significant differences in the disposition trends between indigent cases and those with retained lawyers. Specifically, those that observed a difference report that retained clients fare better than indigent clients (45.2 percent) and that indigent clients are more likely to take pleas (19.7 percent). Defense attorneys also report that defendants with retained counsel receive better plea offers than clients who have appointed counsel (40.2 percent),²⁴ and that clients with retained counsel receive more favorable sentencing decisions (26.5 percent). One prosecutor commented, “I believe that defendants are probably sold down the river by some attorneys because there are attorneys who never try cases. I can’t believe they just coincidentally get clients who always plead guilty” (Prosecutor 758). Another prosecutor commented that defense attorneys will ask for a plea by saying “Just give me any offer - - I’m appointed” (Prosecutor 1113). Another prosecutor echoed the same refrain noting, “They (defense attorneys) begin plea bargaining sessions with ‘I’m appointed and I don’t want to spend a lot of time negotiating, nor do I want to try this case’” (Prosecutor 394).

Politics and Representation of the Poor

Any reasonable conception of justice and fairness would require that all parties judged under the law would be treated equally regardless of class. Unfortunately, the evidence uncovered by our surveys indicates that the state’s poor often do not have equal access to justice due to various political aspects of the current system. The political barriers for the poor manifest themselves in at least three situations.

First, judges feel political pressure from county commissioners to control expenses related to indigent criminal defense. This pressure is very real. Nearly half of all judges (48.1 percent) report that judges in their jurisdiction have been contacted by county commissioners about controlling the cost of their court’s general budget and a similar number (50.2 percent) have been contacted specifically in regard to the cost of indigent criminal defense. One judge observed that

²⁴ Prosecutors disagree with this assessment. Only 6.7 percent of the prosecutors surveyed report that plea offers are better for those with retained counsel. Judges are somewhat more likely to report differences in plea offers (12.4 percent).

“Commissioners look at the criminal justice system as a drain on their assets, thus depriving their constituents of better roads” (Judge 213). Fully one-third (33.5 percent) of judges feel that their budget is already insufficient to properly handle indigent matters. One judge noted that “I must continually explain to Commissioners that appointed attorneys are required under the law and we must pay them. Commissioners feel that they can set budgets at any amount they feel is necessary - they do not understand that while they have the ability not to pave that extra mile of road - judges don’t have the same ability as to attorney fees” (Judge 407). While judges, under the law, can order reasonable and fair payment for all legal services provided to indigents, they clearly feel pressure from county commissioners to control costs. Moreover, given that judges in Texas are elected, they arguably do not wish to be labeled “spendthrifts” during their next reelection bid. The consequences of this pressure are very real. Four in ten judges (40.9 percent) report that budget considerations sometimes influence their decision to compensate appointed counsel and similarly (39.4 percent) the decision to approve support services (see Figure 6) . As discussed earlier, financial disincentives and the lack of necessary services have detrimental consequences on the quality of representation provided to indigent defendants.

(Figure 6 about here)

Political factors also play a role in indigent criminal representation by influencing the appointment process. As noted earlier in this report, at times, judges consider whether an attorney contributed to their campaign or was a political supporter when making appointments. 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.

It also appears that political relationships between the judge and attorney may cut the other way. Instead of rewarding political allies, it is also the case that some judges occasionally extract a measure of retribution from those who fail to support their election efforts. Retribution may take the form of arbitrarily cutting payment requests for successfully completed court appointed work or the assignment of particularly difficult and lengthy indigent cases. The assignment of an especially time consuming case, where payment fails to cover overhead, can create a real financial burden for the sole practitioner who may be forced to chose between economic survival and effective representation of their indigent client. One prosecutor observed that “A successful defense can have an effect on the amount paid to the defense. A verdict for less than the punishment the judge thought can cost the defense lawyer in fees. The court will cut the requested amount often” (Prosecutor 76, emphasis in original)

A final type of pressure that is applied to attorneys representing indigent clients is one that might best be termed “expected behavior” pressure. Judges, quite naturally, are interested in moving their dockets so that cases are not unnecessarily backlogged. This desire, however, occasionally manifests itself in pressure to move cases, regardless of the quality of the defense provided. Defense attorneys report feeling pressured to accept plea offers and to avoid jury trials. A defense attorney who practices in Montgomery County noted that “I personally believe that it is pathetic, by and large, that court appointed lawyers are too quick to plead cases and courts generally put a great deal of pressure on appointed counsel to plead cases” (Defense Attorney 699).

In some instances, defense attorneys indicate that if they go against the wishes of the judge and seek a jury trial, they risk losing any future appointments and encounter the wrath of the judge.

A Crisis that Demands Immediate Attention

“ Our system is in crisis here. . . Judges are slicing appointed fees to look good to voters. We have good lawyers doing good work for little money and with few resources - I am president of the local criminal defense bar and we feel besieged, burned out, and discouraged by the trend we see in our courts. We want to give every client, appointed or retained, the best defense, but, realistically, the indigents usually, or at least sometimes, don’t get our best” (Defense Attorney, 27).

The system of representing indigents charged in criminal matters in Texas is in need of serious reform. By virtually every standard examined here, the current system of indigent legal representation ignores at least the spirit of *Gideon v. Wainwright*. In Texas, indigent criminal representation is, at times, politicized, ineffective, and provides a different standard of justice when compared to those who can afford their own attorneys. The appointment process unnecessarily and inappropriately considers personal and political relationships. Defense attorneys are frequently provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients. Most disturbingly, the current system appears to provide a lower standard of justice for the state’s poor. Attorney General Reno noted that a judicial system is only as strong as its weakest link when she commented that

All of us here recognize that the defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded, and operating with effective standards. The reality is that despite the Supreme Court’s decision 36 years ago in *Gideon v. Wainwright* that every defendant, rich or poor, has the right to be represented by a lawyer when charged with a serious crime, our system of indigent defense needs to be improved. But it is not just poor defendants who have a stake in our system of indigent defense. Just ask a prosecutor, an arresting officer, or even a victim of crime: would they rather face a vigorous defense at trial or risk an overturned conviction and retrial? When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal justice system is interdependent: if one leg of the system is weaker than others, the whole system will ultimately falter. (Reno 1999)

Given this observation and our Committee’s findings, serious reforms merit immediate consideration. Changing a system as large, complex, and diverse as the system in Texas will necessarily be difficult. However, the difficulty of the task should not be a reason for policy makers to shirk an opportunity, and indeed an obligation, to improve on what is a dysfunctional system. For the purposes of consideration, we offer a number of suggestions for improving the system of indigent representation in Texas. No single suggestion should be viewed as a panacea; however, it is hoped that policy makers at all levels will consider adopting specific reforms in the spirit of the suggestions offered below.

◆ *State Level Commitments.* Simply put, the state of Texas is a national embarrassment in the area of indigent legal services. Texas leads the nation in the number of folks that it executes, all of whom are indigent, yet it trails most of the nation in the level of services it provides indigents charged in criminal matters. For example, Texas is one of a handful of states that fails to provide any meaningful state level funding.²⁵ More importantly, Texas currently lacks a meaningful discussion of this problem at the highest level. A number of options are available such as a state level agency to monitor the current system and gather data, state level funding to help counties who currently shoulder the entire bill for indigent legal services, and legal expertise to assist those assigned to represent indigents in criminal matters. Perhaps most importantly, those who are in important policy making roles in the state need to recognize the seriousness of this problem and begin a meaningful dialogue aimed at improving the current system.

◆ *Adopt Professional Standards for Representing Indigent Clients.* Criminal jurisdictions in Texas should adopt standards that govern the appointment process, timeliness of the appointment (within a few hours of arrest, rather than days or weeks), attorney qualifications, work load, and professional behavior. The American Bar Association and others have developed standards for various methods of providing legal representation to indigents that have been successfully adopted elsewhere. Specific attempts should be made to ensure that the appointment process assigns qualified, competent counsel who have workloads that permit them to devote the necessary time and preparation for a vigorous defense of their indigent client. Additionally, the appointment process should be constructed so that the selection of counsel is not influenced by personal, political, or other inappropriate factors, but rather is guided by the best interests of the indigent client.

◆ *Develop Accurate and Efficient Criteria for Determining Indigent Status.* Consistent standards for determining whether or not a defendant is indigent should be adopted. Ideally, these standards would be objective (e.g., examination of tax returns, food stamp qualification) and would rely on the defendant's ability to hire an attorney. At a minimum, the criteria should be consistent with existing law and not base the decision on whether the defendant was able to post bail. Defendants should not be forced to remain in jail in order to obtain legal representation.

◆ *Provide Adequate Compensation and Timely Payments.* Compensation for performing court appointed work should be increased to a level that allows attorneys to cover their overhead expenses and earn a reasonable profit. Moreover, payments to attorneys should be made in a timely, perhaps periodic, fashion so that attorneys do not incur financial hardships by agreeing to represent indigent clients. Defense attorneys should not uniquely subsidize the county's obligation to provide legal

²⁵ An exception to this statement is the recent amendment of Article 37.071 of the Code of Criminal Procedure to provide state funding of post-conviction counsel for death penalty cases. Important though that is, this assumption or responsibility covers only a minuscule number of cases.

representation to indigent criminal defendants. In jurisdictions with public defenders offices, the offices should be funded and staffed in a fashion that is comparable to the district attorney's office.

◆ *Guarantee Access to Necessary and Sufficient Support Services.* Defense attorneys should have access to all the support services necessary for putting on an effective and vigorous defense of their indigent client. More importantly, they should not feel chilled from seeking the services they believe are necessary to ensure an effective defense.

◆ *Data Gathering and Monitoring.* One of the greatest handicaps facing those who wish to examine the current indigent criminal defense system in Texas is the lack of systematic data gathering. Counties should be required to report the amount of money spent on indigent criminal defense services, factors related to the processing of the case (i.e., how long before counsel was assigned, how was indigent status determined, etc.), and disposition patterns. Only through more thorough reporting on the current system will we be able to determine if the system, after reforms, is working as expected.

Gideon's trumpet sounded out the promise that all persons - - rich, poor, or otherwise - - would have access to the same level of justice in our nation's courts. As matters currently exist in Texas, the sound from Gideon's trumpet has effectively been muted.

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Texas Code of Criminal Procedure

Texas Constitution

Appendix A

Total Design Method

The Total Design Method (TDN) was developed by Don Dillman and has been successful in securing high response rates. For example, this design method has routinely secured a 50 to 60 percent response rate for general population surveys and even higher response rates for more specialized populations. Dillman's method is generally regarded as the standard for mail surveys in the social sciences. Dillman explains the goal of this method as follows:

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

The TDM follows these steps:

- (1) All members of the sample are sent a personalized, advance-notice letter. The purpose of this letter is to tell people that they have been selected for the survey and they will be receiving a questionnaire. This helps identify the purpose of the survey and establish its legitimacy.
- (2) Roughly one week after the advance letter is mailed, all members of the sample receive a personalized cover letter with instructions, the questionnaire, and a postage paid return enveloped.
- (3) Roughly one week after the questionnaire is mailed, a follow-up postcard is sent to all members of the sample. The postcard thanks those that have already responded and requests a response from those who have not responded.
- (4) Approximately two weeks after the postcard is mailed, a new personalized cover letter, questionnaire, and postage paid envelope is sent to those who have not responded. This letter conveys the message that we have not heard from the respondent and their comments are important to the success of the survey.

Depending on the response rate, follow-up phone calls can be made to those that have not responded.

Table 1**Who Delivers Justice to the Poor in Texas?**

	<u>Defense Attorneys</u>	<u>Prosecutors</u>	<u>Judges</u>
Male	83.7%	63.3%	84.0%
Female	16.4 (n=1272)	36.7 (n=1073)	16.0 (n=470)
% White	81.1%	86.0%	85.9%
% Black	5.2	2.8	1.9
% Hispanic	11.6	9.6	8.6
% Native American	1.2	0.7	0.4
% Pacific Islander	0.9	0.8	0.0
% Other	0.0 (n=1220)	0.1 (n=1055)	3.2 (n=467)
Mean years of crim. law exper. (standard deviation)	13.63 (9.12) (n=1281)	9.18 (7.52) (n=1094)	23.81 (11.29) (n=459)
Mean years in current position (standard deviation)	12.12 (8.47) (n=1280)	7.37 (5.87) (n=1082)	10.04 (6.98) (n=458)
Attend Bar CLE	75.6%	66.4%	81.8%
Subscribe to Criminal Law Digest	29.2	27.2	24.2
Board Certified in Criminal Law	8.7	6.5	7.5
Attend TCDLA CLE	29.2	n/a	24.3
Attend TDCAA CLE	n/a	89.2	10.5
Attend Texas Center for the Judiciary CLE	n/a	n/a	93.1

Table 2

Assigned Counsel Case Load Over Time and Experience

Defense Attorneys were asked . . .

Has the number of indigent cases you handle each year increased, decreased, or remained roughly the same over the course of your legal career?

Increased Substantially	8.3%	
Increased Somewhat	16.7	
Remained about the Same	26.7	(n=1254)
Decline Somewhat	15.1	
Decline Substantially	3.2	

When thinking of the criminal defense attorneys in your jurisdiction, are the attorneys who provide court appointed representation generally more experienced or less experienced than the typical criminal defense attorney?

	<u>Defense Attorneys</u>	<u>Prosecutors</u>	<u>Judges</u>
Court appointed attorneys are always more experienced	0.6%	0.9%	1.3%
Court appointed attorneys are usually more experienced	8.0	17.1	14.2%
Court appointed and retained attorneys are equally experienced	37.2	54.4	53.2%
Retained attorneys are usually more experienced	50.5	25.4	30.3%
Retained attorneys are always more experienced	3.7	2.2	0.9%
	(n=1255)	(n=1078)	(n=445)

Table 3

Career Paths of Texas Criminal Judges

Judges were asked . . .

We are interested in knowing your experience prior to becoming a judge. Please check all the positions you have held and note the number of years at each position.

<u>Position</u>	<u>Percent Indicating Experience</u>	<u>Number of Years of Experience</u>
Prosecutor	58.3 (n=472)	mean = 6.37, s.d. = 5.05 (n=260)
Criminal Defense	73.6 (n=474)	mean = 10.05, s.d. = 7.56 (n=327)
Civil Lawyer	71.5 (n=474)	mean = 13.14, s.d. = 8.62 (n=312)
Civil Judge	28.3 (n=473)	mean = 11.52, s.d. = 8.14 (n=126)
Law Enforcement Official	5.5 (n=473)	mean = 6.11, s.d. = 7.03 (n=18)

Table 4

Assessments of the Methods of Assigning Counsel

Judges were asked . . .

Generally speaking, do you favor a public defender system or do you prefer the court appointed system?

Strongly prefer the public defender system	12.2%	
Slightly favor the public defender system	11.9	
No preference	21.2	(n=444)
Slightly favor the court appointed system	19.6	
Strongly favor the court appointed system	34.9	

Figure 1

Satisfaction Levels with the Decision to Determine Indigent Status

How satisfied are you with the current method of determining the defendant's indigent status in your jurisdiction?

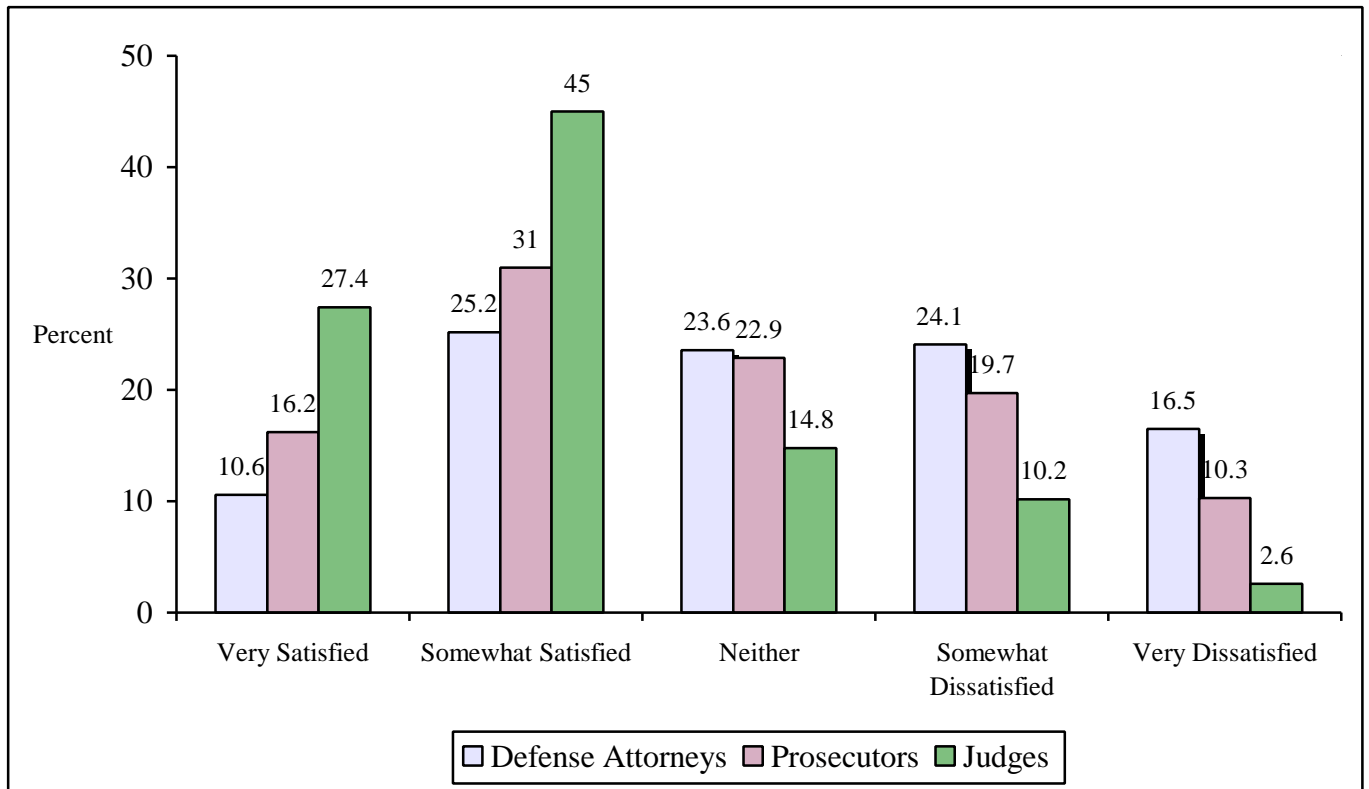


Figure 2

Satisfaction with the Method of Assigning Counsel

How satisfied are you with the method of appointing counsel in indigent criminal cases in your jurisdiction?

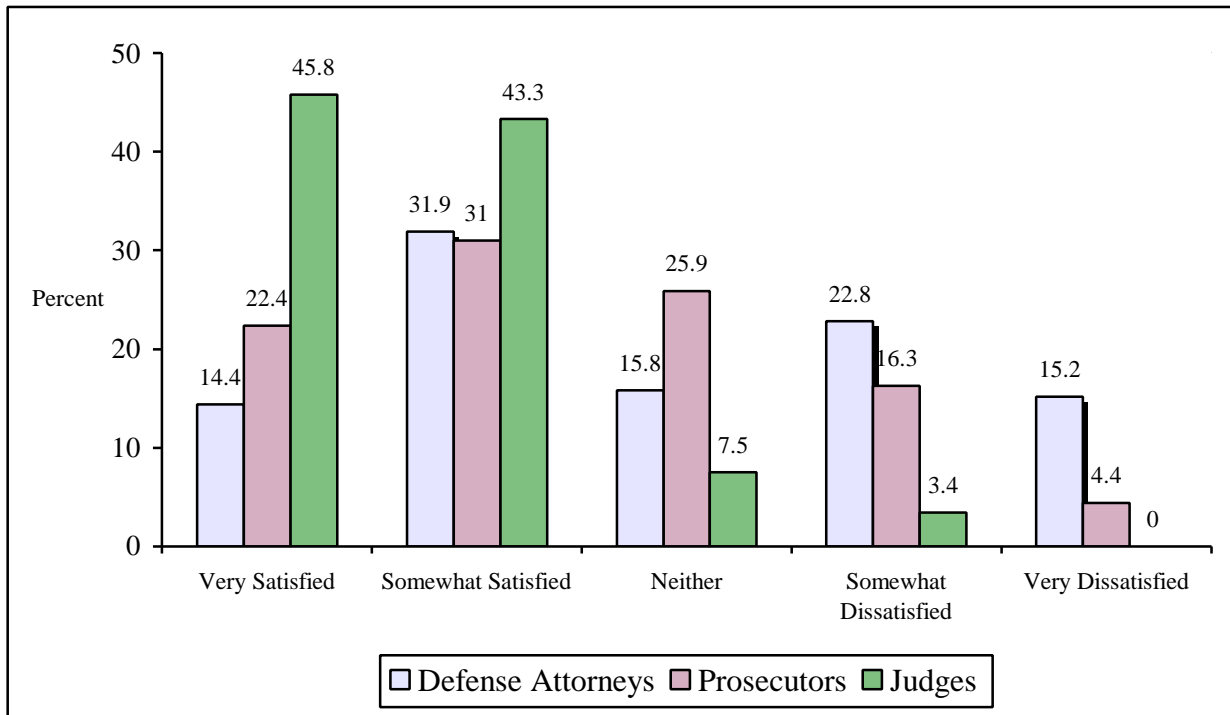


Table 5

Agents Which Influence the Decision to Appoint Counsel

Prosecutors and judges were asked . . .

What influence does each of the following have in the appointment process?

	None		Some/Moderate		Substantial	
	Prosecutors	Judges	Prosecutors	Judges	Prosecutors	Judges
Court Reporter	87.4%	88.5%	12.1%	10.3%	0.6%	0.9% (n=1031)
Individual Court Clerks	78.3	86.5	20.5	12.4	1.3%	1.1 (n=1030)
District Attorney	68.0	88.9	30.2	11.1	1.7%	0.0 (n=1044)
Court Coordinator	32.2	45.7	36.2	39.6	31.6%	14.7 (n=1047)

Table 6**Factors Which Influence a Judge's Decision to Assign Counsel**

Judges were asked . . .

Generally thinking of judges you may know, what influence does each of the following have in the appointment decision in their court?

	<u>None/Rarely</u>	<u>Sometimes</u>	<u>Usually/Always</u>
Difficulty of the case	1.1%	18.5%	80.4%
Defendant's need for specialized knowledge or skill (e.g., a mental illness or retardation issue or a similar unusual need)	4.4%	25.0%	70.7%
Attorney's degree of knowledge and experience	4.4%	25.4%	70.3%
Attorney's reputation for moving cases, regardless of the quality of defense	53.6%	31.0%	15.4%
Attorney's reputation for moving cases, but consistent with a quality defense	11.6%	34.0%	54.4%
The attorney is their friend	60.5%	32.6%	6.9%
The attorney is a political supporter	64.9%	28.9%	6.3%
The attorney contributed to their campaign	69.7%	25.9%	4.4%
Attorney's expressed desire to be appointed	8.8%	37.7%	53.6%
To give attorney courtroom experience	38.3%	56.0%	5.7%
Attorney's need for income	47.6%	47.1%	5.3%
A retired or semi-retired attorney who uses appointments to supplement retirement funds	79.1%	27.9%	7.4%

Figure 3

Percent Who Believe Defense Counsel Lack Necessary Support Services

Do you feel that defense counsel generally receive the support services they need to represent their indigent client?

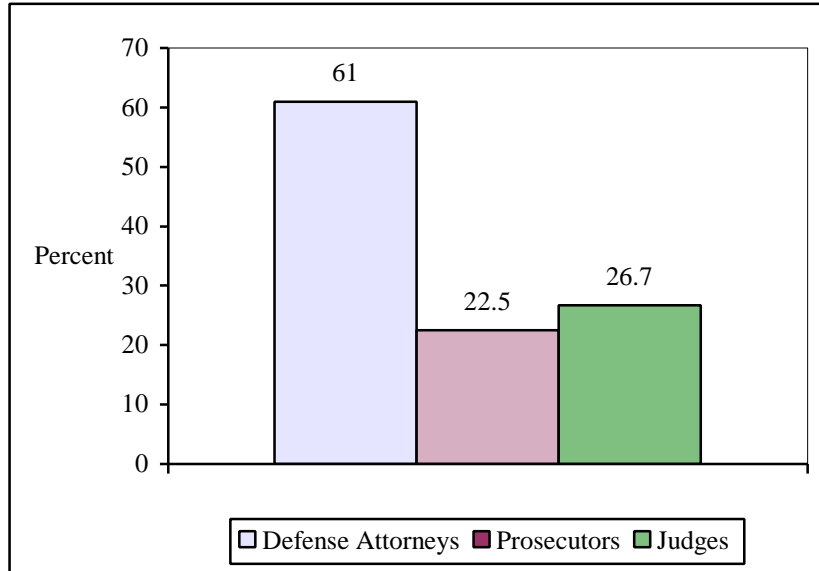


Figure 4

Quality of Legal Representation in Retained and Assigned Matters

In general, do you believe that clients with retained counsel receive better representation than clients who have received court appointed attorneys?

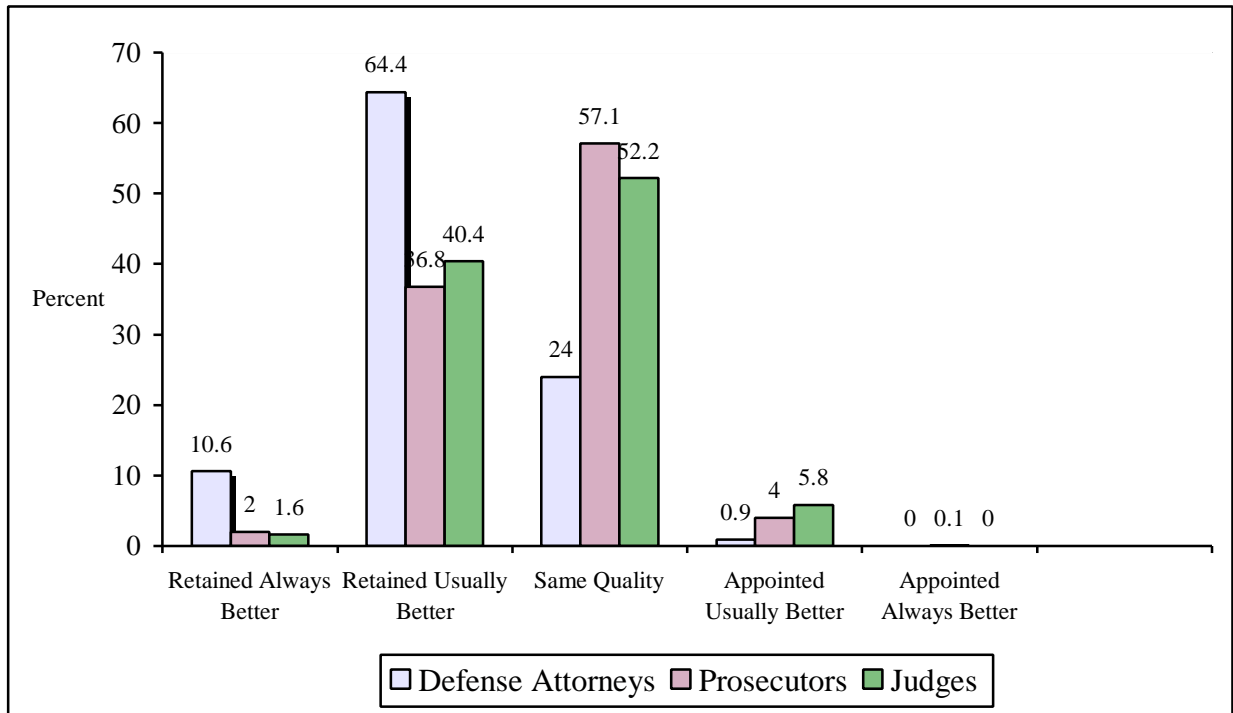


Figure 5

Behavioral Differences in Appointed and Retained Matters

Prosecutors and Judges were asked . . .

Thinking of the defense attorneys you have noticed behaving differently depending on the nature of their client do these attorneys . . .

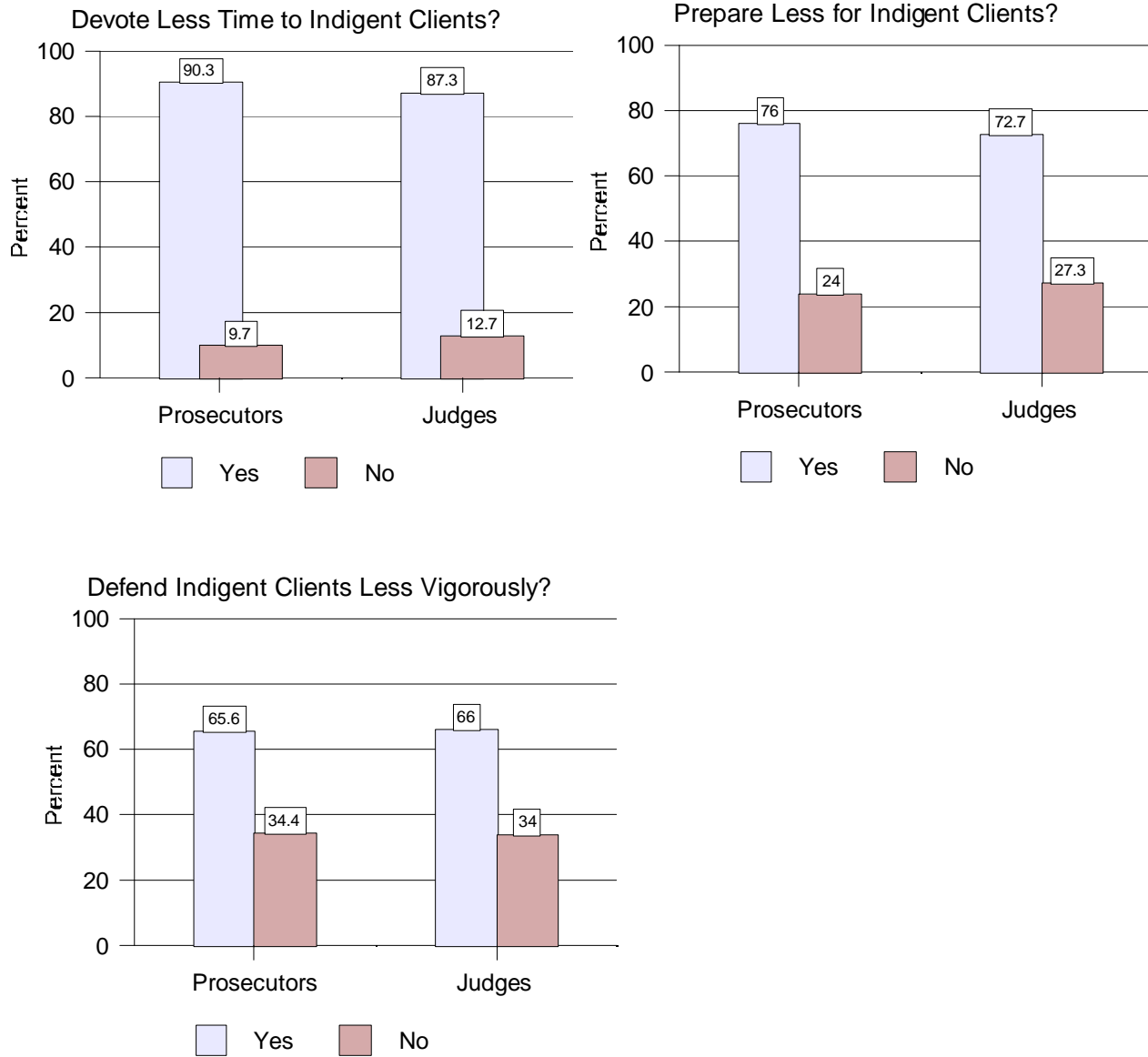
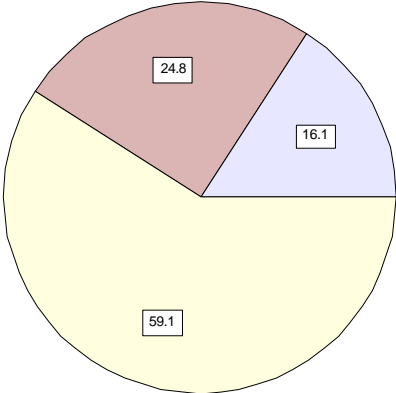


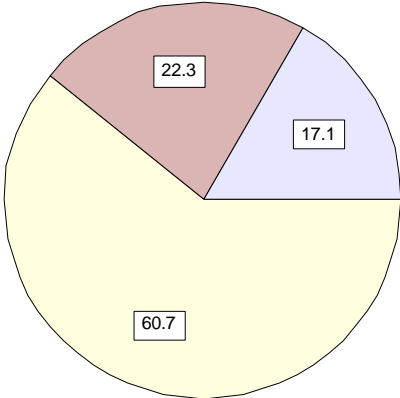
Figure 6 Budget Considerations and Indigent Criminal Defense

Judges were asked “How often do budget considerations influence your decision to . . .

Compensate Appointed Counsel



Approve Special Services



- Always/Usually
- Sometimes
- Rarely/Never