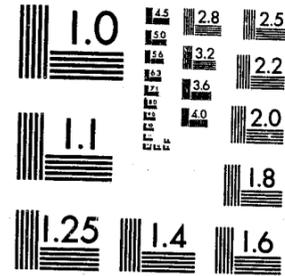


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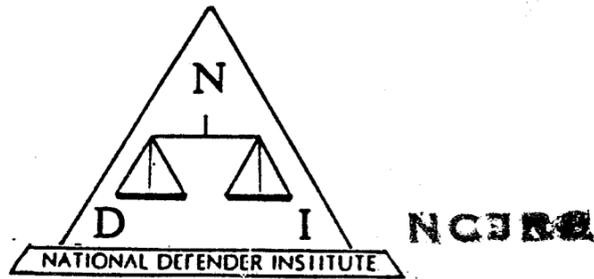
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THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA:
AN EXAMINATION OF ALTERNATIVE MODELS FOR PROVIDING
CRIMINAL DEFENSE SERVICES TO THE POOR v2



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VOLUME II

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ABSTRACT OF RESEARCH

This report presents the findings, conclusions, and policy implications of the study of the Role of Private Counsel in Indigent Defense which was funded by the National Institute of Justice of the U.S. Department of Justice. The project was designed to provide practical information to those charged with the responsibility for determining a jurisdiction's legal defense system on the benefits, limitations, and costs of both traditional assigned counsel programs and also the various alternatives involving private attorneys now in use across the country.

Specifically, the research was to determine which factors in the organization and operation of private counsel indigent defense systems were critical in affecting outcomes, costs, speed of disposition, and quality of performance in general.

The six sites selected for in-depth analysis were typical of the private counsel indigent defense systems in the nation. They included the following counties and system models: Montgomery County, Ohio (hybrid coordinated assigned counsel system), Summit County, Ohio (mixed ad hoc assigned counsel approach), Berrien County, Michigan (contract defense system), Saginaw County, Michigan (coordinated assigned counsel system), Boone County, Illinois (ad hoc assigned counsel approach), and Jo Daviess County, Illinois (part-time defender).

Six other sites were also described in the report. These were the assigned counsel systems of Santa Clara County, California, San Mateo County, California, Alameda County, California, San Francisco, California, and Onondaga County, New York as well as the part-time defender system of Albany County, New York. The coordinated assigned counsel systems of Santa Clara and San Mateo Counties were seen as innovative systems having features worthy of consideration by other areas.

The study team, which included criminal trial lawyers, a management specialist, a PhD. in social psychology, and PhD. economist, and an M.A. in criminal justice, conducted docket studies and cost studies in six jurisdictions and interviewed a variety of actors in twelve counties. A total of 2,400 court cases were sampled and computer-analyzed using statistical techniques and then synthesized with the qualitative data gathered during the site interviews.

The study's findings dealt with the cost implications of using private counsel in indigent defense systems, the relationship between cost and quality of service, assigned counsel fees, the determination of defendant eligibility and recoupment, and the way in which cases are processed in private bar indigent defense systems. Comparisons were drawn between the performance of attorneys appointed to represent the indigent and retained counsel performance. The various types of defense systems were compared with each other with respect to quality and cost of services, and then were examined to determine what effect the existence of quality controls had on performance.

The results of the study will assist policymakers in assessing the impact of selecting particular features of defense systems upon the costs and quality of performance rendered by counsel for the poor in criminal cases.

ACKNOWLEDGMENTS

This study of the Role of Private Counsel in Indigent Defense could not have been conducted without the cooperation, support, and active participation of many individuals too numerous to list here. The research team is especially grateful to those who, in each jurisdiction visited, went beyond the call of duty to give of their time and energies in order to add to the store of knowledge about criminal defense systems using the private bar. While we cannot adequately acknowledge each individual who contributed to the study, the following individuals deserve special recognition.

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The core staff of the Study of the Role of Private Counsel in Indigent Defense was as follows: Nancy Albert-Goldberg, Principal Investigator, Marshall J. Hartman,

Project Manager, William J. OBrien, Director of Field Operations, Joanne Laios and Guinette Jefferson-Harris, Research Associates, and Gloria Giovannoni and Mila Mueller who, as Administrative Assistants/Secretaries, helped to keep the project on track. Special consultants, who were an integral part of the study's design and implementation and analyzed the statistical data collected, were Pauline Houlden, PhD., a social psychologist in the Department of Criminal Justice at the University of Illinois at Chicago, and Steven Balkin, PhD., an economist on the faculty of Roosevelt University. The staff was augmented by a total of 40 local lawyers, law students, criminal justice students, and political science students who assisted with the statistical data gathering in the various counties.

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VOLUME II
POLICY-MAKERS' REPORT

Background of the Problem

Unlike other human services, the provision of counsel to poor persons accused of crime is not an optional function of government. It is imposed by the very foundation of our government -- the U.S. Constitution. The Sixth Amendment provides that, in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

When the Supreme Court decided Gideon v. Wainwright in 1963, it declared that every indigent felony defendant must be offered the assistance of counsel for trial, stating that, "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."

At the time that Gideon was handed down, the right to have the guiding hand of counsel when faced with a felony charge was observed only in this nation's federal courts. Once the Supreme Court mandated that this right was to be implemented across the land, it sent shock waves through this nation's courts. State and local governments were ill prepared to meet the challenge of providing counsel to the hundreds of thousands of indigent persons accused of felonies.

They began to respond to Gideon's challenge with a

hodge-podge of systems. Many jurisdictions established public defender systems for the first time. Others continued to appoint private lawyers to handle felony cases for indigents much as they had done in the few capital cases where counsel had been required before the advent of Gideon.

The problem of providing counsel to the poor has grown geometrically during the two decades that have passed since Gideon was decided. The number of cases for which counsel were needed tripled with the 1972 Argersinger decision which required state and local courts to provide counsel in misdemeanor cases whenever a defendant was deprived of his or her liberty. Manpower requirements were further increased as a result of high court decisions extending the need for counsel at pre-trial interrogations, preliminary hearings, appeals, and probation revocations. The costs of providing counsel have continued to climb as increased crime rates and unemployment have taken their toll.

Yet, costs are often the greatest in areas that can least afford them. Since the defense of the indigent accused in most parts of the United States is financed by county treasuries, it often happens that counties having the highest rates of poverty-related crime also suffer from the lowest tax base. Many counties across the U.S. have approached bankruptcy after being faced with a sudden crime wave necessitating the payment of large fees for court-appointed counsel.

The majority of full-time defender systems in this country have been established in large urban and metropolitan areas. However, most parts of the U.S. lack such programs. A national survey published as late as 1984 reported that fully 60% of all U.S. counties still employ appointed counsel systems. Of the remaining 40%, many counties employ part-time defenders or contracts with lawyers in private practice.

Despite the widespread use of systems using lawyers in private practice to deliver criminal defense services to the poor, there is little information about these systems to guide the policy-maker who must make critical decisions about costs and system design.

A number of counties are considering revamping their indigent defense systems to meet a growing number of concerns. Spiraling and unpredictable costs beset county coffers. As the field of criminal law becomes increasingly complex and specialized, charges of incompetency of counsel and appeals ensue. More and more lawyers eschew criminal practice entirely. Lawyers who gain experience move away from criminal law once given the option of a viable civil practice. New lawyers just out of school, who have the time and incentive to accept appointed cases, often learn at the counties' expense, consuming expensive hours while gaining experience. Areas where a majority of the lawyers have become "successful" may experience a dearth of attorneys available for appointment; this may lead to serious court backlogs and additional expense to

the other segments of the criminal justice system.

In order to provide information that might aid counties in their decision-making, the National Institute of Justice of the U.S. Department of Justice commissioned this research. It was intended as the first major study to examine the prevailing, albeit the most criticized, mode of providing legal defense services to the poor -- the use of lawyers in private practice. In other words, the study would incorporate all systems for indigent criminal defense except those which employed full-time staff lawyers. The various approaches to the use of private lawyers were to be analyzed in light of their implications for cost-effectiveness and quality of the legal services provided to the poor.

During the years that have passed since Gideon, various national bodies have come forth with recommendations and standards seeking to guide jurisdictions in developing approaches that would provide for effective representation to the poor in criminal cases. As early as 1967, the President's Commission on Law Enforcement and the Administration of Justice blasted the ad hoc, or random, approach to the appointment of lawyers as inadequate. In 1968, the American Bar Association adopted standards calling for the provision of counsel according to a "systematic" plan. The ad hoc appointment of counsel was explicitly rejected by the National Study Commission on Defense Services in 1976.

On the other hand, national standards have seen a role for private lawyers in providing defense services. The American Bar Association urged in 1979 that, "The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization and coordinated assigned counsel system involving substantial participation of the private bar." And the National Advisory Commission on Criminal Justice Standards and Goals proposed in 1973 that, "Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available to each jurisdiction..." The Supreme Court has added its vote to those who would require some alternative to the exclusive use of the public defender by deciding in Holloway v. Arkansas that a public defender may not represent two co-defendants who have conflicting interests.

However, these standards have yet to be tested in the nation's courthouses. To date, there has been precious little in the way of hard data that demonstrate the superiority of one approach over another.

In commissioning this study, the Justice Department hoped to provide practical information on the benefits, limitations, and costs of both traditional assigned counsel programs and also the various alternatives involving private attorneys now in use across the country. Using scientific, data-gathering techniques and statistical analysis, the researchers were charged with the task of

drawing conclusions about alternative modes of private attorney representation that would aid policy-makers in designing and funding cost-effective, quality legal defense systems.

Types of Systems Studied and Their Locations

Using a combination of existing surveys, studies and reports, telephone inquiries, and their own knowledge of indigent criminal defense systems, the researchers scanned the country for appropriate research sites. Many states had to be excluded because of their use of statewide public defender systems which placed them outside the ambit of the research.

Ultimately, the study was to span the continent. It included counties on both coasts, i.e., in New York and California. However, the bulk of the research was conducted in the midwestern states of Illinois, Ohio, and Michigan.

The four major types of indigent defense systems using private lawyers were included in the study:

- 1) the ad hoc assigned counsel approach;
- 2) the coordinated assigned counsel system;
- 3) the part-time defender system; and
- 4) the contract defense system.

The ad hoc approach was examined both where it was used as the exclusive mode of providing indigent legal defense services and where it was used alongside a full-time defender agency.

Similarly, the coordinated assigned counsel system was studied in sites where it exercised a monopoly over all of the courts' indigent criminal business, where it handled only cases which represented a conflict of interest for the public defender, and where it handled a major share of the indigent criminal caseload and co-existed with full-time defender programs. Two of the "mixed" systems having both coordinated assigned counsel and defender programs differed from each other in one critical respect -- the first assigned counsel program operated in a separate sphere from that of the defender program (i.e., it handled different cases), while in the second system, the defender office actually handled the preliminary stages of the cases which were ultimately turned over to the assigned counsel.

Finally, the part-time defender system was explored both in a major metropolitan area and in a small, rural county.

To summarize, the following types of systems were included in the study:

1. Ad Hoc Assigned Counsel Approach
 - a. "Pure" Ad Hoc Jurisdiction (Rural)
 - b. "Mixed;" Handles All Felonies (Metropolitan)
2. Coordinated Assigned Counsel System
 - a. "Pure" (Rural & Metropolitan)
 - b. "Mixed;" Handles All Felonies (Metropolitan)
 - c. "Hybrid;" Handles 60% Felonies After Lower Court (Metrop.)
 - d. "Mixed;" Handles Conflicts Only (Metropolitan)

3. Part-time Defender System
 - a. "Pure" (Metropolitan)
 - b. "Pure" (Rural)

4. Contract With Private Law Firm

Before proceeding, it is essential to insure that there is a clear understanding of the distinctions between the various types of indigent defense systems. First, let us define the full-time defender system, which is the one type of system that was excluded from this study.

FULL-TIME DEFENDER SYSTEM: A public or private non-profit agency employing full-time, salaried staff lawyers. The agency may be a "public" defender office whose staff are considered employees of the state or county, or a "private" defender organization such as a non-profit defender corporation or a legal aid society.

The following are definitions of the four major types of systems that were studied:

PART-TIME DEFENDER SYSTEM: This is identical to the "full-time defender system" except insofar as the attorney staff engage in the private practice of law and therefore allocate only a percentage of their time to providing representation for indigent defendants. Part-time defenders may or may not be prohibited from private criminal practice.

CONTRACT DEFENDER SYSTEM: A system whereby a governmental unit contracts directly with one or more private law firms to provide all or a portion of the indigent criminal defense services in a given jurisdiction. This differs from the part-time defender system in that the

lawyers are not government employees, but are employed by the private law firm(s). This definition excludes contracts with nonprofit defender agencies having full-time lawyer staff and with bar associations which administer coordinated assigned counsel programs; the former would be better characterized as full-time defender organizations, while the latter would be considered coordinated assigned counsel systems.

COORDINATED ASSIGNED COUNSEL SYSTEM: A system which uses a panel of private lawyers who are paid on a fee per case basis. The lawyers are appointed from one or more lists, and the appointments are generally made in rotation. The assigned counsel list(s) is(are) under the control of an administrator. Some of the administrator's duties in "coordinating" the system may include: recommending appointments to judges or actually making the attorney assignments; determining the defendants' financial eligibility; reviewing attorney fee vouchers; providing back-up services for assigned counsel; making perfunctory court appearances; and monitoring the performance of members of the panel.

AD HOC ASSIGNED COUNSEL APPROACH: This approach involves the random appointment of private lawyers by judges on a case by case basis. It lacks any systematic plan for the appointment of counsel.

Table 1 shows the sites where in-depth research was conducted and comparisons were drawn between different systems.

Table 1

	BERRIEN, MI.	SAGINAW, MI.	SUMMIT, OH.	MONTGOM- ERY, OH.	JO DAV- IESS, IL.	BOONE, IL.
Contract	X					
Ad Hoc Assigned Counsel			X			X
Coord. Assigned Counsel		X		X		
Part-time Defender					X	

In addition, site visits were made to the counties of Albany, New York, Onondaga County, New York, Santa Clara, California, San Mateo, California, San Francisco, California, and Alameda, California.

Based upon the research that was done prior to final selection of these sites, the counties outside of California were typical of indigent defense systems using private counsel throughout the United States with respect to their design and level of sophistication. Only the California counties visited could be viewed as unique or unusual with respect to some of their indigent defense systems. The most innovative of those were the coordinated assigned counsel systems in San Mateo and Santa Clara Counties.

How the Study Was Conducted

Overview

All of the sites described in this report were visited by a research team. In each of the sites, key people were interviewed. In six of the sites, in-depth studies were conducted in addition to the interviews. Those studies included a sampling of data about criminal court cases and indigent defense system costs followed by statistical analysis of that data.

Staffing

The staffing for this research included two lawyers with experience in criminal practice and criminal justice research, a management specialist, a PhD. in social psychology with a specialty in social science research methodology, and a PhD. economist. The staff was assisted by a person with an M.A. in criminal justice and a group of lawyers and students in each of six sites who assisted in interpreting and recording data.

Interviews

Interviews were conducted with a variety of people in each of the 5 states visited. In each county visited, interviews were had with judges, indigent defense system administrators, prosecutors, bar association representatives, and county officials. In addition, in the six sites where in-depth studies were conducted, interviews were had with retained and appointed counsel, court clerks, clients, community group leaders, social service agency personnel, probation officials, jail officials, and police and sheriff's

personnel. County officials interviewed included county board members, county administrators, and budget directors.

Docket Studies

In each of the six sites where docket studies were conducted, a sample of approximately 400 cases were obtained from court files and docket books. Half of these cases were those handled by private lawyers who were representing indigent criminal defendants, whether as assigned counsel, a part-time defender, or pursuant to a contract for indigent defense cases. The other half were those handled by privately retained counsel. The retained counsel cases were used as a "control group" or yardstick against which to measure the performance of the appointed counsel in each site.

In order to enable the researchers to compare the performance of the different indigent defense system models, they were grouped as follows. Each of the sites was to be compared with another site within the same state which had a different type of indigent defense system. Thus, the study was to consist of three sets of 2-way comparisons as shown in Table 1 above.

Attorney performance was then judged on the basis of how the appointed counsel compared with retained counsel in each site with respect to a number of performance indicators. These indicators included such criteria as outcomes (acquittals, pleas to less than original charge, sentence alternatives to incarceration, length of sentence, dismissal rates), speed (time from first appearance to disposition and

sentencing), and effort expended (number of appearances, pretrial motion practice, change in pretrial release status).

Cost Study

The cost study employed a variety of sources of cost information, depending upon the type of system under consideration. One of the primary sources of information were the appointed counsel fee vouchers and court orders for payment. Data derived from these sources, like the docket study data, were entered into computers and analyzed by computer. In addition, manual calculations were employed to assess direct system costs such as overhead.

Some Model Systems

Two of the sites visited appeared to stand out above the others as exemplary systems for providing criminal defense services. Each of these, Northern California, systems contained a number of features which instilled quality controls into the administration of providing defense services.

Although both sites employed a coordinated assigned counsel system, they differed from each other in that San Mateo County, California's system was responsible for handling all indigent defense representation. Thus, it was dubbed a "pure" coordinated assigned counsel system. On the other hand, the Santa Clara County, California program was limited to handling only those cases which could not be represented by the local full-time defender office, e.g., because they constituted a conflict of interest for the defender. This was, consequently, dubbed a "mixed"

coordinated assigned counsel system in that there was a second component to the county's indigent defense system. Another way to view the Santa Clara model is to describe it as a "conflicts" program. However, it must be noted that counties having populations much smaller than the vast size of Santa Clara might employ such a system to provide a greater share of the indigent defense representation as will be seen in the description of an Ohio program later in this report.

The San Mateo County "Pure" Coordinated Assigned Counsel Program - A Profile

The following are some of the salient features of the San Mateo program:

- Independent board to select the Administrator, negotiate the budget, and supervise the Administrator.
- Full-time criminal defense lawyer-administrator.
- Representation provided by small full-time staff and large assigned counsel panel.
- "Early" representation at initial court appearance by staff or panel attorneys.
- Judiciary removed from the appointment of counsel.
- Entry level and monthly training for panel members.
- Training and experience prerequisites for admission to panel.
- Monitoring of attorney performance and reporting on case outcomes by Administrator.
- Full-time investigative staff for use by panel and other supporting services.
- Judiciary removed from approval of attorney fee vouchers.
- Fee structure does not penalize attorneys for going to trial.

The San Mateo County program involves a contract between the county board and the bar association. The board of directors of the bar association both hires the program's Administrator and appoints a Private Defender Committee of the bar association to "co-administer" the program with the Administrator. This committee consists of 7 attorneys.

The Administrator is a highly competent criminal trial lawyer who has the respect of his contemporaries. This enables him to evaluate the performance of panel members and to avoid misunderstandings in fee determinations.

The most experienced members of the assigned counsel panel attend the arraignment calendars where indigent defendants first appear in court. These attorneys then continue on as counsel in a portion of these appointments, and turn over the remainder for reassignment to other panel members.

The full-time staff of this program includes three attorneys, two investigators, four and one-half secretaries, and a half-time comptroller.

The program's fee structure, which is promulgated to all panel members, provides for flat fees for specific case activities and hourly fees for trials.

The director's duties include approving all attorney fee vouchers, approving the use of support services, preparing the program's budget, maintaining statistics, hiring and firing of staff, monitoring panel member performance, and providing a small amount of in-court representation.

Prerequisites for admission to the panel include at least one year's experience in handling criminal cases and attendance at entry-level training which consists of a set of videotapes on all aspects of a trial. Attorneys are also observed in court by the Administrator or his deputy before being allowed to accept the first appointment. Training seminars thereafter are required once each month.

Counsel are assigned to cases by the administrative office. A rotational system is used except in homicide and other special cases, where the Administrator makes the appointment.

The Assistant Administrator of the program is responsible for continuing education of the panel, making appearances in Superior Court, and making perfunctory court appearances as a convenience to panel members who are unable to be present.

Monitoring of attorney performance by the Administrator includes in-court observation, input from judges, prosecutors, clients and other panel attorneys, and review of a closing form submitted by the attorney along with the fee voucher containing information such as the method of disposition and outcome of the case.

The Santa Clara County "Mixed" Coordinated
Assigned Counsel Program - A Profile

The following are some of the key features of the Santa Clara County program:

- Governing board to nominate Administrator, set fee schedules.
- Full-time criminal defense lawyer-administrator.
- Large assigned counsel panel.
- "Early" representation at initial court appearance by other component's (defender office's) staff.
- Judiciary removed from the appointment of counsel.
- Entry level and monthly training for panel members.
- Training prerequisite for admission to panel.
- Division of panel into classes by experience level and case severity.
- Monitoring of attorney performance.
- Program budgetary allotment for investigative and expert services.
- Judiciary removed from approval of attorney fee vouchers.

The program was established as the result of a joint resolution between the judges of the upper and lower courts, the county bar association, and the county legislature, each of which bodies subsequently appointed two representatives to the governing board of the program.

The program's administrator and its other employees each have a direct contract for services with the county board. The county hired the director based upon the recommendation of the program's governing board.

The appointed counsel panel consists of almost 250 members. In order to participate in the panel, they must first attend a 12 hour entry level seminar, and must attend 7 to 10 hours in training sessions each month thereafter.

The panel is stratified into 5 classes. Class I attorneys are allowed to handle misdemeanors and minor juvenile cases; the remaining classes handle felonies of varying degrees of seriousness. Attorneys are assigned to cases using a strict rotational system for the less serious cases. Special attention is paid to assignments in the most serious cases.

The program's full-time staff includes the Administrator, an administrative assistant/secretary, a paralegal, and a part-time accounting paralegal.

The Administrator's duties include providing training for assigned counsel, reviewing and approving all attorney fee requests, budget preparation, appearing in court to accept case assignments, supervising the assignment of counsel, and reporting to the program's governing board and the county board.

Since this program is designed primarily to handle cases which constitute a conflict of interest for the public defender, it does not appear at initial arraignments. However, early entry at that stage is provided by the public defender's office.

The Administrator's office has a strong monitoring role in that it reviews pretrial motions filed by assigned counsel, observes the appointed attorneys in court, reviews their case dispositions as shown on the fee petitions, and determines their fees in accordance with the fee schedule.

The fee schedule is graduated so that higher fees are paid for more complex cases. There are basic flat fees for each class of case, additional fees for activities such as preliminary hearings and motions to suppress, and daily fees when cases are taken to trial. Thus, the attorneys are compensated for the amount of work expended.

Although the program has no full-time investigative staff like the San Mateo program, its budget includes expenses for payment of investigators, translators, physicians, polygraph operators, legal assistants to aid in motion preparation, psychiatrists, social workers to aid in preparation of sentencing alternatives, and transcripts.

Eight "Typical" Systems Using Private Counsel

The indigent defense systems using private counsel which were examined in counties outside of California proved to be quite different from those just described. The following presents some thumbnail descriptions of each type of system visited.

Other Coordinated Assigned Counsel Systems

Apart from the California systems, coordinated assigned counsel systems were visited in Montgomery County, Ohio, Saginaw County, Michigan, and Onondaga County, New York. The degree to which they employed the quality control features contained in the California models varied.

1. The Montgomery County, Ohio "Hybrid" Coordinated Assigned Counsel System. Montgomery County employs two components in their indigent defense system -- a full-time defender program which handles all indigent misdemeanor cases and 40% of the felony cases. The assigned counsel system is a "hybrid" in that the initial stages of arraignment and preliminary hearing are handled by the public defender office; cases are not assigned to assigned counsel until after the lower court stages.

The assigned counsel system does not have a separate program administrator. Instead, it is under the administrative control of a strong chief judge of the felony court. Various court employees perform the daily ministerial duties of running the program, but the chief judge maintains the ultimate authority.

The task of appointing lawyers for the average felony case falls to a low level court clerk who reports indirectly to the felony Court Administrator's office. The judges establish the attorney fee schedule with the approval of the county board. Attorney fees in individual cases are screened by the Court Administrator's office, with a possible appeal and review by the judge before whom the case was heard. The budgetary allotment for the assigned counsel system is proposed by a committee of judges.

There is no formal supervisory board or monitoring system for assigned counsel performance. However, there are two quality controls built into the system: a) appointed counsel for felony cases are divided into 3 lists based upon the attorney's experience and the seriousness of the case; and an entry level training program conducted by the bar association is required of all panel attorneys. A third feature, which relates to the existence of the full-time defender program in the jurisdiction, consists of early entry by the defender staff, which makes daily jail checks to identify arrestees who are potential indigent clients.

Determination of eligibility for appointed counsel is performed initially by the defender office; the court makes the final determination.

The fee structure provides for flat fees for the majority of work in most cases; however, there are fees of \$30 out of court and \$40 in court for special cases with maximum fees of \$1,000 for non-homicide felonies.

The greatest complaints heard about the program related to fee-cutting by judges, the lack of adequate coordination between the two components of the system, inadequacy of the fees allowed by the fee schedule, the lack of formal monitoring of the attorneys' performance, and the lack of supporting services such as investigation, research bank, or social services coupled with the difficulty of obtaining court approval for expert services.

2. The Saginaw County, Michigan "Pure" Coordinated Assigned Counsel System. The Office of Assigned Counsel is located in the county courthouse. The system is considered a "pure" coordinated assigned counsel program because it provides all indigent defense services for the county.

It is staffed by a part-time attorney/administrator and a full-time eligibility screener/clerk/secretary. The attorney contracts directly with the county, but is not a county employee, and receives no fringe benefits. The assistant is a county employee, and receives benefits.

The Administrator's duties include: supervising the assistant, who makes determinations of defendants' financial eligibility for services; making recommendations to the judges, which recommendations are generally followed, for appointments of counsel; actively recouping monies from defendants for the costs of providing counsel; reviewing and adjusting attorney fee vouchers before sending them on to the judges for final approval; providing direct attorney services at a small number of

line-ups and in extradition and probation violation hearings; reporting to the District Court Administrator; and filing monthly reports.

The assigned counsel lists used by the Administrator contain 77 names. Attorneys can volunteer to handle felonies, misdemeanors, or both. There are no criteria for participation in the lists. Attorneys are selected from the lists in rotation except in special cases or where the attorney is unavailable when called. In special cases, the Administrator will confer with the appointing judge by phone before sending the designee's name to the judge for formal appointment.

Two fee schedules are used, one for the lower court, and one for the upper court. For misdemeanors in the lower court, the fee schedule simply provides for \$30/hour, and does not distinguish between in-court and out-of-court time. The upper court schedule for felonies is based upon flat rates for given "events" such as preliminary hearings (the same rate is paid whether the hearing is held or waived), arraignments, motions (the schedule does not state whether the same rate is paid whether the motion is just filed, or whether it must be argued as well, but motions with a brief receive an extra \$25), pleas, sentencing, and trial days. No fees are provided for time spent in meetings or calls with the client, research, investigation, or other out-of-court activities.

Client eligibility is determined by the assistant using the income level guidelines adopted by the civil Legal Services office. If the defendant earns under those levels, the client is presumed to be eligible, If the client earns over those levels, the assistant refers the case to the Administrator for a determination.

Although a single attorney is appointed to represent a given defendant, there appears to be a fairly common practice that another member of the assigned attorney's law firm may make court appearances on behalf of the defendant. Thus, the assigned counsel system does not assure that there will be continuity of representation.

Although the Administrator is available to provide representation at line-ups when ordered to do so, there is no representation provided for indigent defendants at the initial court arraignment when bond determinations are made. In addition, a number of complaints were made that even after counsel had been appointed, counsel failed to interview defendants held in the county jail until they arrived in the court's holding cells for their preliminary hearing.

Apart from appearing at line-ups, the Office of Assigned Counsel offers no supporting services for assigned counsel such as making perfunctory court appearances, providing training, providing investigative or social services, research bank, or advice on case handling.

The implementation of the Argersinger decision mandating representation in certain misdemeanor cases appeared to be a problem in this jurisdiction. Respondents estimated the rate of appointments in misdemeanor cases to be from 5% to 10% of all filings. A total of 96 cases were sampled from the Saginaw County court files in order to assess possible Argersinger violations. Only cases in which no counsel had been appointed were sampled. Of the 96 "no counsel" cases, 86 defendants pled or were found guilty. Sixteen of these cases, or 18.6%, showed that the defendant was sentenced to some time in jail. Thus, in almost 19% of the "no counsel" cases resulting in conviction, there appeared to be violations of the Argersinger decision.

The greatest complaints heard about the system related to: the low attorney fees and the fact that attorney fees must compete with judicial salaries as part of the budget which the judges control; the use of the bail bondsman system, which funnels scant defendant resources away from retained counsel; the use of recoupment, which further undermines the viability of private criminal law practice in the county; the lag time in appointment of counsel; and excessive plea bargaining by appointed counsel. Additional problems noted were the lack of communication among the various segments of the criminal justice system about the program's operation, lack of accountability of funds received through recoupment, and the lack of monitoring

of attorney performance. As noted, the gaps in misdemeanor representation were of great concern.

3. The Onondaga County, New York "Mixed" Coordinated Assigned Counsel System. Onondaga County's indigent defense system can best be characterized as "mixed" in that indigent criminal cases are divided between a full-time defender office (operated by a Legal Aid Society) and an assigned counsel program. The assigned counsel program handles all indigent felony cases and misdemeanor cases outside of the city courts, while the defender program provides representation for misdemeanants in the Syracuse City Court.

The Onondaga County assigned counsel program involves a contract between the county board and the bar association, similar to the approach taken in San Mateo County. The Bar Association in turn appointed an Assigned Counsel Committee to help administer, monitor, and set policy for the program subject to the approval of the bar association's board of directors. The Committee's duties include making recommendations to the bar association's board for hiring of the program's administrator and reviewing attorney fee vouchers that are appealed.

The program is administered by a part-time attorney director. The director's functions include: budget coordination, review of all assigned counsel fee vouchers, preparation of periodic newsletters to assigned counsel, supervision of staff employees, and coordination of a training program for appointed counsel.

There are approximately 200 lawyers on the assigned counsel panels in Onondaga. The panel which provides representation for criminal cases is divided into classifications for felonies only, misdemeanors only, and all cases. While the bar association had been giving consideration to stratifying the felony list according to attorney experience levels, this had not been accomplished up to the time of the site visit.

The system did have prerequisites for attorney participation in the panel. Attorneys must attend a mandatory entry level training program, and there is a one-year experience requirement for those handling felony cases.

A system had recently been established for the removal of panel attorneys who perform inadequately. A complaint may be filed by the plan's Administrator with the Assigned Counsel Committee, and the Committee has the authority to remove the attorney's name from the lists.

However, the quality control measures instituted by the bar association may have no real effect upon the quality of the Onondaga County system. While the bar association's lists may be upgraded, the appointing authorities are under no obligation to use those lists. The lists are furnished to the judges, and the judges have full discretion in making attorney appointments. Even when judges do employ the lists provided by the bar association, they reportedly select attorneys at will rather than pursuant to any rotational system. In this sense, the system functions more like an ad hoc rather than a coordinated assigned counsel system.

Client eligibility is determined as follows. It is the responsibility of the attorney assigned to each case to fill out an eligibility affidavit for the client. The program's secretary then reviews the affidavit using written guidelines which are employed by the civil Legal Services program and determines whether or not the client falls within those guidelines. The program's Administrator makes the initial eligibility determination based upon this information. However, the defendant can appeal the program's finding of ineligibility to the judge.

Fees in New York State are \$15/hour in-court and \$25/hour out-of-court with maximum fees of \$500/misdemeanor and \$750/felony case. These maxima can be exceeded in extraordinary circumstances.

With the exception of the training programs, there are no staff services available to assigned counsel. In the event that an attorney seeks the assistance of an expert or investigator, he/she must obtain prior approval from both the court and the program's Administrator. The only exception is that the Administrator will automatically approve a sum of up to \$50 for investigative services if the attorney attaches a copy of the investigator's check to the fee voucher.

Apart from the three coordinated assigned counsel systems just described, the study included one contract defense system, 2 part-time defender systems, and 2 ad hoc assigned counsel jurisdictions. These are briefly described below.

The Contract System in Berrien County, Michigan

All indigent criminal defense work in Berrien County falls under a single contract between the County Board and one law firm (the "contract firm"). During each of the years from 1980 through 1983, the county added \$10,000 to the contract's budget.

While the contract firm is responsible for all indigent defense work, some of the work is subcontracted by them to other private law firms; the subcontracted work includes misdemeanors in an outlying town and juvenile cases.

In cases which represent a conflict of interest for the contract firm, usually because of co-defendant cases, the contract firm designates another law firm. Most often, they designate one of the firms with whom they subcontract.

The law firm is paid by the county on a monthly basis, 1/12 of the entire contract sum each month. However, when a conflicts case occurs, the attorney submits a fee petition directly to the court and is paid by the county; this amount is then deducted from the 1/12 monthly payment to the contract firm.

In addition to their work on the contract, lawyers in the contract firm handle both criminal and civil work in their private practice of law.

The criminal defense contract with the county is administered as follows. One of the partners in the contract firm serves as the Administrator. The Administrator

maintains the following data relating to the contract: number of files opened, number of hours spent by each attorney on the contract, and the number of mental health cases handled. The firm also maintains information on the subcontracts. The contract firm is directly accountable to the Administration Committee of the County Board.

The defense firm allocates part of the time of 5 attorneys to the contract work; in addition, 3 other attorneys in the firm devote a small (5 to 10%) percentage of their time. Using the highest estimates of time allocated by the firm's attorneys, a total of 2.65 full-time equivalent attorneys perform contract-related duties.

Other staff employed in contract-related duties include: 1 full-time secretary, 1/4 of a time-keeper, and 1/8 to 1/4 of a bookkeeper. No investigative or social work staff are employed.

The 5 attorneys who devote a substantial percentage of their time on the contract are the newer, less experienced members; none of the 4 partners devotes more than 10% of his time to the contract work.

The three newest attorneys work on a straight salaried basis for the firm. The other two contract attorneys work on a percentage basis, or commission, based upon the number of dollars they produce for the firm. They receive credits for work performed on the contract based upon their established hourly rates times the number of hours they bill.

The remainder of contract funds received by the firm may be used by the firm as it wishes, presumably to cover

items such as rent, the purchase of equipment, professional liability insurance, and income to the firm.

Under the Berrien County system, the defense firm has no role in the determination of a defendant's financial eligibility for the appointment of counsel. This function is performed entirely by the court. If a defendant requests an attorney at arraignment, either a court bailiff or the pre-trial release officer completes a form for the defendant listing his or her assets and liabilities. The defendant signs the form and appears before a Magistrate to swear that the data are correct. The District (lower) Court judge reviews the form shortly thereafter, generally within 2 days, and determines whether or not to appoint counsel.

It is more likely that counsel will be appointed for a person accused of a felony than a misdemeanor. As a result, persons accused of felonies are interviewed for their appointed counsel petition before arraignment, while persons accused of misdemeanors are not questioned about their eligibility until they appear before the bench. In felony cases, the sworn, completed affidavit may be included in the court's file at the time of the initial arraignment, and the judge may determine eligibility at that time.

No formal eligibility criteria are employed in making the determination; the assessment is solely within the court's discretion.

Of a total of 2,831 misdemeanor cases opened in Berrien County during 1981, 1,752, or 62%, were not represented by counsel. A sample of 100 of these "no counsel"

cases were examined in order to ascertain what percentage of the defendants served jail time. Of the 100 cases, 21 were either acquitted or dismissed. Of the 79 cases in which the defendant either pled or was found guilty, 16 cases, or 20.3%, received some jail time without being represented by counsel. Thus, in over 20% of the "no counsel" cases resulting in conviction, there appeared to be violations of the Argersinger decision.

Counsel are provided at the pre-charge stage only under very limited circumstances. If the prosecutor desires to have a defense attorney present at a line-up, he obtains an Order of Court appointing the firm. The firm will not attend line-ups without a court order.

Apart from a very small percentage of cases where representation is provided at line-ups, contract firm attorneys enter the case considerably later. The contract firm is generally appointed about 2 days after the arraignment in lower court. The court's Assignment Clerk places a notice of appointment in the firm's box a day later, and then it must be picked up by a runner for the firm.

It is not the firm's practice to have an attorney present at the lower court arraignment. Thus, defendants are unrepresented at the time when bail is set. Nor are counsel available to be contacted during police interrogations.

Once the defense firm has been appointed, the assignment of counsel has been taken out of the hands of the courts. In practice, defendants rarely have an opportunity to confer with their contract firm lawyer prior to the pre-trial or

pre-exam conference. Defendants who are in custody will be interviewed for the first time while in the courthouse lock-up after being brought over from the jail. In the case of a misdemeanor defendant, persons who are in custody may have their pre-trial conference as late as 21 days after the arraignment. For persons charged with felonies, the pre-exam conference may be 11 days after the arraignment. Persons who are out on bond may be seen by the defense firm for the first time on the date of the pre-trial exam which is held from 6 to 12 weeks after the arraignment.

Defendants who attempt to contact their defense firm lawyer are rarely able to do so. The reason for this is that no particular lawyer is actually assigned to a case until one business day before it comes to court. For example, all files of cases coming up for a pre-trial conference on a Monday will be placed on an attorney's desk the preceding Friday. If there are 10 cases arising on that Monday, they will all be assigned to that one attorney who is to handle the pre-trial conference call in the misdemeanor court that day. The assignment of misdemeanor cases to a given attorney is by lot.

There is no continuity of counsel in this system. If the defendant does not plead guilty on the day of the pre-trial conference, there may be a different attorney at the next court appearance. In felony cases, different attorneys will handle the preliminary examination conference and the preliminary hearing itself about half of the time. These events both occur at the lower court level.

The Chief Judge of the upper (felony) court was evidently disturbed by the practice of having different lawyers handling various stages of a case, and wrote to the contract firm demanding that the same lawyer who appeared at the lower court's preliminary hearing also appear at all subsequent stages of a felony case. However, observers noted that the contract firm will sometimes exchange lawyers even for felony cases after the preliminary hearing.

The caseloads for the contract lawyers were quite high. If one assumes 2.65 full-time equivalent lawyers for a 1981 contract caseload of 1,559 cases, this amounts to an average of 588 indigent criminal cases per full-time equivalent lawyer in addition to the private law firm work. This compares to national standards of a maximum of 150 felonies or up to 400 misdemeanors per annum for a full-time attorney.*

The excessive caseloads were pointed to by local critics of the system as resulting in excessive plea bargaining. Some respondents reported that cases are sometimes disposed of on the first court date after arraignment prior to any factual investigation of the case or even a thorough interview with the defendant.

*National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 13.12.

Part-time Defender Systems

Two part-time defender systems were included in the study. The part-time defender system in the rural Jo Daviess County, Illinois was a one-man operation, while the part-time defender system in the metropolitan area of Albany, New York, encompassed a large staff and offices.

1. The Jo Daviess, Illinois Part-time Defender

Jo Daviess County employs a part-time public defender to handle all indigent criminal cases except those which constitute a conflict of interest for the public defender. In conflicts cases, the court appoints counsel.

This rural area has a very small criminal caseload. In 1982, there were only 131 felonies and 350 misdemeanor cases filed in the Jo Daviess County courts, some of which cases may represent multiple charges arising out of a single incident.

The system operates with a strong overlay of judicial control. The judiciary selects the public defender, negotiates the public defender's budget with the county board, and determines the eligibility of defendants for public defender services.

The program contains characteristics of both public defender and assigned counsel systems. It is like other public defender systems in that the attorney is considered a county employee who receives county fringe benefits and receives a regular salary for the indigent defense work. On the other hand, it resembles an assigned counsel system in that the defender is expected to contribute secretarial services,

purchase his own office equipment, and provide his own office space (with the exception of a small, spare, interviewing room in the courthouse).

The public defender works in that capacity about 80% of the time, and spends the remainder of his time on private cases which are divided between civil and criminal matters.

No support services are provided to the public defender. He conducts his own investigations, and uses the social services of community agencies on an informal basis. Social service resources were utilized in this program to a greater degree than was observed in any of the six programs shown in Table 1 above.

There is no provision for the assistance of counsel in Jo Daviess County at pre-indictment line-ups or interrogations. An indigent defendant's first contact with a lawyer may be at the first court appearance, since the public defender will generally appear in court. The public defender conducts the initial interview with the indigent defendant in a felony case sometime between the first court appearance and the preliminary hearing. Most clients are interviewed within 2 to 3 days of the defender's appointment to the case. However, defendants in Jo Daviess County are sometimes brought to the prosecutor's office prior to the appointment of counsel where they may work out a "deal" before ever going to court.

Once a defendant is brought to court, judges do not appoint counsel unless the prosecutor indicates that he is seeking jail time in a misdemeanor case. The majority of indigents accused of misdemeanors are processed without the benefit of counsel.

Judges assess the defendants' eligibility for appointment of counsel without the use of written guidelines. Recoupment is not practiced in this county.

During the years from 1980 through 1982, the public defender handled an average of 200 to 300 cases per annum. The caseload consisted of a mixture of felonies, misdemeanors, traffic cases, juvenile, ordinance violations, and "family court" cases.

2. The Albany County, New York Part-time Defender System

Albany County employs a part-time defender system which handles 100% of the indigent criminal cases with the exception of conflicts of interest. However, a somewhat unusual feature of the system is that the defender office itself administers the program for handling conflict of interest cases.

The public defender's office does not handle cases in Family Court. These cases are assigned directly by the judges in Family Court, and cost the county an additional \$60,000 in attorney fees.

The public defender agency is a department of the county, and public defender staff are county employees. The agency's budget includes everything except office space, utilities, fringe benefits, and accounting services, which are provided in-kind by the county.

The 1982 adjusted county budget shows a public defender staff of 20 part-time lawyers plus a Coordinator of Assigned Counsel at considerably less than ½ time. In addition, the budget shows support staff consisting of 4 full-time investigators, an administrative assistant, and six secretarial/clerical personnel, some of whom are part-time, as well as a substantial sum for temporary help.

As a department of the county, the public defender prepares and justifies his own department's budget. Budgeting in this county is done via an incremental rather than zero-based approach.

Unlike the Berrien County contract system, this public defender agency does not simply draw down 1/12 of its allotted funds each month. As a county department, the county pays each public defender staff member's salary directly.

Office equipment includes an IBM memory typewriter purchased in 1980 for \$5,000. The office also has funds to rent xerox equipment, purchase law books, travel, and pay auto insurance.

The public defender system in Albany County has been in existence for about 15 years. The chief public defender is appointed by the county legislature.

Cases are handled horizontally. The lawyers are assigned to "Parts," or courtrooms, and not to individual defendants. When a felony case is bound over from the lower court to the felony court, the defendant will have a different lawyer. The office serves the county's 2 felony courtrooms, 3 city courts, and 12 town courts.

The defender's office has the responsibility for making eligibility assessments in cases where the arraignment judge is uncertain about the defendant's financial ability. Judges make the ultimate determination. Albany County does not practice recoupment.

The assigned counsel coordinator who works out of the defender office is responsible for compiling the list of attorneys willing to accept appointments and for making a recommendation to the judge who appoints counsel. The coordinator is also responsible for reviewing the attorney fee vouchers and making final determinations as to the amount that the attorneys receive.

Perceptions about the system by the various segments of the community varied. Judges praised it. County fiscal personnel were pleased with predictability of costs. The bar association demurred, except to praise the quality of some lawyers on the public defender's staff. However, community agencies complained that the system was overburdened and inadequate, that defendants received cursory interviews, and that the system "budgeted for plea bargaining."

A tentative summary of cases sampled from the court's dockets showed that the public defenders had a substantially higher rate of pleas and lower rate of dismissals than a comparable group of retained counsel. However, the public defenders were quicker to dispose of cases than retained counsel.

The Ad Hoc Assigned Counsel Approach

Two jurisdictions which employed the ad hoc, or random, approach to appointing counsel were included in the study. The first is in a metropolitan county of over 500,000 persons, i.e., Summit County, Ohio. However, assigned counsel handle only the felony appointments, while a full-time defender system provides representation in misdemeanor cases. For this reason, we consider it a "mixed" system.

The second site, Boone County, Illinois, is a rural county of less than 29,000. The "pure" assigned counsel system here provides 100% of the indigent criminal defense representation.

1. The Summit County, Ohio Ad Hoc Assigned Counsel Approach

The appointment of counsel in Summit County cannot be characterized as a "system" in that there is no centralization or coordination of appointments. All essential functions are handled by court and county personnel.

Fees for appointed counsel are simply a line item in the felony court's budget.

Each individual lower court judge is responsible for making the appointments of counsel. One judge is not made aware of the appointments made by the other judges. Judges may contact the attorneys themselves, or may request that this be done by a court clerk or bailiff.

Judges may assign attorneys from a list of names compiled by the Akron Bar Association, from letters sent by attorneys seeking appointments, or may simply assign

cases to attorneys whom they know personally.

There is only one criterion for participating in the bar association's list or receiving appointments -- admission to the practice of law. No experience requirements or criminal practice training are necessary.

In some instances, the prosecuting attorney assists the judge in selecting a lawyer. This often happens in aggravated murder cases.

Summit County pays assigned counsel rates of \$20/hour for in-court and \$30/hour for out-of-court time, which is below the \$30 and \$40 rates recommended by the Ohio Public Defender Commission. Maximum fees for non-homicide felonies are \$500, with a \$300 maximum for misdemeanors. These low fees are frequently cut by judges, so that the effective rates run below the stated levels.

The courts discourage the use of investigators by requiring that all use of support services receive prior court approval. None of the judges interviewed could recall any request for investigative services having been made, and conceded that, if it were, it would not be approved simply because the budget was inadequate.

The Ohio statutes provide that an indigent person has the right to "select his own personal counsel to represent him" in lieu of receiving court-appointed counsel. However, it did not appear that this issue had ever been raised, and the courts had not sought to implement the law.

Summit County employs no system for recoupment, although some judges reported that, in the past, they had ordered recoupment as a condition of probation. This practice had changed when court rules provided that attorney's fees were no longer considered part of court costs.

Complaints lodged by the various persons interviewed in Summit County included: a) allegations of favoritism and politics in making attorney appointments; b) financial disincentives to take cases to trial; c) lack of parity with compensation of the prosecution; d) problems in payment of appointed counsel at the end of the county's fiscal year when appropriations have been over-expended; e) judicial control over the fee schedule; e) the lack of monitoring of attorney performance; f) the lack of training and support services for appointed counsel; g) a low level of client contact and late entry by counsel into the case; and h) the lack of a single entity to oversee the provision of indigent defense services in Summit County.

2. The Boone County, Illinois Ad Hoc Assigned Counsel Approach. This rural Illinois county employs a "judge-centered" ad hoc, or random, assigned counsel approach.

The judge controls the selection and appointment of assigned counsel, determines the defendants' financial eligibility for appointed counsel services, reviews attorney

fee petitions and determines the amount of fees that will be paid in each case, prepares the budget request for the assigned counsel appropriation, and administers the assigned counsel budget.

The existing Illinois law does not provide for specific fee levels; it simply requires that fees paid be "reasonable." Various judges appear to pay at different levels ranging from \$30 to \$40 per hour. Some judges cut fee requests, while others do not.

There is no monitoring of attorney performance, other than in an informal way by the judges before whom the attorneys appear. No training is provided, and no back-up services such as access to research or investigative assistance are available.

Defendants have no access to counsel prior to the first court appearance, e.g., for line-ups or custodial interrogations. However, with some exceptions, most of the attorneys appointed do establish prompt contact with their clients after the first court appearance. Reports regarding the giving of Miranda warnings by the police vary; however, there appears to be a high rate of confessions made by defendants before they are brought to court.

There are only about 5 attorneys in this small county who have agreed to accept court appointments. In this respect, the system resembles the part-time defender programs of some other jurisdictions.

One of the greatest problems in this jurisdiction is the lack of fiscal controls over assigned counsel expenses. At the time of the site visit, assigned counsel costs were running well over budget, and it was clear that there would be a substantial cost overrun by the end of the year.

Boone County has recently begun to require recoupment. However, since 1983 was the first year that recoupment had been imposed, no figures were available regarding the sums collected.

Cost Implications of Criminal Defense Systems Using Private Counsel

The study of the costs of private bar systems for providing defense services was able to draw a number of conclusions. It considered the factors that affected the level of costs and identified several elements that must be incorporated into the thinking of criminal justice planners.

The type of criminal defense system approach used was only one of those factors. Data analysis revealed how the three sets of systems studied compared to one another with respect to cost.

However, costs were not examined in a vacuum. The study also revealed the relationship between the cost and the quality of the services provided. The results proved the old maxim that, "you get what you pay for."

The study delved deeper into the question of costs by examining the fees paid to appointed counsel and also considered some other costs of defense systems apart from attorney fees.

Next, the question of costs was approached from a systems planning perspective. Observations were drawn regarding budgeting and accountability of costs in indigent defense systems.

And finally, the levels of funding were dealt with from the perspective of the impact upon effectiveness of the services provided. The following are the set of conclusions and findings made on cost issues.

Factors Affecting Cost

In comparing the six study sites, there were essentially five factors that were found to control the increase or decrease in costs between one jurisdiction and another:

- the type of defense system selected;
- the rate of compensation paid to attorneys;
- the average number of hours spent in processing cases;
- the processing time for the court system as a whole; and
- whether or not the defense system employed a staffed or fee per case approach.

1. The type of defense system. In comparing the three sets of systems against each other, the researchers found:

- a. The part-time defender system in a rural county cost less than the ad hoc assigned counsel approach.
- b. In two mixed systems, each having both a full-time defender program and an assigned counsel system, the one with the ad hoc assigned counsel approach was less costly than the one with the coordinated assigned counsel program.
- c. A contract system whereby a single law firm fulfilled the county's entire requirements for representation of indigent defendants was less costly than a coordinated assigned counsel system.

2. The rate of compensation paid to attorneys. In assessing the reasons for the finding that the ad hoc approach in one county having a mixed system was less costly than the coordinated assigned counsel system in a comparable county, the researchers learned:

The cost savings achieved by the ad hoc assigned counsel approach over the coordinated assigned counsel system in the two "mixed" defense system counties were primarily due to the fee rates paid to attorneys

rather than to the number of hours expended by counsel or to the overhead of the system.

3. Average number of hours consumed. The study proceeded to also examine the basis for the lower costs of the contract defense system as compared with a second coordinated assigned counsel system in order to determine why that system model came in second again. It was discovered that:

The lower cost per case achieved by the contract system compared with the coordinated assigned counsel system was the result of fewer attorney hours spent per case rather than a lower attorney fee per hour.

Before proceeding to the other two factors that affect the cost of criminal defense systems, the reader is referred to Tables 2, 3, and 4 shown on the following pages. These tables depict the indigent defense system costs per case, the number of attorney hours spent per case, and attorney fees received per hour for each of the six major sites in this study.

Table 2

INDIGENT DEFENSE SYSTEM COSTS PER CASE*

	Felony cases	Misdemeanor Cases
Contract System	\$139	\$40
Pure Coordinated Assigned Counsel System	\$262	\$158
Hybrid Coordinated Assigned Counsel	\$331	
Mixed Ad Hoc Assigned Counsel	\$288	
Pure Ad Hoc Assigned Counsel	\$293	\$121
Part-time Defender	\$249	\$80

*This table represents only the cost per case in the six jurisdictions studied, and does not purport to be representative of systems having similar structures in other jurisdictions.

Table 3
ATTORNEY HOURS SPENT PER CASE*

	ATTORNEY HOURS SPENT PER CASE*	
	Felony Cases	Misdemeanor Cases
Contract System	4.55 to 4.43	1 to 1.22
Pure Coordinated Assigned Counsel	7.18	5.76
Hybrid Coordinated Assigned Counsel	11.9	
Mixed Ad Hoc Assigned Counsel	13.7	
Pure Ad Hoc Assigned Counsel	11.5	4.4
Part-time Defender	8	2.5

*This table represents only the number of hours spent in the six jurisdictions studied, and does not purport to be representative of systems having similar structures in other jurisdictions.

Table 4
ATTORNEY FEES PER HOUR* (ACTUAL)

Type of System	Hourly Fee		
	Average	Felony	Misdemeanor
Contract System	\$32.56		
Pure Coordinated Assigned Counsel System		\$33.43	\$27.84
Hybrid Coordinated Assigned Counsel System		\$26.88	
Mixed Ad Hoc Assigned Counsel System		\$20.12	
Pure Ad Hoc Assigned Counsel System		\$24.71	\$25.29
Part-time Defender		\$25.58	\$27.20

*This table represents only the fee per hour in the six jurisdictions studied, and does not purport to be representative of systems having similar structures in other jurisdictions.

4. Processing time for the entire court system.

When comparing the time spent in case handling by assigned counsel and the control group of retained counsel, it was noted that certain counties seemed to be faster than other counties with regard to case disposition time. Not only were appointed counsel generally faster than retained counsel (although this was not always true). It was noted that both retained and assigned counsel in the county having the contract system, which was the least expensive of all, were quicker than either retained or assigned counsel in its comparison county which employed the coordinated assigned counsel system. Upon further examination, the same situation was found in the comparison between the ad hoc assigned counsel and the part-time defender system. The only comparison where the speed of the court system was not related to the difference in cost between the two defense systems was in Ohio, where the slightly faster system was still costlier. Nevertheless, the obvious relationship in the first two sets of counties led the researchers to conclude:

The indigent defense system costs less in a county where the disposition time for both assigned and retained counsel is shorter than in another county where both assigned and retained counsel consumed a longer time to dispose of cases.

5. Staffed vs. fee per case approach. Another hypothesis seemed to bear examination in a search for the key to predicting criminal defense system costs. One of the oldest assumptions among the proponents of defender systems has been that staffed systems were less costly than

systems which paid attorneys on a "piecework" basis. This assumption was therefore tested against the, admittedly, small sample of jurisdictions. This sample contained only two "staffed" systems, the contract system and the part-time defender system. In both of these cases, the comparison with their assigned counsel counterparts showed the staffed system to be less expensive. Thus, the finding that:

Staffed programs, whether they be established as a contract with a private law firm or as a part-time defender system, appear to be less costly than fee per case assigned counsel systems.

The Relationship Between Cost and Quality of Service

Once a policy-maker knows which system produces the greatest and the least costs, it is incumbent upon him or her to insure that the system established will provide a reasonable level of competency. This kind of thinking may help to avert costly lawsuits, appeals, and post-conviction cases.

As a result, the researchers first examined the contract system which appeared to produce the lowest possible cost for the county that had been studied. But in comparing the contract's defense representation with the control group of retained counsel in the same jurisdiction, the statistics showed that system to be in some difficulty. Of all of the systems studied, the contract system made the poorest showing when compared to another group of defense attorneys in the same county. Retained counsel performed better than the contract lawyers with respect

to five different areas of performance. The only area in which the contract firm excelled over the retained counsel was in speed of disposition. This analysis produced the following finding which was based upon the statistical analysis of cases included in the docket study:

The contract system, which was the least expensive of the systems studied, made the worst showing of all of the jurisdictions on which data were collected with regard to the quality of performance.

The most logical inquiry at this point seemed to be, what about the most expensive of the sites studied? What did the data show about its performance? Table 2 showed that, while the contract system spent only \$139 per average case, the hybrid coordinated assigned counsel system spent an average of \$331 per felony case. What did they buy for this difference? The results were interesting enough. The data analysis of docket study cases showed that the "hybrid" coordinated assigned counsel system attorneys, unlike the contract system lawyers, were not outperformed by the local retained counsel on any indicators of performance. Indeed, the assigned counsel showed up better than retained counsel for the one variable where a difference was shown between the two. Thus, the following finding:

The coordinated assigned counsel system operating in a county where a full-time defender handles the initial stages of felony representation, which was the most expensive of the systems studied, made the best showing of all of the jurisdictions on which data was collected with regard to the quality of performance.

Assigned Counsel Fees and Other Defense System Costs

1. Fees paid to assigned counsel. Assigned counsel fees vary widely in different parts of the country. One jurisdiction, which was not included in the present study, was able to raise its fees to \$50 per hour after winning a lawsuit. The lowest fee paid by any system in this study was \$15 per hour for out-of-court work (this was paid in Onondaga County, New York, which was not one of the sites where statistical analysis was done). The highest fee reportedly paid was \$40 per hour by one of the judges in an Illinois county.

However, an analysis of fees actually received by lawyers after cuts were made by the courts turned out to be rather different. These fees, as shown in Table 4, ranged from \$20 to \$33 per hour on the average. Some attorneys interviewed reported receiving as little as \$11 per hour after a judge had cut certain fee applications.

Private attorneys interviewed reported that fees per hour in their retained cases ranged from \$50 to \$100 or so per hour. The following findings regarding the payment of fees were based upon interviews had throughout the jurisdictions visited.

- a. The fee rates paid to private lawyers for handling indigent defense cases were well below comparable private bar rates in all of the sites using a fee per case method of payment.
- b. The fees received by appointed counsel often failed to provide any net income after paying their office overhead expenses.

- c. The stated hourly rates did not necessarily reflect the fees actually received because of frequent fee-cutting by judges.
- c. Most of the counties using a fee per case method of payment employed cumbersome and time-consuming fee processing procedures, and some also employed Draconian rules prohibiting payment for late fee requests.

This last finding was buttressed by observations in two jurisdictions where the situation was even more serious than just described. In one county, all appropriations for assigned counsel ran out at the end of October, and lawyers had to wait until the following year to be paid. In a second county, the funds for payment of attorneys that were allotted in a contract with a bar association were prematurely consumed. As a result, the county's lawyers sued, and won a \$600,000 settlement with the county.

2. Other indigent defense system costs. Providing an adequate defense often requires the services of other disciplines besides lawyering. Criminal defense lawyers frequently use the services of experts such as polygraph examiners, handwriting experts, ballistics, psychiatrists, and the like. They must also research legal issues on complex legal matters and file pretrial motions. While all lawyers need to do research and file motions, these tasks are particularly difficult for the newer lawyers who are most often the ones representing the indigent accused in private bar criminal defense systems. Most importantly, they must investigate factual allegations and, for those who will be found guilty and sentenced, seek the

best sentencing alternatives for their clients.

Of the 8 sites visited outside of California, only one, a part-time defender system in New York State, had any budgetary allotment for investigative or expert services (other than a token sum in another New York State system). Few systems even had the benefit of secretarial assistance paid for at county expense. None provided any social service assistance, although one resourceful part-time defender had recruited the volunteer assistance of local community service agencies. Only the California systems helped the lawyers prepare motions or had any research bank for the lawyers to draw upon. Thus, the following findings:

Most of the indigent defense systems using private counsel failed to provide an adequate budget for investigative services, social services, expert witnesses, or other necessary expenses of providing legal defense services.

- (1) Judges in appointed counsel systems almost uniformly acknowledged that they would not approve expenses for hiring of criminal defense investigators, even where no staff services were available.
- (2) In most jurisdictions studied, the indigent defense program had no budgetary discretion to expend funds for forensic testing or expert services, but were required to obtain prior approval in open court.

Budgeting and Planning

One of the greatest problems perceived, from the county's perspective, was the lack of adequate planning for defense system costs. The level of planning viewed in the 8 "typical" defense system sites falls short of that witnessed by the researchers elsewhere in the country in sites where full-time defender agencies prevail. For example, in New York City, the defender agency presents a voluminous budget proposal to the city each year using complicated cost accounting techniques. A National Institute of Justice videotape prepared for the management series on "Operating a Defender Office" shows county fiscal personnel in Solano County, California in complex negotiations with the public defender to ascertain budgetary needs. Five year projections of caseload increases and planning to meet changes in the law are not uncommon in some parts of the country.

However, very little planning for future defense system costs had been undertaken in most of the study sites where the private bar was used in providing defense services. While some counties did attempt to assess case costs in their budgetary planning, others relied upon "incremental budgeting" whereby they simply added a sum each year to the previous year's costs.

The pitfall in this approach was that some of the counties visited had experienced large shortfalls in assigned counsel fee appropriations. To add insult to injury, some counties seemed to have no notion of the total costs that

they were expending on indigent defense, because these costs were scattered through several different departmental budgets or line items that were not clearly segregated as to who was doing the spending.

Those observations led the researchers to draw the following conclusions:

Most of the private bar indigent defense systems studied lacked proper budgeting and planning procedures.

- (1) Few jurisdictions had any notion of their costs per case or of any other unit measurement for projecting future costs.
- (2) Most jurisdictions were not aware of their total annual expenses for indigent defense representation.
- (3) Systems which employed the fee per case method of payment frequently exceeded their budget appropriations.
- (4) Most of the systems studied lacked any one person, department, or agency with the responsibility for knowing the total cost of all components of the indigent defense system, so that planning for these costs was often disjointed.
- (5) Most of the systems studied failed to monitor the rate at which fee appropriations were being expended.

The Effect of Inadequate Defense System Financing Upon Counsel for the Accused

Finally, the consideration of costs led the researchers to attempt to assess the impact of the financial anaemia faced by indigent defense systems upon the actions of counsel for the accused. The research team, in each jurisdiction visited, was besieged with answers to these questions even before the questions had made their way to the interviewers' lips. The perceptions of clients, community groups, rehabilitation programs, defense lawyers, and prosecutors indicated that:

The low fee rates paid to assigned counsel, compounded by fee-cutting, delays in payment of fees, and the lack of funds for support services, appeared to result in:

- (1) Incentives for lawyers to dispose of cases as quickly as possible and with a minimum of case preparation.
- (2) More experienced lawyers either withdrawing from accepting criminal appointments altogether or limiting their participation to the types of cases where payment is more lucrative, so that the bulk of criminal appointments are handled by young, inexperienced attorneys.
- (3) The bar's perception that they are being penalized for delivering services to the indigent accused.
- (4) The bar's perception that the judiciary expects a lower quality of representation in cases where the public pays the fee.
- (5) A sense of futility on the part of the bar with regard to obtaining adequate fee levels for assigned cases because new lawyers will always be available to accept the appointments.
- (6) The failure by appointed counsel to conduct investigations in the majority of cases or to refute the prosecution's evidence through the use of forensic tests.

Other Cost-Related Considerations

Two other factors may affect the overall costs of providing defense services for the poor. These are the determination of financial eligibility for the services of appointed counsel and the recoupment of the costs of providing legal representation. These factors are fraught with policy considerations which space does not permit discussing here. However, for further reading on these topics, the reader is referred to the report entitled,

Guidelines for Legal Defense Systems in the United States: Report of the National Study Commission on Defense Services (National Legal Aid and Defender Association, 1976).

With respect to the determination of defendants' financial eligibility for appointed counsel, the study found that only 2 of 7 jurisdictions studied outside of California employed any written criteria for determining the client's indigency. Generally, the matter was within an individual judge's discretion, and the criteria employed differed among the various judges in a single county.

In the 2 jurisdictions where written guidelines were used, they were those developed for civil legal services offices by the Legal Services Corporation. Both of the systems using the written guidelines were coordinated assigned counsel systems.

With respect to recoupment, again, only 2 of the sites attempted to obtain reimbursement from defendants for attorney services. In one jurisdiction, recoupment was the responsibility of the assigned counsel administrator. In the second jurisdiction, an ad hoc assigned counsel system, the practice of obtaining recoupment had only recently commenced, and there was little experience to be gleaned.

Given this background, the following findings were reached:

The majority of indigent defense systems using private counsel lack any written criteria for determining the financial eligibility of defendants for appointed counsel.

Furthermore,

Private bar indigent defense systems rarely practice recoupment of the costs of providing defense services.

How Well Did Attorneys Perform in Defense Systems Using Private Counsel, and Why

This section presents the study's findings relating more specifically to attorney performance as opposed to cost. It reports the docket study results showing how assigned counsel, contract lawyers, and the part-time defender performed in comparison with retained counsel in their own jurisdictions. Secondly, it shows how the different types of systems within a single state compared with one another.

Based upon site visit interviews, the researchers' observations about the comparisons between defense and prosecution are reported.

The remainder of this section deals with the presence or lack of quality controls in private bar indigent defense systems and how their existence appears to affect attorney performance.

1. Statistical comparisons of performance. In four of the six sites visited, retained counsel performed considerably better than the lawyers who provided representation for indigents accused of crime. The two exceptions were the Montgomery County hybrid coordinated assigned counsel system and the Jo Daviess County part-time defender system. In Montgomery County, there were no areas where retained counsel

excelled, and there was one area where assigned counsel appeared to excel. In Jo Daviess County, there were mixed results. The part-time defender was speedier in disposing of misdemeanors and engaged in more pre-trial practice than retained counsel, but the privately retained counsel outperformed the defender in obtaining pre-trial release and sentence alternatives to incarceration for persons charged with misdemeanors. There were no differences between the two groups with respect to the handling of felonies. On balance, it would appear that retained counsel performed somewhat better than the part-time defender in Jo Daviess County. Thus, the finding:

- a. The statistical study showed that most systems using private lawyers to provide criminal defense services to the poor compare unfavorably with services provided by retained counsel.

When it came time to compare the various private bar indigent defense systems with each other, there were much smaller differences in performance than there had been between privately retained and court-appointed lawyers. The study also found that there seemed to be greater differences between defense systems in different states than between varying models of defense systems within the same state. If one county in a state provided services that were not on a par with retained counsel, then another county in the same state tended to provide equally substandard representation to the indigent accused. Thus,

the study seemed to reflect regional differences in attitudes toward adequate funding and staffing of services for the indigent. This phenomenon occurred in two of the three sets of comparisons made. This resulted in the finding that:

- b. By and large, the study showed few statistically significant differences between different types of indigent defense systems employing private lawyers operating within the same state.

In the third set of comparisons of indigent defense systems within a single state, somewhat more substantial differences were found; these were identified in the comparison between the Boone County, Illinois ad hoc assigned counsel approach and the Jo Daviess County, Illinois part-time defender. When the two counties were statistically compared to one another, it was found that the Boone County approach excelled only with respect to speed, while the Jo Daviess County defender received more favorable results with regard to trial rates, higher pre-trial release rates in misdemeanor cases, extent of pre-trial motion practice in felony cases, and securing a higher percentage of sentencing alternatives to incarceration. Thus, the finding that:

- c. The greatest difference found in comparing private lawyer indigent defense systems with each other was between a part-time defender system and an ad hoc assigned counsel approach.

2. Comparison of prosecution and defense systems.

Given the nature and design of our adversary system in America, it is axiomatic that in order for the scale of justice to function properly, the prosecution and defense

components must be equal. If one outweighs the other, there is an imbalance in our system of justice which results in unfairness.

However, in none of the systems visited outside of California did an indigent defense system other than a full-time defender program hold equal status or credibility with the office of the prosecution.

The private bar indigent defense systems tended to be far more dependent upon judicial and political officials for their budgets and appointments, and lacked independent backing in their fight for adequate salaries and fees. They were not as well-established, poorer paying, had fewer professional and support staffs in proportion to their workloads, and had lower status and influence in the court system and in the eyes of the public. In fact, while the prosecution was well known, some of the community agencies interviewed had never heard of the defense program.

In none of the sites visited outside of California was the appointment of counsel entirely divorced from the judiciary. Even in the sites which used an assigned counsel administrator, the courts retained control over the appointment process, either by making the appointments themselves or by having a major influence over the hiring of the defender or administrator.

In most jurisdictions, the budget for the indigent defense services was not a separate budget to be presented

to the county board, as was the prosecution's, but merely a line item in the court's budget. Indeed, funding for indigent defense services often competed with the line item for judicial salaries while it was the judges that determined the allocation of items in the court's budget.

None of the systems studied outside of California possessed an independent board or commission to advocate for improved conditions or to serve as an insulator from judicial and political pressures, although party politics often influenced the selection of a part-time defender or assigned counsel. Attorneys were often placed in the awkward position of having to choose between vigorous advocacy for their clients and future benefits of employment and adequate fee awards. These considerations led the researchers to find that:

Compared with prosecution agencies, systems for providing defense services using private lawyers:

- (1) Provide a lower rate of compensation, whether organized as a part-time defender or fee per case basis.
- (2) Have considerably less control over their own budgeting process.
- (3) Lack the independence and status accorded to prosecutors, who are generally elected officials.
- (4) Lack comparable professional and support staffs per work unit.
- (5) Differ from the prosecution in that they are dependent upon the judiciary for their appointment.

3. Quality controls. Given the comparisons of performance that have been presented, the question remains, to what can we attribute differences in performance. Not surprisingly, the statistical data show a correlation between the presence of quality controls and attorney performance. The statistical comparisons were confirmed by the observations and interviews by the research team. This section presents the results of the statistical comparisons and reports on the presence or absence of quality controls in the jurisdictions visited.

a. The hybrid coordinated assigned counsel system. The coordinated assigned counsel system that operated in conjunction with a full-time defender system was the only system for which statistical data were gathered which incorporated the following quality controls: a) an entry-level training program with required attendance for all appointed counsel; b) a three-level stratification of attorney lists for the handling of felony appointments accordint to attorney experience level and seriousness of the charge; and c) jail checks (performed by the defender office staff) made to visit arrestees prior to initial appointment. In addition, the program had the "moderating" influence of a full-time defender program in the jurisdiction, which appears to have served as an asset.

When compared to retained counsel in the same site, the hybrid coordinated assigned counsel system was the only jurisdiction studied that compared favorably with retained counsel in all respects, and appeared superior in one respect.

This data resulted in the finding that:

The hybrid coordinated assigned counsel system, which performed the best of all of the systems studied in statistical comparisons, incorporated the greatest degree of quality control.

b. The pure coordinated assigned counsel system.

It was interesting for the researchers to learn that, while the coordinated assigned counsel system in one jurisdiction produced excellent results, a second coordinated assigned counsel system in another state did not perform as well when compared with retained counsel in its own county. The question arose, what factors were responsible for this difference. One hypothesis was that, although the systems bore the same name, they were really quite different. While the Montgomery County system had implemented several types of quality controls, no such features were embodied in the Saginaw County, Michigan system.

The statistical analysis bore that hypothesis out. The assigned counsel system that lacked any quality controls performed poorly when compared to retained counsel in four areas versus only one area where assigned counsel excelled. With regard to simple speed in disposing of cases, there appeared to be a "draw" between retained and assigned counsel: assigned counsel were faster for felony drug cases, while retained counsel processed misdemeanors more quickly. Thus, the finding:

The pure coordinated assigned counsel system, which lacked quality controls, performed relatively poorly when compared to retained counsel in the same jurisdiction.

c. The presence or absence of quality controls in private bar defense systems. The findings that were just discussed led the researchers to explore the extent to which private bar defense systems in general possessed features which demonstrated some degree of control over the indigent defense system. The features considered were: the presence of training opportunities or requirements, the existence of a system for formal monitoring of performance, procedures for providing services to the accused at the earliest stages of a case, and the use of a board of commission. These were the results of that inquiry:

(1) Training. In five out of 7 indigent defense systems outside of California, no training was provided for the lawyers who represented the indigent accused, and no funds were made available for attendance at seminars outside of the jurisdiction. In the remaining two jurisdictions, only entry level training had been provided up until the date of the study. Only in the California sites were programs already in place to provide continuing legal education to appointed counsel. Thus, the finding that:

The majority of indigent defense systems employing private counsel provide no training for the attorneys.

(2) Monitoring. Of the systems visited outside of California, only one, the coordinated assigned counsel program in Onondaga County, New York, made any affirmative

effort to provide for monitoring of assigned counsel performance. This led to the finding that:

Private bar indigent defense systems rarely have any systematic procedures for monitoring of attorney performance.

(3) Early representation. It did not appear that counsel was available for custodial interrogations in any of the jurisdictions visited despite the mandates of the Miranda and Escobedo decisions; indeed, the frequency of confessions obtained from defendants before they had conferred with counsel was one of the most frequent complaints heard during the site visits.

Very few jurisdictions had any provision for counsel at line-ups.

One of the few counties where defendants were visited prior to going to court was Montgomery County; however, this function was performed by the defender's staff rather than by the private counsel program.

Outside of California, few jurisdictions provided attorneys until after the first court appearance where bond was set. This was particularly troublesome in one county where defense counsel faced a heavy burden of proof to reverse the bond decision made at the first, counselless, court appearance. Accordingly, there was no refuting the finding that:

Few of the private bar defense systems studied had counsel available to the indigent accused for custodial interrogations, line-ups, for consultation shortly after arrest, or at the initial court appearance where decisions were made about pretrial release.

(4) Use of independent board or commission.

One of the most prevalent concerns encountered in studying indigent defense systems has been the undue influence of party politics or the judiciary upon the independence of counsel for the indigent accused. The appointment of counsel by judges has often been criticized as a means of handing out political patronage and rewarding attorneys who worked on judges' campaigns. Attorneys interviewed in the sites visited throughout this study complained about this practice. In one county which has a strong democratic political machine, a community leader implied that the part-time defender could not have been appointed in the county without political backing. The use of an independent board, apart from insulating the defense system from outside pressures, has often been recommended as a means of assuring an objective evaluation of the defense system's budgetary needs.

However, outside of California, the only program visited which employed a supervisory body separate from the judiciary or from county politics was the bar association's program in Onondaga County, New York. This led to the finding that:

Most of the indigent defense systems studied lacked any supervisory board or commission to insure merit selection, advocate for adequate funding, or insulate the system from judicial and political influence.

How Cases Are Processed in Jurisdictions Using
Private Counsel Indigent Defense Systems

This study concludes with an analysis of the way in which cases are processed in the criminal courts of counties employing private counsel to represent the indigent. It has long been said that it is not its laws that make a society free, but the procedures which must give life to those laws.

The Supreme Court has ruled that no person shall be sent to jail in any court of this land without having had the assistance of counsel. Have the courts thrown their mantle over the accused in implementing this law, or have they merely winked at it? And further, once the courts have done their job of appointing counsel, have the lawyers rushed to do their duty, or have defendants languished in jail, wondering what will become of them and unable to assist in their own defense? Still further, how are the consumers of defense services to be treated? Have they, like other consumers, any say in who will represent them, or are they told, in effect, "take it or leave it."

Related to the question of how the administration of justice affects the underprivileged in society is the inquiry as to how it allocates its resources. Are those resources spread even-handedly across the spectrum of prosecutions in criminal cases or are they hoarded in a small part of the system?

1. Gaps in Providing Representation in Misdemeanor Cases.

One of the first priorities which this study focused upon was the examination of implementation of the Argersinger decision according counsel to the poor in misdemeanor cases when jail

time was to be imposed.

Docket studies in two jurisdictions indicated that counsel had not been appointed in close to 20% of all misdemeanor cases where defendants received some jail time.

These figures were buttressed by the observation that out of a total of 2,831 misdemeanor files in one jurisdiction's lower court during 1981, the court's computer system showed that 62% of all defendants were not represented by counsel. In a second jurisdiction, interview respondents estimated the rate of appointments in misdemeanor cases to be from 5% to 10%.

For the 20% of misdemeanors showing jail time, there could be two possible explanations apart from the failure to implement Argersinger. First, the defendant could have given an oral waiver while standing in front of the bench, although no written waivers appeared in the court's files. Secondly, the jail time might have been served while awaiting trial.

The courts' practices with respect to appointing counsel in misdemeanor cases were open to question. In one site, judges preferred to err on the side of not appointing counsel for defendants. Then, if the judge, after hearing a defendant's case, changed his mind about not incarcerating a defendant who had appeared without counsel, he would declare a mistrial, appoint counsel, and recuse himself from the case. In a second site, the judge required all misdemeanor defendants to read a long page of rights and to sign

it at the bottom before stepping up to the bench. Then the judge inquired, "You have certain rights given to you in written form. Do you understand those rights?" If the answer was in the affirmative, the judge simply asked, "How do you wish to plead?" without making any reference to counsel. While the study team was informed that the page of rights did not constitute a waiver of counsel, there was apparently some confusion about its meaning, since one local felony court judge, many defendants, and, initially, those conducting the docket study, construed it as a waiver.

The team made the following findings about the implementation of the Argersinger decision:

- a. The right to counsel as required by the Argersinger decision was often chilled by court practices in rendering advisements.
- b. Docket study data indicated that counsel was not being provided to indigent defendants accused of misdemeanors in a significant percentage of cases where some jail time was imposed.

2. The problem of access to counsel for pretrial detainees. Once counsel were appointed, how soon did they begin to do their job? One of the most frequent complaints heard from defendants, corrections personnel, and reform-minded attorneys was that many lawyers failed to interview or visit their clients until the clients are brought to the court's holding cells for their preliminary hearing or, in the case of a misdemeanor, next court appearance. When the clients attempted to telephone their attorneys from the jail, their collect phone calls were routinely refused. One

program failed to assign any attorney in the office until the day of court, and when an indigent defendant telephoned, was deliberately given the run-around. These observations led to the finding that:

In a large percentage of cases, counsel appointed to represent the indigent accused fail to interview their detained clients prior to the time they next appear in court.

3. Choice of counsel. Are the indigent accused treated like other consumers of legal services? This study concluded that they were clearly not.

None of the interviewees throughout the site visits thought that their system provided defendants with the counsel of their choice. Although the Ohio public defender statute grants this right to defendants, the law is evidently practiced in the breach.

There was a small degree of leeway granted to some defendants, however. Some judges responded that, in a case where a defendant is vociferous in opposition to a particular assigned counsel, contract lawyer, or defender and provides good reasons, the judge may assign a different lawyer or request that the program do so. These interviews resulted in the conclusion that:

Indigent defendants rarely, if ever, have a say in selecting either the system or the attorney to represent them.

4. Allocation of system resources between felony and misdemeanor cases. The 1967 President's Commission on Law Enforcement and the Administration of Justice pointed

out that the "war on crime" that was to be fought needed badly to improve the administration of justice. That report explained that, while few Americans percentage-wise are prosecuted for felonies, millions of our citizens have the experience of being prosecuted in our nation's misdemeanor courts. It is there that Americans receive their impressions of the presence or absence of fairness in our judicial systems. It is there that they decide whether we are a nation of laws or of men.

The data that were examined in the docket studies appears to indicate that the court's resources are stacked heavily toward the provision of counsel for felony cases, although they are fewer in number. For example, in Saginaw County, Michigan, the felony court spent \$367,408 for appointed counsel in 1981, while the misdemeanor court spent only \$72,095. While the lower court appointed counsel for 1/3 of the number of cases handled in the felony court, the misdemeanor assigned counsel budget was less than 20% of the felony assigned counsel budget.

However, the more interesting finding related to the differences between retained and assigned counsel performance; the differences were substantially greater in misdemeanor cases.

In sites where the study included both felonies and misdemeanors, there were much greater differences between the performance of assigned and retained counsel for the misdemeanor cases. In the two Ohio sites where no misdemeanor cases could be included in the sample, there were few differences found between assigned and retained counsel.

These statistical findings were confirmed by the interviews conducted. The researchers were informed that the more serious the case, the more experienced the attorney who would be assigned to provide representation. Thus, the finding that:

The statistical analyses showed that differences between the performance of retained counsel and counsel for the poor were greater in misdemeanor than in felony cases.

5. Differences in representation provided in most felony cases and serious felony cases. The reasoning behind the greater allocation of resources to felony than to misdemeanor cases can be taken one step further. All of the fee schedules that were examined made exceptions for the maximum fee levels allowed for felonies when the case involved a homicide or other very serious felony charge. Often, fees for the serious cases were many times the fees paid for representing the average felony case. This disparity in the fees allowed leads to a difference in incentives for attorneys to handle these cases; they are considered the "plums" for criminal defense attorneys.

The interviews revealed that many experienced criminal trial attorneys will refuse to handle any but the most serious appointed cases because of the more lucrative fees paid.

There was also a difference in the attitudes of the appointing judges when it came to murder or other serious cases. In each case, the judge personally scrutinized the

appointment to insure that a competent attorney was appointed. In some cases, where the trial judge felt that there were no sufficiently experienced lawyers residing in the local area, they brought in an attorney from outside of the county for a very serious case. Thus, the following disparity was noted between the average felony case and extraordinary felonies:

The attorneys who provide representation to the indigent accused in murder and other very serious cases are more highly qualified than the average of the attorneys who provide representation in other felony cases.

Conclusion

This report has described a variety of criminal defense systems using private counsel. Some of these have served as the exclusive mode of indigent defense representation in a jurisdiction, while others merely augmented the services of a full-time defender organization.

We hope that the study will enable county boards, legislators, municipal or county court judges, and community leaders to better assess the merits and drawbacks of each type of system. The study has addressed such questions as:

1. Is the system cost-effective?
2. Do the cost savings result in sacrificing quality legal defense?
3. Can savings be achieved by making other segments of the criminal justice system more efficient?
4. What are the quality controls needed to make the defense system function properly?

5. What is needed to establish a balance in the adversary system between prosecution and defense?
6. How should budget projections be made?

By assembling information about the features of the various systems in use throughout the United States and presenting statistical findings about the operations of those systems, this research has attempted to assist policy-makers in drawing their own conclusions about the features that will best suit their own jurisdictions.

While this volume has summarized the study's results, those who wish to examine the data in further detail are referred to Volume I of this report which provides in-depth descriptions of each of the programs visited and the actual data and analysis that was performed in each case.

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END