

# Appendix 1

## Use and Types of Court IT Tools

Country	Types of Technology Tools				
	<p><b>Court Information Delivered Over the Internet</b>            The content of court internet sites cover a diverse array but typical information includes:</p> <ul style="list-style-type: none"> <li>~Description &amp; function</li> <li>~Legislation or links to</li> <li>~Lists and calendars</li> <li>~Assistance &amp; guidance to the public and litigants in person</li> <li>~court contacts &amp; links to other courts and related agencies</li> <li>~CM/ECF</li> <li>~broadcasting proceedings, including video footage &amp; transcripts</li> <li>~online payment of fines &amp; fees and</li> <li>~online mediation or other ADR<sup>1</sup></li> </ul>	<p><b>Case Management / Electronic Case Filing (CM/ECF)</b>            CM technology records key life events or procedural stages of a case and provided significantly enhanced information management functionality, electronic data storage, retrieval and analysis capability. CM systems increasingly incorporate ECF.<sup>2</sup> Basically this allows materials relevant to a case to be presented to the court in electronic form and accessed electronically by all case participants.</p>	<p><b>Electronic / Virtual Court Rooms</b>            Courts are able to seriously consider their implementation. Public access from remote locations is one of their keys features. <u>Video conferencing</u> is increasingly used for pre-trial and directions hearings, dealing with applications for special leave, to hand down judgments, to receive evidence from witnesses from remote locations/overseas, to conduct remands and even to pass sentence.            There is likely to be an increased use of <u>desktop video over the Net</u> (which would eliminate the cost associated with setting up fixed video conferencing facilities).  <u>Voice recognition technology</u>, has potential benefits but is still in its infancy (especially in light of the time taken to train the software to recognise voice &amp; speech patterns).</p>	<p><b>Electronic Public Access (EPA)</b>            The technological link between court users and the courts, which supports and enables public access</p>	<p><b>E-Commerce</b>            Other organisations, such as the Inland Revenue, banks and the retail sector, lead developments here. As applied to court processes E-commerce is yet to be to take root, though in some electronic filing systems payment of fees can occur electronically.</p>

<sup>1</sup> McKechnie, D. (2003) "The Use of the Internet by Courts and the Judiciary: Findings from a Study Trip and Supplementary Research" 11:2 *International Journal of Law and Information Technology* 109 at 129.

<sup>2</sup> *Ibid* at 129-130.

<b>United States Federal</b>		<p style="text-align: center;">√</p> <p>Capabilities: <i>Filing</i> (direct Internet connection to file through court website using user name and password. <i>Access</i> (real time access to court docket and documents on the court website). <i>Notice of Case Events</i> (electronic notice of case events, e.g., filing by other parties, result in automatic generation of e-mail to attorney of record). CM/ECF systems are in use in approx c70 district courts, nearly all, c85, bankruptcy courts (full scale implementation is expected in the district and bankruptcy jurisdictions by end 2005), the Court of International Trade and the Court of Federal Claims. Case documents are converted to PDF, attorneys submit them to the courts via the CM/ECF Web site by completing a few fields on a browser-based form and attaching the PDF files. The file is stored and catalogued in an Informix database.</p>	<p style="text-align: center;">√</p> <p>The US Courtroom 21 Project is a joint project between the National Centre for State Courts and William and Mary Law School (Williamsburg, Virginia), with the tag line "The Courtroom of the 21<sup>st</sup> Century Today". It includes, <i>inter alia</i>, two full-size travelling, high technology Courtroom 21 Portable Courtrooms and the McGlothlin Courtroom, the worlds most technologically advanced trial and appellate courtroom. The project is recognised as the world's centre for courtroom and related technology information and experimentation.</p>	<p style="text-align: center;">√</p> <p>The internet based Public Access to Court Electronic Records (PACER) system allows users to obtain case and docket information, such as a listing of all parties and participants in a case, a chronology of case events and court opinions, from federal appellate, district, and bankruptcy courts via the Internet (Jan 2004 approx 300,000 users).<sup>3</sup> The AO's PACER Service Centre provides the public and the judiciary with registration, centralized billing, and technical support services. Access cost \$0.08 per page resulting from search, whether or not there are any hits. Access via dial up generate \$0.60 per minute charge. Users do not incur both per minute and per page chargers for a PACER session. Users are build quarterly, however, no fee is owed until a user accrues &gt;\$10.00 per annum.</p>	
------------------------------	--	--	--	---	--

<sup>3</sup> Anon (2004) "IV. The Administrative Office of the United States Courts" 36:1 *The Third Branch Newsletter of the Federal Courts* [www.uscourts.gov/ttb/jan04ttb/iv/](http://www.uscourts.gov/ttb/jan04ttb/iv/) accessed 11.11.05

<b>Australia: Federal</b>	<p>Most Australian courts have court websites which contain a variety of material including information about the court process and what to expect at court, virtual guides to the courtroom, access to court forms, contact details, links to other resources and education material for schools.</p>	<p style="text-align: center;">√</p> <p>In 2004, the Federal Court completed the implementation of Casetrack, its new case management system. It supports the Judges and assists with the management of their dockets. It records case events, manages Court lists and records orders and outcomes. Casetrack is the primary source for statistical, operational and other essential management information. It is a complete court management system that will be the foundation for many of the eCourt initiatives and underpins the Court's judicial and business operations.</p> <p style="text-align: center;">√</p> <p>The Court was the first Australian national court to introduce electronic filing. The Electronic Filing System (EFS) is accessible through the Court's website and allows for the lodgment of applications and supporting documentation and the credit card payment of filing fees. The Court introduced the EFS in manageable stages in the later stages the EFS will be integrated with Casetrack.</p>	<p style="text-align: center;">√</p> <p>eCourt Forum is a virtual courtroom that assists in the management of pre-trial matters by allowing directions and other orders to be made online via the Court's website. The Federal Court of Australia is the first court in Australia to introduce such an initiative. Using eCourt Forum, the Court may receive submissions and affidavit evidence and make orders as if the parties were in a normal courtroom.</p> <p>Electronic courtrooms and hearings: The Court has made significant progress in enhancing existing courtrooms and developing new courtrooms that are electronically flexible and able to cater for integrated electronic trials, with connection to the Court's network and the Internet, and the integration of audio, video and data communications and information.</p> <p>Accessibility technologies are also being progressively implemented, including hearing loops, audio and video systems, voice reinforcement systems, teleconferencing and videoconferencing systems and CCTV linkage to other courtrooms and spaces to enable public viewing and media coverage.</p>	<p style="text-align: center;">√</p> <p>eSearch is a publicly searchable database of selected information (in Casetrack the courts case management system) on cases initiated in the Federal Court of Australia and in the federal law jurisdiction of the Federal Magistrates Court of Australia. The case information provided (via the Court's website) on eSearch includes participants in the case, the current status of the case, a list of important dates and the text of orders, where available, that may have been made. The database is updated in real time and includes information on all cases that have commenced since 1 January 1984.</p> <p>The Electronic Filing System (EFS) is the public's main electronic interface for the lodgment of applications and supporting documentation.</p>	
---------------------------	--	---	---	--	--

Australia: New South Wales	Daily Court Lists on Supreme Court website	NSW Supreme Court, Sept 2004 draft policy on access to e records. On line access to e-records restricted to parties (except for data exchange records)	<p style="text-align: center;">√</p> Each jurisdiction has at least one courtroom specifically adapted for use as an <u>electronic courtroom</u> . Many jurisdictions regularly use <u>video-conferencing</u> technology to conduct remands and hear bail applications. Advantages include savings in transportation and personnel costs, reduction in security problems and in waiting times for both the court and those in custody. Video-conferencing can also be used for pre-trial hearings and preliminary applications.		
France				<p style="text-align: center;">√</p> Public access to judicial information was restricted by regulations granting a monopoly on distribution of legal information in the public domain to a private sub-contractor running a legal database consultation service. This system was recently abandoned (c2002) in favour of a free public website providing access to all of the case law. But only to cover decisions of particular legal interest (not all court decisions). Each court is responsible for determining which of its decision should be published on the Internet site. <sup>4</sup>	
New Zealand	The Supreme Court puts e-court calendars on line.	<p style="text-align: center;">X</p> Under consideration. The Law Cmsn is currently reviewing rules & law on access to court and tribunal records and plans to recommend new rules. NZ Supreme Court, Court of Appeal (civil); Maori Land Court and Employment Court rules enable e-records.			New Zealand Fines Online website ( <a href="http://www.fines.govt.nz">www.fines.govt.nz</a> ) allows payments of fines electronically.

<sup>4</sup> Committee of Experts on Information Technology and Law (CJ-IT) (2001) *Report on the Use of Electronic Documents in the Justice Sector* see Council of Europe website at [www.coe.int](http://www.coe.int)

# Appendix 2

U.S. Department of Labor  
 Bureau of Labor Statistics *Occupational Employment Statistics*  
[www.bls.gov/oes/current/oes231011.htm](http://www.bls.gov/oes/current/oes231011.htm)

## Occupational Employment and Wages, November 2004

### 23-1011 Lawyers

Represent clients in criminal and civil litigation and other legal proceedings, draw up legal documents, and manage or advise clients on legal transactions. May specialize in a single area or may practice broadly in many areas of law.

#### National estimates for this occupation

#### Industry profile for this occupation

#### State profile for this occupation

#### Metropolitan area profile for this occupation

#### National estimates for this occupation:

Employment estimate and mean wage estimates for this occupation:

Employment <a href="#">(1)</a>	Employment RSE <a href="#">(3)</a>	Mean hourly wage	Mean annual wage <a href="#">(2)</a>	Wage RSE <a href="#">(3)</a>
528,270	1.0 %	\$53.17	\$110,590	1.1 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	\$23.38	\$32.00	\$46.83	<a href="#">(5)</a>	<a href="#">(5)</a>
Annual Wage <a href="#">(2)</a>	\$48,630	\$66,550	\$97,420	<a href="#">(5)</a>	<a href="#">(5)</a>

#### Industry profile for this occupation:

Industries with the highest levels of employment in this occupation:

Industry	Employment	Hourly mean wage	Annual mean wage
<a href="#">Legal services</a>	353,470	\$56.26	\$117,020
<a href="#">Local government (OES designation)</a>	49,380	\$38.29	\$79,640
<a href="#">State government (OES designation)</a>	32,970	\$35.12	\$73,050
<a href="#">Federal government (OES designation)</a>	24,380	\$52.16	\$108,490
<a href="#">Insurance carriers</a>	11,990	\$48.93	\$101,760

Top paying industries for this occupation:

Industry	Employment	Hourly mean wage	Annual mean wage
<a href="#">Facilities support services</a>	(7)	\$77.92	\$162,070
<a href="#">Support activities for mining</a>	40	\$77.80	\$161,830
<a href="#">Other information services</a>	50	\$77.66	\$161,540
<a href="#">Agents and managers for public figures</a>	40	\$75.37	\$156,760
<a href="#">Computer systems design and related services</a>	1,990	\$75.33	\$156,680

State profile for this occupation:

States with the highest concentration of workers in this occupation:

State	Employment	Hourly mean wage	Annual mean wage	Percent of State employment
<a href="#">District of Columbia</a>	26,160	\$63.26	\$131,570	4.290%
<a href="#">New York</a>	60,470	\$58.67	\$122,030	0.729%
<a href="#">New Jersey</a>	20,570	\$54.70	\$113,780	0.527%
<a href="#">Illinois</a>	29,740	\$60.37	\$125,560	0.518%
<a href="#">Delaware</a>	2,110	\$56.92	\$118,400	0.510%

Top paying States for this occupation:

State	Employment	Hourly mean wage	Annual mean wage	Percent of State employment
<a href="#">District of Columbia</a>	26,160	\$63.26	\$131,570	4.290%
<a href="#">California</a>	59,660	\$61.16	\$127,210	0.409%
<a href="#">Illinois</a>	29,740	\$60.37	\$125,560	0.518%
<a href="#">Virginia</a>	12,770	\$59.31	\$123,370	0.365%
<a href="#">New York</a>	60,470	\$58.67	\$122,030	0.729%

**Metropolitan area profile for this occupation:**

Metropolitan areas with the highest concentration of workers in this occupation:

MSA	Employment	Hourly mean wage	Annual mean wage	Percent of MSA employment
<a href="#">Washington, DC-MD-VA-WV PMSA</a>	36,300	\$61.29	\$127,490	1.295%
<a href="#">Tallahassee, FL MSA</a>	1,850	\$43.10	\$89,660	1.182%
<a href="#">New York, NY PMSA</a>	43,500	\$63.79	\$132,690	1.086%
<a href="#">San Francisco, CA PMSA</a>	8,610	\$64.83	\$134,850	0.905%
<a href="#">Trenton, NJ PMSA</a>	1,980	\$49.41	\$102,770	0.898%

Top paying Metropolitan areas for this occupation:

MSA	Employment	Hourly mean wage	Annual mean wage	Percent of MSA employment
<a href="#">San Jose, CA PMSA</a>	3,640	\$72.63	\$151,070	0.427%
<a href="#">Danbury, CT PMSA</a>	250	\$68.69	\$142,870	0.274%
<a href="#">Champaign-Urbana, IL MSA</a>	170	\$66.12	\$137,540	0.186%
<a href="#">San Francisco, CA PMSA</a>	8,610	\$64.83	\$134,850	0.905%
<a href="#">Sumter, SC MSA</a>	60	\$64.78	\$134,740	0.160%

**About November 2004 National, State, and Metropolitan Area Occupational Employment and Wage Estimates**

These estimates are calculated with data collected from employers in all industry sectors in metropolitan and non-metropolitan areas in every State and the District of Columbia. The top five employment and wage figures are provided above. The complete list is available in the [downloadable Excel files\(XLS\)](#).

Percentile wage estimates show the percentage of workers in an occupation that earn less than a given wage and the percentage that earn more. The median wage is the 50th percentile wage estimate--50 percent of workers earn less than the median and 50 percent of workers earn more than the median. [More about percentile wages.](#)

- (1) Estimates for detailed occupations do not sum to the totals because the totals include occupations not shown separately. Estimates do not include self-employed workers.
- (2) Annual wages have been calculated by multiplying the hourly mean wage by a "year-round, full-time" hours figure of 2,080 hours; for those occupations where there is not an hourly mean wage published, the annual wage has been directly calculated from the reported survey data.
- (3) The relative standard error (RSE) is a measure of the reliability of a survey statistic. The smaller the relative standard error, the more precise the estimate.
- (5) This wage is equal to or greater than \$70.00 per hour or \$145,600 per year.
- (7) Estimate not released.

**Last Modified Date:** November 9, 2005

# Appendix 3

Source:<http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1g.htm>

## G. Public Defender Offices

A public defender office is the most obvious component of any set of standards for criminal defense. Most, if not all, of the standards applicable to defense services generally are applicable here. This section includes standards that relate only to defender offices. Topics covered are the following:

- [1. Chief public defender](#)
- [2. Prohibition on private practice](#)
- [3. Compensation](#)
- [4. Responsibility for the administration of criminal justice](#)

### 1. Chief Public Defender

*Commentary.* The chief public defender may be either elected or appointed. Where the chief defender is appointed, the standards require that selection be based on merit. This is because the independence of defense services requires the exclusion of political factors between the head of the defender agency and the attorneys staffing it. Merit selection standards are thus included in three national standards and two state standards (Georgia and Kansas). Where the defender agency is a state agency (e.g., in Connecticut), merit selection may be implicit under civil service laws.

A second way to help ensure the independence of the chief defender is to provide for a fixed minimum term of office or, in the alternative, removal for good cause only (see also comparable provisions under Contract Systems).

Three national sets of standards and those of Georgia speak to the chief defender's term of office.

### ***ABA Standards for Criminal Justice: Providing Defense Services***

#### **Standard 5-4.1 Chief Defender and Staff**

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.... Selection of the chief defender and staff by judges should be prohibited.... The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause.

## ***NLADA Guidelines for Legal Defense Systems in the United States***

### **2.13 The Governing Body for Assigned Counsel Programs**

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: designing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the administrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special selection committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

### ***National Conference of Commissioners on Uniform State Laws, Model Public Defender Act***

#### **Section 10. Office Of Defender General**

(b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [\\$].

### ***National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts***

#### **Standard 13.8. Selection of Public Defenders**

3 A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

4 A public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice. Power to discipline a public

defender should be placed in the judicial conduct commission provided in Standard 7.4.

### **Standard 13.10. Selection and Retention of Attorney Staff Members**

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit. Staff attorneys, however, should not have civil service status.

### ***Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs***

#### **Guideline 2.3 Public Defender Program**

The local committee may elect to provide indigent defense services through a Public Defender Program. The Public Defender shall be selected by the local committee from qualified applicants for the office. The Public Defender shall have the authority to operate the Public Defender's Office on a day to day basis and shall select and manage the staff of the office. The local committee shall not interfere with professional decisions involving representation of clients or the operation of the office.

...Removal of the Public Defender short of the agreed term should be for good cause only. The Contract shall define "good cause" such as is required for removal of the Public Defender as: failure by the Public Defender to comply with the terms of the contract to an extent that the delivery of services to clients is impaired or rendered impossible, or a willful disregard by the Public Defender of the rights and best interest of clients under this contract such as leaves them impaired. The individual actions of the Public Defender taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

A Public Defender should have a contract for at least a one-year term.

### ***Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations***

#### **105-10-3. Implementation Schedule for Public Defender System**

The district court judge shall appoint the public defender, or any other attorney under the system established by the board, to represent all persons entitled to counsel who have not, before the system implementation date, had counsel appointed in the action pending before the court.

#### **105-21-1. Qualifications**

Each public defender shall be an attorney licensed to practice law in Kansas and shall be selected on the basis of merit. Primary qualifications shall be:

(a) demonstrated commitment to the provision of quality legal representation for eligible persons charged with or convicted of criminal conduct;...

## **2. Prohibition on Private Practice**

*Commentary.* Along with provisions for ensuring the independence of the defender system are provisions for minimizing conflicts of interest. Chief among them is a limitation on acceptance of outside cases.

### ***ABA Standards for Criminal Justice: Providing Defense Services***

#### **Standard 5-4.2. Restrictions on Private Practice**

Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.

### ***NLADA Guidelines for Legal Defense Systems in the United States***

#### **2.9 Full-Time Defenders and Minimum Staff Size**

Defender Directors and staff attorneys should be full-time employees, prohibited from engaging in the private practice of law. No defender office should be staffed by less than two full-time defenders. Where this cannot be accomplished by regionalization, it should be accomplished by merging the criminal and civil legal aid functions.

### ***National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts***

#### **Standard 13.7. Defender to be Full Time and Adequately Compensated**

The office of public defender should be a full-time occupation. State or local units of government should create regional public defenders serving more than one local unit of government if this is necessary to create a caseload of sufficient size to justify a full-time public defender.

## **3. Compensation**

*Commentary.* The prohibition on private practice leads directly to questions about the adequacy of the compensation paid to defender attorneys in attracting and retaining talented and dedicated counsel. The three national standards (NLADA, Model Act, and NAC) would peg defender salaries to a non-defender position (private bar, prosecutors, or judges). Provisions similar to these are also contained in the standards relating to contract services and assigned counsel. The New York City and Washington state standards also match defender salaries with those of prosecutors.

### ***NLADA Guidelines for Legal Defense Systems in the United States***

#### **3.2 Defender System Salaries**

The Defender Director's compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. The Director's compensation should be comparable with that paid to presiding judges, be professionally appropriate

when compared with the private bar, and be in no event less than that of the chief prosecutor.

The starting levels of compensation for staff attorneys should be adequate to attract qualified personnel. Salary levels thereafter should be set to promote the Defender Director's policy on retention of legal staff and should in no event be less than that paid in the prosecutor's office. Compensation should be professionally appropriate when analyzed or compared with the compensation of the private bar.

In order to attract and retain qualified supporting personnel, compensation should be comparable to that paid by the private bar and related positions in the private sector and should in no event be less than that paid for similar positions in the court system and prosecution offices.

***National Conference of Commissioners on Uniform State Laws, Model Public Defender Act***

**Section 11. Local Offices**

The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.

***National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts***

**Standard 13.7. Defender to be Full Time and Adequately Compensated**

...The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction.

**Standard 13.11. Salaries for Defender Attorneys**

Salaries through the first 5 years of service for public defender staff attorneys should be comparable to those of attorney associates in local private law firms.

***Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases***

**G. Compensation of Salaried or Contractual Public Defenders**

The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

***New York City Indigent Defense Organization Oversight Committee,  
General Requirements for All Organized Providers of Defense Services  
to Indigent Defendants***

**II. Qualification of Lawyers**

**B. Evaluation Criteria**

(2) Recruitment and Hiring

***Specific Guidelines:***

*Defense lawyers should receive total compensation packages, including fringe benefits, comparable to compensation packages paid to Assistant District Attorneys in the First Department who are of equal seniority, experience and level of responsibility.*

***Washington Defender Association, Standards for Public Defense Services***

**Standard One. Compensation**

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

**4. Responsibility for Administration of Criminal Justice**

*Commentary.* A final subset of defender standards addresses the relationship between defender agencies and both the private bar and the larger community outside the justice system. The intent of these standards is, of course, to increase support for the defense function.

***ABA Standards for Criminal Justice: Prosecution Function and Defense Function***

**Standard 4-1.2. The Function of Defense Counsel**

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

***National Conference of Commissioners on Uniform State Laws, Model Public Defender Act***

**Section 10. Office Of Defender General**

(f) Whenever appropriate, the Defender General may appear in legislative or administrative proceedings for the purpose of assuring adequate representation to the persons covered by this Act.

(g) The Defender General shall consult and cooperate with interested professional groups with respect to the causes of crime, the development of effective means for discouraging crime, the rehabilitation of convicted criminals, the administration of criminal justice, and the administration of the Office of the Public Defender.

***National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts***

**Standard 13.9. Performance of Public Defender Function**

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.
2. The public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community.
3. The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.
4. He should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of them. Specifically:
  - a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.

b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overloads, and cooperate in resolving these.

c. He must maintain the bar's faith in the defender system by affording vigorous and effective representation to his own clients.

d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

### **Standard 13.13. Community Relations**

The public defender should be sensitive to all of the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.
2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.
3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

# Appendix 4

## **What Policymakers Need To Know To Improve Public Defense Systems**

### **Series: Bulletin #2**

Author: Tony Fabelo, Harvard University, John F. Kennedy School of Government

Published: December 2001

Subject: defense services, case processing, legal aid services 23 pages

Source: <http://www.ojp.usdoj.gov/BJA/txt/NCJ19720.txt>

PDF available at: <http://www.ojp.usdoj.gov/BJA/pdf/NCJ19720.pdf>

This is one in a series of papers developed with some of the leading figures in public defense during their periodic meetings at Harvard University's John F. Kennedy School of Government. These 30 members of the Executive Session on Public Defense (ESPD) included state public defender leaders, assigned counsel managers, a prosecutor, a legislator, a social worker, a journalist, and criminal justice experts. In their discussions and resulting papers, they tried to rethink the field of public defense--challenging conventional wisdom and exploring new ways to serve clients and society.

ESPD was a partnership effort of Harvard University's Program in Criminal Justice Policy and Management, the Harvard Law School, the Vera Institute of Justice, The Spangenberg Group, and the Bureau of Justice Assistance.

Points of view or opinions in this document are those of the author and do not represent the official position or policies of the U.S. Department of Justice.

## **What Policymakers Need To Know To Improve Public Defense Systems**

Tony Fabelo

In 1937, U.S. Supreme Court Justice Benjamin Cardozo stated that certain fundamental constitutional rights are the basis for all other rights and that these fundamental rights are "implicit in the concept of ordered liberty." [1] In criminal trials, the right to counsel is a fundamental right. Since the Court's 1963 decision in *Gideon v. Wainwright*, [2] an indigent defendant who cannot afford counsel must be provided an attorney by the state. The Court made the states responsible for how public defense would be provided to criminal offenders who are unable to pay for private counsel. This and subsequent Court decisions led states to adopt public defense systems. Today, many questions exist as to the effectiveness of some of these public defense systems. [3]

This paper establishes sets of questions to aid policymakers in thinking about the value and effectiveness of their public defense systems and includes several responses to the author's views by Mark Moore, Daniel and Florence V. Guggenheim Professor of Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, Cambridge, Massachusetts. Because this field is complex and practices vary throughout the country, knowing where to start can be difficult. Instead of establishing specific outcomes, this paper serves as a guide--a map of questions that policymakers should ask when deciding where to begin investigating public defense services, how to direct field researchers, and how to evaluate the information gathered.

Two serious obstacles to improving public defense systems are the lack of data and lack of systemic policy analysis that state policymakers need to address the relevant issues concerning public defense. Examination of the limited literature in this area reveals the lack of empirical research relevant to improving public defense systems. This paper proposes that policymakers and researchers develop a strategy for formulating relevant inquiries and then gathering current data to assess the effectiveness of a state's public defense system.

To begin, policymakers must identify why a state would want a strong public defense system and formulate key questions to ask before deciding how best to improve and evaluate their public defense system.[4] Until a comprehensive body of knowledge is established and analyzed, reforms in public defense systems will continue to be difficult.

### Value of a Strong Public Defense System

Traditionally, support for a strong public defense system arises from the notion that a defendant cannot be tried fairly in the U.S. court system without an adequate defense. Supreme Court Justice Hugo Black stated in the Gideon decision that the "right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." [5] To achieve justice, an adversarial system structured to search for the truth requires capable counsel for the state and the defendant. In addition, a strong public defense system is a central component of an effective crime-fighting policy to shield poor citizens and, indirectly, all citizens against abuses by the state. It also facilitates a smoother operating justice system and, in so doing, allows the courts to respond effectively to growing caseloads. A strong public defense system promotes the legitimacy of the justice system--legitimacy necessary to maintain public support.

### Protection Against Crimes Committed by the State

A strong public defense system is the first line of defense against corruption in the justice system. The state can commit crimes against its citizens by abusing policing, prosecutorial, and judicial powers. Abuses tend to occur first against poor people who are alienated from the socioeconomic and political mainstreams. The general public may "look the other way" when the justice system abuses members of alienated populations, but this apathy may fuel further corruption in the system. Widespread corruption can lead to state abuses against law-abiding citizens. Providers of public defense services maintain the system's integrity and prevent corruption of the justice system. Therefore, a strong public defense system also can help control crime within the justice system--crimes committed by those who abuse state policing, prosecutorial, and judicial powers.

### Increasing the Effectiveness of the Justice System

Justice works best when all players within the system are competent and have access to adequate resources. When the system includes well-trained public defenders, cases move faster (helping the court manage growing caseloads), and the system tends to generate and implement innovative programs. With

members of such nontraditional populations as homeless and mentally ill people flooding the system, public defenders can act as mediators to facilitate access to special programs that divert these offenders away from crowded jails and prisons. For example, Miami's Public Defender Anti-Violence Initiative reaches out to a variety of public and private service providers in the community that a defendant might need to successfully avoid further legal troubles.[6] By managing caseloads and facilitating effective alternative interventions for special needs populations, public defenders increase the justice system's capacity to respond to growing demands. In this sense, public defenders assist in the fight against crime and contribute to the effective operation of programs that may help reduce recidivism, thereby increasing the effectiveness of our justice system.

-----

### Identifying the Value of Public Defense

"In Tony's conception, the value of a public defender office lies only in the services delivered directly to clients and indirectly to the operations of the court system as a whole. Absent from this conception is the value that might be created by expanding the public defender's capacity to understand and speak for the impact that public policy decisions will have on those accused of crimes, their families, and their neighborhoods. In effect, Tony's view ignores the value that could be produced by a public defender office through its contribution to the quality of criminal justice policymaking."

Mark Moore

-----

### Legitimacy of the Judicial Process

A strong public defense system is essential for maintaining the legitimacy of the judicial process. The public's belief that the system is governed by fair play is essential for long-term support. Studies show that the public supports the police when its members--and particularly, citizens who live in poor neighborhoods-- feel police are playing by the rules.[7] A strong public defense system allows those most alienated from the institutional mainstream to feel that the system is not stacked against them, even when they break the law and are punished. Among alienated populations, this perception of fairness helps maintain the peace by reducing grievances against the system. When lawbreakers confront a fair justice system, they get the message that the public values the law. When lawbreakers confront an unfair justice system, they get the message that the public values power and privilege, instead of the law.

### Research To Guide Policymaking

A significant problem facing policymakers is the lack of comprehensive research to guide public defense policy and reform. Advocates for improving public defense services debate issues regarding the best way to deliver quality public defense services, with a strong bias in favor of enhancing public

defender offices. As expected, advocates favor spending more money rather than less on these services. For policymakers, however, a basic obstacle to promoting reform is the lack of systematic research to guide policy development. Consequently, efforts are under way to gather data, set standards, and measure outcomes.

### Obstacles to Gathering Data and Setting Standards

A major obstacle to gathering data is the inconsistency in the delivery of public defense services among systems nationwide. This makes it difficult not only to gather data but also to make comparisons between systems. According to The Spangenberg Group (a nationally recognized research and consulting firm that specializes in improving justice programs), most states deliver public defense services using a public defender's office (18 states) or a combination of public defender, assigned counsel, and contract defender (another 29 states).[8] Only three states rely mainly on an assigned counsel system, with or without contract defenders. States vary also in how they regulate public defense systems. Most develop minimum state standards, whereas others provide minimal state oversight with more local control.[9]

Another obstacle to gathering relevant data and making comparisons is that funding levels for indigent defense services vary among states. A Spangenberg Group survey finds that 21 states fund public systems and the remaining states rely on county funds or a mix of funds derived from county, state, and court filing fees. The survey finds that assigned counsel's hourly compensation at felony trials (noncapital cases) varies significantly among states, with some paying less than \$40 for in-court services, with a maximum benefit of \$1,000, and others paying up to \$60, with a maximum benefit of \$3,000. Because funding for defense services is affected by a wide variety of local circumstances, calculating and comparing funding levels among states is difficult.

Further, federal research funds for the defense lack parity with those for prosecution and law enforcement; this has not motivated the research community to develop a basic research agenda as a starting point for informing policymakers on public defense operations. Moreover, state legislatures have been reluctant to provide resources to research state and local public defense concerns. One reason for this reluctance may be that policymakers have not been clear about why the research is needed or what is required to achieve it. Another reason for this reluctance may be society's--and thus legislators'--ambiguous commitment to funding public defense services. Because of this lack of funding and general interest in defense research, individual policymakers concerned with public defense issues must start from scratch to identify areas for data collection that will ground future decisions in fact rather than anecdote.

In summary, reasons for the lack of research data and analysis in public defense services include little federal and state funding, a weak political constituency for public defense, and no nationwide uniformity of state defender services. What is needed is a national infrastructure for public defense service providers, which would serve as a clearinghouse for research and other information.

---

## Costs of Quality

"Tony is right, I think, to want to get harder information about the costs of providing the quality of publicly supported criminal defense that is consistent with our notions of what all defendants are entitled to have. This standard can get dragged down to a minimum, of course, by an interest in satisfying taxpayers' demands to save money, and by the public's belief that 'most defendants are guilty anyway.' But we ought to try to fix a standard at a level above the current tawdry one. It is too easy for us to imagine that 'we' would never need indigent defender services and that 'they' who do are not worth the trouble. This leads to stinting on the quality of the service. If, however, we carry in our minds the notion that 'we' might actually find ourselves in 'their' position, the standard is likely to rise."

--Mark Moore

---

## Developing a Research Agenda

Localities need a research agenda to collect accurate and useful data, establish standards, and identify better practices in public defense systems. Each locality should establish agreed-upon standards and provide support to defense lawyers to meet those standards when representing the indigent accused. In 1997, the National Legal Aid and Defenders Association's Blue Ribbon Committee on Indigent Defense stated that indigent defense systems need "well-researched, reliable, nationally accepted standards."

A policy research agenda that guides systemic reforms should identify prima facie elements that are known components of quality defense. Quality representation of a targeted group requires identifying core elements that make a system efficient, fair, cost-effective, and productive. Support for one aspect of a public defense system will affect other elements of the system. To make informed decisions, legislators and system designers must consider the interrelationship of all elements within a public defense system.

Before beginning to collect data and study local public defense services, a research agenda must be designed. In previous literature concerning public defense, the most basic questions have not been answered in a systematic way and, apparently, cannot be easily answered for particular localities without a well-established research agenda.

Research must provide hard facts to progress from general to specific operational strategies directed at improving public defense services. The research should provide the knowledge to

- Develop standards for providing quality public defense services.
- Determine funding needed in a locality for a public defense system to meet agreed-upon standards.
- Monitor compliance with standards.

- Design and measure performance to justify investments in public defense.
- Determine operational procedures that can be improved to increase performance.

State financial expenditures made without understanding how best to achieve these policy goals will not serve the criminal justice system well--nor will they serve the growing number of individuals who cannot afford to hire defense counsel. The minimum expectation for indigent defendants is that they receive a competent defense that meets minimum constitutional standards. However, until an adequate defense--one that extends beyond basic constitutional requirements--is defined and made operational with standards, no significant progress will occur in improving defense services.

### Standards for Public Defense Systems

Although the American Bar Association has established some minimum standards, they must be revised for modern defense systems. Others have articulated general standards for public defense systems, including James Neuhard, Director of the Michigan Appellate Defender Office, and Scott Wallace, Director of the Defender Legal Services for the National Legal Aid and Defender Association. With the advice of other public defense leaders, they have written "The Ten Commandments of Public Defense Delivery Systems,"<sup>[10]</sup> which provides guidance for creating standards that define quality in defense systems.

With literature reviews and case studies, these Commandments may be refined to satisfy the needs of a specific locality. If developed with accurate case studies, they could aid policymakers substantially. To build on Neuhard and Wallace's Commandments, a policy research strategy should examine the many dimensions at work in a public defense system and identify what information needs gathering, what needs reform, what impact those reforms will have on other parts of the system, and how to make the proposed reforms.

### Nine Elements of a Research Strategy

The following list highlights nine major elements to include in developing a public defense research agenda. The research agenda needs to examine the structural characteristics (elements one through six) of the public defense system first--those that make it independent, determine workload capacity, and determine how to organize and prepare for its work. Next, it needs to examine the quality of services provided, using the last three elements--notification time, access to counsel, and overall quality of representation.

**Independence.** How do mechanisms used to appoint and compensate counsel affect the independence of counsel to engage in a vigorous defense? Indicators need to be developed to assess the extent to which appointment and funding are removed from parties that can pressure defense counsel into engaging in less than a vigorous defense to satisfy court processes or funding goals.

**Coverage.** What is the target population to be served? How are requests for

counsel screened for eligibility for the appointment of counsel? The eligibility criteria should allow a range of populations to be served, from a minimal number of defendants who meet only very strict definitions of indigence to a larger number that includes marginally indigent defendants, who can be served using copayments.

What eligibility criteria will be established for appointing publicly supported counsel? The Constitution establishes the basic concept of right to counsel regardless of ability to pay. But it is much less clear on the question of what constitutes indigency for deciding who will be eligible for publicly supported counsel. For example, what will be measured--wealth or income? Will the capacity to pay be calculated for the particular individual or will resources of extended family members be considered as well? What will be the cutoff point for eligibility? Obviously, eligibility is an important design feature because it influences the overall size of the potential client population and workload of the system.

Workload. Are mechanisms in place to monitor properly the workload handled by each defender? Workload is a measure of the capacity to do the job and the demand. It is thought to be related to quality but is not a direct measure of quality representation. Closely tied to the issue of defense counsel qualifications and case complexity, workload measures need to be developed to guarantee the capacity of counsel to properly handle their cases. For example, in some states, such as Tennessee, workload measurements are more accurate because analysts use weighted caseload measures.

-----

## The Ten Commandments of Public Defense Delivery Systems

Poverty is not an excuse to provide less than competent representation.

Public defense delivery systems must efficiently and effectively provide high quality, zealous, conflict-free representation to those charged with crimes who cannot afford to hire an attorney. To meet this goal,

Thou shalt . . .

1. Assure that the public defense function, including the selection, funding, and payment of appointed counsel, is independent. The indigent defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.

To safeguard independence, and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel or contract systems. Ensuring that the judiciary is independent from undue political pressures is an important means of furthering the independence of indigent defense.

2. Assure that where the caseload is sufficient, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part-time defenders, a

controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is an attorney familiar with the varied requirements of criminal practice in the jurisdiction. Since the responsibility to provide defense services rests with the state to assure uniform quality statewide, systems should be funded and organized at the state level.

3. Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours. Counsel should be furnished upon arrest, detention, or request, and in no event more than 24 hours thereafter.

4. Provide counsel sufficient time and a confidential space to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

5. Assure counsel's workload matches counsel's capacity. Counsel's workload of both appointed and other work should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity and an attorney's nonrepresentational duties) is a more accurate measurement.

6. Assure counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide zealous, high quality representation.

7. Assure that the same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. On appeal, the attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. Provide counsel with parity of resources with the prosecution and include counsel as an equal partner in the justice system. There should be parity of workload, salaries, and other resources (such as technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and indigent defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, should provide an overflow or funding mechanism for excess, unusual, or complex cases, and should separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased

without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Indigent defense should participate as an equal partner in improving the justice system.

9. Provide and require counsel to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

10. Supervise and systematically review counsel for quality and efficiency according to nationally and locally adopted standards. The defender office, its professional and support staff, and assigned counsel or contract defenders should be supervised and periodically evaluated for competence and efficiency.

-----  
Qualifications. Are mechanisms in place to guarantee that the abilities of defense counselors match the complexity of the cases to which they are assigned? Criteria that categorize counselor qualifications in relation to their types of cases establish a baseline for evaluating whether qualified defense lawyers are provided to the accused. Generally, qualification standards are thought to ensure quality representation, but qualifications are not a direct measure of quality.

Support Services. Are mechanisms in place to access current research materials, investigators, expert witnesses, and sentencing specialists? Developing standards for minimum support services needed for specific types of cases is essential in the calculation of adequate support services. Like workload and qualifications, support services are thought to be an attribute of quality but not a direct measure.

Training. Are mechanisms in place to require specific training or continuing legal education for defense counselors? Training is essential for defense lawyers to maintain their skills, particularly in areas that require special expertise (for example, defending convicted sex offenders who are eligible for post-prison sentence civil commitment under the new civil commitment statutes adopted in some states). Training also may help retain a racially and culturally diverse public defense bar.

Notification Time. How long does it take for counsel to be appointed and the defendant to be notified of the appointment? The speed of appointment affects the counsel's ability to influence early stages of the criminal prosecution process and the defendant's ability to be released on bail and gather witnesses and other resources to prepare the defense. Notification time is a feature of quality representation that may be valued by both society and the client. It is thought by both to be a direct but incomplete measure of the quality of representation in a case. However, the cost associated with providing short notification time is that a number of lawyers must be on duty to respond around the clock. A consequence of this readiness for peak workloads and quick response is that this same capacity is available even when the demand for legal services is low.

Access to Counsel. How are defendants granted access to counsel and how is confidentiality protected? Access to counsel is closely related to notification time and may affect costs significantly. Organizational structures can facilitate or handicap access to counsel and confidentiality, which in turn can impact the effectiveness of attorney-client interactions.

Overall Quality Representation. What is the actual quality of performance in representing individual clients--as judged by clients and as judged against professional standards?

It may appear that the nine elements listed above are arranged in a sequence that moves from "policy" (legislative interest and action) to "operations" (left to the discretion of system managers), but this is not necessarily the case. Legislators may believe some aspects of service quality are fundamental to public defender offices, and consequently, lawmakers may design policies to limit or guide the discretion of system managers. Thus, the kind of justice lawmakers intend to produce will affect the operational features of the system as system managers implement policy.

Courts, too, can mandate performance standards that identify attributes of quality that must be met. As mentioned in the nine elements above, the need for defendants to see their counsel early is an apparent operational standard that both legislatures and courts may specify. Whether or not standards mandated by legislatures or courts are higher or lower than one another, the challenge for system managers is to calculate the costs to meet the specified standards of quality.

The development of national standards in the areas highlighted above may provide a comparative benchmark. Therefore, reform advocates need to show policymakers how a public defense system can be improved by focusing, at least initially, on the critical issues above. For example, it would be powerful for case studies to reveal that

- A system's target population omits a large group of marginally poor people who cannot afford a quality defense.
- Appointment notification time is longer than in most other systems.
- Discretionary appointments, which are made by judges and follow no established guidelines, have a negative impact on the independence of counsel even if access to counsel is adequate.
- Qualification standards for counsel are not present.
- Workloads are not monitored and may be excessively high.
- Support services are lacking.
- Continued education and/or training are not required.

By defining the elements of the public defense system and implementing standards and practices, the quality of systems may be measured. In similar localities (outside and inside a state under examination), the evaluation of an individual defense system may also allow other systems to revise their policies based on the one evaluation--creating a more efficient and fair public defense system nationally.

---

## Desired Outcomes Judged by Whom?

"In the provision of public defender services, a gap appears between the practical results or outcomes that the society desires and what the individual client desires. Society may want crime control and low cost. The client wants effective defense of his liberty interests and is not concerned with costs. The way to close this gap is to return to the original idea that what everyone should want in providing public defender services is not any particular outcome such as more or less crime. The society should be interested in ensuring that its criminal justice system operates justly, and should understand that that means providing adequate defense services to those who cannot pay to defend themselves. That is the outcome they seek: justice at low cost, not crime control. The client should understand that he is entitled to a quality defense, but that his idea of a quality defense may not be exactly the same as society's view.

The difficulty in looking at public defense services in terms of alternate outcomes is that traditionally the most important outcomes have focused on an accused person's liberty interests, or a reduction of state supervision, or a reduction of state supervision to a less intensive form. A defender's traditional role is to defend the liberty interests of a client against the state's desire to bring the defendant under state control. In principle, we could even measure this outcome: by measuring the total number of years in prison saved by the efforts of public defenders. The difficulty with this view of measuring outcomes of public defenders is that society as a whole may not think this result is particularly valuable. From a social perspective that values crime control over many other competing values, the idea that we use public funds to produce freedom for accused criminals seems perverse. But from a client's perspective, this does not seem perverse at all.

One can imagine a variety of outcomes other than improving the overall quality of justice in society, such as providing services to address the client's underlying problems. Defendants might feel better treated by the society, and with that, somewhat more willing to accept the judgments offered. It is even possible that effective criminal representation focused on finding just and effective dispositions for defendants might reduce crime over the long run. And, as a consequence, effective dispositions might reduce the overall number of people in prison and relative costs imposed. These are potential benefits for both the society and the individual service recipients. In that respect, these beneficial outcomes are like the results that we anticipate for other kinds of social service programs."

--Mark Moore

---

## Defining and Measuring Outcomes

What is the market value of quality representation? This key question must be answered in order to address funding decisions. In the theory of a pure free

market system, if the price paid by the state or county for defending an indigent in a criminal case were not competitive, no competent lawyers could be hired. A system that pressures bar members to participate in a public defense market reduces competitive forces. A system that treats all lawyers as if they were of equal competence also reduces the competitive forces by allowing "rookies" to bid for jobs that would be more difficult to get in a free market. Under these circumstances, the state or funding agency has the upper hand and the private sector ends up subsidizing the provision of defense services--just as privately insured individuals subsidize the health care of uninsured indigent patients.

This harsh market reality will be hard to change unless evidence clearly indicates that a given locality's level of public defense funding adversely affects standards and outcomes for indigent offenders. Without better defined standards and outcomes, it will be difficult to address the issue of what is adequate funding for public defense. Clearly, systems that have been neglected to the extent that they are unable to meet basic standards in the areas delineated earlier can be taken to task for providing too little funding. When the systems seem to meet the basic requirements, however, the question becomes, what would additional funding buy in outcomes for defendants--greater client satisfaction? More litigation? That their voices be heard? If public defense lawyers are paid a lower fee than private lawyers for defending comparable cases, will indigent defendants be more likely to be indicted, incarcerated, denied some other benefit, or to receive longer sentences?

Few studies, according to a review of the literature conducted by Feeney and Jackson in 1991, "have closely examined the relationship between level of resources and quality representation."<sup>[11]</sup> Opinion surveys of judges, prosecutors, defense lawyers, and defendants show that these players perceive private attorneys to be more effective. However, statistically, defendant cases that are examined reveal no evidence to support this perception.<sup>[12]</sup>

Sentencing studies that consider type of counsel have produced mixed results.

"The more controlled the sentencing study is, the more likely that the type of counsel will have no effect on case outcome."<sup>[13]</sup> No empirical evidence links what outcomes are expected at higher levels of funding with those achieved at lower levels of funding. Therefore, policymakers and legislators must ask the following questions of defense systems with fewer financial resources. Will better-funded defense systems

- Help the judicial system process cases faster?
- Provide better pretrial and sentencing alternatives?
- Provide better coordination of support services?
- Increase public confidence in the justice system?
- Decrease the errors that deny defendants' rights, without increasing public safety risks?

Obtaining better research data is a critical first step to answering these questions. Operational research also can be used to improve service delivery.

For example, research can be used for "spot" quality control checks--such as uncovering problems with the billing practices of assigned counsel or identifying areas of billing and accountability that can be improved--and for monitoring caseloads and workloads to maintain quality.

---

### What Are Valued Outcomes?

"Tony is correct to want to define more clearly the outcomes society seeks through the provision of public defender services, and to get some quantitative indicators of the extent to which the desired outcomes are achieved. He may be right to try to value the outcomes in terms of some kind of 'market value' so that the benefits can be directly compared with the costs of providing the services. This is all part of public defenders' being accountable not only to their clients for providing a quality defense, but also to the public and their representatives who are paying the costs of providing the service. It is certainly important in making appropriation decisions that the legislature have some idea of the costs of providing different levels of quality defense.

The question of what constitutes the valuable outcomes of public defender offices remains uncertain. Are we interested in producing important attributes of justice (regardless of cost or impact on overall levels of crime), or are we interested in achieving more practical, material results such as reductions in crime and costs? Is the value of the service to be judged by society in terms of its particular desires, or is it to be judged by the client or beneficiaries in whose interests, at least in part, the services are provided? Can we see the value produced right at the point of service delivery as the public defender offers a more or less zealous defense of the client's interests, or do we have to wait to see what happens over time to the subsequent criminality of those who are defended? Should we try to capture the benefits of public defenders in money terms? Should we try to calculate the economic costs of crimes either allowed or avoided, and add them to the costs of imprisonment either imposed or avoided? Or, should we impute a financial value to the public defense services by attaching a price that the private market would charge for the same services? Or, should we ask the clients to say how much they would have been willing to pay for the services they received from their public defense lawyer? We must ask these hard questions to conceptualize and then measure the valuable outcomes that society expects to achieve by supporting public defender services."

--Mark Moore

---

### Conclusion

Defense lawyers are a necessity, not a luxury, in any criminal justice system,[14] but it is important to identify the best ways to provide public defense services before deciding on funding. This nation's defense systems need a national research agenda to generate critical information to guide state or local

Policy makers who may be struggling to improve their systems. Such information will help policymakers develop standards for public defense services, understand how achieving these standards will affect funding, and design performance measures to demonstrate the returns and generate higher investments in public defense systems.

Strong advocacy is an inherent quality of the public defense lawyer culture, driven by the conviction that these attorneys and other advocates have "their hearts in the right place." However, emotional zeal is not enough in an era that requires hard facts to influence policymaking. Today, this vein of zealous trial advocacy struggles against a lack of relevant policy analysis to guide and influence the enactment of policies that affect the defense function.

With the controversial issue of public outlays for the legal defense of alleged criminals, the lack of hard facts makes it especially difficult to enact effective policies. Anecdotes about particular abuses of indigent defendants are countered by anecdotes of injustices to victims. Without accurate empirical information on what to reform, how best to reform it, and what outcomes to expect, it will be difficult to achieve the consensus necessary to improve public defense services.

-----

#### **Notes**

1. *Palko v. Connecticut*, 302 U.S. 319 (1937).
2. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
3. Throughout this article, the term "public defender" refers to all public defense lawyers, including professional full-time public defenders, assigned counsel, and contract lawyers. A public defender office is a publicly funded agency that hires lawyers and various support services to provide indigent defense. An assigned counsel system relies on the assignment of defense counsel by an appointed authority (usually the judge or a designee), and the defense counsel are private practice attorneys paid a standard fee. In a contract system, the funding agency contracts with private law firms, which provide their services at a contractual rate.
4. This bulletin does not address public defense issues in capital cases.
5. *Gideon*, 372 U.S. 344.
6. National Legal Aid and Defender Association, "Community Partnerships," in *Indigent Defense*, Vol. 3, No. 2 (May/June 1999).
7. See e.g., Blaine Harden, "Poll Shows City's Blacks Fearing Brutality and Bias but Optimistic on Future," *New York Times*, June 26, 2000, at A29. "Black residents of New York City are afraid of being brutalized by the police, but they welcome and appreciate officers who keep criminals out of their neighborhood." *Id.* at A29.
8. For a more complete explanation of how defender services are provided, see Robert L. Spangenberg and Marea L. Beeman, "Indigent Defense Systems in the United States," *Law and Contemporary Problems*, Vol. 58, No. 31 (1995). Maine and North Dakota are two states that have no public defender system across the entire state.
9. The American Bar Association, along with most states, has established written guidelines. See e.g., *ABA Standards for Criminal Justice: Providing Defense Services*, 3d Edition (Washington, DC: American Bar Association, 1992), [www.abanet.org/crimjust/standards/defsvcs\\_toc.html](http://www.abanet.org/crimjust/standards/defsvcs_toc.html). State standards

for public defense practices can be accessed on the National Legal Aid and Defender Web site ([www.nlada.org](http://www.nlada.org)).

10. For complete text, see [www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm](http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm).

11. Floyd Feeney and Patrick G. Jackson, "Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?" *Rutgers Law Journal*, Vol. 22, No. 361, 410 (1991).

12. *Id.* at 408.

13. *Id.* at 338.

14. *Gideon*, 372 U.S. at 344. See also *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

# Appendix 5

U.S. Department of Justice  
Office of Justice Programs  
Bureau of Justice Statistics  
Special Report

## Defense Counsel in Criminal Cases

November 2000, NCJ 179023

Source: <http://www.ojp.usdoj.gov/bjs/pub/ascii/dccc.txt>

PDF available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>

-----  
By Caroline Wolf Harlow, Ph.D. BJS Statistician  
-----

### Highlights

At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996 and 66% of Federal defendants in 1998

	Percent of defendants	
	Felons	Misdemeanants
<b>75 largest counties</b>		
Public defender	68.3%	--
Assigned counsel	13.7	--
Private attorney	17.6	--
Self (pro se)/other	0.4	--

### U.S. district courts

Federal Defender Organization	30.1%	25.5%
Panel attorney	36.3	17.4
Private attorney	33.4	18.7
Self representation	0.3	38.4

Note: These data reflect use of defense counsel at termination of the case.--Not available.

\* Over 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys.

\* About half of large county felony defendants with a public defender or assigned counsel and three-quarters with a private lawyer were released from jail pending trial.

Defendants with publicly financed or private attorneys had the same conviction rates

Case disposition	Public counsel	Private counsel
------------------	----------------	-----------------

### 75 largest counties

Guilty by plea	71.0%	72.8%
Guilty by trial	4.4	4.3
Case dismissal	23.0	21.2
Acquittal	1.3	1.6

**U.S. district courts**

Guilty by plea	87.1%	84.6%
Guilty by trial	5.2	6.4
Case dismissal	6.7	7.4
Acquittal	1.0	1.6

\* In State courts in the largest counties, 3 in 4 defendants with either court-appointed or private counsel were convicted; in Federal courts 9 in 10 felony defendants with public or private attorneys were found guilty.

\* In Federal court 88% of felony defendants with publicly financed attorneys and 77% with private lawyers received a prison sentence.

Except for State drug offenders, Federal and State inmates received about the same sentence on average with appointed or private legal counsel

<b>Offenses</b>	State prison inmates		Federal prison inmates	
	Public counsel	Private counsel	Public counsel	Private counsel
Total	155 mo	179 mo	126 mo	126 mo
Violent	223	231	164	162
Property	118	128	59	59
Drug	97	140	126	132

\* Three-fourths of State and Federal inmates with an appointed counsel and two-thirds with a hired counsel had pleaded guilty.

Almost all persons charged with a felony in Federal and large State courts were represented by counsel, either hired or appointed. But over a third of persons charged with a misdemeanor in cases terminated in Federal court represented themselves (pro se) in court proceedings prior to conviction, as did almost a third of those in local jails.

Indigent defense involves the use of publicly financed counsel to represent criminal defendants who are unable to afford private counsel. At the end of their case approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel.

In both Federal and large State courts, conviction rates were the same for defendants represented by publicly financed and private attorneys. Approximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties were found guilty, regardless of type of attorney.

However, of those found guilty, higher percentages of defendants with publicly financed counsel were sentenced to incarceration. Of defendants found guilty in Federal district courts, 88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large State courts 71% with public counsel and 54% with private counsel. This report uses information from Bureau of Justice Statistics (BJS) data collections that, although gathered for wider purposes, present information about the type of counsel defendants and inmates used in their criminal case.

Data are from --

- \* U.S. district court statistics for persons accused of Federal crimes (fiscal year 1998),
- \* pretrial records for felony defendants in the Nation's 75 largest counties (1992-96),
- \* State court prosecutors' information gathered nationwide (1990-94),
- \* the Administrative Office of the U.S. Courts (1998), and
- \* personal interviews with nationally representative samples of inmates in local jails (1996) and State and Federal prisons (1997).

For more information on the data used in this report, see Data sources, page 11.

In this report the type of counsel for Federal and State defendants was the type at case termination. Other counsel may have represented the defendant earlier. Data describing counsel at filing or initiation were not used because they were incomplete or unavailable. The terms "publicly financed attorneys," "public attorney," and "appointed attorney" used in this report include public defenders, panel attorneys, assigned counsel, contract attorneys, and any other government-funded attorney programs for those unable to provide their own attorney.

Right to counsel is in the U.S.  
Constitution

The sixth amendment to the U.S. Constitution, a part of the Bill of Rights, provides that "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence."

In the 1960's and 1970's, the Supreme Court expanded this clause by recognizing a constitutional right to counsel at public expense for those unable to pay a private attorney. In *Gideon v. Wainwright* (372 US 335 (1963)) the Supreme Court held that the sixth amendment requires indigent defendants in State court proceedings to have appointed counsel. *Gideon* involved a felony, but in another case, *Argersinger v. Hamlin* (407 US 25 (1972)), the Court ruled that an indigent defendant may not be imprisoned, even for a misdemeanor, unless afforded the right to counsel.

Two types of programs provide indigent representation in Federal cases

Pursuant to the Criminal Justice Act of 1964 (18 USC ' 3006 A), the Defender Services Division of the Administrative Office of the U.S. Courts oversees spending for Federal defendants through two types of programs:

\* Panel attorneys, appointed by the court from a list of private attorneys on a case-by-case basis. At the end of 1998 all 94 U.S. district courts used such panels, including 20 districts in which only panel attorneys were used.

\* Federal defender organizations (FDO's), take one of two forms:

--Federal public defender organizations staffed with Federal Government employees and headed by a public defender appointed by the court of appeals

or

--Community defender organizations that are incorporated, nonprofit legal service organizations receiving grants from the Administrative Office of the U.S. Courts.

At the end of 1998, 63 Federal or community defender organizations served 74 of the 94 U.S. district courts.\*\*\*Footnote 1: Administrative Office of the U.S. Courts, Judicial Business of the United States Courts, 1998.\*\*\*

Workloads rose more than spending for the Defender Services Division

The panel attorney and FDO programs can represent defendants at any time from arraignment through appeal and during supervised release. The Defender Services Division counts use of these publicly financed attorneys in terms of representations.

Total representations by panel attorneys and FDO's rose 26% from 80,200 in fiscal year 1994 to 101,200 in fiscal 1998. The number of criminal representations grew substantially during the period (25%), with the FDO workload increasing 35% and the panel attorney workload 17%. The Defender Services Division estimates that court-appointed counsel represent 85% of criminal defendants at some time during the conduct of their case (unpublished correspondence).

From fiscal year 1994 through fiscal year 1998, spending grew 20% in constant 1998 dollars from \$293 million to \$353 million.

Criminal Justice Act obligations, 1994-98 (in 1998 dollars)

1994	\$293,342,000
1995	\$296,794,000
1996	\$316,884,000
1997	\$338,028,000
1998	\$352,837,000

Note: An obligation is generally defined as a legal commitment for goods or services ordered or received by the government.

Source: Unpublished data, Administrative Office of the U.S. Courts, Defender Services Division.

All felony defendants in cases terminated in U.S. district court had an attorney in 1998

Nearly all defendants facing a felony charge terminated in U.S. district court in 1998 and almost two-thirds with a misdemeanor charge had lawyers to represent them in court. Felony defendants were more likely than misdemeanants to have publicly financed counsel. Sixty-six per cent of those facing a felony charge and 43% with a misdemeanor charge had used either a FDO or panel attorney.

Defendants charged with a felony (33%) were also more likely than those charged with a misdemeanor (19%) to have private representation. About a third of misdemeanants represented themselves during judicial proceedings.

White collar Federal defendants most likely to use private counsel

Most likely to have a private attorney were defendants charged with a white collar offense, primarily fraud or a regulatory offense. Having private counsel were 43% of fraud defendants and 63% of those charged with a regulatory offense -- violations of laws pertaining to agriculture, antitrust, food and drug, transportation, civil rights, communications, customs, and postal delivery. By contrast, about 2 in 10 defendants charged with a violent crime used private attorneys.

Disposition	Type of counsel	
	Public*	Private
Guilty		
By plea	87.1 %	84.6 %
By trial	5.2	6.4
Acquittal	1.0	1.6
Dismissal	6.7	7.4
Number of defendants	37,188	18,709

\*Includes Federal Defender Organizations (FDO's) and panel attorneys.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

9 in 10 Federal defendants found guilty regardless of type of attorney

In 1998, 92% of defendants with public counsel and 91% with private counsel either pleaded guilty or were found guilty at trial.

Sentence	Type of counsel	
	Public*	Private
Incarceration	87.6 %	76.5 %
Probation only	12.1	22.4
Fine only	0.3	1.1
Number of defendants	33,068	16,622

\*Includes Federal Defender Organization (FDO's) and panel attorneys.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

Incarceration more likely for Federal defendants with public counsel than for those with private attorneys

Defendants found guilty after using a FDO or panel attorney were more likely to be sentenced to prison (about 88% of defendants found guilty) than those with private attorneys (77%). The difference in incarceration rates is explained in part by the likelihood of prison after conviction for different types of offenses. As has been shown, public counsel represented a higher percentage of violent, drug, and public-order (excluding regulatory crimes) offenders, who were very likely to receive a sentence to serve time, and private counsel represented a higher percentage of white collar defendants, who are not as likely to receive incarceration sentences.\*\*\*Footnote 2: Compendium of Federal Justice Statistics, 1998, BJS report, NCJ 180258, table 5.1.\*\*\*

Federal defendants with private attorneys had longer average sentences than defendants with publicly financed attorneys

Defendants with private attorneys were sentenced to an average of 62 months in prison, and those with publicly financed attorneys, to 58 months. The primary differences in average sentence length were between offenses, not between the types of attorney. Other factors not shown may also have had a role.

Among those sentenced to incarceration, drug offenders who used publicly financed counsel had shorter sentences on average than those who used private attorneys -- an average of 75 months compared to 84 months.

Among Federal violent and regulatory offenders, those with private attorneys received shorter sentences than those with public lawyers. Violent offenders who used private attorneys were given 74 months on average, and those with public counsel, 84 months. Similarly, those sentenced for a regulatory offense with a private lawyer had an average sentence of 23 months, and those with a public attorney, 33 months.

Most criminal defendants are tried in State courts

The bulk of the task of providing counsel for the indigent has fallen to lawyers working in State courts. Approximately 95% of criminal defendants are charged in State courts, with the remainder tried in Federal courts.

Two-thirds of State prosecutors reported that their courts used public defenders

Three systems now serve as the primary means for providing defense services to indigent criminal defendants charged in State court.

\* Under a public defender system, salaried staff attorneys render criminal indigent defense services through a public or private non-profit organization or as direct government employees. In 1994, 68% of State court prosecutors reported that a public defender program was used to defend indigents in cases they prosecuted.

\* In an assigned counsel system, courts appoint attorneys from a list of private bar members who accept cases on a judge-by-judge, court-by-court, or case-by-case basis. About 63% of prosecutors in State criminal courts reported an assigned counsel program in their jurisdiction.

\* In contract attorney systems, private attorneys, bar associations, law firms, groups of attorneys, and nonprofit corporations provide indigent services based on legal agreements with State, county, or other local governmental units. Approximately 29% of prosecutors indicated that in their jurisdiction contracts were awarded to attorney groups to provide indigents with legal representation.

Although the Supreme Court in Gideon mandated that the States must provide counsel for indigents accused of serious crimes, the court did not specify how such services were to be provided. State court prosecutors increasingly report that their jurisdictions use more than one type of program to defend indigents. In 1990, 31% of prosecutors' offices reported that their courts used a combination of public defenders, assigned counsel, and contract attorneys; in 1994 -- the last time BJS asked prosecutors about their indigent defense systems -- 53% of the courts relied on more than one program.

In 1994 about 6% of prosecutors reported the court of their jurisdiction using all three systems: public defenders, assigned counsel, and contract attorneys. The most prevalent combination of two programs was public defenders and assigned counsel -- indicated by almost a third of prosecutors' offices.

8 in 10 felony defendants in large State courts used publicly financed attorneys

In 1992 and 1996 about 80% of defendants charged with a felony in the Nation's 75 most populous counties reported having public defenders or assigned counsel while nearly 20% hired an attorney. Between 1992 and 1996 the percentage of felons in large counties using public defenders increased from 59% to 68% and the percentage with assigned counsel decreased from 21% to 14%.

Defendants charged with violent, property, and drug crimes were more likely to have been represented by public defenders or assigned counsel (81%-84%) than those charged with public-order offenses (73%). Public-order offenses include weapons, driving-related, flight/escape, parole or probation, prison contraband, habitual offender, obstruction of justice, rioting, libel, slander, treason, perjury, prostitution/pandering, bribery, and tax law violations.

State defendants with a criminal record more likely than other defendants to use public counsel

Felony defendants with prior convictions were more likely than those without a criminal record to have used a publicly financed lawyer. According to criminal history records available to the court, 86% with a previous conviction and 77% without had public defenders or assigned counsel. When arrested for their current charge, about 86% of those already on criminal justice status -- for example, on pretrial release, probation, or parole and 79% not on criminal justice status used appointed counsel.

Pretrial release less common for State defendants with public attorneys

About half of defendants using a public defender or assigned counsel, compared with over three-quarters employing a private attorney, were released from jail prior to trial.

Release on bail, a payment to a court to guarantee the defendant's appearance at subsequent court dates, was awarded to 57% of defendants with public counsel and to 65% with a private lawyer. Of those allowed bail, about a third with a public attorney and three-quarters with a hired attorney were released before adjudication.

About 3 in 4 State defendants with public or private attorneys were found guilty

Conviction rates were about the same for defendants with court-appointed attorneys (75%) and for those who hired private counsel (77%). Of those convicted, about 8 in 10 were convicted of a felony and the remainder of a misdemeanor, regardless of type of attorney.

Almost a quarter of defendants with publicly financed or private attorneys had their cases dismissed or were acquitted. Just over a fifth had charges dismissed and around 2% were acquitted.

State defendants with public counsel sentenced more often to prison or jail but for shorter terms than those with private lawyers

Convicted defendants represented by publicly financed counsel were more likely than those who hired a private attorney to be sentenced to incarceration. About 7 in 10 with appointed counsel and 5 in 10 with a private attorney were sentenced to a prison or jail term.

Of defendants sentenced to serve time, those using publicly financed attorneys had shorter sentences than those with private counsel. Those with publicly financed attorneys were sentenced to an average of 2 1/2 years of incarceration and those with private counsel to 3 years.

Similar to drug offenders convicted in Federal court, those sentenced for drug offenses with court-appointed attorneys had shorter sentences (2 years) than those who hired their attorneys (3 years). For other offense categories,

sentences were about the same for defendants with public and private attorneys.

Local jail inmates described their experiences with the criminal justice system

In addition to gathering information on defendants in Federal and State courts, BJS sponsors interviews of inmates in local jails and State and Federal prisons. Nationally representative samples of inmates describe their personal experiences with the criminal justice system. Jail inmates either may be awaiting trial or sentencing or may be serving their sentence; prison inmates are serving a sentence.

In the 1996 Survey of Inmates in Local Jails, most inmates charged with a felony reported they were represented by counsel; 97% had an attorney -- 77% a court-appointed counsel and 20% a private attorney. Over a quarter of jail inmates charged with a misdemeanor had no attorney, and over half used public counsel.

The percent of all jail inmates who had been represented by a publicly financed attorney rose from 64% in 1989 to 68% in 1996.

Defendants in jail for homicide most likely to hire their own attorneys

About 40% of jail inmates charged with homicide hired their own attorney, as did 25% charged with rape or sexual assault, 28% driving while intoxicated, and 25% weapons offenses.

Public-order defendants were more likely than other defendants to represent themselves in legal proceedings. About 4 in 10 charged with a public-order offense such as obstruction of justice, a traffic violation, drunkenness, or a violation of probation or parole represented themselves. Two in ten charged with driving while intoxicated reported that they had no lawyer.

1 in 4 convicted jail inmates with public counsel and with bail set were released before trial

Whether their attorney was appointed or hired, about three-quarters of convicted jail inmates charged with a felony had bail or bond set for them. Of inmates with bail set, a quarter with a court-appointed attorney and two-thirds with hired attorneys were released on bond before their trial. The lack of financial assets that prevented hiring a private attorney may have also impeded posting bond.

Convicted jail inmates with a public attorney were more likely than those with private counsel to have entered a guilty plea after reaching an agreement with the prosecutor to plead guilty to a lesser charge or fewer counts. An estimated 54% with a publicly financed attorney and 49% with a hired attorney plea bargained.

Prison inmates -- those already convicted -- reported their experience with their attorneys

In 1997 publicly financed attorneys had represented in court proceedings 3 in 4 inmates in State prison and 6 in 10 in Federal prison. About 1%-2% represented themselves rather than using a lawyer.

From 1991 to 1997 the percentage of State inmates with appointed counsel remained the same, while that of sentenced Federal inmates increased from 54% to 60%.

Prison inmates spoke to court-appointed lawyers later and less often than to private attorneys

Of inmates with court-appointed counsel, 37% of State inmates and 54% of Federal inmates spoke with their attorneys within the first week. In contrast, of those with hired counsel, about 60% of State inmates and 75% of Federal inmates had contact with their attorneys within a week of arrest.

Few inmates said they never spoke to their attorneys. Of those with appointed counsel, about 5% of State inmates and 2% of Federal inmates did not discuss their cases with an attorney; of those with hired attorneys, 1-2% never spoke to them.

Inmates with appointed lawyers spoke to them less frequently than inmates with private lawyers. About 26% of State inmates and 46% of Federal inmates with court-appointed attorneys discussed their cases with counsel at least four times. An estimated 58% of State inmates and 65% of Federal inmates who employed their own attorneys talked with them four or more times about their charges.

Inmates who used public counsel were less likely to proceed to trial than those employing private attorneys. A quarter of both State and Federal inmates with public counsel pleaded not guilty, as did about a third of those with hired attorneys.

In an Alford plea the defendant agrees to plead guilty because he or she realizes that there is little chance to win acquittal because of the strong evidence of guilt. About 17% of State inmates and 5% of Federal inmates submitted either an Alford plea or a no contest plea, regardless of the type of attorney. This difference reflects the relative readiness of State courts, compared to Federal courts, to accept an alternative plea.

State and Federal inmates who used public attorneys were less likely than those with private attorneys to have been tried by jury. Among State inmates 17% who used appointed counsel and 22% who employed a private lawyer were tried before a jury. Among Federal inmates 21% of those with appointed lawyers and 27% with privately hired counsel had jury trials.

State and Federal inmates with public attorneys and those with private lawyers were equally likely to have pleaded guilty to a lesser offense or fewer counts than originally charged. About half had plea bargained, regardless of the type of attorney or the jurisdiction of the court.

State inmates with public attorneys had shorter sentences than inmates with private counsel

On average State inmates who used appointed counsel expected to serve over 7 years on sentences of 13 years, while those who hired their attorneys expected to remain in prison 8 years on sentences of 15 years. Federal inmates expected to serve an average of almost 9 years for sentences of 10 1/2 years, whether they had appointed attorneys or hired their own.

Drug offenders in State prison who had appointed counsel expected shorter prison stays on shorter sentences than those who hired their own lawyers. The average length of stay expected by State drug offenders who used appointed counsel was 4 years while that expected by those who employed their own lawyers was almost 5 years.

Federal public-order offenders with appointed counsel had on average shorter sentence lengths than those with private counsel (9 versus 10 years).

Minority inmates were more likely than whites to have appointed counsel

In State prisons, while 69% of white inmates reported they had lawyers appointed by the court, 77% of blacks and 73% of Hispanics had public defenders or assigned counsel. In the Federal system, blacks also were more likely to have public defenders or panel attorneys than other inmates; 65% of blacks had publicly financed attorneys. About the same percentage of whites and Hispanics used publicly financed attorneys (57% of whites and 56% of Hispanics).

Lower educational attainment among inmates was associated with higher use of court appointed attorneys. Over 7 in 10 with less than a high school diploma or GED used government financed attorneys. Sixty-one percent of State inmates and 50% of Federal inmates who had attended at least some college also had appointed lawyers.

Inmates who were unemployed were more likely than other inmates to use court-appointed attorneys

About 8 in 10 State inmates without a job before their most recent arrest, compared to 7 in 10 employed full time, had appointed counsel. Among Federal inmates two-thirds who were not employed and half who were employed full time had publicly financed attorneys.

Over three-quarters of State inmates with monthly personal incomes of less than \$1,000 had publicly financed defenders. Less than two-thirds of those with incomes of \$2,000 or more per month had publicly financed lawyers. Over two-thirds of Federal inmates with incomes less than \$1,000 and nearly half with incomes of \$2,000 or more per month had publicly supported attorneys. For both State and Federal inmates, 9 in 10 who were homeless at any time in the year before their most recent arrest had court-appointed counsel.

Type of counsel for prison inmates varied by conviction offense

Among State offenders, those serving sentences for burglary, larceny, fraud, or robbery had relatively high rates of court appointed attorneys; about 8 in 10 had publicly financed counsel. Similarly in the Federal system, 8 in 10 robbery or burglary offenders used public defenders or panel attorneys.

State inmates convicted of serious violent and drug offenses made less use of publicly financed attorneys. Approximately two-thirds of those convicted of homicide, sexual offenses, drug trafficking, and drug possession reported using public defenders or assigned counsel.

Among Federal offenders about half convicted of fraud (46%), drug trafficking (55%), or drug possession (56%) reported using public defenders or panel attorneys. Over 8 in 10 sentenced for rape or other sexual crime, robbery, and burglary used publicly financed attorneys.

## Methodology

### Data sources

This report uses a variety of data sources.

\* Data on Federal court representations were published by the Administrative Office of the U.S. Courts (AOUSC) in their annual, Judicial Business of the United States Court. The AOUSC's Defender Services Division supplied additional unpublished data.

\* The AOUSC also provides BJS with data from their Criminal Master File. This dataset includes defendants in cases terminated each year in the Federal court system. Tables from the data are published each year in the Compendium of Federal Justice Statistics. BJS makes these data available on its Federal Justice Statistics web- site <<http://fjsrc.urban.org/index.shtml>>.

\* In the National Survey of State Court Prosecutors, BJS has surveyed local prosecutors' offices biennially and several times has asked about types of indigent attorney programs in their jurisdictions. For more information, see the publication Prosecutors in State Courts, 1996 (July 1998, NCJ 170092). The data, together with the code sheet and documentation, are available at <<http://www.icpsr.umich.edu/NACJD/bus.html#nps>>.

In 1999 BJS fielded the National Survey of Indigent Defense Systems to collect data from providers of criminal indigent services. Results are published in Indigent Defense Services in Large Counties, 1999 (BJS Bulletin, NCJ 184932).

\* In the State Court Processing Statistics data (formerly known as the National Pretrial Reporting Program) BJS collects a sample of records for felony cases filed in the Nation's 75 most populous counties in the United States. This survey includes information on the type of attorney used by the defendants. For more information, see Felony Defendants in Large Urban Counties, 1996 (October 1999, NCJ 176981). Data are available at <<http://www.icpsr.umich.edu/NACJD/bjs.html#scps>>.

\* Every 5 to 6 years BJS sponsors surveys of inmates in State prisons, Federal prisons, and local jails. In hour-long personal interviews with a nationally representative sample of inmates, respondents are asked about their current and prior offenses, personal and family characteristics, and the processes that resulted in their current incarceration. For further information, see Profile of Jail Inmates, 1996 (April 1998, NCJ 164620) and Substance Abuse and Treatment of State and Federal Prison Inmates, 1997 (December 1998, NCJ 172871).

Documentation, codebook, questionnaire, and the public use data files can be accessed at <<http://www.icpsr.umich.edu/NACJD/bjs.html#silj>> for the Survey of Inmates in Local Jails and at <<http://www.icpsr.umich.edu/NACJD/bjs.html#siscf>> for the Surveys of Inmates in State and Federal Correctional Facilities.

#### Standard errors and accuracy of the estimates

The accuracy of the estimates presented in this report for the State Court Processing Statistics, Survey of Inmates in Local Jails, and the Surveys of Inmates in State and Federal Correctional Facilities depend on the size of the sampling error. This error, as measured by an estimated standard error, varies with the size of the estimate and the size of the base population. Estimates of the standard error for selected characteristics have been calculated for each survey. These standard errors may be used to construct confidence intervals around percentages.

For example, using standard errors from appendix table 1, the 95% confidence interval for the estimated 68% of jail inmates using court appointed counsel is calculated as  $68.1\% \pm 1.96(.83)$ , or 66.5-69.7%.

The standard error of the difference of two percentages is the square root of the sum of the squared standard errors for each group. For example, also using standard errors from appendix table 1, the 95% confidence interval for the estimated difference in the percentage with appointed counsel for jail inmates charged with a felony (76.6%) or misdemeanor (56.3%) is calculated as  $20.3 \pm 1.96(2.1)$ , or 16.2 to 24.4.

Because this interval does not include zero, we can conclude with 95% confidence that the percentages of those charged with a felony or misdemeanour using public counsel are actually different.

All relationships discussed in the text of this report are significant at the 95% confidence level.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Special Reports address a specific topic in depth from one or more datasets that cover many topics.

Caroline Wolf Harlow wrote this report under the supervision of Allen J. Beck.

In BJS, Carol DeFrances consulted extensively on research approaches and reviewed the State prosecutor data analysis; John Scalia provided numbers and reviewed the items dealing with Federal defendants; Tim Hart reviewed the section from State Court Processing Statistics; David Levin assisted in accessing the SCPS dataset; Tracy Snell provided a statistical review of material from the surveys of inmates in State or Federal prisons or local jails; and Greg Steadman reviewed the standard error calculations.

William Sabol, formerly of Urban Institute, verified the Federal data from the Criminal Master File. Staff of the Administrative Office of the U.S. Courts, Steven R. Schlesinger and Catherine Whitaker of the Statistical Division, and Theodore J. Lidz, Steven G. Asin, George M. Drakalich, and Stephan C. Macartney of the Defender Services Division, provided and verified data and reviewed text. Tom Hester and Ellen Goldberg produced and edited the report. Jayne Robinson prepared the report for final printing.

November 2000 NCJ 179023

End of file

# Appendix 6

## “Plea-bargaining”: Anglo-Saxon Countries versus Continental Approach

Countries	Type of Offences	Legislation on Plea-bargaining	Consequence of a Guilty Plea	Procedural Aspects	Procedural Safeguards
<p><b>Australia NSW</b></p> <p>All from the Report by The Honourable Gordon Samuels AC CVO QC: <i>Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts</i> www.cso.nsw.gov.au/report/lpd_reports.nsf/files/Report%201.PDF/\$FILE/Report%201.PDF</p>		<p>Criminal Procedure Act, 1986, Section 63A.</p> <p>NSW Director of Public Prosecutions’ Policy and Guidelines for charge bargaining and tendering of agreed facts.</p>	Leads to the sentence being reduced by 10 to 15%.	<p>Called “charge bargaining” in Australia.</p> <p>The prosecutor agrees to withdraw a charge upon the promise of an accused to plead guilty. The charge “bargain” is the product of informed discussion between advocates for the prosecution and the defence.</p> <p>A charge bargain might be initiated by either the prosecution or the defence at any time during proceedings.</p>	<p>No discussion over sentence.</p> <p>Only charges which are supported by admissible evidence should go into an indictment.</p> <p>Adequacy test: adequate reflection of the criminality involved and adequate scope for sentencing.</p>
<b>England &amp; Wales</b>	Any offence can be subject to an admission of guilt.	<ul style="list-style-type: none"> <li>• Common Law</li> <li>• Criminal Justice and Public Order Act 1994, Art. 48<sup>5</sup></li> <li>• Criminal and Procedure Investigations Act 1996 - Art. 49</li> </ul>	Leads to the charge being reduced by 20 to 30%.	Initiated by the defendant, the admission of guilt can take place during the pre-trial hearing.	<p>Attorney General Guidelines on the acceptance of plea.<sup>6</sup></p> <p><i>R v Turner</i> [1970] 2 QB 321 on the illegality of advance indication of sentence to be imposed upon guilty plea overturned by <i>R v Goodyear</i> [2005] EWCA Crim 888</p>

<sup>5</sup> **Reduction in sentences for guilty pleas, Criminal Justice and Public Order Act 1994**

48.—(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court a court shall take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.

<sup>6</sup> Annex A, The Attorney General's Guidelines on the acceptance of pleas, Casework bulletin number 34 of 2000, [http://www.cps.gov.uk/legal/section15/chapter\\_j\\_annex\\_a.html](http://www.cps.gov.uk/legal/section15/chapter_j_annex_a.html), [accessed 9 November 2005]

<p><b>France</b></p> <p>Source: Ministère de la Justice, Dossier de presse, "Projet de loi portant adaptation de la justice aux évolutions de la criminalité", April 2003 : <a href="http://www.justice.gouv.fr/presse/connf090403e.htm">www.justice.gouv.fr/presse/connf090403e.htm</a></p>	<p>Only applicable to minor offences punishable by a maximum of 5 years imprisonment.</p>	<p>Law dated 9 March 2004, amending the Penal Code - Articles 495-7 and 520-1.<sup>7</sup></p>	<p>An admission of guilt will result in a reduction in the sentence. The new sentence should not exceed 6 months imprisonment. Fines cannot exceed half of the fine originally incurred.</p>	<p>The procedure is initiated by the prosecutor who can suggest a reduced sentence to a defendant that he intends to prosecute in exchange for an admission of guilt.</p>	<ul style="list-style-type: none"> <li>• Admission of guilt by the defendant and consent to the sentence proposed by the prosecutor will take place in presence of his lawyer who will have access to the file and the opportunity to advise his client.</li> <li>• The defendant will be granted a 10 days cooling off period before making his decision.</li> <li>• The validity of the agreement will be verified by the Chair of the High Court.</li> <li>• The defendant will be allowed to appeal within 10 days of the decision.</li> </ul>
<p><b>Netherlands</b></p> <p>Source: The Dutch Ministry of Justice – press releases, at <a href="http://www.justitie.nl/english/">www.justitie.nl/english/</a></p>	<p>Summary or criminal offences carrying a maximum punishment of 6 years.</p>	<p><b>No Plea-bargaining</b> but the Public Prosecution Service has the power to impose a punishment on a suspect by dropping charges provided the suspect meets certain conditions.</p> <p>'Transaction' to be replaced by a 'punishment order' under the Bill introduced by the Dutch Ministry of Justice in 2004 as part of the Government Safety Programme.</p>		<p>Under the new legislation, the Public Prosecution Service (OM) will be able to impose punishments without the use of courts and cooperation of the suspect to implement the decision will no longer be needed.</p>	<p>The Bill provides that no custodial sentence can be passed under a punishment order.</p> <p>If a suspect disagrees with a punishment order, he may submit an objection to the criminal court – the case would then receive a full trial.</p>
<p><b>New Zealand</b></p> <p>Law Commission, Report 66, Criminal Prosecution,</p>		<p>Sentence negotiation is expressly prohibited.</p> <p>Charge negotiation is not</p>	<p>Charge negotiation will result in the defendant being charged with a less serious offence and /or with fewer charges.</p>	<p>The prosecution and the defence reach an agreement on charges to which the defendant will plead guilty. This</p>	

<sup>7</sup> **Code de procédure pénale, Article 495-7**, (inséré par Loi n° 2004-204 du 9 mars 2004 art. 137 | Journal Officiel du 10 mars 2004 en vigueur le 1er octobre 2004)

*Pour les délits punis à titre principal d'une peine d'amende ou d'une peine d'emprisonnement d'une durée inférieure ou égale à cinq ans, le procureur de la République peut, d'office ou à la demande de l'intéressé ou de son avocat, recourir à la procédure de comparution sur reconnaissance préalable de culpabilité conformément aux dispositions de la présente section à l'égard de toute personne convoquée à cette fin ou déférée devant lui en application des dispositions de l'article 393, lorsque cette personne reconnaît les faits qui lui sont reprochés*

<p>October 2000, Wellington, New Zealand, www.lawcom.govt.nz/Upload Files/Publications/Publicatio n_73_150_R66.pdf</p>		<p>encouraged but it does occur.  Solicitor's General Prosecutions Guidelines.</p>		<p>occurs before trial.</p>	
<p><b>US</b>  All from Le Sénat, "Le Plaider Coupable", N° LC 122, Série Législation Comparée pp. 29-33.</p>	<p>Any offence can be subject to an admission of guilt. Although some states exclude severe crimes when they would be punishable by death or life imprisonment.</p>	<p>Recognised by the Supreme Court as an essential element of the administration of justice since 1970.</p>	<p>By pleading guilty, the defendant gives up on certain rights guaranteed by the Constitution such as his right to bring witnesses for cross examination, the right to have a jury establish his guilt but in exchange, he can obtain from the prosecutor a revision of the charge and the prosecutor can make recommendations to the judge in favour of the defendant. The reduction in the sentence does not necessarily result from the "bargaining" but might be the consequence of an early admission of guilt.</p>	<p>The procedure is usually initiated by the prosecutor although the defendant or his lawyer can also suggest an admission of guilt.</p>	<p>Informal negotiation but the agreement is subject to a public hearing and the sentence must be verified by the judge.</p>

Other countries: In **Spain**, guilty pleas are only available for offences punishable by a maximum of 6 years imprisonment – provisions on admission of guilt are to be found in the Penal Code since 1988 – it allows the parties to agree on a sanction which the judge must then validate. In **Portugal**, admissions of guilt are only applicable to offences punishable by a maximum of 5 years imprisonment – there have been provisions in the Penal Code since 1987 allowing the defendant to confess his crime. This however does not lead to the sentence being reduced. In **Italy**, the procedure is applicable to any offence. Provisions on guilty pleas can be found in the Penal Code. There are two procedures available; one of them called "*patteggiamento*" (bargaining) allows the defendant to agree on a sentence with the prosecutor, leading to the sentence being reduced by one third. This however is only applicable to minor offences. In **Germany**, guilty pleas are not codified but are part of the common law (Le Sénat, "Le Plaider Coupable", N° LC 122, Série Législation Comparée)