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THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA:
A STUDY OF THE ROLE
OF PRIVATE COUNSEL IN INDIGENT DEFENSE

U.S. Department of Justice
National Institute of Justice

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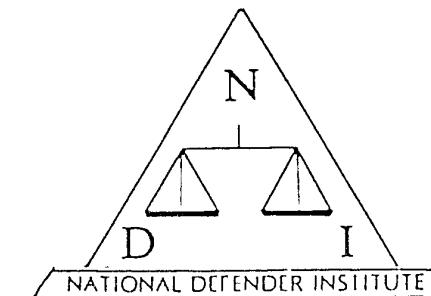
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EXECUTIVE SUMMARY

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



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EXECUTIVE SUMMARY

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ABSTRACT OF RESEARCH

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

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

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

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

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

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

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

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

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

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

EXECUTIVE SUMMARY

I. Background of the Study

The Legal Mandate

The courts have been compared to a tripod consisting of three legs -- judges, prosecution, and defense. If any of these three components malfunctions, the adversary system of justice fails to produce fairness in our courts.

The great majority of persons accused of felony offenses and a substantial percentage of alleged misdemeanants are unable to afford to retain private counsel. The makers of the U.S. Constitution recognized that need when they drafted the Sixth Amendment, which provided that, "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence."

Until 1963, this basic human right was recognized only in our nation's federal courts. In that year, the U.S. Supreme Court decided the celebrated case of Gideon v. Wainwright which held that, henceforth, every indigent defendant accused of a felony must be offered the assistance of counsel for trial as an essential ingredient of due process. The high court declared that, "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."

Nature of the Problem

Once the Supreme Court mandated that this right was to be implemented across the land, it sent shock waves through this nation's courts. State and local governments were ill prepared to meet the challenge of providing counsel to the hundreds of thousands of indigent persons accused of felonies.

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

The problem of providing counsel to the poor has grown geometrically during the two decades that have passed since Gideon was decided. The number of cases for which counsel were needed tripled with the 1972

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Argersinger decision which required state and local courts to provide counsel in misdemeanor cases whenever a defendant was deprived of his or her liberty.

The manpower requirements for providing counsel were further increased as a result of high court decisions extending the need for representation at pre-trial interrogations, preliminary hearings, appeals, and probation revocation hearings. And the costs of delivering legal defense services have continued to climb as increased crime rates and unemployment have taken their toll.

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

As a result, counties have been faced with the dilemma of how to meet the constitutional mandate to provide effective legal defense services while maintaining their solvency. Many counties believe that their criminal court caseloads are too small to justify establishing a full-time defender system, and have left alone the notion of joining with other counties to share such a system. Other counties have seen fit, for one reason or another, to maintain the private bar's involvement in all or a substantial share of the job of representing the indigent accused.

A national survey published as late as 1984 reported that fully 60% of all U.S. counties still employ appointed counsel systems. Of the remaining 40%, many counties still employ part-time defenders or contracts with lawyers in private practice to meet their indigent criminal defense requirements.

A number of those counties that continue to use the private bar as a major element in providing defense services to the poor are considering revamping their systems to meet a growing number of concerns. Spiraling and unpredictable costs beset county coffers. As the field of criminal law becomes increasingly complex and specialized, charges of incompetency of counsel and appeals ensue. More and more lawyers eschew criminal practice entirely. Those who gain experience move away from criminal practice once given the option of a viable civil practice. New lawyers just out of school, who have the time and incentive to accept criminal cases, often learn at the counties' expense, consuming costly hours while gaining experience.

Parts of the country where a majority of the lawyers have become "successful" may experience a dearth of attorneys available for appointment; this may lead to serious court backlogs and additional expense to the other segments of the criminal justice system.

These concerns have led many counties to wonder whether a viable compromise can be had. Can private bar systems for providing counsel be both cost effective and provide constitutionally adequate services? Or must they make drastic changes in their present systems? If they are to continue using the private bar to deliver services, are some models more effective and less costly than others?

Goals of This Study

In order to assist state and local policy-makers in reaching decisions about the design of legal defense systems using private counsel, the National Institute of Justice of the U.S. Department of Justice commissioned this study. The study was to provide practical information on the benefits, limitations, and costs of both the traditional assigned counsel programs and also the various alternatives involving private attorneys now in use across the country. Using scientific data-gathering techniques and statistical analysis, the researchers were charged with the task of drawing conclusions about alternative modes of private attorney representation that would aid policy-makers in designing and funding cost-effective, quality legal defense systems.

Overview of the Research Design

In order to maximize the resources allotted to the study, the researchers elected to take a two-pronged approach to the study. The first prong was to identify and describe a wide range of private counsel defense systems in different regions of the country so that policy-makers could have a better understanding of the options available. The second prong entailed a comparison of different types of systems using a scientifically controlled research design.

A. Research Sites

Since most legal defense systems are established and funded at the county level, the county was selected as the unit of analysis. Twelve counties in five states were included in the study. Of these, there were in-depth analyses conducted in six counties and examinations of the design and operations of the indigent defense systems in the remaining six counties.

The four major types of indigent defense systems involving the use of private counsel were included in the study as well as variations on these models. The four system types were:

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

Counties where the private counsel indigent defense system was used to handle all of the jurisdiction's appointed criminal cases were characterized as "pure" systems, while counties where there was a full-time defender system as an additional component for providing legal defense services to the poor were defined as "mixed" or "hybrid" systems.

The following matrix depicts the counties that were included in the study and their type of defense system. They are broken down into the "in-depth" study sites and the "descriptive" sites.

Table 1
Matrix of System Types and Jurisdictions

	Ad Hoc	Coord. A/C	P--T Def.	Contract	Sub- Category
<u>SITES</u>					
<u>In-depth:</u>					
BERRIEN, MI				X	Pure
SAGINAW, MI		X			Pure
SUMMIT, OH	X				Mixed
MONTGOMERY, OH		X			Hybrid
JO DAVIESS, IL			X		Pure
BOONE, IL	X				Pure
<u>Descriptive:</u>					
ONONDAGA, NY		X			Mixed
ALBANY, NY			X		Pure
SANTA CLARA, CA		X			Mixed
SAN MATEO, CA		X			Pure
SAN FRANCISCO, CA		X			Mixed
ALAMEDA, CA		X			Mixed

B. Staffing

The staffing for this research included two lawyers with experience in criminal practice and criminal justice research, a management specialist with experience in conducting docket studies, a PhD. in social psychology with a specialty in social science research methodology, and a PhD. economist. The staff was assisted by an M.A. in criminal justice, a B.A. in criminal justice, and a group of lawyers and students in each of six sites who helped to interpret and record data.

C. Interviews

Interviews were conducted with a variety of people in each of the 12 counties in the 5 states visited. The interviews, which were more inclusive in the six in-depth study sites, encompassed the following types of actors: judges, criminal defense system administrators, prosecutors, bar association representatives, retained and appointed counsel, court clerks, clients, community group leaders, social service agency personnel, probation officials, pre-trial release agency personnel, jail officials, police and sheriff's agency personnel, indigent defense system advisory board members, county board members, county executives and administrators, county clerks, county treasurers and comptrollers, and other court and county personnel. For consistency, standardized questionnaires were used for each category of actor.

D. Docket Studies

A total of 2,400 cases were included in the docket studies conducted in the six in-depth study sites. The studies were conducted in two stages. In the first stage, cases were eliminated that would bias the study such as cases that were still pending and cases which were combined with unrelated previous or subsequent charges.

The second stage entailed recording data from criminal court files and docket books onto computer-ready questionnaires. Data were recorded about case handling and disposition and well as about characteristics of defendants and their prior records. Half of the cases studied in each site were those handled by private lawyers who represented indigent defendants, while the other half were those handled by privately retained counsel. The retained counsel cases were used as a "control group" or yardstick against which to measure the performance of the appointed counsel in each of the six sites.

In addition, for the four sites where misdemeanors were included in the docket study samples, a separate docket study was conducted of cases where no counsel at all had been provided by the courts.

In order to enable the researchers to compare the performance of the different indigent defense system models, they were grouped as follows. Each of the sites was to be compared with another site within the same state which had a different type of indigent defense system. Thus, the study was to consist of three sets of comparisons; each set of comparisons included two different types of indigent defense systems.

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

E. Cost Study

The cost study employed a variety of sources of cost information, depending upon the type of system under consideration. One of the primary sources of information were the appointed counsel fee vouchers and court orders for payment. Data derived from these sources, like the docket study data, were coded onto questionnaires, entered into computers, and computer-analyzed. In addition, where specific information was not available, statistical techniques were manually employed to project cost data. Direct system costs such as overhead were obtained from interviews, county budget books, and other materials.

II. Description and Comparison of the Sites

Some Model Sites

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

The two sites, San Mateo County, California, and Santa Clara County, California both employed a coordinated assigned counsel system. However, San Mateo employed a "pure" system in that it was responsible for handling all of the indigent criminal cases in the county. The Santa Clara program, on the other hand, was a "mixed" system in that it was limited to handling only those cases which could not be represented by the local full-time defender office, e.g., because they constituted a conflict of interest for the defender. Another way to view the Santa Clara model is to describe it as a "conflicts" program.

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

The Santa Clara model is interesting both to jurisdictions which do and do not employ full-time defender systems. Since every jurisdiction, after the advent of the Supreme Court's decision in Holloway v. Arkansas, must employ counsel other than the public defender where co-defendants have conflicting interests, it has become essential for every jurisdiction to re-examine its system for providing attorneys other than those in the full-time defender office.

The Santa Clara model is of use to mid-sized counties where the private bar is employed to handle a major share of the indigent cases as well. In light of the large population size of Santa Clara, its program could well be transplanted in a jurisdiction where the number of cases handled by the private bar approximates the size of the "conflicts only" caseload in Santa Clara.

Some of the key features of the Santa Clara program include:

- Program separately administered from the public defender;
- Governing board to nominate program's administrator and set fee schedules;
- Full-time lawyer-administrator;
- Large assigned counsel panel of attorneys;
- "Early" representation at initial court appearance by other component's (defender's) staff;
- Judiciary removed from appointment of counsel;
- Entry level and monthly training for panel;
- Training prerequisite for admission to panel;

- Fee structure does not penalize going to trial;
- Division of panel into classes by experience level and case severity;
- Monitoring of attorney performance;
- Program budgetary allotment for investigative and expert services; and
- Judiciary removed from approval of attorney fee vouchers.

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

Apart from the fact that it handles all of the county's indigent defense needs, San Mateo differs from Santa Clara in some major respects. While the Santa Clara program is directly accountable to the county, which has a direct contract for services with the program's staff, the San Mateo program is operated by the local bar association.

While the Santa Clara County's governing board includes judges and representatives appointed by the county board as well as bar association representatives, the San Mateo program is accountable to a committee of the bar association.

Since the program serves all of the county's legal defense requirements, the San Mateo program has devised its own means of insuring access to counsel at the initial court appearance by assigning certain attorneys from the private bar to "man" those courtrooms.

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

- Independent board to select the administrator, negotiate the budget, and supervise the administrator;
- Representation provided by small full-time staff and large assigned counsel panel;
- "Early" representation at initial court appearance by staff or panel attorneys;
- Judiciary removed from appointment of counsel;
- Entry level and monthly training for panel;
- Training and experience prerequisites for panel;
- Administrator has monitoring & reporting duties;
- Investigative and other supporting staff;
- Judiciary removed from approving fee vouchers; and
- Fee structure does not penalize attorneys for going to trial.

Some "Typical" Sites

The indigent defense systems using private counsel visited in other counties proved to be quite different from those just described. The following discussion presents some of the features of other jurisdictions which contrast with the Santa Clara and San Mateo systems.

A. Other Coordinated Assigned Counsel Systems

As Table 1 shows, the study examined five other coordinated assigned counsel systems in addition to the two just discussed: two in California, one in New York State, one in Ohio, and one in Michigan. These are some of the major differences perceived in their structure and operations.

1. Who hires the administrator. Similar to San Mateo County, the assigned counsel administrator was hired by the local bar association in the remaining two California counties and in Onondaga County, New York. No other county besides Santa Clara employed a governing board having varied representation to appoint the administrator. In Saginaw County, Michigan, the courts basically designated the individual to be the administrator, and the appointment was ratified by the county board. On the other hand, the Montgomery County, Ohio system is essentially administered by a strong chief judge who is assisted by the court clerks that handle the court calendars.

2. How is the system administered. In each of the coordinated assigned counsel systems studied with the exception of Montgomery County, Ohio, the program was managed on a daily basis by an administrator. However, the status, experience level, and scope of duties of the administrators varied considerably. Only in the two "model" sites were the directors full-time criminal defense attorneys. In the remainder of the counties, this function was a part-time responsibility. In both Alameda and San Francisco Counties, the administrator was an employee of the bar association who dealt with the bar's referral panels, and spent only a small percentage of time on the criminal assignment work. In Saginaw and Onondaga, the administrators worked about half-time in their own private law practices.

In the California systems and in Saginaw, Michigan, the administrators or their clerical staffs designated the attorneys who would be assigned to particular cases, although in Saginaw the administrator would confer with the judges in homicide cases. Similarly, in Montgomery County, court clerks handle the routine case assignments. However, the assigned counsel administrator in Onondaga County, New York has no control over the assignment process; the bar association can only furnish the courts with attorney lists, but cannot determine how the lists are to be

employed. In sum, the degree to which the courts controlled the appointment process varied across a wide range.

The counties also differed with regard to judicial involvement in the payment of assigned counsel fees. In Montgomery County, while the function of assigning counsel was delegated to the court department charged with calendaring, the function of screening fee vouchers was performed by the court administrator's office. However, attorneys who are dissatisfied with determinations by the court's clerical staff may appeal to the trial judge. The review of fee vouchers by non-lawyer personnel has led to grumbling among the bar. In Saginaw, Michigan, the administrator screens the vouchers and makes tentative adjustments, which most judges follow; however, one judge makes his own determinations and refuses to convey the final figures to the administrator's office. San Francisco judges reserve the right to determine assigned counsel fees, which remain part of the court's budget. On the other hand, assigned counsel fees are part of a separate assigned counsel program budget in Santa Clara, San Mateo, Alameda, and Onondaga Counties, and the courts have no involvement in deciding on attorney fees. Moreover, the decision-making on attorney fees is up to attorney-administrators and/or bar committees rather than court clerical staff or judges.

3. Some other variations. No two programs were alike in the scope of the administrator's functions, budgets, staffing, assigned counsel fees, or treatment of the attorney lists. Three of the California programs and the New York program provided some degree of monitoring of attorney performance, while the remainder did not. In some programs, the financial eligibility was assessed by the administrator's office, while in others it was determined by the court or the local defender office. Only the two model programs required training beyond an orientation program, while two others required attorneys to attend an entry level seminar and the remaining three had no training requirements. Only one program practiced recoupment of attorney fees from defendants. Some of the counties suffered from lag time in making the attorney appointments, so that counsel were not available by the time of the defendant's bail hearing. The two model programs had investigative staff and/or budgetary allotments for the payment of investigators and experts, but most of the systems required the attorneys to petition the courts for support services (which requests were rarely made and even more rarely granted).

Perhaps one of the most significant differences observed among coordinated assigned counsel systems were in the fees paid to attorneys. Some jurisdictions paid on a straight hourly basis for all types of cases. Some used a mixture of hourly rates for, say, just felonies or just misdemeanors, and provided a different payment system for the other type of case. When straight hourly fees were not used, counties employed an array of systems including flat fees, basic flat fees with add-ons for certain types of court "events," activity fees for performing such tasks as filing motions, daily fees for going to trial, or a combination of these approaches. The degree to which the fee structure provided some good performance incentives appeared to have a high correlation with the extent to which other quality control features were built into the program.

B. The Contract Defense System

Only one contract system was included in the study sites, i.e., the system in Berrien County, Michigan. In this county, the contract firm was selected by the county board. No formal bidding procedures were used in selecting the contractor, and there was no notice provided to the public that such a contract was to be awarded.

With the exception of eligibility determination, which is performed by the court, the entire system is administered by the contracting law firm. The firm assigns attorneys within the firm to cases and manages the entire program budget, which it receives from the county in twelve monthly installments.

There are no attorney fees to deal with, since the attorneys are paid out of a lump sum budget. The law firm itself determines how the funds received by the county are to be allocated within the law firm for attorney salaries, clerical personnel, equipment, office overhead, or profit to the firm.

No investigative or social service staff or consultants are provided by the defense firm.

Attorneys are not provided by the firm at the defendants' initial court appearance. Even after the defense firm is appointed, the firm does not assign attorneys to cases until one business day before the case comes back to court. In misdemeanor cases, this may be as late as 21 days after the initial court appearance for a defendant who is being held in custody, and may take 11 days for persons held in custody while charged with felonies.

In order to maximize the number of cases that could be handled by the firm's attorneys, attorneys are assigned to handle particular court appearances rather than to represent individual defendants. As a result, one client may have two or more attorneys from the defense firm as his lawyers.

Except in the more serious cases, the younger, less experienced members of the contract firm are designated to handle the indigent defense cases. In addition to their work on the contract, lawyers handling these cases also handle both criminal and civil work for the firm's private clients.

The contract defense firm is responsible for making the decision as to when a co-defendant case represents a conflict of interest for them. In such cases, the firm designates an outside attorney to handle the case, and the attorney's fee is deducted from the contract budget.

The caseloads handled by the contract lawyers were quite high. It was estimated that the firm employed the full-time equivalent of 2.65 lawyers who averaged 588 indigent criminal cases apiece in addition to their private law firm work during 1981.

C. Part-time Defender Systems

Two part-time defender systems were included in the study. The first, a one-man operation, was located in the rural area of Jo Daviess County, Illinois near the Iowa and Wisconsin borders. The second, a large operation employing 20 part-time lawyers, operated in Albany, the state capitol of New York, which boasts a population of 286,000.

In both instances, the part-time defender system handles all of the county's indigent defense cases except those which pose a conflict of interest for the defender. However, while judges appoint counsel for conflicts cases in Jo Daviess, a lawyer on the public defender's staff in Albany County maintains the assigned counsel list and makes recommendations to the appointing judges. The Albany assigned counsel coordinator is also responsible for reviewing the attorney fee vouchers and determining the fees.

The Jo Daviess public defender system is a very low budget operation. The public defender is expected to provide his own office, secretarial staff, and equipment; needless to say, no investigative assistance is available. On the other hand, the Albany system has spacious offices, a variety of clerical and administrative support personnel, full-time investigative staff, word processing equipment, law books, and an automobile.

Both public defenders are treated as county employees and receive fringe benefits accorded to other employees. They both receive a monthly salary from the county. The public defender's office in Albany is considered a county department and as such prepares and negotiates its own budget, which is entirely separate from that of the courts. On the other hand, in Jo Daviess County, the judges negotiate the public defender's budget. The Jo Daviess County defender is appointed by the judges, while the Albany County defender is selected by the county legislature.

Inasmuch as the part-time defender in Jo Daviess is the only staff of the program, he represents a defendant from the first court appearance until the case is completed. However, in Albany, the defenders are assigned to staff courtrooms, and do not provide continuity of counsel for a defendant. The Albany defender office serves the county's 2 felony courtrooms, 3 city courts, and 12 town courts.

While the court assumes full responsibility for making eligibility determinations in Jo Daviess, the Albany defender's office assesses eligibility in cases where the arraigning judge is uncertain about the defendant's financial ability. Neither jurisdiction practices recoupment.

When the performance of the part-time defenders was compared to that of retained counsel within the same county, the Jo Daviess County defender demonstrated some significant differences in the handling of misdemeanors, but there were no significant differences between the handling of felonies by the defender and privately retained counsel. On the other hand, a tentative summary of cases sampled from the court dockets showed that the Albany public defenders had a substantially higher rate of pleas and lower rate of dismissals than a comparable group of retained counsel.

D. The Ad Hoc Assigned Counsel Jurisdictions

The two ad hoc jurisdictions included in the study were the rural county of Boone in Illinois and Summit County, Ohio, a jurisdiction of over one-half million people. While the Boone County random appointment approach was used to meet all of the county's indigent defense needs, Summit County appointed private lawyers to handle felony cases, but used a full-time defender office for misdemeanor appointments. In that sense, Summit County may be considered a "mixed system" jurisdiction.

Truly, neither jurisdiction's assigned counsel approach can be characterized as a "system" in that there is no centralization or coordination of appointments. In Summit County, each individual lower court judge, when rotated into the arraignment courtroom, is responsible for making the appointments of counsel. One

judge is not made aware of the appointments made by the other judges. Judges may contact the attorneys themselves, or may request that they be contacted by a court clerk or bailiff. Summit County judges may assign lawyers from a list of names compiled by the Akron Bar Association, from letters sent by attorneys seeking appointments, or may simply assign cases to attorneys whom they know personally. In the small town atmosphere of Boone County, there are only a small number of lawyers who have agreed to accept appointments. A computer print-out of payments made to assigned counsel in 1982 showed payments to 9 attorneys. The number of appointments per attorney ranged from one to seventeen; the second lowest number of appointments was four, and two attorneys from one family received eight apiece. Thus, it is clear that appointments were not made in rotation. In cases where a very serious felony was charged, the judge has brought in an attorney from a nearby county.

There was no formal classification of attorneys according to case seriousness or experience level. The two Boone County judges differed in their approach to appointment. One indicated that all attorneys on the list were qualified to handle any type of case, while the second skips over a particular attorney's name when it comes time to appoint on a felony case. Similarly, Summit County judges employed no experience criteria in matching lawyers with cases, notwithstanding the fact that the Ohio Public Defender Commission had adopted regulations requiring the use of such criteria as a prerequisite to receiving partial state reimbursement for attorneys' fees.

In both counties, the judges are responsible for making eligibility determinations. Boone County has recently commenced the collection of recoupment monies from defendants to reimburse some of the county's expenses in providing representation. In both counties, assigned counsel fees are included in the court's budget, and judges are responsible for reviewing attorney fee vouchers.

Both jurisdictions used a straight hourly fee schedule. Summit County paid fees of \$20/hour for in-court time and \$30/hour out-of-court, again, in spite of the fact that the state office had recommended fee levels of \$30 and \$40/hour. In Boone County, some judges paid \$30 in-court and \$40 out-of-court, while one of the judges paid \$40/hour across the board. Illinois law merely required that the fees be "reasonable." Some judges in Boone County cut fee requests submitted by the lawyers, while others do not (there are only two Boone County judges, but other judges in the Circuit rotate to that county from time to time). There were many complaints of fee-cutting by Summit County judges.

The Summit County court practice of requiring prior approval for expenditures relating to the hiring of investigators or experts discouraged their use. Judges conceded that requests for investigative services, if requested, would be denied because the budget was simply inadequate. Similarly, access to experts and supporting services for appointed counsel is virtually non-existent in Boone County. Assigned counsel in Boone County do have access to the library in the county courthouse, but the courthouse has no federal case reporters, nor does it subscribe to the U.S. Law Week or Criminal Law Reporter which provide updates on recent U.S. Supreme Court decisions.

There are no lawyers available for indigent defendants at pre-indictment line-ups or custodial interrogations; the police do not employ a list or contact attorneys for defendants in Boone County. Boone County attorneys first receive notification of their appointment as counsel about 2 to 3 days after a defendant is first arraigned in court. Summit County judges require appointed lawyers to appear in court with their clients on the day after appointment of counsel. While complaints were heard from some defendants that these procedures did not necessarily result in the lawyers' taking the time to interview them, it appeared that attorneys in the ad hoc assigned counsel jurisdictions of Boone and Summit Counties entered the case sooner than in the contract system of Berrien County or the coordinated assigned counsel system of Saginaw County, Michigan.

One of the most striking features of the ad hoc jurisdictions was the great disparity between the compensation and status of lawyers appointed to represent indigent defendants and lawyers representing the prosecution.

III. Major Findings

The research was able to draw conclusions about private counsel indigent defense systems relating to costs, attorney performance, and case processing. These areas are discussed below.

Cost Implications of Criminal Defense Systems Using Private Counsel

Several areas were examined with respect to the cost of indigent defense systems. These included: the factors that determine relative defense system costs; the relationship between cost and quality of services; the adequacy of funding; budgeting and accountability of costs; and the impact of the levels of financing upon the attitudes of those participating in the systems.

A. Factors Affecting Cost

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

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

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

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

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

The cost savings achieved by the ad hoc assigned counsel approach over the coordinated assigned counsel system in the two "mixed" defense system counties were primarily due to the fee rates paid to attorneys rather than to the number of hours expended by counsel or to the overhead of the system. Indeed, the estimated overhead of the ad hoc was higher.

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

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

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

Table 2

INDIGENT DEFENSE SYSTEM COSTS PER CASE*

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

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

Table 3

ATTORNEY HOURS SPENT PER CASE*

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

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

Table 4

ATTORNEY FEES PER HOUR* (ACTUAL)

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

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

4. Processing time for the entire court system. When comparing the time spent in case handling by assigned counsel and the control group of retained counsel, it was noted that certain counties seemed to be faster than other counties with regard to case disposition time. Not only were appointed counsel generally faster than retained counsel (although this was not always the case). It was also noted that both retained and assigned counsel in the contract defense system county, which was the least costly of the counties, were quicker than either retained or assigned counsel in its comparison site which employed the coordinated assigned counsel system. Upon further examination, the same ratio existed in comparing the ad hoc assigned counsel and the part-time defender system. The only instance where the speed of the court system as a whole was not correlated with the difference in cost between the two defense systems was in Ohio, where the slightly faster system was still costlier. Nevertheless, the larger discrepancies in speed demonstrated in the first two sets of counties led the researchers to conclude:

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

5. Staffed vs. fee per case approach. Another hypothesis seemed to bear examination in a search for the key to predicting criminal defense system costs. One of the oldest assumptions among the proponents of defender systems has been that staffed programs were less costly than systems which paid attorneys on a "piecework" basis. This assumption was therefore tested against the, admittedly, small sample of jurisdictions in the study. This sample contained only two "staffed" systems, the contract system and the part-time defender system. In both of these cases, the comparison with their assigned counsel counterparts showed the staffed system to be less expensive. Thus, the finding that:

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

B. The Relationship Between Cost and Quality of Service

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

As a result, the researchers first examined the contract system which appeared to produce the lowest possible cost for the county. In comparing the contract defense system's performance with the control group of retained counsel in the same county, the statistics showed that system to be in some difficulty. Of all of the systems studied, the contract system made the poorest showing when compared to another group of defense attorneys within the county. Retained counsel performed better than the contract lawyers with respect to five different areas of performance. The only area in which the contract firm excelled over retained counsel was in speed of disposition. Thus, the study found:

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

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

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

C. Assigned Counsel Fees and Other Defense System Costs

1. Fees paid to assigned counsel. Assigned counsel fees vary widely in different parts of the country. Fees in Iowa were raised to \$50/hour after appointed lawyers won a lawsuit. The lowest fee paid by any system in the present study was \$15/hour for out-of-court work (this was paid in Onondaga County, New York, which was not one of the counties where statistical analysis was conducted). The highest fee reportedly paid in a county included in this study was \$40/hour by a judge in Boone County, Illinois.

However, an analysis of the fees actually received by lawyers after fee-cutting by courts did not correspond to the purported fee rates. These fees, as shown in Table 4, ranged from \$20 to \$33/hour on the average. Some attorneys interviewed reported receiving as little as \$11/hour after fee-cutting.

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

- a. The fee rates paid to private lawyers for handling indigent defense cases well below comparable private bar rates in all of the sites using a fee per case method of payment.
- b. The fees received by appointed counsel often failed to provide any net income to attorneys after paying their office overhead expenses.
- c. The stated hourly rates did not necessarily reflect the fees actually received because of frequent fee-cutting by judges.
- d. Most of the counties using a fee per case method of payment employed cumbersome and time-consuming procedures, and some also employed Draconian rules prohibiting payment for late fee requests.

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

2. Other indigent defense system costs. Other indigent defense system costs may include the services of investigators and social workers as well as experts such as polygraph operators, handwriting analysts, ballistics, psychiatrists, and the like in addition to secretaries, accountants, and administrative personnel. Payment for travel, photocopying, purchase of transcripts and medical reports, books and office equipment are among other costs of providing defense services.

After considering the systems visited, the study concluded that:

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

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

D. Budgeting and Planning

The level of budgetary planning viewed in the 8 "typical" defense system sites in the states of Ohio, Michigan, Illinois, and New York fell short of that witnessed by the researchers in some other areas of the country where full-time defender systems prevail. Seldom was a zero-based budgeting approach taken; most relied upon "incremental budgeting" whereby they simply added a sum each year to the previous year's costs. The pitfall in this approach was that some of the counties visited had experienced large shortfalls in assigned counsel fee appropriations at the end of a year. The following findings resulted from an examination of the fiscal management of the private bar systems:

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

- (1) Few jurisdictions had any notion of their costs per case or of any other unit measurement for projecting future costs.

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

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

Finally, the consideration of costs led the researchers to attempt to assess the impact of the financial anaemia faced by indigent defense systems upon the actions of counsel for the accused. These conclusions were based upon the perceptions of clients, community groups, rehabilitation programs, human resource agencies, defense lawyers, and prosecutors.

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

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

- (6) The failure by appointed counsel to conduct investigations in the majority of cases or to refute the prosecution's evidence through the use of forensic tests.

Other Cost-Related Considerations

Two other factors may affect the overall costs of providing defense services to the poor: the determination of defendant eligibility for appointed counsel and whether or not a jurisdiction attempts to recoup some of the costs of providing representation. These factors are fraught with policy considerations that space limitations do not permit discussing here. For further information on these topics, the reader is referred to the Report of the National Study Commission on Defense Services entitled, Guidelines for Legal Defense Systems in the United States (National Legal Aid and Defender Association, Washington, D.C. 1976).

To summarize, the study found that:

- A. The majority of indigent defense systems using private counsel lack any written criteria for determining the financial eligibility of defendants for appointed counsel.
- B. Private bar indigent defense systems rarely practice recoupment of the costs of providing defense services.

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

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

Based upon site visit interviews, this section also reports on the researchers' observations about comparisons between the defense and prosecution.

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

A. Statistical Comparisons of Performance

In five of the six in-depth study sites, counsel providing indigent defense representation compared unfavorably with retained counsel in the quality of representation provided. The only exception to this was Montgomery, Ohio, where assigned counsel were on a par with retained counsel. Thus, the finding that:

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

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

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

In the third set of comparisons of indigent defense systems within a single state, there were somewhat more substantial differences found. These differences were seen in comparing a rural part-time defender and a rural ad hoc assigned counsel system. Therefore, the finding:

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

B. Comparison of Prosecution and Defense Systems

In none of the systems visited outside of California did an indigent defense system other than a full-time public defender program hold equal status or credibility with the office of the prosecution. In comparing these two components of the adversary system of justice, the study found that:

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

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

C. Quality Controls

Given the comparisons of performance that have been presented, the question remains, to what can we attribute differences in performance. Not surprisingly, the statistical data show a correlation between the presence of quality controls and attorney performance.

1. The hybrid coordinated assigned counsel system. The coordinated assigned counsel system that operated in conjunction with a full-time defender system was the only in-depth study site which incorporated several quality controls: a) required entry-level training program; b) stratification of attorney lists according to attorney experience and type of charge; and c) early entry by virtue of jail checks made by its counterpart, the local defender office. In analyzing the docket study data, it was found that:

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

2. The pure coordinated assigned counsel system. It was interesting to learn that, while the coordinated assigned counsel system in one jurisdiction produced excellent results, a second coordinated assigned

in another state did not perform as well when compared with retained counsel within its own county. The question arose, what accounted for this difference in results between two systems bearing the same name? The answer appeared to be that the second system lacked any quality controls over the appointment or performance of assigned counsel.

The pure coordinated assigned counsel system, which lacked quality controls, performed relatively poorly when compared to retained counsel in the same jurisdiction. Thus, the presence or absence of quality controls appears to affect attorney performance.

D. The Presence or Absence of Quality Controls in Private Bar Defense Systems

The findings that were just presented led the researchers to explore the extent to which private bar systems in general possessed features which demonstrated some degree of control over the system. These were the results of that inquiry:

1. Training. The majority of indigent defense systems employing private counsel provide no training for the attorneys.
2. Monitoring. Private bar indigent defense systems rarely have any systematic procedures for monitoring of attorney performance.
3. Early representation. Few of the private bar systems studied had counsel available to the indigent accused for custodial interrogations, line-ups, for consultation shortly after arrest, or at the initial court appearance where decisions were made about pre-trial release.
4. Use of independent board or commission. Most of the indigent defense systems studied lacked any supervisory board or commission to insure merit selection, advocate for adequate funding, or insulate the system from judicial and political influence.

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

This study concludes with an analysis of the way in which cases are processed in the criminal courts of counties employing private counsel to represent the indigent accused. It undertakes to determine whether or not counties are complying with the Argersinger man-

date, whether the accused are actually accorded access to their attorneys soon after counsel is appointed; and how the counties and courts allocate the resources that are directed to the defense of indigents.

These findings convey much about the attitudes toward indigent defendants that prevail in our nation's courts.

A. Compliance with Argersinger

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

B. The Problem of Access to Counsel for Pretrial Detainees

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

C. Choice of Counsel

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

D. Allocation of System Resources Between Felony and Misdemeanor Cases

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

E. Differences in Representation Provided in Most Felony Cases Versus Serious Felony Cases

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

Conclusion

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

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

1. Is the system cost-effective?
2. Do the cost savings result in sacrificing quality legal defense?
3. Can savings be achieved by making other segments of the criminal justice system more efficient?
4. What are the quality controls needed to make the defense system function properly?
5. What is needed to strike a balance in the adversary system between prosecution and defense?
6. How should budget projections be made?

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

#

END