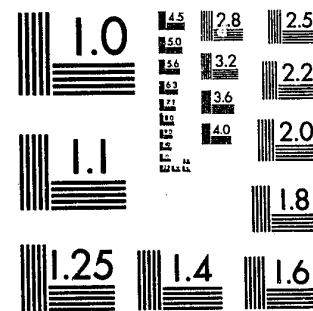


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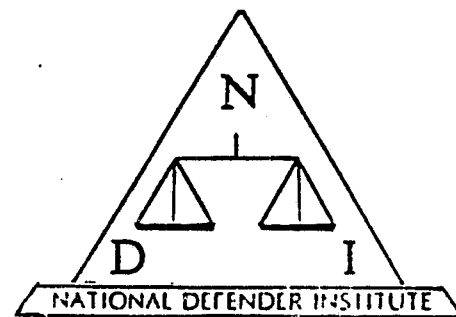
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THE FLIGHT OF THE INDIGENT ACCUSED IN AMERICA:
AN EXAMINATION OF ALTERNATIVE MODELS FOR PROVIDING
CRIMINAL DEFENSE SERVICES TO THE POOR



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ACQUISITIONS

VOLUME I

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ABSTRACT OF RESEARCH

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

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

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

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

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

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

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

ACKNOWLEDGMENTS

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

We wish to thank Ms. Cheryl Martorana, Director of the Adjudication Division of the National Institute of Justice, who provided support and valuable insight to the study design and lent assistance in securing access to data. We are very grateful to Maureen O'Connor and Bettye Chemers who, in serving as our project monitors, helped to guide the project to its successful conclusion.

Special thanks are due to our Project Advisory Board: William G. Bohn, Charles M. Friel, Ramon S. Lelli, James P. Manak, Donald Murray, Roberta Rovner-Piecznik, and Hon. James J. Richards. Their knowledge of the criminal justice system and research techniques insured a sound basis and practical approach to the research.

Particular recognition should be given to the individuals in the six in-depth study sites as well as in the six other sites which contributed to the research. In Berrien County, Michigan, our gratitude goes to Hon. Zoe S. Burkholz, Hon. John T. Hammond, and Circuit Court Administrator Lloyd Both. Drew Seaman, Director of the defense contract firm, was generous with his time and specific in his information. In Saginaw County, Michigan, we are indebted to Hon. Fred J. Borchard, Hon. Daniel Webber, Circuit Court Administrator David Cable, District Court Administrator Barbara Kalbfleisch, and Mary Jane Aspin. Peter Jensen, the assigned counsel administrator, provided more than ample cooperation and assistance. We also thank James R. Neuhard, State Appellate Defender of Michigan, for his insights about Michigan defense systems.

In Montgomery County, Ohio, thanks are owing to Hon. Carl D. Kessler, Hon. John Kessler, Hon. Michael Merz, Court Administrator Judith Cramer, and Public Defender Kurt Portmann.

Summit County, Ohio likewise provided the study team with the utmost of assistance and support. We thank Hon. John Reece, Hon. Ted Schneiderman, Court Executive Officer Anthony LaSalvia, Municipal Court Clerks Lawrence Walsh, William Quartel, and David Zampelli, and Summit County Legal Defender Joseph Kodish. For an overview of the Ohio defense system, we thank Ohio State Public Defender Randy Dana.

Assistance was amply provided in Boone County, Illinois by Hon. David Englund, Hon. Paul Logli, and Court Clerk Darlene Burkett. Similarly, many thanks are owing to Hon. Harold Nagel, Hon. Eric DeMar, Deputy Court Clerk Sharon Wand, and Public Defender Lonn Francomb in Jo Daviess County, Illinois.

The study team also wishes to extend its appreciation to the folks who assisted in enabling the study to provide profiles of the California and New York counties which added breadth to the research. In Onondaga County, New York, the team is particularly appreciative of the help given by Assigned Counsel Administrator John Parker and his staff, Hon. Thomas Aloï, Hon. Mathilda Bersani, and Attorney Thomas Marzullo. The study team is grateful for the courtesy extended by Hon. Edward Conway, Police Court Clerk Janet Gibson, and Susan Brandau in Albany County, New York. We also thank Jonathan Gradess and Donna Hall of the New York State Defender Association for providing information.

And last, but by no means least, we thank the individuals who made our California sites visits so fruitful. Phil Pennypacker, the Administrator of the Conflicts Administration Program, Hon. Peter G. Stone, and Hon. David Leahy, in Santa Clara County, John K. McInerney, the Assigned Counsel Administrator, Hon. Thomas Jenkins, Hon. Wilbur Johnson, and Advisory Board Member Ramon Lelli in San Mateo County, Public Defender Jeff Brown and Lawyer Referral Service Director Larry Long in San Francisco, and James Giller, Chairman of the Court-Appointed Attorneys Program along with Alden McClelland, Administrator of the Court-Appointed Attorneys Program in Alameda County all provided invaluable information. And a very special thanks to Santa Clara County Public Defender Sheldon Portman, whose sound advice regarding the value of visiting these systems was much appreciated.

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

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

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FINDINGS

INTRODUCTION

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

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

When the Gideon decision was handed down, 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 in this nation's courts. 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 provided before Gideon.

The problem of devising an adequate system for providing defense counsel for the poor has grown over the years as subsequent mandates of the U.S. Supreme Court have greatly expanded the need for qualified lawyers to handle the defense of indigent criminal cases. First, the range of cases involving the need for counsel has increased, particularly as a result of the landmark Argersinger decision requiring the provision of counsel in misdemeanor cases involving the loss of liberty. Secondly, the amount of work that attorneys were required to do was expanded when the Supreme Court held that attorneys were expected to provide representation at various stages of the criminal case beyond the trial itself. And third, the rate of crime continues to rise. As a result, the costs of providing representation have skyrocketed.

To further exacerbate the problem, costs are often the greatest in areas which have the least ability to afford them. Since indigent defense in most parts of the country is financed by county treasuries, the result is often that the counties having the largest amount of poverty-related crime also have the lowest tax base. This problem is particularly troublesome when one considers that the Argersinger decision alone may be responsible for increasing the state's burden to provide counsel from the earlier quota of approximately 600,000 felonies to an additional potential of 2 million misdemeanors per annum.

That situation has led to solutions which have become part of the problem. Expanding caseloads in Missouri caused a breakdown of the system when assigned counsel funding ran out midyear, and one judge decided to draft untrained lawyers on the government's payroll to fill the gap. In Washington, D.C., one judge ruled that all persons charged with misdemeanors in his courtroom must be dismissed because no more funds were available to pay appointed lawyers.

A survey published in 1973 by the National Legal Aid and Defender Association¹ pointed out the failure of state and local governments to meet Supreme Court mandates, particularly in the area of misdemeanor representation. The National Defender Institute has recently uncovered evidence that the criminal court dockets in a number of jurisdictions show a dearth of appointments in misdemeanor cases, even where imprisonment was imposed in violation of Argersinger.

Part of the difficulty in providing adequate, cost-effective indigent defense services relates to the lack of knowledge on the part of county boards and other policymakers regarding legal defense systems. With only a few exceptions, organized defense systems in the United States are only twenty years old. Furthermore, studies indicate that approximately two-thirds of U.S. counties still lack an organized system for providing defense services to the poor. As a result, many areas of the country are seeking to revamp their methods for delivering these services to ensure that effective services can be provided at the lowest cost to the public.

There are a number of factors apart from the matter of direct costs for hiring lawyers which policy-makers must consider in selecting a legal defense system. Some of these factors impact on cost in an indirect way. For example, there is the problem of ensuring that the system provides for effective representation.

The great majority of attorneys in the U.S. practice exclusively in the area of civil law, and, as Chief Justice Burger has often decried, lack expertise in the increasingly complex field of criminal law. This leads to major problems in the system. Not only may it produce unjust outcomes for defendants; it may also result in increased costs to society when cases are appealed. Moreover, the lack of ability on the part of these attorneys may result in higher assigned counsel costs due to the need for the novice to spend more time in preparation than would be necessary for the skilled criminal law practitioner.

Delays in court dockets may ultimately result in additional expense to the taxpayer in jurisdictions which, because they have failed to establish a workable system, find that there are not enough private attorneys available for appointment when courts experience a large influx of criminal cases.

U.S. Supreme Court mandates also help to dictate the type of system that may be established. For example, the high court held in Holloway v. Arkansas that a public defender may not represent two co-defendants who have conflicting interests. As a result, the private bar may have a greater role to play than was anticipated prior to Holloway.

The foregoing do not exhaust the types of problems inherent in a governmentally provided scheme for indigent defense services. Other concerns include political and judicial interference, both overt and implicit, in both the appointment process and the representation afforded; delays in commencing representation which are responsible for the loss of important rights during interrogation, line-ups, and bond hearings; and widespread client dissatisfaction with counsel. Examples have been cited of judges who avoid re-appointing attorneys who file pre-trial motions and of those who

use the appointment process as a source of political patronage. While these examples may not represent the majority of judicial appointments, any system which is designed for providing services to the public must avoid the potential for abuse as well as the appearance of impropriety.

What options, then, are available to those who must plan for the operations of a criminal justice system? What systems have been employed in the United States to provide legal defense services, and how do they compare to one another?

The present study was commissioned by the National Institute of Justice, U.S. Department of Justice, to examine the various models of defense systems that employ the services of private lawyers as opposed to full-time defenders.

The role of the private bar in providing legal assistance to the criminally accused has been recognized in national standards. The American Bar Association has urged that, "The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization and coordinated assigned counsel system involving substantial participation of the private bar."² The National Advisory Commission on Criminal Justice Standards and Goals has proposed that, "Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available to each jurisdiction..."³

In its survey, the National Legal Aid and Defender Association reported that in 2,227 counties representing over a third of the nation's population, indigent defense services were provided through the appointment of lawyers in private practice.⁴ Even in jurisdictions employing some form of defender system, lawyers who spend much of their time in the private practice of law are often used. For example, in a 1975 study funded by the Justice Department, researchers found that 46% of all defender agencies ^{surveyed} relied on a part-time director, and that 38% of those surveyed use part-time staff attorneys.⁵

Notwithstanding the widespread use of lawyers who spend all or a large portion of their time in private practice to provide defense services for the poor, there has yet been no comprehensive examination of the role of the private bar in indigent defense. The present research has undertaken to examine the use of "private bar systems" from a national perspective.

Through use of research techniques, the present study attempts to provide policy-makers with practical information on the benefits, limitations, and costs of both traditional assigned counsel programs and also the various alternatives now in use across the country.

Twelve counties throughout the United States were visited in the course of this research. In six sites, interviews were conducted which enabled the researchers to prepare descriptive reports about the operations of those systems. Among these six sites were some which contained "innovative" features that may bear replication in other jurisdictions.

In the six other sites, in-depth studies were conducted for the purpose of enabling the research team to scientifically compare the various types of programs. Data were collected and analyzed about a variety of indicators of the cost and quality of services in order to aid future policy-makers in their decision-making. Using six sites allowed the researchers to draw three sets of scientific comparisons between defense system models. In addition to the collection of statistical data, in-person interviews were conducted which allowed the researchers to: a) better interpret the statistical data; and b) convey a first-hand understanding of how well each system works.

Before proceeding to describe the systems that were revealed by the present research, it is essential to define the types of indigent defense systems that exist in the United States. First, let us define the full-time defender system, which is the one type of system that was excluded from this study.

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

The following types of systems all fall under our rubric of "private bar indigent defense systems," and therefore, are included in the scope of the present research:

PART-TIME DEFENDER SYSTEM: This is identical to the "full-time defender system" except insofar as the lawyers engage in private practice and therefore allocate only part of their time to providing representation for the poor in criminal cases. Lawyers working in a part-time defender office may or may not be prohibited from representing their private clients in criminal cases.

CONTRACT DEFENDER SYSTEM: Contract(s) between a governmental unit and one or more private law firms to provide all or a portion of the indigent criminal defense representation in a given jurisdiction. This differs from the part-time defender system in that the lawyers are not government employees, but are employed directly by the private law firm(s). This definition excludes contracts with nonprofit defender agencies having full-time lawyer staff and contracts with a bar association to administer a coordinated assigned counsel program, as those organizations would be best characterized as a full-time defender system and a coordinated assigned counsel system respectively.

COORDINATED ASSIGNED COUNSEL SYSTEM: A coordinated assigned counsel system uses private lawyers who are paid a fee for each case handled. They are appointed from one or more lists, and the appointments are generally made in rotation. The assigned counsel list(s) is under the control of an administrator. Some of the activities involved in "coordinating" the system may include: recommending appointments to judges or actually appointing individual attorneys to handle cases; reviewing attorney fee vouchers, providing back-up services for assigned lawyers, making perfunctory court appearances, and monitoring attorney performance.

AD HOC ASSIGNED COUNSEL APPROACH: This approach involves the random appointment of private lawyers on a case by case basis. There is no systematic method of appointment or coordination of attorney services.

The following matrix shows the sites where in-depth research was conducted to compare cost and quality indicators in six U.S. jurisdictions.

Table 1
MATRIX OF SYSTEM TYPES AND JURISDICTIONS

	Berrien, MI	Saginaw, MI	Summit, OH	Montgomery, OH	JoDaviess, IL	Boone, IL
Contract Defender	X					
Ad hoc Assigned Counsel			X			X
Coordinated Assigned Counsel		X		X		
Part-time Defender					X	

The two ad hoc assigned counsel jurisdictions studied differed in one major respect. Boone County, Illinois employed the random assignment of counsel as its exclusive mode of providing representation. This is perhaps not surprising for a jurisdiction of approximately 28,000 persons. On the other hand, Summit County, Ohio, a jurisdiction boasting some 525,000 persons, employed a "mixed" system whereby a substantial portion of the indigent criminal cases was handled by a full-time defender system. Thus, the in-depth aspect of this research encompasses both a "pure" and a "mixed" ad hoc assigned counsel system.

In addition, site visits were made to the counties of Albany, New York (part-time defender system), Onondaga County, New York (coordinated assigned counsel system), San Mateo, California (coordinated assigned counsel system), Santa Clara, California (coordinated assigned counsel system), Alameda, California (coordinated assigned counsel system), and San Francisco, California (coordinated assigned counsel system).

With the exception of the California site visits which took place in 1982, all of the on-site work was conducted during 1983. However, because of the necessity to study court cases which had proceeded to conclusion, most of the statistical data compiled relates to 1981 and, in some cases, to 1982 as well. Detailed information on the data included is found in the Report of Methodology, Volume 3 of this study.

Tables 2 and 3 which follow present an overview of the characteristics of each of the counties visited and of the salient features of the particular indigent defense systems in each jurisdiction.

Table 2
MATRIX OF SITES VISITED BY COUNTY CHARACTERISTICS

	Population	Crime Rate/ 100,000	Bar Size	Method of County Admin.	Area (sq.mi.)	% below poverty	%black	%pop. growth 1970-80	pop/ sqmi pop. den- sity	% mfg.	per cap. income	Extent of ct. centriztn
BERRIEN, MI.	171,276	6,905	231	County Board appts.County Coordinator	580	9.6	14.5	4.5	294	43.2	\$4,313	Separ.admin. for Fel&Misd; all 1 locatn
SAGINAW, MI.	228,059	7,767	309	No staff ad- min. besides Controller	814	7.7	15	3.8	278	38.8	4,506	same as above
MONTGOMERY, OH.	571,697	7,442	988	County Comm. appts.County Administratr	465	6.1	16.5	-6.0	1,280	38.0	4,902	Separ.admin. for Fel&Misd; sevr1 locatns
SUMMIT, OH.	524,472	6,346	1,150	Elected County Executive	408	6.3	10.8	-5.2	1,311	39.7	4,914	same as above
BOONE, IL.	28,630		24	County Board appts.Admin. Coordinator	283	6.6	30	12.5	101.5			unified cts.
JO DAVIESS, IL.	22,965		20	County Board; no staff admin.	606	7.8	5	8.1	37.9			same as above
ALBANY, N.Y.	285,909	3,493	1,100	Elected County Executive	526	5.9	6.6	-.3	547	15.6	5,034	16 M.ct. loc; 2 cts.w/Fel. jurisd.
ONONDAGA, N.Y.	463,324	5,682	1,011	Elected County Executive	794	6.6	6.5	-2.0	595	26.6	4,691	29 M.Ct. loc; 2 cts. w/Fel. jurisd.
SAN MATEO, CA.	588,164				447		6.9	5.5	1316			
SANTA CLARA, CA.	1,295,071				1,174		3.4	21.6	1103			
ALAMEDA, CA.	1,105,379				1,090		18.4	3.2	1014			
SAN FRAN. CA.	678,974				45		12.7	-5.1	15,110			

Table 3

MATRIX OF SITES VISITED BY INDIGENT DEFENSE SYSTEM CHARACTERISTICS

	System Type	How Admin-istered	Who Hires Admin-istrator	Fee Type	Extent of Priv. Bar Participatn	Strati-ficatu of lists	Train-ing	Formal Monit-oring	Support Services Provided To Attys	Maximum Fees Allowed	Cost/Case	% of indgent cases handled by priv. bar
BERRIEN, MI.	Contract	Priv. Law Firm	County Board	Annual Budget	Small Group (law firm)	N/A	NO	NO	clerical only	N/A	\$139/* Felony \$40/M*	All cases
SAGINAW, MI.	Coord. Assigned Counsel	A/C Adm'r	County Bd. w/ Ct. input	Fel: by event; M:\$30/hr.	1/4 of bar	NO	NO	NO	NO	None	\$262/ Felony \$158/M	All cases
MONTGOMERY, OH.	Hybrid Coord. A/C	Court w/asst. of p.d.	Court	Flat fee + hourly	1/4 of bar	YES	Entry level only	NO	NO	\$1,000/Fel 500/Mis	\$331/ Felony	60% fel.; only conflict misd.
SUMMIT, OH.	Mixed Ad Hoc A/C	Court	N/A	Hourly \$30/\$20	1/6 of bar	NO	NO	NO	NO	\$500/Fel \$300/Mis	\$288/ Felony	Almost all fel. cases; no misd.
BOONE, IL.	Pure Ad Hoc A/C	Court	N/A	"Reason-able" hourly	1/5 of bar	NO	NO	NO	NO	None	\$293/ Felony \$121/M	All cases
JO DAVIESS, IL.	Part-time Defender	Public Defender	Court	Annual Budget	1 p.d. + 1/4 for conflicts	N/A	NO	NO	NO	N/A	\$249/ Felony \$80/M	All cases
ALBANY, N.Y.	Part-time Defender	Public Defender	County Board	Annual Budget	Small Group (p.d. ofc)	N/A		NO	clerical & invest.	N/A		All cases
ONONDAGA, N.Y.	Mixed Coord. A/C	A/C Adm'r + Court	Bar Assn.	Hourly \$25/\$15	1/5 of bar	YES	YES	YES	NO	\$750/Fel \$500/Mis		All fel.; no misd.
SAN MATEO, CA.	Coord. Assigned Counsel	A/C Adm'r	Bar Assn.	Activity fees + \$35-\$40/hr.	1/6 of bar	YES	YES	YES	YES	None	\$179 average	All cases
SANTA CLARA, CA.	Mixed Coord. A/C	A/C Adm'r	County Bd.	Activity fees	1/10 of bar	YES	YES	YES	YES	None		Conflicts only
ALAMEDA, CA.	Mixed Coord. A/C	Bar Refer. Adm'r	Bar Assn.	Activity fees	5% for conflicts	YES	NO	YES	YES	None		Conflicts only
SAN FRAN., CA.	Mixed Coord. A/C	Bar Refer. Adm'r	Bar Assn.	Fel: hourly, 5% \$36&\$24/hr. for M: activity	5% for conflicts	NO	NO	NO		None	(est.) \$651/F \$217/M	Conflicts only

*The Berrien County cost data does not include certain overhead costs. However, these costs are estimated to run no more than \$5/case.

This report is divided into three volumes. This, first, volume contains a complete descriptive report of all of the sites visited and information contained. For the six sites where in-depth studies were conducted, there are Profile Reports. These contain, for each site, a detailed description of the operation of the indigent defense system, a statistical analysis of objective data gathered about cases handled by assigned and retained counsel, and an analysis of costs.

Volume I also contains the statistical comparisons that were made between the three sets of in-depth study sites. One chapter compares the docket study data and a second chapter compares the cost data. The volume concludes with the findings that were drawn from the study.

Volume II consists of a Policy-Makers' Report which presents the highlights of Volume I and draws conclusions about the implications of those findings for those having the responsibility to design and fund future programs for providing defense services.

The final volume consists of a detailed report of the methodology used in conducting the research. It includes a copy of all instruments (interview questionnaires, docket study coding forms, etc.) used in the study.

FOOTNOTES

INTRODUCTION

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3. National Advisory Commission on Criminal Justice Standards and Goals (1973) Courts, Standard 13.5. Washington, D.C.: Government Printing Office.
5. Singer, S. and Lynch, E. (1983) "Indigent Defense Systems: Characteristics and Costs" The Defense Counsel. W. McDonald, Ed. Sage Publications.
4. Supra, note 1.

PART I

THE MONTGOMERY COUNTY, OHIO HYBRID
COORDINATED ASSIGNED COUNSEL SYSTEM

CHAPTER I

PROFILE OF THE MONTGOMERY COUNTY, OHIO HYBRID

COORDINATED ASSIGNED COUNSEL SYSTEM

The Environment of the Indigent Defense System

Settled in 1796, the area that is now Montgomery County was attractive to settlers because of its fertile farmland and abundant water supply. Many flatboats travelled the Great Miami River to and from the Ohio River. In 1929, the Miami Canal was extended to Dayton, bringing with it a means for fast, economical travel to and from large centers along the Ohio River.

Located in Southwestern Ohio, Montgomery County, with its 571,472 persons, is the fourth most populous county in the state. Its largest city, Dayton, which comprises over a third of the county's population, boasts 199,917 persons. The county has a land mass of 465 square miles with a population density of 1,228 persons per square mile. The population is 82.4% white, 16.5% black, and 1% other minorities.

Three elected County Commissioners preside over county government, sharing responsibilities with eight other separately elected officials: the Clerk of Court, Coroner, Engineer, Prosecuting Attorney, Recorder, Sheriff, Auditor, and Treasurer. The county's chief executive, the County Administrator, is appointed by the County Commissioners.

While slightly below the national average in its rate of unemployment, the area has not been as hard hit by the recession as some of the counties examined. Per capita income stood at \$7,743, while effective buying income for the median household in 1981 was \$23,296. The Dayton area showed an unemployment rate of 9.3% in November of 1981, which was three percentage points better than the Youngstown area and 1.5 points lower than the average for the state.

The City of Dayton has approximately 800 manufacturing plants which distribute over 1,000 products. Its major products include aircraft, automotive parts, air conditioning, cash registers, printing, and business forms. However, only 26% of Dayton's employees are engaged in manufacturing; the majority of workers are employed in services, government, and retail sales.

The 1983 total county budget comes to \$183,118,860, of which 17% was spent for "law enforcement and justice." Among other costs, this includes \$3.5 million for the prosecutor's office, \$1.1 million for public defender services, and \$405,000 for assigned counsel.

The county receives state aid to defray part of the cost of both public defenders and assigned counsel. During 1981, the county received \$182,371 for public defenders and \$149,086 for assigned counsel from the state. The 1981 county appropriation for public defenders was \$752,411 and expenditures were \$711,669. Payments to assigned counsel were \$455,758 in 1981 and \$341,052 in 1982, while \$405,000 was budgeted for 1983 appointments.

The Montgomery County Bar Association has approximately 1,200 lawyers of whom about 800 were in the private practice of law. In 1975, census figures showed a crime rate of 7,442 crimes per 100,000 population. Over 10,000 misdemeanor cases were filed in the Dayton Municipal Court during 1981, while 2,345 felony cases reached the Montgomery County Court of Common Pleas that year.

The Criminal Justice System

The Courts

There are two levels of courts in Montgomery County: the lower courts, which are the Municipal or District Courts, and the upper court, which is the Court of Common Pleas. The lower courts have criminal jurisdiction over all ordinance violations and misdemeanors and conduct preliminary hearings in felony cases. The Dayton Municipal Court has 5 judges who hear both criminal and civil cases.

The Court of Common Pleas, in its General Division, has exclusive jurisdiction over felonies after the preliminary hearing stage. There is a Court of Common Pleas in each of the state's 88 counties. The General Division of the Montgomery County Common Pleas Court has 9 judges who hear both criminal and civil matters. Each Common Pleas Court is independent of the others in that there is no centralized administration in the state, but each has its own Presiding Judge.

Judges in the Dayton Municipal Court earn \$50,750 per year, while Common Pleas judges earn \$55,000 per year.

The Criminal Justice Process

All felonies must be prosecuted by way of indictment unless indictment is waived; only if indictment is waived can a felony proceed by way of information. If the defendant is indicted prior to the preliminary hearing, no hearing will be held. However, preliminary hearings are required in all other felony cases unless the defendant waives the hearing in writing. Where there is no waiver and the defendant is in custody, the preliminary hearing must be held within 5 days of arrest (Rule 5, Ohio RCP).

There are two stages of a felony case which take place in the lower (Municipal) court -- the Preliminary Arraignment and the Preliminary Hearing. If probable cause is found at the Preliminary Hearing, then the case is bound over to the Court of Common Pleas where the felony Arraignment takes place.

The Montgomery County Court of Common Pleas has adopted a Court Management Plan with the goal of shortening case processing time to 45 days from arrest to trial. At the time of the preliminary hearing in Municipal Court, the prosecutor serves notice of the time for the central arraignment in the Court of Common Pleas; central arraignments are held twice a week.

At arraignment in the Common Pleas Court, the prosecutor is supposed to give the defense an "information packet" consisting of discovery material. Reciprocal discovery is triggered by the defense's acceptance of the information packet. A pre-trial conference date is included in the prosecutor's packet; the scheduled date is within a week of arraignment.

This is followed shortly by a "scheduling conference," which is a court date to report on the pretrial conference. Once the scheduling conference is held, the felony case is not to be disposed of by anything other than the indicted charge. This process is intended to eliminate last minute plea bargaining.

This system attempts to set cases for trial within 2 weeks of the scheduling conference, although that does not necessarily occur.

Pretrial Release and the Use of Bail Bondsmen

Bondsmen are rarely used in Montgomery County. The courts make liberal use of 10% bail and often employ release on personal recognizance. (See Rule 46, Ohio RCP.)

The Department of Pre-Trial/Community Services of the Dayton Municipal Court has a staff of three who provide bond recommendations and community services supervision. Each day, counselors obtain information on all arrested persons booked in the City Jail on felony or first-degree misdemeanor charges and make a bond recommendation to the arraigning judge. The recommendation is based on verified information, including the person's prior record and history of appearing for court.

Using the verified information obtained, the counselors will at times recommend that the accused be released to the department's supervision and counseling prior to trial. 608 defendants were released on a personal recognizance bond to the department's supervision in 1982. In addition, 236 defendants were released on recognizance without supervision.

The Department projects that if all 844 defendants released had spent an average of 7 days in jail awaiting their court date at \$33/day, the cost to the city and county would have been \$194,964.

In the upper court, the Court Liaison Division of the Adult Probation Department interviews defendants and makes recommendations regarding conditions of release to the arraigning Common Pleas judge. Those defendants who are given conditional release are supervised by Adult Probation staff.

However, notwithstanding the existence of pre-trial release programs at both the Municipal and Common Pleas Court levels, our statistical study showed that 25% of assigned counsel clients and 10% of retained counsel clients remained in jail pending case disposition.

Probation

The Montgomery County Adult Probation Department has 25 probation officers for 2300 pending cases. In addition to their caseload, each officer conducts six to eight pre-sentence investigations each month. The probation department relies upon counsel for the defendant to develop dispositional plans for their clients and to make contacts with social service agencies.

The Probation Department solicits information from defense counsel for their pre-sentence investigations on a special form designed for that purpose. They request input regarding information that is relevant to sentencing and they ask for defense counsel's recommendation for conditions of probation.

The Prosecution

There are 27 full-time attorneys on the staff of the Office of the Montgomery County Prosecuting Attorney who handle trial level felonies in the Montgomery County Court of Common Pleas. In addition, the office has 5 prosecutors in the lower (District) courts outside of Dayton who handle misdemeanors and preliminary hearings in felony cases. The office also has 3 prosecutors who handle juvenile delinquency matters, 3 felony appeals attorneys, and 2 consumer fraud attorneys. This comes to a total of 40 full-time attorneys in all.

The 40 attorneys do not handle misdemeanors in the Dayton Municipal Court. These are handled by a separate office.

In addition to the various police and sheriff's personnel who provide investigatory information to the prosecution, the Montgomery County Prosecuting Attorney's office employs 8 staff investigators.

While the office tends to be moving toward vertical representation, separate attorneys presently handle the grand jury, preliminary hearing, and trial stages of a felony case.

The total 1983 budget for the office is \$3,509,460; this supports 119 full-time and 126 total positions.

The Indigent Defense System

The Ohio Indigent Defense System

In accordance with Ohio law (Ohio Rev. Code, Ch. 120), Ohio counties have three options in providing defense services to the indigent accused: 1) a county public defender system; 2) a joint county public defender system whereby counties share defender services; and 3) an assigned counsel system. They may also utilize a combination of those models. In those counties which elect to establish a public defender system, a County Public Defender Commission must be formed.

The Montgomery County Indigent Defense System - An Overview

Montgomery County has elected to form a public defender office, and also employs a coordinated assigned counsel system with coordination being performed partially by the courts and partially by the defender office. The functions of the defender system and the coordinated assigned counsel system are intertwined.

The defender office handles the early stages of every indigent felony case in the county except for those which present a conflict of interest for the office. Approximately 60% of the felonies originally processed by the defender office are subsequently assigned out to appointed counsel. Forty percent of the felonies remain with the defender office. In addition, the defender office handles the indigent misdemeanor cases throughout the county.

Because assigned counsel rarely handle an appointed case from the very beginning, the coordinated assigned counsel program in Montgomery County can best be described as a mixed, or "hybrid" system. This system could not be replicated in any jurisdiction lacking a staff attorney component.

Office of the Montgomery County Public Defender

As previously noted, this office handles all indigent misdemeanor cases in the county and 40% of the indigent felonies. In addition, it provides representation in juvenile delinquency cases, parole and probation revocation matters, extradition cases, and appeals.

The staffing of the office is as follows: 16 full-time trial attorneys, including the director, 2 full-time appellate attorneys, 8 secretaries, 2 investigators, 3 intake workers, and a half-time business manager. One/tenth of one investigator's time is used in assisting appointed counsel, who use the person about three times each month.

All representation provided by public defender attorneys is vertical; that is, they handle a case from beginning to end, except where a felony case is referred out to assigned counsel after the preliminary hearing.

The percentage of felony cases to be handled by the office is negotiated with the judges.

The office is governed by a Public Defender Commission in accordance with state law. The Commission is composed of five persons; 2 are appointed by the Presiding Judge, while 3 are appointed by the county board. They review the budget request prepared by the public defender and submit it to the county board.

Operation and Administration of the Coordinated Assigned Counsel Program

As previously noted, assigned counsel are generally not employed to handle indigent misdemeanor cases. The only exception is when a case represents a conflict of interest for the public defender's office. In those instances, the individual lower court judges make the appointment on a random basis.

Thus, all of the discussion of the assigned counsel system in this report relates to the coordinated assigned counsel system administered by the felony court with some assistance by the local defender agency.

The assigned counsel system is under the administrative control of a strong chief judge of the felony court. Various court employees perform the daily ministerial duties of running the program, but the chief judge maintains the ultimate authority.

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

The coordinated assigned counsel program in Montgomery County is responsible for handling the majority of indigent felony cases. The indigent felony cases comprise 75% to 80% of the court's total felony caseload.

There is no formal supervisory structure or monitoring system for assigned counsel performance. The judges maintain their inherent authority to expel an attorney from the assignment lists, but no one can recall any specific instance when that was done. However, the chief judge reserves the right to determine which attorneys are permitted to handle the most serious cases, and individual judges decide which of a list of 5 attorneys is appointed to handle a very serious case coming before them.

The public defender office helps out in cases which are ultimately referred to appointed counsel in two major respects: making initial eligibility assessments and providing representation at the lower court stages of a felony case. Their work is detailed below.

Case Entry; Duties; Early Representation

Early provision of defense services in appointed counsel cases is accomplished by relegating this function to the public defender's staff. The following is a detailed account of the early entry services provided.

The defender office has 3 intake workers. Every week-day morning at 7:30 a.m., an intake worker from the defender office arrives at the jail and checks the jail log to identify new arrestees. The intake worker then proceeds to interview each new arrestee and fills out the following forms: a financial inquiry; an affidavit of indigency; an authorization for release of information; a case activity report; and an intake/referral form. The worker also: files the affidavit of

indigency with the court, obtains rap sheets from the police records department, briefs the defender attorney on the client, and sits in court in order to obtain and note the date of the preliminary hearing and case number on the intake form. Defendants who have been released from custody are interviewed by the intake worker in the courthouse on the date of their first arraignment or in the defender office.

The defender lawyer does not conduct any initial interview with a person arrested on a felony charge until after the arraignment. The first time that the lawyer sees the defendant is in the courtroom after a quick briefing by the intake worker. The defenders provide representation to all indigent defendants at the arraignment stage.

Unless the defendant waives a preliminary hearing, the hearing is scheduled for no later than 5 days following the arrest for a defendant who is in custody or no later than 15 days after arrest for a defendant who is not in custody.

After the arraignment, the defender will conduct an initial interview with the defendant. In approximately 10% of the cases, the defender's office will also conduct some investigation prior to the preliminary hearing. In some cases, the defender agrees to waive the preliminary hearing if the prosecutor agrees to reducing the defendant's bond. The defenders handle all preliminary hearings for indigents charged with felonies; however, preliminary hearings are waived in 20% to 30% of their cases.

Notwithstanding the procedures instituted for careful jail checks by the defender office's intake worker, there were complaints about the lack of sufficiently early entry by lawyers heard in several quarters. A jail official complained that the defendants do not see any attorney until after arraignment. The arraignment is often two days after arrest, and in some cases, defendants seem to get lost in the jail system and are not arraigned for 3 weeks. Two inmates who were interviewed complained about the lag time until their first interview. In one case, the first interview took 7 days from the time of arrest, while in the second, there was no interview until the defendant had been in county jail for 3 to 4 weeks. An attorney who handles appointed cases complained that in most of the cases referred from the public defender, the defender's policy of waiting until after the arraignment resulted in the clients' already giving statements to the police.

Following the preliminary hearing, the defender office will refer about 60% of the felonies to the court for assignment of appointed counsel. The defender office makes the decision as to which cases are assigned to the appointed counsel lawyers based upon their own office's caseload and logistics. Also, cases which consume too much staff time, such as aggravated murder cases, may be delegated to appointed counsel, thus allowing the assigned counsel component to serve as an overflow valve for the defender system.

The public defender office uses a 1-page Felony Case Evaluation Report form to help them in determining which cases to give away. They keep the case if: a) there is a good issue to be tried; b) there will be an automatic plea; or c) they will be unable to provide vertical representation (keep the same lawyer on the case). In addition, they will assign cases out to the private bar if there is a peak period of case activity, e.g., when there is a massive "drug bust" by the police.

Selection and Assignment of Appointed Counsel

All felony appointments of counsel are made by the Presiding Judge of the Court of Common Pleas with the assistance of the court's Assignment Commissioner, who works under the supervision of the Court Administrator. The Assignment Commissioner's office's primary duties relate to docket control; the assignment of counsel is an additional responsibility.

All attorneys are eligible to participate in court appointments to indigent criminal cases. However, an attorney wishing to be placed on the assignment lists must fill out an application form and attend a two-day seminar sponsored by the bar association.

However, not every attorney can be appointed to handle a given case. Felonies in Ohio are classified as 1st, 2nd, 3rd, or 4th degree felonies, and the attorneys are categorized accordingly. While some attorneys may only be qualified to handle 4th degree felonies, others are placed on all of the lists.

Classification of attorneys for the lists is performed by the Presiding Judge. In the event that an attorney wants to move into a higher category, he or she must see the Presiding Judge.

The designation of attorneys to handle court-appointed cases is done by a clerk in the Assignment Commissioner's office. Lawyers are assigned from the lists in rotation by the clerk. However, in a murder case, the assistant assignment commissioner will give 5 names to the judge, and the judge will make the final selection.

Each attorney on the lists is given a case once every 4 to 6 weeks. Attorneys who are busy when contacted must wait until their turn comes around again.

The office has no procedure for keeping track of an attorney's pending appointed caseload, since they are not notified when a case has been closed. However, a lawyer will generally receive only about 12 appointments per year.

While most of the people interviewed felt that the assignment system was fair and objective, one judge stated that if one of the lawyers was "a pain," he would not be appointed to another case. Another observer pointed out that some judges don't want certain lawyers in their court, but that most of the favoritism had been eliminated by use of the Assignment Commissioner system.

In murder cases, the court has a greater degree of involvement in the appointment system. According to an attorney who accepts appointments, "non-boat rockers get the appointments in murder cases." One of the appointing judges said that he won't appoint attorneys who "file too many motions" in a murder case.

There are 221 attorneys who participate in the appointed counsel system for Montgomery County, or approximately 1/4 of the practicing bar. During the past two years, some 30 lawyers have removed their names from the appointment lists. No attorneys have ever been removed from the lists involuntarily as far as any of the respondents could remember.

In addition to handling appointments of private lawyers, the assistant assignment commissioner processes appointments made to the public defender's office. She simply officially assigns to that office the cases that the public defender has indicated that they are willing to accept.

The clerk who performs these duties is a non-lawyer who has had some college education. Approximately 35% of her time is devoted to indigent appointments. Until recently, the assistant assignment commissioner spent 50% of her time on these duties; however, her duties were changed to remove the processing of fee vouchers from her bailiwick.

Fee Processing

Fee processing is now performed under the direct supervision of the Court Administrator. This change occurred due to complaints from appointed counsel concerning the previous system. A major outcry arose from the bar when the system was changed from an hourly to a flat rate fee structure. Many of the attorney's bills were being reduced by the Assignment Commissioner's office because of the change in fee structure, and the attorneys were not learning of the reduction in their bills until they received a check some 2 months after they had submitted them.

Under the new system, once attorneys submit their bills (which must be done within 30 days of closing a case), the Court Administrator's office notifies the attorney immediately by telephone if his or her bill is to be cut. This gives the attorney an opportunity to discuss the bill or possibly appeal to the judge if the attorney believes that it is unfair. Approximately 50% of all bills submitted are being changed by the Court Administrator's office because they do not con-

form to the new fee schedule.

Following corrections made by the Court Administrator, the trial judge reviews each fee voucher. It is subsequently reviewed by a clerk in the office of the County Commissioner. Finally, it is sent to the County Auditing Department for payment.

The appointed attorneys have voiced two major complaints about the way in which their fee vouchers are processed. First, they are disturbed about the fact that their bills are reviewed by non-attorneys who cannot appreciate the amount of work that goes into the handling of a case.

Their second complaint relates to the fact that bills must be submitted within 30 days of case disposition, or they are refused. This raises an apparently insurmountable problem in certain cases where the defendant is placed on "shock probation." In those cases, the defendant must serve at least 30 days in the penitentiary before the attorney may file the shock probation motion to suspend further executive of the defendant's sentence. As a result, the attorney's work is not completed until after the 30 day period for requesting payment has run. Nevertheless, the County Administrator has refused to pay attorney fees submitted after the 30 day period in those cases.

Determination of Defendant Eligibility

In most cases, the public defender's office makes the initial determination of client eligibility for representation subject to review by the court. As noted previously, the public defender's intake worker obtains financial information from each prospective client, using the financial inquiry form and makes a determination of eligibility based on general office guidelines. Information which is questionable is verified by public defender office staff.

The defendant signs an affidavit of indigency, which is submitted to the court. If the court requests it, the financial inquiry form will also be submitted to the court for review. In most cases, the court appoints counsel based upon the eligibility determination made by the public defender staff.

In some instances, where the public defender staff has had no opportunity to interview the defendant prior to felony arraignment, the judge will make an eligibility determination from the bench. The public defender staff will, nevertheless, obtain financial information from the defendant following the court's appointment.

Thus, the public defender's office performs the function of eligibility determination as well as providing early representation for the clients of assigned counsel in this hybrid system.

Financial Implications of the Hybrid Coordinated Assigned Counsel System

1. Attorney Fee Structure. The fees for appointed counsel in Montgomery County were changed in January of 1982. Under the old fee schedule, fees were based on the number of hours spent, with \$30 /hour for in-court and \$25/hour for out of court activities.

The new fee structure is a combined flat rate and hourly system. There is a \$150 flat rate for the first appearance, a client conference, 1 dispositional appearance, and 1 pre-trial conference. This accords with the court rules which states that the fees in a felony case consist of a flat rate of \$150 for "all basic legal services" and hourly rates of \$40 in-court and \$30 out-of-court for other services. (R. 309, 1983 Rules of Practice and Procedure, Montgomery County Court of Common Pleas.) The underlying assumption for this fee structure seems to be that many felony cases can be disposed of by a defense attorney in 4 to 5 hours. (See Exhibit A for fee schedule.)

There are maximum fees of \$1,000 for felonies, \$4,000 for murder cases, and \$500 for misdemeanors. Basic legal research is included in the \$150 flat rate. Since misdemeanor cases requiring appointment of counsel are handled by the public defender's office unless they involve a conflict of interest, there are few cases where assigned counsel fees must be paid for the handling of misdemeanors.

The Ohio Public Defender Commission provides partial reimbursement for county expenditures on indigent defense -- up to 50%. The Commission has set standards that provide for hourly fees at the rates of \$40/hour in-court and \$30/hour out-of-court. They will reimburse the county at those rates, or, if the county's fee resolution is lower than the Commission's standards, the Commission will reimburse the county at the County's maximum fee rate. Thus, the

county will receive more reimbursement if it meets the levels of fees set by the State Commission. These standards are intended to help provide uniformity in fees and to establish minimum standards for the payment of appointed counsel.

2. Reimbursement for Other Defense Costs. Attorneys submit vouchers for their fees on forms which are provided by the State Defender's Office. According to local court rule, they may request such items as expert witness fees, polygraph examination costs, long distance phone calls, photocopying, and certain travel expenses. However, prior court approval must be obtained for expert witnesses and travel expenses. Reimbursement is not provided for local mileage or local telephone calls.

The courts will not approve requests for payment of investigative services, inasmuch as there is a tacit assumption that investigators will be provided for appointed counsel through the public defender's office. However, that office is short of investigative staff to meet its own needs, and the investigative branch of that office has been referred to as its "weak link." As a result, most assigned counsel cases do not utilize investigative services.

While theoretically, appointed counsel could request the services of an independent polygraph examiner, in practice, judges reportedly resist such requests and insist on the defense's use of the polygraph examiner in the Dayton Police Department. Moreover, some judges will refuse to pay for the defense to have the opinion of an independent psychologist.

Some attorneys complained about the need to receive prior approval from the court for the employment of experts because it reveals the defense strategy. One attorney revealed that he will sometimes "eat" the cost of a psychiatrist or polygraph examiner if the results are unfavorable rather than request prior approval from the court, since the results would otherwise be exempt from discovery as part of the attorney's "work product." (Rule 16, Ohio RCP.) Such reports are discoverable only if the attorney intends to use them at trial.

Some persons interviewed called for the addition of an investigator or investigative service for assigned counsel to make them more on a par with the prosecution.

3. Adequacy of Fees. There was virtual unanimity among interviewees that the fees paid to appointed counsel are woefully inadequate. County Commissioners, judges, prosecutors, and defense attorneys all expressed the view that fees were not high enough to motivate attorneys to remain involved in indigent defense work. Several persons characterized the problem by saying that there was no one to "front" for the lawyers -- that the public was not interested in vigorous advocacy for accused persons, and thus, when it came to budget-cutting time, attorney fees were the first to be diminished. Or, as one lawyer put it, the county board makes their cuts where "no one will get on their case."

Observers point out that, between 1977 and 1982, judges' salaries increased by 35%, while appointed counsel rates had not increased during the same time period.

There were large disparities found between the appointed counsel fees and rates charged by the private bar for retained cases. Office overhead was pegged at from \$11 to \$35 per hour, and fees generally charged ranged from \$50 to \$100 per hour. Thus, in many cases, appointed counsel fees barely covered office overhead, and did not provide any net income for the attorneys.

Whereas the maximum fee for an appointed felony case is \$1,000, attorneys estimated that privately retained cases would cost from \$1,500 to \$2,000 for a 4th degree felony and from \$6,000 to \$10,000 for a 1st degree felony.

Some persons expressed the view that the present fee schedule encourages attorneys to take the easy way out, i.e., to avoid investing any time in a case. A committee of the local bar association has considered a lawsuit over the issue, and favors a rate of \$50 for in-court representation and \$40/hour for out-of-court time with a minimum of \$400 per case rather than the flat fee of \$150 for plea bargained cases without pretrial motions. The bar's complaints about fee-cutting to date have resulted only in the responsibility for fee-cutting being shifted from the Assignment Commissioner to the Court Administrator.

Fee-cutting has been one of the greatest complaints among appointed lawyers. Since the ultimate decision as to the amount of fees paid is that of the trial judge, judges who believe that attorneys performed unnecessary work on a case or engaged in what they consider "frivolous" motions will disallow some of the hours claimed by the attorneys. This results in the effective hourly rate received being decreased well below the \$30/\$40 per hour level.

The local bar association committee has proposed that, rather than have fee-cutting performed by the trial judge or by non-lawyer court staff, an arbitration panel consisting of 3 lawyers with extensive trial experience decide upon fee questions.

Appointed lawyers also complained that the fee-cutting is part and parcel of the judges' view that indigent defendants do not deserve the same degree of competence on the part of the lawyers as do defendants with retained lawyers. One lawyer stated that judges in an appointed case expect no more than a "medium fair" trial, but expect the lawyers to fight for their clients in retained cases. Another attorney charged that judges refuse to allow continuances in indigent cases.

There was general agreement that the fee structure discourages the private bar from accepting appointed cases and that a number of the more experienced lawyers had withdrawn from the appointed counsel list because they felt that the rates and rampant fee-cutting were unfair.

4. Impact of Change from Hourly to Flat Rate Fees. As noted above, Montgomery County changed its assigned counsel fee structure to a flat rate system at the beginning of 1982. An analysis was performed to ascertain whether or not this resulted in a lower cost per case to the county.

Figures for this computation were taken from the ledgers maintained by the fiscal staff of the county showing annual expenditures and individual payments made to appointed counsel for calendar years 1981 and 1982.

For the year 1981, a total of \$455,758 was expended for appointed counsel to handle 946 felony cases.¹ This computes to an average cost per case of \$482.

For the year 1982, a total of \$341,251.93² was expended for appointed counsel to handle 851 cases. This computes to an average cost of \$401 per case, a savings of \$81 per felony case. Thus, the flat rate system appears to produce cost savings for the county. On the other hand, another possible factor in cost reduction is the county's refusal to pay invoices which are submitted after the 30 day deadline. The relative importance of this factor is difficult to assess.

¹This figure does not include other direct costs of case processing such as work performed by the public defender on the initial stages of a felony case and administrative work performed by court staff. For an analysis of other 1981 case costs, see the cost chapter of this report.

²This figure has been adjusted to account for an error found by the research staff in the county's ledger books whereby one item was backed out of the books twice.

Choice of Counsel

The Ohio Statutes (§120.33) provide that an indigent person has the right to "select his own personal counsel to represent him" in lieu of receiving court-appointed counsel. It further provides that the counsel selected by the indigent person shall be compensated by the county for the representation provided.

There appears to be little, if any, recognition of this provision at the county court level. No formal procedures are available to accord the accused an opportunity to select his own her own counsel, and, with some notable exceptions, neither judges nor defendants appear to be aware of this right. One of the more well-informed judges pointed out that, in light of the statute, the courts probably have an obligation to advise defendants that they have a right to choose their lawyer.

Indeed, judges appear to routinely flaunt this law. Even those judges who were aware of the law observed that, as a matter of practice, defendants were not accorded their rights to select their lawyers.

Continuity of Representation

By the very nature of the system's design in Montgomery County, there is no continuity of representation between the initial arraignment in the lower court and the time that a felony case is bound over to Common Pleas Court for an appointed case. As we noted previously, the public defender office handles almost all indigent felony cases at the initial arraignment and preliminary hearing stages.

This system results in certain deficiencies. According to the prosecution, there is no transfer of discovery information from the public defender office to assigned counsel. The prosecution must

re-xerox all discovery information given to the public defender for the newly appointed lawyer.

It may also be assumed that, if the public defender's file is not handed over to appointed counsel, other valuable information contained therein about the defendant may be lost to the appointed lawyer. For example, the defendant must be given a second factual interview. Any information contained in the initial factual interview or investigative work performed would be lost. Moreover, the attorney-client relationship would be undermined by the necessity to go over the same ground a second time with a new lawyer.

The transfer of representation also proves cumbersome for the prosecution in dealing with the defense. Plea bargaining is more difficult to accomplish in lower court. Moreover, assigned counsel are not familiar with the case by the time that it is bound over to the upper court.

In sum, the disjointed nature of the system leads to duplication of effort by both prosecution and defense, and may cause delays in the system in addition to adversely affecting the defendant's perspective.

Training, Investigation, and Supporting Services

1. Training. As previously noted, all appointed counsel are required to attend a 2-day seminar sponsored by the bar association in order to participate in assigned counsel work.

After the one orientation seminar, no further training is required for appointed counsel. This poses a problem regarding the adequacy of training considering the fact that a large portion of the lawyers on the appointed counsel lists are newly out of school.

2. Investigation. The adequacy of investigations conducted by appointed counsel has been the subject of criticism. The prosecution has observed that assigned counsel do less adequate investigations than retained counsel and also introduce less in the way of physical evidence at trial.

The \$1,000 cap on fees for handling felony cases virtually prohibits assigned counsel lawyers from conducting their own investigations. Nor are lawyers trained to conduct investigations. Meanwhile, the courts will not permit assigned counsel to obtain reimbursement if they hire outside investigators. And, assigned counsel rarely receive investigative assistance from the public defender's office.

The courts keep a tight rein on expenses in appointed cases. Judges tell the lawyers to go to the public defender office if they want investigators. Judges tend to justify the lack of investigation in appointed cases by pointing to liberal discovery rules in that the prosecutor hands the file over to defense counsel in most cases.

The police department observed that assigned counsel rarely use investigators, while the public defenders do.

This situation leads to an imbalance in the adversary system. On the one hand, the prosecution is served by police and sheriff's personnel who provide them with investigation in addition to 8 staff investigators, all of whom ferret out incriminating information. On the other hand, appointed counsel have no assistance in uncovering exculpatory information.

3. Other Supporting Services. No social work staff are available for appointed counsel, nor did any interviewee suggest that social service assistance had ever been employed by assigned counsel. Expert witnesses were seldom approved by the court.

Supervision of the Program and Monitoring of Attorney Performance

No formal procedures have been adopted by this jurisdiction for monitoring of appointed counsel performance. Whatever informal monitoring is done depends upon observations by the judges before whom attorneys appear.

One of the judges interviewed said that he didn't believe that the monitoring done by judges was adequate because the judges can't tell how the attorney prepares his case, deals with the client, or just how good an advocate the attorney is, since less than 10% of cases go to trial -- as a result, the judge sees only the "tip of the iceberg."

Another judge commented that he had complained to the Assignment Office three times about appointed attorneys, but didn't know whether the attorneys had ever been removed from the appointment list.

The court administrator's office reported that attorneys are not removed from the list, but may be moved to another list (e.g., from 1st degree felonies to a lesser felony list). However, the Chief Judge makes the final determination of which attorney goes on which list.

While it was generally agreed that the Chief Judge could terminate an attorney from the appointed counsel lists, one of the judges pointed out that he couldn't recall any instance where an attorney had ever been terminated.

Local Perspectives of the Hybrid Coordinated Assigned Counsel System

In general, the opinions expressed by the various actors about the appointed counsel system were critical. Appointed counsel were adversely compared to retained counsel. A portion of the blame for criticism of the system was attributed to the low fees paid.

Probation

Probation Department staff noted a difference between the amount of effort and results obtained by assigned and retained counsel. Retained counsel were said to get more clients out on bond and to attempt to "handcarry" their clients through the system better.

Judges

Four of the judges interviewed commented adversely about the relative performance of appointed counsel. One said that retained counsel were generally older and more experienced, that they performed better, that they engaged in more motion practice, had more trials in serious cases, and had more of their cases dismissed. He also thought that the flat fee system was unfair, and that there should be a \$55/hour rate.

A second judge thought that retained counsel did better than assigned lawyers with regard to the length of sentences received because they were more tenacious and knew how to operate better. He justified the low fees paid by saying that it's a lawyer's duty to be on the appointment list as a service to the community.

A third judge observed that many lawyers take their names off of the appointment list because they feel that they don't receive as good treatment from the court when they appear as appointed counsel and because the fees are inadequate. However, he noted that many new

lawyers come on the list to handle 4th degree felonies.

Finally, a fourth judge thought that, while the fees are "not enough," it was all that the county could afford. He pointed out that most appointments are going to the young attorneys because only they want and need that income.

Police

A police interviewee observed that assigned counsel rarely use investigators, although public defenders do. The respondent declared that, if he were a defense attorney, he would never rely exclusively upon one source of information such as police reports. He thought that retained counsel were more aggressive than assigned counsel, public defenders were just as aggressive as retained counsel.

Corrections

A corrections official complained that appointed counsel don't accept collect phone calls and don't compensate for this fact by coming out to see incarcerated clients. He had also heard complaints that defendants received sentences which were different than the ones that the defendants believed were imposed by the court.

Defendants

Not surprisingly, convicted defendants were heard to complain about the services received from appointed counsel. Clients complained that the appointed attorneys took a long time before coming to interview them, that they were inaccessible, did not keep them informed about what was taking place, spent very little time on the case, failed to file appropriate motions, and were young and inexperienced.

One defendant complained of a violation of Argersinger. The judge had told him, when he requested that counsel be appointed to represent him on a misdemeanor charge, "You don't need counsel, since you won't go to jail." The judge subsequently sentenced him to 30

days in the Rehabilitation Center. A second defendant whose financial eligibility was in question was also sentenced to jail without a lawyer.

Attorneys

Eight attorneys interviewed were heard to complain about the present system. Many of these attorneys participate in the appointment lists.

One attorney complained about fee-cutting by nonlawyers who cannot appreciate the amount of work that goes into handling a case. This attorney also complained about the requirement that bills be filed within 30 days after case disposition even where an attorney is required to do some work on a case after the 30 day period.

A second attorney commented that his overhead alone is \$30 per hour, and that he bills \$75 per hour. He has taken his name off of the appointment list. He felt that the lack of funds for investigation was a fault in the system, and that the low fees "encourage attorneys to take the easy way out."

The latter view was echoed by another attorney, a criminal law specialist, who had also taken his name off the list. He thought that the fee schedule was "absurd," and complained that judges refused to grant continuances in indigent cases.

Another attorney complained that the main problem with the fee schedule was the maximum fees. For example, the maximum fee for a non-murder felony is \$1,000. Even on cases where the amount of work is similar to a homicide case, e.g., attempted murder, the fee will not exceed \$1,000 notwithstanding the number of hours put in by the attorney.

One of the attorneys charged that all attorneys have their fees slashed and that the fees discourage experienced attorneys from

continuing to practice criminal law.

An experienced appointed attorney called the fee schedule "an insult." That attorney is only on the most experienced list, and refuses to handle lesser felonies. He alleged that some judges won't reappoint assigned counsel who fight for their clients.

The interviewers were informed by one attorney that there were less than 20 attorneys in the county who specialize in criminal defense work (this was the highest estimate given by interviewees), and that the \$150 cap discourages quality and innovative representation and brings new law graduates into the system.

Finally, the interviewers were told that the top 15 or 20 names on the appointed counsel list were the best in the country, but after that, the defendant is "taking his life in his hands."

Strength and Weaknesses in the Montgomery County

Hybrid Assigned Counsel System

There are several strong points in the Montgomery County system for providing defense services in felony cases. The first is the ability to enter the case shortly after arrest. This can be accomplished because of the assigned counsel program's sister defender office which makes jail checks for all indigent persons charged with felonies each week-day morning. While some assigned counsel have complained that public defenders fail to interview the defendant before interrogations and confessions have taken place, the point at which the defender enters the case in Montgomery County is far earlier than in other jurisdictions studied.

The second favorable feature of this system is the mandatory entry level training program required of all attorneys who wish to be placed on the assigned counsel lists. While a more extensive

program of post-entry level training would be preferable, the training program in this county is a step in the right direction.

Third, the classification of attorneys into separate lists is a salutary feature. In this way, attorneys may be matched with cases that suit their experience levels. For the most serious cases, the court may call upon the very attorneys who serve as part of the small cadre of private criminal defense practitioners.

On the other hand, there also appear to be some serious shortcomings in the Montgomery County assigned counsel system. One of the problems stems from the lack of sufficient coordination between the two sister indigent defense systems. Defendants appear to suffer from lack of continuity as a result of the fact that the public defender's office, which represents all indigent felony defendants at the preliminary hearing stage, fails to pass along the information that they receive.

The low fee system diminishes the incentive for experienced criminal lawyers to participate in the appointment system. As a result, the quality of appointed services for the indigent accused is diluted. The appointment system relies largely upon a vast army of new, inexperienced lawyers as opposed to a small cadre of well-trained, qualified criminal defense specialists such as those employed in the public defender's office. As one lawyer expressed it, "There will always be some lawyers who will take the appointed cases. You won't get unanimity among to bar (to press for raising the fees). Some need it to survive and will take whatever crumbs are passed around. The courts take advantage of that."

No serious effort is made to monitor the performance of these young lawyers by the appointing authority or by any other agency.

Moreover, the young lawyers are given precious little in the way of back-up or supporting services. Investigative assistance is rarely available. There is no motion or research bank for them to draw upon or mentor to advise them regarding case strategy or research. No social services are available to assess psychological or other problems which might indicate the need for defendant rehabilitative services.

It was sensed in the interviews that there is an undercurrent of pressure to convert the existing system to one where the public defender office will virtually take over indigent criminal defense work. This would substantially reduce the cost of providing defense services and eliminate some of the problems described above. In lieu of this alternative, there is a need to upgrade financial incentives for qualified lawyers, to provide further training and back-up services for appointed lawyers, and to institute quality controls.

This in no way implies that there are not many qualified, dedicated lawyers who participate in the assignment system in Montgomery County. Indeed, some of the lawyers interviewed impressed the research team by their commitment and evident experience. Nevertheless, it must be observed that, while some such attorneys continue to participate in the system at one level or another, many attorneys are dropping out of the program once they obtain a measure of success and experience, leaving the majority of indigent defendants who receive appointed counsel other than the public defender to be served by attorneys newly out of school.

(2-A)
FEE SCHEDULE

EXHIBIT A

Reimbursement will be made for actual time accrued in any case up to \$150.00 per case for the following basic services:

- a. Arraignment & Related Activities
(Including all continuances, arraignment on multiple cases, bond checks, phone calls to client and client's family and appointment call from the Assignment Office.)
- b. Prosecutor's Pre-trial & Related Activities
(All pre-trials with Prosecutor assigned to case, Prosecutor with Diversion Program, calls with Prosecutor, client or client's family concerning plea negotiations and conferences or calls with co-counsel.)
- c. Initial Interviews & Related Activities
(All interviews with client following each event, all calls or letters following each event, and all interviews, calls and/or letters following each event with client's family.)
- c. Scheduling Conferences & Related Activities
(All Scheduling Conferences and continuances. Also considered in this category is a Status Report, Eligibility Report and Forensic Report in relation to Treatment in Lieu of Conviction.)
- e. Plea (s) & Related Activities
(Continuances and calls or interviews with client or client's family. Calls, interviews or letters to Co-Counsel or Drug Programs if disposition is for T.L.C. or Conditional Probation.)
- f. Final Disposition & Related Activities
(Covers all continuances. All calls, letters or interviews with client or client's family. Also all calls, letters or interviews with Probation Department, Probation Officer, Parole Officer and Assigned Judge or Bailiff. Included in this event is the filing of the Notice of Appeal.
- g. Basic Legal Research
(Research covering charge, multiple cases, past report, new or past cases and cases in other courts.)
- h. Case Review
(Reviewing the indictment, review of case with client or client's family, reviewing of case for each scheduled event and review of all files related to case or charge.)
- i. Discovery
(Obtaining of Discovery Packet, review of Discovery Packet, review of Discovery Packet with client or client's family and all motions for Discovery.)

If a client is indicated on multiple cases at the same time, payment will be made on those services that are not performed at the same time.

(2-B)
SPECIAL SERVICES

Reimbursement will be made for actual time accrued in any case for the following special services:

- a. Special Legal Research & Writings
(Research for all motions that require extra court hearings, research of sanity plea and trial preparation.)
- b. Court Hearings
(Hearings required on all motions and sanity plea.)
- c. Field Investigations
(Viewing of scene and outside investigations for trial preparation.)
- d. Jury or Court Trial
(Actual time spent in trial and related activities.
Example: Opening and closing arguments and verdict.)
- e. Client & Witness Conferences
(Interviews in relation to Trial.)

The filing of the Notice of Appeal is not considered a special service.

EXPENSES

The following expenses will be reimbursed when submitted on a separate entry with bill.

- a. Expert Witness Fees
- b. Polygraph Examination Cost
- c. Long Distance Telephone Calls
(Must have xerox copy of telephone bill.)
- d. Photocopying
- e. Certain Travel Expenses that are approved IN ADVANCE by the Assigned Judge before submitting bill.

Reimbursement will not be made for mileage.

(2-C)

MAXIMUM AMOUNT OF PAYMENT

Payment shall not exceed the following maximum amounts for these cases.

Aggravated Murder (w/o specs)	\$4,000 (1 attorney)
	\$6,000 (2 attorneys)
Murder	\$3,000
Felonies	\$1,000
Misdemeanors	\$ 500
**Post-convictions Proceedings	
With Evidentiary Hearing	\$ 750
Without Hearing	\$ 300
**Habeas Corpus, Parole, Probation	
and all other proceedings not	
elsewhere classified	\$ 300

**These proceedings do not follow the events as related in the flat rate of \$150.00 per case and payment will be made under the in-court/out-of-court rate.

Additional reimbursement shall be made for extraordinary cases when approved by the Court. Such reimbursement shall be made at the rate of \$40.00 per hour in-court and \$30.00 per hour out-of-court, up to \$200.00 per day whenever a trial continues beyond the following periods.

Aggravated Murder	13 days
Murder	8 days
Felonies	4 days

The attorney's certificate when submitted shall include a separate written statement noting that the Court has allowed extraordinary fees, with the specific amount of the fee and the time involved indicated.

zkf 11/10/82.

ATTORNEY APPLICATION FOR CRIMINAL APPOINTMENT

Example

NAME _____ TELEPHONE # _____

ADDRESS _____ FIRM _____

DATE _____

1. Date admitted to Bar _____ If after Jan., 1978, have you completed the Criminal Attorney Seminar and when? _____
2. What is the last criminal case (charge and degree of felony) you completed in Common Pleas Court? _____
3. Have you ever been counsel on:
 - a. Agg. Murder or Murder _____ If yes, approx. how many _____
 - b. 1st. Degree Felony _____ If yes, approx. how many _____
(Agg. Robbery, Rape, etc.)
 - c. 2nd. Degree Felony _____ If yes, approx. how many _____
(Robbery, Burglary, etc.)
 - d. 3rd. Degree Felony _____ If yes, approx. how many _____
(Safecracking, Abduction, ect.)
 - e. 4th. Degree Felony _____ If yes, approx. how many _____
(Grand Theft, Forgery, ect.)
 - f. Appeals _____ If yes, approx. how many _____
 - g. Post-Convictions _____ If yes, approx. how many _____
4. Have you handled any cases that required forensic or psychiatric examination or reports? _____
5. What degree of felony have you handled that has been tried before a jury or a court trial? _____
6. What type of felony cases are you not prepared to accept and why? _____

Please return to the Assignment Office as soon as possible. You will be contacted for criminal appointment after further analysis of this application.

If you have any questions please contact:

Edna Raymond, Assignment Commissioner
Montgomery County Courts Building
41 N. Perry St.
Dayton, Ohio 45422

CHAPTER II

STATISTICAL ANALYSIS OF COURT DOCKET DATA IN MONTGOMERY COUNTY

Using data from the court files in Montgomery County, the following statistical comparison was made of performance by the coordinated assigned counsel system attorneys and privately retained counsel.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the attorneys, the outcomes that the attorneys were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser crime than was originally charged; if it was resolved by trial, whether or not there was an acquittal; the sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; and how long it took to handle the cases from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

In Montgomery County, a sample of 236 felonies (82 felony assault and 154 felony drug) cases was drawn from the court dockets.

A breakdown of the frequencies of the specific felony offenses in the sample by their type of representation is presented in Table

1. Cases are classified according to the type of counsel that handled the disposition of the case rather than the type of counsel originally assigned to the case. There was, however, relatively

little change in type of representation. Only three defendants changed from assigned counsel and four from a public defender to retained counsel. Two switched from retained counsel and seven from a public defender to assigned representation.

Table 1

Felony Offense Type	Frequency	
	Assigned Counsel	Retained Counsel
Assault:		
Aggravated	1	6
Felonious	37	38
Total	38	44
Drug:		
Corruption of Another	1	3
Trafficking	28	52
Drug Abuse	27	29
Permitting Drug Abuse	0	2
Deception to Obtain		
A Dangerous Drug	1	1
Illegal Possession of a Drug	7	3
Total	64	90

The frequency of various outcomes for defendants represented by assigned and retained counsel after the first appearance is presented in Table 2.

Table 2

Initial Bond Status

	Frequency	
	Assigned Counsel	Retained Counsel
Money Bond		
Jail	22.5% (23)	17.9% (24)
Released on	23.5 (24)	8.2 (11)
Recognizance	48.0 (49)	56.7 (76)
No Information/N/A	5.9 (6)	17.2 (23)

Defendant status at the time of case disposition is presented in Table 3. These two tables indicate that the clients of assigned counsel were more likely to remain in jail after the first appearance and to still be in jail at the time of case disposition. Although assigned counsel were as successful as retained counsel in the number of defendants released from

incarceration prior to case disposition, as a percentage of clients that could have been released, the retained counsel were far more successful.

Table 3

Bond Status at Time of Case Disposition

	Frequency			
	Assigned Counsel		Retained Counsel	
Money Bond/Property Bond	25.5%	(26)	17.9%	(24)
Jail	17.6	(18)	3.7	(5)
Released on				
Recognizance	54.9	(56)	70.9	(95)
No Information/N/A	2.0	(2)	7.5	(10)

In Montgomery County, the court dockets indicated that for assigned counsel, 97.8% of the felony cases were filed by indictment (99 of the 102 cases for which there was data). For retained counsel, 90.3% of the felony cases were initiated by indictment (121 of the 134 cases for which there was data). Preliminary hearings were held for 32.4% of the assigned counsel felony cases (33 of the 102) and 28.3% of the cases represented by retained counsel (38 of the 134 cases).

Patterns of case disposition are presented in Table 4.

Table 4

Method of Disposition

	Frequency			
	Assigned Counsel		Retained Counsel	
Dismissal	13.7%	(14)	18.7%	(25)
Plea	77.5	(79)	68.7	(92)
Bench Trial	1.0	(1)	3.0	(4)
Jury Trial	2.9	(3)	3.7	(5)
Deferred Prosecution	4.9	(5)	5.2	(7)

A wide range of sentences were assigned in Montgomery County. Frequencies of these sanctions are displayed in Table 5.

Table 5

Type of Sentence

	Frequency	
	Assigned Counsel	Retained Counsel
Deferred Sentence	9	15
Suspended Sentence	56	78
Fine	28	50
Court Costs	61	80
Probation	65	79
Time Served	8	4
Incarceration	35	32

(Note: Frequencies do not total the number of pleas plus the number found guilty at trial, because more than one type of sanction was often assigned to a defendant.)

Attorney activity, as reflected in number of motions filed and number of court appearances is presented in Tables 43 through 6.

Table 6

Number of Motions Filed

	Frequency		Retained Counsel	
	Assigned Counsel			
0				
1	52.0%	(53)		
2	27.5	(28)	55.2%	(74)
3	14.7	(15)	31.3	(42)
4	2.9	(3)	10.4	(14)
5	1.0	(1)	2.2	(3)
6 or more	2.0	(2)	0.0	(0)
	0.0	(0)	0.0	(0)
			.7	(1)

Table 7

Table 7

Type of Motions Filed

	Frequency	
	Assigned Counsel	Retained Counsel
Reduce Bond	.	
Dismiss	2	
Suppress	5	1
Discovery	17	5
	5	20
		4

Table 8

Number of Attorney Appearances in Court

	Assigned Counsel		Frequency		Retained Counsel	
0	0.0%	(0)				
1	3.9	(4)			.7%	(1)
2	9.8	(10)			9.0	(12)
3	25.5	(26)			14.9	(20)
4	20.6	(21)			28.4	(38)
5	18.6	(19)			22.4	(30)
6	10.8	(11)			14.2	(19)
7	4.9	(5)			2.2	(3)
8	1.0	(1)			4.5	(6)
9	1.0	(1)			1.5	(2)
10 or more	3.9	(4)			2.2	(3)
					0.0	(0)

The tables presented above represent the frequencies of given answers to the questions posed on the docket study instruments. In order to analyze those responses, two types of variables had to be created.

The first type of variable created was the "dichotomous" variable. Dichotomous variables allow us to boil the issues down into two choices such as "yes" and "no." This allows the results to be expressed as fractions of 100%. Examples of dichotomous variables depicted in the table below are: defendant detained in jail vs. defendant released from jail, or case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of responses may be collapsed, and instances where there were missing data are dropped from the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by making computations of the data collected so that "intervals" such as the length of time from the defendant's first court date until case disposition can be compared.

Frequencies of the dichotomous variables created for the analyses of covariance from the court dockets in Montgomery County are presented in Table 9.

Table 9

Variable	Frequency	
	Assigned Counsel	Retained Counsel
Bond Status at Time of Case Disposition		
-in jail	25.0% (24)	9.9% (11)
-out of jail	75.0 (72)	90.1 (100)
Change in Bond Status from First Appearance to Disposition		
-change--		
was in jail-now out	37.5 (9)	63.6 (7)
-no change--		
was in jail-still in	62.5 (15)	36.4 (4)
Case Disposition:		
a) dismissal		
-case dismissed	14.4 (14)	19.8 (25)
-not dismissed	85.6 (83)	80.2 (101)
b) trial		
-case tried	4.1 (4)	7.1 (9)
-case not tried	95.9 (93)	92.9 (117)
c) trial vs. plea		
-plea entered	95.2 (79)	91.1 (92)
-case tried	4.8 (4)	8.9 (9)
d) type of plea		
-original charge	51.9 (41)	46.7 (43)
-lesser charge	48.1 (38)	53.3 (49)
e) trial outcome		
-guilty	100.0 (4)	77.8 (7)
-not guilty	0.0 (0)	22.2 (2)
f) trial outcome		
-guilty of		
original charge	100.0 (4)	71.4 (5)
-guilty of		
lesser charge	0.0 (0)	28.6 (2)
g) motions filed		
-filed none	52.0 (53)	55.2 (74)
-filed any	48.0 (49)	44.8 (60)

h) overall disposition			
-guilty	85.6	(83)	78.6 (99)
-not guilty	14.4	(14)	21.4 (27)
Sentence:			
a) incarceration			
-yes	39.8	(35)	30.2 (32)
-no	60.2	(53)	69.8 (74)
b) type			
-incarceration	39.8	(35)	30.2 (32)
-probation	54.5	(48)	56.6 (60)
-other	5.7	(5)	13.2 (14)

The mean performance of assigned and retained counsel on the variables for which interval level data was collected is presented in Table 10.

Table 10

Variable	Mean Performance of Assigned Counsel	Mean Performance of Retained Counsel
Length of Incarceration (range)	11.48 mos. (1-60)	9.7 (1-60)
Number of Motions Filed (range)	.79 motions (0-5)	.63 (0-6)
Number of Attorney Appearances (range)	4.3 apps. (1-13)	3.6 (0-9)
Days from First Appearance to Disposition (range)	78.92 days (2-219)	79.5 (0-372)
Days from First Appearance to Sentencing (range)	100.0 days (21-218)	101.7 (0-421)

2) Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in Montgomery County: Felony Cases, Controlling for Defendant Sex, Race, Age, Prior Convictions and Initial Bond Status

1) Covariates. Table 11 presents the frequency distributions of the characteristics of clients represented by

assigned and retained counsel in Montgomery County.

Table 11

Case and Defendant Characteristics	Frequency		Retained Counsel	
	Assigned Counsel			
Prior Convictions:				
Yes				
No	35.3%	(36)	15.7%	(21)
No Information	54.9	(56)	73.1	(98)
	9.8	(10)	11.2	(15)
Sex:				
Female				
Male	12.7%	(13)	9.7%	(13)
No Information	87.3	(89)	88.8	(119)
	0.0	(0)	1.5	(2)
Race:				
White				
Black	53.9%	(55)	67.9%	(91)
No Information	38.2	(39)	19.4	(26)
	7.8	(8)	12.7	(17)
Initial Bond Status				
Bond				
Jail	22.5%	(23)	17.9%	(24)
ROR	23.5	(24)	8.2	(11)
No Information	48.0	(49)	56.7	(76)
	5.9	(6)	17.2	(23)
Mean Year of Birth				
	1955		1951	

1) Analyses. The analyses of covariance revealed no significant differences between assigned and retained counsel in Montgomery County. There was, however, one statistically significant interaction between type of attorney (assigned/retained) and type of felony (assault/drug). This occurred for the variable:

1) whether or not motions were filed ($F(1,68)=5.48$ p .022)

Contrary to the effects in Summit County, in Montgomery County, assigned counsel are more likely than retained to file motions for assault cases ($F(1,68)=3.94$, p .05) (adjusted means=1.7 and 1.0, respectively). Again, however, assigned and retained counsel do not differ in their likelihood of filing motions for felony drug cases.

3) Summary of Differences between Assigned and Retained Counsel

Differences in the handling of:

Felonies

-whether or not motions were filed

CONCLUSION

The Ohio docket studies were limited by the fact that they were restricted to the examination of felony cases because most of the indigent misdemeanor cases were handled by the local full-time defender program rather than by assigned counsel. As we can see from the Montgomery County data, the handling of felony cases tends to be somewhat similar for the clients of retained and assigned counsel.

Only one difference was found between assigned and retained counsel in Montgomery County. That was that assigned counsel tended to be more likely than retained counsel to file pretrial motions in felony assault cases.

The question arises, whether this one indicator militates in favor of assigned or retained counsel. Some might suggest that it favors retained counsel, because it shows that they do not file "frivolous" motions. However, the numbers belie that conclusion, since assigned counsel filed no motions in 52% of their cases, while retained counsel filed no motions in 55.2% of their cases.

In sum, there is no evidence from the data analysis to suggest that retained counsel out-performed assigned counsel in this jurisdiction, while there is a small amount of statistical evidence to show that assigned counsel performed better.

Whatever shortcomings might be observed in the Montgomery County system, if any, would have to be obtained from the other sources of information used in the study. One possible explanation for the favorable outcomes for assigned counsel is the fact that counsel enters the case at an earlier stage than is done in most jurisdictions because of the availability of the public defender's office to handle the

initial stages even before assigned counsel are able to receive appointment. Other studies have indicated that early entry is a factor in obtaining better case dispositions. This would tend to give some credence to the theory that an assigned counsel system performs better when there is some entity to call upon at the earliest possible stage. The sister defender program in Montgomery County may be a factor in helping to obtain better outcomes for indigent felony defendants. Whether this hypothesis is correct or not, the fact remains that Montgomery County is the only one of the six jurisdictions where docket studies were conducted where assigned counsel were shown to perform as well or better than retained counsel.

Two other factors might also help to explain the favorable results. The first is that this jurisdiction, unlike most others, operates an entry level training program for attorneys as a pre-requisite for participation in the assigned counsel program. The second is that the attorneys are separated into three separate lists according to experience levels and the seriousness of the case. These two factors may do much to improve the quality of the services performed by assigned counsel.

CHAPTER III

The Montgomery County Cost Study

From assigned counsel attorneys fee requests, data was obtained to estimate fee per case, time spent per case, and fee per hour. These results are presented in Table 1.

Table 1
Fee per case, fee per hour, hours per case for Montgomery County

Case type	Fee/case	Fee/hour	Hours/case	Hours-in	Hours-out	N
Ass+ Drg	\$321.79	\$26.88	11.97	3.53	8.44	89
" trials	862.00	22.82	37.78	13.95	23.83	4
" pleas	314.40	28.48	11.04	3.36	8.03	68
" dismis	224.24	27.11	8.27	1.79	6.48	17
Assaults	460.82	27.24	16.92	4.96	11.95	33
" trials	862.00	22.82	37.78	13.95	23.83	4
" pleas	420.62	29.25	14.38	3.95	10.43	26
" dismis	274.33	24.71	11.10	1.77	9.33	3
Drugs	239.86	26.45	9.07	2.69	6.38	56
" trials	-	-	-	-	-	0
" pleas	248.64	26.06	9.54	2.99	6.55	42
" dismis	213.50	27.87	7.66	1.80	5.86	14

For the entire sample of 89 felony fee requests, average fee (per case) was \$322 with a fee per hour of \$26.88. Assigned counsel lawyers spent, on average, 11.97 hours on a felony case for an assault or a drug charge. Almost 2 1/2 as much time was spent out of court as was spent in court. Trials were more expensive than plea cases, and plea cases were more expensive than dismissals. A trial's cost is a 2.74 multiple of the cost of a plea case, and a 3.84 multiple of a dismissal case. However, trials cost the least on a per hour basis at only \$22.82 per hour.

Assaults were generally more expensive than drug cases. Assault plea cases were substantially more expensive than drug plea cases (\$420.62 vs \$248.64). Assault dismissal cases were more expensive than drug dismissal cases (\$274.33 vs \$213.50).

Caution should be taken in interpreting this last difference since the Ns are so small (3 and 14). No comparison across charge for trial cases could be made since our cost sample contained no drug trial cases. On a fee per hour basis, assault plea cases were more expensive than drug plea cases (\$29.25 per hour vs \$26.06 per hour). However, assault dismissal cases were slightly less expensive than drug dismissal cases (\$24.71 vs. \$27.87). Again, caution should be exercised because of the small Ns for these last case types.

It is important to note that in this County all the early representation part of the case is handled by a public defender. Therefore, part of the cost of each case handled by an assigned counsel attorney is incurred by the public defender's office. Additive adjustments for this will be made in a latter section.

Fee costs from Aggregate Data

Data on fees were also obtainable from aggregate budget data which the county and State uses to assess its Indigent Defense Systems. This data is from the fiscal year 1982 Annual Report of the Ohio Public Defender Commission. A total of 1298 assigned counsel felony cases were handled by the Montgomery County (coordinated) assigned counsel system.

The following data was reported.

For Montgomery County : Fee per felony case = \$366.66
Fee per hour for a felony case = \$23.51
Hours per case for a felony case = 15.6
Fee per case (all types) = \$319.09
Fee per hour (all types) = \$24.17
Hours per case (all types) = 13.2

Compared to our estimates from our sample of felony assault and drug cases, our sample shows a lower felony cost per case (\$321.79 vs. \$366.66) and a lower number of hours per case (11.97 vs 15.6). However, our cost per hour estimate is higher than the cost per hour from the aggregate data (\$26.88 vs \$23.51). It would be natural for these differences to occur in that our sample is for just two types of felonies (assaults and drugs - and of drug cases, there were no drug trials) while the aggregate data represents the universe of cases handled by assigned counsel across all felony types.

Felonies comprise 76% of the caseload of the assigned counsel system.

Overhead Costs

The overhead costs for running this coordinated - mixed assigned counsel system consists of costs associated with the assignment process and the payment process. Almost all the tasks in this realm are performed by an Assignment Commissioner. This person works for the Administrator of the Court. After the Public Defender's Office decides which felony cases it

wants the assigned attorneys to handle, the Assignment Commissioner is contacted. The Assignment Commissioner appoints attorneys from a set of lists. Each list is for a case type that an attorney can be qualified for e.g. capital murder, 1st and 2nd degree felony, 3rd and 4th degree felony. Judges would occasionally review the lists and could move attorneys up to a list for more difficult cases or the attorney could be dropped from the list. The Assignment Commissioner also handles the fee vouchers to see that attorneys are paid by the county. The Judge also enters the process when he/she reviews the voucher after the attorney submits it to the Assignment Commissioner.

The Assignment Commissioner earns approximately \$18,000 a year including fringes. In fiscal year 1982, there were 1298 felony cases handled by the assigned counsel system. Approximately 50% of the Commissioner's time is spent on indigent defense matters. Therefore, it can be reckoned that \$6.93 is the cost per case for services of the Assignment Commissioner. The formula used was:

$$(\$18,000 \times .5) / 1298 = \$6.93$$

It is also estimated that a judge has to spend approximately 15 minutes for each assigned counsel case to review the voucher. Using the assumption of \$50,000 for a judges salary, The cost per case for judicial review of the voucher is estimated to be \$6.30 .

Therefore, the overhead cost per case for running the assigned counsel system (not yet counting the contribution of the public defender) is \$13.93. This is summarized in Table 2.

Table 2
Computation of Overhead Costs for Assigned Counsel System in Montgomery County .

Overhead Component	Contribution to Cost Per Case
Assignment Commissioner (appoints & reviews voucher)	\$ 6.93
Judicial Review of Voucher	6.30
Total	\$13.23

Contribution by Public Defender

The Office of the Public Defender handles all cases at early stages of the case, while the case is still in lower court. If the case never reaches the upper court (i.e. the case is dismissed in lower court), an assigned counsel attorney is never given the case. If the case is to go to upper court, the Office of the Public Defender will either take the case itself or it will be designated to the assignment commissioner to be handled by an assigned attorney.

Some work on the case is, therefore, performed by the Office of the Public Defender. This work may involve being at line-ups, interviewing the defendant, determining eligibility for indigent services, appearing at the first appearance and at a preliminary hearing. If the Public Defender did not exist, then assigned attorneys would have to do these tasks. The cost for these services, which are paid by the County, should be allocated to the cost for an assigned counsel case.

From the 1982 Annual Report of the Ohio Public Defender Commission, it is reported that the cost per case of the Montgomery County Public Defender's office is \$75.77 . This includes personnel and operating costs.

As a rough approximation, 1/3 of this cost per case will be allocated to the cost per case of the assigned counsel system. Therefore, the cost per case of the assigned counsel system is to be higher by an amount of \$25.

Cost per Case

We can now estimate cost per case for the case types presented in Table 1 by adding the overhead per case and the public defender cost per case to the fee per case. This is presented in Table 3.

Table 3
Cost per Case of Assigned Counsel System in Montgomery County

Case type	Fee / Case	Ovhd / Case	PDef / Case	Cost per Case
Ass+ Drgs	\$321.79	\$13.23	\$25.00	\$360.02
" trials	862.00	"	"	900.23
" pleas	314.40	"	"	352.63
" dismis	224.24	"	"	262.47
Assaults	460.82	"	"	499.05
" trials	862.00	"	"	900.23
" pleas	420.62	"	"	458.85
" dismis	274.73	"	"	312.96
Drugs	239.86	"	"	278.09
" trials	-	-	-	-
" pleas	248.64	"	"	286.87
" dismis	213.50	"	"	251.73

PART II

THE SUMMIT COUNTY, OHIO AD HOC ASSIGNED COUNSEL APPROACH

CHAPTER I

PROFILE OF THE SUMMIT COUNTY, OHIO

AD HOC ASSIGNED COUNSEL APPROACH

The Environment of the Indigent Defense System

The major city in Summit County, Akron, is the rubber capital of the world. Headquartered there are Firestone, B.F. Goodrich, General Tire and Rubber, and Mohawk Tire Companies. The area boasts many types of manufacturing plants producing everything from boiler shop products to aerospace and defense systems. Located in northeastern Ohio, Akron is a vital distribution gateway between the industrial East and the Midwest. Its history dates back to 1825 when the Ohio Canal was built.

While it has been touted as one of the greatest manufacturing and merchandising centers in the world, it was hard hit by the 1981 recession. Akron had an unemployment rate of 9.5% which, while slightly lower than the average for the state, was almost two points higher than the national average. The Akron Regional Development Board attributes the increase in unemployment to the trend of diversification in the economy toward more services and less manufacturing.

The loss of jobs is perhaps responsible for the fact that Summit County lost 5.2% of its population between 1970 and 1980; the county's population in 1980 stood at 524,472. The county is densely populated, with 1,311 persons per square mile, and 10.8% of its population is black.

Previous census figures showed that 6.3% of Summit County's population lived below the poverty level and that the per capita income was \$4,914. However, 1982 figures showed that effective buying income for the median household amounted to \$18,381.

Summit is the only county in Ohio to have home rule. Its County Charter provides that the County Executive shall be the Chief Executive Officer and shall run for election every four years. The County Council, consisting of seven members, is the legislative authority for the county.

The County Council is democratic by a 6 to 1 majority. However, the judges who appoint counsel are primarily republican.

The Akron Bar Association has approximately 1,200 members. In 1975, census figures showed a crime rate of 6,346 crimes per 100,000 population. Two thousand, two hundred and forty-nine felony cases were filed in the Akron Municipal Court during 1981. Only 1,122 felony cases were processed by the county's felony court.

Seventy to eight percent of the felony cases required the appointment of counsel due to the defendant's indigency. Observers speculate that the rate of appointments in criminal cases has increased due to the increased unemployment rates, thus increasing the annual cost of appointed counsel and the resultant tax burden on Summit County citizens.

The Criminal Justice System

The Courts

There are two levels of courts in Summit County: the lower courts, which are the Municipal Courts, and the upper court, which is the Court of Common Pleas. The lower courts have criminal jurisdiction over all ordinance violations and misdemeanors and conduct preliminary hearings in felony cases.

The Court of Common Pleas, in its General Division, has exclusive jurisdiction over felonies after the preliminary hearing stage.

There are three Municipal Courts; they are located in Akron, Barberton, and Cuyahoga Falls. There are seven felony court judges, all of whom are located in the Court of Common Pleas in Akron.

Common Pleas judges receive a salary of \$55,000 per year; the majority of this salary is paid by the state. The County pays less than \$20,000 of this amount. Municipal Court judges receive \$51,000 per year of which 60% is paid by the city of 40% is paid by the county.

The Criminal Justice Process

All felonies must be prosecuted by way of indictment unless indictment is waived; only if indictment is waived can a felony proceed by way of information. If the defendant is indicted prior to the preliminary hearing, no hearing will be held. However, preliminary hearings are required in all other felony cases unless the defendant waives the hearing in writing. Where there is no waiver and the defendant is in custody, the preliminary hearing must be held within 5 days of arrest (Rule 5, Ohio RCP).

Most cases are initiated by complaint and then bound over to the Grand Jury. Cases proceeding by information are generally the result of a plea agreement. Drug cases are often initiated by secret indictment.

There are two stages of a felony case which take place in the Municipal Court -- the preliminary arraignment and the preliminary hearing. If probable cause is found at the preliminary hearing, then the case is bound over to the Court of Common Pleas where the felony arraignment takes place. Some cases are diverted out of the system after the preliminary hearing if defense counsel sends a request to the prosecutor before indictment.

The County Prosecutor's office has a pre-trial diversion program for first offenders who have committed nonviolent crimes. However, neither drugs or assaults are included in this program. In order for a defendant to receive diversion, the victim, the police department, and the prosecutor's office must agree. The case will be dismissed after a 12 month probationary period. In the meantime, the offender may be required to undergo counseling with a psychologist and pay restitution.

According to local estimates, approximately 20% of felony cases are disposed of by a plea to a misdemeanor charge at the Municipal Court level; the remainder are bound over to Common Pleas Court.

Discovery in criminal cases appears to be difficult to come by in this jurisdiction. The City Prosecutor's files are not shown to defense counsel. The police have confidential reports which defense counsel are not permitted to see. Defense counsel are promised fuller discovery from the police if they agree to waive preliminary hearings. Attorneys are also pressured to waive preliminary hearings in order to obtain a reduction in bond for their clients. Also, until recently, assigned counsel would not be paid a fee if a felony case was disposed at the lower court level, this added to the pressure to waive preliminary hearings.

The Prosecution

There are 10 full-time felony trial attorneys on the staff of the Summit County Prosecuting Attorney. In addition, there are two appellate attorneys, 5 civil attorneys, and two attorneys who handle juvenile cases -- a total of 19 lawyers in all. The Chief Prosecuting Attorney is an elected official.

Attorney salaries in the office range from \$18,000 to \$36,000, with \$37,250 for the Chief. The total budget for the office in 1981 was \$1,405,625, while the budget for 1982 was \$1,452,282.

This total does not include prosecutors in the three Municipal Courts who handle misdemeanors and felony cases which are disposed of as misdemeanors in the lower courts.

The prosecution provides "horizontal representation," that is, they are assigned to the courtroom of a particular judge, rather than handling a given case from beginning to end.

The Indigent Defense System

The Ohio Indigent Defense System

In accordance with Ohio law (Ohio Rev. Code, Ch. 120), Ohio counties have three options in providing defense services to the indigent accused: 1) a county public defender system; 2) a joint county public defender system whereby counties share defender services; and an assigned counsel system. They may also utilize a combination of these models. In those counties which elect to establish a public defender system, a County Public Defender Commission must be formed.

The Summit County Indigent Defense System - An Overview

The Summit County Council has elected a "mixed" system consisting of a defender office and an ad hoc approach to the appointment of private lawyers. Unlike Montgomery County, where the functions of the defender and assigned counsel systems are intertwined, the two systems in Summit County operate independently of one another.

The defender office is primarily responsible for the handling of indigent misdemeanor cases, while the private bar receives almost all cases involving indigents accused of felonies.

The Legal Defender Office

This full-time defender system is funded by the county through a contract with the Akron Bar Association. The director of the office was originally hired by the Association's Executive Committee. It was established in 1973, largely in response to the Argersinger decision which required the appointment of counsel in misdemeanor cases where defendants received jail time.

In order to comply with state law, a Public Defender Commission

has been formed. It consists of five people, 2 of whom are appointed by the Common Pleas Court judges, and 3 of whom are appointed by the County Council.

However, the office was established as a private, nonprofit corporation, which antedated the state's public defender law. The office is governed by the Bar Association's executive board, and the Bar Association monitors funds for the office.

The office expended \$198,829 during 1981 and \$219,373 during 1982. No investigators or social service personnel are included in the office staff. Staff includes 5 attorneys, 2 secretaries, and 3 interns.

Up to 50% of the costs of public defender and assigned counsel services are reimbursed by the Ohio Public Defender Commission. During 1981, the rate of reimbursement appears to have been only 35%.

During 1981, the judges of the Akron Municipal Court appointed the Legal Defender to represent 1,984 persons charged with misdemeanors and 32 persons accused of felonies.

Administration of the Appointed Counsel Component

The remainder of this Chapter deals with the appointed counsel component of the Summit County indigent defense system, i.e., the use of private lawyers appointed to handle indigent felony cases in the county's courts.

The appointment of counsel in Summit County cannot be described as a "system" in that there is no centralization or coordination of appointments. All essential functions are handled by court and county personnel. Fees for appointed counsel are simply a line item in the budget for the Court of Common Pleas. The offices of the Prosecutor and the Public Defender, on the other hand, are treated as separate entities in the county's budget.

Selection and Assignment of Appointed Counsel

1. Appointing Authority. Prior to the passage of the Ohio public defender statute, counsel in felony cases were appointed by the felony court judges. However, after that time, the responsibility was shifted to the Municipal Court judges in all indigent felony cases except where there is a secret indictment whereby the defendants do not make an initial appearance in the lower courts. Common Pleas judges who were interviewed appeared to be pleased to be relieved of that function.

Currently, the majority of appointments in felony cases are made by the Municipal Court judges.

2. Method of Appointment. Each individual lower court judge is responsible for making the appointments. In the City of Akron, there are six judges who rotate each week into the felony courtroom. During the week's period, the judge who has rotated into that courtroom makes the appointments.

There is no coordination of the appointments made, and one judge is not made aware of the appointments made by the other judges. Thus, conceivably, the 6 judges could allow a single attorney to receive 6 consecutive appointments.

Judges may contact the attorneys themselves, or may request the assistance of a court clerk or bailiff for this purpose.

3. Criteria for Appointment and Method of Selection. There are basically three sources used by the judges in selecting attorneys for appointment. The first source is a list compiled by the Akron Bar Association, which is the active bar group in Summit County. The Bar Association posts an application form for interested attorneys in its newsletter, and interested attorneys send their requests in to the Association. The bar then compiles a list of names and sends it to the judges.

The second source of names for appointments comes from letters sent by attorneys directly to judges requesting that they be considered for appointments. And finally, judges may assign cases to attorneys whom they know personally.

There is only one known criterion for participating in the list or receiving appointments -- admission to the practice of law. No experience requirements or criminal practice training are required as prerequisites.

When asked about their practice and procedures in making appointments, the judges provided similar answers. No judge responded that he or she used the bar list in a rotational system. One judge used the bar list, but skipped over names not considered competent or "those you have to fight with or those who raise frivolous motions."

In some cases, the prosecution assists the judge in selecting an attorney. This often happens in aggravated murder cases.

Summit County is out of compliance with the regulations adopted by the Ohio Public Defender Commission for experience qualifications of assigned counsel. These regulations require specific prior experience and/or training for attorneys handling the various types of criminal cases (see Exhibit B). The lack of criteria employed by the Summit County officials in appointing counsel raises questions as to whether the county is entitled to be reimbursed by the state for up to 50% of those expenses, since §120.33 of the Ohio statutes relating to county appointed counsel systems requires that the standards established by the Commission must be followed in order to receive payment for attorney fee reimbursements.

A number of serious allegations were made about the ways that appointed counsel are selected by the judges. Representatives of county government, fiscal personnel, appointed attorneys, and judges alike charged that the Republican judges appointed lawyers on the basis of politics. One lawyer stated that some attorneys campaign for judges. Another attorney alleged that the better attorneys don't get appointed in murder cases, which carry a higher maximum fee, because of the patronage system. A third attorney charged that only a few attorneys are appointed in aggravated murder cases based upon their political party and personal relationships with the judges.

There are 127 names on the attorney appointment lists. Apart from the most serious cases, respondents generally concurred that the appointment system is used as a training ground for lawyers just out of law school. Many of the more experienced criminal lawyers have withdrawn from the appointment list, and are willing to accept appointments only in the better-paying, very serious cases.

One respondent charged that judges may punish some defendants by appointing a "rotten attorney." The allegation was made that the "general bar" receives the majority of criminal appointments rather than the specialized criminal bar, and that judges won't appoint competent lawyers to handle murder cases for fear that they will file a lot of motions. Further, the charge was made that a select group of attorneys receive many appointments, while others get very few.

The foregoing discussion raises questions about the fairness and proper functioning of the adversary system in Summit County felony cases. If allegations about control of defense attorneys by the prosecution and by self-serving judges are true, there can be no equal battle of adversaries. The rights of the accused would appear to be seriously jeopardized in such a system.

Funding for Appointed Counsel

Like the public defender office, appointed counsel are paid from county funds with up to 50% of those costs reimbursed through the Ohio Public Defender Commission, a state agency.

Unlike the prosecution, there is no elected official or other official organization to argue for adequate funding. The budget for appointed counsel is controlled by the judges, since it is presented to the county as part of the court's budget. As a result, it competes with the salaries of judges, since it is up to the individual Ohio counties as to whether or not to pay the judges their maximum statutory compensation. Indeed, at the time that this research was underway, the courts were locked in litigation with the county seeking a mandamus action to force the county to provide adequate funding to operate the court system.

The budgeting process for appointed counsel fees is as follows. Since the assigned counsel budget is part of the felony court appropriation, the felony court's administrator projects a dollar figure. Then, the judges vote on it and the court administrator negotiates with the County Council for the entire court budget.

Assigned Counsel Fees

1. Amount and Type of Fee Structure. Summit County employs an hourly rate fee structure with \$20/hour for in-court and \$30/hour for out-of-court time. In addition, the following maximum fees are allowed for the various types of cases: aggravated murder "with specifications" - unlimited; aggravated murder and murder - \$1,500; all other felonies - \$500; and misdemeanors - \$300. The courts also have an unwritten understanding that felony cases will receive no more than ½ of the statutory \$500 maximum in plea bargained cases. (See Exhibit A for fee schedule.)

The Ohio Public Defender Commission has established statewide standards for appointed counsel fees. Those standards provide for hourly fees of \$30/hour in-court and \$40/hour out of court. The maximum fees allowed by the state for the most serious cases are several times the amounts of those allowed by Summit County. The Commission recommends: Aggravated murder "without specifications" - \$4,000; murder - \$4,750; all other felonies - \$1,000; and misdemeanors - \$400. The county has refused to adopt these recommendations.

Attorney fees in Summit County have not been increased since 1974.

Notwithstanding the low level of fees paid, judges frequently cut attorney fee requests. As a result, the effective hourly rates paid are substantially below the \$20/\$30 rates.

In the past, appointed counsel were not paid at all if a felony case was disposed in the lower court. However, this procedure has recently been changed; appointed counsel are paid from the felony court budget even if the case was disposed as a misdemeanor.

2. Processing of Fee Applications. Attorney bills for appointed counsel fees must be submitted to the judge before whom an attorney appeared. The judge has the authority to approve the fee as requested, provided that it is consistent with the fee schedule, or to reduce the amount awarded. Judges spend 20 seconds to 15 minutes to review each voucher.

Once the judge has ordered payment, the fee application is returned to the attorney. The attorney must then walk the bill over to the court clerk's office, where 2 copies of the bill are certified. The attorney is then required to walk it through to the County Auditor's office.

The County Auditor gives the fee request to the County Executive for approval by the County Council.

An accounting clerk in the Auditor's office spends 30% to 40% of her time in reviewing the fee applications and typing vouchers for payment. She earns about \$14,000 including fringe benefits. The clerk is also required to record all fee vouchers on a form that is sent to the state for reimbursement.

It is estimated that it takes approximately 3 weeks from the time that an attorney fee request is submitted until payment. However, in recent years, the annual appropriation has been consumed 2 to 3 months before the end of the year. As a result, attorneys appointed toward the end of the year must wait for several months before receiving payment.

3. Local Opinions on Adequacy of Fees. There was unanimity of opinion that attorneys appointed to handle criminal cases receive far less than attorneys in private practice. Although the fee rates were recommended by the Common Pleas Court judges, they agreed that the fees were too low. One judge opined that, "What we pay lawyers is sinful." He pointed out that when they wanted more, the threat was made to replace them with public defenders. He thought that "the low fees can get to the point of subverting defendants' rights."

Attorneys complained bitterly about fee-cutting and low rates of fees. However, they declined to confront officials about the fee structure for fear that they would retaliate by replacing appointed counsel with the public defender system. Many of the more experienced criminal bar had responded by declining to accept appointments in other than murder and aggravated murder cases where the low maximum fees did not apply.

Determination of Eligibility

Summit County has not established any formal written criteria for determining the eligibility of an accused for the services of appointed counsel. The judge before whom the defendant appears at arraignment in Municipal Court makes an inquiry into the financial situation of the defendant. The individual judges use their own discretion in deciding upon eligibility.

If the judges determines that a given defendant is eligible for appointed counsel at the indigency hearing, the Sessions Clerk is instructed to fill out an Affidavit of Indigency for the defendant. The clerk who does this work earns approximately \$11,000/year exclusive of fringe benefits.

Timing of Case Entry by Appointed Counsel

Early entry into a case by counsel has been credited with achieving better outcomes for defendants. Counsel, if acting on the defendant's behalf at the earliest stages of a case can: a) advise the defendant regarding statements made to the police; b) turn up perishable evidence and interview witnesses while their memories are still fresh; c) assist in obtaining pre-trial release for the defendant, who can then better assist in his or her own defense; and d) benefit the defendant and the defendant's family in other ways, such as establishing attorney-client rapport, securing emergency funds and shelter for the defendant's family, etc.

The procedure for case entry in Summit County was described by respondents as follows. The defendant is asked by the judge at the first court appearance whether or not he or she has a lawyer. If it is necessary that an attorney be appointed, the judge continues the case until the following morning at which time the defendant is supposed to

appear with his appointed attorney. In the meantime, the Sessions Clerk and court bailiffs may assist the judges in contacting an attorney for the defendant.

From the procedure described above, it would appear that attorneys commence representation at a relatively early stage in the proceedings. However, this conclusion was not borne out in interviews with some former clients of appointed counsel.

One defendant reported that the first time that he saw his appointed lawyer was 7 days after the judge appointed counsel. At that time, the entire meeting with the lawyer took place in the holding cell at the courthouse where the defendant was brought for his preliminary hearing. The meeting consumed no more than 5 minutes. Since the defendant had not been given the attorney's name prior to that time, there was no opportunity to contact the attorney.

A second defendant reported that his first interview consisted of a 15 minute discussion with the attorney on the date of his preliminary hearing. As a result, the defendant had no opportunity to tell the attorney about defense witnesses that might have been brought to testify at the preliminary hearing.

Jail officials confirmed that persons awaiting trial had great difficulty in contacting their attorneys. They stated that appointed counsel refused to accept collect phone calls from the jail, and that they also failed to return phone calls from inmates who were awaiting trial.

On the other hand, it did appear that some defendants had the opportunity to confer with appointed counsel within a day of their first court appearance. While additional measures need to be taken to ensure that this occurs in all cases, the judiciary of Montgomery County should be commended for their practice of requesting that appointed counsel appear in court with their client the day after appointment.

The appointment system in Summit County lacks any provision for making lawyers available to accused persons prior to court appointment. As a result, there is no access to counsel at pre-indictment line-ups. A complaint was lodged by one of the Summit County social services agencies that, in some cases, persons against whom charges had not yet been filed were forced to go to the prosecutor's office without counsel for questioning.

Another problem relating to the lack of early access to counsel is that some defendants seem to become lost in the jail for a time, and are not arraigned immediately. One defendant, an 18-year old male, told interviewers that he had been in jail for three days before his mother found out where he was, and was not brought to court until the fourth day. In the meantime, the police had asked him to make a statement.

Finally, while the judges appear to do their part in ensuring early access to counsel by requiring the attorney to appear in court the day after appointment with the defendant, some attorneys treat this as merely a perfunctory appearance. One defendant told the interviewer that the attorney had his associate show up on the second day after his arrest, but his attorney did not actually interview him until the day of the preliminary hearing. Attorneys need to take advantage of the first appearance in court by conducting the initial interview with the client on that day.

CONTINUED

1 OF 6

Training, Investigation, and Supporting Services

1. Training. No training programs are required of lawyers who participate in receiving indigent criminal appointments. The bar association, from time to time, offers some continuing legal education in the criminal law area, but attendance at these seminars is not mandatory for appointed counsel.

2. Investigation. The courts discourage the use of investigators in appointed criminal cases by requiring that all requests receive prior court approval. None of the judges interviewed could recall any request for such services ever having been made, and conceded that, if such a request were made, it would not be approved simply because the budget was inadequate.

While in the past, it may have been possible for appointed counsel to receive some investigative assistance from the public defender's office, such assistance is not longer feasible because there are currently no investigators on the public defender's staff.

3. Use of experts. The court's policy with regard to approving funds for expert witnesses in appointed counsel cases is similar to its stance on investigators. Prior court approval is required, and it is almost never given. The only cases where approval might be given would involve an insanity defense. Even in those cases, judges refer the lawyers to the Psycho-Diagnostic Clinic located at the Summit County Courthouse which is a court- and state-funded agency. Attorneys interviewed complained bitterly about the adequacy of evaluations performed by that agency. Requests for polygraph examinations are referred to the Akron Police Department.

Choice of Counsel

The Ohio Statutes (§120.33) provide that an indigent person has the right to "select his own personal counsel to represent him" in lieu of receiving court-appointed counsel. It further provides that the counsel selected by the indigent person shall be compensated by the county for the representation provided.

Few of the judges interviewed appeared to be aware of this statute. Apparently, no one has ever raised the issue in Summit County regarding a defendant's right to select his or her own lawyer in an indigent case. Those judges who were aware of the law had made no effort to implement it. However, some rare cases were noted where a defendant requested a specific attorney and the court granted the request.

Supervision and Monitoring of Attorney Performance

Summit County employs no formal procedures for monitoring or supervising the performance of appointed lawyers. Moreover, no procedures have been established to remove any attorney's name from the appointment lists for inadequate performance.

Those interviewed could not remember any attorney ever having been removed from the appointment list. One judge offered the suggestion that, if any attorney were really bad, the felony judges would tell the Municipal Court judges. However, he felt that he would like the system to have more monitoring, especially by the lay public.

Recoupment

Summit County employs no system for recoupment of the cost of providing legal representation. Some judges reported that, in the past, they had ordered recoupment as a condition of probation. One of those judges stated that he had sent defendants to jail for failure to pay on 15 occasions.

However, the practice of ordering recoupment as a condition of probation has fallen by the wayside since court rules were changed so that attorney's fees were no longer considered part of court costs.

Most judges do not order recoupment in Summit County. Some of the respondents stated that there was no incentive to do so, since the money goes back into the General Fund rather than the court's own budget. In addition, 50% of all recoupment monies would have to be refunded to the state.

Local Perspectives of the Ad Hoc Appointment Approach in Summit County

1. Judges. When asked about appointed counsel, most of the judges appeared to be relatively satisfied with the system. However, judges did make several suggestions for improvement, and some compared assigned counsel unfavorably with retained counsel.

One judge thought that appointed counsel needed some sort of back-up, and suggested that it would be helpful to have the public defender provide supportive services. A second judge believed that assigned counsel need more training. She also observed that retained counsel take more trials than appointed counsel.

A third judge thought that assigned counsel lack expertise. He suggested that lawyers who handled criminal work all of the time would do it more efficiently and would know what a case is "worth" when it comes to plea bargaining. He agreed with the previous judge that more training was needed for the younger attorneys. And finally, as noted previously, a fourth judge felt that the inadequacy of fees paid to appointed counsel posed a threat to the rights of defendants.

2. The Prosecution. A representative of the prosecutor's office complained that he sometimes has to tell appointed counsel when to file pre-trial motions and to ask for discovery. He thought that

some appointed counsel are "pretty bad" and "get sloppy." He pointed out that specialization is required for criminal representation, and that the Summit County system failed to require specialization.

3. Social Service Agencies. Social service agencies complained that the attorneys lacked knowledge of the system. They failed to use the mental health and drug alternatives that were available to their clients and did not know enough to subpoena agency personnel to testify in their clients' behalf. A drug center's director observed that attorneys failed to utilize the statute which allows treatment in lieu of conviction in drug cases. In addition, the probation department reported that attorneys seldom contact that office prior to case disposition to discuss a possible dispositional alternative.

A social service agency representative expressed his opinion that indigent defense was ineffectual in Summit County and that people who were not guilty were forced into plea bargaining.

4. Clients. Clients interviewed indicated that their opinions of assigned counsel varied depending upon the particular lawyer.

A defendant whose request for a particular well-known criminal lawyer was granted was very pleased with that lawyer's performance, but stated that other court-appointed lawyers who had represented him in the past were not so good. His view was that they received the same \$250 win or lose, and so their attitude was, "get the case over with, and get on to the next fee." The lawyers who had represented him previously had failed to confer with him until the day that he went to court.

Other clients similarly complained that they were unable to contact their lawyers, and that their lawyers had not interviewed them until just before the preliminary hearing. However, these complaints were not uniform; some defendants reported being interviewed by their lawyers soon after appointment.

One of the defendants interviewed stated that he had wanted to qualify under the statute permitting treatment in lieu of conviction for drug users, but that his lawyer had said that he couldn't do it. He felt that his lawyer hadn't "pushed" enough. Now, he is sentenced to 3 years probation, but felt that he couldn't make the probation because of his drug problem.

4. Attorneys. Members of the bar raised complaints and made suggestions for improvement in a number of areas relating to the Summit County appointed counsel component.

With regard to the question of low fees, they thought that it operated as a serious disincentive. One lawyer thought that the low fees caused many attorneys to waive the preliminary hearing, which could otherwise serve as a valuable source of discovery of exculpatory evidence for the defendant. It was also pointed out that there was a lack of parity between the payment of appointed counsel and the prosecution--the prosecutors receive 7% raises each year, while appointed counsel fees had not been increased since 1974. Yet, appointed counsel must continue to pay \$10/hour of their fees for office overhead. A suggestion was made that the fee schedule should be revised in such a way that it did not provide disincentives for going to trial; it was thought that the present system penalizes attorneys for taking trials.

In discussing the fees, some attorneys brought up the apparent conflict of interest between the judges who draft the assigned counsel

budget and their own salaries. It was thought that judges would be jeopardizing their own raises if they requested raises for assigned counsel. Some complained that the court's own budget was increased, but that no increase had been allotted for attorney fees.

The method of appointing counsel was roundly criticized by attorneys. One lawyer commented, "The more controversial the case, the weaker the defense team that's appointed." It was alleged that some judges may appoint without regard to the severity of the case, and may give new attorneys very serious cases. It was also alleged that appointments are based on party and personal relationships. Lawyers complained that "it's wrong to use the assigned counsel system as a training ground for new lawyers," and that defendants don't get fair representation by younger lawyers. It was suggested that the appointment system be upgraded through use of a centralized appointing agent who employed at least two lists separated by the degree of competence and experience of the lawyers.

It was pointed out that more training in criminal practice was needed. A comment was made that the bar association's occasional seminars were not helpful.

Several attorneys called for the establishment of formal, written eligibility criteria to ensure that judges were not appointing lawyers for defendants who could afford to retain counsel.

With regard to the need for investigators and other support services, it was suggested that there be a set dollar amount set aside for support services so that they need not be requested in advance from the court. It was noted that judges routinely deny attorney requests for investigative costs. In general, the attorneys saw the need for more investigative resources as well as more access to the services of experts.

The court's psycho-diagnostic clinic received mixed reviews from the lawyers. But even lawyers who liked the clinic saw the need for additional resources for incompetency or insanity evaluations.

The mixed defender-assigned counsel system was credited with providing some benefit to assigned counsel in Summit County. Although the office had no investigators to share with appointed counsel, they did, on some occasions, confer with appointed counsel on case strategy. In addition, the Ohio Public Defender Commission provided some back-up assistance through its briefbank.

The specialized criminal bar appeared to be in an internal conflict with the bar at large regarding the appointment system. The Criminal Law Committee of the local bar association had recommended that assigned counsel be required to have practical experience as a prerequisite to court appointment and that a system be established for newer lawyers to "second-chair" in criminal trials. However, the board of the bar association rejected that recommendation.

Summary of Statistical Comparisons of Attorney Performance

The performance of the appointed attorneys and retained counsel were statistically compared. A detailed discussion of the data is presented in the following chapter. This section gives a brief summary of the statistical analyses of court records showing cases handled by both groups of attorneys.

The results showed several areas in which retained counsel excelled over appointed lawyers. First of all, retained counsel cases were more likely to have trials, as opposed to being resolved through plea bargaining, than the cases handled by appointed counsel. The data also showed that retained counsel filed pre-trial motions to suppress illegally obtained evidence more often than did assigned counsel in felony assault cases. In addition to filing such motions in more cases, they filed more motions per case. While these two indicators do not necessarily influence the outcome of a criminal case, they indicate the amount of skill and effort expended by the attorney. Finally, although more an indicator of cost than of attorney skill, it was noted that retained counsel process felony drug cases more quickly than do assigned counsel.

In summary, while there were no areas in which appointed counsel were shown to have produced statistically significant better results than retained counsel, there were several areas in which retained counsel produced better results.

Problem Areas in the Summit County Ad Hoc Assigned Counsel Approach

There are a number of problems inherent in the assigned counsel system in Summit County that seriously jeopardize the quality of justice for the indigent accused in felony cases.

The approach to appointing counsel is beset with problems. The lack of any prerequisite experience or training for appointment even in the most serious cases creates the risk of providing unconstitutionally inadequate representation. Moreover, the absence of criteria and the failure to match attorney skill with the seriousness of the charge violate state standards and put the county at risk of having the state refuse to reimburse county expenses.

Allegations of favoritism and politics as well as charges that attorneys are refused appointments for providing vigorous representation give cause for great concern. When the independence of counsel is endangered, there can be no fairness in the functioning of the adversary system. The interests of the accused are subrogated to personal and political goals.

Financial disincentives in the Summit County system for appointed counsel appear to undermine the quality of representation and deter qualified lawyers from remaining part of the system. The maximum fee of \$500 for a non-homicide felony case and \$250 for felony cases which are resolved by plea penalizes both defendants and lawyers. Lawyers are forced to cut corners with regard to interviewing clients, investigating facts, skipping essential stages of the process, and are pressured to resolve the case by a quick plea rather than going to trial. The compensation for criminal defense lawyers lacks parity with the prosecution, which receives annual raises, as do the judges. Further disincentives to perform quality work are caused by fee-cutting by judges so that fees

paid are even lower than the \$30/hour in-court and \$20/hour out-of-court rates prescribed by the fee schedule. Yet, even the prescribed fees fall far short of the standard fees established by the State Public Defender Commission.

The timing and system for processing of fee payments provide further disincentives for appointed lawyers. Of particular concern is the need for attorneys who handle cases in the latter part of the year to wait until the following fiscal year for payment because appropriations have run out. The system whereby attorneys have to hand-carry their fee applications through the system is cumbersome, inefficient, and demeaning. Moreover, requiring attorney fee requests to be reviewed by the judge before whom the attorney appeared would seem to chill zealous representation and the filing of essential pre-trial motions.

Judges who must compete for scarce resources with assigned counsel control the appropriation for assigned counsel fees and influence the fee schedule. As a result, defense counsel have no opportunity to influence rates as does the prosecution whose budget is independent of that of the judiciary. There appears to be an inherent conflict of interest here on the part of the judiciary. This apparent conflict could be resolved by separating out assigned counsel fees from the judiciary, perhaps by placing it under the control of the local Public Defender Commission. This would provide a separate entity which could advocate for adequate compensation with the appropriating agency.

Because of the random and uncoordinated nature of appointments, there is no entity to provide supervision or monitoring of appointed counsel. Judges confess that their perceptions of the competency of counsel are merely impressionistic. Moreover, since over 90% of all cases are plea bargained, judges have no opportunity to observe the

extent of preparation of effort expended by appointed counsel. The only segment which has first-hand knowledge of attorney performance, the clients, are a disenfranchised group. As a result, there is a need for some means of ensuring that appointed counsel are providing effective services.

The lack of training and supporting services seriously impairs the ability of appointed counsel to perform well. Since a large percentage of the appointed lawyers are fresh out of school, there is a great need for specialized training in criminal practice. The lack of either a budgetary allotment or staff investigative services means that the defense must rely on one-sided and incomplete reports from the police and prosecution to establish the facts of a case. This simply robs the defense of any chance of proving either innocence or mitigation. The same principle applies to the lack of forensic experts for the defense.

While, as has been observed, the courts' efforts to ensure early appointment of counsel are laudatory, Summit County lacks a system to provide defendants with lawyers at the outset of the case. No lawyers are available for pre-indictment line-ups or interrogations. And even in cases where an attorney has been appointed and appeared with the client, attorneys may not follow up by interviewing the client until the date of the preliminary hearing. By that time, evidence may have disappeared and witnesses' memories may have lapsed. To compound this problem, defendants who are incarcerated pending their trial have great difficulty in contacting their lawyers because their calls are not returned and collect calls are not accepted.

The lack of resources allocated to the defense function may be a short-sighted savings. Since inexperienced lawyers are used and no social services are available, community resources that might aid in

reducing recidivism are overlooked. Attorneys are unfamiliar with drug and mental health programs that could be employed to rehabilitate defendants awaiting trial and recommended as alternatives to incarceration. The duty to provide dispositional plans for defendants is not fulfilled by the defense function in Summit County.

While the dual, or mixed, defense system may provide some side benefits in that appointed counsel can obtain some information from the public defender, the bifurcated nature of criminal defense in this county also creates a problem. Since there is no single entity in charge of the defense function, no one has complete statistics about the defense of indigents. As a result, there can be no adequate planning; in effect, the system falls through the cracks. This probably accounts for the fact that the county has been surprised when funds run out before the end of the year. Again, placing the entire function under the auspices of the Public Defender Commission might provide a solution.

SUMMIT COUNTY, OHIO FEE SCHEDULE Exhibit A June, 1977

**AMENDMENT TO ADJUST FEES SCHEDULE FOR COURT APPOINTED
ATTORNEYS TO REPRESENT INDIGENT DEFENDANTS**

Effective June 1, 1977

1 Aggravated murder with specifications	Unlimited
2 Aggravated murder (2903.01), murder (2903.02):	\$1,500.00
a—Maximum per attorney per case	30.00
b—Per hour in Court	20.00
c—Per hour out of Court	as approved
d—Expenses	by Court
3 Felony other than as in above:	\$ 500.00
a—Maximum per attorney per case	30.00
b—Per hour in Court	20.00
c—Per hour out of Court	as allowed
d—Expenses	by Court
4 All Misdemeanors:	\$ 300.00
a—Maximum per attorney per case	30.00
b—Per hour in Court	20.00
c—Per hour out of Court	as allowed
d—Expenses	by Court
5 All Appellate Court procedures:	Unlimited
a—Aggravated murder with specifications	
b—Aggravated murder (2903.01), murder (2903.02)	\$1,500.00
1—Maximum per attorney per case	30.00
2—Per hour in Court	20.00
3—Per hour out of Court	as allowed
4—Expenses	by Court
c—All other Felonies	\$ 500.00
1—Maximum per attorney per case	30.00
2—Per hour in Court	20.00
3—Per hour out of Court	as allowed
4—Expenses	by Court
6 All other including but not limited to post conviction remedies, Juvenile Court, Mental Health, Probate Court, Probation, Parole, Habeas Corpus or any other hearing which could result in the loss of liberty:	\$ 500.00
a—Maximum per attorney per case	30.00
b—Per hour in Court	20.00
c—Per hour out of Court	as allowed
d—Expenses	by Court

- 7 Attorney to be paid for time upon dismissal of any case.
- 8 Any additional compensation for felony or misdemeanor cases in excess of the maximum as indicated with permission of the Court.

Resolution adopted by the Summit County Commissioners May 24, 1977.

RICHARD GOLDSMITH, Chairman
Criminal Law Committee

January 27, 1979

EXHIBIT B

Regulations on Experience
Qualifications for Assigned Counsel
and Public Defenders

Any attorney (including Public Defenders and Assistant Public Defenders) who fails to meet the following minimum qualifications shall not be assigned to represent an indigent person in a criminal case.

(A) Where the defendant is charged with murder, aggravated murder and aggravated murder with specifications.

- (1) Trial counsel or co-counsel in one prior murder trial; or
- (2) Trial counsel in two first degree felony trials; or
- (3) Trial counsel in ten or more jury trials.

(B) Where the defendant is charged with a first, second or third degree felony.

- (1) Trial counsel in two or more first, second or third degree felony trials at least one of which was a jury trial; or
- (2) Trial counsel in any four jury trials at least one of which was a criminal jury trial in a first, second or third degree felony trial; or
- (3) Trial counsel in any two criminal trials and
 - (a) Co-counsel in at least one criminal jury trial, or
 - (b) Trial counsel or co-counsel in two jury trials.

(C) Where the defendant is charged with a fourth degree felony,

- (1) Trial counsel or co-counsel in at least one jury trial; or
- (2) Completion of a training program certified by the local bar association, the Court in which the case is being tried or the State Public Defender Commission. (1-1-78).

(D) All other cases for which assigned counsel is required by current constitutional interpretations.

- (1) Trial co-counsel in one trial tried to verdict or
- (2) Completion of a training program certified by the local bar association, the court in which the case is being tried or the State Public Defender Commission.

II. Assignments should be distributed as widely as possible among the member of the bar who meet the qualifications for assignment.

III. The respective courts and county and joint public defender commissions shall be free to adopt local rules requiring qualifications in addition to the minimum standards established by this regulation.

a share of such state reimbursement in proportion to the percentage of the total cost it has agreed to pay.

(B) If the joint county public defender fails to maintain the standards for the conduct of the office established by the rules of the Ohio public defender commission pursuant to division (B) of section 120.03 of the Revised Code, the Ohio public defender commission shall notify the joint county public defender commission and the county commissioners of each county in the district that the joint county public defender has failed to comply with its rules. Unless the joint public defender commission or the joint county public defender corrects the conduct of his office to comply with the rules within ninety days after the date of the notice, the counties' right to reimbursement from the state authorized in division (A) of this section shall terminate at the close of the current fiscal year.

HISTORY: 138 v H 164 (Eff 1-13-76); 138 v H 204 (Eff 7-30-79); 139 v H 694. Eff 11-15-81.

§ 120.33 [County appointed counsel system.]

In lieu of using a county or joint county public defender to represent indigent persons in the proceedings set forth in division (A) of section 120.16 of the Revised Code, the county commissioners of any county may adopt a resolution to pay counsel who are either personally selected by the indigent person or appointed by the court. The resolution shall include those provisions the county commissioners consider necessary to provide effective representation of indigent persons in any proceeding for which counsel is provided under this section. The resolution shall include provisions for contracts with any municipal corporation under which the municipal corporation shall reimburse the county for counsel appointed to represent indigent persons charged with violations of the ordinances of the municipal corporation.

(A) In such a county, an indigent person shall have the right to do either of the following:

(1) To select his own personal counsel to represent him in any proceeding included within the provisions of the resolution;

(2) To request the court to appoint counsel to represent him in such a proceeding.

(B) The court having jurisdiction over the proceeding shall, after determining that the person is indigent and entitled to legal representation under this section, do either of the following:

(1) By signed journal entry recorded on its docket, enter the name of the lawyer selected by the indigent person as counsel of record;

(2) Appoint counsel for the indigent person if the person has requested the court to appoint counsel and, by signed journal entry recorded on its docket, enter the name of the lawyer appointed for the indigent person as counsel of record.

(C) The county commissioners shall establish a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided pursuant to this section. Prior to establishing the schedule, the

county commissioners shall request the bar association or associations of the county to submit a proposed schedule. The schedule submitted shall be subject to the review, amendment, and approval of the county commissioners.

(D) Counsel selected by the indigent person or appointed by the court at the request of an indigent person, except for counsel appointed to represent a person charged with any violation of an ordinance of a municipal corporation that has not contracted with the county commissioners for the payment of appointed counsel, shall be paid by the county and shall receive the compensation and expenses the court approves. Compensation and expenses shall not exceed the amounts fixed by the county commissioners in the schedule adopted pursuant to division (C) of this section.

The fees and expenses approved by the court shall not be taxed as part of the costs and shall be paid by the county.

The county auditor shall draw his warrant on the county treasurer for the payment of counsel in the amount fixed by the court, plus the expenses the court fixes and certifies to the auditor. The county auditor shall report periodically, but not less than annually, to the board of county commissioners the amounts paid out pursuant to the approval of the court. The county commissioners, after review and approval of the auditor's report, may then certify it to the state public defender for reimbursement. If a request for the reimbursement of the cost of counsel in any case is not received by the state public defender within ninety days after the end of the calendar month in which the case is finally disposed of by the court, the state public defender shall not pay the requested reimbursement. The state public defender shall also review the report and, in accordance with the standards, guidelines, and maximums established pursuant to divisions (B)(7) and (8) of section 120.04 of the Revised Code, prepare a voucher for fifty per cent of the total cost of each county appointed counsel system in the period of time covered by the certified report. Upon presentation of the voucher to the auditor of state, the auditor, if satisfied as to the correctness of the voucher, shall issue a warrant on the treasurer of state, payable to the order of the county commissioners, for the amount of the voucher or, if the amount of money appropriated by the general assembly to reimburse counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems is not sufficient to pay fifty per cent of the total cost of all of the offices and systems, for the lesser amount required by section 120.34 of the Revised Code.

(E) If any county appointed counsel system fails to maintain the standards for the conduct of the system established by the rules of the Ohio public defender commission pursuant to division (B) of section 120.03 of the Revised Code, the Ohio public defender commission shall notify the county commissioners of the county that the county appointed

CHAPTER II

STATISTICAL ANALYSIS OF COURT DOCKET DATA IN SUMMIT COUNTY

Using data from the court files in Summit County, the following statistical comparison was made of performance by the ad hoc, or randomly appointed lawyers, and privately retained counsel. The privately retained counsel were used as a "control group," i.e., a means of assessing the performance of the assigned counsel by providing a yardstick against which to measure them.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the lawyers, the outcomes that the lawyers were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser crime than was originally charged; if it was resolved by trial, whether or not there was an acquittal; the length and type of sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; and how long it took to handle the cases from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

In Summit County, a sample of 223 felonies (86 felony assault and 137 felony drug) cases was drawn from the court dockets. A

breakdown of the types of the major felony offenses with which the defendants were charged and their method of representation in the sample is presented in Table 1.

Cases are classified by the type of counsel that eventually represented them, rather than their initial mode of representation. Only 8 defendants changed from retained to assigned counsel, while only 2 changed from assigned to retained counsel.

Table 1

Felony Offense Type

	Frequency	
	Assigned Counsel	Retained Counsel
Assault:		
Aggravated	1	2
Felonious	54	29
Total	55	31

Drug:		
Corruption of Another	0	1
Trafficking	25	29
Drug Abuse	15	40
Theft of Drugs	5	3
Deception to Obtain a Dangerous Drug	2	0
Illegal Possession of a Drug	12	5
Total	59	78

The frequency of various statuses of clients of both assigned and retained counsel, after the first arraignment and at the time of case disposition is presented in Tables 2 and 3. The tables show that clients of assigned counsel are more likely to remain in jail after first arraignment than are the clients of retained counsel and that though assigned counsel are more successful in getting clients released from jail, that this is still true at the time of case disposition.

Table 2

Initial Bond Status

	Frequency	
	Assigned Counsel	Retained Counsel
Money Bond	55.3% (63)	63.3% (69)
Jail	20.2 (23)	4.6 (5)
Released on Recognizance	23.7 (27)	32.1 (35)
No Information/N/A	.9 (1)	0.0 (0)

Table 3

Bond Status at Time of Case Disposition

	Frequency	
	Assigned Counsel	Retained Counsel
Money Bond	56.1% (64)	61.5% (67)
Jail	15.8 (18)	4.6 (5)
Released on Recognizance	27.2 (31)	33.0 (36)
Other	0.0 (0)	.9 (1)
No Information/N/A	.9 (1)	0.0 (0)

In Summit County, docket data reveal that 86% of the felonies represented by assigned counsel were charged by indictment (98 of the 114 for which there are data) and 82.6% of the felonies taken by retained counsel (90 of the 108 for which there are data) were so charged. 50.9% of assigned counsel felony cases (58 of the 112 for which there are data) were seen to involve preliminary hearings; 45.9% of the

retained counsel felony cases (50 of the 103 for which there are data) did so.

Patterns of case disposition in Summit County, Ohio are presented in Table 4.

Table 4

Method of Disposition

	Frequency				
	Assigned Counsel	Retained Counsel	Assigned Counsel	Retained Counsel	
Dismissal	11.4% (13)	12.8% (14)			
Plea	75.4 (86)	73.4 (80)			
Bench Trial	3.5 (4)	2.8 (3)			
Jury Trial	8.8 (10)	6.4 (7)			
Deferred Prosecution	0.0 (0)	1.8 (2)			

Frequencies of the various sanctions imposed on those adjudicated guilty in the jurisdiction are displayed in Table 5.

Table 5

Type of Sentence

	Frequency				
	Assigned Counsel	Retained Counsel	Assigned Counsel	Retained Counsel	
Deferred Sentence	12	12			
Suspended Sentence	64	61			
Fine	17	19			
Court Costs	84	73			
Probation	67	59			
Time Served	11	2			
Incarceration	56	38			

(Note: Frequencies do not total number of pleas plus number found guilty at trial, because more than one type of sentence was often assigned to a defendant.)

The activity of counsel as revealed by the number of motions filed by assigned and retained counsel in Summit County is presented in Table 6.

Table 6

Total Number of Motions Filed

	Frequency				
	Assigned Counsel	Retained Counsel	Assigned Counsel	Retained Counsel	
0	52.6% (60)	56.9% (62)			
1	35.1 (40)	20.2 (22)			
2	5.3 (6)	18.3 (20)			
3	7.0 (8)	.9 (1)			
4	0.0 (0)	0.0 (0)			

5
6 or more

0.0 (0)	1.8 (2)
0.0 (0)	1.8 (2)

The frequency of filing of the four most common types of motions can be see in Table 7.

Table 7

Type of Motions Filed

	Frequency				
	Assigned Counsel	Retained Counsel	Assigned Counsel	Retained Counsel	
Reduce Bond	12	6			
Dismiss	2	3			
Suppress	7	14			
Discovery	7	18			

Data on the second indicator of attorney activity, number of appearances in court, is presented in Table 8.

Table 8

Number of Attorney Appearances in Court

	Frequency				
	Assigned Counsel	Retained Counsel	Assigned Counsel	Retained Counsel	
0	0.0 (0)	.9 (1)			
1	3.5 (4)	7.3 (8)			
2	6.1 (7)	3.7 (4)			
3	7.9 (9)	21.1 (23)			
4	17.5 (20)	26.6 (29)			
5	21.9 (25)	16.5 (18)			
6	18.4 (21)	11.0 (12)			
7	14.9 (17)	4.6 (5)			
8	5.3 (6)	2.8 (3)			
9	2.6 (3)	.9 (1)			
10 or more	1.8 (2)	4.5 (5)			

The tables presented above represent the frequencies of given answers to the questions posed on the docket study instrument. In order to analyze those responses, two types of variables had to be created.

The first type of variable created was the "dichotomous" variable. Dichotomous variables allow us to boil the issues down into two choices such as "yes" and "no." This allows the results to be expressed as fractions of 100%. Examples of dichotomous variables depicted in the table below are: defendant detained in jail vs. defendant released from jail, and case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of responses may be collapsed, and instances where there were missing data are dropped from the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by making computations of the data collected so that "intervals" such as the length of time from the defendant's first court date until case disposition can be compared.

Frequencies of the dichotomous variables created for the analyses of covariance from the court dockets in Summit County are presented in Table 9.

Table 9

Variable	Frequency	
	Assigned Counsel	Retained Counsel
Bond Status at Time of Case Disposition		
-in jail	20.4% (23)	4.6% (5)
-out of jail	79.6 (90)	95.4 (104)
Change in Bond		

Status from First Appearance to Disposition				
-change--				
was in jail-now out	34.8	(8)	20.0	(1)
-no change--				
was in jail-still in	65.2	(15)	80.0	(4)
Case Disposition:				
a) dismissal				
-case dismissed	11.5	(13)	13.5	(14)
-not dismissed	88.5	(100)	86.5	(90)
b) trial				
-case tried	12.4	(14)	9.6	(10)
-case not tried	87.6	(99)	90.4	(94)
c) trial vs. plea				
-plea entered	86.0	(86)	88.9	(80)
-case tried	14.0	(14)	11.1	(10)
d) type of plea				
-original charge	44.2	(38)	43.8	(35)
-lesser charge	55.8	(48)	56.2	(45)
e) trial outcome				
-guilty	64.3	(9)	90.0	(9)
-not guilty	35.7	(5)	10.0	(1)
f) trial outcome				
-guilty of				
original charge	33.3	(3)	55.6	(5)
-guilty of				
lesser charge	66.7	(6)	44.4	(4)
g) motions filed				
-filed none	52.6	(60)	56.9	(62)
-filed any	47.4	(54)	43.1	(47)
h) overall disposition				
-guilty	64.3	(9)	85.6	(89)
-not guilty	35.7	(5)	14.4	(15)
Sentence:				
a) incarceration				
-incarcerated	58.8	(57)	41.8	(38)
-not incarcerated	41.2	(40)	58.2	(53)
b) type				
-incarceration	58.8	(57)	41.8	(38)
-probation	38.1	(37)	46.2	(42)
-other	3.1	(3)	12.0	(11)

The mean performance of assigned and retained counsel on the

variables for which interval-level data was gathered in Summit County are presented in Table 10.

Table 10

Variable	Mean of Assigned Counsel	Mean of Retained Counsel
Length of Incarceration (range)	19.9 mos. (1-227)	22.94 mos. (1-180)
Number of Motions Filed (range)	.67 motions (0-3)	.81 motions (0-8)
Number of Attorney Appearances (range)	5.1 apps. (1-12)	4.5 apps. (0-14)
Days from First Appearance to Disposition (range)	105.7 days (0-334)	120.0 days (27-359)
Days from First Appearance to Sentencing (range)	121.9 days (7-334)	136.1 days (31-334)

2) Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in Summit County: Felony Cases, Controlling for Defendant Sex, Race, Age, Prior Convictions and Initial Bond Status

i) Covariates. In performing the analyses of the data, it was necessary to control for the characteristics of defendants. For example, it was thought that if the clients of appointed counsel had significantly more prior convictions than the clients of retained counsel, this could skew the outcomes unless the statistical model used adjusted for that fact. In Summit County, the study controlled for prior convictions, sex, race, initial bond status, and age.

Table 11 presents the frequency distributions of the characteristics of clients of assigned and retained counsel.

Table 11

Case and Defendant Characteristics

	Frequency	
	Assigned Counsel	Retained Counsel
Prior Convictions:		
Yes	54.4% (62)	43.1% (47)
No	27.2 (31)	37.6 (41)
No Information	18.4 (21)	19.3 (21)
Sex:		
Female	19.3% (22)	13.8% (15)
Male	80.7 (92)	86.2 (94)
Race:		
White	41.2% (47)	48.6% (53)
Black	34.2 (39)	15.6 (17)
No Information	24.6 (28)	35.8 (39)
Initial Bond Status:		
Bond	55.3% (63)	63.3% (69)
Jail	20.2 (23)	4.6 (5)
ROR	23.7 (27)	32.1 (35)
No Information	.9 (1)	0.0 (0)
Mean Year of Birth	1953	1952

ii) Analyses. The analyses of covariance revealed the following significant difference between assigned and retained counsel in Summit County: whether or not a case was resolved by trial ($F(1,64)=4.29, p .042$).

The coefficient of regression is non-significant for this dependent variable, indicating that the covariates of prior convictions, etc. did not alter the finding. Examination of adjusted means indicates that clients of retained counsel are more likely to have their cases taken to trial than are the clients of assigned counsel (adjusted means=1.7 and 1.9 respectively).

There are also three interactions between the type of attorney handling a case (assigned/retained) and type of felony with which the defendant was charged (assault/drug) in Summit County:

- 1) number of days between first appearance and sentencing ($F(1,57)=9.92, p .003$)
- 2) number of motions filed ($F(1,68)=7.72, p .007$)
- 3) whether or not motions were filed ($F(1,68)=7.42, p .008$).

The coefficient of regression is not significant for any of these variables, again, indicating that the findings were not affected by the control variables designating defendant characteristics.

To be more specific, the statistical analysis indicates that

the interaction involving the number of days from first appearance to sentencing occurs because of a difference between retained and assigned counsel with respect to drug cases ($F(1,57)=7.31, p .009$). Retained counsel process felony drug cases more quickly than assigned counsel (adjusted means=101.3 days and 191.1 days, respectively). Retained and assigned counsel do not differ in their speed of processing assault cases (adjusted means=140.0 and 113.9 days, respectively). With respect to the number of motions filed, analysis indicates that retained counsel file more motions than assigned counsel for assault cases ($F(1,68)=4.76, p .033$) (adjusted means=1.2 and .44 motions, respectively). Retained and assigned counsel do not differ with respect to number of motions filed for felony drug cases (adjusted means=.66 and 1.3 motions, respectively). With respect to whether or not motions are filed, analyses reveal that retained counsel are more likely to file than assigned counsel for assault cases ($F(1,68)=7.47, p .008$) (adjusted means=1.7 and 1.2, respectively). Retained and assigned counsel do not differ significantly in their motion behavior for felony drug cases (adjusted means=1.5 and 1.7, respectively). Thus, retained counsel are filing more motions and are more likely to file motions for felony assault cases, yet are taking less time to bring felony drug cases to sentencing than are assigned counsel.

3) Summary of Differences between Assigned and Retained Counsel

Differences in the handling of:

Felonies

- likelihood case resolved by trial
- number of motions filed
- whether or not motions filed
- days from first appearance to sentencing

CONCLUSION

As noted above, there were several areas where the data showed that retained counsel performed significantly better than assigned counsel in Summit County. Any one of these indicators, taken alone, would not be particularly persuasive evidence that assigned counsel were not performing up to par. However, taken together, they do appear to present a pattern.

For example, in felony drug cases, retained counsel disposed of the cases in an average of 101.3 days as opposed to 191.1 days for assigned counsel. They were also faster in disposing of felony assault cases, but there, the difference was not statistically significant.

While pre-trial motion activity alone is not an unambiguous indicator of performance, it does tend to show more effort. Here, retained counsel filed 1.2 motions in the average felony assault case, while assigned counsel filed only .44 motions. The notion that they are expending extra effort on cases is buttressed by the finding that they are statistically more likely to take cases to trial than assigned counsel.

In sum, while these findings are not overwhelming, they seem to indicate that retained counsel are significantly more efficient than assigned counsel and, at the same time, they put more effort into their representation of the accused.

CHAPTER IV

The Summit County Cost Study

From assigned counsel attorneys' fee requests, data was obtained to estimate fee per case, time spent per case, and fee per hour. These results are presented in table 1.

Table 1
Fee per case, fee per hour, hours per case for Summit County.

Case type	Fee/case	Fee/hour	Hours/case	Hours-in	Hours-out	N
Ass+Drg	\$275.88	\$20.12	13.71	6.84	6.87	88
" trials	498.75	17.92	27.83	14.98	12.85	12
" pleas	264.88	22.50	11.77	5.74	6.03	68
" dismis	188.00	20.89	9.00	3.98	5.02	8
Assaults	304.65	19.73	15.44	7.31	8.13	40
" trials	523.11	20.61	25.38	13.50	11.88	9
" pleas	252.12	19.09	13.21	5.80	7.41	26
" dismis	184.60	20.15	9.16	4.00	5.16	5
Drugs	251.90	20.55	12.26	6.44	5.82	48
" trials	425.67	12.09	35.20	19.43	15.77	3
" pleas	243.64	22.39	10.88	5.70	5.18	42
" dismis	193.67	22.18	8.73	3.93	4.80	3

For the entire sample of 88 felony fee requests, average fee (per case) was \$276 with a fee per hour of \$20. Assigned counsel lawyers spent, on average, 13.71 hours on a felony case for an assault or drug charge. Approximately half of this time was spent in court. Trials were more expensive than plea cases, and plea cases were more expensive than dismissals. A trial cost over 2 1/2 times as much as a dismissal. However, trials cost the least on a per hour basis at only \$17.92 per hour.

Assaults were generally more expensive than drug cases. Assault trials were more expensive than drug trials. Assault pleas were more expensive than drug pleas. However, assault dismissals were slightly less expensive than drug dismissals but the Ns are too small to make much of that. On a fee per hour basis, assaults generally were slightly

less expensive than drug cases. However, assault trial cases had a substantially greater fee per hour (\$20.61) compared to the fee per hour for a drug case (\$12.09). This must be interpreted cautiously as the Ns are so small for these case types.

Fee Costs from Aggregate Budget Data

Data on fees were also obtainable from aggregate budget data which the county and State uses to assess its Indigent Defense Systems. This data is from the 1982 Annual Report of the Ohio Public Defender Commission. A total of 2020 assigned counsel felony cases were handled by the Summit County Assigned Counsel System.

The following cost items are reported.

For Summit County : Fee per felony case = \$211.18
 Fee per hour for a felony case = \$20.85
 Hours per case for a felony case = 10.13
 Fee per case (all types) = \$209.48
 Fee per hour (all types) = \$20.88
 Hours per case (all types) = 10.03

Compared to our estimates from our sample of felony assault and drug cases, our sample shows a higher felony cost per case (\$276 vs \$211) and a higher number of hours per case (13.71 vs. 10.13). But our cost per hour estimate is very close, almost identical, to the aggregate calculation (\$20.12 vs \$20.85). It would be natural for these differences to occur in that our sample is for just two types of felonies (assaults and drugs) while the aggregate data represents the universe of cases across all felony types.

It at first seems startling that, in the aggregate data above, the data for felony cases is very similar to that reported for all cases (felonies, misdemeanors, appeals). This is explained due to the assigned counsel systems caseload being 95% comprised of felony cases.

Overhead Costs

The overhead costs for running this ad-hoc assigned counsel system consists of costs associated with the assignment process and the payment process.

The assignment process uses (roughly) approximately 5 minutes of a judge's time to pick the assigned attorney and 10 minutes of a court clerk or bailiff to call the attorney and arrange for the appointment. Using an assumption of \$50,000 per year salary for a judge and \$20,000 a year salary for a bailiff, this assignment process adds an additional \$2.10 for judicial resources expended and an additional \$1.70 for bailiff resources expended. Thus we roughly estimate that each case costs an additional \$3.80 beyond the fee as the cost for appointing attorneys.

The payment process uses (roughly) approximately 15 minutes of a

judge's time to review and approve the voucher. In addition, a part-time accounting clerk is used to fill out the necessary forms so the county can send payment to the attorneys and to keep a filing system. From the assumption above, the judge's time resources used in the payment process adds an additional \$6.30 per case. From interviews it was learned that the accounting clerk works approximately 40% of the time on the assigned counsel system during February through December, and then works 90% of the time during January when special accounting procedures are followed. The accounting clerk earns \$14,040 per year, including fringe benefits. From this information, we calculate that the accounting clerk costs attributable to the assigned counsel system are: \$6201.00. The formula used was: $[(11/12 \times .4) + (1/12 \times .9)] \times \$14,040 = \$6201$. Since 1037 assigned counsel cases were handled in 1981, we calculate that the accounting clerk cost attributable to the cost Per Case of the assigned counsel system is: $\$6201 / 1037 = \5.98 . Thus we roughly estimate that each case costs an additional \$12.25 beyond the fee as the cost of the payment process of the assigned counsel system ($\$12.28 = \$6.30 + \$5.98$). A summarization of the estimation of the overhead costs is presented in Table 2.

Table 2
Components of Overhead Costs in Assigned Counsel System of Summit County

Overhead Component	Contribution to Cost per Case
Judge in appointment	\$ 2.10
Bailiff in appointment	1.70
Judge in fee approval	6.30
Accounting clerk in fee approval	5.98
TOTAL	\$16.08

We can now estimate cost per case for the case types presented in Table 1 by adding the fee per case to the overhead per case. This is presented in Table 3.

Table 3
Cost per case of Assigned Counsel System in Summit County

Case type	Fee / case	Overhead / case	Cost per case
Ass+ Drgs	\$275.88	\$16.08	\$291.08
" trials	498.75	"	\$514.83
" pleas	264.88	"	280.96

less expensive than drug cases. However, assault trial cases had a substantially greater fee per hour (\$20.61) compared to the fee per hour for a drug case (\$12.09). This must be interpreted cautiously as the Ns are so small for these case types.

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" pleas	264.88	"	280.96

4

"	dismiss	188.00	"	204.08
Assaults		304.65	"	320.7~3
"	trials	523.11	"	539.19
"	pleas	252.12	"	268.20
"	dismiss	184.60	"	200.68
Drugs		251.90	"	267.98
"	trials	425.67	"	441.75
"	pleas	243.64	"	250.72
"	dismiss	193.67	"	209.75

PART III

THE SAGINAW COUNTY, MICHIGAN COORDINATED ASSIGNED COUNSEL SYSTEM

VOLUME I
P a r t III

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CHAPTER I

PROFILE OF THE SAGINAW COUNTY, MICHIGAN COORDINATED ASSIGNED COUNSEL SYSTEM

The Environment of the Indigent Defense System

Saginaw County is located near the center of the State of Michigan. Five sizable rivers -- the Flint, Tittabawassee, Cass, Shiawassee, and Badd -- flow into Saginaw County to form the Saginaw River.

Following the Civil War and extending until the turn of the century, Saginaw County was a busy lumbering center. Many sawmills were clustered on the Saginaw River's banks, and the rivers provided forest-to-mill transportation for logs. Vast tonnages of mill products, from boards to barrel staves, were sent to market aboard vessels plying the Great Lakes with Saginaw as a port of call.

The lumber industry came to a screeching halt after the Saginaw Valley was shorn of its pine forests. Today, Saginaw is a General Motors town. Approximately 25,000 workers are employed by GM's various divisions. However, at the time of this study in 1983, the automobile industry was hard-hit. Approximately 15% of the population was unemployed out of a total labor force of 101,200, and further lay-offs were being predicted by the local press.

The east side of the City of Saginaw is very poor -- a ghetto with a high crime rate. The downtown section seems almost deserted, and expensive hotels located there are suffering from lack of business because out of town visitors eschew the area. The west side of the city is where the more affluent, white citizens live. These two sections of the city are separated by the Saginaw River.

The population of Saginaw County is 228,059 persons of whom 15% are black and about 5% are Hispanic. The county covers a land mass of 814 square miles with a population density of 278 persons per square mile. The latest (1974) figures show per capita income at \$5,506. The 1975 crime rate per 100,000 persons was 7,767 crimes.

The county's bar association boasts 309 members. In addition, there are some 40 attorneys who practice in the county, but do not belong to the bar association.

The county is managed by an elected Board of Commissioners, and lacks either a County Administrator or a County Manager. The County Controller is the chief executive officer. This official's duties include that of presenting the budget for the assigned counsel program to the county's Board of Commissioners.

The county budget for 1982 was \$66.6 million, which includes approximately \$2 million in state and federal funds. Interestingly enough, while there is widespread unemployment in the county and consequent loss of income by the residents, the county tax coffers increased from 1981 to 1982 by 5.5% due to increases in property taxes. The major sources of real estate taxes have continued despite harsh economic times. This county has consistently operated in the black.

The Criminal Justice SystemThe Courts

There are two levels of criminal courts in Saginaw County: the lower courts which are the District Courts, and the Circuit Courts. The District Courts have 6 judges, while the Circuit Courts are served by 5 judges, all of whom hear both criminal and civil cases. Both sets of courts are located in the Saginaw County Court Building; however, juvenile cases are heard elsewhere. The jurisdiction of the

Circuit and District Courts is congruent with the county's boundaries.

Maximum judicial salaries are controlled by state law. They are set at a fixed percentage of the salaries paid to judges of the State Supreme Court; e.g., judges of the Circuit Court may receive no more than 92% of the salaries paid to State Supreme Court judges. A portion of the judges' salaries is paid directly by the state. It is then up to the individual counties to determine whether or not to pay a supplement bringing judicial salaries up to the statutory amount.

While some Michigan counties have elected not to do so, Saginaw County pays its judges the maximum allowable amount. The Chief Judge of the Circuit Court earns approximately \$63,000 of which \$37,775 is paid by the state, with the remainder coming from county funds.

Costs for payment of assigned counsel are allocated from the courts' budgets. Costs of prosecution, on the other hand, are found in the county budget under General Services Administration.

The Prosecution

The Chief Prosecuting Attorney for Saginaw County is an elected official. The budget for that office in 1982 was \$676,765. Fourteen full-time-equivalent attorneys are employed by that office, of whom 2 are housed in a satellite office and handle only paternity cases. An additional \$170,668 is allotted for welfare enforcement. The salary of the Chief Prosecuting Attorney is \$47,517.

The budget for that office is prepared on the basis of last year's budget rather than on the principle of zero-based budgeting. No analysis is conducted of caseloads or costs per case.

The office handles all misdemeanors, traffic cases, and civil infractions as well as felonies, mental commitment, guardianship,

neglect cases, and research for the Attorney General on certain questions.

The prosecutor presents his budget directly to the County Board's Finance committee; the courts take no part in these budget negotiations.

The office makes no effort to handle cases by way of vertical prosecution. That is, the preliminary hearing, arraignment, and sentencing stages may be handled by different attorneys in the office.

Pretrial Release and the Use of Bail Bondsmen

The Michigan Constitution states that, "All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for (persons in certain specified kinds of cases) ...when the proof is evident or the presumption is great."¹ The exceptions to the presumption of bail deal with repeat offenders, charges of murder or treason, first degree criminal sexual assault, armed robbery, and kidnapping with intent to extort money.

In accordance with the Michigan Constitution, a Michigan Court Rule² incorporates the presumption of release, and allows the courts to utilize either personal recognizance, conditional release, 10% deposit with the court, or the posting of the full amount of cash bail.

Notwithstanding the rule permitting judges to use 10% bonds, Saginaw County judges in most cases decline to use the system, preferring to require the posting of full cash bail. This has led to the widespread use of bail bondsmen. Bondsmen are frequently observed waiting in the courthouse office of the Assigned Counsel Coordinator.

Indigency and the Criminal Justice System

Defendant indigency rates have increased due to the current high unemployment situation. When the present assigned counsel

Administrator assumed his position a year and a half ago, assigned counsel were being appointed in 70-80% of the felony cases. Due to current economic conditions, counsel are now being appointed in over 90% of felonies.

The Criminal Justice Process

All cases originate in the District Court. If they are misdemeanors, they may be tried or pled in District Court. If they are felonies, they may be pled in District Court if they have been reduced to misdemeanors. However, if a preliminary hearing is held and probable cause is found, the case will be bound over to the Circuit Court where it may be tried, pled or dismissed.

Initiating a case by way of indictment very rarely takes place in this county.

The Indigent Defense System

History and Goals of the Program

The present system grew out of a mounting dissatisfaction with the random court-appointed approach to providing defense services to indigents accused of crime. As early as 1969, there were charges that Republican judges favored Republican attorneys in making criminal appointments.³ At that time, another problem that had surfaced was an excess of expenditures over county budget appropriations. Newspaper commentary at that time predicted the replacement of the existing system with a public defender system.⁴

The Argersinger decision brought increased concern about skyrocketing court expense, particularly in the face of continued cost increases. This led, in 1972, to a pledge by county commissioners to study the option of a public defender system.⁵

Again, in 1975, the fiscal officers of Saginaw County complained that, under the random assigned counsel approach, the county had "no handle on how much the program is going to cost each year."⁶

The contract system employed in Berrien and Isabelle Counties was considered by the Board, but the County Board noted that judges would have to be consulted in the planning of any new funding method "since they have the authority to appoint attorneys (and) without their cooperation it wouldn't do us any good to have a contract with a firm for legal services...We could end up having to honor the contract and still have to pay to an attorney if a judge wanted to appoint one."

In 1976, Legal Services for Eastern Michigan recommended a study by the National Center for Defense Management (NCDM) of the National Legal Aid and Defender Association to assess the problem and make recommendations. The impetus for this study were assigned counsel costs in 1975 approaching \$500,000; this was up from \$177,000 in 1969 and \$53,600 in 1968. The NCDM study was highly critical of the system, alleging that a large percentage of appointed attorneys were not qualified to handle criminal law and that clients are getting poor service.⁷ The report recommended that the county establish a six member private defender system. The report was blasted by both judges and lawyers who were angry over the allegations of incompetency of counsel, and its recommendations were roundly rejected.

A newspaper article in 1977 claimed that, "a few attorneys are doing a good business representing people who are being defended at taxpayers' expense."⁸ This article culminated a series of articles alleging either favoritism in appointments or uncontrollable costs as defects in the random appointment system.

All of the persons interviewed in the course of the present study agreed in substance about the objectives of the county in rejecting the random assignment approach and establishing a new coordinated assigned counsel system in 1979. The major objective of the system was that of cost-saving. This was to be accomplished through better screening of defendants for eligibility, by keeping attorney fees down, and by seeking repayment from defendants who could afford to reimburse the county for the cost of representation. A second objective was that of taking the pressure off of judges by avoiding charges of favoritism. None of the individuals interviewed thought that improving the quality of legal defense services was one of the goals of establishing the program. When established, the new system was modeled after a similar program in Genesee County, Michigan.

To a large degree, the program appears to have met those goals. The total cost of appointed counsel was no greater in 1981 than it was in 1978. In addition, the \$40,000 cost of administering the program (most of which is used to pay a part-time attorney-administrator and a full-time assistant) has produced no additional cost to the county if we consider that approximately \$27,000 is recouped from defendants as a result of the program and that \$13,500 of actual attorney services are provided by the Administrator in attending line-ups, extradition, and probation violation hearings.

The Coordinated Assigned Counsel Program - An Overview

Saginaw County currently employs a coordinated assigned counsel system as the exclusive mode of providing legal defense services to indigent defendants. It is staffed, as we noted above, by a part-time attorney-administrator and a full-time eligibility screener/clerk/secretary. The attorney contracts directly with the county, and is paid \$20,000 per year with no fringe benefits; he is not a county employee. The assistant is a county employee; she receives approximately \$16,000 in salary plus the county fringe rate of 25%.

The Administrator of the program is a former Assistant Prosecuting Attorney for Saginaw County as well as a former U.S. Attorney. Since 1980, he has been in private practice with the firm that serves as counsel for the County. The County Attorney is also a partner in that firm. The Administrator ran unsuccessfully for the post of Chief Prosecuting Attorney in the last election.

As noted earlier, the program has been in existence since 1979; the present head is the second Administrator for the program.

The program handles the following types of cases: felonies, misdemeanors, paternity, and some appeals (the remainder are handled by the Michigan State Appellate Defender Office). These cases are assigned out to attorneys on the program's appointment list. In addition, the Administrator himself provides direct attorney services at line-ups, in probation violation hearings, and in extradition cases. It handles no juvenile cases or mental commitments; those are handled through direct random attorney appointment by the individual judges in those courts.

The Administrator is hired via a Special Services Contract with the County. His duties, as specified in the contract, include: supervising the eligibility screener, making recommendations to the judges regarding the appointment of counsel, actively engaging in recoupment from defendants, providing direct attorney services as described above, reporting to the District Court Administrator, and filing monthly reports with the "monitoring committee" which consists of one District Court and one Circuit Court judge, the two court administrators, and a county commissioner.

The Administrator, in each indigent case, submits an attorney's name to the judge for appointment. His recommendations are based upon lists containing 77 attorney names.

According to the Administrator, the sole criteria for participating in the assignments are a request by the attorney and maintaining either a residence or an office within the county. Two appointment books are used, one for attorneys who accept felony cases, and a second, for attorneys who accept misdemeanors. Attorneys are selected from the books in rotation, except where the case requires special skill, in which case, names will be skipped over until the name of a more skilled attorney appears on the list. Attorneys will also be passed over in the event that they are unavailable for the preliminary hearing which, by Michigan law, must be held within 12 days of the defendant's arrest. In special cases, the Administrator will confer with the appointing judge by phone before sending the appointee's name up to the judge for formal appointment. However, in most cases, the Administrator, in effect, makes the selection, which is subsequently rubber-stamped by the judge.

Attorney Fees

1. Fee Schedule. The fee schedule provided by the Assigned Counsel Administrator shows separate fee structures for cases handled in the Circuit and District Courts. For Circuit Court, an "event" structure is employed which specifies flat rates for given court appearances, e.g., preliminary hearings (the same rate is paid whether the hearing is held or waived), arraignments, motions (the schedule does not state whether the same rate is paid whether the motion is just filed, or whether it must be heard as well, but motions with a brief receive an additional \$25), pleas, sentencing, and trial days. An extra \$25 is given for case preparation. No fees are provided for time spent in meetings or calls with the client, research, investigation, or other out-of-court activities.

For District Court, the fee schedule simply provides a flat \$30 per hour rate, and does not distinguish between in-court and out-of-court activities.

These schedules are dated July 7, 1981. Fees are recommended by the Administrator on the basis of these schedules; actual fees are decided by the trial judge in each case.

2. Judges' Perceptions. Five judges were interviewed including the Chief Judges of both the Circuit and District Courts. None of these judges appeared to be familiar with the printed fee schedules. A Circuit Court judge who was not shown the schedule stated that they don't use a schedule, but that each judge approves the fee of the lawyer who appeared before him in his own discretion. He stated that he pays the lawyers for motions and telephone calls, but that the initial factual interview falls under the flat initial arraignment fee. According to this judge, the fees are designed to

compensate the attorney for actual court time.

A District Court judge stated that he hasn't seen a fee schedule and doesn't know how much is given for each event or trial day, but that fees are based on events in District Court. He stated that his payments are based on how many times the attorney comes to the courthouse, but that he would also pay for case investigation if he felt that the investigation was "valid." If the attorney files a pre-trial motion, this judge would pay only if the motion was a "good" one. He felt that many attorneys pad their bills, and he seeks to screen those out. He believed that the Administrator generally recommended slightly under what the attorney should be paid and that this practice by the Administrator had the objective of making him look like he was conserving county funds.

A second District Court judge believed that the Administrator began with the presumption of paying \$25/hour for District Court cases, and that the District Court did not use "events" as they did in Circuit Court. However, he expanded, fees are a case by case determination, and factors such as the lawyer's experience, sincerity, the outcome, and the number of charges against the defendant are considered. Misdemeanor fees seem to range from a low of \$50 to a high of \$600, according to this judge. While the interviewer was present, the judge approved a fee of \$100 for 2 hours of work; this was the Administrator's recommendation in that case. According to this judge, he would compensate time spent in investigation if it was requested; however, no one requests payment for time spent in investigation of cases.

The Chief Judge of the Circuit Court agreed that lawyers never request payment of time to investigate or interview witnesses, but stated that they would not receive payment for doing so; however,

he stated that they are paid for telephone calls. According to the Chief, no one has ever asked for social services for a defendant.

A third District Court judge believed that there were no hourly rates in District Court.

In sum, substantial differences were noted between the "official" fee schedules employed by the Administrator's office in submitting recommendations regarding attorney fees and the fees that the judges, who made the final fee determinations, used. In addition, in the one case that the interviewers observed, the fee recommended by the Administrator did not appear to be consistent with the fee schedule.

3. Attorney Perceptions. Like the judges, the perceptions of the attorneys on the appointment list varied substantially, both from the fee schedule and from each other.

One attorney believed that attorneys were paid \$30/hour in both Circuit and District Courts. A second attorney thought that they were paid \$40 to \$45/hour for in-court time in both felonies and misdemeanors, but that out-of-court time was paid at the rate of \$20/hour. A third attorney stated that attorneys receive fees by event in felony court; this attorney does only felony work.

Another attorney said that there is no fee schedule, and that he does not know the hourly rates given, but he thought that the judges approve whatever the Administrator recommends. A fifth attorney said that there was a flat fee for particular court appearances with no payment for out-of-court appearances, and that these fees were the same for both felonies and misdemeanors. He routinely puts down hours spent on his billings, but was considering taking that off, since he did not believe that it was considered in setting fees.

A sixth attorney was not aware of any fee schedule, but guessed that fees averaged \$25/hour; however, he thought that the rates paid varied from judge to judge. He was aware of the \$30/hour rate paid in juvenile court, however. He complained that there was no payment for work done outside of court.

Several of the attorneys said that, if the attorney went back to the judge and complained, the judge would often pay more.

One lawyer thought that the fees were \$150 for preliminary hearings and \$100 per day of trial, both of which differed from the fee schedule.

All of the attorneys interviewed agreed that the fees paid are inadequate. One attorney expressed his concern that the present system, whereby judges approve vouchers, could compromise the work of an attorney who really depends on appointed work, noting that it is difficult to stand up to a judge who might delay payment, might pay at a lower rate, and might even prevent your receiving appointments. Another attorney made it clear that the system encourages attorneys to "cop a plea" in order to be paid at a rate which is reasonable, since out-of-court time is paid at a rate which does not compensate attorneys for their office overhead, and, he continued, if you can't meet these expenses, you must go out of business. A third attorney stated that his overhead alone is \$200 per day, and when he handles appointed cases, he makes only \$150 per day. He thought that the system often results in a defendant's pleading to an overcharge by the prosecutor. He also thought that the county had no more than 5 to 8 good criminal lawyers.

Fees paid for privately retained cases range from \$50 to \$200 per hour, according to another informant. Another lawyer

noted that the fee schedule does not take into account the seriousness of the case or the disposition obtained, and that you don't get paid for research, preparation, or client visits, so that you do only what you must to avoid malpractice suits, but that it "tends to promote plea bargaining."

Another attorney contended that the lack of funds determines the kind of service that a defendant receives, since no money is paid for preparation out of court. He thought that higher fees would attract a better quality of lawyers to handle those cases.

One prominent lawyer, who thought that appointed attorneys were paid the same in both Circuit and District Court, i.e., basically a flat fee for court appearances with some money for out-of-court time, stated that the fee structure deters effective representation because, for example, the attorney is not paid to interview the defendant in jail. Many attorneys wait until the defendant is brought to court and interview the defendant just before the preliminary hearing is held for the first time.

It was generally agreed that attorneys are not paid to conduct factual investigations of cases, and no informant was aware of judges' ever approving of funds for attorneys to hire investigators.

One of the attorneys interviewed has taken his name from the felony appointment list, since he believes that the fees paid in misdemeanor cases are more adequate.

Nine attorneys in all were interviewed, 8 of whom were members of the appointment lists.

4. Bar Association Inquiry. As the foregoing discussion would indicate, the fee schedules for Circuit and District Court have never been circulated among members of the assigned counsel panels. Indeed, judges appear to be unfamiliar with it. The cloud of secrecy that appears to hang over the assigned counsel system has led to a formal inquiry on the part of the bar.

The Saginaw County Bar Committee on Court Appointments was created to evaluate and study the current appointment system. One of the areas of their inquiry relates to assigned counsel fees. In a series of questions directed to the Chief District Court Judge (these questions are referred to as "interrogatories" by some members of the bar, thus indicating their potential for use in litigation), the bar committee propounded such questions as:

a) What are the guidelines for payment of court-appointed attorneys in Circuit and District Courts; b) Who is the final determiner of such fees; c) Do the judges ever order an amount of fees different from that recommended by the Office of Assigned Counsel.

The inquiry addressed to the Chief District Court Judge was dated July 8, 1982; however, as of September 17, 1982, no reply had been submitted to the bar committee. The Chief District Court Judge did observe that the judges were considering a meeting with members of the bar to discuss the matter, inasmuch as the judges had rejected the notion of submitting a written reply.

Processing of Attorney Fee Vouchers

The process by which assigned counsel fees are paid is as follows. The attorney submits the bill. The bill is then sent to the Office of Assigned Counsel where the staff makes a recommendation as to what fee should be received. The bill is then returned to the

trial judge along with the recommendation. Finally, the judge reviews the recommendation and signs an order for payment.

Most judges also send the assigned counsel office a form showing the amount that the judge decided to pay. The judge's order for payment goes next to the court administrator. The court administrator sends it to the County Clerk. The County Clerk's office prepares a Disbursement Voucher. The voucher goes to the County Controller, but, before it can be paid, 2 of the county's 3 auditors must approve the check. Then, the check is paid.

By law, once a judge signs an order, the bill must be paid. Nevertheless, the county requires the auditors to approve the checks before payment in most cases.

Attorneys interviewed were highly critical of the length of time involved in payment. They estimated that it took from three weeks to five months for payment; the answers varied with each respondent. They also stated that, in the event that an attorney complained about the size of the fee and an additional fee was approved, the supplemental check took another two to three months.

The attorney fee petition may not be submitted until after sentencing, which may not take place until several months after case disposition. The majority of those interviewed stated that payment took from 2 to 3 months from the time that their bills were submitted.

One county official thought that the auditors sometimes "sat on" attorney fee vouchers out of spite.

Recoupment Scheme

The system for securing repayment of counsel costs was described by the program's Administrator as follows. Most defendants who receive appointed counsel are asked to sign a pay-back agreement; this includes those who are on unemployment compensation at the time of the appointment. However, most defendants do not actually pay back the cost of counsel.

Those who are working, approximately 10%, are subject to a wage assignment, and have monthly installments deducted from their paychecks toward the cost of counsel. Unlike some other jurisdictions, where the partially eligible make some percentage contribution to the cost of counsel, defendants in Saginaw who do pay are expected to reimburse the county for the full cost of their attorney's fees.

Approximately \$27,000 was recouped in 1981. Judges may, and often do, make the repayment of appointed counsel fees a condition of probation.

If a case is dismissed, the county keeps the monies paid, but ceases collection of further monies. Even after a defendant completes his probation, he must continue paying until the entire cost of counsel is paid off. However, if a defendant goes to prison, no effort is made toward collection.

No instances have occurred to date where a defendant who was required to repay the cost of providing counsel was found innocent; thus, there is no precedent in this jurisdiction for determining whether or not those funds would be reimbursed. However, as noted above, there is no return of monies paid by a defendant whose case is dismissed.

At the time that the pay-back agreement is signed, no specific cost for legal services is designated, as the total cost of services

will not be known until the conclusion of the case.

The Administrator's description of the operation of the recoupment system does not coincide with the perceptions of other actors interviewed.

It was the view of one critical actor that the system was not "recoupment," since it was his belief that the defendant only pays back that portion which can be paid off during the pendency of a case. According to that actor, once the defendant has been acquitted or sentenced, there was no longer any obligation on the part of the defendant to pay. That interviewee felt that such restrictions produced a fairer system, and did not hamper the defendant's rehabilitation as would making repayment a condition of probation.

The Chief Judge of the District Court was under the impression that a fixed amount for repayment was set at the time of the pay-back agreement, and that no more is paid regardless of the actual payment made by the courts to the appointed lawyer.

Two of three District Court judges thought that a defendant still has to pay if found innocent; a third thought that if the defendant is found guilty, he would not be required to reimburse the county.

The Chief Circuit Court Judge believed that the defendant is not asked to repay the entire cost of counsel; in his view, the scheme is designed to obtain a contribution, not a repayment. He believed that after a trial is over, the defendant no longer has to pay. Moreover, he believed that a defendant could not be required to pay after that time because after sentencing, the Office of Assigned Counsel and the courts lose jurisdiction over the defendant.

The Chief Circuit Court Judge's belief was in sharp contrast to the views of District Court judges interviewed who regularly make repayments a condition of probation. The Chief Circuit Court judge also believed that an acquitted defendant would not have to pay. A second Circuit Court judge, however, believed that recoupment may be a condition of probation and that the defendant continues to pay during probation.

The Chairman of the County Board was also of the view that the defendant remains liable to repay the cost of counsel after adjudication and sentencing; he stated that a person may be liable for several years and will make small payments during that time. That policy, he observed, was set by the program's administrator.

Client Eligibility Criteria

1. Criteria employed. One of the areas of interest to this study was the method for determining which defendants were entitled to have counsel appointed by the Office of Assigned Counsel as opposed to retaining counsel on their own.

All persons interviewed agreed that there were no formal eligibility criteria issued by the courts, nor were there any statutory guidelines. The Assigned Counsel Administrator reported that no one had ever given him any guidance in assessing defendant eligibility for the appointment of counsel, either in written or oral form. He believed that the question of salary was irrelevant to the inquiry; the main issue was whether or not the defendant had sufficient funds to retain counsel. He thought that the judges would make a defendant eligible if he is unable to make a down payment to a

lawyer, even though the defendant is able to make installment payments.

On the other hand, the Administrative Assistant to the Administrator, who actually performs the initial eligibility screening, stated that she employs the income level criteria adopted by Legal Services (the organization that provides free lawyers in civil cases). If the defendant earns under those levels, she assumes that they are eligible, while if he/she earns over those amounts, she refers the decision to the Administrator.

2. Reaction of the Bar. Attorneys interviewed agreed that the eligibility criteria employed were too liberal. One attorney stated that too many people were declared eligible and cited an example of a defendant who had 3 cars and a house and was declared eligible with the proviso that he repay the lawyer's fee. He stated that all the defendant needs to do is say that he needs a lawyer appointed.

A second attorney opined that one of the main problems with the present system was that non-indigent defendants were receiving the service, thus driving up the cost to the county and lowering bar fees. He also believed that one of the problems for lawyers was that the defendants gave all of their money to the Bondman, with the result that they could no longer afford to retain counsel; this occurred notwithstanding the legal presumption that defendants should be released on their own recognizance.

A third lawyer complained that defendants who are able to retain counsel are often declared eligible on the condition that they make pay-backs, and that many lawyers feel that only the truly indigent should receive this service.

That view coincided with the opinion of another attorney

who believed that the pay-back scheme tends to draw cases away from the private bar. He noted that a person working full-time at General Motors may still receive appointed counsel. The bar would prefer to have those clients make a wage assignment with the bar association.

One lawyer complained that "they don't bother with criteria." He thought that a defendant may receive appointed counsel if he is making \$265/week working in a plant. He wanted to insist upon a requirement that such a defendant be required to seek to retain at least 4 attorneys before the court determines that he is unable to afford counsel. He described the court's use of wage assignments as nothing more than a prepaid referral system and said that enough attorneys would be willing to accept wage assignments with a small retainer as a down payment. According to this attorney, "The present system takes the bread and butter out of retained practice, and is not justified by the need to move cases."

3. Judges' Perceptions. Judges, citing the case of People v. Westin, believed that Michigan's requirement that a case be dismissed if the preliminary hearing is not held within 12 days necessitated liberal rules for appointment of counsel.

One of the judges interviewed complained that the present system of assigning counsel made it difficult to obtain counsel within 12 days. He described the problems in the system as follows.

If the defendant is arraigned on a Friday, he must then go to the Office of Assigned Counsel for an eligibility interview. Subsequently, that office must make an eligibility decision, identify an attorney to handle the case, and send the proposed appointment

order up to the judge. Then, the judge must sign the order and send it back to the assigned counsel office. This process may take several days. Next, the attorney who has been appointed may be on trial in another case. As a result, the 12 day period may sail by before the attorney has had time to prepare for the preliminary hearing, according to the judge.

Appointment of Counsel

1. Criteria for Participation in the Panel. All attorneys who are licensed to practice in the State of Michigan and either live or office in Saginaw County are eligible to participate in the court appointment system. No other criteria are employed, and the Administrator has no authority to accept or reject attorneys from the appointment lists on any other basis.

There is no requirement that all licensed attorneys in the county participate; participation is strictly voluntary. There are a total of 77 attorneys participating in court appointments through the Office of Assigned Counsel out of approximately 350 residing in the county.

2. Attorney Classification. Unlike Alameda and Santa Clara Counties in California, there is no formal stratification of the attorney lists. The attorneys themselves may volunteer to participate in the felony or misdemeanor list. Some attorneys have refused to handle appointed felonies or to handle certain types of offenses; their wishes have been acceded to by the program.

3. Method of Selection. In the main, the names of attorneys are selected by the Office through a rotational system. There are two books used in making the selection; one has a page for each misdemeanor attorney, while the other has the felony

attorneys. Attorneys are identified in order unless the case requires special expertise or is a capital case. In such cases, the pages will be turned until a person with the required expertise is found. In such special cases, the Administrator will confer with the appointing judge by phone before sending the recommendation.

Judges make the final decisions on all appointments, but almost uniformly approve of the recommendation submitted by the Administrator. No instances were cited of cases where judges circumvented the use of the Office of Assigned Counsel in making appointments.

Members of the bar have complained of the lack of criteria in determining which attorneys may receive appointments in capital cases. The list of questions submitted to the judges by the Saginaw County Bar Association Committee on Court Appointments asks whether there are any guidelines for appointment of attorneys, and if so, under what circumstances they are waived.

4. Role of Client Preference. Defendants have no role in the selection of counsel. Respondents were asked whether or not a defendant has the right to refuse the first attorney appointed. The response was that, in general, defendants had no such right, but in instances where it was apparent that the defendant could not get along with a particular lawyer, the judges have sometimes been willing to appoint a substitute.

5. Perceptions as to Equity in Distribution of Appointments.

A number of attorneys were asked whether they perceived the distribution of appointments among members of the bar as being equitable. Apart from some concern over the lack of appointments in very serious cases, the bar appears to be satisfied that appointments are being fairly apportioned throughout the bar.

Continuity of Representation

Even though a single attorney is appointed to represent a given defendant, there seems to be a fairly common practice that another member of the assigned attorney's law firm may make court appearances on behalf of the defendant and otherwise participate in the defendant's representation. As a result, continuity of representation is not insured by selecting an assigned counsel program in lieu of a contract or a defender system.

Time of Entry

The lack of continuity of representation in the Saginaw County system is further exacerbated by a significant gap in representation. In most cases, counsel are not available to represent indigent defendants at the initial court arraignment where the terms of the defendant's bond are set.

Appointed counsel entry into a case occurs through the following procedures. At the initial court arraignment, the judge inquires about the defendant's ability to hire an attorney. Next, the defendant is sent to the Office of Assigned Counsel for an eligibility interview. Then, that Office identifies an attorney who is available to handle the case (this may require several phone calls), after which a recommendation and draft Order of Appointment must be sent to the judge and returned to the Office. The attorney is then

informed of his appointment.

Some attorneys make an effort to interview incarcerated clients in the County Jail shortly after their appointment. Others, however, first greet and interview their clients while in the holding cells immediately preceding preliminary hearing. Many complain that they are not paid for their out-of-court time in interviewing the defendant.

The procedure described above contrasts with other appointed counsel systems such as those in Santa Clara and San Mateo Counties, California, where a representative of the assigned counsel program is present in court at the initial arraignment and confers with the defendant at that time.

One prominent Saginaw County lawyer thought that judges did not want lawyers present at the arraignment because they would argue for more personal recognizances, money would not go to the Bondsmen, and the Bondsmen "do a good job in insuring that the defendants come to court."

Supporting Services and Training

The Office of Assigned Counsel offers no assistance or supporting services to assigned attorneys in the handling of their cases other than appearances at line-ups prior to appointment of counsel. It has no training program, offers no advice on case handling, makes no appearances at initial arraignments, has no briefbank, motion bank, or library, and has no support staff such as investigators or social workers to assist the appointed attorneys.

No training is required of members of the appointed counsel lists, nor is any offered through either the program, the bar association, or any other entity, nor are funds available for them

to participate in programs presented by national or out-of-county agencies.

Judges appear to assume that the issuance of a license to practice law by the state endows the attorney with a sufficient amount of criminal law expertise to handle the appointed cases.

No funds are included in the District Court's budget for experts requested by defense attorneys. The Circuit Court's budget includes \$1,000 for "judicial investigations" and \$5,000 for "court-ordered medical exams." Presumably, these line items are primarily used when lawyers request expert assistance. However, those amounts are very small for a county with a high crime rate such as Saginaw's.

Prior approval is required from the court for any major expenditures by defense counsel. Judges reported that they never approve funds for investigators, since the defense has access to police reports, and thought that defense lawyers had no need to investigate criminal cases.

Social service assistance is apparently never requested of the court. Most of the monies in the court's budget go to pay for psychiatrists in cases where insanity is an issue.

Development of Dispositional Plans

It is the lawyer's duty to present alternatives to incarceration to the court at the sentencing stage in appropriate cases. According to standards issued by the American Bar Association, "If a presentence report or summary is made available to the defense lawyer, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not

disclosed, the lawyer should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on the lawyer's exploration of employment, and other opportunities made available by community services."⁹

The interviews conducted indicated very little involvement by Saginaw County lawyers in the development of sentencing plans for alternatives to incarceration. The probation department indicated that lawyers seldom attempt to provide input into presentence reports or even contact the probation department prior to sentencing, and that that is particularly true of appointed counsel.

It was noted, by way of comparison, that, while in Saginaw one rarely sees a lawyer referring anyone to a rehabilitation program, attorneys in Ann Arbor, Michigan put a great deal of time into setting up programs for their clients.

Referring to the local halfway house, the director of probation stated that many attorneys are not even aware that it exists. He believed that, while the probation office has no jurisdiction to get a defendant into a rehabilitation program prior to final disposition of a case, the defense lawyer can and should be more active in that regard so that the defendant would look better by the time that the case was disposed.

According to the probation department director, the only way in which the local attorneys do attempt to improve their clients' sentences is through motions for delayed sentences in cases where the defendant is between ages 17 and 20 through an option provided in Michigan law (the Youth Training Act). He also stressed that, if attorneys would work more closely with the probation

staff in developing presentence reports, the probation officers would welcome their assistance, as they are highly overworked and carry high caseloads. He believed that defense attorneys could assist those defendants who receive sentences of "fine or probation" by doing some leg work to insure that their clients get the fine paid on time in order to avoid going to jail. Finally, he urged lawyers to make use of a directory published by the United Fund listing all of the social service and counseling agencies available in the county for providing assistance to their clients.

The Community Action Program in Saginaw runs a halfway house, Harambee House, which is funded by the Michigan Department of Corrections. It accepts first-time felons who are not charged with violent crimes and who are not currently addicted to drugs.

The director of the program indicated that he very rarely heard from lawyers, and dealt almost exclusively with the probation department. He thought that it would be a good idea to distribute literature about the program to the Office of Assigned Counsel so that the lawyers would make better use of the facility, which was only using 2/3 of its capacity.

Also interviewed was the Saginaw County Office of Substance Abuse Services, also known as TASC (Treatment Alternatives to Street Crime). Most of their clientele are indigent defendants who have court-appointed counsel. The program does much of its own screening in the jails for clients, and thus, does not necessarily rely on counsel for referrals.

The program's director reported that, in many cases, the defendants don't know the names of their attorneys because the

defendants may not see their attorneys prior to coming to court, and the drug program must phone the Office of Assigned Counsel to request the attorney's name in order to confer with him or her.

Supervision of the Program and Monitoring of Attorney Performance

1. Supervision of the Office of Assigned Counsel. There were substantial differences in the perceptions of key actors regarding supervision and accountability of the Office of Assigned

ding to the contract between the Assigned Counsel Administrator and the County, the Administrator is required to report to the District Court Administrator for administrative purposes and shall prepare and file monthly reports with a "monitoring committee" consisting of a judge from both the Circuit and District Courts, the District Court Administrator, and one county commissioner designated by the County Board.

According to the Circuit Court Administrator, the role of the Monitoring Committee is to solicit, screen, and recommend applicants for the post of Administrator to the Board of Commissioners, to receive reports from the Administrator, and to monitor the program. On the other hand, the County Board's "Courthouse and Criminal Justice Committee," in his view, performed the role of monitoring the assigned counsel program's budget.

On the other hand, the Assigned Counsel Administrator stated that his office is monitored by the Courthouse and Criminal Justice Committee of the County Board and that he files monthly reports with them. He also reports to the judges by making appointments to meet with them.

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An article appearing in The Saginaw News exemplifies some of the confusion that surrounds the program. The article, which appeared in August of 1981, explains that the Assigned Counsel Administrator was hired by the Courthouse and Criminal Justice Committee, but that that was done unlawfully, because only the County Board itself has the authority to hire.¹⁰ The decision that only the County Board could hire was handed down by the County Attorney after the newspaper complained that interviews for candidates were taking place in violation of the state's Open Meetings Act.

Two County Board members were interviewed regarding the question of which entity governs the program. One board member stated that the program is accountable to the Courthouse and Criminal Justice Committee of the County Board which monitors the program, establishes its budget, and hires the Administrator. Another member stated that the program is accountable to the judges of the Circuit Court, since only they can accept or reject the Administrator's recommendations and, if dissatisfied with the operations of the program, could choose to ignore it and appoint attorneys at will.

Several judges were also queried regarding responsibility for monitoring the program. One judge stated that the Administrator files monthly reports with all of the judges, but that he is hired by the County with the approval of the courts. A district Court judge stated that the Administrator must report to the Chief Judge of the Circuit Court, who must also approve the person hired by the County. However, the Chief Judge of the District Court stated that the monitoring committee composed of the two judges, two court administrators, and one county board member had the ultimate authority to hire and fire the Administrator and to

establish his duties.

2. Monitoring of Appointed Counsel Performance. All persons interviewed agreed that, whatever monitoring of attorney performance takes place, is performed by the judges before whom they appear. The monitoring of appointed counsel performance is not considered one of the duties assigned to the Administrator. The following example of judicial monitoring was provided by a judge: when the court receives a letter from a defendant complaining of poor representation, the judge hauls the attorney into court with the defendant and airs the grievance in court.

Only one person interviewed was aware of any instance where an attorney had been removed from the appointment list or even suspended. A judge stated that he had ordered the Administrator to remove or suspend an attorney three or four times for drunkenness.

Statistical and Reporting Function

The Office of Assigned Counsel prepares a monthly report containing the following data: 1) number of defendants interviewed; 2) numbers of defendants receiving appointed counsel with and without payback agreements; 3) number denied court-appointed counsel; 4) number of defendants making payments that month; 5) total amount of payback monies received; 6) numbers and types of proceedings handled by the Administrator; and 7) number of attorney fee vouchers processed. That office also maintains records on the amounts owed and received by each defendant required to repay the cost of counsel.

Cases on the monthly reports are broken down by type of case, i.e., felony, misdemeanor, traffic, paternity, and appeals. No data are maintained on case dispositions or sentences received. All case files are maintained by the individual lawyers; thus, the

Office of Assigned Counsel has no data regarding the types or number of motions filed by appointed attorneys.

The office does keep track of the numbers of cases assigned to each attorney and the amount of the fee approved in each case with the exception of the fees approved by one judge who is unwilling to inform the Office of the amounts that he approves. No information is maintained regarding whether cases assigned remain pending or have been disposed. As a result, the Office has no means of knowing whether a given attorney is overloaded with pending appointments.

Implementation of Argersinger

The 1972 U.S. Supreme Court decision in Argersinger v. Hamlin required that no person may be sentenced to a period of incarceration without having the assistance of counsel. This decision has been implemented in a variety of ways throughout the country. In some jurisdictions, attorneys are routinely appointed to represent indigent defendants in cases where the penalty imposed could, under the law, result in incarceration. In others, judges have attempted to assess the likelihood that a particular defendant may go to jail before determining whether or not to appoint counsel.

In Saginaw, judges appear to interpret Argersinger as a restriction on their sentencing authority rather than as a right accruing to the benefit of the defendant. Respondents estimated the rate of appointments in misdemeanor cases to be from 5% to 10% of all misdemeanor cases. Judges prefer to err on the side of not appointing counsel for a given defendant. Then, if the judge, after hearing the case, changes his mind about incarcerating a defendant who has not been represented, he will declare a mistrial, appoint counsel, and recuse himself from the case. According to the

Administrator, this costs the courts less than would the cost of appointing counsel in a large number of cases.

One attorney who was interviewed cited examples of pressures placed on defendants to waive their right to counsel. He stated that, in misdemeanors which allow for a maximum incarceration period of 90 days, the judge will often inform the defendant as follows: "This is a 90 day misdemeanor. If you enter a plea of guilty today, I can't send you to jail. If you want a trial, you may get up to 90 days in jail. Do you want to plead today, or do you want a trial?" He suggested that such a procedure has a very chilling effect upon the right to counsel.

A total of 96 cases were sampled from the Saginaw County court files in order to assess possible Argersinger violations. No counsel had been appointed in any of these cases. Of the 96 cases, 86 defendants pled or were found guilty. Sixteen of these cases, or 18.6%, showed that the defendant was sentenced to some time in jail. Thus, in almost 19% of the "no counsel" cases resulting in conviction, there appeared to be violations of the Argersinger decision.

Summary of Statistical Comparisons of Attorney Performance

The performance of the attorneys appointed by the Office of Assigned Counsel was statistically compared. A detailed discussion of the data is presented in the following chapter. This section gives a brief summary of the statistical analyses of court records showing cases handled by both groups of attorneys.

It should be noted here that the two groups of lawyers are not necessarily mutually exclusive; i.e., some of the attorneys on the appointed counsel lists also handle privately retained cases. Differences in performance may be attributed to a variety of factors

in addition to attorney skill, such as the amount of time and effort expended, financial incentives, attitude of the attorneys, etc. Moreover, the poverty and social standing of the indigent defendants themselves may be a factor. The following results are merely presented as a factual comparison of the types of justice received by poor and relatively affluent defendants in Saginaw County.

Clients of appointed counsel are less likely to be released from custody pending disposition of their case, notwithstanding the statutory presumption of release on one's own recognizance. Assigned counsel clients also fare worse when it comes to sentencing. They are more likely to be incarcerated and when incarcerated tend to receive harsher sentences.

With regard to the speed at which assigned and retained counsel dispose of cases, there seems to be a "mixed bag." Retained counsel are faster in disposing of misdemeanor cases, while assigned counsel show fewer days from first court appearance to final disposition in felony drug cases; retained and assigned counsel do not differ significantly in the amount of time consumed in disposing of felony assault cases.

Why do clients of retained counsel fare better with regard to pretrial release and sentence? These results may be partly attributable to the amount of effort expended by the attorneys. Retained counsel engage in more motion practice than assigned counsel and make more court appearances in felony drug cases. (However, both groups made few appearances.)

On the other hand, assigned counsel are very good at obtaining dismissals for their clients; they received dismissals in almost 44% of all misdemeanor cases and over 28% of their felony cases compared with 33% and 17% respectively for retained counsel. It

cannot be ascertained whether the high rates of dismissals received by assigned counsel are attributable to their familiarity with the courts, to overly aggressive arrests by police of the indigent, to other factors, or to a combination of factors.

Local Perspectives of the Coordinated Assigned Counsel System
Community Groups

Representatives of five community groups concerned with justice, human services, and politics were interviewed about community attitudes toward the coordinated assigned counsel system.

One group complained that lawyers who get on the assigned counsel list are often those who have no other work to do, that they engage in excessive plea bargaining, and that conscientious lawyers simply don't get paid for their work. They also believed that rendering justice was not one of the goals of the assigned counsel program, and that most of the better lawyers are not on the appointment list. This group also thought that the pay scale should be altered to pay lawyers what is needed or, in the alternative, that the county should adopt a public defender system.

A human services agency believed that a lot of blacks and Mexicans were being railroaded under the present system and that the court-appointed lawyers don't fight for their clients. The interviewee felt that the best lawyers don't accept appointments, but that new lawyers use the program to gain experience. When people are referred to him, he tells them to hire a lawyer if they can afford one, because he feels that they will have better representation with a paid lawyer. He himself would prefer a public defender system, since he believes that court-appointed attorneys are not as good as public defenders. It was his belief that, because public defenders are salaried, they don't have to

"hustle cases" for a living.

A representative of a local minority group stated her perceptions based upon contacts with clients receiving assigned counsel representation. She has been told that appointed counsel do not return phone calls from their clients, that clients are made to feel like second class citizens, and that the clients don't feel that they lawyers do as much for them as they would if they were paid. In general, she thought that people feel that the caliber of lawyers in the program is low. The community perception is that, "if you're from the East Side, lawyers feel that you don't deserve to be defended."

One interviewee, an ex-offender himself, thought that the assigned counsel assume guilt on the part of their clients and fail to do any serious questioning of the police. Most of the lawyers on the list plead everyone out, according to this informant. He thought that if a lawyer is too vigorous, he won't be reappointed by the judge. He also believed that most lawyers refuse to participate in the program, and that better lawyers will provide vigorous representation only if they are paid. Some of the black lawyers who have "made it" are afraid to speak out because they have to get along in the community, this interviewee told the interviewer.

According to one respondent, it sometimes takes six months for an attorney to be paid. Moreover, she believed that there is an injustice in that each judge pays at a different rate. The program is under some pressure because, by law, the judges have the final say, and don't have to use the assigned counsel program if they are dissatisfied with it, the interviewer was told.

She also felt that the program failed to help in curbing police abuses such as improper warrant procedures and breaking into the wrong houses.

In summary, the community representatives who were interviewed appeared to have a great deal of familiarity with the program. However, they shared a very poor opinion of the existing system.

Attitude of the Bar

Attorneys who were interviewed appeared to be very unhappy with the program. They believed that the compensation was very inadequate, and felt that they could not continue to subsidize the system.

Attorneys complained that, when they handled a lengthy case, their office overhead exceeds the amount of their fees. Some seemed apologetic about seeking to earn any money from practicing criminal law.

One lawyer admitted that he was "apathetic" about changing the system because only 10% of his criminal cases are appointed. He thought that the problem with the present system is that it will result in fewer and fewer attorneys continuing to practice criminal law, whether privately or as retained counsel. He reasoned that the wage assignment system encourages people who could otherwise afford to retain counsel by paying in installments, to use appointed counsel. As a result, they wind up paying the appointed counsel at much lower rates than they would be required to pay retained counsel. He believed that the former "ad hoc" system resulted in better quality services because it employed only the criminal law practitioners rather than the bar at large.

On the other hand, particularly among the newer members of the bar, attorneys continue to participate in the assigned counsel system

because of bad economic times, the surfeit of lawyers in the county, and economic necessity, which has them over a barrel. Some believed that, if they moved to increase the rates, lawyers just out of law school would come along to take their place, and that therefore it was impossible to get the fees increased. Other attorneys continued to participate out of a sense of moral duty to provide representation to indigent defendants.

In general, the lawyers appeared to be intimidated by the present system. Somewhere afraid to request a set amount on their fee requests lest judges deny it out of pique. They are uninformed about the fee schedule and how the assignment system works and feel apologetic about asking. It does not occur to them that they should request investigators or receive any services from the Office of Assigned Counsel.

One lawyer was concerned that the judges had abdicated their responsibility to insure that clients were adequately represented, and had turned it over to elected public officials whose only concern was the budget. He suggested that a means of providing earlier entry into cases was to hand the Assigned Counsel Administrator a copy of the arrest warrant and allow him to be present at the initial arraignment. This would provide an opportunity for advocacy at the bail hearing stage.

One respondent told an anecdote which implied that judges use intimidation to keep attorney fees down. According to the anecdote, when an appointed lawyer complained to the judge that he received \$75 per hour in his private practice, the judge replied, "if you're so busy, why don't you take your name off the list?"

The worst allegations made by members of the bar about the Saginaw County assigned counsel system related to possible collusion. A committee of the county bar association is planning a suit against

the judges claiming that the superintendency of the court should be removed from the control of the judges. A reason cited was the allegation that there was collusion between the judges and the bail bondsmen. It cites as evidence that the bondsmen will call the arrestee shortly after he is arrested on Friday and tell him to get together \$500 by Monday and that if he does, the bondsman will be able to get him out of jail. Then, on Monday, the judge will, "miraculously," set bond at \$5,000, thus meeting the 10% requirement. The suit cites these figures as evidence of collusion.

According to the Assigned Counsel Administrator, although there were 77 members of the bar on the appointed counsel lists, only one attorney had obtained the fee schedule. This was done through use of the Freedom of Information Act (although the Administrator insisted that all that the attorney needed to do was request a copy from him). Despite all of the complaints among members of the bar, however, about the inadequacy of the fees, the majority of the appointed counsel who were interviewed wished to continue with the coordinated assigned counsel system.

Defendants' Perspectives

Several former clients of assigned counsel were interviewed in the local branch of Jackson State Prison which is located at the YMCA. Two of these were represented prior to the establishment of the Office of Assigned Counsel, while three were represented by the existing program. It should be noted that these defendants are not necessarily representative of the universe of appointed counsel clients, since they obviously received convictions and sentences of incarceration.

Of the two defendants who were represented before the existence of the new program, one was satisfied with the appointed lawyer's performance, while the other was not. The disgruntled defendant complained that the lawyer had waited for two weeks after her arrest and incarceration before interviewing her, arranged for a jury trial when she would have preferred a bench trial, failed to fight for her at trial, failed to request that her case be severed from that of her codefendant, and never informed her regarding whether or not her appeal had been perfected. In addition, she received a much higher sentence than the lawyer had predicted. She indicated that most prison inmates with whom she had spoken believe that all court-appointed lawyers work with the state and try to get the defendant to "cop out." Her case was complicated by the fact that one lawyer had started the case and then moved away, so another lawyer had to take over.

The three defendants represented by the present coordinated assigned counsel system were all disappointed with their representation. One defendant, whose lawyer was appointed in 1981, complained that his lawyer kept switching his case back and forth with the lawyer's partner, with the result that neither lawyer prepared his case carefully. He felt that you are always better off with retained counsel.

A second defendant was never interviewed by his lawyer until he was in the courthouse's holding tank awaiting preliminary hearing. He thought that he would have received probation instead of a prison sentence if he had been represented by a private lawyer, and thought that all appointed counsel were friends of the prosecutors, who "reward" them.

A third defendant, arraigned in 1981, indicated that he was not interviewed by the attorney until he reached the courthouse. He

had thought that he would be acquitted because there was "no case" against him. He felt that his attorney did not prepare the case properly, complained that the attorney only returned his phone calls one time out of 30, that the attorney wasn't honest with him about what was happening in the case, and that he would have been better off with a retained attorney. He believed that court-appointed lawyers are paid by the county or the state, and so they are working for the State. The lawyer did not help him get into a dispositional alternative, but the defendant did get into TASC after he was in jail and he was also in a drug program while in prison.

Problem Areas in the Saginaw County Assigned Counsel System

There are a number of existing and potential problems facing the coordinated assigned counsel system in Saginaw County. One such problem is the apparent conflict of interest in which circuit court judges find themselves. Assigned counsel fees and a portion (about 1/3) of the circuit court judges' salaries are paid out of the same budget. (The state pays about 2/3 of the judges' salaries, and the county commissioners may elect to supplement this state salary or not, in their discretion.) In Saginaw, the county has elected to pay the judges the full supplement allowed by law. This has provoked jealousy on the part of the bar. They reason that, if assigned counsel fees were increased, this could conceivably diminish the salaries of the judges, and imply that the judges are conspiring with county officials to keep appointed counsel fees low to their own personal advantage.

A second problem relates to allegations of impropriety between the judiciary and the bail bondsmen. These allegations are fueled by the fact that, although Michigan law and court rules allow defendants to pay 10% of their bond directly to the court in lieu

of using bail bondsmen, the judges in Saginaw seldom employ this technique, preferring instead to require full bonds to be paid to the court. This results in the perpetuation of the bail bondsman system. This angers the bar because the continued use of bail bondsmen means that large amounts of money are going to the bail bondsmen that could otherwise be used to pay attorney fees.

While this report does not contend that there is any substance to these allegations, the fact remains that the bar's perceptions that such conditions exist create a problem in the criminal justice community. The bad feelings among lawyers are further exacerbated by the fact that the county's recoupment system appears to drain cases away from retained counsel and to dilute the fees that the private bar can charge.

discussion is the impact of use of the pay-back system combined with bail bondsmen upon the vitality of the private bar and its ability to continue criminal practice.

An obvious problem in the system is the difference between the perceptions of all of the actors involved regarding the major features of the assigned counsel program. The program's administrator, the court administrators, the judges, and appointed lawyers appear to have entirely different conceptions about the workings of the recoupment system, appointed counsel fees, eligibility criteria, and which entity governs the program. The program is clouded by a shroud of secrecy and poor communications between the actors. This leads to a host of problems including hostility between actors, lack of uniformity in application of procedures with resultant unfairness to

some, and ultimately, a lowering in the quality of services provided. For example, lawyers who could have charged for out-of-court time under the District Court's fee schedule, but believed that such time would be uncompensated, often avoided spending time that would have greatly improved their representation.

Accountability of recoupment funds paid by defendants under this system appears to be another problem. The Assigned Counsel Administrator requires most defendants to sign a form that they will pay so much per month for their defense. Since this is signed at the outset of the representation, no amount is put on the agreement, as the defendants are expected to eventually repay the entire cost of counsel. Theoretically, the defendants are to pay no more than the county actually pays out for the attorneys who provided the representation. A wage assignment is often executed whereby the defendant's employer automatically deducts a certain sum each pay period from the defendant's wages and pays it directly to the court. The problem is that the Assigned Counsel Administrator does not maintain records of the amounts actually paid to counsel (since this item is not paid out of the Administrator's budget, but comes instead from the budgets of the Circuit and District Courts), and therefore, has no way of knowing whether the payments received from the defendant have actually exceeded the amount of the fee paid to the defendant's attorney. As a result, defendants may sometimes repay more than their representation actually costs.

Of greatest concern are the weaknesses of the program which directly impact on the kind of representation being afforded to the indigent accused. One such area is the appointment process, which lacks any semblance of quality control. The Administrator has no authority either to accept or

reject attorneys for inclusion in the appointment list. All interested attorneys who reside or office in the county are automatically accepted. No attorney has ever been, to the knowledge of those interviewed, removed from the list for incompetence. The list is in no way stratified by experience level; every attorney is permitted to handle any type of case, with the exception of those few unusual cases where a judge is consulted prior to appointment.

There is no system for formal monitoring of the program or for any direct supervision of the attorneys participating in it. As a result, the attorneys may put in as much or as little effort as they wish.

Yet, the fee schedules provide a financial disincentive to put in time on an indigent's defense. For felony cases, no out-of-court preparation time is paid. This discourages attorneys from interviewing the defendant, researching critical issues, and conducting factual investigations that may be critical to the defense. This problem is compounded by the court's refusal to consider the payment of investigators to assist the defense and unnecessary delay in payment of fees.

The program's administrative structure results in lag time at the beginning of a case. Because of the cumbersome procedures in appointing counsel, essential rights are lost at the bail hearing stage. This lag time also seems to compel some judges to rush into appointing counsel for defendants who may not be indigent.

The defense program is weak by comparison with the prosecution. The program's administrator has no say in the preparation of his own department's budget, which is prepared by the court administrators and the judges. As a result, the Administrator was unaware that the line item for payment of appointed counsel in paternity cases had been

transferred to the prosecutor's office so that the prosecutor could request state reimbursement of those costs along with the costs of prosecution in paternity cases.

The statistical analysis indicates that assigned counsel performance falls short of that of retained counsel. This fact alone indicates that the present system merits re-examination.

Of perhaps even greater concern are the apparent violations of the U.S. Supreme Court's mandate to appoint counsel as required by the Argersinger decision. It appears that persons charged with misdemeanors in Saginaw County may be denied their constitutional rights.

Finally, the present system appears to lead to excessive plea bargaining. The fee structure places pressure on lawyers to plead cases without adequate research or investigation in order to avoid losing money on cases. This impression is buttressed by the greater use of motion practice and more frequent court appearances by privately retained lawyers in some cases and by the perceptions of lawyers, community leaders, and clients.

FOOTNOTES

PART

Chapter 1

1. Michigan Constitution, Article I, Section 15.
2. Michigan Court Rule GCR 1963 790.
3. "Mossner Backs Circuit Judges," The Saginaw News, Dec. 19, 1969.
4. "Dissatisfaction Voiced on Court Appointments," The Saginaw News, October 6, 1969.
5. "Cost of Court Defense for Indigents Mounting," The Saginaw News, Jul. 13, 1972.
6. "It has happened: Defense Costs more than prosecution: County to battle (again) penniless defendant issue," The Saginaw News, Oct. 9, 1975.
7. "'I think you'll have a million dollar budget': Judges find defender report in contempt of court," The Saginaw News, April 14, 1977.
8. "No one gets rich, but court appointments sweeten the paycheck," The Saginaw News, Jul. 31, 1977.
9. American Bar Association, Standards on the Prosecution and Defense Function, Standard 4-8.1.
10. "Jensen may lose county job," The Saginaw News, Aug. 28, 1981.

COUNTY of SAGINAW

Office of
ASSIGNED COUNSEL

APPENDIX A

Patrick S. Werner
Administrator

Pamela S. Rice
Administrative Assistant

Room 311 - Courthouse
Saginaw, Michigan 48602
Phone: 790-5207

July 7, 1981

PRESENT FEE SCHEDULE FOR SAGINAW COUNTY

This is a suggested fee schedule only and adjustments are made in appropriate cases:

CIRCUIT COURT:

Preliminary Examination, Held or Waived.....	\$100.00
Arraignments.....	\$ 75.00
Motions.....	\$ 75.00
Motions to Suppress With a Brief.....	\$100.00
Plea.....	\$ 75.00
Sentencing.....	\$ 75.00
Preparation Fee.....	\$ 25.00
Trial.....	

Capital Cases, First Day.....\$250.00
or any fraction thereof.

All Succeeding Days or any fraction.....\$150.00
therefore.

Non Capital Cases, First Day.....\$150.00
or any Fraction thereof.

All Succeeding Days or any.....\$100.00
fraction thereof.

NOTE: Since October of 1980, the attorneys fee has been based upon the above amounts, also, 10% of the computed attorneys fee has been added to each attorneys fee.

COURT OF APPEALS:

The first 400 pages of transcript read.....	\$250.00
For each 200 pages after that.....	\$100.00

For other services rendered including motions, preparation of briefs, and oral argument, there is no set fee schedule. The amount paid being set on a case by case basis.

COUNTY of SAGINAW

Office of
ASSIGNED COUNSEL

Room 311 - Courthouse
Saginaw, Michigan 48602
Phone: 790-5207

Patrick S. Werner
Administrator

Pamela S. Rice
Administrative Assistant

July 7, 1981

DISTRICT COURT FEE SCHEDULE:

The attorneys are paid \$30.00 per hour.

ATTORNEY: _____ ADDRESS: _____ PHONE: _____

[illegible]

APPENDIX C

AGREEMENT TO PAY COST OF APPOINTED COUNSEL

I agree that if counsel is appointed for me I will pay Saginaw County, when I am able to do so without substantial hardship to me or my dependents, the reasonable value of the services of my court-appointed lawyer, but not exceeding the amount which Saginaw County ultimately pays said lawyer. I understand that I am entitled to a court hearing if I claim that the cost to the county for the lawyer's services exceed their reasonable value.

It appears to me that I will be able to make such weekly payments on this obligation beginning the _____ day of _____, 19____, at the rate of \$ _____ Dollars per week; payments are to be made to the Office of Assigned Counsel, Room 311, Saginaw County Courthouse, Saginaw, Michigan, 48602.

I understand that I am entitled to a court hearing if I claim that I am unable to make payments without such hardship.

Dated: _____ Defendant's signature _____

Prepared by:
PATRICK S. WERNER (P25226)
Assigned Counsel Administrator
Room 311 - Courthouse
Saginaw, Michigan 48602
Phone: 790-5207

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE OF)
MICHIGAN,)
Plaintiff,)
vs.)
Defendant.)
_____)
_____)

APPENDIX D
File No _____

WAGE ASSIGNMENT

In this cause the Assignor, being obligated by an Order of the Court for payment for legal representation, hereby assigns to Attorney _____, Saginaw County, Michigan, \$ _____ Dollars of each pay check and hereby authorizes his employer _____ to deduct such sum each week from his earnings and authorizes said employer to comply with this assignment and authorization, the assignor releases said employer from any obligation with regard to the pay for the period for which this assignment and authorization is in force. This assignment and authorization is to commence as of _____ of \$ _____, and to continue until the amount of \$ _____ Dollars is paid in full.

Approved by: _____ Assignor's signature _____
Assigned Counsel Administrator _____ Social Security Number _____
Date _____ Badge Number _____

APPROVAL OF WAGE ASSIGNMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, ON THE _____ DAY OF _____, 19____
PRESENT: HONORABLE _____ Circuit Judge

This matter having been set on for hearing, and the Court having been advised in the premises:

This Wage Assignment is hereby approved.

Dated _____
Deputy Clerk _____ CIRCUIT JUDGE _____

CHAPTER II

STATISTICAL ANALYSIS OF COURT DOCKET DATA IN SAGINAW COUNTY

Using data from the court files in Saginaw County, the following statistical comparison was made of performance by the coordinated assigned counsel system attorneys and privately retained counsel.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the attorneys, the outcomes that they were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser charge; if it was resolved by trial, whether or not there was an acquittal; the sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; how many times the attorney came to court for the client; and how long it took to handle the case from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

Court files were examined for a sample of 159 felonies (73 felony assault and 86 felony drug charges) and 198 misdemeanors. A breakdown of the felony offenses by type of counsel representing the case is presented in Table 1. A change in type of representation was relatively rare. Six defendants changed from assigned to retained counsel and six from retained to assigned counsel. In the analyses reported below it is the type of counsel that a defendant changed to (if there was a change in representation) that is used as an independent variable.

Table 1

Felony Offense Type

	Frequency	
	Assigned Counsel	Retained Counsel
Assault:		
with Intent to Murder	2	5
with Intent to Commit Great Bodily Harm	7	2
with Intent to Rob (armed)	2	0
with Intent to Rob (unarmed)	1	1
Felonious	30	23
Total	42	31
Drug:		
Manufacture/Delivery Opiates	29	26
Creation/Delivery Narcotics	3	3
Possession	15	9
Other	0	1
Total	47	39

Misdemeanor offenses were coded as offenses against persons, property, or the public order, or offenses involving drugs or driving. The distribution of these offenses is presented in Table 2.

Table 2

Misdemeanor Offense Type	Frequency		Retained Counsel
	Assigned Counsel		
Against Persons	22		16
Against Property	35		27
Against Public Order	20		27
Drugs	19		18
Driving	2		11
Other	0		1
Total	98		100

With respect to the processing of cases in Saginaw County, the data reveal that at the time of first arraignment, the largest number of defendants were released on money bond. Large percentages, however, were kept in jail or released on their own recognizance (see Table 3).

Table 3

Initial Bond Status	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money Bond	31.0% (27)	64.2% (61)	35.7% (25)	49.2% (31)
Jail	58.6 (51)	8.4 (8)	37.1 (26)	3.2 (2)
Released on				
Recognizance	9.2 (8)	27.4 (26)	25.7 (18)	25.7 (30)
Other	1.1 (1)	0.0 (0)	1.4 (1)	0.0 (0)

At the time of case disposition fewer defendants were in jail and more had been released on money bond or their own recognizance. Frequencies are presented in Table 4.

Table 4

Bond Status at Time of Case Disposition

	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money Bond	60.9% (53)	64.2% (61)	62.3% (43)	50.8% (33)
Jail	21.8 (19)	8.4 (8)	5.8 (4)	1.5 (1)
Released on				
Recognizance	14.9 (13)	27.4 (26)	31.9 (22)	47.7 (31)
Other	2.3 (2)	0.0 (0)	0.0 (0)	0.0 (0)

Information from the court files indicated that none of the felonies handled by assigned counsel, and only one of the felonies represented by retained counsel was initiated by an indictment. Preliminary hearings were held for 77.5% (69 of 89 felony cases) of the felonies represented by assigned counsel and 82.9% (58 of 70 cases) of those taken by privately retained attorneys.

Patterns of disposition in Saginaw County are presented in Table 5.

Table 5

Method of Disposition

	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Dismissal	28.1% (25)	43.9% (43)	17.1% (12)	33.3% (33)
Plea	67.4 (60)	45.9 (45)	82.9 (58)	57.0 (57)
Bench Trial	2.2 (2)	7.1 (7)	0.0 (0)	5.0 (5)
Jury Trial	1.1 (1)	2.0 (2)	0.0 (0)	5.0 (5)
Deferred				
Prosecution	0.0 (0)	1.0 (1)	0.0 (0)	0.0 (0)

Frequencies of the various sanctions are presented in Table 6.

Table 6

Type of Sentence

	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Deferred				
Sentence	3	8	12	25
Fine	26	28	34	43
Court Costs	10	5	22	18
Probation	22	4	23	7
Time Served	3	13	2	0
Incarceration	24	8	9	6

(Note: Frequencies do not total number of pleas plus number found guilty at trial (238) because more than one type of sentence was often assigned to a defendant).

The activity of counsel on behalf of a client is reflected in two measures: number of motions filed and number of attorney appearances in court. Information on the number of motions filed by assigned and retained counsel in Saginaw County is presented in Table 7.

Table 7

Total Number of Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	84.3% (75)	88.8% (87)	75.7% (53)	92.0% (92)
1	13.5 (12)	9.2 (9)	18.6 (13)	7.0 (7)
2	.2 (2)	1.0 (1)	1.4 (1)	1.0 (1)
3	0.0 (0)	1.0 (1)	4.3 (3)	0.0 (0)

Information about the types of motions filed is presented in Table 8.

Table 8

Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Reduce Bond	4	1	3	0
Dismiss	5	6	6	4
Suppress	0	3	5	0
Discovery	3	0	5	2

Attorney activity, as reflected in number of court appearances, is presented in Table 9.

Table 9

Number of Attorney Appearances in Court

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	0.0% (0)	3.1% (3)	0.0% (0)	0.0% (0)
1	25.8 (23)	56.1 (55)	24.6 (17)	55.0 (55)
2	31.5 (28)	18.4 (18)	26.1 (18)	34.0 (34)
3	21.3 (19)	15.3 (15)	17.4 (12)	5.0 (5)
4	16.9 (15)	3.1 (3)	17.4 (12)	3.0 (3)
5	2.2 (2)	4.1 (4)	10.1 (7)	2.0 (2)
6	2.2 (2)	0.0 (0)	4.3 (3)	1.0 (1)

Two types of variables were created from the docket study data in order to conduct statistical analyses. The first are "dichotomous variables" in that they allow the researcher to boil the issues down into only two choices so that the results can be expressed as fractions of 100%. Examples of such variables are: defendant kept in jail vs. defendant released from jail while awaiting trial, or case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of answers may be collapsed, and instances where there were missing data are dropped out of the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by performing computations using the data collected so that "intervals" such as the length of time from the defendant's first court appearance until case disposition can be compared.

CONTINUED

2 OF 6

Frequencies for the dichotomous variables created from the data gathered from court files are presented in Table 10.

Table 10

Variable	Assigned Counsel		Retained Counsel	
	Felonies	Misdemeanors	Felonies	Misdemeanors
Bond Status				
At Time of Case Disposition				
-in jail	22.4% (19)	8.4% (8)	5.8% (4)	1.5% (1)
-out of jail	77.6 (66)	91.6 (87)	94.2 (65)	98.5 (64)
Change in Bond Status				
-change	64.0 (32)	37.5 (3)	88.0 (22)	100.0 (0)
-no change	36.0 (18)	62.5 (5)	12.0 (3)	0.0 (0)
Case Disposition:				
a) dismissal				
-dismissed	28.4 (25)	44.3 (43)	17.1 (12)	33.0 (33)
-not dismissed	71.6 (63)	55.7 (54)	82.9 (58)	67.0 (67)
b) trial				
-case tried	3.4 (3)	9.3 (9)	0.0 (0)	10.0 (10)
-case not tried	96.6 (85)	90.7 (88)	100.0 (70)	90.0 (90)
c) trial vs. plea				
-plea entered	95.2 (60)	83.3 (45)	100.0 (58)	85.1 (57)
-case tried	4.8 (3)	16.7 (9)	0.0 (0)	14.9 (10)
d) type of plea				
-original charge	1.7 (1)	48.9 (22)	5.2 (3)	52.6 (30)
-lesser charge	98.3 (59)	51.1 (23)	94.8 (55)	47.4 (27)
e) trial outcome				
-guilty	33.3 (1)	77.8 (7)	0.0 (0)	80.0 (8)
-not guilty	66.7 (2)	22.2	0.0 (0)	20.0 (2)
f) trial outcome				
-guilty of original charge	100.0 (1)	85.7 (6)	0.0 (0)	75.0 (6)
-guilty of lesser charge	0.0 (0)	14.3 (1)	0.0 (0)	25.0 (2)
g) motions filed				
-any filed	15.7 (14)	11.2 (11)	24.3 (17)	8.0 (8)
-none filed	84.3 (75)	88.8 (87)	75.7 (53)	92.0 (92)

h) overall disposition

-not guilty	30.7 (27)	46.4 (45)	17.1 (12)	35.0 (35)
-guilty	69.3 (61)	53.6 (52)	82.9 (58)	65.0 (65)

Sentence:

a) incarceration

-yes	45.0 (27)	39.2 (20)	19.6 (11)	9.5 (6)
-no	55.0 (33)	60.8 (31)	80.4 (45)	90.5 (57)

b) type

-incarceration	45.0 (27)	39.2 (20)	19.6 (11)	9.5 (6)
-probation	25.0 (15)	3.9 (2)	37.5 (21)	9.5 (6)
-other	30.0 (18)	56.9 (29)	42.9 (24)	81.0 (51)

The mean performance of assigned and retained counsel on the variables for which interval-level data were obtained in Saginaw County is presented in Table 11.

Table 11

Variable	Mean of Assigned Counsel		Mean of Retained Counsel	
	Felonies	Misdemeanors	Felonies	Misdemeanors
Length of Incarceration (range)	13.3 months (1-120)	2.75 (1-12)	7.1 months (9-24)	3.4 (1-12)
Number of Motions Filed (range)	.17 motions (0-2)	.14 (0-3)	.34 motions (0-3)	.09 (0-2)
Number of Attorney Appearances (range)	2.4 apps. (1-6)	1.7 (0-5)	2.7 apps. (1-6)	1.6 (1-6)
Days from First Appearance to Disposition (range)	68.8 days (1-307)	122.1 (0-358)	88.7 days (0-334)	113.1 (0-371)
Days from First Appearance to Sentencing (range)	142.1 days (0-318)	138.6 (8-394)	147.4 days (15-402)	94.2 (0-371)

2) Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in Saginaw County: Felony and Misdemeanor Cases:

Controlling for Initial Bond Status and Whether Other Offenses Were Charged

In order to assess whether the differences between the above-reported percentages and means reflect significant differences in the quality of representation provided by assigned and retained counsel in Saginaw County, analyses of covariance were conducted. The first analysis, conducted on all the data--both felonies and misdemeanors--controlled for bond status of the defendant after the first arraignment (a measure that earlier research has shown to be related to prior record of the defendant and an element that should be controlled) and whether other offenses were charged at the time of the current arrest. (This too was thought likely to exert an effect on case processing that should be controlled if the effects truly due to attorney behavior were to be detected.)

i) Covariates. Table 12 presents the frequency distributions of initial bond status and whether other offenses were charged for the clients of assigned and retained counsel.

Table 12

Case and Defendant Characteristics	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Initial Bond Status:				
Bond	31.0% (27)	64.2% (61)	35.7% (25)	49.2% (31)
Jail	58.6 (51)	8.4 (8)	37.1 (26)	3.2 (2)
ROR	9.2 (8)	27.4 (26)	25.7 (18)	25.7 (30)
Other Offenses Charged at the Time of this Arrest:				
Yes	48.3% (43)	22.4% (22)	54.3% (38)	17.0% (17)
No	51.7 (46)	77.6 (76)	45.7 (32)	83.0 (83)

ii) Analyses. There were significant differences between assigned and retained counsel in Saginaw County and the coefficient of regression was significant (indicating that considering the covaried variables did indeed increase the accuracy of the conclusions and that bond status at the time of first appearance and number of offenses charged are related to outcomes on these measures) for the first five of the following variables. The coefficient of regression was non-significant for the sixth.

- 1) bond status at time of case disposition ($F(1,632)=11.21, p .001$) (FN 1)
- 2) whether or not the case was dismissed ($F(1,630)=4.26, p .039$)
- 3) whether the defendant was judged guilty or not guilty

($F(1,630)=3.87, p .05$)

4) likelihood of incarceration ($F(1,407)=8.35, p .004$)

5) severity of sentence ($F(1,407)=5.77, p .017$)

6) likelihood of change in bond status from time of first arraignment to case disposition ($F(1,154)=8.12, p .005$) (FN 1)

Thus, it would seem that type of counsel affects initial bond status, likelihood of changing from incarceration to release from jail before the disposition of the case, likelihood of case dismissal, and overall outcome of a case (with respect to: whether a defendant was found guilty, received a sentence of incarceration and severity of sentence). These effects exist over and above any effect that may be exerted by the variables of defendant's initial bond status and whether he/she was charged with other offenses at the time of this arrest. The effect of type of counsel is such that assigned counsel are less likely than retained counsel to have their clients released from jail at the time of the first arraignment (adjusted means=1.82 and 1.96, respectively), less likely to get their clients released from jail before the time of case disposition (adjusted means=1.05 and 1.43, respectively), and more likely to have cases dismissed (adjusted means=1.62 and 1.73, respectively). Assigned counsel are more likely to have clients adjudicated not guilty (adjusted means=1.37 and 1.26, respectively) (presumably because more of their clients' cases are dismissed), but if their clients are found guilty they are more likely to receive a sentence of incarceration (means=1.62 and 1.78, respectively) and to receive a harsher sentence (means=1.95 and 1.70, respectively).

Although these effects are true for both felonies and misdemeanors the analyses reveal two interactions between type of counsel and type of offense (felony vs. misdemeanor). That is, they reveal two dimensions for which assigned and retained counsel differ in the handling of felonies vs. misdemeanors. This occurs for the variables:

1) number of motions filed ($F(1,632)=4.49, p .034$)

2) number of days from first arraignment to sentencing ($F(1,414)=4.40, p .037$)

The coefficient of regression is significant for neither dependent variable. Statistical investigation of these interactions suggests that for the first of the effects, retained counsel file more motions than do assigned counsel for felony cases ($F(1,636)=5.09, p .024$) (adjusted means=.32 and .16, respectively). For misdemeanors, retained counsel do not file significantly more motions than assigned counsel (adjusted means=.12 and .15, respectively). That is, one should not conclude that retained counsel file more motions in general, but only that retained counsel file more motions for felony cases.

This interaction of type of counsel and type of offense for the variable, number of motions filed, is further qualified by an interaction with the type of felony committed (assault vs. drug) ($F(1,632)=4.49, p .034$). It appears that

there is no difference in the number of motions filed by assigned and retained counsel for felony assault cases (adjusted means=.22 and .24, respectively), but there is a difference in the number of motions filed for felony drug cases (adjusted means=.11 and .41, respectively) ($F(1,279)=6.92, p=.009$). For felony drug cases, retained counsel file more motions than assigned counsel. In sum, the difference between assigned and retained counsel with respect to the number of motions filed is such that the lawyers differ only on felony drug cases. On these cases, retained counsel are slightly more likely to file. In all other circumstances, assigned and retained counsel appear very similar.

For the variable, number of days from first appearance to sentencing, examination of adjusted means suggests that assigned and retained counsel do not differ in their handling of felonies (adjusted means=134.4 days and 146.2 days, respectively). Retained counsel, however, are quicker than assigned in disposing of misdemeanors (adjusted means=142.0 days and 110.4 days, respectively). Statistical investigation of the interaction supports this interpretation. There is a significant difference between assigned and retained counsel in the speed of case disposition only for misdemeanors ($F(1,418)=8.95, p=.003$).

For this variable there is also a significant interaction of type of counsel and type of felony (drug vs. assault) ($F(1,414)=3.96, p=.04$). Statistical analysis suggests that there is no difference in speed of processing between retained and assigned counsel with respect to felony assault cases (adjusted means=140.8 and 156.5 days, respectively). However, assigned counsel are more significantly more expeditious with felony drug cases ($F(1,217)=4.19, p=.04$) (adjusted means=112.2 days and 151.5 days, respectively). Thus felony drug cases handled by assigned counsel appear to be sentenced more quickly than any other type of case.

Finally, there are two additional interactions of type of counsel and type of felony offense (drug vs. assault). They occur for the variables: number of attorney appearances ($F(1,632)=5.06, p=.025$) and whether or not a motion is filed ($F(1,634)=5.23, p=.022$). The coefficient of regression is significant (.036) for the first, but not the second, of these effects. Again, statistical analyses suggest that there is no difference in the behavior of retained and assigned counsel for felony assault cases (adjusted means=2.3 and 2.4 appearances, respectively). There is, however a difference in the handling of felony drug cases ($F(1,280)=5.39, p=.021$). For felony drug cases, retained counsel appear more often than assigned counsel (adjusted means=2.2 and 2.9 appearances, respectively).

With respect to whether or not motions are filed, statistical investigation reveals the same pattern of effect: no difference in the behavior of retained and assigned counsel for felony assault cases (adjusted means=1.1 and 1.2) but a greater likelihood that a motion will be filed for felony drug cases taken by retained counsel ($F(1,281)=5.84, p=.016$) (adjusted means=1.2 and 1.0, respectively).

3) Summary of Differences Between Assigned and Retained Counsel

Differences exist with respect to the handling of:

Felonies

- bond status at case disposition
- likelihood of change in bond status

- # motions filed
- whether or not motions filed

- likelihood of incarceration
- severity of sentence

Misdemeanors

- bond status at case disposition
- likelihood of change in bond status
- likelihood of being found guilty
- likelihood of case dismissal
- number of days from first arraignment to sentencing

- whether or not motions filed
- number of attorney appearances
- likelihood of incarceration
- severity of sentence

4) Analyses of Covariance of the Differences in the Performance of Assigned and Retained Counsel in Saginaw Felony Cases Only, Controlling for Defendant Sex, Race, Age, Prior Convictions, Whether Other Offenses Were Charged and Initial Bond Status

Background

Previous research has indicated that characteristics of defendants can influence the disposition of a case, and one might therefore speculate that the above-discussed differences between assigned and retained attorneys' performance appear because of differences in clientele rather than differences in their quality of representation. To check for this possibility analyses of covariance were conducted controlling: defendant age, sex, race, prior convictions (yes/no), whether other offenses were charged at the time of this arrest and initial bond status (in jail/out of jail). Unfortunately, this data was available only for defendants who had committed felony offenses. Thus these covariance analyses could be performed only for felony offenses.

1) Covariates. Table 13 presents the frequency distributions of the characteristics of defendants represented by assigned and retained counsel which were used as covariates in the analyses of felony cases only.

Table 13

Case and Defendant Characteristics

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	Frequency			
	Assigned Counsel		Retained Counsel	
Prior Convictions:				
Yes	53.9%	(48)	31.4%	(22)
No	30.3	(27)	44.3	(31)
No Information	15.7	(14)	24.3	(17)
Sex:				
Female	11.2%	(10)	15.7%	(11)
Male	87.6	(78)	81.4	(57)
No Information	1.1	(1)	2.9	(2)
Race:				
White	42.7%	(38)	57.1%	(40)
Black	51.7	(46)	31.4	(22)
Hispanic	4.5	(4)	7.1	(5)
No Information	1.1	(1)	4.3	(3)
Initial Bond Status				
Bond	31.0%	(27)	35.7%	(25)
Jail	58.6	(51)	37.1	(26)
ROR	9.2	(8)	25.7	(18)
Other Offenses Charged at				
Time of this Arrest:				
Yes	48.3%	(43)	54.3%	(38)
No	51.7%	(46)	45.7	(32)
Mean Year of Birth:	1952		1951	

ii) Analyses. Analyses revealed two variables for which the type of attorney exerted a statistically significant effect and the coefficient of regression was significant. These variables were:

- 1) number of motions filed ($F(1,241)=6.39, p .012$)
- 2) whether or not any motions were filed ($F(1,243)=4.70, p .031$)

The first of these effects emerged in the above-reported analyses of covariance of both felony and misdemeanor data as an interaction involving type of counsel (assigned/retained) and type of offense (felony/misdemeanor). It was reported above that differences in attorney behavior with respect to motions occurred only for felony cases and were such that retained counsel were likely to file more motions than assigned counsel. In this analysis, as would be expected, retained counsel are again seen to be likely to file more motions than assigned counsel (adjusted means=.34 and .12, respectively).

The second effect appeared in the analysis of both felony and misdemeanor data as an interaction between type of counsel and type of felony (assault/drug). In this analysis, when additional defendant characteristics are controlled, the interaction disappears and only the main effect difference between retained

and assigned counsel remains. Retained counsel appear more likely to file motions than assigned counsel (adjusted means=1.24 and 1.12, respectively).

The analyses of felony-only data reveal two other variables for which type of attorney exerted a significant effect, but the effect is qualified by the type of felony committed (drug vs. assault).

1) days from first appearance to case disposition ($F(1,242)=3.95, p .048$)

2) days from first appearance to sentencing ($F(1,183)=5.53, p .020$)

The coefficient of regression was non-significant for both effects. Both of these effects also emerged in the above-reported analyses of both felony and misdemeanor data. The first of the two effects was not presented above because it was a marginally significant interaction of type of counsel and type of felony ($p .057$). Although the extra covariates do not reduce the error significantly in this analysis, clearly they do control enough error for this effect to now achieve a significance level of less than .05. The effect is such that retained counsel bring felony assault cases to disposition as quickly as assigned counsel (77.9 and 90.5 days, respectively) while assigned counsel dispose of felony drug cases more quickly than retained counsel ($F(1,241)=3.51, p .06$) (60.8 and 103.9 days, respectively).

The second effect was reported above in the analyses of the combined felony and misdemeanor data. As before, the interaction is such that retained and assigned counsel do not differ in their speed of processing felony assault cases (adjusted means=134.4 and 160.0 days, respectively) yet assigned counsel bring felony drug cases to sentencing more expeditiously than retained counsel (adjusted means=117.9 and 177.2 days, respectively) ($F(1,183)=4.10, p .044$).

Four other variables had been significant in the analysis of both felony and misdemeanor data: bond status at time of case disposition, likelihood of change in bond status, likelihood of incarceration and severity of sentence. The failure to find significant effects for these variables in the analysis of felony-only data, where a larger number of defendant characteristics were controlled might suggest that the previous observation of these differences had been merely a reflection of differences in the clientele represented by assigned and retained counsel. However, the lack of significance might also result from the reduced number of degrees of freedom associated with the felonies-only analyses. To test between these explanations, analyses of covariance controlling only for the original two covariates, initial bond status and whether or not other offenses were charged, were conducted on the felony cases. The results indicated that for three of the above variables assigned counsel differed significantly from retained counsel, even with the reduced number of degrees of freedom. This

supports the conclusion that for these three variables, the finding of significant differences in the combined felony-misdemeanor analysis of these variables was due to uncontrolled for differences in the clientele of assigned and retained counsel. Only for the variable, sentence severity, did assigned and retained counsel not differ significantly. On the two covariates, felonies-only analysis. This lack of a significant difference suggests that it was not the more extensive list of covariates in the six covariates, felonies-only analysis that removed this effect, but the fact that the effect had not been particularly strong for felonies (though not sufficiently different from the effect for misdemeanors as to result in a significant interaction of type of offense) and disappeared in an analysis with a reduced number of degrees of freedom.

CONCLUSION

On the whole, it would seem that retained counsel did better than assigned counsel. In misdemeanor cases, retained counsel were better at securing pre-trial release, achieved a higher rate of alternatives to incarceration, obtained shorter terms of incarceration, expended more effort in filing pre-trial motions, and disposed of cases faster. For felony drug cases, retained counsel made more court appearances and did more pre-trial motion practice.

Assigned counsel, on the other hand, excelled in only two respects, obtaining a higher rate of dismissals and disposing of felony drug cases faster.

Necessarily, these conclusions require some interpretation. One might conclude that the best thing one can do for one's clients is to obtain their release through a dismissal, and everything else is secondary. On the other hand, if many police arrests simply reflect police harassment of the indigent, then these results may reflect more of a difference in the clientele than in attorney performance. Similarly, whether or not disposing of felony cases faster is a plus or a minus depends upon what the optimum time for disposing of a felony case in Saginaw County is. In this case, assigned counsel disposed of felony drugs in an average of 112 days, while retained counsel took an average of 151.5 days. From a county administrator's perspective, if the performances of both types of counsel are effective, it would be more cost effective to dispose of cases in fewer days.

Would the 5 indicators for which retained counsel excelled indicate better performance by retained counsel? Take the indicator of making more court appearances, for example. Whether or not more court appearances are better than fewer may depend upon the number made. Here, retained counsel made only 2.9 appearances in the average felony drug case. It

would be difficult to conclude that making more appearances is indicative of requesting excessive continuances where attorneys appeared only 2.9 times in the average case.

Again, whether or not retained counsel should be applauded for disposing of misdemeanor cases faster depends upon the optimum time for misdemeanor case disposition as well as on one's perspective. In this case, retained counsel took 110 days to bring a case to sentencing, while assigned counsel took 142 days.

Whether or not retained counsel's more extensive pretrial motion practice is a plus or minus also bears some scrutiny. Many judges complain that attorneys tend to file "frivolous" motions. However, the numbers would tend to belie this conclusion, as retained counsel filed an average of only .41 pre-trial motions in felony drug cases which are generally considered to be the type of charge where motions to suppress illegally obtained evidence would be applicable.

In conclusion, if we assume that, under the circumstances, all of the areas where assigned and retained counsel excelled indicated good performance, one would nevertheless find that retained counsel excelled in 4 areas, assigned counsel excelled in 1 area, and retained and assigned counsel both excelled with respect to speed in different types of cases. Moreover, the differences in speed disappear when averaged together, since assigned counsel take 134.2 days, while retained counsel take an average of 136.9 days (this small difference has no statistical significance).

CHAPTER III

The Saginaw County Cost Study

Two sources of cost information were available for the Saginaw site. Cost information was obtainable in aggregate form from budget documents and case type information was available from monthly office reports. Cost analysis using this type of information is similar, in nature, to the type of cost analysis performed for Berrien County. The other type of cost information was obtained from lawyer fee request forms and from County fee payment forms. Some of these forms were available in case files and others were obtained separately from records in the court administrators office. Costs analysis using this type of information was able to be performed for the Saginaw site but not for the Berrien site. This was because the Berrien site was a contract system where the county paid one large fixed fee for the entire caseload while Saginaw was a coordinated system where the county paid fees for each case.

Aggregate Cost Analysis

From budget documents, monthly reports and interviews the following numbers are the total direct county expenditures for its coordinated assigned counsel system in 1981.

Circuit court attorney fees:	\$367,407.58	74%
District court attorney fees:	\$72,095.00	15%
Administrative Budget:	\$56,553.61	11%

Total direct cost :	\$496,056.19	100%
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less recoupment:	(\$26,932.65)
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Total direct money cost to the County:	\$469,123.54
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Circuit court fees were paid to attorneys who represented indigent felony clients. This comprises the largest part of the costs. Also included in circuit court fees were fees for a few cases that were paternity cases.

District court fees were paid to attorneys who represented indigent misdemeanor clients. Also included in district court fees were fees for a sizable number of indigent traffic violator cases. That this cost category is so small relative to circuit cases shows the relative priority that this county puts on providing counsel to indigent misdemeanants.

Administrative costs comprise the cost of running the coordinators²

office of which the largest budget items include the salaries of the coordinator (who is an attorney) and his administrative assistant.

Recoupment represents the money collected by the Coordinated assigned counsel office from clients that it has provided attorney services for and who were deemed either indigent or "partially" indigent and clients whose assets were in a state-of-affairs that they could not pay for attorney services in the private marketplace. It was the practice of this assigned counsel office to consider clients designated indigent as capable of paying some portion of their attorney's fees at least at a latter time. Recoupment can be viewed as merely a transfer payment where part of the cost of the assigned counsel system is shifted back to its clients. Therefore it is not a savings to society as a whole. However, since this arrangement does reduce the amount of expenditure from the county budget, it can also be viewed as lowering the cost to the county (but not to society). Total costs have been expressed , therefore, both ways. In any case, recoupment only represents a little more than 5% of total costs. However, during 1981, 12.5% of the total assigned counsel office caseload comprised cases where at least some payback was required.

assigned counsel caseload*

			percent of total	
Circuit court:.....	1287			75%
Felony cases:	1225		72%	
Paternity cases:	62		4%	
District court:.....	424			25%
Misdemeanor cases:	229		13%	
Traffic cases:	195		11%	
<hr/>				
Total cases:	1711	1711	100%	100%

As can be observed in the table above, 3/4 of the total assigned counsel caseload was in the higher court and all but 4% of these cases were felony cases. In the lower court, there is almost a 50-50 split between misdemeanor cases and traffic cases.

*NOTE. Caseload data was available for only ten out the twelve months for 1981. A linear interpolation was used to project the missing data.

Aggregate cost per case

total caseload costs:

fee per case = total fees / total cases = \$439,565.58 / 1711 = \$257

administrative overhead

cost per case = total administrative cost / total cases =

\$56,553.61 / 1711 = \$33

cost per case = total cost / total cases = \$496,056.19 / 1711 = \$290

circuit court costs*

fee per circuit court case = \$367,407.58 / 1287 = \$285

cost per circuit court case = \$285 + \$33 = \$318
(fee + ad. overhead per case)

district court costs*

fee per district court case = \$72,095.00 / 424 = \$170

cost per district court case = \$170 + \$33 = \$203
(fee + ad. overhead per case)

costs adjusted for recoupment

To obtain cost per case estimations when recoupment is taken into account, one merely reduces the cost number by 5.4%. This adjustment is used since recoupment is 5.4% of total costs. This new downward adjusted number would be more reflective of what cost per case is to the county.

costs per case adjusted for recoupment:

county cost per case = \$274

county cost per circuit court case = \$301

county cost per district court case = \$192

Regardless of whether a recoupment adjustment is made or not, it can be seen that a district court assigned counsel case is approximately 36% less expensive than a circuit court assigned counsel case.

*NOTE. It would have been preferable to have obtained fee data only for felony and misdemeanor cases. Then cost data could be reported for felony and misdemeanor cases rather than for circuit court and district court cases. However, the assigned counsel caseload for circuit court cases has only approximately 6% of cases being non-felony cases. Practically, cost per case of circuit court cases will be a very close approximation of costs per felony case. The assigned counsel caseload for district court cases has 46% of its cases being non-misdemeanor. To the extent that the resources used in these traffic cases are comparable to resources used in misdemeanor assigned counsel cases, cost per district court case will be a decent approximation to cost per misdemeanor case.

System overhead costs

The costs per case calculated already include its per case proportional share of administrative overhead of the office of assigned counsel for Saginaw county. However, there are other overhead costs endemic to the county system of providing indigent defense services. These will be referred to as system overhead costs whereas the former will be referred to as office overhead costs.

These system overhead costs represent direct costs incurred for activities in the assigned counsel process but not covered by the budget numbers already used in the calculations. These activities involve the approval and payment process to the attorneys. The following actors are involved in the process:

judges (who review fee requests)
court administrators (who forwards fee request to county clerk)
county clerk (who prepares the disbursement voucher)
county auditor (who has to approve the voucher)
county controller (who writes and sends the check)

While costs for these services are not minor in absolute value, they are probably minor when compared to the entire budget for the assigned counsel system. These costs probably comprise approximately 6% of total costs. However, 6% of total costs is approximately equivalent to 50% of the assigned counsel administrative budget, which is sizable.

The following is a rough approximation to this magnitude:

1711 fee requests were processed. Each had to be handled by at least five actors (see list above). The time it took each actor to handle a fee request is assumed to be ten minutes.

Thus, $1711 \times 5 \times 10 = 85,550$ work minutes were involved in processing the fee requests in Saginaw county during 1981.

A standard work year (35hrs per week, 50 weeks per year) is 105,000 work minutes.

Thus, processing the fee requests involved:

$85,500 / 105,000 = 81.42\%$ of a full time high level county employee.

The average salary of the persons in the above list can be assumed to be approximately \$35,000.

Thus it can be roughly estimated that $.8 \times \$35,000 = \$28,000$ was the cost to the county for processing these fee requests.

Processing costs per case can be estimated by $\$28,000 / 1711 = \16.36 .

Cost per case adjusted for recoupment and system overhead
can be roughly approximated by the following:

County cost per case (adjusted) = $\$274 + \$16 = \$290$
County circuit court cost per case (adjusted) = $\$301 + \$16 = \$317$
County district court cost per case (adjusted) = $\$192 + \$16 = \$208$

It can be argued whether these system overhead costs should be included. A major point why they should be included is that these activities upon which these costs are built, would not be incurred by any system which paid for attorney services with a once-a-year flat fee. Systems such as a public defender office or a contract system would not incur expenses resulting from individual payments per case. And this is precisely the comparison used for the two Michigan counties.

On the other hand, one could argue that a disbursement system is already in place in Saginaw and there are no extra (incremental) costs to pay attorneys for the assigned counsel office, which is one county agency among many. Full costs attributable to the disbursement system were not added into assigned counsel system costs. Only those associated with direct labor minutes were attributed. Further, it can be assumed that if these five actors in the process did not have to engage in some work time for the assigned counsel system, that their time freed-up would be utilized in ways worthwhile to the county. That is, the opportunity cost for county employee time is not zero. In sum, it seems reasonable and correct to include some additional cost to the assigned counsel system for disbursement costs.

CASE COST ANALYSIS

This analysis estimates cost per case from the ground up. The basis for the calculations are the fees paid to assigned counsel attorneys. Fee data for a sample of cases from the docket study was obtained from looking at individual case files as well as from documents in the court administrators office. The number of cases sampled for the cost study constituted 50% of the assigned counsel cases in the total docket study.

Docket Sample for Cost Study

Felonies47
 Assaults 27
 Drug 20

Misdemeanors55

total cases sampled 102

Fee per case*

Felonies (assaults + drug) \$262
 Assault Felonies \$278
 Drug Felonies \$241
 Misdemeanors \$158

*Note: Fee numbers represent the amounts paid to attorneys from the assigned counsel office for services rendered. An examination was made of each fee request to determine if these fees incorporated any payment for other services in the defense process such as: investigator services, forensic services, secretarial services. We found no fee requests that incorporated these potential expenses.

Fee per case can be translated to cost per case by adding into each case its proportional share of administrative overhead of the Office of Assigned Counsel. From analysis in preceding sections, this was determined to be \$33 per case.

Cost per case(from docket study)

Felonies (assaults + drug) \$262 + \$33 = \$295
 Assault Felonies \$278 + \$33 = \$311
 Drug Felonies \$241 + \$33 = \$374

Misdemeanors \$158 + \$33 = \$191

Cost per case for all assigned counsel cases (as a whole) can be estimated using this data by assuming that cost per felony (assaults + drug) is a reasonable approximation to cost per case for all felonies. A weighted average formula is used to calculate cost per case for all cases. The weights are the percent of assigned counsel caseload that are felony cases and the percent that are misdemeanor cases. These weights were obtained from monthly office reports of the Saginaw Assigned Counsel Office.

The weights are: 1225 Felonies/1454 = .84 and
 229 Misdemeanors/1454 = .16

Cost per case = \$295 x .84 + \$191 x .16 = \$278

Using either aggregate data or individual case fee data, gives very similar estimates for cost per case.

Cost per Case Comparison (by method):

	Aggregate Data	Case Data
Cost per case(as a whole)	\$290	\$278
Cost per felony case	\$318	\$295
Cost per misdemeanor case	\$203	\$191

The reasons for the slight differences between the two sets of estimates are:
 1. rounding error
 2. aggregate data comes from units Circuit Court and District Court. Non-felony, non-misdemeanor data are included.
 3. case data does not represent all felonies just a sample of two types.
 4. sampling error. The docket study data was derived from a sample of cases, not a census.

It seems that in spite of shortcomings of the two approaches they provide similar results and therefore one can have a stronger sense of validity in these cost estimates.

A comparison of cost per case, when both types of estimates are adjusted for recoupment and system overhead, yields a

similar close correspondence.

Cost per Case (adjusted) Comparison:

	Aggregate Data	Case Data
Cost per case (adj)	\$290	\$279
Cost per case felony (adj)	\$317	\$295
Cost per case misdemeanor (adj)	\$208	\$197

Besides having fee data from the docket study at the level of felony and misdemeanor. Fee data is also available at a more disaggregative level distinguishing between trial and non-trial cases. The following table presents that data.

Docket Study Fee per Case(trials and non-trial cases):

type of case	fee per case	#valid cases in sample
Felony (assault + drug)	\$262	42
Felony trial (assault + drug)	\$645	2
Felony non-trial	\$243	40
Misdemeanor	\$158	48
Misdemeanor trial	\$132	6
Misdemeanor non-trial	\$161	49

Because of the few trial cases in our sample, which were reflective of the few criminal trials occurring in the courts, it is difficult to have much reliability in the cost numbers being a good estimate of trial costs for the population of all trial cases in Saginaw.

Time Related Costs

Information on hours spent per case was available in the attorney requests for fee payment. While one can expect abuse in the reporting of attorney hours, all the fee requests were reviewed and had to be approved by both the coordinator and the judges. Another possible problem was that many of the fee requests did not report time spent on the case. Therefore, there was a considerable number of missing data cases for this variable. Nonetheless, data on fee per case, number of hours spent per case, and fee per hour is presented in the following table.

Time related cost data(from docket study):

type of case	fee per case	Ave.* #hours	fee per hour	# of valid cases
Felony (Ass.+ Drug)	\$240	7.18	\$33.43	15
Felony Assault	\$219	6.51	\$33.64	8
Felony Drug	\$264	7.94	\$33.29	7
Felony Trial (A + D)	xxx	xxxx	xxxxxx	0
Felony Non-trial (A+D)	\$240	7.18	\$33.43	15
Misdemeanor	\$160	5.76	\$27.844	48
Misdemeanor Trial	\$132	4.53	\$29.07	6
Misdemeanor Non-trial	\$164	5.94	\$27.69	42

*Note: Data was also available in the docket study on the number of hours spent in court vs. out of court. For felonies(assaults + drug) , 54% of attorney time was spent out of court. For misdemeanors, 67% of attorney time was spent out of court.

PART IV

THE BERRIEN COUNTY, MICHIGAN CONTRACT SYSTEM

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CHAPTER I

PROFILE OF THE BERRIEN COUNTY, MICHIGAN CONTRACT DEFENDER SYSTEM The Environment of the Indigent Defense System

Berrien County is located at the Southwestern tip of Michigan. Lying 90 miles northeast of Chicago, the twin cities of Benton Harbor and St. Joseph are on opposite sides of the St. Joseph River which empties into Lake Michigan; thus, historically the area was an important port for shipping throughout the Great Lakes. The area has been known as a tourist attraction because of its lake shore beaches.

However, more recently, it has fallen into hard economic times. One of its major employers is General Motors, which has laid off many workers. As of May, 1982, the Twin Cities Area Chamber of Commerce reported an unemployment rate of 14.6%, while Benton Harbor's unemployment rate had climbed to 27.6%. Almost 99% of the population works in non-farm industries. There are more than 350 plants in Berrien County which produce a variety of products including electrical equipment, home appliances, earth moving equipment, auto parts, die castings, plastics, and food products. The local chamber of commerce is alarmed, however, about the number of industries that have been moving out of the area.

Racial tension exists between the adjoining cities of Benton Harbor, which has a large poor, black, population, and St. Joseph, which is predominantly white. In addition, there is a large migrant worker population. This transient population works in the fruit-picking industry which has made Benton Harbor the largest cash-to-grower fruit market in the United States. The total population of the county is 171,276 persons, of whom 14.5% are black. The migrant worker population is primarily Chicano.

The county covers a land mass of 580 square miles, and has a population density of 294 persons per square mile. In addition to the twin cities, the county boasts a third major population center, Niles, in the southern tip of the county.

In 1981, there were 7,025 cases filed in the Berrien County District Courts. Of these, 5,894 were filed in the St. Joseph courthouse; the remainder originated in Niles. Two hundred thirty-one lawyers practice in the county.

The latest (1974) figures show per capita income at \$4,313. Approximately 80% to 90% of the persons charged with felonies are financially unable to retain counsel.

The county is run by a 13-member County Board of Commissioners who are assisted by a County Coordinator. The county is operated by its board committees; the County Coordinator has no legal authority.

The 1983 county budget is \$15,237,800. Given the 1983 indigent defense budget of \$205,000, the county spends 1.3% of its funds for indigent defense services. All legal defense funds are provided with county monies. Berrien County has consistently operated in the black, and currently has a substantial surplus.

The Criminal Justice System

The Courts

There are two levels of criminal courts in Berrien County: the lower courts which are the District Courts, and the Circuit Courts. The District Courts have 5 judges; four are located in the St. Joseph courthouse, while the fifth is in a satellite courthouse in Niles. All 4 Circuit Court judges are located in the St. Joseph courthouse. All judges hear both civil and criminal matters. Both the Circuit and District Courts' boundaries are congruent with the County of Berrien.

All data maintained by the District Court is computerized, while Circuit Court data is kept manually.

Pretrial Release

Michigan Court Rule GCR governs pretrial release. It provides for a presumption in favor of release on one's own recognizance. Other conditions of release include conditional release without the posting of money bail and money bail either through a 10% deposit with the court or a full cash bail. The full cash amount may be posted through the use of a bondsman.

There appears to be very little use of bondsmen in Berrien County; it seems that most of the bondsmen have in fact gone out of business. Jail officials had an outdated list of bondsmen posted next to the

telephone in the lock-up, and when asked, they could not readily recall the names of bonding companies.

In cases where the defendant is charged with a misdemeanor, he has an absolute right to be released. This is accomplished by setting an interim bond at the time of arrest. These interim bonds have pre-set minimum and maximum amounts.

Police Practices in Making Arrests

Police practices in Berrien County may have an affect upon the seriousness of charges filed against arrested persons. Police are prohibited from taking a person into custody for a misdemeanor offense if the misdemeanor was committed outside the officer's presence. As a result, it appears that a number of cases that would otherwise be considered misdemeanors are originally charged as felonies. Prosecutors often later reduce these cases to misdemeanors when they come to court.

For example, if a defendant steals a package of cigarettes, he may be charged with larceny in a building, which is a felony, as opposed to petty larceny, a misdemeanor offense. The penalty for petty larceny is a maximum of 90 days, and a first time offender will generally be sentenced to a fine plus court costs, while a second offender will probably receive probation.

Probation Departments

The Circuit and District Courts have separate adult probation departments. In the Circuit Court's probation service, which is part of the Michigan Department of Corrections, there are an average of 500 persons on probation at any given time. They are served by 4 regular probation officers and 3 officers in a special, temporary, program known as PIP. Normal caseloads carried by a probation officer are 85 to 90 cases.

The District Court's probation office has a staff of 6 officers including the chief. Their probation officers carry caseloads of 110 to 120 cases per probation officer.

The Prosecution

The prosecutor's office has a 1983 budget allotment of \$617,000. This includes \$38,000 for a deferred prosecution unit. The prosecutor's staff includes 12 full-time lawyers. Of these, there are 5 3/4 full-time equivalent positions to handle felony and misdemeanor prosecutions. The paternity unit, which receives \$100,000 from the state treasury, has a staff of one full-time lawyer, an investigator, and 2 secretaries.

The prosecutor's staff includes an administrative secretary, 6 additional secretaries, a separate secretary for the deferred prosecution unit, clerical support for the paternity unit, and a secretary in the Niles satellite courthouse. The staff also includes several investigators; there are investigators in the paternity unit and two investigators who specialize in white collar crime. However, most of the investigation for the prosecution is performed by the 25 police agencies in the county.

The chief prosecutor is an elected official; however, the incumbent was appointed when his predecessor became the U.S. Attorney. The prosecution's budget is prepared and submitted as a separate and distinct item apart from the court's budget.

The Chief Prosecutor's salary is \$40,000 per annum; assistants receive from \$23,138 to \$37,000 per annum. Continuing legal education is provided to assistant prosecutors without charge. Each assistant prosecutor attends at least one seminar each year. These are held by the State Prosecutor's Association or the National District Attorneys Association.

The prosecutor's office runs a deferred prosecution program for first offenders dealing primarily with property-related crimes. It does not apply to assaults or drugs other than marijuana. Prior to August of 1981, the deferred prosecution program was available to defendants whose cases had already gone to arraignment so long as they met the program's criteria. However, the office presently restricts the program to arrestees whose cases have not yet gone to arraignment.

As a result, defendants must now be screened prior to going to court and therefore prior to the appointment of counsel in order to be eligible for the deferred prosecution program. Admission to the program requires the defendant to admit committing the offense and to take a polygraph test both at the beginning and end of the program. At the beginning, the test is used to verify the defendant's admission of this offense and any prior offenses that he may have committed. At the end of the program, the polygraph is used to ensure that the defendant has not committed any other offenses during the period. If the defendant recidivates during the period of his deferred prosecution, the court will become aware of the fact that the defendant had participated in the deferred prosecution program, but had failed.

The Criminal Justice Process

Cases in Berrien County rarely proceed by way of indictment, as Grand Juries are very seldom convened.

All cases, whether felony or misdemeanor, are initiated in the District Courts. Misdemeanors may be tried or pled in the District Court. Felonies may be pled in the District Court only if they have been reduced to misdemeanors. Preliminary hearings on felonies are also heard in the District Court. However, felonies disposed of as felonies, whether by plea or trial, are handled in the Circuit Court.

The first court appearance for a defendant will be the arraignment in the District Court at which time the defendant is informed of the charges against him and the issue of bail is determined. No counsel is available at this stage in Berrien County unless the defendant has retained counsel.

The next stage of the proceedings is not an official court hearing, since it does not occur in open court. It involves a meeting between the prosecutor, the defense lawyer, and the District Court judge to discuss the possibility of a plea bargain. The defendant is nearby so that

his attorney can inform him of the offer that has been made. In a misdemeanor, this event is called a "pre-trial conference," and may occur from 2 to 3 weeks after the arraignment for a defendant who is in custody. In a felony case, the event is called a "preliminary examination conference," and it will occur approximately 11 days after the arraignment because Michigan case law requires that the preliminary examination in a felony case must be held within 12 days of arraignment in order to avoid automatic dismissal of the case. If the defendant agrees to the offer made during the pretrial conference or preliminary examination conference, the defendant's plea will be taken before the District Court judge that very day. If the case was filed as a felony, the preliminary examination will be waived and will never take place.

If a misdemeanor case was not settled on the day of the pre-trial conference, it is set down for a trial date. However, four days before the trial date, there is a last ditch effort to settle the case through a "pretrial settlement conference" which is much like the pretrial conference. If the case is not settled on that date, there will be a trial and sentencing. In most cases, the attorney will appear in the courthouse from one to four times in a misdemeanor case: at the pre-trial conference (most cases are limited to this one appearance); at the pre-trial settlement conference; at the trial; and at the sentencing hearing. In the majority of cases, the sentencing hearing takes place on the day of trial unless a pre-sentence investigation by the Probation Department has been ordered.

If a felony case is not settled on the day of the preliminary examination conference, a preliminary examination will be held in court on the following day. If probable cause is found, the case will be bound over to the Circuit Court. The defendant will appear at a second arraignment in Circuit Court, at which time he will be informed of the charges against him. The judge at the Circuit Court arraignment will not modify the terms of the bail set in District Court unless a motion is made alleging that there was an abuse of judicial discretion on the part

of the District Court Judge and the Circuit Court Judge determines that such abuse existed (see Michigan General Court Rules, Rule 790.7). The motion must be made in writing and have the District Court's bail hearing transcript attached. Thus, the lack of an attorney to provide representation at the District Court arraignment becomes critical, since it may prevent release for defendants who are indigent.

Following the felony arraignment, there will be a pretrial settlement conference at which a possible plea bargain is discussed. If the case is not settled at that time, there will be a trial and sentencing. The defense lawyer is generally present in court at the time of sentencing; however, the prosecutor is generally not present at that time.

Pretrial conferences often involve discussion of a large number of cases simultaneously. As a result, a number of pleas may be taken by the judge in a given afternoon.

In certain cases, a standard offer is made by the prosecution for a reduced charge, and a letter from the prosecutor's office will be included in the defendant's file at the time of the initial arraignment in District Court. For example, first time offenders charged with driving under the influence of liquor are offered a reduction to "impaired driving," a lesser included offense. This appears to be an incentive for many defendants to plead guilty at arraignment prior to the appointment of counsel.

Some cases, which at one time were considered as felonies, have been reclassified by Michigan law as "high court misdemeanors," and are heard in the District Court. These cases allow for a maximum penalty of 1½ years imprisonment.

The Indigent Defense System

History and Goals of the Program

Prior to the establishment of the present system, lawyers were appointed on a random basis by the courts to provide legal representation for the indigent accused. A number of circumstances led to a change in that approach. Costs were escalating rapidly, and pressure was placed on the courts by the county board to save money. The county had been embarrassed because of the fact that some cases had been reversed due to incompetency of counsel. The courts were backlogged, and the frequent continuances requested by appointed counsel were costing the county more money. Moreover, the county board was concerned about the lack of predictability in budgetary planning.

The courts found the private bar to be reluctant to accept appointments, since the majority of the bar did not find the fees paid in appointed criminal cases to be worthwhile. The quality of representation provided by the bar was at best uneven; many who handled the cases were not familiar with criminal law and procedure, and did not practice sufficient criminal law to keep up with that field. Those who specialized in criminal law preferred to handle privately retained cases, and did not wish to be involved in accepting appointments.

Armed with an understanding of this background, three lawyers approached the County Board and offered to contract for all of the indigent criminal defense work. The contract was awarded to these lawyers, who formed a law firm for the purpose of handling the indigent defense work, in November of 1971. No competitive bidding procedures were used in awarding the contract, nor was any effort made on the part of the County Board to solicit other bids.

The firm that had received the contract gradually built up 15 lawyers. This first contract ran for a period of one year. There was little or no resistance to this development on the part of the private bar. However, three firms later bid against the first contract firm. The first firm was subsequently awarded a 2-year contract.

The first contract firm continued through 1979. However, another

firm approached the County Board to negotiate a contract for 1980. This firm proposed to handle all of the indigent criminal cases for a sum of \$175,000 in 1980, while the first firm had set a figure of \$220,000. The County Board checked with the Chief Judges to ascertain whether there was any reason why they should not accept the lower bid, and found that the courts had no objections to either firm. As a result, the Board accepted the offer made by the second firm.

The private bar has traditionally been rather apathetic about working to increase rates paid to assigned counsel, and this fact contributed to the bar's disinterest in accepting appointments to indigent criminal cases. This lack of interest, in turn, contributed to the establishment of a contract defender system in Berrien County.

Bidding Process

As is evident from the foregoing description of the process that led to the Berrien County contract defender system, there is no formal bidding process used. Bids from law firms were unsolicited. No criteria or contract specifications were drawn up by the County Board. No notices went out that bidding was to take place. When the proposals were received from the law firms, they were for a flat sum; neither the proposals nor the contract that was eventually awarded contained budget line items, restrictions upon performance or how funds were to be allocated, or specifications regarding person-hours to be spent or resources to be utilized. Moreover, the contract placed no limitations upon the amount of work that was required of the law firm.

Although two bids were received for the most recent contract, the County Board has the discretion to renew the contract without competitive bidding if they so desire. Thus, in essence, it might be said that Berrien County employs a "no-bid" system.

This process did incur some grumbling among members of the bar about "politics" in the awarding of the contract. However, those who complained failed to bid because of the low amount first awarded. Subsequently, the annual contract fee bid was increased, and continues to escalate each year.

The Contract Defender Program - An Overview

All indigent criminal defense work in the county falls under a single contract between the County Board and one law firm (hereafter, contract firm). The contract appropriation has increased by \$10,000 each year; the budgets for the last several years have been as follows: 1980 - \$175,000; 1981 - \$185,000; 1982 - \$195,000; 1983 - \$205,000.

The county allocates the costs of the indigent defense contract among the budgets of the various courts served: 69% from District Court, 19% from Circuit Court; 6% from Juvenile Court; and 6% from the Probate Court. The firm is paid by the county on a monthly basis, 1/12 of the entire contract sum each month.

While the contract firm is responsible for all indigent defense work, some of the work is subcontracted by them to other private attorneys. The subcontracted work consists of: a) all work in the Niles satellite courthouse, and b) all juvenile attorneys. In 1981, the firm also subcontracted for mental illness commitment defense work; however, that work is presently performed in-house. Hearings on mental commitments take place in Kalamazoo, Michigan.

In cases which represent a conflict of interest for the law firm, usually because one or more co-defendants in an indigent criminal prosecution have conflicting defenses, the contract firm designates another attorney to handle the case. Most often, the firm designates one of the attorneys with whom they subcontract. When handling a "conflicts" case, the attorney submits his/her ^{fee} petition directly to the court and is paid through the courts. This amount is deducted by the county from the 1/12 monthly payment made to the contract firm.

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

Program Administration and Operations

One of the partners in the contract firm serves as the administrator of the contract. The administrator maintains the following data relating to the contract: the number of files opened, the number of hours spent by each attorney on the contract, and the number of mental health cases handled. The firm also maintains information on the subcontracts.

The contract firm reports to the Administration Committee of the County Board. Their last annual report, which consisted of a 2 page letter, was filed with that Committee on August 29, 1980.

Staffing for the defense contract is as follows. As noted above, juvenile work and work in the south part of the county are farmed out. The remainder of the indigent criminal defense work is performed by lawyers within the contract firm.

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

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

The 5 attorneys who devote a substantial percentage of their time on the contract are the newer, less experienced attorneys in the law firm. None of the 4 partners devotes more than 10% of his time to the

contract work. Three of the ^{five} contract attorneys had been with the firm less than 2 years each at the time of the field visit.

The three newest attorneys work on a straight salaried basis for the firm. The two other contract attorneys work on a percentage basis, or commission, based upon the number of dollars that they produce for the law firm. They receive credits for work performed on the contract based upon their established hourly rates times the number of hours billed by them. The remainder of the contract may be used by the firm as it wishes, presumably to cover items such as rent, the purchase of equipment, professional liability insurance, and income to the firm.

Financial Implications of the Defense Contract

During 1981, the cost of the contract to the county was \$185,000. The contract firm's subcontracts for mental illness commitments, juvenile work, and cases in the Niles satellite courthouse cost a total of \$33,000. In addition, \$10,424.40 was deducted by the county from the contract for payments made to attorneys handling conflict of interest cases. This left a balance of \$141,576 net to the contract firm for handling the defense work.

Dividing the net amount received by the firm by the total of 1,559 cases handled by the firm during 1981, we have an average cost per case handled by the firm of \$90.81. Attorneys in the contract firm spent a total of 4,347.05 billable hours during 1981 working on the contract. Dividing the firm's net receipts of \$141,576 by the number of hours spent results in an hourly rate paid by the county per attorney hour of \$32.57.

According to one attorney who participates in the contract work, the average entry level attorney costs the firm \$10/hour in salary plus approximately \$2/hour in fringe benefits. Assuming an entry level salary for the contract attorneys and multiplying this \$12/hour figure by the number of hours logged by the contract attorneys, this amounts to a minimum cost to the defense firm of \$52,164.60. This leaves the sum of \$89,411.40 for the defense firm to allocate to overhead expense and profit.

Taken from another perspective, the county is paying \$141,576 to the firm for 2.65 full-time equivalent attorneys. This amounts to the sum of \$53,424.90 per attorney per year.

Associated Direct Costs of the Indigent Defense System

Costs to the county apart from the appropriation for the defense contract are difficult to assess. However, it is clear that a variety of other costs are attributable to processing the indigent defense work, and that such costs would become a necessary part of any defender system budget.

Certain costs have been absorbed in the budgets of other court-related functions, and therefore cannot be clearly separated out for the defense. One such cost is for transcripts (e.g., transcripts for preliminary hearings and pre-trial motions). These are paid from various court budgets. In the case of the Circuit Court, \$20,000 is allotted for transcripts supplied to the courts, prosecution, and defense. Witness fees come from the prosecutor's budget, according to the Circuit Court's Administrator. There are two line items in the prosecutor's budget for witness fees: one in the amount of \$16,980.15 and a second, \$15,815.10 which is marked, "witness-District Court." The County Coordinator indicated that in some cases, the costs of transcripts and psychiatrists for indigent defense cases come out of line items which have a surplus rather than from line items specifically targeted for these expenses.

With regard to other personnel expenses, some costs of administering the indigent defense system can be attributed to the salaries of various public officials. For example, the preparation of court orders for payment of fees in conflict cases is performed by the judge's secretary in Circuit Court and by the Court Administrator in District Court. These vouchers must also be processed by the Purchasing Department and approved by the County Commissioners. Checks must be drawn by the County Clerk and signed by the County Clerk and the Treasurer. The County Coordinator must spend some time in presenting the contract budget to the County Commissioners, and he also spends from 5% to 7% of his time in dealing with the courts on issues relating to the court system. In addition, a small amount of time is spent by judges in approving the fee requests of the conflict attorneys, although most of this work has been eliminated by virtue of the establishment of a contract defense system.

The court's Assignment Office performs work directly related to the defense contract when it processes court orders appointing counsel and performs the necessary paperwork to notify the defense firm and the defendants of the court appointments.

Determination of Eligibility for Appointment of Counsel

Under the Berrien County system, the defense firm has no role in the determination of a defendant's financial eligibility for the appointment of counsel. This function is performed entirely by the court.

The procedure for assessing eligibility is as follows. Assuming that the defendant has not already pleaded guilty at the arraignment, the District Court Judge will ask the defendant whether he wishes to hire his own attorney or petition for a court-appointed attorney. If the defendant requests a court-appointed attorney, either a court bailiff or the pre-trial release officer fills out a form for the defendant listing his or her assets and liabilities (see Appendix A). The defendant must then sign the form and appear before a Magistrate to swear that the data on the form are correct. The District Court Judge reviews the form shortly thereafter, generally within 2 days, and determines, on the basis of the information provided therein, whether or not to appoint counsel for the defendant.

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

No formal eligibility criteria are published or employed by the judge. The assessment of eligibility is a matter solely within the court's discretion. Some interviewees believed that the contract defense system fosters a liberal approach to eligibility assessment because additional cases result in no additional cost to the county.

The contract firm agrees that the eligibility assessment function should remain with the courts. If it were to be assigned to the contract firm, it would present a conflict of interest in that handling additional cases would tend to diminish the amount of profit that the firm could receive.

In some jurisdictions, courts may determine that a defendant is partially eligible because they have some funds, but not sufficient monies to retain private counsel. There is no system for recoupment of any portion of the cost of providing counsel in Berrien County.

Scope and Availability of Representation

Provision of Counsel in Misdemeanor Cases. One of the issues assessed in the docket study of Berrien County was the extent to which the jurisdiction was in compliance with the U.S. Supreme Court's decision in Argersinger v. Hamlin mandating that no person accused of a misdemeanor may be sent to jail unless represented by counsel. The study found substantial noncompliance with the Argersinger decision.

Of a total of 2,831 misdemeanors opened in the Berrien County District Courts during 1981, 1,752, or 62%, were not represented by counsel. A sample of 100 of these "no counsel" cases was taken in order to ascertain what percentage of the defendants served jail time. Of the 100 cases, 21 were either acquitted or dismissed. Of the 79 cases in which the defendant either pled or was found guilty, 16 cases, or 20.3%, received some jail time without being represented by counsel. Thus, in over 20% of the "no counsel" cases resulting in conviction, there appeared to be violations of the Argersinger decision.

In order to better understand the reasons for this phenomenon, interviewees were asked to explain how and why so many misdemeanors were disposed without appointment of counsel. Some of the hypotheses offered were: a) the defendant is anxious to get the case over quickly and so pleads guilty; b) he does not believe that he is financially eligible for the appointment of counsel, although he cannot afford to hire a lawyer; c) he is anxious to get out of jail, and knows that he must go back to jail if he has to await court appointment of counsel; e) the defendant's file often contains an offer of a reduced charge made by the prosecutor which the defendant feels compelled to accept promptly; and f) he feels that the system will be harder on him if he puts the court to the trouble of appointing counsel. This last view was echoed by many of the defendants interviewed, and is amplified by the form given to all defendants at the District Court which seems to urge defendants to plead as soon as possible (see Appendix B). Another possible explanation may lie in the procedures used by the court to advise defendants of their rights. These court procedures

reflect the court's greater predisposition to appointing counsel in felony rather than misdemeanor cases. There are two ways in which procedures for appointing counsel in felonies differs from misdemeanor case procedures. First, persons accused of felonies are requested to complete an eligibility affidavit before arraignment, while alleged misdemeanants are not questioned about appointment of counsel until they come before the bench. Secondly, the dialogue with defendants accused of misdemeanors is substantially different with regard to the issue of appointment of counsel. When a felony defendant is arraigned, he is told of the charge and asked specifically, "What do you want to do about an attorney?" However, when a misdemeanor defendant is arraigned, the following dialogue takes place:

Judge: Are you John Doe?

Defendant: Yes

Judge: You're charged with the offense of theft.

Do you understand this charge?

Defendant: Yes

Judge: This charge is punishable upon conviction by six months in the County Jail. You have certain rights given to you in written form. Do you understand these rights?

Defendant: Yes.

Judge: How do you wish to plead? (Or, What do you want to do?)

There is no specific mention of attorneys in the prepared remarks made by judges to misdemeanors at arraignment. The judge merely alludes to a long page of procedures which includes mention of a number of rights and in which the right to counsel is included (see Appendix C). All defendants charged with misdemeanors are asked to sign the form indicating that they have read and understood their rights. Apparently, this form causes a great deal of confusion. While the Chief Judge of the District Court assured the study team that the form was merely used to inform the defendants and did not constitute a waiver of any rights, it is evidently so construed by at least one Circuit Court Judge, many defendants, and, initially, by those conducting the docket study for this research.

Commencement of Representation. The question of how soon after arrest the defendant has access to counsel was addressed in interviews with a variety of actors. The study attempted to

ascertain the availability of representation at line-ups, custodial interrogations, and bail determinations, and how soon the appointed attorneys were appointed and actually commenced representation.

Counsel are provided by the contract firm at the pre-charge stage under very limited circumstances. The director of the contract explained that, because they are not public defenders, he has instructed the firm's attorneys not to attend line-ups unless they have already been appointed by the court. However, if the prosecutor desires to have a defense attorney present at a line-up, he obtains an Order of Court appointing the firm to represent the defendant even though a charge has not yet been filed. The director estimated that the firm is called for pre-arraignment line-ups by the prosecutor approximately once a month.

Apart from this limited exception, it does not appear that contract firm lawyers are present at pre-charge stages of the prosecution. In most cases, their entry into the case is much later. The process by which appointed attorneys enter the case is explained below.

Defendants are generally brought to court for their arraignment in the District Court the day after their arrest. Eligibility for appointment of counsel will either be determined at the time of arraignment or within two days of the arraignment. The judge signs an order appointing counsel as soon as eligibility is determined, i.e., either at the time of the arraignment or within two days. The judge's order will be sent to the Assignment Office the day after eligibility is determined. Thus, if a defendant is arrested on a Monday, chances are that the Assignment Office will receive an order appointing counsel on Wednesday.

The Assignment Clerk has 4 computerized calendars, one for each of the District Court Judges in the St. Joseph courthouse. She assigns the defendant's case to a judge for a particular date and sends out a notice to the defendant and to the defense firm informing them of the appointment and the date of the next court appearance. This notice is placed in a mailbox for the defense firm at the courthouse and is picked up by a runner for the firm. Assuming that the defendant was arraigned on a

Tuesday and the Assignment Clerk received an order appointing counsel on Wednesday, the firm would generally be notified by Thursday, 2 days following the arraignment, since the Assignment Office generally gets its paperwork done within 1 day of receipt of the court's order.

In sum, the defense firm is generally notified of their appointment to a given case within 3 days of the defendant's arrest. It is not the firm's practice to have any representative of the firm present at the District Court arraignment. Thus, the defendant is unrepresented at the time that the District Court sets bail. Nor are counsel available to be contacted during police interrogations. In the event that the defendant requests counsel pursuant to his Miranda warnings, the police practice in Berrien is to cease questioning, inasmuch as they have not been authorized to contact the contract firm.

Once the defense firm has been appointed, the assignment of counsel has been taken out of the hands of the courts. The defense firm itself determines which attorney to assign to represent a given case; this authority extends to conflicts cases where an attorney from outside of the defense firm must be appointed. In addition, once the contract firm has been appointed, the question of when the initial client interview will take place falls entirely within the contract firm's discretion.

After it receives notification of their appointment from the court, the contract firm sends a letter to the defendant regarding the initial attorney-client meeting. The letter does not specify the name of any specific attorney designated to represent a given defendant, but simply states that the firm has been appointed. In the case of misdemeanors, the letter suggests that the first meeting will take place in the courthouse approximately 15 minutes before the pre-trial conference. In the case of incarcerated persons charged with felonies, the letter suggests that the attorney may see the defendant at the jail, but otherwise, the attorney will interview the defendant at the courthouse on the day set for the pre-exam conference.

In practice, defendants rarely have an opportunity to confer with their contract firm lawyer prior to the pre-trial or pre-exam conference. Defendants who are in custody will be interviewed for the first time while in the courthouse lock-up after being brought over from the jail. In the case of a misdemeanor defendant, persons who are in custody may have their pre-trial conference as late as 21 days after the arraignment. In the case of a person charged with a felony, the pre-exam conference may be 11 days after the arraignment. Persons who are charged with misdemeanors and are out on bond may be seen by the defense firm for the first time on the date of the pre-trial exam which is held from 6 to 12 weeks after the arraignment.

Defendants who attempt to contact their lawyer prior to the pre-trial or pre-exam conference are rarely able to do so. Interviewers were informed by the contract firm that all calls from indigent defendants are screened in the following way. The defendants are given the name of a secretary, Kim, to call regarding any matter relating to their case. However, the name "Kim" is used as a code word in the office to signal them that it is an indigent case; in fact, the secretary that handles the contract work has a different name.

The interviewers witnessed the following scenario during the site visit. A youthful indigent defendant and his father entered the defense firm's office, asked for the public defender, and stated that his court date was to be next Wednesday, this being Friday. The receptionist responded, "The attorney who handles that is not here right now. Call back and ask for Kim; she handles his appointments." She made no effort to ascertain whether or not a particular attorney had been designated to represent the defendant, nor did she inquire whether or not he knew the name of his attorney. As a matter of fact, some of the attorneys who handled the contract work were present in the office at that time.

Scope of Legal Services Required. As previously noted, the contract requires that the firm provide representation at line-ups and extends to juvenile cases (which are subcontracted to an individual who is not part of the firm) and mental commitments as well as felonies and misdemeanors. In addition, the firm is required to provide representation in extradition proceedings, parole and probation violations, and any other situation where counsel is mandated by law. Appellate representation is not covered by the contract, nor are prison legal services.

Assignment of Counsel and Continuity of Representation. As noted above, the courts have in effect delegated the function of assigning counsel to the contract firm. The firm, in order to conserve resources, does not assign attorneys to individual cases. Rather, an attorney is assigned to handle all cases arising on a given day. This assignment is made on the previous business day. For example, all case files of cases coming up for a pre-trial conference on a Monday will be placed on an attorney's desk on the preceding Friday. This will be the attorney's first notification that he is assigned to the cases of those particular defendants. If there are 10 cases arising on that Monday, they will all be assigned to that one attorney who is to handle the pre-trial conference call in District Court on that day. The assignment of misdemeanor cases to a given attorney is by lot.

As a result of this practice, there is no attorney who is designated the responsibility of a defendant's case until it comes back to court for the conference which may be dispositive of its outcome. Under this system, no facts are elicited until the day on which a plea may be taken in a misdemeanor case; moreover, it would not be feasible to commence investigation on a case prior to the defendant's court date. As noted in the earlier discussion of commencement of representation, a misdemeanor defendant who is not in custody may not have even met his attorney as much as 12 weeks following his arraignment.

In misdemeanor cases, whoever is assigned to be in court on a given day will handle the case. Thus, if the defendant does not plead on the day of the pre-trial conference, there may be a different attorney at the next court appearance.

In felony cases, according to one of the contract firm's attorneys, about half of the time, different attorneys handle the preliminary examination conference and the preliminary examination itself. These events both occur at the District Court level.

The Chief Judge of the Circuit Court was evidently disturbed by the practice of having different lawyers handling the various stages in felony cases. In November of 1980, she wrote to the contract firm demanding that the same lawyer who appears at the District Court preliminary examination must appear at all stages of the case. However, observers have noted that the contract firm will sometimes exchange lawyers even in felony cases notwithstanding the judge's request.

Investigation and Supporting Services

According to the American Bar Association and other national standards, part of the defense counsel's function is to investigate and present to the court possible alternatives to incarceration at the sentencing stage. Probation department and social service agency personnel were interviewed to assess the extent to which the contract lawyers have made such efforts. Three social service agencies responded that, although they are willing to accept referrals from attorneys, they have not been contacted by the defense firm, but are frequently contacted by the probation department. In only one case was assistance provided during the pendency of a contract defendant's case, and it was evidently the defendant himself who had requested the service. One social service agency interviewee stated his opinion that the contract lawyers do not represent people properly in seeking alternatives; they do the minimum amount of work possible because it is their attitude that they will be paid no matter what they do.

The Probation Departments stated that the contract attorneys do not initiate contacts with probation officers to make recommendations as to sentence, although the probation office sometimes seeks their recommendations. One interviewee reported that attorneys do not know about rehabilitation, and that social workers would provide insights to the attorneys. He stated that very seldom will a contract attorney place a defendant in a drug or other rehabilitation program in advance of case disposition, but that that is more apt to happen with a private attorney. The social service agencies agreed that they have been contacted by private lawyers to perform these services, including lawyers from the contract firm regarding their privately retained clients.

The clients interviewed uniformly stated that no investigation had been done on their cases; no witnesses had been interviewed, and no one had viewed the scene of the alleged offense. Lawyers from the defense firm confirmed that there were no resources for this function, and several indicated that one of the flaws in the system was the lack of investigative services available to clients under the contract. One of the contract attorneys also indicated that the jail schedule, which prohibits attorneys from visiting their clients during 6 hours of the day which are feeding times, inhibits investigation, since he is rarely able to see his clients before the pre-exam conference in the courthouse.

It is interesting to note the disparity between prosecution and defense in the area of investigative services. As previously discussed, the prosecutors staff includes investigators who specialize in white collar crime and paternity cases, and is assisted by 25 police agencies in the county, while attorneys for the indigent accused have no investigative assistance. In addition, the prosecution is in charge of the program which diverts first offenders from the criminal justice system. In some other jurisdictions where the defense program has social service staff, defendants may receive rehabilitative services prior to trial without giving up their right to counsel or being required to confess to the offense in order to receive lenient treatment.

Apart from the allocation provided for attorney services, some jurisdictions will provide additional support services for the lawyers upon request from the courts or another agency. This question was pursued during interviews with various actors. It was the view of judges that no funds could be requested from the court for investigative or social services, but that those services were the responsibility of the contract firm. However, the court would, in some instances, grant ^{motion for} a/expert witnesses such as psychiatrists and handwriting experts.

The need for some special supporting services in the office of the contract firm was voiced by a representative of the Spanish-speaking community. Given the high migrant worker population in the area, it was felt that the contract law firm needed a lawyer who could speak Spanish. Apparently, the migrant workers suffer more than local residents because high bonds are often set when they are arrested, and they often plead guilty in order to get out of jail.

Contract Attorney Workloads. The caseloads of the members of the contract firm who were interviewed were well above the national standards prescribed for defender offices. If we assume 2.65 lawyers and an office caseload of 1,559 cases, then each full-time equivalent lawyer has an indigent criminal caseload of 588 cases. This compares to the national standards of a maximum of 150 felonies per annum or no more than 400 misdemeanors per annum exclusive of any other type of case. While the national standards do not prescribe a maximum for a mixed caseload, presumably a caseload including both felonies and misdemeanors would be well below the 400 level.

Several of the contract lawyers interviewed estimated their indigent criminal caseloads on an annual basis. In each case, these workloads were in addition to their private criminal and civil practice which ranged from 1/2 to 3/4 of their work. These estimates were as follows:

	% of contract workload	contract felonies	contract misdem.	other contract cases	Total indigent caseload (part-time)
ATTORNEY A	50%	120	65		185
ATTORNEY B	35%	don't know	don't know		?
ATTORNEY C	35%	200	over 300	25-30 m.i. & 1 juv.	approx. 530
ATTORNEY D	25%	150	350	20 m.i. 5-10 par.	approx. 575
ATTORNEY E(subcont.)	unclear	200	400		600

As the foregoing figures indicate, the numbers of indigent criminal cases handled in some cases exceeded the nationally prescribed maximums even without considering the attorneys' private practice. If the percentage of private practice is taken into consideration, the average individual attorneys caseload may more than double the recommended maximums.

Attorney Time and Effort Expended. The amount of effort expended by attorneys was viewed as one of the indicators of attorney performance for purposes of this study. Considered among factors in attorney effort are the number of court appearances, length of interview, degree of investigation performed, extent of pre-trial motion practice, the frequency of attendance by counsel at the bond hearings, and the number of meetings, phone calls, and other attorney-client contacts.

As noted previously, counsel from the defense firm are not present in court at the initial arraignment when bond is initially determined by the court. This fact is particularly troublesome because of the heavy burden placed upon defense counsel with regard to the review of bail decisions in Circuit Court (see the Administrative Order of 3/31/78 attached as Appendix D).

As discussed earlier, the initial meeting with indigent defense clients by the contract lawyers is often a cursory 5 to 10 minute interview in the courthouse lock-up just prior to the pre-trial conference at which plea bargaining discussions take place. This interview, moreover, takes place in the presence of the other defendants in the lock-up, as no private interviewing space is available. However, some indigent defendants stated that their initial interviews lasted 30 minutes or longer. A client of the previous contract firm stated that her interview had lasted 1½ hours.

With regard to the extent of client contact, defendants interviewed had varying experiences. One defendant stated that his attorney spent a total of 15 minutes with him during the entire case. Several clients stated that it was close to impossible to get in touch with their lawyers or to have their phone calls returned during the pendency of the case.

One defendant, who stated that he was innocent of the charge, had tried to talk to his lawyer after the sentence, and when he couldn't, he slit his wrists. It was generally agreed that the firm would never accept collect phone calls from the jail. One defendant stated that his initial interview lasted only 5 minutes, and that was the only time that he was in court with his attorney, because he pled guilty that day. However, another defendant stated that he could reach his lawyer when he needed him and had a great deal of opportunity to talk to his lawyer. One defendant reported receiving the run-around when he called the law firm; he phoned and asked to speak to Kim, and was told that Kim was out of town, and that he was to keep calling.

The docket study showed that there is very little pretrial motion practice by either appointed or retained counsel in Berrien County. Retained counsel filed pretrial motions in only one of 99 misdemeanor cases, while appointed counsel filed no pretrial motions in misdemeanor cases. In felony cases, the contract lawyers filed motions in only 5 of 88 cases sampled, while retained counsel filed motions in only 5 of 49 cases sampled. Statistical data analysis showed that, while the sample sizes were small, it was significant that retained counsel filed motions more frequently than did appointed counsel in felony cases.

In sum, there appeared to be relatively little time and effort spent by the contract lawyers on the indigent criminal appointments as compared with retained counsel.

The docket study data show that the contract attorneys in Berrien County make significantly fewer court appearances with their clients than do privately retained counsel. As noted earlier, the majority of cases are disposed of on the first date that the attorney appears in court with his indigent client.

Appointed Counsel Fees

Although this jurisdiction employs a contract system, the question of attorney fees is relevant to Berrien County in two respects. First, appointed counsel were paid directly by the court prior to the establishment of the contract defense system, and would be so paid in the event that the jurisdiction returned to an assigned counsel approach. Secondly, attorneys are paid through the courts at the present time for conflicts cases which cannot be handled by the contract firm.

In the past, appointed attorneys were paid by "event," no matter what type of case they were assigned. They were paid one sum for disposing of the case in District Court without a preliminary hearing, a higher sum for handling the preliminary hearing as well, a fee for each day spent in trial, etc. The schedule for fees by event continues to prevail in the Circuit Court; however, the District Court no longer employs the old schedule, but pays on an hourly basis. The fees paid by the District Court are generally at the rate of \$35/hour, but if an attorney requests a lesser sum, possibly due to lack of knowledge of the current rate, he will be paid the amount requested.

By virtue of the defense contract, lawyers in the contract firm are in effect paid on a flat fee basis. Judges were questioned regarding the impact of the change to a flat fee system. According to the arraigning judge, when assigned counsel were paid by event, the court was flooded with preliminary hearings. Now that it's a flat amount paid to the contract firm, the number of preliminary hearings has declined substantially.

Inasmuch as the contract system resulted in part from the unwillingness of the bar at large to accept appointed cases, private lawyers were asked to compare the court-appointed rates to private bar rates. One lawyer stated that his private fees were \$750 for a misdemeanor, \$1,500 for a felony, and \$6,000 for a capital case. On indigent cases, the highest fee that he was ever paid averaged out to \$22.50 per hour, and the lowest was \$7.50/hour in a case where the bill that he submitted was cut. However, his overhead alone amounted to \$22/hour, and he generally loses \$8/hour for every hour that he handles an indigent case, with no payment at all for his time. This response was typical of the replies made by the private bar.

Monitoring, Supervision, and other Mechanisms for Quality Control

As Peter Drucker has pointed out in his treatises on management, where the profit motive does not exist, it is necessary to have some method of evaluating a public service in order to ensure quality. Accordingly, it is not surprising that national standards relating to the provision of indigent defense services have recommended supervision, monitoring, and evaluation of legal services to the poor.

The Reporting Function. Virtually no reporting requirements have been placed upon the indigent defense contract; as a result, the funding agency has no means of monitoring the firm's performance. The firm is not required to keep track of the numbers of various types of cases handled, their outcomes, disposition times, resources employed, etc. The County Board essentially relies upon the courts to perform whatever monitoring is done, since its members believe that they are not able to evaluate the performance of such professional services.

Internal Supervision. Lawyers were asked what type of monitoring and supervision takes place within the firm. One attorney stated that he thought that new lawyers are monitored on an informal basis and that the first week that he was there, someone watched him and assisted him with his first two preliminary hearings and pretrials and also sat with him at his first felony trial. He also stated that individual lawyers may bring up questions about cases at office meetings. However, no routine review of cases is said to take place, and no assistance with cases appears to be provided after the first week or the first felony trial.

External Monitoring. According to interviewees, the primary mode of monitoring and evaluation of the contract firm's services is by the judges before whom they appear. While there is no systematic approach employed by the judges, such as periodic written evaluations, some informal monitoring is performed by the judges. One judge reported that, when he had been concerned that the contract lawyers were appearing to be unprepared for sentencing hearings, he subsequently took the problem up with senior members of the firm, and the deficiencies were corrected. According to one observer in the prosecutor's office, the court's monitoring only related to serious problems or patterns that were developing, but could not address most areas of attorney performance.

One of the judges interviewed expressed his belief that there ought to be some objective means of evaluating the contract lawyers' work. He thought that the situation could be improved by including in the contract a number of requirements such as performance standards, the number of hours of service required, the number of lawyers who would devote full-time to the contract, caseload limitations, and the number of additional cases that would be handled for a given additional charge.

In sum, there is little in the way of oversight in the Berrien County system. The contract does not specify performance standards or reporting requirements or restrict in any way the amount of cases that can be assigned to the lawyers, there is a minimum of supervision and training within the contract firm, and the judges are able to spot only very serious problems.

Summary of Statistical Comparisons of Attorney Performance

The performance of the contract attorneys and privately retained counsel, as reflected in court records, has been statistically compared in the following chapter. This section presents a brief summary of the statistical analyses of court records showing cases handled by both groups of attorneys.

In a combined analysis of felony and misdemeanor cases, the statistics showed that the contract attorneys disposed of cases in a shorter time than retained lawyers. However, retained counsel did better for their clients in obtaining their release from custody prior to trial (obtained release on bond or personal recognizance), made more court appearances for their clients, and obtained shorter sentences for those clients who received sentences of incarceration.

When felonies were analyzed alone and additional control variables were added, the results were similar. The statistics further showed that for felonies alone, retained counsel engaged in more motion practice than the court-appointed lawyers (although the total number of cases involving motion practice for both sets of lawyers were too small to show statistical significance). Retained counsel clients also received fewer sentences of incarceration. However, there were no significant differences in the lengths of sentences received by retained and appointed counsel clients.

Conflicts of Interest and Referrals

The determination as to when to declare that a contract case presents a conflict of interest for the firm lies within the discretion of the law firm. When such a conflict is declared, the contract firm designates which attorney will handle the case. As described by the contract firm, the first attorney to be designated is usually the one who subcontracts for juvenile cases; the next codefendant will be assigned to the lawyer who subcontracts for the Niles cases; and if there are more than 3 defendants, another lawyer will be called in. However, it appears that if there is a "heat" case that is likely to draw a lot of public attention, a more prominent attorney will be designated.

The firm does not automatically declare a conflict of interest by virtue of the fact that there are codefendants in a case, but only if the defendants' cases are potentially in conflict. One of the contract defenders estimated that approximately 10% of the case represent a conflict of interest.

Once the firm has declared a conflict of interest, the firm's contract fee is diminished, since the courts deduct the payment to the conflict lawyers from the 1/12 monthly payment to the contract firm. A similar practice, whereby the contract lawyers decide when a case is a conflict of interest and then must have the conflicts lawyer's fees deducted from their payment was held to be a conflict of interest in the California case of People v. Barboza in that it might tend to influence the lawyers to avoid declaring a case to be a conflict.

The contract firm attorneys also reported that they have an understanding with attorneys who receive the conflicts appointments that they will refer civil cases which they are unable to handle to the contract firm. This practice was confirmed by one of the subcontractors who handles conflicts cases. He related that he has a specific gentleman's agreement made at the contract firm's insistence that any civil business that he generates from contract clients which he does not personally handle will be referred to the contract firm. He also reported that he received approximately \$8,000 from these civil referrals during the past year over and above the payment for the subcontract itself.

Local Perspectives of the Contract System

A number of different "actors" in the local community were interviewed to gain their individual perspectives regarding how well the contract system was functioning. Persons interviewed ranged from county board members and county employees, to judges, prosecutors, corrections officials, lawyers, social service agencies, community representatives, criminal defendants, and others. Their opinions are offered not for their accuracy, but as an indication of the attitudes toward the system that prevail among officials and the community at large.

County Administration

The county administration is pleased with the contract system's predictability when it comes to costs. They believe that the previous system tended to increase costs, while the present system, which has been in effect for over 10 years, helps to keep the lid on costs, and that costs actually decreased immediately after the system was instituted. They also believe that the quality of representation had been very uneven under the old system, and that the present system has resulted in improved representation.

The Contract Firm

The lawyers in the contract firm are very proud of their system and open to discussing its operation. However, they felt that more funding ^{was needed} to hire investigative staff and to process additional mental health cases in response to the mandates of a new law. One of the lawyers in the firm conceded that the firm provided an "adequate criminal defense," but that it was not as good as that of retained counsel. He thought that the biggest flaw in the representation provided was that most cases are bargained to a guilty plea and that, because of the jail schedule, he rarely sees his clients before the preliminary examination conference.

The Prosecution

One prosecutor interviewed thought that the present system is the best for Berrien County because a public defender system would be more costly. However, he believed that, while contract attorneys are faster in disposing of cases than retained counsel, they are weaker in legal research and developing a theory of the case and that retained counsel do more motion practice and handle search and seizure cases better. Another prosecutor thought that retained counsel do less plea bargaining and more

investigation, and that obtaining alternatives to incarceration is something that the contract lawyers could improve on.

The Judges

The judiciary gave the program mixed reviews. One judge saw the contract system as an aid to him in running his court call. The principal differences he saw between the contract attorneys and retained counsel were that retained counsel were more aggressive, made many more motions in court, and took a much higher percentage of cases to trial. While he believed that the individual contract attorneys' caseloads were too high, he thought that no changes were necessary in the system and that the present system made for more effective plea bargaining and controlled costs.

A second judge thought that the contract system saves judges time in screening cases, served the needs of attorneys who had neither the background nor the interest in accepting criminal appointments, and was good for the county supervisors, who wanted to save money. However, he believed that there were too many cases handled by each attorney, and that there was not enough time spent on each case. He felt that neither retained or appointed counsel did enough in the way of developing sentencing plans for their clients.

A third judge was critical of the contract firm's practice of seeing the client for the first time at the pre-trial conference, and thought that they should go to the jail and conduct a thorough interview beforehand. He noted that this was important, for example, to ascertain early on in the case about the claims of alibi witnesses, to provide a better defense in general, and to eliminate defendants' claims against attorneys. However, when he has brought it up with the attorneys, they informed him that they have time problems.

Private Lawyers

The private bar had mixed feelings about the existence of the contract system. The younger lawyers who were just starting up their practice would have liked to participate in the system. However, one source stated that only about 10 lawyers in the county specialize in criminal law and that there are only 50 active trial lawyers in the entire county. Furthermore, of those 50 lawyers, only about 20, he estimated, would be willing to handle assigned cases.

On the other hand, those interviewed gave very negative impressions about the quality of the work being performed by the contract firm.

While the lawyers interviewed are not presented as a representative sample, they do give an indication of the level of emotion evoked by the contract defense system in Berrien County.

One source stated that the contract firm uses newer lawyers who bill at a lower rate rather than using the partners to do an equal amount of work on the indigent contract in order to make a profit. This was described as a good deal for the law firm, particularly since the contract serves to provide the firm with a dependable source of cash flow while the firm is waiting for other business.

This view was echoed by another attorney, who stated that the contract firm "rakes in the money," while poorly paid associates do all of the work. This individual also stated that a lot of the money from the contract went into equipment, e.g., they bought 5 word processors the first year (thus implying that the equipment was used for the firm's civil business, and that 5 word processors were not needed to handle the indigent contract). The attorney also thought that the firm should be required to do more reporting on the types of cases handled, the amount of time spent, etc. Another critical comment by this attorney was that the system affects independence because of the high volume of pleas, as trade-offs must be made in the plea bargaining process. The attorney thought that the contract system was preferable to the assigned counsel system, but that the firm should be supplied with more paralegals or investigators. The interviewee also charged that the firm got the contract on the basis of the reputations of the senior members of the law firm before turning around and delegating the work to new recruits..

The potential for trade-offs in plea bargaining was the butt of criticism by other lawyers as well. One, very blunt, attorney stated that, "The program sucks," in that, if the lawyers are too vigorous, e.g., they take too many jury trials, they might lose the contract; thus, he felt that there was a built-in conflict of interest. He also believed that the defendants' caseloads were astronomically high and that the system operates on the premise that a large number of clients will plead guilty. As a result, he alleged, the contract lawyers walk into a pre-trial conference with 15 files and engage in "wholesale plea bargaining," which results in trading off one defendant's rights for another. He queried, "How can you plead defendants guilty the first time you see them?"

He believed that the county was saving money, but that it was at the cost of delivering inadequate legal services to the indigent. He also pointed out that, although the program was sold to the county board by the senior members of a prestigious law firm, it is being run by lawyers right out of law school without supervision by the senior lawyers. While the prosecutor and county board were satisfied with the program, he thought, no one had asked the clients whether or not they were satisfied. He felt that a preferred approach would be to have a full-time, organized, autonomous defender system staffed by competent attorneys.

Another private lawyer shared similar views about the contract system. He described their use of plea bargaining as follows. The contract defender comes in with 8 or 10 files and says to the prosecutor, "Let me trade a breaking and entering on this case for a larceny on that one." He thought that such a package deal was a violation of ethics. He also described the manner in which contract defenders interviewed their clients as follows:

Lawyer: What are you charged with?

Client: Breaking and entering.

Lawyer: I can get you larceny in a building.

He stated that he has observed such interviews, and that there was no discussion of the facts of possible legal defenses. The "interview" was conducted in the holding area behinds the courtroom where there was absolutely no privacy. This lawyer also believed that the firm's having a direct contract with the county results in a loss of independence. In summing up, he stated that, "The system stinks. It borders on a sham. They are not able to provide research or investigation on that contract." He charged that the lawyers viewed the scene of the crime in less than 2% of the cases, failed to interview witnesses, rely for the most part on police reports, generally lack a legal theory of the case, and often waive preliminary hearings before they know whether the prosecutor has a case. He believed that they did a good job with pleas due to their familiarity with the system. He would prefer a judicare type of program in which the clients can select their own lawyers.

The final attorney-interviewee, a leader of the bar who is not engaged in criminal law practice, thought that a potential abuse of the present contract system might be that the lawyer would indicate to the defendant that he would do a better job if the client would pay him. He viewed this abuse as feasible in a system where the firm is allowed to handle private criminal work as well as the appointed criminal cases. He also urged a change in the present "supermarket" approach whereby the firm does horizontal representation of one defendant using several lawyers to vertical representation where one defendant has a single attorney throughout all proceedings. He believed that a better approach would be to establish a panel of approximately 25 to 30 attorneys and publicize an adequate fee schedule, and that the judge should not allow other attorneys to cover their court appearances. He felt that the present system was designed to save money, and that the county is not interested in providing the best representation. He suggested that the prosecutor's office is too "fat" by 1/2 and that the county can save money by cutting the prosecutor's staff and spending more on indigent defense. The lawyer criticized the contract firm for not giving the same quality of representation to their indigent clients as they do for their private clients, and for doing insufficient preparation on indigent cases. He suggested that a monitoring system with real teeth be established. However, he believed that the present system was an improvement over the previous system, and that some of the lawyers who had accepted cases under the old system should have been disbarred.

Minority Community and Civil Rights Agencies

The theme of racism in the county power structure was reflected in interviews with representatives of the minority community. One such representative stated that, based upon his occasional visits to prisoners at the jail and his discussion with judges regarding problems raised by those prisoners, he believes that the county is strongly racist and that it is best to have a lawyer from outside the county to represent you if you expect to challenge any county official or policeman as part of your defense. He thought that paid attorneys put more effort into a case than contract lawyers, and that contract lawyers are afraid to buck the power structure. He has also received some complaints from individuals about how their lawyer does not come to see them at the jail or that the lawyer tricked them into pleading guilty.

That view was reinforced by the next interviewee. She indicated that the majority of people she talked to said that the attorneys never take the time to discuss the case fully, that they are not representing their clients adequately, don't spend enough time on the case, conduct no investigation, and that they simply make it easier for the court system to work. They do not protect people's civil rights, and there was an undercurrent of political influence in the system, she believed. She felt that the system affected the independence of attorneys in that, if you are too vigorous, "you will get your neck chopped off," so that if you want to live here, you must cooperate with the system.

Another interviewee, whose role is closely involved with the court system, characterized the contract defender system as "rotten." He thought that the contract lawyers handled the indigent defense contract as a "moonlighting business" by disposing of cases quickly in order to avoid getting judges mad at them. Their main skill was at plea bargaining, but if you wanted a good defense, he felt that you had to get out of town lawyers. The interviewee indicated that he had personally spoken with one of the contract lawyers and asked him how he could interview his client only ten minutes before the hearing. The lawyer had responded, "We're not being paid to do more. We operate on a plea bargaining system here." He also observed that the contract lawyers never see their clients in jail before the court date or in between court dates. He thought that client interviews should be earlier and more lengthy. He would prefer to have either a public defender system or to have the contract go to out of county firms at a higher rate than is presently being offered.

Finally, a representative of the Spanish-speaking minority community complained that, although the county had 15,000 to 20,000 migrant workers living in agricultural camps from April through October, the county had no Spanish-speaking lawyers nor did they have any translators in the court. He felt that the Spanish-speaking community was not being adequately served, and that this posed a particular problem when migrant workers are arrested because very high bonds are set as a result of their lack of roots in the community. The lawyers in the contract firm are unable to communicate with these clients, he believed, because none of them can speak Spanish. He would prefer a public defender system, and thinks that that would be preferable because they would be available to work full-time and would be more accountable to community needs.

Social Service Agencies

Three social service agencies were interviewed regarding the contract firm's use of rehabilitative alternatives to incarceration. All indicated that, while they are willing to take referrals from the attorneys, the contract lawyers do not appear to make use of community social service alternatives for their clients or to take an advocacy role in sentencing. One interviewee indicated that the contract lawyers, he felt, took the attitude that they will get paid no matter what they do on a case, and that they used the agency's services only on their private cases.

Clients

Ten former clients of the present and former contract firm were interviewed at the County Jail. They expressed varying degrees of satisfaction with their appointed lawyers.

One of the defendants, who was represented by a lawyer who sub-contracts with the firm, was very unhappy with his lawyer. He stated that the lawyer insisted that he plead guilty and when he refused, told him, "If you want to be a smartass, I'll make sure you get life." Another defendant felt that his lawyer was no good, and that he would have been better off with no lawyer at all. He said that it was not his lawyer who got him out on a personal recognizance bond; he had requested and obtained it himself.

On the other hand, one inmate, who had been represented by a lawyer under the previous contract for a manslaughter charge thought that his representation was o.k. A second inmate, who had pled guilty to the original charge in a felony case (larceny of a vehicle) at his second court appearance and received a sentence of 2-4 also thought that his lawyer's representation was o.k. A third defendant, who had managed to fire the first contract lawyer assigned to him and obtain a second contract lawyer, could not tolerate the first lawyer, but was pleased with the second lawyer.

Another client said that his lawyer wasn't a real advocate, and did not speak up for him. He was told by the lawyer that he would receive a sentence of 45 days if he pled, and if not, he would get 90 days. He pled, and received a sentence of 90 days anyway. He had less respect for the criminal justice system as a result of his experience. His lawyer had neither investigated the case, interviewed witnesses, filed motions, helped him to get released on bond, or tried to develop a dispositional plan even though the judge had said that there should be

a way for the defendant to keep his job.

One client was somewhat satisfied, but thought that the attorneys should meet with them earlier to let them know what is going on and should become more involved in the cases. He also thought that the lawyer who had started on his case was very inexperienced, and was relieved when a more experienced lawyer in the firm took over the case.

Another inmate stated that he was not very satisfied with his lawyer. As in the case of other inmates interviewed, he was asked to plead guilty by his lawyer. He thought that if he had had a private lawyer, he would have had a jury trial; as it was, he was forced to plead on the day of his pretrial conference after a 5 minute interview. He thought that the contract lawyers just want everyone to plead guilty, and that they are acting in concert with the judge. He had less respect for the criminal justice system as a result of his experience.

Finally, one defendant had tried to fire his contract attorney, but the judge wouldn't allow it. He felt that his sentence was too severe for his crime -- 45 days for taking a book out of the library without checking it out. He felt that the contract lawyers were not incompetent, only negligent. In general, the defendants interviewed felt that paid attorneys would stand up more for a defendant's rights, would do more to develop sentencing alternative plans, spend more time on the case, were more respected by the judges, and were more independent of judicial influence.

Problem Areas in the Berrien County Contract System

As described in the foregoing chapter, there are a number of serious deficiencies in the Berrien County system. While the system appears to be very effective at holding down the costs of providing representation to the poor, it has done so at the cost of providing less than adequate services.

First, the system has failed to meet minimum Constitutional mandates laid down by the U.S. Supreme Court in that it has not provided for representation to a significant number of misdemeanants who received sentences of incarceration.

Secondly, valuable rights have been lost to defendants as a result of late entry into a case by appointed counsel. No members of the Contract Firm are available at the initial bail hearing notwithstanding the jurisdiction's onerous rules regarding the appeal of initial bail decisions. Lack of availability of counsel causes some defendants to plead guilty at the first court appearance without a full understanding of the ramifications of their actions, and others to literally confess to crimes in order to qualify for a deferred prosecution program that they may not successfully complete.

Third, even when counsel are present, cases are sometimes disposed of on the the first court date prior to any factual investigation of the case or even a thorough interview with the defendant by the lawyer.

In addition, certain practices such as the contract firm having the discretion to pick which other law firms are selected to represent cases in which the contract firm has a conflict of interest, themselves may cause possible conflicts of interest. This is especially true if those firms selected then refer civil work to the contract law firm.

Finally, the clearly excessive caseloads carried by the contract lawyers are particularly troublesome in light of the inherent tension created by their responsibilities to their private law cases. The fact that those who handle the appointed cases in the law firm do not work full-time on indigent work creates a conflict of priorities between the indigent and retained work. The fact that the profit motive must also operate within the context of a private law firm creates pressures upon the lawyers to minimize their time on the indigent defense work.

FOOTNOTES

PART

Chapter I

1. People v. Barboza, 173 Cal. Rptr. 458. In that case, the California Supreme Court held that the Madera public defender office was in a conflict of interest because of the manner in which private counsel was selected and because private counsel were paid from the public defender's budget.

APPENDIX A STATE OF MICHIGAN THE DISTRICT COURT — JUDICIAL DISTRICT NO. 5 COUNTY OF BERRIEN		DISTRICT COURT CASE NO.
THE PEOPLE OF THE STATE OF MICHIGAN		OFFENSE _____
THE _____ OF _____		Bond \$ _____
vs.		Posted _____
()		
Phone Number: _____	Defendant(s) _____	

AUTHORIZATION FOR ELIGIBILITY INVESTIGATION

I hereby authorize the 5th District Court and the County of Berrien and their designated agents and employees, to investigate and verify all information provided by me in connection with my petition for court appointed counsel, and to investigate any other matter pertaining to my personal finances and income for the purpose of determining my eligibility for court appointed counsel. I further authorize and request any person, partnership, corporation, association or governmental agency possessing any information of records pertaining to my personal finances or income to provide such information and records, or copies thereof, to any agency, person, or representative authorized above to investigate and review the same, and I release any such person, partnership, corporation, association, or governmental agency from any and all liability in connection with their production of information and records in accordance with this authorization.

DATE: _____ Signature _____

TO: THE PRESIDING JUDGE OF THE DISTRICT COURT FOR THE SAID COURT:

NOW COMES THE ABOVE NAMED DEFENDANT, BEING FIRST DULY SWORN AND SAYS: 1. THATHE IS CHARGED IN THE DISTRICT COURT FOR THE 5TH JUDICIAL DISTRICT WITH THE OFFENSE AS INDICATED SHOWN ABOVE. 2. THAT DEFENDANT AND ANY PERSON LEGALLY OBLIGATED TO FURNISH NECESSITIES FOR DEFENDANT ARE WITHOUT FUNDS TO RETAIN COUNSEL. 3. THAT THE ANSWERS BELOW ARE TRUE, CORRECT AND COMPLETE.

FAMILY AGE: _____ LIVING WITH PARENTS?: _____ GUARDIAN?: _____
 RESIDENCE: MARITAL STATUS: _____ LIVING WITH SPOUSE?: _____ NO. OF DEPENDANT CHILDREN: _____
 COURT ORDERED SUPPORT: _____ CURRENT: _____ ARREARS: _____
 BUYING OR RENTING HOME: _____ MONTHLY PAYMENTS: _____
 IF BUYING, AMOUNT OF EQUITY: _____
 EMPLOYMENT: EMPLOYER & ADDRESS: _____
 POSITION: _____ TAKE HOME PAY: _____ PAY PERIOD: _____
 SPOUSE, PARENT OR GUARDIAN EMPLOYER: _____ EMPLOYER: _____ TAKE HOME PAY: _____
 ASSETS: OTHER REAL ESTATE OWNED: _____ TYPE: _____ LOCATION: _____
 VALUE OF OTHER REAL ESTATE: _____ INCOME FROM IT: _____
 ANY OTHER INCOME: _____ SOURCES: _____
 NO. OF VEHICLES OWNED: _____ MAKE & YEAR: _____
 LEIN?: \$ _____ PAYMENTS: _____
 BANK ACCOUNT S + L, CR. UNION: _____ WHERE: _____ TYPE: _____ AMT./BALANCE: _____
 OTHER ASSETS: _____
 LIFE INS.: _____ AMT.: _____ COMPANY: _____

PUBLIC ASSISTANCE: ANY FORM OF PUBLIC ASSIST.: _____
 CREDITORS: CREDITORS: _____ NATURE OF DEBT: _____
 BALANCE OWED: _____ MONTHLY PAYMENTS: _____
 CREDITORS: _____ NATURE OF DEBT: _____
 BALANCE OWED: _____ MONTHLY PAYMENTS: _____
 ARE YOU ON PROBATION OR PAROLE? _____ DISTRICT COURT: _____ CIRCUIT COURT: _____

The Defendant therefore prays that counsel be appointed to represent him in this case.

Dated: _____ Defendant.

Subscribed and sworn to before:

Deputy Clerk/Magistrate, District Judge for District No. 5

ORDER

Attorney _____ is hereby appointed on the conditions set out above.

Dated: _____ District Judge.

APPENDIX B



**STATE OF MICHIGAN
DISTRICT COURT - FIFTH JUDICIAL DISTRICT**

COUNTY COURT HOUSE • ST. JOSEPH, MICHIGAN 49085
BERRIEN COUNTY

The District Court sets cases for pre-trial conference because we have learned from experience that, out of every four cases set for jury trial, an average of two will result in the defendant pleading guilty just before the start of trial and the Prosecuting Attorney dismissing one other case just before the start of trial.

This means that three-quarters of all of the cases set for jury trial result in no trial even starting.

On one occasion we "costed out" a jury trial in District Court. Not counting such items as rent, heat, light, clerical expense, etc., etc., and just counting the costs of the jury, witnesses, and other personnel immediately and directly involved in the courtroom in the trial of the case, the cost was \$499.00!

If a case must go to trial, this expense is justified, reasonable and proper, but it is difficult to justify bringing in hundreds of dollars worth of jurors and witnesses where no trial is even started, either because of a dismissal before trial on Motion of the Prosecutor or because of a change of plea by the defendant.

If the defendant wants to go to trial, that is his absolute right. If the Prosecutor wants to go to trial, that is just fine. But, if the case is to be dismissed by the Prosecutor, he owes a duty to the defendant and to the court, as an officer of the court, to do so as soon as possible so that the expense to the defendant and the taxpayers can be minimized. If a defendant desires to change his plea, to either "guilty" or "nolo contendere" (no contest) he owes it to his own best interests to do so as soon as possible.

There are, of course, other matters which may be taken up and disposed of at the time of pre-trial conference.

This explanation is furnished to you so that you may review in your mind, and with the available witnesses, the true character of the case, come to an honest evaluation in your own mind about the matter and be prepared either to indicate that the matter will have to go to trial as far as you are concerned or that the matter need not go to trial. It is you who must determine whether a trial or a change of plea as to the original offense or a plea to a reduced charge is in your best interest and the cause of justice.

APPENDIX C

DEFENDANT'S RIGHTS AT ARRAIGNMENT

FOR DUIL OR SUSPENDED, COMPLETE REVERSE SIDE

STATE OF MICHIGAN
IN THE DISTRICT COURT - FIFTH JUDICIAL DISTRICT
BERRIEN COUNTY, MICHIGAN

PROCEDURE AT ARRAIGNMENT

This arraignment is being recorded, therefore, please answer all questions loudly and clearly. When your name is called please step forward, stand beneath the microphone, and face the Judge. The charge against you will be read and you will be expected to plead, or to say, "guilty", or "not guilty", or to stand mute. If you plead not guilty or stand mute bond will be set and you will receive a notice by mail of the date and time of your next court appearance. If you plead guilty, the Judge will impose sentence upon you either immediately or after a presentence investigation by the Probation Department. When your arraignment is completed, please step back, be seated, and wait for the Court Officer.

POSSIBLE SENTENCE

The Judge is not permitted to tell you what your sentence would be before you decide what your plea will be. Unless you are told otherwise by the Judge, you cannot receive a sentence greater than 90 days in jail and a \$100 Fine plus Court Costs, if you are convicted. If you are on parole or probation, a conviction of this charge is a violation of your parole or probation; your parole or probation could be revoked and you could be re-sentenced on the original charge under which you were paroled or placed on probation.

YOUR RIGHTS

Please read the following statements of your rights. If you understand these rights please sign and date this form on the places indicated and give it to the Court Officer. He will furnish a copy to you for you to keep if you wish. If you do not understand any of these rights you may ask the Judge questions about these rights before pleading to the charge brought against you.

YOU HAVE CERTAIN RIGHTS, INCLUDING THE FOLLOWING

1. You have the right to plead guilty, and not have a trial;
2. You have the right to plead not guilty or stand mute, in which case the Court will enter a plea of not guilty for you;
3. You have the right to hire your own attorney or to represent yourself;
4. If you cannot afford an attorney, you may petition to have one appointed to represent you in this case at public expense;
5. IF A PLEA OF NOT GUILTY IS ENTERED, YOU HAVE THE FOLLOWING RIGHTS:
 - a. You have the right to a Jury trial or a trial by the Judge without a Jury;
 - b. You have the right to be free on bond. You may post your bond in a number of ways including: depositing the full amount of the bond in cash, depositing ten percent (10%) of the full amount in cash, or hiring a bondsman; if you fail to post bond you will be held in custody until your case is disposed of.
 - c. You have the right to a reasonable time to prepare your case for trial;
 - d. You are presumed innocent until proven guilty beyond a reasonable doubt;
 - e. You have the right to confront and question under oath any witnesses called against you;
 - f. You have the right to subpoena and call witnesses of your own for your trial;
 - g. You have the right to testify or not to testify as you choose. If you choose not to testify it will not be held against you.
6. IF YOU PLEAD GUILTY OR NOLO CONTENDERE and your plea is accepted, you will not have a trial of any kind and therefore give up the rights listed in number 5.
7. You have the right to appeal from any conviction, within twenty days after the final judgment of the Court is entered, as provided by statute and Court rules.

I HAVE READ AND UNDERSTAND MY RIGHTS AND THE POSSIBLE SENTENCE AS LISTED ON THIS STATEMENT; I UNDERSTAND THAT A PLEA OF GUILTY, IF ACCEPTED BY THE COURT, CONSTITUTES A WAIVER OF ALL OF THE RIGHTS LISTED IN NUMBER FIVE ABOVE.

Dated: _____

ARRAIGNMENT RIGHTS
5-77

Defendant's Signature _____

DC-81/77

CHAPTER II
STATISTICAL ANALYSIS OF COURT DOCKET DATA IN BERRIEN COUNTY

Using data from the court files in Berrien County, the following statistical comparison was made of performance by the contract attorneys who handled the indigent criminal defense work and the private lawyers who were retained by clients able to afford counsel of their choice.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the attorneys, the outcomes that they were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser charge; if it was resolved by trial, whether or not there was an acquittal; the sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; how many times did the attorney come to court for the client; and how long it took to handle the case from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

At this site, the court files of a sample of 138 felonies (64 felony assault and 73 felony drug) and 203 misdemeanors were examined. The frequencies of the felony offenses represented by the contract lawyers and retained counsel are presented in Table 1 and of the misdemeanors in Table 2. Fifteen clients who originally accepted contract lawyers changed to privately retained counsel, and nine individuals who had initially expected to privately retain a lawyer eventually accepted the services of the contract defender's office. The tables indicate the type of counsel handling the case at the time of case disposition.

Table 1

Felony Offense Type	Contract Lawyers	Frequency	Retained Counsel
Assault:			
with intent to murder	1		2
with intent to commit great bodily harm	4		4
with intent to rob (armed) felonious	1		1
	41		11
Total	47		17
Drug:			
manufacture/delivery opiates	35		23
possession	3		9
other	3		0
Total	41		32

In the remaining tables and discussion, "contract lawyers" will be referred to as "assigned counsel" for the sake of simplicity and comparison with the other jurisdictions in this study.

Table 2

Misdemeanor Offense Type	Frequency	
	Assigned Counsel	Retained Counsel
Against Persons	27	35
Against Property	32	13
Against Public Order	23	28
Drugs	10	16
Driving	5	6
Other	7	1
Total	104	99

At the time of first arraignment, the majority of defendants were released on own recognizance. Large percentages, however, were released on money bond or retained in jail (see Table 3).

Table 3

Initial Bond Status	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money Bond	16.1% (14)	33.7% (35)	23.4% (11)	29.5% (28)
Jail	58.6 (51)	13.5 (14)	29.8 (14)	3.2 (3)
Released on Recognizance	25.3 (22)	52.9 (55)	42.6 (20)	67.4 (64)
Other	0.0 (0)	0.0 (0)	2.1 (2)	0.0 (0)

At the time of case disposition, as in Saginaw County, fewer defendants were in jail. Unlike Saginaw County, where defendants had now been released on either money bond or own recognizance, in Berrien County all defendants released since their first arraignment had been released on money bond (see Table 4).

Table 4

Bond Status at Time of Case Disposition	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor

Money Bond	33.3% (29)	35.0% (36)	44.7% (21)	29.5% (28)
Jail	41.4 (36)	11.7 (12)	8.5 (4)	3.2 (3)
Release on Recognizance	25.3 (22)	53.4 (55)	42.6 (20)	67.4 (64)
Other	0.0 (0)	0.0 (0)	4.2 (2)	0.0 (0)

Data indicate that no felony cases were initiated by indictment in Berrien County, regardless of whether they were represented by assigned or retained counsel. Preliminary examinations were relatively uncommon. They occurred for 14.8% of the felony cases represented by assigned counsel (13 of 88) and 28.6% of the felonies represented by retained counsel (14 of 49).

Patterns of case disposition in Berrien County are presented in Table 5.

Table 5

Method of Disposition

Method of Disposition	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Dismissal	17.0% (15)	56.7% (59)	16.3% (8)	40.4% (40)
Plea	79.5 (70)	34.6 (36)	77.6 (38)	52.5 (52)
Bench Trial	0.0 (0)	2.9 (3)	0.0 (0)	1.0 (1)
Jury Trial	3.4 (3)	3.8 (4)	6.1 (3)	6.1 (6)
Deferred Prosecution	0.0 (0)	1.0 (1)	0.0 (0)	0.0 (0)

As in Saginaw County, a wide range of sentences were applied in Berrien County. Frequencies of the various sanctions are presented in Table 6.

Table 6

Type of Sentence

Type of Sentence	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Suspended Sentence	1	0	0	0
Fine	49	31	34	52
Court Costs	49	32	34	53
Probation	15	2	21	8
Time Served	20	10	6	3
Incarceration	44	20	12	9

(Note: Frequencies do not total the number of pleas plus the number found guilty at trial (321), because more than one type of sanction was often assigned to a defendant.)

Data on the number of motions filed is presented in Table 7.

Table 7

Number of Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	96.5% (83)	100% (104)	89.8% (44)	99.0% (98)
1	3.5 (3)	0.0 (0)	4.1 (2)	1.0 (1)
2	0.0 (0)	0.0 (0)	4.1 (2)	0.0 (0)
3	0.0 (0)	0.0 (0)	2.0 (1)	0.0 (0)

Information about type of motions filed is presented in Table 8.

Table 8

Type of Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Reduce Bond	2	0	2	0
Dismiss	1	0	3	0
Suppress	0	0	1	0
Discovery	0	0	0	0

Data reflecting attorney activity with respect to the number of attorney appearances in court is presented in Table 9.

Table 9

Number of Attorney Appearances in Court

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	5.7% (5)	24.3% (25)	0.0% (0)	0.0% (0)
1	42.0 (37)	65.0 (67)	30.6 (15)	64.6 (64)
2	25.0 (22)	8.7 (9)	44.9 (22)	30.3 (30)
3	25.0 (22)	1.9 (2)	16.3 (8)	5.1 (5)
4	1.1 (1)	0.0 (0)	4.1 (2)	0.0 (0)
5	1.1 (1)	0.0 (0)	2.0 (1)	0.0 (0)
6	0.0 (0)	0.0 (0)	2.0 (1)	0.0 (0)

Two types of variables were created from the docket studies in order to conduct statistical analyses. The first are "dichotomous variables" in that they allow the researcher to boil the issues down into only two choices so that the results can be expressed as fractions of 100%. Examples of such variables are: defendant kept in jail vs. defendant released from jail while awaiting trial, or case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of answers may be collapsed, and instances where there were missing data are dropped out of the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by making computations using the data collected so that "intervals" such as the length of time from the defendant's first court appearance until case disposition can be compared.

Frequencies of the dichotomous variables created for the analyses of covariance are presented in Table 10.

Table 10

5

Variable	Frequency of Assigned Counsel		Frequency of Retained Counsel	
	Felonies	Misdemeanors	Felonies	Misdemeanors
Bond Status at Time of Case Disposition				
-in jail	41.4% (36)	11.7% (12)	8.7% (4)	3.2% (3)
-out of jail	58.6 (51)	88.3 (91)	91.3 (42)	96.8 (92)
Change in Bond Status				
-change--				
was in jail-now out	31.4 (16)	14.3 (2)	71.4 (10)	0.0 (0)
-no change--				
was in jail-still in	68.6 (35)	85.7 (12)	28.6 (4)	100.0 (3)
Case Disposition:				
a) dismissal				
-dismissed	17.0 (15)	83.0 (59)	16.3 (8)	40.4 (40)
-not dismissed	57.8 (73)	42.2 (43)	83.7 (41)	59.6 (59)
b) trial				
-tried	3.4 (3)	6.9 (7)	6.1 (3)	7.1 (7)
-not tried	96.6 (85)	93.1 (95)	93.9 (46)	92.9 (92)
c) trial vs. plea				
-plea entered	95.9 (70)	83.7 (36)	92.7 (38)	88.1 (52)
-case tried	4.1 (3)	16.1 (7)	7.3 (3)	11.9 (7)
d) type of plea				
-original charge	5.7 (4)	38.9 (14)	7.9 (3)	59.6 (31)
-lesser charge	94.3 (66)	61.1 (22)	92.1 (35)	40.4 (21)
e) trial outcome				
-guilty	66.7 (2)	85.7 (6)	100.0 (3)	71.4 (5)
-not guilty	33.3 (1)	14.3 (1)	0.0 (0)	28.6 (2)
f) trial outcome				
-guilty of original charge	50.0 (1)	100.0 (6)	66.7 (2)	60.0 (3)
-guilty of lesser charge	50.0 (6)	0.0 (0)	33.3 (1)	40.0 (2)
g) motions filed				
-yes	5.7 (5)	0.0 (0)	10.2 (5)	1.0 (1)
-no	94.3 (83)	100.0 (104)	89.8 (44)	99.0 (98)
h) overall disposition				
-not guilty	18.2 (16)	58.8 (60)	16.3 (8)	42.4 (42)
-guilty	81.8 (72)	41.2 (42)	83.7 (41)	57.6 (57)

6

Sentence:

a) incarceration

-yes

61.1 (44)	41.2 (21)	29.3 (12)	15.5 (9)
38.9 (28)	58.8 (30)	70.7 (29)	84.5 (49)

-no

b) type

-incarceration

61.1 (44)	41.2 (21)	29.3 (12)	15.5 (9)
13.9 (10)	3.9 (2)	41.5 (17)	8.6 (5)
25.0 (18)	54.9 (28)	29.3 (12)	75.9 (44)

-probation

-other

The mean performance of assigned and retained counsel on the variables for which interval-level data were collected in Berrien County are presented in Table 11.

Table 11

Variable	Mean Performance of Assigned Counsel		Mean Performance of Retained Counsel	
	Felonies	Misdemeanors	Felonies	Misdemeanors
Length of Incarceration (range)	7.25 months (1-90)	1.8 (1-12)	7.8 months (1-24)	2.4 (1-6)
Number of Motions Filed (range)	.034 motions (0-1)	0 (0)	.18 motions (0-3)	.01 (0-1)
Number of Attorney Appearances (range)	1.77 apps. (0-5)	.88 (0-3)	2.08 apps. (1-6)	1.4 (1-3)
Days from First Appearance to Disposition (range)	31.5 days (12-329)	42.3 (12-232)	61.1 days (0-343)	51.7 (0-224)
Days from First Appearance to Sentencing (range)	34.7 days (3-329)	41.7 (5-142)	79.6 days (0-343)	54.6 (0-131)

2) Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in Berrien County: Felony and Misdemeanor Cases, Controlling for Initial Bond Status and Number of Offenses Charged

1) Covariates. Table 12 presents the frequency

distributions of the two variables employed as covariates: initial bond status and whether other offenses were charged at the time of this arrest, for both assigned and retained counsel.

Table 12

Case and Defendant Characteristics

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Initial Bond Status:				
Bond	16.1% (14)	33.7% (35)	23.4% (11)	29.5% (28)
Jail	58.6 (51)	13.5 (14)	29.8 (14)	3.2 (3)
ROR	25.3 (22)	52.9 (55)	42.6 (20)	67.4 (64)
Other Offenses Charged at the Time of this Arrest:				
Yes	23.9% (21)	1.9% (2)	18.4% (9)	5.1% (5)
No	76.1 (67)	98.1 (102)	81.6 (40)	94.9 (94)

ii) Analyses. The analyses of covariance indicate a significant difference between assigned and retained counsel and a significant coefficient of regression for the first four of the below-listed variables. The coefficient of regression was not significant for the remainder.

- 1) bond status at the time of case disposition ($F(1,328)=23.81, p .001$) (FN 1)
- 2) likelihood of incarceration ($F(1,407)=13.76, p .001$)
- 3) severity of sentence ($F(1,407)=6.38, p .012$)
- 4) number of court appearances ($F(1,632)=17.07, p .001$).
- 5) likelihood of change in bond status from time of first arraignment to case disposition ($F(1,54)=6.04, p .015$)
- 6) days from first arraignment to case disposition ($F(1,628)=4.31, p .038$)
- 7) days from first arraignment to sentencing ($F(1,414)=10.84, p .001$)

Examination of adjusted means suggests that in Berrien County, assigned counsel are more likely than retained to have clients in jail at the time of case disposition (adjusted means=1.68 and 1.84, respectively). This conclusion is qualified, however, by an interaction with type of offense (felony/misdemeanor). Statistical analysis reveals that there is no difference in the initial bond status of misdemeanor clients of retained and assigned counsel (adjusted means=1.86 and 1.98, respectively) but that retained counsel are more likely to have felons out of jail at the time of case disposition than are assigned counsel ($F(1,632)=29.65, p .001$) (adjusted means=1.87 and 1.58, respectively).

Similarly, examination of adjusted means for the variable, likelihood of change in bond status, suggests that assigned counsel achieve less good outcomes for their clients than retained

counsel (adjusted means=1.74 and 1.54, respectively). Assigned counsel are less likely to have clients who were initially incarcerated, released from jail by the time of case disposition than are retained counsel.

It also appears that the clients of assigned counsel are more likely to receive a sentence of incarceration (adjusted means=1.48 and 1.64, respectively) or more severe outcomes (adjusted means=2.15 and 1.99, respectively). These conclusions are unqualified by any interactions and would therefore be true for both felony and misdemeanor cases.

With respect to the number of court appearances, it seems that assigned counsel appear less frequently in court (adjusted means=1.52 and 2.04 appearances, respectively). This effect, however, is qualified by an interaction with the type of felony offense (assault vs. drug) ($F(1,632)=10.217, p .001$). Statistical analyses indicate that assigned and retained counsel appear equally often for felony drug cases (adjusted means=1.9 and 1.8 appearances, respectively) but that retained counsel make significantly more appearances than assigned for felony assault cases ($F(1,280)=16.52, p .001$) (adjusted means=2.7 and 1.6 appearances, respectively).

Perhaps as a consequence of their lesser number of court appearance, assigned counsel dispose of their cases more quickly than retained counsel (adjusted means=37.2 days and 61.4 days, respectively). Assigned counsel also are quicker to move their cases to sentencing (adjusted means= 37.3 days and 84.8 days, respectively). This last effect, however, is qualified by an interaction with the type of crime committed ($F(1,414)=4.65, p .032$). Statistical analysis reveals that assigned and retained counsel do not differ in speed of handling misdemeanors (adjusted means=40.92 and 57.2 days, respectively) but do differ significantly in the speed of processing felonies ($F(1,418)=23.56, p .001$) (adjusted means=35.5 and 98.6 days respectively).

3) Summary of Differences between Assigned and Retained Counsel

Differences in the handling of:

Felonies	Misdemeanors
-bond status at the time of case disposition	
-likelihood of change in bond status	-likelihood of change in bond status
-# of court appearances	-# of court appearances
-likelihood of incarceration	-likelihood of incarceration
-sentence severity	-sentence severity
-days from first appearance to case disposition	-days from first appearance to case disposition
-days from first appearance to sentencing	

4) Analyses of Covariance of the Differences in Performance of Assigned and Retained Counsel For Felonies Only, Controlling for the Full Range of Covariates

A separate analysis of covariance was conducted of felonies alone because the researchers were able to obtain information on additional covariates for felony cases. In addition to the two control variables for defendant characteristics employed in the previous analysis, i.e., initial bond status and the presence of multiple charges, felony cases were also controlled for prior criminal records, sex, and race.

1) Covariates. The frequency distributions of the six covariates in Berrien County are presented in Table

Table

Case and Defendant Characteristics	Frequency		Retained Counsel
	Assigned Counsel		
Prior Convictions:			
Yes	44.3% (39)		34.7% (17)
No	53.4 (47)		65.3 (32)
No Information	2.3 (2)		0.0 (0)
Sex:			
Female	19.3% (17)		14.3% (7)
Male	78.4 (69)		85.7 (42)
No Information	2.3 (2)		0.0 (0)
Race:			
White	45.5% (40)		67.3% (33)
Black	51.1 (45)		32.7 (16)
No Information	3.3 (3)		0.0 (0)
Initial Bond Status			
Bond	16.1% (14)		23.4% (11)
Jail	58.6 (51)		29.8 (14)
ROR	25.3 (22)		42.6 (20)
Other Offenses Charged at Time of this Arrest:			
Yes	23.9% (21)		18.4% (9)
No	76.1 (67)		81.6 (40)
Mean Year of Birth	1954		1950

ii) Analyses. The analyses of covariance of the felony data reveal six measures of attorney performance which significantly differentiate between the performance of assigned and retained counsel in Berrien. The coefficient of regression was significant for the first two of these variables.

- 1) bond status at time of case disposition ($F(1,243)=15.45, p .001$) (FN 1)
- 2) likelihood of a change in bond status from the time of first appearance to case disposition ($F(1,111)=7.68, p .007$)
- 3) days from first appearance to case disposition ($F(1,241)=5.45, p .020$)
- 4) days from first appearance to sentencing ($F(1,183)=11.20, p .001$)
- 5) likelihood of incarceration ($F(1,186)=4.29, p .04$)
- 6) number of motions filed ($F(1,242)=4.72, p .031$)

The first five of these effects are the same as those that emerged in the previously reported analyses of covariance, combining felony and misdemeanor data. Assigned counsel are more likely to have clients in jail at the time of case disposition (adjusted means=1.58 and 1.86 respectively), less likely to get their clients out of jail between the first arraignment and case disposition (adjusted means=1.71 and 1.35), take fewer days to disposition (adjusted means=33.8 and 68.7 days, respectively), move their cases to sentencing more quickly (adjusted means=31.4 and 99.6 days, respectively) and are more likely to have their clients incarcerated than retained counsel (adjusted means=1.48 and 1.64, respectively).

The final effect was only marginally significant for the combined felony and misdemeanor data ($p .08$) and therefore, was not reported above. Although the coefficient of regression is not significant, the extra covariates included in the analysis of the felony data apparently do reduce the error sufficiently for the effect to now achieve a level of significance of less than .05. The effect is such that retained counsel file more motions than assigned counsel (adjusted means=.246 and .031, respectively).

Assigned and retained counsel also differ on one other dimension that appeared in the analysis of the combined felony and misdemeanor data, but as before, this effect is qualified by an interaction with type of felony (assault/drug).

- 1) number of attorney appearances in court ($F(1,242)=7.13, p .008$)

For this effect the coefficient of regression is non-significant. Adjusted means suggest the existence of an interaction such that in Berrien County, retained counsel appear more often than assigned counsel for felony assault cases (adjusted means=2.74 and 1.62, respectively) while there is no difference in number of appearances for felony drug cases (adjusted

means=1.97 and 2.06, respectively). This interpretation is supported by statistical investigations of the interaction. There is no statistically significant difference in the number of appearances of assigned and retained counsel for felony drug cases; there is a statistically significant difference for felony assault cases ($F(1,242)=15.09, p .001$).

Only one effect, that for the variable of sentence severity, was significant in the analysis of the combined felony and misdemeanor data and is not significant in the analysis of felony data only. In order to test whether this effect had been due to differences in the defendants represented by assigned and retained counsel, or disappeared (as it had in Saginaw County) because it had not been particularly robust, an analysis of covariance, controlling only for the two covariates: initial bond status and whether other offenses were charged, was conducted on the felony cases. The lack of a significant effect on this test supports the latter conclusion. The effect appears to have disappeared in the six covariate, felony-only analysis not because it reflected differences in attorney behavior due to differences in clientele, but because it was more reflective of differences with respect to misdemeanors, than felonies.

CONCLUSION

It would be difficult to dispute the conclusion that retained counsel performed considerably better than the contract lawyers in Berrien County.

With respect to misdemeanor cases, retained counsel did better at securing pre-trial release, achieved a higher rate of alternatives in incarceration, obtained shorter terms of incarceration, and made more appearances in court.

With respect to felony cases, retained counsel also did better at securing pre-trial release, obtained alternatives to incarceration more often, filed more pre-trial motions, and made more court appearances in felony assault cases.

Lest an impartial observer complain that some of these supposed "better" results could be interpreted to instead indicate poorer performance, let us analyze the data more closely. For example, take the number of court appearances made -- could it be said that making more court appearances indicates taking up the court's time by requesting too many continuances? Not if we examine the Berrien County data. For the sample of felonies and misdemeanors combined, retained counsel made 2.7 continuances, while the contract lawyers made an average of only 1.6 appearances per case. For the sample of felony cases, retained counsel made only 2.74 appearances per case, while the contract lawyers made 1.62. In other words, the case was disposed of practically before the lawyers came to court!

Another sceptic might say about the data that the filing of more motions might indicate that retained counsel are filing "frivolous" motions. However, again, the data belie that conclusion, since retained counsel file only .2 motions per case, while contract lawyers

file even fewer still.

The only way in which the contract lawyers "excelled" in Berrien county was in taking cases to disposition faster. For example, the contract lawyers took a case from first court appearance to disposition in 33.8 days as opposed to 68.7 days for retained counsel. This compares to a disposition time of 60.8 days for assigned counsel and 103.9 days for retained counsel to handle felony drug cases in Saginaw County. Given the extreme speed with which contract attorneys dispose of felonies in Berrien County, one must question whether this represents cost-effectiveness or simply lack of preparation.

CHAPTER III

The Berrien Cost Study

The approach used in the Berrien cost study differed from that used in Saginaw. Less information was available about costs in Berrien County. This occurred for two reasons. First, the assigned counsel system in Berrien County is a Contract System. Payment to attorneys in a contract system consists of one lump sum payment to a law firm to handle the entire caseload. Therefore, data does not exist on fees for individual cases. Second, because the contracted law firm was not formally a government agency, it did not have to keep and report detailed records about each individual case nor provide monthly workload reports.

Data was available about total number of cases handled and about the total contract dollar amount. However, data did not exist to apportion cost between felony cases vs misdemeanor cases and for various types of felony and misdemeanor cases. We therefore had to create a method to provide us with detail about the variation in costs among different case types. This method used a delphi type interview scheme to elicit information about the relative time spent per case. That relative time vector was then combined with other known information to produce estimates of cost per case for a set of case types.

Aggregate Cost Analysis

The dollar amount of the contract for 1981 was for services which included work other than for criminal defense. The dollar amount for contract criminal defense services was arrived at by subtracting amounts for the other services.

Total Contract Fee	\$185,040
Less(for Niles Court)*	\$10,000
Less(for Mental Cases)	\$10,000
Less(for Juvenile Cases)	\$13,000
Less(for Conflict Cases)	\$11,424
total disbursements from contract for non-criminal work.....	(\$44,424)

Total Effective Contract for Criminal Defense....\$141,576

The contracted firm was expected to provide all the services listed above. It satisfied this obligation of the contract by subcontracting out with other law firms and lawyers to handle cases in those other areas.

*Note: The main courthouse in Berrien County is in the County Seat of the city of St. Joseph. There is one branch court in the city of Niles, which handles some cases of the lower court. All cases originating and disposed of in the Niles court were subcontracted to a law firm having offices in Niles.

County System Overhead Costs

The county did have to incur some other direct costs in administering the contract but these were miniscule in absolute value and in comparison with overhead system costs of Saginaw County. These costs were for activities involved with the contract letting process (the bidding and selection process to determine which firm recieved the contract), and the disbursement process (each month the contract firm would recieve 1/12th of its contract total fee). A casual estimation of these costs reveal them to be less than one dollar per case. Therefore, no adjustment was made to cost per case for the very minor system overhead costs associated with the contract system.

Contract Criminal Caseload

From interviews at the contract firm the following distribution of its 1981 criminal caseload was provided:

Type of case	Number of cases
Felony.....	819
Misdemeanor.....	713
Total caseload.....	1532

Cost per case (using aggregate data):

Contract Amount	\$141,576	
# cases handled	1532	\$91.41

THIS COST PER CASE IS LESS THAN A THIRD OF THE COST PER CASE OF THE COORDINATED ASSIGNED COUNSEL SYSTEM OF SAGINAW COUNTY.

Data on contract dollars associated with different types of cases was not available to us. We , therefore, now proceed to the analysis that estimates cost per case for various types of cases.

Time Related Cost Analysis (to determine cost per case for different case types)

A methodology was devised to estimate cost per case based on viewing the aggregate cost per case (which is known) as composed of a weighted average of costs per case of a mutually exclusive set of case types. Further, cost was based on a time dimension. The cost of a case is considered to be determined by the number of attorney hours used to handle the case multiplied by the cost per attorney (firm) hour. Eventhough this method for determining costs was not the approach used by the county to pay the contract firm, this framework for viewing costs provides a method of calculating costs per case based only on knowing aggregate costs, the relative amount of hours spent for different types of cases, and the frequency distribution of case types.

The fundemental identity equations involved in this analysis are:

$$\text{average cost} = \text{total cost} / \text{total \# cases}$$

$$= \frac{\text{total hours (total cost / total hours)}}{\text{total \# cases}}$$

$$= (\text{total hours} \times \text{cost per hour}) / \text{total \# cases}$$

As a weighted average of, for example, two types of cases (felonies and misdemeanors), cost per case could be expressed as:

$$\begin{aligned} \text{average cost} = & (\text{hours per felony case}) (\text{cost per felony case hour}) \\ & (\% \text{ of cases felony}) + \\ & (\text{hours per misdem case}) (\text{cost per misdem case hour}) \end{aligned}$$

(% of cases misdem)

By assuming that cost per hour is the same for all cases*, this equation just above can be manipulated to show that cost per felony case and cost per misdemeanor case is determined by knowing only:

- aggregate cost per case i.e. average cost.
- total number of cases
- % of cases felony
- the ratio of hours for the types of cases:

hours per felony case / hours per misdemeanor case .

This approach works for a large set of case types. The information required is just aggregate cost per case, the frequency distribution of case types and the string of ratios of hours spent per case for all the case types in the set. This last item was obtained from interviews with attorneys at the contract firm.

*Note: Cost per hour is based on attorney time but it is meant to reflect cost per firm hour. Other inputs can go into the defense process such as paralegals, secretaries, and investigators. It is assumed that these other inputs (as well as the usual overhead e.g. utilities, rent) are used in roughly the same amount across case types as a proportion to an hour of attorney time.

Types of cases

The minimum set of case types that lawyers could respond meaningfully concerning hours spent per case was:*

Felony capital trial
Felony non-capital trial
Felony plea and dismissal (capital and non-capital)
Misdemeanor trial
Misdemeanor plea and dismissal

This list can be latter aggregated to obtain estimates for cost per case just for felonies and for misdemeanors. It is this categorization which can most easily be compared across jurisdictions.

*Note: The set was originally greater than five cases but some groups were aggregated after the interviews when little or no differences were observed.

Time spent per case

While the following table reports the results of the delphi-type interviews to obtain information on time spent per case, it must be noted that ultimately it will be the ratio of hours that will be used in our analyses, not the absolute hours. A total of eight lawyers at the contract firm were interviewed. The following table reports the average response from those eight lawyers. The range of responses (high-low) is also reported.

Case type	Hours per case	Range
Fel Capital Trial	86	35 - 200
Fel Non-Capital Trial	41	18 - 70
Fel Plea & Dismissal	8	2 - 20
Mis Trial	10	6 - 16
Mis Plea and Dismissal	3	1 - 8

Using the case type, misdemeanor trial, as a convenient base of one, the string of ratios describing relative time spent per case is (in order of the table above):

8.6 : 4.1 : 0.8 : 1.0 : 0.3

This string of ratios can be interpreted as, for example:

A felony capital trial , on average, takes a little more than twice as much time as a felony non-capital trial.

A felony capital trial , on average, takes a little more than eight and one-half as much time as misdemeanor trial.

A misdemeanor plea or dismissal takes a little less than a third as much time as a misdemeanor trial.

Frequency distribution of the five case types for contract caseload

Detailed information about the frequency distribution for this set of five case types was unobtainable from the county. Information about misdemeanors was reliably obtained from our docket study. Information about non-capital felony trials and felony pleas and dismissals was obtained from inferring from sample information about assault and drug felonies . Information about capital felony trials was developed from interviews. Since the estimation of this crucial frequency was uncertain, an upper and lower boundry estimate was used in this analysis.

At the upper boundry, it was assumed that , at most, 8% of the total contract felony caseload were capital felonies. At the lower boundry, 4% was assumed.

Relative frequency distribution of felony caseload

Type of felony case	relative frequency:	
	low	high
felony capital trial	4%	8%
felony non-capital trial	3%	3%
felony plea and dismissal	93%	89%
total	100%	100%

Relative frequency distribution of misdemeanor caseload

Type of misdemeanor case	relative frequency
misdemeanor trial	7%
misdemeanor plea and dismissal	93%
total	100%

Using the above relative frequency distributions, the ratios of relative time spent per case, and the weighted average formulas suggested above, cost per case was calculated.

Cost Per Case for Different Types of Cases

Case type	Cost per case:	
	Using first assumpt. about fel. caseload	Using second assumpt. about fel. caseload
Felony Capital Trial	\$ 978.68	\$ 810.98
Felony Non-Captial Trial	466.58	386.63
Felony Plea and Dismissal	91.04	75.44
Misdemeanor Trial	113.80	94.30
Misdemeanor Plea and Dismissal	34.14	28.29

Felony Case	138.27	144.21
Misdemeanor	39.73	32.71
Average cost per case for entire caseload as previously computed:	92.41	92.41

The data also reveal how much time was spent per case and what the implied cost per case hour is.

During the interviews at the contract firm, they informed us that they knew the total hours of lawyer time that was devoted to contract cases during 1981. Dividing this number into the total contract dollar fee will provide the calculation for cost per firm hour to the county and its equivalent, revenue per firm hour to the contract firm.

$$\text{cost per hour} = \text{total fee} / \text{total hours}$$

$$\text{cost per hour} = \$141,576 / 4347.75 \text{ hours} = \$32.56$$

Dividing this newly computed cost per hour into the cost per case data above, implies what the lawyers' time allocation was for each type of case.

Time spent per case:

Case type	Hours per case:	
	1st assumpt.	2nd assumpt.
Felony Capital Trial	30.06	24.91
Felony Non-Capital Trial	14.33	11.87
Felony Plea and Dismissal	2.80	2.32
Misdemeanor Trial	3.47	2.90
Misdemeanor Plea and Dismissal	1.05	.87
Felony Misdemeanor	4.25	4.43
	1.22	1.00
For all case types	2.84	2.84

*Note. If the original hours information as obtained from the interviews would have been used as estimates of absolute hours spent (rather than just relative hours spent), the total contract hours would be implied to be: 12,440 hours (using 1st assumpt.) and 15,014 hours (using the 2nd assumpt.). Cost per hour would then have been \$11.38 and \$9.43 respectively. The delphi interviews yielded an overestimate of absolute hours

by a multiple of approximately three.

PART V

THE BOONE COUNTY, ILLINOIS
AD HOC ASSIGNED COUNSEL APPROACH

CHAPTER I

PROFILE OF THE BOONE COUNTY, ILLINOIS

AD HOC ASSIGNED COUNSEL APPROACH

The Environment of the Indigent Defense System

Located in the Rock River Valley of Northern Illinois, Boone County is a rural area of some 28,630 citizens. It was once part of the Northwest Territory, which was later divided into Illinois, Indiana, Wisconsin, and Michigan.

Its original inhabitants, the Pottawattomie Indians, were followed in the early 19th century by Scotch, English, and Irish settlers. Boone County, of which Belvidere is the county seat, was named after Colonel Daniel Boone, first settler of Kentucky and leader in protecting the frontier against Indian attacks. Boone County was created in 1837, when it was split off from Winnebago County. It is 12 miles wide, 24 miles long, and has a total area of 283 square miles.

The county adjoins Winnebago County where Rockford, the second largest city in Illinois, is located. Rockford College is the closest college to Boone County.

The largest industry in the county is the Chrysler automobile plant, with some 4,000 employees. Other major employers are Green Giant food processors, White-Sunstrand Machine Tools, Ipsen heat trading equipment, and CamCar Screw & Manufacturing Company. In addition, K.U. Farms employs a large number of people. The county's early settlers were primarily farmers, and farmers remain politically influential, as their land helps to provide a healthy tax base for the county.

The county's population is 30% black. In addition, the city of Belvidere, which has over half of the county's population, is 20% hispanic. The hispanics are largely migrant workers, many of whom work for Green Giant.

It is considered a highly conservative, Republican community. The county is run by a county board which employs an appointed administrative coordinator.

The Boone County Bar Association boasts 28 members of whom only 5 accept appointed counsel cases. In 1979, 6.6% of the population was below the poverty level. In 1981, 10.1 percent of the workers were unemployed. There were 1526 reported index crimes in 1981, and the population density (population per square mile) was 101.5 in 1980.

The Criminal Justice System

Criminal Court Caseloads

Because of the rural nature of this county, the severity of crime differs somewhat from that found in the city. According to one informant, the most frequent crimes are driving under the influence of alcohol, burglary, drug offenses, battery, and theft.

In general, the criminal court caseload is very small. The criminal filings for recent years have been as follows:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Felonies	101	130	83
Misdemeanors	538	594	370

Even these figures are inflated, since each charge is generally counted as a separate case. This may occur initially because the police file the initial charges separately. However, separate charges may be consolidated into one information for each incident after the preliminary hearing stage.

The Courts

Illinois has only three levels of courts: Supreme, Appellate, and Circuit. The Circuit Courts have original jurisdiction over most matters, so that both felonies and misdemeanors are heard in the Circuit Courts. The courts in Boone County are part of the 17th Judicial Circuit of Illinois which also includes Winnebago County.

There are two categories of judges in the Circuit Courts: circuit judges and associate judges. Both categories have the full jurisdiction conferred on the Circuit Court; however, the Supreme Court, by rule, provides for the matters to be assigned

to associate judges.

All administrative authority over the Illinois courts is vested in the Illinois Supreme Court, which is the state's court of last resort. Circuit Court Judges and associate judges must meet the same qualifications as Supreme Court Judges.

The Circuit Court Judge in Boone County received a salary of \$60,000 in 1982, and the salary was slated to increase to \$65,500 in July of 1983. All but \$500 of the judge's 1982 salary was paid by the state.

The Criminal Justice Process

The flow of a felony case in this jurisdiction is as follows. Defendants who are in custody are brought to court either the day of their arrest or the following day unless it is a week-end. The first court appearance is called a Presentment.

At the Presentment, the Circuit Court judge will assess the defendant's eligibility for appointed counsel, inform the defendant of the charges against him and the potential penalties, and set bond.

The defendant is not required to plead until after there has been a preliminary hearing, which will be set for 1 to 2 weeks after the Presentment.

Counsel is appointed on the day of the Presentment.

Immediately after the Preliminary Hearing is held, assuming that probable cause to proceed has been found, there will be an Arraignment. According to one informant, preliminary hearings are seldom waived in this county.

The next date in a felony case may be a "status" date to ascertain whether motions have been filed and whether discovery has been answered. Next, there will be a date set to hear motions, and finally, a trial date will be set.

The Circuit Judge hears preliminary hearings and misdemeanor arraignments every Friday.

In misdemeanor cases, the first appearance is an Arraignment. The defendant may waive a jury at the first court date before counsel has been appointed. It was reported that most defendants have no counsel in misdemeanor cases, particularly when the State's Attorney says at arraignment that the prosecution will not be seeking a jail sentence. The State's Attorney's input is requested by the judge in misdemeanor cases as to whether or not counsel should be appointed. The Judge will ask the State whether or not they are seeking a jail sentence prior to appointing counsel.

Two weeks after the misdemeanor arraignment, there will be a pretrial conference. The purpose of this conference is to resolve the case without a trial. All pretrial motions must be filed by that date, and plea offers must be accepted by the defendant by that date. The defendant will not be given the opportunity to accept the deal once the case is set for a jury trial.

The judges do not directly participate in plea bargaining. The State's Attorney will present the plea negotiation results at a status hearing, and the judge will state at that time whether he accepts or rejects the agreement. The judge, if he accepts the agreement, may require some additional conditions of probation, such as repayment of attorney's fees.

The Prosecution

The Boone County State's Attorney is an elected official. The head of the State's Attorney's office is de facto full-time, although this is not required by law.

The State's Attorney is assisted by 1 full-time prosecutor to handle misdemeanors and also by the Assistant City Attorney who handles traffic violations on a full-time basis. The head of the office handles all of the felonies. He is also assisted by a law student who is certified to assist under Rule 711 of the Illinois Supreme Court.

Since Boone County is a county of 30,000 population or less, by statute, the State's Attorney's salary is set at \$36,000 (counties of over 30,000 have full-time prosecutors who receive \$50,500). Two-thirds of the prosecutor's salary are paid by the state, and one-third, by the county.

With respect to support staff, the office has 2 secretaries, but no investigators, as they use the police to conduct investigations.

The State's Attorney does not consider this a career position, since it is limited in the number of four-year terms that one individual may serve.

The State's Attorney's jurisdiction is limited to cases occurring in Boone County. This office prosecutes cases in both felony and misdemeanor cases, since Illinois has a unified court system.

The prosecutor's office budget is submitted directly to the Finance Committee of the County Board, and is entirely separate from the court's budget.

CONTINUED

3 OF 6

The Indigent Defense System

The Boone County Indigent Defense System - An Overview

This rural, Illinois county employs a "judge-centered," ad hoc, or random assigned counsel approach. The judge controls the selection and appointment of assigned counsel, determines the defendants' financial eligibility for appointed counsel services, reviews attorney fee petitions and determines the amount of fees that will be paid in each case, prepares the budget request for the assigned counsel appropriation, and administers the assigned counsel budget. By virtue of making almost all attorney appointments, the Resident Circuit Judge controls the number of appointments (the assigned counsel caseload) received by each attorney who has requested to have his name placed on the appointment list. The new judge appears to attempt to appoint the attorneys in rotation; however, prior to 1983, there appears to have been no effort to make the appointments in rotation.

The existing Illinois law does not provide for specific fee levels; it simply requires that the fees be "reasonable" (Ill. Rev. Stat., 1980 Supp., ch. 38 §113-3(c)). Moreover, there is no local fee schedule for Boone County.

As a result, the amounts awarded are a matter of discretion by the individual judges. The Circuit Judge and the Associate Judge do not pay the same rates, nor do they cut fees to the same extent. The attorneys who receive indigent appointments have varying perceptions regarding the rates that they receive. In addition, appointed counsel do not all submit their bills in the same fashion -- some request a specific dollar amount, while others do not. The only thing that the law, the judges, and the lawyers all

appear to agree upon is that the rates which had been established in the Illinois legislation prior to 1979, i.e., maxima of \$20/hour in-court and \$30/hour out of court, were unreasonable in light of the costs of running a law office today. When a judge from an adjoining county is brought over to fill in, he is likely to pay a different rate from either Boone County judge.

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

No access to attorneys is available prior to the first court appearance. However, with some exceptions, most of the attorneys on the appointment list do establish prompt contact with their clients after the court appearance, which generally takes place within a day of arrest. Reports regarding the giving of Miranda warnings by the police vary, and there is some evidence that they are not always given in a timely manner. In any event, there seem to be a high rate of confessions made before defendants are brought to court.

The major shortcomings of this system appear to be the lack of any centralized administration for indigent defense services and the fact that, because there is no single indigent defense entity, the jurisdiction lacks an advocate for defendants' rights. There are no checks upon police abuses, there is no law reform activity, and there is no counterbalance to the actions of the state's attorney or the court. There is no procedure for termination of an attorney from the assigned counsel list for incompetence; any attorney who wishes may receive court appointments.

Excessive judicial control gives the appearance, if not the reality, of discouraging lawyers from taking substitutions of judge, filing pretrial motions, conducting investigations, and going to trial. Although in general the performance of appointed counsel appears to be adequate, this does not seem to hold true for all of the lawyers. In other words, there are no quality controls in the system, so that there is no uniformity in the quality of services provided. To say the least, there are no incentives built into the fees -- not only are the rates uncertain, but attorneys never know whether their fees will be cut if they work harder and put in additional hours. When attorneys build up a sufficient clientele and have developed expertise, they tend to remove their names from the appointment list.

Finally, the present system lacks fiscal controls. The County Board must pay the cost of assigned counsel no matter what the original appropriation. At the time of the site visit, assigned counsel costs were running well over budget, and it was clear that there would be a substantial cost overrun.

Financial Eligibility and Recoupment

As in all other aspects of Boone County's indigent defense system, the court controls the determination of eligibility and recoupment, and has total discretion. There are no formal eligibility criteria or guidelines. Determination of eligibility for appointment of counsel takes place before the judge at the first court appearance.

Boone County has recently begun to require recoupment in full or in part. Since 1983 was the first year that recoupment had been imposed, no figures were available regarding the amounts collected or

how those monies were expended.

In assessing eligibility, the court requires the defendant to fill out an Affidavit of Assets and Liabilities. The test employed to determine eligibility is left to the discretion of the individual judge. It was estimated by the court that 30% to 40% of all felony defendants are indigent and receive appointed counsel. Figures show that, over a 5 year period, 69% of felony defendants having lawyers were represented by appointed counsel and 23% of misdemeanor defendants having lawyers had appointed counsel. The study did not provide any data on the percentage of defendants having no counsel in felony cases.

The Affidavit is completed only if, after oral questioning, the judge believes that the defendant cannot afford a lawyer. The judge asks the defendant whether or not he has a car and tries to anticipate what kind of case it is. He often asks the defendant to try and hire an attorney and to come back and ask for appointment if he is unable to retain one.

In assessing whether or not the defendant has sufficient funds to retain a lawyer, the judge may consider the cost of retaining private counsel in a similar case. For example, for a case of driving with a revoked license, it was estimated that private counsel would charge about \$200, while a rape case would cost several thousand dollars.

Timing of Case Entry by Appointed Counsel

There are no lawyers available for indigent defendants at pre-indictment line-ups or interrogations. The police do not employ a list or contact attorneys for defendants.

Defense counsel are notified by phone of their appointment to indigent cases by the clerks of the Circuit Court on the date of appointment, and also receive written notice of their appointment along with the criminal complaint within 2 to 3 days.

Although the police do not contact the lawyers prior to court appointment, it was the researchers' impression that, once the defendant gets to court, appointment of counsel was relatively swift, and the attorneys by and large appear to follow up rather soon thereafter. Some may come into court the afternoon of appointment to request reduction of bond. However, this practice varies with the attorney. One close observer stated that it will generally take no longer than 1 day after the defendant comes to court for the attorney to contact his incarcerated client. However, there is no procedure for a defendant who wishes to speak to an attorney before he comes to court to do so unless he has retained counsel.

If the defendant requests a lawyer after being brought to the lock-up, he is given the telephone book, but no list of local lawyers is provided otherwise. He is allowed 1 to 3 free local phone calls, according to the Sheriff's Lieutenant. The defendant is allowed to look through the yellow pages. His only alternative if he cannot afford a lawyer is to await court appointment.

While the arresting authority stated that defendants are routinely given their Miranda warnings when arrested, conflicting stories were told by others in the jurisdiction. One interviewee expressed the view that a full-time public defender office might help to make everyone in the system "shape up."

As previously noted, counsel is appointed on the day of Presentment, the defendant's first court appearance, which is generally within a day or two of the defendant's arrest. Most of the defendants who were interviewed reported that they had met with their attorney within 48 hours of arrest. However, some defendants were not interviewed in the jail, although they were being held in custody, but in the courthouse, and one individual, who was incarcerated prior to seeing his lawyer, did not meet his appointed lawyer until 6 days after his first court appearance.

Selection and Assignment of Appointed Counsel

Counsel are appointed by whatever judge happens to be presiding at the first court appearance. The judge will appoint one of the 5 attorneys who has volunteered to accept appointed cases.

The 5 local attorneys are used exclusively for most appointed cases. However, when there is a serious murder case, the judge may bring in another lawyer from the Rockford area.

The new Resident Circuit Judge, who took office in 1983, indicated that he appoints counsel in rotation. On the other hand, the 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, while the present Resident Judge may appoint in rotation, previous judges did not do so. In addition, it was reported that when one of the other judges makes the appointment, a rotational system is not used.

The two Boone County judges differed in their approach to assignment. One stated that all attorneys on the list are considered qualified by him to handle any type of case, whether felony or misdemeanor.

The other local judge reported that he skipped over a particular attorney's name when it came time to appoint on a felony case.

No attorneys had ever been excluded from the appointment list. One of the judges observed that to do so would be "embarrassing."

Generally, the defendant is given no voice in the selection of his lawyer. However, if he objects vociferously to the appointment of a given attorney, the judge may go to the next name on the list.

Assigned Counsel Fees

1. Amount and Type of Fee Structure. Under the previous law in Illinois, the fees allowed were quite specific. Appointed counsel were to receive \$30/hour for in-court time and \$20/hour for out-of-court time with maxima of \$150 for misdemeanors and \$1,000 for felony cases. However, the statute was subsequently amended to state simply that the fees paid to assigned counsel must be "reasonable."

When questioned about the rates being currently paid, the two Boone County judges differed in what they allowed. One paid \$40/hour for in-court and \$30/hour for out-of-court time, while the other gave \$40/hour for time spent both in and out of court. The judges also differed regarding whether or not they cut fee requests. One judge stated that he never cuts hours or disallows any activity, while the other stated that hours were cut when the judge felt that the number of hours requested was unreasonable.

The lawyers' perceptions of the fees allowed varied. One lawyer requests \$30/hour for both in and out of court work. Another attorney requests \$40/hour for both in and out of court work. A

third attorney reported that he never requests a specific hourly rate in submitting fee requests, but had observed that the hourly rate he generally received came to \$25/hour. And a fourth attorney stated that he believed the rates to be \$40/hour in-court and \$30 out of court. One of the judges commented that he would prefer that the attorneys did not request a specific amount, because it "looks funny" if he cuts the amount in those cases.

2. Adequacy of Fees. With respect to the comparability of appointed counsel and private attorney fees, it was estimated by court officials that the fees paid were approximately one-half of what the attorneys would receive in private practice.

One of the attorneys interviewed complained that when you have put a lot of hours into a case, the judge is more likely to cut the fee request. As a result, that lawyer felt inhibited about conducting thorough investigations in his appointed cases. He estimated that he received an average of \$100 for an average misdemeanor appointment and \$350 for an average felony appointment.

With regard to the availability of funds in the county to adequately compensate assigned counsel, the court responded that the reality is that whatever the judge requests for that purpose gets paid.

Members of the private bar indicated that prevailing local rates for fees in private practice ranged from \$60 to \$80/hour. Office overhead costs ranged from \$11 to \$30/hour.

It was generally agreed that, while fees were still low, they had increased from previous years. In response to queries about the reasons for the increased fees, interviewees attributed the increase to several factors: 1) the Bar Associated had taken some initiative in

approaching the judges about a fee increase; 2) the legislation had changed so that the previous hourly and maximum rates were removed from the legislation; 3) new case law had criticized low fee awards; and, perhaps most significantly, 4) some younger judges had come on the bench having recent experience in private practice who realized that \$20/hour barely paid for office overhead, much less the lawyers' time.

3. Processing of Fee Vouchers. The procedure for filing and processing fee requests is as follows. First, the attorney submits his or her bill to the office of the Circuit Clerk. The Clerk's office puts all of these bills in the Judge's box. When the Judge comes into the Clerk's office, he goes through each bill and either approves or modifies the bill. The Judge then signs an Order that the approved amount be paid.

The Clerk's office then makes a file copy and attaches the court's Order to a Claim Form which is transmitted to the Treasurer. The Treasurer's office submits the claims to the Claims Committee of the County Board. Once the Claims Committee approves them, the claims are submitted to the full county board for approval.

The County Board meets once each month. Attorneys generally know the dates of these meetings and submit their vouchers shortly before the meetings.

Once the bills are approved, the Treasurer's office brings the claim to the County Clerk's office, where it is entered into the Budget Book. Checks are cut shortly after the Board's meeting. For example, if a bill is submitted shortly before a Board meeting taking place on May 26th, an attorney may receive a check by June 3rd. However, if the voucher is submitted after the Board's meeting, the

lawyer would have to wait until the following month to be paid. There is no penalty assessed against a lawyer, other than waiting, for filing a late claim.

Training, Investigation, and Supporting Services

Access to experts and supporting services for appointed counsel is virtually non-existent in Boone County. There is no training for assigned counsel that is available at no or at little cost, nor does the county pay for assigned counsel to receive any continuing legal education.

There are no back-up services, such as research banks, assistance or advice in case handling, or any other support services. Although Illinois has a State Appellate Defender's office, there are no regular services from that office to bring assigned counsel up to date on the law.

Assigned counsel have access to the law library in the Boone County Courthouse. However, the courthouse has no federal case law, nor does it subscribe to the U.S. Law Week or the Criminal Law Reporter to provide recent federal court decisions. When attorneys wish to delve into U.S. Supreme Court decisions, they must travel to Rockford or Chicago.

The services of investigators and social workers are not available, inasmuch as there is no staff back-up for assigned counsel, and the courts do not authorize reimbursement for such assistance. According to the court, no one has ever requested payment for investigative services. According to the attorneys, payment would not be authorized by the court if such a request were made. However, the services of a psychiatrist were granted in some cases if prior approval had been given by the court. Attorneys interviewed stated that investigative support services were badly needed for appointed counsel.

Continuity of Representation

For the most part, it appears that Boone County appointed counsel employ continuity of representation in that a single attorney represents a given defendant from the commencement of proceedings through the sentencing stage. While the research team did observe in the court's records some instances where several attorneys appeared for a given defendant at different stages of a case, interviewees stated that such a circumstance was uncommon.

The Cost of Assigned Counsel Services and Fiscal Accountability

1. Costs. For the fiscal year ending November 30, 1982, a total of \$21,000 was appropriated by Boone County for assigned counsel fees. However, a total of \$35,704.16 was actually expended, a cost overrun of some \$14,704. Those funds are allocated in a line item entitled, "Relief: Legal Services for Indigents." In addition, some \$1,999.80 was allocated for "Indigent Families;" a portion of this sum was used to pay for expert witness fees used by appointed counsel. Another cost of assigned counsel is that of transcripts of the preliminary hearing and of pretrial motions. This cost is found under the line item for Court Reporters rather than included in the allocation for Legal Services for Indigents.

In 1983, the budgeted amounts were increased to \$30,000 for Legal Services to Indigents and \$3,000 for "Indigent Families."

The total county budget for fiscal 1983 is \$6.37 million, of which \$1.89 million is composed of General Fund monies.

Other direct costs of the assigned counsel system include the cost of processing attorney claims and bookkeeping. The Court Clerk stated that each claim processed in that office consumes about 5 minutes. That involves sending the attorney claims form to the

County Clerk and attaching the court's Order. The Clerk must also phone the attorneys to inform them of their appointment and send them the Notice of Appointment and Complaint. In addition, there is some time spent by the judge in reviewing the attorney claims and deciding upon the amount of fees to be paid in each case.

There is some bookkeeping time expended in the Treasurer's office, where all of the expenditures are entered into the county's books. Apart from the Treasurer, all of the bookkeeping for the assigned counsel system is done by the County Clerk. This consists of entering into the ledger the name of each payee, the date, and the amount. The Clerk also mails the assigned counsel fee checks out and pays the postage.

There are no full-time personnel of the assigned counsel system who are county employees. However, the Court Clerk, County Clerk, Judges, and Treasurer's office do receive fringe benefits as county employees.

Whatever costs there are for recoupment are incurred by the Circuit Clerk's office which is in charge of collecting the fees.

2. Fiscal Accountability. The budgetary approach employed is an incremental rather than zero-based budgeting. In other words, there is no attempt to make an assessment of the numbers or types of criminal cases or to attach a dollar figure to the caseload. Instead, each department head submits a proposed budget based upon the budget of the previous year.

The Circuit Judge is considered a department head for purposes of assessing indigent defense costs, and is required to complete budget request forms which include a 1-page narrative and to make any necessary oral presentations before the County Board to defend

his budget.

There are no fiscal controls upon these expenditures, because the County Board is obligated to pay assigned counsel bills regardless of how much was appropriated. As of May, 1983, 87.6% of the sum appropriated for indigent defense in 1983 had been expended with half of the fiscal year left to run. In the event of an over-expenditure, the Department Head, in this case, the judge, would, in coordination with the Administrative Coordinator's office, request the appropriate committee of the County Board to allocate additional funds. The source(s) of those funds would be assessed by the Administrator.

The Administrator's office maintains no statistics with regard to cost per case or cost per capita for appointed counsel fees, nor does it attempt to project the cost of indigent defense by using the crime rate.

The Chairman of the County Board was interviewed about the likely causes for the increase of indigent defense costs. He responded that the factors were primarily the amount of crime, the seriousness of crimes committed, and the economy -- all factors over which the Board had no control. He thought that the judges had "some" control, however in that they had the sole discretion to set assigned counsel fees and to establish criteria for defendant eligibility. He did not believe that a significant percentage of the cost of appointed counsel was received by the county through recoupment.

Local Perspectives of the Ad Hoc Appointment Approach in Boone County

Interviews with a variety of actors in the Boone County system resulted in a significant amount of criticism. In addition, a number of suggestions were made for improvements in the system.

1. County Board. There was implied criticism in some of the suggestions made by county board members for improvements. It was suggested that the system could be improved by having different attorneys handle the more severe cases so that there would be the most competent representation, and that those attorneys could then be paid at a higher rate. There was concern expressed over the lack of predictability of costs, and the thought was expressed that, with the current over-expenditure of the assigned counsel budget, the county should be able to hire a good public defender for the same amount. It was also urged that the courts could cut costs by more aggressive efforts to screen defendants for indigency.

The Chairman of the County Board was asked about the process of changing the type of indigent defense system. He noted that he had recommended last year that the county study the possibility of going to a public defender system. He responded that the type of indigent defense system employed would be a joint decision between the judge, the State's Attorney, and the County Board. He would be opposed to a multi-county approach, since that lowers the visibility of the county. However, it appears to be acknowledged that the judges have control over the means of providing defense services. For example, he noted that when the bar association wanted to increase its hourly rates, the approached the judges and not the county board.

2. The Court. Contrary to the views expressed by the County Board, the judge thought that a public defender system would be more costly than the present assigned counsel approach. The judge thought that cost savings resulted from having the attorneys bear the costs of overhead. The judge felt that the existing system was workable because he is familiar with all of the attorneys in this small county, and he also felt that the attorneys do fight hard for the clients. He thought that assigned counsel might be more likely to have jury trials because it's free to them, since the county pays for it. In general, he didn't see much difference in the ways that assigned and retained counsel handle cases, although some experienced criminal lawyers now refuse to accept appointed cases.

3. The State's Attorney and the Bar. The judge's views were contradicted in interviews with the State's Attorney and with other lawyers in Boone County.

One interviewee pointed out a gross abuse of the present system. He stated that a former judge had threatened an attorney who requested a substitution of judge with taking his name off of the appointment list. Such judicial interference directly related to the handling of cases is a clear indication of problems inherent in the practice of having the trial judge make the appointment of counsel for an indigent defendant.

With regard to the use of experts by appointed counsel, it was pointed out that assigned counsel tend to use the "old standby" psychiatrists whose testimony the State can refute. On the other hand, retained counsel tend to obtain psychiatrists with better reputations. However, neither assigned nor retained counsel seem

to obtain other types of experts to contravene the State's testimony on laboratory tests.

With respect to motion practice, it was observed that retained counsel are more likely to file them because they know that they will receive full payment; however, they are also more likely to go to a hearing on a frivolous motion to suppress.

An attorney who had recently removed his name from the appointment list was asked why. He responded that one judge had cut his fee requests so badly that the effective fee was down to \$13/hour, which is the cost of his overhead. As a result, not only did he receive no compensation for his time, but he had to let the matters of other fee-paying clients slide, and this was hurting his ability to build a practice. This attorney also stated that he feared going to trial lest the judge cut his fee for doing so. He also complained that the judiciary discourages the filing of motions for indigent defendants, and treat counsel differently when they are representing indigents because they are paying. This type of pressure, according to the lawyer, may discourage the filing of motions, especially since the judges won't pay for what they consider "frivolous" motions.

Another lawyer pointed out an additional defect inherent in the present system. Some judges are known to pay appointed counsel at higher rates than others. However, when one judge came on the bench and the lawyers had no knowledge of how he would sentence because he had never heard a criminal trial, some of the lawyers wanted to request a substitution of judge for the sake of their clients. However, those who did so would be penalized, because the other judge did not pay as well. Thus, the lack of uniformity in the way that judges

compensate counsel produces a tendency to sacrifice the interests of indigent defendants.

Lack of monitoring of assigned counsel and the lack of sanctions for inadequate performance was one of the defects complained of. It was alleged that, even when the judges know that an attorney is not performing effectively, they do not remove attorneys from the panel. One of the attorneys interviewed charged that some assigned counsel are not doing a good job either in court or in communicating with their clients. For example, he stated that one of the older attorneys makes his clients sit in jail a long time, and the judges are aware of it, and that one attorney hadn't seen his client for a whole month while the client languished in jail. He alleged that there is not as much client contact in the appointed cases, and that, from the attorney register in the jail, you can see that no one has been up to see the appointed cases.

One of the lawyers delivered an eloquent soliloquy on the problems with handling appointed counsel cases. He was considering removing his name from the list now that his civil practice had picked up because "that is where my future lies in this community." He noted that you can't build a clientele from court-appointed work. When he does work for banks, they aren't happy about his representation of indigent defendants. The appointed counsel cases require immediate attention, which causes other work to be put off, and the private clients tend to suffer as a result.

Several of the attorneys interviewed said that they would prefer a public defender system, even though they received appointed counsel fees. One of the older attorneys said that the county could use one full-time and one part-time public defender to serve the county's

needs. One attorney thought that, with the present system, cases that should be tried are pled out. Very few jury trials are taken by assigned counsel, although part of the reason is that the State's Attorney tends to offer excellent deals.

Finally, a problem pointed out by the bar was that no counsel are available prior to court appointment. The result is that many defendants confess before they ever get to court where counsel are appointed. If the police would call an attorney, according to one lawyer, it might make a difference.

4. Clients. The defendants who were interviewed had varying opinions of the quality of assigned counsel.

One defendant complained that his attorney was never in when he phoned, and that he had to wait until he was in court to get in touch with the attorney. He stated that his lawyer did not explain much of what was happening during the pendency of the case, that his lawyer was asleep at the switch, and neither interviewed witnesses nor did street investigation of the case. He reported that, in general, the reputation of assigned counsel was that they were no good, and no one would hire them, which was why they had to accept court appointments. He thought that there should be more screening of which lawyers could be selected for court appointments.

A second defendant said that his court-appointed lawyer had been very good. A third defendant thought that his court-appointed lawyer had been somewhat vigorous, although he could have done more work in preparing the case. The lawyer had done no street investigation, nor had he interviewed witnesses. However, he reported that the reputation of assigned counsel in general was that they were "full of it," but

but that even the ones you pay for aren't very good. although a defendant is better off with retained counsel. The lawyer did not file a motion to suppress his confession, but was able to get his bond reduced.

A fourth defendant said that the reputation of assigned counsel in the area was terrible. However, the fifth defendant interviewed was very contented with the performance of his appointed lawyer, and beleived that the outcome was better than expected, although it was worse than the outcome for most people charged with the same crime. The lawyer had listened to his story and had taken enough time to prepare the case. He was accessible when the defendant tried to make contact. The defendant thought that his appointed counsel was a "successful lawyer." However, this assessment was tempered by his statement that assigned counsel don't tell you anything, but are "only worried about getting it over with." His lawyer did file motions and got him released on bond, and also, got him work release which was suggested by the probation department.

Corrections. A corrections official stated that most of the attorneys on the list are super, but that one shouldn't be on the list at all. He also observed that when the attorneys build up a clientele, they generally remove their names from the appointment list.

Summary of Statistical Comparisons of Attorney Performance

The performance of the appointed attorneys and retained counsel were statistically compared. A detailed discussion of the data is presented in the following chapter. This section gives a brief summary of the statistical analyses of court records showing cases handled by both groups of attorneys.

In a combined analysis of felony and misdemeanor cases, there proved to be a number of statistically significant differences between the performance of appointed counsel and privately retained lawyers. The clients of retained counsel were more likely to be released from custody prior to case disposition. Retained counsel were also more likely to obtain release from pretrial detention for clients who had been detained following the initial court appearance than were court-appointed lawyers. Retained counsel were more likely to go to trial than were assigned counsel as opposed to accepting a plea bargain. Retained counsel clients were less likely to receive a sentence of incarceration than were assigned counsel clients, and more likely than assigned counsel clients to receive probation or some other alternative to incarceration. When retained counsel clients did receive a sentence of incarceration, the sentence was likely to be less severe than sentences meted out to the clients of assigned counsel.

On the other hand, assigned counsel were speedier in processing cases, both from first appearance to case disposition and to sentencing. Assigned counsel also made more court appearances and were more likely to file pretrial motions in misdemeanor cases.

When felony cases were analyzed without the misdemeanors, only three differences between assigned and retained counsel emerged. The significant differences between the two groups of attorneys in felony cases were: a) sentences of incarceration received by retained counsel clients were shorter than those received by assigned counsel clients; b) retained counsel clients were more likely to be released from custody prior to case disposition; and c) retained counsel clients who had been detained after the first court appearance were more likely to be released prior to case disposition.

In summary, the felonies only analysis showed that retained counsel out-performed assigned counsel in three respects, while assigned counsel failed to achieve better results than retained counsel in any respect. In the combined analysis of felonies and misdemeanors, retained counsel did better in obtaining pre-trial release, went to trial more, received fewer sentences of incarceration, and obtained shorter terms of incarceration. On the other hand, for the combined felony and misdemeanor sample, assigned counsel were speedier, made more court appearances, and were more likely to file pretrial motions in misdemeanor cases.

CHAPTER II

STATISTICAL ANALYSIS OF COURT DOCKET DATA IN BOONE COUNTY

Using data from the court files in Boone County, the following statistical comparison was made of performance by the ad hoc, or randomly appointed lawyers, and privately retained counsel. The privately retained counsel were used as a "control group," i.e., a means of assessing the performance of the assigned counsel by providing a yardstick against which to measure them.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the lawyers, the outcomes that the lawyers were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser crime than was originally charged; if it was resolved by trial, whether or not there was an acquittal; the length and type of sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; and how long it took to handle the cases from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

A random sample of 184 felonies and 192 misdemeanors was drawn from the court files in Boone County. Because of the limited number of crimes committed at this site, the sample was drawn from all felony and misdemeanor crime types.

A breakdown of the primary felony classes with which defendants

were charged is presented in Table 1.

Cases are grouped by the type of counsel that disposed of them rather than by the type of counsel initially associated with them.

Twelve defendants changed from retained to assigned counsel, and 14, from assigned to retained representation.

Table 1

Felony Offense Type

	Frequency	
	Assigned Counsel	Retained Counsel
Class 1	3	7
Class 2	39	12
Class 3	41	27
Class 4	21	28
Class X	5	2
Murder	0	0
Total	109	76

The classes of misdemeanor offenses with which the defendants had been charged in the sample of cases examined in this research are presented in Table 2.

Table 2

	Frequency	
	Assigned Counsel	Retained Counsel
Class A	34	126
Class B	0	0
Class C	5	27
Other	0	1
Total	39	154

Table 3 shows that, after the first arraignment, defendants represented by assigned counsel were most likely to remain in jail, while defendants represented by retained counsel were most likely to be released on money bond.

Table 3

Initial Bond Status

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money Bond	25.0% (27)	36.8% (14)	67.5% (52)	82.6% (128)
Jail	59.3 (64)	60.5 (23)	27.3 (21)	4.5 (7)
Released on				
Recognizance	14.8 (16)	2.6 (1)	5.2 (4)	1.9 (3)
Other	0.0 (0)	0.0 (0)	0.0 (0)	.6 (1)
No Info/N/A	.9 (1)	0.0 (0)	0.0 (0)	10.4 (16)

At the time of case disposition, fewer defendants were in jail and more had been released on money bond, or their own recognizance. Frequencies are presented in Table 4.

Table 4

Bond Status at Time of Case Disposition

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money Bond	50.9% (55)	55.3% (21)	92.2% (71)	85.1% (132)
Jail	23.1 (25)	18.4 (7)	2.6 (2)	1.3 (2)
Released on				
Recognizance	25.0 (27)	26.3 (10)	5.2 (4)	2.6 (4)
Other	0.0 (0)	0.0 (0)	0.0 (0)	.6 (1)
No Info/N/A	.9 (1)	0.0 (0)	0.0 (0)	10.4 (16)

Docket information also revealed the frequency of indictments and preliminary examinations for felony offenses. Of the 77 felony cases represented by retained counsel, 10.4% (8) were initiated by indictment. 2.8% of the felony cases handled by assigned counsel (3 of 108) originated from an indictment. Preliminary hearings were held for 49.4% of felony cases taken by retained counsel (38 of 77) and 43.5% of the assigned counsel felony cases (47 of 108).

Patterns of case disposition in Boone County are presented in

Table 5.

Table 5

Method of Disposition

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Dismissal	9.3% (10)	23.7% (9)	9.1% (7)	21.3% (33)
Plea	82.4 (89)	57.9 (22)	79.2 (61)	51.6 (80)
Bench Trial	3.7 (4)	10.5 (4)	9.1 (7)	23.9 (37)
Jury Trial	3.7 (4)	0.0 (0)	2.6 (2)	2.6 (1)

Frequencies of the various sanctions imposed in the jurisdiction are presented in Table 6.

Table 6

Type of Sentence

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Deferred Sentence	8	4	6	35
Fine	70	14	55	95
Court Costs	69	21	56	105
Probation	70	6	52	24
Time Served	32	12	14	2
Incarceration	50	13	21	13

(Note: Frequencies do not total number of pleas plus number found guilty at trial because more than one type of sentence was often assigned to a defendant.)

The activity of counsel on behalf of defendants, as revealed by the number of motions filed is presented in Table 7.

Table 7

Total Number of Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	15.7% (17)	47.4% (18)	24.7% (19)	80.0% (124)
1	28.7 (31)	42.1 (16)	20.8 (16)	15.5 (24)
2	23.1 (25)	5.3 (2)	26.0 (20)	3.2 (5)
3	19.4 (21)	2.6 (1)	14.3 (11)	0.0 (0)
4	8.3 (9)	0.0 (0)	7.8 (6)	0.0 (0)
5	1.9 (2)	2.6 (1)	5.2 (4)	0.0 (0)
6 or more	2.7 (3)	0.0 (0)	1.3 (1)	0.0 (0)

Information about the types of motions filed is presented in Table 8.

Table 8

Type of Motions Filed

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Reduce Bond	53	14	20	1
Dismiss	10	36	18	5
Suppress	33	37	27	6
Discovery	76	31	49	14

Attorney activity as reflected in the number of court appearances is presented in Table 9.

Table 9

Number of Attorney Appearances

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
1	6.5% (7)	21.1% (8)	6.5% (5)	25.2% (39)
2	13.0 (14)	36.8 (14)	13.0 (10)	41.3 (64)
3	15.7 (17)	21.1 (8)	11.7 (9)	20.0 (31)
4	13.9 (15)	13.2 (5)	13.0 (10)	5.2 (8)
5	8.3 (9)	2.6 (1)	18.2 (14)	3.9 (6)
6	17.6 (19)	2.6 (1)	14.3 (11)	1.9 (3)
7	5.6 (6)	0.0 (0)	6.5 (5)	.6 (1)
8	10.2 (11)	0.0 (0)	3.9 (3)	.6 (1)
9	1.9 (2)	0.0 (0)	3.9 (3)	0.0 (0)
10 or more	7.3 (8)	2.6 (1)	9.1 (7)	0.0 (0)

The tables presented above represent the frequencies of given answers to the questions posed on the docket study instrument. In order to analyze those responses, two types of variables had to be created.

The first type of variable created was the "dichotomous" variable. Dichotomous variables allow us to boil the issues down into two choices such as "yes" and "no." This allows the results to be expressed as

fractions of 100%. Examples of the dichotomous variables depicted in the table below are: defendant detained in jail vs. defendant released from jail pending case disposition, and case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of responses may be collapsed, and instances where there were missing data are dropped from the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by making computations of the data collected so that "intervals" such as the length of time between the defendant's first court date and the date of case disposition can be compared.

Frequencies of the dichotomous variables created from the court docket data are presented in Table 10.

Table 10

Variable	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Bond Status at Time of Case Disposition				
-in jail	59.8% (64)	60.5% (23)	27.2% (21)	5.1% (7)
-out of jail	40.2 (43)	39.5 (15)	72.8 (56)	94.9 (131)
Change in Bond Status from First				

Appearance to Disposition				
-change--				
was in jail--				
now out	60.3 (38)	78.2 (18)	90.4 (19)	71.4 (5)
-no change--				
was in jail--				
still in	39.7 (25)	21.8 (5)	9.6 (2)	28.6 (2)
Case Disposition:				
a) dismissal				
-case dismissed	9.3 (10)	25.7 (9)	9.1 (7)	21.9 (33)
-not dismissed	90.7 (98)	74.3 (26)	90.9 (70)	78.1 (118)
b) trial				
-case tried	7.4 (8)	11.4 (4)	11.7 (9)	25.1 (38)
-case not tried	92.6 (100)	88.6 (31)	88.3 (68)	74.9 (113)
c) trial vs. plea				
-plea entered	91.8 (89)	84.6 (22)	87.1 (61)	67.8 (80)
-case tried	8.2 (8)	15.4 (4)	12.9 (9)	32.2 (38)
d) type of plea				
-original charge	52.8 (47)	63.6 (14)	39.3 (24)	55.0 (44)
-lesser charge	47.2 (42)	36.4 (8)	60.7 (37)	45.0 (36)
e) trial outcome				
-guilty	87.5 (7)	75.0 (3)	88.9 (8)	78.9 (30)
-not guilty	12.5 (1)	25.0 (1)	11.1 (1)	21.1 (8)
f) trial outcome				
-guilty of				
original charge	85.7 (6)	66.6 (2)	37.5 (3)	70.0 (21)
-guilty of				
lesser charge	14.3 (1)	33.4 (1)	62.5 (5)	30.0 (9)
g) motions filed				
-filed none	15.7 (17)	47.4 (18)	24.7 (19)	20.0 (31)
-filed any	84.3 (91)	52.6 (20)	75.3 (58)	80.0 (124)
h) overall disposition				
-guilty	89.7 (96)	71.4 (25)	89.6 (69)	72.8 (110)
-not guilty	10.3 (11)	28.6 (10)	10.4 (8)	27.2 (41)
Sentence:				
a) incarceration				
-yes	53.1 (51)	52.0 (13)	31.8 (22)	11.9 (13)
-no	46.9 (45)	48.0 (12)	68.1 (47)	88.1 (96)
b) type				
-incarceration	53.1 (51)	52.0 (13)	31.9 (22)	11.9 (13)
-probation	38.5 (37)	8.0 (2)	53.6 (37)	19.3 (21)
-other	8.4 (8)	40.0 (10)	14.5 (10)	68.8 (75)

The mean performance of assigned and retained counsel on the variables for which interval-level data was obtained in Boone County are presented in Table 11.

Table 11

Variable	Mean of Assigned Counsel		Mean of Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Length of Incarceration (range)	21.6 mos. (1-324)	1 (n/a)	6.1 mos. (1-48)	1.2 (1-3)
Number of Motions Filed (range)	1.9 motions (0-8)	.74 (0-5)	1.8 motions (0-6)	.22 (0-2)
Number of Attorney Appearances (range)	5.1 apps. (1-25)	2.7 (1-11)	5.1 apps. (1-15)	2.3 (1-8)
Days from First Appearance to Disposition (range)	84.8 days (1-355)	81.3 (1-174)	111.8 days (7-387)	91.7 (14-376)
Days from First Appearance to Sentencing (range)	93.4 days (1-355)	72.8 (1-162)	129.8 days (7-417)	86.8 (14-261)

2) Analyses of Covariance of the Differences in Performance of Assigned and Retained Counsel Controlling for Initial Bond Status and Whether Other Offenses Were Charged

i) Covariates. In order to insure that the differences found reflected differences in attorney performance and not in the types of clients represented by the two groups of attorneys, the results were controlled for differences in the defendants. In the combined analysis of felony and misdemeanor cases, the results were controlled for the clients' initial bond status and the presence of multiple charges. The initial bond status was thought to be an indicator of the prior records of defendants.

Table 12 displays the frequency distributions of those two variables which were used as covariates.

Table 12

Case and Defendant Characteristics

	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Initial Bond Status				
Bond	25.0% (27)	36.8% (14)	67.5% (52)	82.6% (128)
Jail	59.3 (64)	60.5 (23)	27.3 (21)	4.5 (7)
ROR	14.8 (16)	2.6 (1)	5.2 (4)	1.9 (3)
No Info.	.9 (1)	0.0 (0)	0.0 (0)	10.4 (16)
Other Offenses Charged at Time of Arrest				
Yes	13.1% (14)	36.8% (14)	23.4% (18)	23.4% (118)
No	86.9 (93)	63.2 (24)	76.6 (59)	76.6 (36)

ii) Analyses. Significant differences between assigned and retained counsel in Boone County emerged for the following dimensions:

- 1) bond status at time of case disposition ($F(1,685)=35.94, p .001$)
- 2) likelihood of change in bond status from first arraignment to time of case disposition ($F(1,176)=4.19, p .042$)
- 3) likelihood a case would be resolved by trial ($F(1,664)=7.11, p .008$)¹
- 4) likelihood that a case would be resolved by plea vs. trial ($F(1,479)=5.76, p .017$)¹
- 5) days from first arraignment to disposition ($F(1,647)=4.87, p .028$)
- 6) days from first arraignment to sentencing ($F(1,448)=7.49, p .006$)
- 7) likelihood of incarceration ($F(1,461)=24.26, p .001$)
- 8) number of attorney appearances in court ($F(1,671)=5.57, p .019$)
- 9) number of motions filed ($F(1,671)=13.04, p .001$)
- 10) likelihood of motions being filed ($F(1,673)=19.42, p .001$)
- 11) sentence severity ($F(1,461)=18.15, p .001$)

Examination of means adjusted for the covariates reveals that clients of retained counsel are more likely to be released before case disposition than are clients of assigned counsel (adjusted means=1.98 and 1.79, respectively). Similarly, retained counsel are more likely to change the bond status of their clients, such that those who had been incarcerated at the time of first arraignment are released from jail before the time of case disposition, than are assigned counsel (adjusted means=1.19 and 1.29, respectively). Adjusted means also indicate that clients of retained counsel are more likely to have their cases resolved by trial (than dismissed or settled by plea) (adjusted means=1.81 and 1.90, respectively). More specifically, retained counsel appear more likely to take a case to trial rather than arrange a plea, than assigned counsel (adjusted means=1.23 and 1.13, respectively). Cases taken by assigned counsel move more quickly, both from first arraignment to disposition (adjusted means=86.67

¹ The coefficient of regression, indicating that there is some relationship between the covariate(s) and type of attorney was significant for all but the third- and fourth-listed variables, the likelihood that a case would be resolved by trial and the likelihood that a case would be resolved by plea vs. trial.

and 102.16 days, respectively) and from first arraignment to sentencing (adjusted means=87.03 and 107.97 days, respectively). The adjusted means indicate that clients of assigned counsel are more likely to receive sentences of incarceration (adjusted means=1.53 and 1.77, respectively). This same finding emerges in the analysis of the variable comparing incarceration, probation and alternative sentences. The adjusted means reveal that clients of assigned counsel are more likely to be incarcerated and less likely to receive probation or alternative sentences than the clients of retained counsel (adjusted means=2.19 and 1.82, respectively). Assigned counsel also make more appearances in court than do retained counsel (adjusted means=3.81 and 3.72 appearances, respectively). Assigned counsel appear to file more motions than retained counsel (adjusted means=1.25 and 1.01 motions, respectively). Assigned counsel also appear more likely to file motions than retained counsel (adjusted means=1.66 and 1.47, respectively).

This main effect is, however, qualified by an interaction with the type of crime with which a defendant was charged (felony/misdemeanor) ($F(1,673)=5.39, p .021$).^{marginally} If a felony is charged, assigned and retained counsel differ significantly in their likelihood of filing a motion ($F(1,673)=10.81, p .001$) (adjusted means=1.83 and 1.75, respectively). If a misdemeanor is charged, assigned counsel are again more likely to file motions than are retained counsel ($F(1,673)=32.99, p .001$) (adjusted means=1.50 and 1.20, respectively). The interaction occurs because the difference between assigned and retained counsel is greater for misdemeanors than felonies.

3) Summary of Differences between Assigned and Retained Counsel

Differences in the handling of:

Felonies	Misdemeanors
-bond status at the time of case disposition	-bond status at the time of case disposition
-likelihood of change in bond status	-likelihood of change in bond status
-likelihood of resolution by trial	-likelihood of resolution by trial
-likelihood of resolution by plea vs. trial	-likelihood of resolution by plea vs. trial
-days from first appearance to case disposition	-days from first appearance to case disposition
-days from first appearance to sentencing	-days from first appearance to sentencing
-likelihood of incarceration	-likelihood of incarceration
-sentence severity	-sentence severity
-number of motions filed	-number of motions filed
-number of attorney appearances	-likelihood of a motion being filed
	-number of attorney appearances

3) Analyses of Covariance of the Differences in Performance of Assigned and Retained Counsel for Felonies Only, Controlling For the Full Range of Covariates

A separate analysis of covariance was conducted of felonies alone because the researchers were able to obtain information on additional covariates for felony cases. In addition to the two control variables for defendant characteristics employed in the previous analysis, i.e., initial bond status and the presence of multiple charges, felony cases were also controlled for prior criminal records, sex, and race.

1) Covariates. Table 13 presents the frequency distributions of the characteristics of clients of assigned and retained counsel in Boone County.

Table 13
Case and Defendant Characteristics

	Frequency	
	Assigned Counsel	Retained Counsel
Prior Convictions		
Yes	50.9% (55)	48.1% (37)
No	38.0 (41)	41.6 (32)
No Information	4.1 (12)	10.4 (8)
Sex:		
Female	10.2% (11)	9.1% (7)
Male	89.8 (97)	89.6 (69)
No Information	0.0 (0)	1.3 (1)
Race:		
White	75.9% (82)	80.5% (62)
Black	3.7 (4)	3.9 (3)
Hispanic	6.5 (7)	2.6 (2)
No Information	13.9 (15)	13.0 (10)
Initial Bond Status		
Bond	25.0% (27)	67.5% (52)
Jail	59.3 (64)	27.3 (21)
ROR	14.8 (16)	5.2 (4)
No Information	.9 (1)	10.4 (16)
Other Charges at Time of this Arrest:		
Yes	13.1% (14)	23.4% (18)
No	86.9 (93)	76.6 (59)
Mean Year of Birth	1957	1952

ii) Analyses. Analyses reveal three variables for which the type of attorney (assigned/retained) exerts a statistically significant effect. These variables are:

- 1) bond status at time of case disposition ($F(1,267)=12.88, p .001$)
- 2) likelihood of change in bond status from time of first appearance to time of case disposition ($F(1,100)=6.19, p .014$)
- 3) length of incarceration ($F(1,63)=6.16, p .016$)

Adjusted cell means indicate that clients of assigned counsel are more likely to be in jail at the time of case disposition than the clients of retained counsel (adjusted means=1.77 and 1.98, respectively). Similarly, assigned counsel are less likely to have clients who were initially incarcerated, released before case disposition than are retained counsel (adjusted means=1.42 and 1.10, respectively). Both these findings emerged in the above-reported analyses of covariance conducted on both felonies and misdemeanors. There, the effects were found for both felonies and misdemeanors, so it is no surprise that the same effects should occur in an analysis of felonies only. In this set of analyses, however, contrary to the finding of the analysis of the combined felony and misdemeanor data, the coefficients of regression are non-significant. There is no indication that differences in defendants represented by the two types of attorneys are related to the quality of representation received.

The third difference between assigned and retained counsel, that relating to length of incarceration, did not emerge in the above-reported analyses of both misdemeanors and felonies. The coefficient of regression is non-significant for this effect as well as the previous two, but apparently, controlling for the more extensive set of covariates reduced the error variance sufficiently for this effect to emerge. Clients of assigned counsel who incur sentences of incarceration receive significantly longer sentences than clients of retained counsel (adjusted means=34.2 and 2.2 months, respectively).

The failure to find significant differences for the extensive list of variables which emerged as significant in the analyses of the combined misdemeanor and felony data: likelihood of resolution by trial, days from first appearance to case disposition, days from first appearance to sentencing, likelihood of incarceration, sentence severity, number of motions filed and number of attorney appearances might suggest that these differences were a reflection of differences in the clients of assigned and retained counsel. That is, with the more extensive list of covariates controlling for these differences in defendants, these effects simply disappeared. Another possible explanation for the failure to observe these effects is the reduced number of degrees of freedom associated with the analysis of only the felony cases. To ascertain the validity of this explanation, analyses of covariance controlling for only initial bond status and number of offenses charged were conducted for felony cases only for the seven variables which had significantly discriminated between types of counsel in the analysis of combined felony and misdemeanor data but not in the analysis of felony data.

These analyses revealed the existence of significant differences between assigned and retained counsel for:

- 1) likelihood of incarceration
- 2) sentence severity
- 3) days from first appearance to disposition
- 4) days from first appearance to sentencing

That is, for four of the seven variables, the lack of a significant difference between assigned and retained counsel in the felony-only analyses with six covariates cannot be ascribed to the reduced number of degrees of freedom associated with the felonies-only analysis. The lack of a significant difference would appear to be associated with the more extensive list of covariates employed in the felonies-only analyses. That is, for these variables, the differences between assigned and retained counsel observed in the combined felony and misdemeanor analyses were actually reflections of differences in the clientele represented by assigned and retained attorneys.

For three of the variables, however,

- 1) likelihood of resolution at trial
- 2) likelihood of filing a motion
- 3) number of attorney appearances in court

the analyses of felonies only, controlling only for initial bond status and whether other offenses were charged, revealed no significant differences between assigned and retained counsel. For these variables, it would appear that the difference between assigned and retained counsel for felonies had not been particularly robust. Without the inclusion of the misdemeanors in the analysis, the effects disappeared. For these three variables it was not the addition of the extra covariates that eliminated their ability to discriminate between assigned and retained counsel, it was the loss of the misdemeanor cases in the analyses.

CONCLUSION

To summarize, the difference between retained and assigned counsel performance was demonstrated in two sets of analyses. In the first set, the entire sample of felonies and misdemeanors was analyzed together. This showed that retained counsel in Boone County excelled over the ad hoc appointed counsel with respect to obtaining pre-trial release, the percentage of cases tried, and securing alternatives to incarceration. On the other hand, assigned counsel were quicker to dispose of cases, made more court appearances, and engaged in more motion practice.

When the misdemeanor cases were removed from the sample and control variables for such factors as prior record were also considered, there were only two differences between retained and assigned counsel. Retained counsel did better in obtaining pre-trial release and in achieving shorter sentences of incarceration for their clients, while assigned counsel did not achieve any significantly better results for the felony cases.

For the first set of analyses, then, each group excelled in three different areas. Which group did better depends upon the weight that one places upon each factor. Retained counsel did better in obtaining less jail time for their clients, both before and after the trial, by arranging for pre-trial release and securing sentencing alternatives to incarceration. They also spent extra effort by taking more cases to trial. Assigned counsel also demonstrated extra effort by making pre-trial motions and appearing in court more often, and they also saved money for the court system by processing the cases quicker.

However, for the felony cases, retained counsel clearly did better

than assigned counsel. While assigned counsel did not excel in any respect, retained counsel outperformed assigned counsel in two major respects. The fact that retained counsel obtained shorter sentences of incarceration was a particularly significant finding because the difference was so great -- an average of 2.2 months for the clients of retained counsel as compared to an average of 34.2 months for assigned counsel.

CHAPTER III COST STUDY

Boone County (Belvedere, Illinois): An Ad-hoc System

From assigned counsel attorney's fee requests, data was obtained to estimate fee per case, time spent per case, and fee per hour. These results are presented in Table 1.

TABLE 1
Fee per case, Fee per hour, Hours per case for Boone County

Case type	Fee/Case	Fee/hour	Hours/Case	N
Felonies	\$284.15	24.71	11.50	98
Felony - Trials	1080.67	27.73	38.97	7
Felony - Nontrials	229.22	24.59	9.32	91
Misdemeanors	112.03	25.29	4.43	34
Misdemeanor- Trials	139.75	26.72	5.32	4
Misdemeanor- Nontrials	108.33	25.08	4.32	30

It should be noted that the sampling for cost data utilized a random sample of cases across all felony types and a random sample of cases across all misdemeanor types. We were not able to sample for just the two charges: assault and drug, as in the other sites in Michigan and Ohio.

For the entire sample of 98 felony fee requests, average fee (per case) was \$284 with a fee per hour of \$24. Assigned counsel lawyers spent, on average 11.5 hours on a felony case. Of this time, 38% was spent, on average, in court, and, therefore 62% of the attorneys' hours were spent out-of-court.

While the sample for felony trial cases is admittedly very small, the table does show that felony trial cases were over a $4 \frac{2}{3}$ multiple of the fee of a felony non-trial case. The fee per hour for a felony trial case was only slightly greater than the fee per hour for a felony non-trial case. Therefore, the much greater fee per case for a felony trial case was due to the much greater amount of time spent on that type of case.

For the entire sample of 34 misdemeanor case fee requests, average fee (per case) was \$112 with a fee per hour of \$25.59. Assigned counsel lawyers spent, on average, 4.43 hours on a misdemeanor case. The percent division of time spent in-court vs. out-of-court was virtually the same for misdemeanor cases (37% in court vs 63% out-of-court) as for felony cases.

While the sample for misdemeanor trial cases is admittedly very small, the table does show that misdemeanor trial cases had a fee per case 29% greater than the fee per case for misdemeanor non-trial cases. This difference is much smaller than the difference in fee per case (trial vs non-trial) for felony cases. However, as in felony cases, the fee per hour for a trial case was only very slightly greater than the fee per hour for a non-trial case. The difference was, therefore, due to the relative number of hours spent per case.

Comparing felony cases, as a whole, to misdemeanor cases, it can be seen in Table 1 that felony cases had a fee per case approximately a 2 1/2 multiple of a misdemeanor case. This difference was due primarily to the greater number of hours required for a felony case.

Fee per case (all cases)

While data was not available to directly calculate fee per case for all cases (felonies plus misdemeanors), an indirect estimation is possible. Data was available on the distribution of criminal case filings between felonies and misdemeanors. During this time period, 18% of the criminal case filings were for felony charges and, therefore, 82% of were for misdemeanors. Assuming this distribution is the same for assigned counsel as for retained counsel, fee per case can be estimated using a weighted average formula:

Fee per case for all cases =

$(\text{Fel fee per case} \times \% \text{ Fel cases}) + (\text{Mis fee per case} \times \% \text{ Mis cases}).$

In numerical terms this is: $(\$284 \times .18) + (\$112 \times .82) = \$143.$

On average, the fee for an assigned counsel case is \$143.

We can see in the formula above that fee per case for all cases is very sensitive to the per cent distribution of the caseload. Since we don't know what the felony/misdemeanor breakdown was for the assigned counsel system in Boone County, it may be helpful to perform a little sensitivity analysis. For this analysis, we will recalculate fee per case (all cases) using the felony/misdemeanor mix that occurred for the assigned counsel system of JoDaviess County (40% felonies; 60% misdemeanors).

In numerical terms this new calculation is:

$(\$284 \times .4) + (\$112 \times .6) = \$180.80.$

This new calculation for fee per case (all cases) can be interpreted as: fee per case would be \$180.80 in Boone County if its assigned counsel system handled the same mix of cases between felonies and misdemeanors.

Overhead costs

The overhead costs for running this ad-hoc assigned counsel system consists of costs associated with the assignment process and the payment process.

The assignment process uses (roughly) approximately 5 minutes of a judges time to pick the assigned attorney and 10 minutes of a court clerk's time to phone the attorney and send the Notice of Appointment and Complaint. Using an assumption of a \$60,000 per year salary for a judge and a \$20,000 a year salary for the court clerk, this assignment process adds an additional \$2.50 for judicial resources expended and an additional \$1.67 for court clerk resources expended. Thus, we roughly estimate each case costs an additional \$4.17 beyond the fee as the cost for appointing attorneys.

The payment process uses approximately 5 minutes of a judges' time to review and approve the voucher. In addition, this process uses: 5 minutes of a court clerk's time to send the attorney's claim form and court's order to the treasurer's office; 5 minutes of a clerk's time in the treasurer's office to submit the claim for approval at the once-each-month county board meeting; and 5 minutes of a county clerk's time to enter the transaction in the county budget book and cut the check. Using the same assumptions as above concerning salaries, the value of the judges time in the process is estimated at \$2.50, and the value of each of the 5 minutes of clerk's time is valued at \$.83. Therefore, it can be estimates that the cost of the payment process is : $\$2.50 + \$.83 + \$.83 + \$.83 = \$4.99.$

The total overhead cost per case is then equal to:

cost of appointment process + cost of payment process =
 $\$4.17 + \$4.99 = \$9.16$

A summarization of the estimation of the overhead costs is presented in Table 2.

Table 2
Components of Overhead Costs in Assigned Counsel System of
Boone County

Overhead Component	Contribution to Cost per Case
Judge in appointment	\$2.50
Court Clerk in appointment	1.67
Judge in payment	2.50
Court Clerk in payment	.83
Treasurer's Clerk in payment	.83
County Clerk in payment	.83
Total	\$9.16

Cost per case

We can now estimate cost per case for the case types presented in Table 1 by adding the fee per case to the overhead per case. This is presented in Table 3.

Table 3
Cost per Case of Assigned Counsel System in Boone County

Case type	Fee / case	Overhead / case	Cost per case
Felonies	\$284.15	\$9.16	\$293.31
Felony - trials	1080.67	"	1089.83
Felony - nontrials	229.22	"	238.38
Misdemeanors	112.03	"	121.19
Misdemeanor - trials	139.75	"	148.91
Misdemeanor - nontrials	108.33	"	117.49
All Adult Criminal Cases	143.00	"	152.16

PART VI

THE JO DAVIESS COUNTY, ILLINOIS
PART-TIME DEFENDER SYSTEM

CHAPTER I

PROFILE OF THE JO DAVIESS COUNTY, ILLINOIS

PART-TIME DEFENDER SYSTEM

The Environment of the Indigent Defense System

Located in the northwest corner of Illinois, Jo Daviess County is unlike most of that prairie state. The area is distinguished by the steep bluffs and terraces of the Galena River. It is bordered by Iowa to the west and Wisconsin on the north.

The county seat of Jo Daviess County is Galena. Tourists flock to Galena to view the century-old homes built by fortunes amassed from the lead and steamboat businesses that made Galena famous, including the home of the 18th President of the United States, Ulysses S. Grant.

Three hundred years ago, French explorers found lead mines in the area being worked by the Indians. During the mid-19th century, 80% of all lead mining in the world was done here. Galena was once the largest port on the Mississippi River north of St. Louis, and center of trade for the upper Mississippi lead mine region. However, with the advent of the railroad, commerce moved away from Galena, although the lead mines remained open until the 1970's.

Founded in 1826, Jo Daviess County was named after the hero of the battle of Tippecanoe. Its 1980 census population was 22,965, of whom less than 4,000 persons live in Galena. The county covers a relatively large geographical area of 606 square miles, and has a sparse population of only 38 persons per square mile.

Economic activity in the area now includes agriculture and the production of dairy products, batteries, beverages, castings, phonograph parts, and wire goods.

During the period from 1970 to 1980, the county experienced an 8% growth in population. Almost 8% of its population has incomes below the poverty line, and 5% of its population is black.

The county's 1983 annual budget was set at \$3,104,211. A County Board administers the county through its committees, and has no staff administrator as such. The only county officials other than the judges, prosecutor, and sheriff, are the Circuit Court Clerk, County Clerk, County Treasurer, Assessor, Superintendents of Schools and of Highways, and Coroner. Only about 20 lawyers practice in the county if one excludes judges and prosecutors.

The Criminal Justice System

Criminal Court Caseloads

Because of the rural nature of the county, the severity of crime differs considerably from that of urban and metropolitan areas. For example, one of the most prevalent crimes is cattle-rustling; other frequent crimes include auto theft and breaking and entering.

In general, the criminal court caseload is very small. The criminal filings for recent years have been as follows:

	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
Felonies	105	174	100	131
Misdemeanors	297	380	322	350

Even these figures are inflated, since each charge is generally filed as a separate case. This may occur initially because the police file the initial charges separately. However, separate charges may be consolidated into one information for each incident

after the preliminary hearing stage.

The Courts

Illinois has only three levels of courts: Supreme, Appellate, and Circuit. The Circuit Courts have original jurisdiction over most matters, so that both felonies and misdemeanors are heard in the Circuit Courts.

There are two categories of judges in the Circuit Courts: circuit judges and associate judges. Both categories have the full jurisdiction conferred on the Circuit Court; however, the Supreme Court, by rule, provides for the matters to be assigned to associate judges.

All administrative authority over the Illinois courts is vested in the Illinois Supreme Court, which is the state's court of last resort. Circuit Court Judges and Associate Judges must meet the same qualifications as Supreme Court Judges.

The county pays no more than \$1,000 towards the salaries of its judges. The remainder of judicial salaries is paid by the state.

Jo Daviess County is part of the Fifteenth Judicial Circuit which also includes Carroll, Lee, Ogle, and Stephenson Counties. The county is served by one Circuit and one Associate Judge; judges from one of the other counties in the Fifteenth Circuit may preside at the Jo Daviess County Courthouse from time to time.

The Criminal Justice Process

The flow of a criminal case in this jurisdiction is as follows. Defendants who are in custody are brought to court either the day of their arrest or on the following day unless it is a week-end.

On a minor drug charge or other misdemeanor, the defendant may be brought by the police directly to the prosecutor's office. In such cases, the prosecutor may offer a deal to the defendant before the defendant ever goes to court. This takes place prior to the appointment of the public defender and without his participation or knowledge. In such cases, the prosecutor frequently offers the defendant a fine of \$25 and 30 days' supervision in exchange for a plea of guilty. These are referred to as "25" cases.

One informant indicated that most defendants (presumably, this includes those charged with felonies as well) come to the prosecutor's office before they go to court unless they have exercised their rights under Miranda.

In the event that the defendant is determined to be financially eligible, the public defender is appointed at the first court appearance.

Few cases in this jurisdiction proceed by way of indictment. Most felony cases proceed by way of information. After the initial appearance, the case will be scheduled for a preliminary hearing.

The Associate Judge hears misdemeanor cases, initial appearances in felony cases, and preliminary hearings, while the Circuit Judge hears all felony cases after the preliminary hearing stage.

Illinois has a 10% bond law which has virtually eliminated the bail bondsman. Jo Daviess County reportedly makes liberal use of pre-trial release.

The Prosecution

Unlike the public defender, the position of State's Attorney is full-time. The prosecutor is an elected official, and receives a salary of \$36,000 per annum - which is double the salary received by the public defender, whose position requires about 80% of his time.

The prosecutor's office also includes an Assistant State's Attorney who works 80% time and earns \$20,211/year and 1½ secretaries.

The State's Attorney serves in a dual capacity as attorney for the County Board.

The budget for that office is prepared by the State's Attorney and submitted by him directly to the Finance Committee of the County Board.

The Sheriff and County Jail

The Jo Daviess County Sheriff has a staff of 17 deputies in addition to non-professional staff. The County Jail has a capacity of 24 inmates, but its average daily population is 6 inmates at a daily cost of \$32 per inmate.

Probation Department

The staff of the Probation Department is limited to the director and a secretary. A portion of the director's salary is reimbursed by the state.

In the average year, the probation officer performs about 15 pre-sentence investigations.

The Indigent Defense System

The Jo Daviess County Indigent Defense System - An Overview

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

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

The system in Jo Daviess County contains characteristics of both public defender and assigned counsel systems. It is like other public defender systems in that the public defender is treated like a county employee, and receives county fringe benefits and a regular salary. It resembles an assigned counsel system in that the defender is expected to contribute secretarial services, purchase his own office equipment, and pay office rent (with the exception of a small interviewing room furnished in the courthouse).

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

No support services are provided. The public defender does his own investigation, but uses the social services of community agencies on an informal basis.

History and Goals of the Program

The program was initiated by the county board and the prosecutor in response to a crisis situation. In the late 1960's, the county had 6 murder cases in one 14-month period. The county was billed \$9,000 by appointed counsel for just one of those cases. This unexpected increase in costs prompted the county to change from the then existing assigned counsel approach.

The county's goal in establishing the public defender office was to ensure predictability in costs of counsel for the indigent defendant.

Timing of Case Entry by Counsel

There is no provision for the assistance of counsel in Jo Daviess County at pre-indictment line-ups or interrogations. When a defendant is brought into police custody and requests the assistance of counsel after hearing the Miranda warnings, the police may cease questioning. However, no effort is made to contact the public defender unless the defendant was previously a public defender client.

An indigent defendant's first contact with a lawyer may be at the first court appearance, since the public defender will generally appear in court. The public defender will conduct the initial interview with the indigent defendant in a felony case sometime between the first court appearance and the preliminary hearing.

Jail officials verified that, while the public defender does not conduct jail checks, most clients who are detained are interviewed within 2 to 3 days of the defender's appointment to the case.

In the event that a conflict of interest on the part of the public defender is declared, outside counsel must be appointed. Appointments are generally made within 3 to 7 days after arrest -- sometime between the first court appearance and the preliminary hearing. Assigned counsel are notified of their appointment by telephone.

As noted above in the discussion of the criminal justice process, defendants in Jo Daviess County are sometimes brought to the prosecutor's office prior to the appointment of counsel. This practice constitutes an incursion upon their right to counsel.

Implementation of Argersinger

The 1972 U.S. Supreme Court decision in Argersinger v. Hamlin required that no person may be sentenced to a period of incarceration without having had the assistance of counsel. This decision has been implemented in a variety of ways throughout the country. In some jurisdictions, attorneys are routinely appointed to represent indigent defendants in cases where the penalty imposed could, under the law, result in incarceration.

In Jo Daviess County, judges do not appoint counsel unless the prosecutor indicates that he is seeking jail time for the misdemeanor offense. The majority of indigents accused of misdemeanors are processed without the benefit of counsel.

Financial Eligibility and Recoupment

The judge makes a determination of a defendant's eligibility for appointed counsel at the first court appearance. In most cases, the defendant is required to fill out an Affidavit of Assets and Liabilities.

There are no written guidelines for use by the court in determining eligibility; it is strictly a matter for judicial discretion. In describing the actual practices, one source reported that the court would look at the defendant's net worth and borrowing power to determine whether or not he/she could afford counsel. Another informant noted that the two sitting judges were not necessarily consistent as to what constitutes indigency. It was generally agreed that counsel is usually appointed for defendants who request counsel in felony cases, although there had been one recent felony trial in the county where a defendant who had been denied counsel represented himself.

There were few complaints voiced about eligibility practices, since the local bar did not desire the additional criminal appointments. However, at least one lawyer felt that too many defendants were declared eligible.

With respect to recoupment, Illinois law (Ill. Rev. Stat. 1981, ch. 38, §113-3.1) authorizes a trial court to require defendants to pay "a reasonable sum" to reimburse the county for some or all of the costs incurred in furnishing counsel. A 1983 case, People v. Kelleher affirmed a trial court's order that a portion of the defendant's bail bond be retained to reimburse the county for his appointed counsel services.

However, it does not appear that recoupment is practiced in Jo Daviess County as it is in Boone County. Respondents attribute this to the fact that a judge had been reversed for ordering recoupment to be paid from bond monies in 1976, which was prior to the passage of the new law.

Operation of the Public Defender System

The part-time public defender spends approximately 80% of his time in representing indigent defendants after appointment by the court. For these duties, he received a salary of \$18,800 in 1982 plus \$3,600 in fringe benefits such as FICA and hospitalization. There is an additional \$1,500 budgeted for public defender expenses such as telephone, travel outside of the county, transcripts, etc. However, in 1982, the public defender used only \$312 of that amount. The budget includes no funds for secretarial or other support services.

All indigent criminal cases requiring the appointment of counsel are handled by the public defender except in cases of a conflict. The cases handled by the defender for the years 1980-1982 were as follows:

Year Opened	Felonies	Misdemeanor	Traffic	Juvenile	Ordinance	Family	Total
1980	102	65	77	31	11	2	288
1981	56	79	58	27	9	0	229
1982	39	65	40	35	9	4	192

The public defender works primarily out of his private law office, although there is a small interviewing room in the courthouse available for his use. The room contains no typewriter, however, and no secretarial services are available there. The public defender does have the use of the courthouse's photocopying machine and a telephone, and has access to the county library.

Support Services

Although the defender has no support staff, he does utilize the assistance of community social service agencies such as the Department of Children and Family Services, Jane Adams Center, Youth Services Network, and Sojourn House. The Jane Adams Center provides family counseling and referral services, and has performed diagnostic work-ups on public defender clients for the court. During 1982, services for nine public defender clients were provided at no cost to the county. The agency bills the state for its services. Its most frequent service is to develop a treatment plan for the defendant.

Sojourn House provides counseling for drug and alcohol abuse problems and evaluates defendants for those problems. That agency received 2 to 3 referrals from the public defender during 1982.

The defender is required to request the court for permission in advance of retaining the assistance of a psychiatrist. Funds to pay psychiatrists are paid from a Witness Expense line item in the county budget. The entire budgeted amount is \$1,000, which appears to include the prosecutor's expense as well.

The defender has no staff investigative assistance. Some interviewees expressed the belief that there was no stated policy with respect to investigators, and that the defender could hire investigators on a per case basis without prior clearance from the court by paying the expense out of the \$1,500 defender expense budget. However, the defender, when questioned regarding the need for support services, expressed the view that a full-time secretary and a part-time investigator for use on a per case basis would be helpful.

The Assigned Counsel Component

1. Appointment System. Assigned counsel are appointed in cases when the public defender or state's attorney declares that there is a conflict of interest for the public defender. A total of 7 lawyers are appointed by the two local judges for these cases.

During 1982, one of those lawyers handled 4 or 5 felonies. Another lawyer was appointed to 3 felonies and 2 misdemeanors.

The "lists" of lawyers used are very informal. Each of the judges had 5 attorneys on his list; only 3 of those names on each list coincided. One of the judges stated that his "list" was in his head.

There were no criteria specified for inclusion in the lists. Respondents reported that if a new lawyer wanted to be included, he would speak to the judge and request it. The lawyer would probably be assigned the easier cases at first until the judge had the opportunity to evaluate his performance in the courtroom.

2. Assigned Counsel Fees. Since the state statute requires only that attorney fees be "reasonable," local fee schedules are prescribed by Circuit Court Rule. The Fifteenth Circuit has prescribed that appointed counsel receive \$30/hour in-court and \$20/hour out-of-court. However, one of the judges reported that he pays \$30/hour whether the attorney is in or out of court.

The interviewers received no complaints about fee-cutting, and the judges reported that they do not cut fee requests.

3. Processing of Fee Requests. The procedure by which an attorney receives the appointed counsel fee is as follows. The attorney must submit his claim to the trial judge. The judge then reviews the fee petition, approves it, and signs a court order for payment. The

judge then gives the paperwork to the Circuit Clerk who sends the order to the County Clerk. According to some informants, the County Clerk forwards the order to the Claims Committee of the County Board, and that Committee must approve the claims prior to final approval by the County Board in their monthly meeting. However, another informant reported that, since the system was computerized, the County Board does not have to vote on the claims before they are paid. The County Clerk authorizes payment after the Circuit Clerk issues the order. According to that informant, the check is cut and signed by the Treasurer and County Clerk before the County Board meets. However, the County Board ratifies payment at its monthly board meeting.

Assuming that the latter informant is correct, Jo Daviess County is a step ahead of most of the counties visited. By law, once the judge signs the order for payment, the county is obligated to pay it. Thus, the cumbersome procedure used by most counties whereby the claim must await approval by county board committees and the full board, is a cumbersome, unnecessary, and time-consuming practice.

4. Cost of Assigned Counsel. The 1982 expenditure for assigned counsel was \$4,115 which was placed in a line item entitled, "Outside Counsel." However, \$2,800 of this amount was evidently spent by the State's Attorney for the services of the Illinois State's Attorney's appellate program. As a result, only \$1,315 was actually expended for appointed counsel during fiscal year 1982.

The Cost of Indigent Defense Services A fuller discussion of costs is found in Chapter III of this part of the report. This discussion is a brief summary of the cost of counsel in Jo Daviess.

The total direct costs of indigent criminal defense services for fiscal year 1982 were \$23,396.48. This includes the following expenses:

Defender salary -	\$18,144.00
Defender fringe -	3,601.16
Defender expense-	312.00
Witness expense -	24.00
Outside counsel -	1,315.16
TOTAL	\$23,396.48

This amounted to a per capita cost of \$1.02 for the 22,965 inhabitants of Jo Daviess County. It constituted less than 1% of the county's \$2,872,700 fiscal year budget.

The average cost per case for the public defender came to \$115, while the average cost per case for the outside counsel who handled conflicts cases came to \$93.95. In this connection, it might be noted that in co-defendant cases, the public defender generally handles the most serious of the charges.

Budgeting Process for Indigent Defense System Costs

The courts administer the budget for the indigent defense system in Jo Daviess County. While the prosecution prepares and submits its own budget, the budgets for the public defender and appointed counsel are prepared by the Circuit Judge and submitted to the Finance Committee of the County Board. The judge negotiates the public defender's salary with the public defender.

The public defender has no independent negotiating authority, and has no board or commission to insulate the office from judicial or political influence.

There is no defense entity with oversight over the entire indigent defense budget. This fact was evidenced by the fact that the public defender was unaware that the prosecution had been making use of the line item for Outside Counsel.

Monitoring

There is no formal system for monitoring the performance of counsel for indigent defendants in this small, rural county. As in other private bar systems visited which lack either a defender commission or a strong indigent defense administrator, the duty to monitor falls to the court.

In the event that the public defender or assigned counsel were not delivering adequate service, the court's remedy would be to replace the public defender and not reappoint the outside counsel. However, it did not appear that the court had ever availed itself of that remedy since the beginning of the public defender program.

Local Perspectives of the Part-time Defender System in Jo Daviess County

With the exception of some disgruntled defendants, the general consensus of respondents in Jo Daviess County was that the public defender program was providing effective services to the poor.

1. County Board. The county board had received no complaints about the operation of the program and felt that it benefited the county in that there was predictability of costs.

2. The Court. The court also expressed the view that the defender program was cost effective and that an appointed counsel system would be more expensive. The view was also expressed that there was no difference between the public defender and retained counsel with respect to the filing of pre-trial motions, taking trials, or obtaining dismissals and acquittals. One of the advantages cited for the public defender system was that of educating the police and keeping the prosecutor in line. The system also made the judge's job easier because of the public defender's availability.

3. The State's Attorney and the Bar. The prosecutor, whose predecessor had helped to initiate the public defender program, was well satisfied with it. An advantage cited was the immediate availability of the public defender. The public defender's performance was described as "comparable" to that of retained counsel.

On the other hand, an influential member of the bar expressed the view that the present system hampered the independence of the public defender, and thought that the defender should be selected by a screening committee emanating from the county board rather than by the judges. He feared that, if the public defender were too vigorous in defense of clients, the court would not reappoint him. However, he favored the continuation of the public defender system on the grounds that it holds down costs over the long run.

Some members of the bar appeared grateful for the public defender program because it took the pressure off of them to handle the indigent caseload. The view was also expressed that a public defender is in a position to learn court procedures and the ins and outs of dealing with the prosecution, whereas appointed counsel would be at a disadvantage.

On the other hand, one interviewee expressed the view that the prosecution in this jurisdiction was more effective and dominated the courtroom. This may tend to disrupt the balance required for proper functioning of the adversary system.

4. Community Agencies. The public defender was praised effusively by one community agency head who noted his rapport with youth and his personal commitment to clients. On the other hand, one community group, who was familiar with the courts, the state's attorney's office, and probation, had never heard of the public

defender's office. One social service agency to whom the public defender had referred some cases wondered why more cases were not referred.

5. Clients. Most of the criticism of the public defender came from former clients. According to one informant, about one-third of defendants placed on probation complain that they "know as much law as that lawyer." Some defendants complained that the public defender did not take enough time with them, failed to interview witnesses or to conduct street investigations, and did not provide as good a service as they thought could have been provided by retained counsel. One defendant complained that the public defender did not get to see him until 2 weeks after arrest. However, at least one client gave the public defender high marks. He stated that the public defender had negotiated a year's probation for him and had actually visited him in his home to check on his progress. In addition, he had seen the public defender once a month during his probation to ensure that he could successfully complete probation.

Summary of Statistical Comparisons of Attorney Performance

The performance of the public defender and retained counsel was statistically compared. A detailed discussion of the data is presented in the following chapter. This section gives a brief summary of the statistical analyses of court records showing cases handled by both components of the legal defense system.

In a combined analysis of felony and misdemeanor cases, there proved to be several statistically significant differences between the performance of the public defender and retained counsel.

The clients of assigned counsel were more likely to have remained in jail pending case disposition than were clients of retained counsel. Public defender clients were more likely than retained counsel clients to receive probation or other alternatives to incarceration when sentenced. However, the public defender was more likely to file pre-trial motions than were retained counsel, and disposed of misdemeanor cases more quickly than did retained counsel.

However, when felonies were analyzed alone, there appeared to be no significant differences between the public defender and retained counsel representation. It would seem that differences in outcomes and attorney behavior did not exist strongly for felony cases.

Strengths and Weaknesses in the Jo Daviess County Public

Defender System

A number of advantages were seen in the public defender system which has been established in Jo Daviess County. The availability of counsel helps in court scheduling and promotes speedy dispositions. The fact that the public defender exists on a continuing basis seems to provide an educational vehicle for the police and to curb some potential prosecutorial excesses. The public defender has maintained good relationships with most segments of the criminal justice system. The public defender's awareness and use of community social services for defendant evaluations and treatment appears to be one of the best assets of the system. In addition, the availability of private interviewing space for the public defender helps to facilitate client interviews -- this is in sharp contrast to the practices of some jurisdictions where defendants are typically interviewed in the bull-pens. And finally, the existence of the public defender system helps the county to predict the costs of indigent defense, and may help to

keep costs down.

On the other hand, there are some features of the system in Jo Daviess County which hamper effective representation of defendants. There is little parity between prosecution and defense services. Although the prosecutor is a full-time, elected official, who also serves as chief counsel for the county board, the public defender is a part-time employee who serves at the discretion of the judges before whom he appears. While the prosecutor earns a full-time salary of \$36,000 per annum, the public defender earns only \$18,144 for about 80% of his time -- nearly half the salary of the prosecutor. The public defender lacks the status, independence, and earning power of the prosecution.

Moreover, while the prosecution has access to the investigative services of the police, and has secretarial and other attorney staff for his office, the public defender has none of the above. This necessarily limits the defender's ability to adequately investigate cases, and causes him to perform clerical tasks as well.

The lack of parity between prosecution and defense extends to the initial entry in the case. Because the public defender must await court appointment, an egregious practice has arisen in the county whereby defendants are brought to bargain and discuss their cases with the prosecution without the benefit of counsel.

The system is typified by the informality that might be expected in a part-time system serving only a single, rural county. There are no monitoring procedures established by the court. There is no management information system in the public defender's office, so that if the public defender should be on vacation or for some reason incapacitated, it would be difficult for someone else to step in and

complete pending cases.

The excessive influence exercised by the prosecution in Jo Daviess County extends to the appointment of counsel for persons charged with misdemeanors. While this may be viewed as a cost-saving measure by the county, the practice of having the prosecutor inform the judge whether jail time will be requested tends to unfairly prejudice the court against those defendants for whom counsel is appointed. The tendency is for the court to view those defendants as "worse" than those for whom counsel is not appointed.

Finally, the public defender's lack of independence is exemplified by his lack of control over the indigent defense budget. The public defender budget is submitted to the county board not as a separate entity, as is the prosecution's, but as a part of the court's budget. And the lack of any oversight over the entire indigent defense budget is responsible for the fact that the prosecution was able to dip into the appropriation for assigned counsel without the defender's knowledge.

CHAPTER II

STATISTICAL ANALYSIS OF COURT DOCKET DATA IN JO DAVIESS COUNTY

Using data from the court files in Jo Daviess County, the following statistical comparison was made of performance by the public defender program and privately retained counsel. The retained counsel were used as a "control group," i.e., a means of assessing the performance of the public defender by providing a yardstick against which to measure it.

In this study, a variety of indicators of attorney performance were used as variables. They told the researchers about the amount of effort expended by the lawyers, the outcomes that the lawyers were able to achieve for their clients, and how expeditiously the cases were processed. For example, data were extracted about: the attorney's ability to get the defendant out on bond; the method by which the case was resolved; if it was resolved by plea, whether the case was pled to a lesser crime than was originally charged; if it was resolved by trial, whether or not there was an acquittal; the length and type of sentence received; whether or not pre-trial motions were filed; if they were filed, how many and what types of motions; and how long it took to handle the case from beginning to end.

The data that were collected about these variables were analyzed within the framework of a statistical analysis of variance. A univariate analysis of covariance was computed for each dependent variable.

1) Description of the Sample

A sample of 187 felonies and 217 misdemeanors was examined in Jo Daviess County. Cases are classified according to the

type of counsel associated with the case at the time of its disposition. The data indicate that 11 defendants switched from retained counsel to the part-time public defender, and 23 changed from the public defender to retained counsel. As in Boone county, the small size of this jurisdiction required us to sample all types of felonies and misdemeanors in order to gather sufficient data for statistical analyses. A breakdown of the frequencies of the various classes of felony offenses which were the primary charges against the defendants in this sample and their types of representation are presented in Table 1. The words "assigned counsel" in the following tables and discussion should be read as "public defender." Table 1

Felony Offense Type

	Frequency	
	Assigned Counsel	Retained Counsel
Class 1	4	7
Class 2	25	18
Class 3	42	38
Class 4	25	24
Class X	1	2
Murder	1	1
Total	98	90

The frequencies of the primary misdemeanor offenses with which the defendants in the sample were charged are presented in Table 2.

Table 2

Misdemeanor Offense Type

	Frequency	
	Assigned Counsel	Retained Counsel
Class A	92	83
Class B	2	6
Class C	9	25
Class D	0	0
Total	103	114

Initial bond status of defendants is presented in Table 3 and at time of case disposition in Table 4. Defendants represented by assigned counsel appear less likely to be released on money bond and more likely to remain in jail or be released on their own

recognizance after the first arraignment. This is still true at the time of case disposition.

Table 3

Initial Bond Status	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money/Property Bond	14.4% (14)	39.8% (40)	41.1% (37)	47.4% (54)
Jail	37.1 (36)	10.7 (11)	20.0 (18)	7.0 (8)
Released on				
Recognizance	42.3 (41)	26.2 (27)	36.7 (33)	4.4 (5)
No Info/N/A	6.2 (6)	23.3 (24)	2.2 (2)	41.2 (47)

Table 4

Bond Status at Time of Case Disposition	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Money/Property Bond	21.6% (21)	43.7% (45)	48.9% (44)	54.4% (62)
Jail	15.5 (15)	5.8 (6)	7.8 (7)	1.8 (2)
Released on				
Recognizance	59.8 (58)	31.1 (32)	40.0 (36)	7.9 (9)
Other	0.0 (0)	0.0 (0)	1.1 (1)	0.0 (0)
No Info/N/A	3.1 (3)	19.4 (20)	2.2 (2)	36.0 (41)

None of the felony cases represented by assigned counsel was charged by indictment. 3.3% of the felonies (3 of 90) represented by retained counsel were, however, so initiated. Preliminary hearings were held for 38.1% of the felonies taken by assigned counsel (37 of 97) and 17.8% of the felonies handled by retained counsel (16 of 90).

Patterns of case disposition in Jo Daviess County are presented in Table 5.

Table 5

Method of Disposition	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Dismissal	41.2% (40)	39.8% (41)	33.3% (30)	41.2% (47)
Plea	52.6 (51)	51.5 (53)	62.2 (56)	51.8 (59)
Bench Trial	6.2 (6)	6.8 (7)	4.4 (4)	7.0 (8)
Jury Trial	0.0 (0)	0.0 (0)	0.0 (0)	0.0 (0)

As in Boone County, a wide range of sentences were applied in Jo Daviess County. Frequencies of the various sanctions are

presented in Table 6.

Table 6

Type of Sentence

Type of Sentence	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Deferred Sentence	18	32	25	31
Fine	43	50	47	52
Court Costs	50	53	49	55
Probation	30	11	20	8
Time Served	2	2	4	1
Incarceration	6	5	6	2

(Note: Frequencies do not total the # of pleas plus the # found guilty at trial, because more than one type of sanction was often assigned to a defendant.)

Data on the activity of assigned and retained counsel with respect to the number of motions filed is presented in Table 7.

Table 7

Number of Motions Filed

Number of Motions Filed	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
0	60.8% (59)	91.3% (94)	72.2% (65)	94.7% (104)
1	26.8 (26)	4.9 (5)	21.1 (19)	4.4 (5)
2	8.2 (8)	1.9 (2)	4.4 (4)	.9 (1)
3	3.1 (3)	1.9 (2)	1.1 (1)	0.0 (0)
4	1.0 (1)	0.0 (0)	0.0 (0)	0.0 (0)
5	0.0 (0)	0.0 (0)	0.0 (0)	0.0 (0)
6 or more	0.0 (0)	0.0 (0)	1.1 (1)	0.0 (0)

Information about the frequency of filing of the four most common types of motions is presented in Table 8.

Table 8

Type of Motions Filed

Type of Motions Filed	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Reduce Bond	20	3	9	0
Dismiss	2	3	1	3
Suppress	4	4	4	1
Discovery	27	3	16	3

Attorney activity as reflected in number of court appearances is displayed in Table 9.

Table 9

	Frequency							
	Assigned Counsel				Retained Counsel			
	Felony	Misdemeanor	Felony	Misdemeanor	Felony	Misdemeanor	Felony	Misdemeanor
0	12.4%	(12)	9.7%	(10)	13.3%	(12)	7.9%	(9)
1	44.3	(43)	59.2	(61)	51.1	(46)	67.5	(77)
2	16.5	(16)	16.5	(17)	18.9	(17)	18.4	(21)
3	16.5	(16)	9.7	(10)	7.8	(7)	4.4	(5)
4	5.2	(5)	3.9	(4)	4.4	(4)	.9	(1)
5	1.0	(1)	0.0	(0)	2.2	(2)	.9	(1)
6	1.0	(1)	0.0	(0)	1.1	(1)	0.0	(0)
7	1.0	(1)	1.0	(1)	0.0	(0)	0.0	(0)
8	2.1	(2)	0.0	(0)	1.1	(1)	0.0	(0)

The tables presented above represent the frequencies of given responses to the questions posed on the docket study instrument. In order to analyze these responses, two types of variables had to be created.

The first type of variable created was the "dichotomous" variable. Dichotomous variables allow us to boil the issues down into two choices such as "yes" and "no." This allows the results to be expressed as fractions of 100%. Examples of the dichotomous variables depicted in the table below are: defendant detained in jail vs. defendant released from jail pending case disposition, and case dismissed vs. case not dismissed. In order to simplify the world for purposes of this analysis, several categories of responses may be combined, and instances where there were missing data are dropped from the analysis.

The second type of variable created for the analysis is presented as "interval level" data. These were created by making computations of the data collected so that "intervals" such as the length of time between the defendant's first court date and the date of case disposition can be compared.

Frequencies of the dichotomous variables created for the analyses of covariance from data gathered from the court dockets are presented in Table 10.

Table 10

Variable	Frequency							
	Assigned Counsel				Retained Counsel			
	Felony	Misdemeanor	Felony	Misdemeanor	Felony	Misdemeanor	Felony	Misdemeanor
Bond Status at Time of Case Disposition								
-in jail	39.6%	(36)	13.9%	(11)	20.5%	(18)	11.9%	(8)
-out of jail	60.4	(55)	86.1	(68)	79.5	(70)	88.1	(59)
Change in Bond Status from First Appearance to Disposition								
-change--								
was in jail--								
now out	66.1	(22)	45.5	(5)	64.7	(11)	75.0	(6)
-no change--								
was in jail--								
still in	38.9	(14)	54.5	(6)	35.3	(6)	25.0	(2)
Case Disposition:								
a) dismissal								
-case dismissed	41.2	(40)	40.6	(41)	33.3	(30)	41.2	(47)
-not dismissed	58.8	(57)	59.4	(60)	66.7	(60)	58.8	(67)
b) trial								
-case tried	6.2	(6)	6.9	(7)	4.4	(4)	7.0	(8)
-case not tried	93.8	(91)	93.1	(94)	95.6	(86)	93.0	(106)
c) trial vs. plea								
-plea entered	89.5	(51)	88.3	(53)	93.3	(56)	88.1	(59)
-case tried	10.5	(6)	11.7	(7)	6.7	(4)	11.9	(8)
d) type of plea								
-original charge	25.5	(13)	69.8	(37)	28.6	(16)	71.2	(42)
-lesser charge	74.5	(38)	30.2	(16)	71.4	(40)	28.8	(17)
e) trial outcome								
-guilty	50.0	(3)	85.7	(6)	75.0	(3)	75.0	(6)
-not guilty	50.0	(3)	14.3	(1)	25.0	(1)	25.0	(2)

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f) trial outcome							
-guilty of original charge	66.7	(2)	100.0	(6)	33.3	(1)	83.3 (5)
-guilty of lesser charge	33.3	(1)	0.0	(0)	66.7	(2)	16.7 (1)
g) motions filed							
-filed none	60.8	(59)	91.3	(94)	72.2	(65)	94.7(108)
-filed any	39.1	(38)	8.7	(9)	27.8	(25)	5.3 (6)
h) overall disposition							
-guilty	55.7	(54)	58.4	(59)	65.6	(59)	57.0 (65)
-not guilty	44.3	(43)	41.6	(42)	34.4	(31)	43.0 (49)

Sentence:							
a) incarceration							
-yes	11.1	(6)	8.5	(5)	10.2	(6)	3.1 (2)
-no	88.9	(48)	91.5	(54)	89.8	(53)	96.9 (63)
b) type							
-incarceration	11.1	(6)	8.5	(5)	10.2	(6)	3.1 (2)
-probation	50.0	(27)	16.9	(10)	27.1	(16)	12.3 (8)
-other	38.9	(21)	74.6	(44)	62.7	(37)	84.6 (55)

The mean performance of assigned and retained counsel on the variables for which we were able to obtain interval-level data in Jo Daviess County are presented in Table 11.

Table 11

Variable	Mean Performance of Assigned Counsel		Mean Performance of Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Length of Incarceration (range)	2.8 mo. (1-6)	1 (n/a)	16.3 mo. (6-36)	1.5 (1-2)
Number of Motions Filed (range)	.56 motions (0-4)	.14 (0-3)	.42 motions (0-8)	.06 (0-2)
Number of Attorney Appearances (range)	1.8 apps. (0-8)	1.4 (0-7)	1.5 apps. (0-8)	1.3 (0-5)
Days from First Appearance to Disposition (range)	76.0 days (1-344)	47.9 (1-265)	71.8 days (0-266)	69.9 (0-523)
Days from First Appearance to Sentencing (range)	68.8 days (1-278)	41.4 (1-149)	76.4 days (0-284)	54.8 (0-256)

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2) Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in Jo Daviess County: Felony and Misdemeanor Cases, Controlling for Initial Bond Status and Whether Other Offenses Were Charged

1) Covariates. Table 12 displays the frequency distributions of the two covariates: initial bond status and whether other offenses were charged at the time of this arrest for the clients of both assigned and retained counsel.

Table 12

	Frequency			
	Assigned Counsel		Retained Counsel	
	Felony	Misdemeanor	Felony	Misdemeanor
Initial Bond Status:				
Bond	14.4% (14)	39.8% (40)	41.1% (37)	47.4% (54)
Jail	37.1 (36)	10.7 (11)	20.0 (18)	7.0 (8)
ROR	42.3 (41)	26.2 (27)	36.7 (33)	4.4 (5)
No Info.	6.2 (6)	23.3 (24)	2.2 (2)	41.2 (47)
Other Offenses Charged at Time of this Arrest:				
Yes	14.6% (14)	14.6% (15)	22.2% (20)	13.3% (15)
No	85.4 (82)	85.4 (88)	77.8 (70)	86.7 (98)

ii) Analyses. In Jo Daviess County differences between assigned and retained counsel emerged on these dimensions:

- 1) bond status at time of case disposition ($F(1,685)=3.93, p .048$)
- 2) sentence severity ($F(1,461)=6.271, p .013$)
- 3) likelihood of motions being filed ($F(1,673)=4.70, p .030$)

As in Boone County, it appears that clients of assigned counsel are more likely to be in jail at the time of case disposition than the clients of retained counsel (adjusted means=1.88 and 1.94, respectively). Again as in Boone County, these clients are more likely to receive sentences of incarceration and less likely to receive probation or alternative sentences than the clients of retained counsel (adjusted means=1.61 and 1.38, respectively). Examination of adjusted cell means also suggests that assigned counsel are more likely to file motions (adjusted means=1.25 and 1.16, respectively).

The analyses also reveal a significant interaction between type of counsel (assigned/retained) and type of offense (felony/misdemeanor) for one variable:

- 1) days from first arraignment to disposition
($F(1,647)=7.91, p .005$)

Analyses indicate that assigned and retained counsel do not differ in the days to disposition for felonies (adjusted means=77.5 and 81.9 days, respectively) but that misdemeanors are moved to disposition more quickly by assigned than retained counsel ($F(1,647)=13.51, p .001$) (adjusted means=45.8 and 81.9 days, respectively).

3) Summary of Differences between Assigned and Retained Counsel

Differences in the handling of:

Felonies	Misdemeanors
-sentence severity	-sentence severity
-likelihood of motions being filed	-likelihood of motions being filed
	-days from first arraignment to case disposition

- 4) Analyses of Covariance of the Differences in Performance of Assigned and Retained Counsel For Felonies Only, Controlling for the Full Range of Covariates

A separate analysis of covariance was conducted of felonies alone because the researchers were able to obtain information on additional covariates for felony cases. In addition to the two control variables for defendant characteristics employed in the previous analysis, i.e., initial bond status and the presence of multiple charges, felony cases were also controlled for prior criminal records, sex, and race.

1) Covariates. Table 14 displays the frequency distributions of the characteristics of defendants of assigned and retained counsel in Jo Daviess County.

Table 14

Characteristics of Defendants	Frequency		Retained Counsel
	Assigned Counsel		
Prior Convictions:			
Yes	41.2% (40)		54.5% (49)
No	46.4 (45)		41.1 (37)
No Information	12.4 (12)		4.4 (4)
Sex:			
Female	13.4% (13)		10.0 (9)
Male	85.6 (83)		90.0 (81)
No Information	1.0 (1)		0.0 (0)
Race:			
White	75.3% (73)		74.4% (67)
Black	5.2 (5)		0.0 (0)
No Information	19.6 (19)		25.6 (23)
Initial Bond Status:			
Bond	14.4% (14)		41.1% (37)
Jail	37.1 (36)		20.0 (18)
ROR	42.3 (41)		36.7 (33)
No Information	6.2 (6)		2.2 (2)
Other Charges at Time of this Arrest:			
Yes	14.6% (14)		22.2% (20)
No	85.4 (82)		77.8 (70)
Mean Year of Birth	1956		1953

ii) Analyses. There were no significant differences between the part-time public defender system and retained counsel system in Jo Daviess County when only felonies were analysed and a more extensive list of covariates was employed. The failure to find significant effects for the variable, days from first appearance to disposition is not surprising since, as noted above, this effect was true only for misdemeanor cases. The failure to find significant effects for the variables which had previously been significant: sentence severity and likelihood of motions being filed suggests that these observed differences may have been due to differences in the clientele represented by assigned and retained counsel, or to the reduced number of degrees of freedom associated with an analysis of covariance involving only felony cases. Both effects are still marginally significant (.067 and .054, respectively), but in order to help evaluate the utility of these two explanations, analyses of covariance controlling only for initial bond status and number of offenses charged were conducted for felony cases for the two variables, sentence severity and likelihood of motions being filed. The results revealed marginally significant results for both analyses (p .071 and p .08, respectively). It would seem that these were variables for which differences in attorney behavior did not strongly exist for felony cases.

CONCLUSION

In sum, whether the part-time defender performed better or worse than retained counsel depends upon one's perspective. For the combined sample of felony and misdemeanor cases, retained counsel were better at securing their clients' release pending trial and obtained alternatives to incarceration more often. On the other hand, the part-time defender engaged in more pre-trial motion practice and disposed of misdemeanor cases in only 45.8 days on the average as compared with 81.9 for retained counsel.

Thus, the part-time defender helped the court system to reduce costs by disposing of cases quicker and demonstrated effort with regard to filing pretrial motions. Retained counsel obtained better outcomes for their clients by enabling them to spend less time in jail. However, none of these differences were demonstrated with respect to felony cases. Neither component excelled significantly over the other when it came to the handling of felonies.

CHAPTER III

Cost Study

JoDavies County (Galena, Illinois): A Part-time Public Defender System

The methodology used in the JoDavies cost study differed from that used in Boone County. Less information was available about costs in JoDavies County. This occurred because the assigned counsel system in JoDavies County is a Part-time Public Defender System. Payment to the part-time defender consist of an annual salary to handle the entire caseload. Therefore, data does not exist on fees for individual cases.

Data was provided by the part-time defender himself concerning number of cases handled, their distribution among case types, and the number of hours spent, on average, for different case types. Knowing the aforementioned, plus knowing his salary, allowed us to estimate cost per case. This approach utilized a weighted average formula where only 'relative' time spent per case entered into the determination of cost per case of different case types. This method is similar to that used to estimate cost per case across case types in Berrien County, Michigan.

One difference in the methodology from that used in Berrien County is that data was used across two years. Therefore, we present estimates for each of the two years as well as the aggregate across the total of the two years. This multi-year data issue was encountered in Boone County, Illinois, but no special methodology was used to deal with it since the data was already aggregated across the years.

First, we will estimate cost per case aggregated across all cases handled by the part-time defender. Then we will estimate costs just for the adult criminal caseload.

Aggregate Cost Analysis

The salary that the part-time defender recieved was for services that included work other than for criminal defense. The caseload distribution for the years 1981 and 1982 are presented in Table 1.

Table 1
Caseload distribution for 1981 and 1982 in JoDavies County

Case type	#cases, 1981	#cases, 1982
Felonies	56	39
Misdemeanors	79	65
total adult criminal caseload	135	104
Traffic Cases	58	40
Juvenile Cases	27	35
Ordinance Cases	9	9
Family Cases	0	4
total caseload	229	192

The salaries that the part-time defender recieved in 1981 and 1982 were very similar. They are presented in Table 2.

Table 2
Remuneration to the Part-time defender in JoDavies County

Remuneration category	1981	1982
Direct Salary	\$17,280	\$18,144
Fringe Benefits	3,600	3,600
telephone	150	150
total	\$21,030	\$21,894

Cost per case, on average, aggregating across all case types is presented in Table 3.

Table 3 Cost per Case across all cases for JoDavies County			
Year	Total # Cases	Total Renumeration	Cost per Case: Renumeration/#cases
1981	229	\$21,030	\$91.83
1982	192	\$21,894	\$114.03

Since the cases for the docket study spanned across the years 1981 and 1982, it may be helpful to have a cost per case for the this two year period. The data would then be more comparable to the cost estimates for Boone County, in which fee requests were examined over this two year period also.

This can be easily calculated by taking a weighted average of cost per case over this two span. This becomes:

$$((229/421) \times \$91.83) + ((192/421) \times \$114.03) = \$101.95$$

Thus, the cost per case for all cases over the years 1981 and 1982 is, on average, equal to: \$101.95.

Cost per case for different case types: a time related analysis

A methodology was devised to estimate cost per case based on viewing the aggregate cost per case (which is known) as composed of a weighted average of costs per case of a mutually exclusive set of case types. Further, cost per case was based on a time dimension. The cost of a case is considered to be determined by the number of attorney hours used to handle that case type multiplied by the cost per attorney hour. This methodology is identical to the one employed in our study of costs in the Contract System of Berrien County, Michigan. It needs to be emphasized that while data on hours was provided by the part-time defender, only relative hours enter into the analysis; not absolute hours.

Types of Cases

The minimum set of case types that the part-time defender could respond meaningfully concerning hours spent per case was:

- Felony trial
- Felony non-trial
- Misdemeanor trial
- Misdemeanor non-trial

The part-time defender also responded about case types which were not adult criminal cases: traffic, juvenile, ordinance, and family. These had to be included in the analysis so they could be parcelled out of the estimates of adult criminal cases.

Time spent per case

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Table 4 reports the time data provided by the part-time defender by case type. For the non-adult criminal cases, an assumption was made that trials occurred in only 5% of the cases. This was necessary to appropriately aggregate the defender's time data on those cases.

Table 4
Hours per case for a Set of Case Types (JoDaviessCounty)

Case type	Hours per case
Felony trial	8.00
Felony non-trial	8.00
Misdemeanor trial	3.00
Misdemeanor non-trial	2.50
Traffic	1.55
Juvenile	1.10
Ordinance	.50
Family	4.00

Using the case type, misdemeanor non-trial, as a convenient base of one, the string of ratios describing relative time spent per case is (in order of the table above):

3.2 : 3.2 : 1.2 : 1 : .62 : .44 : .2 : 1.6

This string of ratios can be interpreted as, for example:

A felony case, on average, takes three and a fifth as much time as a misdemeanor non-trial case.

A felony trial case, on average, takes as much time as a felony non-trial case.

A misdemeanor trial takes twenty percent longer than a misdemeanor non-trial case.

Frequency distribution of the 8 case types in the Part-time Defender's caseload

The frequency distribution for the 8 case types is presented in Table 5.

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Table 5
Distribution for Part-time Defender's Caseload (JoDaviessCounty)

Case type	1981:		1982:	
	freq	rel. freq	freq	rel. freq
Felony trial	3	1.3%	2	1.0%
Felony non-trial	53	23.1	37	19.3
Mis trial	5	2.2	5	2.6
Mis non-trial	74	32.2	60	31.3
Traffic	58	25.3	40	20.8
Juvenile	27	11.8	35	18.2
Ordinance	9	3.9	9	4.7
Family	0	0.0	4	2.1
total	229	100.0%	192	100.0%

Cost per case for different case types

Using the above relative frequency distributions, the ratios of relative time spent per case, and a weighted average formula, cost per case was calculated for each of the 8 case types. These cost per case estimates are presented in Table 6.

Table 6
Cost per case for different case types (JoDaviesCounty)

Case type	1981	1982	Combined 1981 + 1982
Felonies	\$218.72	\$293.84	\$249.56
Felony trial	\$218.72	\$293.84	\$248.77
Felony non-trial	218.72	293.84	249.61
Misdemeanors	69.21	93.25	80.06
Misdemeanor trial	82.02	110.19	96.11
Mis non-trial	68.35	91.83	78.87
All Adult Criminal Cases	131.24	168.47	147.44
Traffic	41.01	55.10	46.76
Juvenile	30.07	40.40	35.90
Ordinance	13.67	18.37	16.02
Family	109.36	146.92	146.92
All Cases	91.83	114.03	101.95

PART VII

STATISTICAL COMPARISONS

STATISTICAL COMPARISONS FOR THE SIX IN-DEPTH

STUDY SITES: A STUDY OF THREE MATCHED PAIRS

This chapter details the ultimate findings that were reached through the statistical analysis. While the Profiles detailed the comparisons between counsel for the indigent accused and retained counsel in each site, this chapter presents the statistical comparisons that were made between each pair of matched sites in a state. Statistical comparisons could not be made outside of a single state because there would be too many variables that could not be held constant or accounted for.

In the Michigan and Illinois sites, two sets of analyses were performed. First, a sample of felony and misdemeanor cases combined were analyzed in order to determine significant differences between retained and appointed counsel. Secondly, felony cases were analyzed alone. This was done because the researchers were able to control for additional information, such as prior record of the defendant, only for felony cases.

In the Ohio sites, however, misdemeanor cases were not included in the samples because they were not handled by the assigned counsel component in either of those two mixed system jurisdictions. As a result, the data were analyzed only for the felony cases.

The objective of the present analysis was to assess differences that could be said to occur as the result of changes in the characteristics of the indigent defense system.

I. Comparison of Berrien and Saginaw Counties, Michigan Contract vs. Coordinated Assigned Counsel Systems

A. Summary of the Results

Overall, few significant differences were found between the coordinated assigned counsel (Saginaw County) and contract assigned counsel system (Berrien County), on our set of performance indicators. If there were differences, they tended to concern length of time for the processing of the case and number of attorney appearances. The contract system generally disposes of cases more quickly (relative to retained counsel) than does the coordinated assigned system. However, the contract system generally involves fewer attorney appearances (relative to retained counsel) than does the coordinated assigned system.

B. Analysis of the Differences in the Performance of Assigned Counsel Systems in Saginaw and Berrien Counties

1) Overview

Differences in the performance of the assigned counsel systems in Saginaw and Berrien Counties could be determined by "eyeballing" the appropriate tables in the text and looking for situations in which a difference occurs between assigned and retained counsel in one site, but not in another. One could find, for example, that in Saginaw County assigned counsel were more likely to have their cases dismissed than were retained counsel, while this difference did not exist in Berrien County. On the basis of such an "eyeball" test, one might conclude that the assigned counsel system in Saginaw County is superior to that in Berrien County with respect to the dimension of rate of dismissals. For in Saginaw County, assigned counsel perform significantly better on this dimension than retained counsel, while in Berrien County assigned counsel can do no better than retained counsel.

The shortcomings of such an approach, however, are clearly revealed when one considers the situation in which assigned counsel perform differently than retained counsel in both sites. This occurs, for instance, for felony offenses for the variable, "whether or not clients received sentences of incarceration". As can be seen, retained counsel perform 25.4% better than assigned counsel in Saginaw County and 31.8% better than assigned counsel in Berrien County. One would like to know whether the difference in Berrien County is meaningfully (or significantly) greater than that in Saginaw County. In this situation it becomes clear that one needs a statistical test to determine whether the difference between the assigned and retained counsel differences at the two sites is statistically significant.

2) Comparison of Data for Felonies and Misdemeanors Combined

If the interaction tests are conducted, and the defendant's bond status after the first arraignment and whether other offenses were charged at the time of this arrest are covaried,

statistically significant differences between assigned and retained counsel between Berrien and Saginaw Counties are found only for the variables:

- 1) number of days from first appearance to sentencing ($F(1,414)=7.03, p .008$)
- 2) number of attorney appearances ($F(1,632)=4.11, p .043$).

Assigned and retained counsel do not differ in the relative number of days they take to get a case to sentencing in Saginaw County (adjusted means=134.2 and 136.9 days), but in Berrien County, assigned counsel move cases to sentencing more quickly than retained counsel (adjusted means=37.3 and 84.8 days). The contract assigned counsel system of Berrien County is quicker than the coordinated assigned counsel system of Saginaw County.

This effect is, however qualified by an interaction with the type of felony offense (drug vs. assault) ($F(1,414)=5.22, p .023$). This interaction occurs because assigned counsel in Saginaw County are significantly quicker than retained counsel in processing felony drug cases, while no differences in the processing speed of felony assault vs. drug cases by assigned and retained counsel exist in Berrien County.

The second interaction is also qualified by an additional interaction with the type of felony offense (assault vs. drug) ($F(1,632)=15.12, p < .001$). In Berrien County, assigned counsel appear less often than retained counsel for felony assault cases, while in Saginaw, assigned counsel appear less often than retained counsel for felony drug cases.

3) Comparison of Data for Felonies Only

Two statistically significant interactions between type of counsel and site were found, and these were qualified by an interaction with the type of felony (assault/drug) committed.

- 1) days from first arraignment to sentencing ($F(1,183)=5.46, p .02$)
- 2) number of attorney appearances in court ($F(1,242)=8.23, p .004$)

The coefficient of regression is non-significant for both these effects. The first triple-order interaction occurs because in Saginaw there is a double-order interaction between type of counsel and type of felony, while in Berrien the double-order interaction does not occur. In Saginaw,

felony drug cases were sentenced more quickly when handled by assigned counsel while there is no difference in speed of sentencing felony assault cases. In Berrien, however, both felony assault and felony drug cases are sentenced more quickly when taken by assigned counsel. This finding is identical to the conclusion reached in the analysis of both felony and misdemeanor cases. Within the contract system, assigned counsel seem always to finish cases more quickly. Within the coordinated assigned counsel system it is more difficult to determine whether assigned or retained counsel will complete cases more quickly.

The second triple-order interaction is significant because a double-order interaction occurs in Berrien County, but not in Saginaw County. In Berrien County, assigned and retained counsel do not differ in the number of appearances they make for drug cases, but retained counsel appear more often for assault cases.

In Saginaw County, however, assigned and retained counsel do not differ significantly in their number of appearances for felony drug and assault cases. Thus, within the contract system there are differences in the number of appearances of retained and assigned counsel, at least with respect to felony assault cases but no significant differences in the number of appearances are observed within the coordinated assigned counsel system.

II. Comparison of Summit and Montgomery Counties, Ohio Coordinated Assigned vs. Ad Hoc Assigned Defender Systems

A. Overview of the Results

The analyses reveal only two performance attributes on which the coordinated assigned and ad hoc assigned counsel systems of Ohio differ, and both relate to the same attorney activity--the filing of motions. There are no main effect differences between the assigned counsel systems, the differences between the systems are qualified by the type of felony involved. The coordinated system appears to file more motions and to be more likely to file motions than the ~~coordinated~~ assigned counsel system, but only for felony assault cases.

B. Analysis of the Differences in the Performance of Assigned Counsel Systems in Summit and Montgomery Counties

As noted in the discussion of the variable, whether or not motions were filed in Montgomery County, there was a difference in the interactions between type of attorney and type of felony between the two sites in Ohio. Analyses revealed this interaction difference and one other to be statistically significant.

- 1) whether or not motions were filed ($F(1,68)=12.52, p .001$)
- 2) number of motions filed ($F(1,68)=9.9, p .002$)

The first of the two interactions is such that in Summit County retained counsel are more likely than assigned to file motions for assault cases while in Montgomery County, assigned counsel are more likely than retained to file for assault cases.

The second interaction occurs because there is a significant difference in the number of motions filed by assigned and retained counsel for felony assault cases in Summit County, but not in Montgomery County. As noted in the discussion of Summit County, retained counsel file significantly more motions for assault cases than do assigned counsel.

In sum, there are only two significant differences between the two types of assigned counsel systems. In neither do assigned file more or fewer motions in general (across both types of felonies) than retained counsel. The existence of differences depends upon the type of felony. In the ad hoc assigned counsel site (Summit County), assigned counsel are less likely to file and file fewer motions for assault cases than retained counsel. In the coordinated assigned counsel site (Montgomery County), assigned counsel are more likely to file for assault cases, although there is no difference in the number of motions filed. Thus, the coordinated assigned counsel system of Montgomery County seems associated with both a greater likelihood of filing and a greater number of filings than the ad hoc assigned counsel system of Summit County.

III. Comparison of Boone and Jo Daviess Counties, Illinois Ad Hoc Assigned Defender vs. Part-Time Public Defender

A. Overview of the Results

Considering both felony and misdemeanor cases, differences between the ad hoc assigned defender and part-time public defender system emerged with respect to: bond status at the

time of case disposition, the likelihood of incarceration and the likelihood of resolving a case at trial. The ad hoc assigned counsel system is more likely than the part-time public defender system to have clients incarcerated at the time of case disposition, to resolve cases through plea rather than trial and to have its clients receive sentences of incarceration. The first of these differences may well, however, reflect uncontrolled for differences in the clientele of assigned and retained counsel. The latter two effects appear stronger for misdemeanors than felonies (though not sufficiently to yield a significant interaction).

B. Analysis of Differences in the Performance of the Assigned Counsel and Part-time Defender Systems in Boone and Jo Daviess Counties

1. Comparison of Data for Felonies and Misdemeanors Combined

Statistically significant differences between assigned and retained counsel between Boone and Jo Daviess Counties were found for:

- 1) likelihood of resolving a case at trial ($F(1,664)=3.92, p .048$)
- 2) bond status at the time of case disposition ($F(1,685)=8.40, p .004$)
- 3) likelihood of incarceration ($F(1,461)=6.86, p .009$)

The first of these interactions is a result of the above discussed occurrence of a statistically significant difference between assigned and retained counsel in Boone County and the lack of such a difference between the part-time defender and retained counsel in Jo Daviess County. The analyses also suggest that the ad hoc assigned counsel system in Boone County is more likely to have clients in jail at the time of case disposition and to resolve cases without going to trial than is the part-time defender system in Jo Daviess County.

In addition, the analyses indicate an interaction between type of counsel, site and type of crime charged for:

- 1) likelihood of change in bond status between first arraignment and case disposition ($F(1,176)=4.03, p .046$)
- 2) the number of days between first arraignment and case disposition ($F(1,647)=7.24, p .007$)
- 3) likelihood that motions will be filed ($F(1,673)=4.06, p .044$)

The first of these three-way interactions occurs because of a marginally significant difference between assigned and retained counsel in Boone County in their handling of felony

cases which does not occur in Jo Daviess County. It appears that in Boone County, assigned counsel may be less likely to release initially incarcerated felony clients from jail before the date of case disposition than are retained counsel. This difference does not exist for misdemeanor clients in Boone County and does not occur in Jo Daviess County.

The second three-way interaction is a reflection of the fact that the ad hoc assigned counsel system in Boone County is significantly quicker than retained counsel for both felonies and misdemeanors, while the part-time public defender system in Jo Daviess County is significantly quicker than retained counsel only for misdemeanors.

The third, three-way interaction of type of counsel, site and type of crime charged is a result of the fact that there is an interaction of type of attorney and type of crime in Boone county, but not in Jo Daviess County. In Jo Daviess County the part-time public defender is more likely to file motions (for both felonies and misdemeanors) than retained counsel in that jurisdiction. The assigned counsel system in Boone County is more likely to file motions than retained counsel, but this is particularly true for misdemeanor cases. This qualification of the performance of the ad hoc assigned counsel system in Boone County is what generates the statistically significant interaction.

In sum, the ad hoc assigned counsel system in Boone County appears less likely to release felony clients from jail prior to disposition, more speedy and less likely to file motions than the part-time public defender system of Jo Daviess County.

2) Comparison of Data for Felonies Only

No statistically significant differences between type of counsel and site were found. That is, on the basis of statistical analyses, one cannot conclude that there is any significant difference in the functioning of ad hoc assigned counsel and part-time public defender systems in rural counties.

Since the three differences between assigned and retained counsel that had emerged in the combined analysis of felony and misdemeanor data might have disappeared either as a result of the more extensive set of covariates employed in this analysis or the reduced number of degrees of freedom associated with the analysis of felonies only, analyses of only felonies, controlling for the two covariates employed in the combined tests were conducted. They revealed a significant effect for the variable, bond status at case disposition. Thus, the lack of difference between assigned and retained counsel in the six covariate, felonies only analysis of covariance for this variable would appear to be due to the additional covariates. Differences observed in the combined misdemeanor/felony analyses would appear to have been at least partly due to differences in the clientele represented by assigned and retained counsel. The

analyses revealed a marginally significant difference between assigned and retained counsel for the variable, likelihood of incarceration. There was no significant effect for the variable, likelihood of resolving a case at trial. It would appear that for these two variables, the lack of a difference between assigned and retained counsel in the analysis of felonies only is due more to the reduction in the degrees of freedom and lack of strength of the effect for the felony data, than any differences in attorney behavior associated with differences in clientele.

Three interactions of type of counsel, site and type of crime (felony/misdemeanor) had also emerged in the combined felony-misdemeanor analyses. The absence of two of these effects, those concerning the number of days between first arraignment and case disposition, and the likelihood that motions will be filed is not surprising since the interactions were a result of differences that existed for misdemeanor, but not felony cases. In an analysis of only felony cases, one would not expect to find an interaction of type and counsel and site. The third three-way interaction, however, had related to a difference between assigned and retained counsel between Boone and Joe Daviess county with respect to felonies. To ascertain why this effect might have disappeared, an analysis with the original two covariates was conducted on the felony data. The results were non-significant, suggesting that it was not controlling for the the additional covariates in the felonies-only analysis that eliminated this effect, but the fact that this effect had depended heavily on the contribution of the misdemeanor cases.

COMPARISON OF COSTS IN THE SIX IN-DEPTH STUDY SITES

I. Comparison of Costs in Two Ohio Counties

Costs were compared for the system in Summit County, Ohio, which employs an ad hoc assigned counsel approach alongside a full-time defender program, and Montgomery County, which has a coordinated assigned counsel system that operates in conjunction with a full-time defender program. For purposes of discussion, the Ad hoc assigned counsel approach in Summit County will be called "jurisdiction A," while the Coordinated assigned counsel system in Montgomery County will be called "jurisdiction C."

A. Overview

It can be shown that cost per case equals average variable costs plus average overhead cost. Average variable cost in this instance is fee per case. Fee per case identically equals fee per hour multiplied by hours per case. By knowing the cost dimensions of: fee per case, fee per hour, hour per case and average overhead per case, we can both estimate average cost of a case and explain differences in assigned counsel system cost, if they occur.

In each jurisdiction, we located the fee requests for a sample of felony assault and drug cases handled by assigned counsel. From these requests, data were obtained to estimate: fee per case, attorney's hours per case, and fee per hour. Analyses of variance were performed to test for statistically significant differences between jurisdictions. Fee per case is found to be significantly greater for the coordinated assigned

counsel system. This appears to be a consequence of the greater fees per hour for coordinated assigned counsel. In addition, overhead costs for each system were calculated. The process of calculating overhead is discussed and estimated total cost per case is then presented.

B. A Comparison of Costs Per Case, Hours Per Case, and Fees Per Case

Table 1 below shows the fee/case, hours/case, and fee/hour for both Summit County, the ad hoc jurisdiction, and Montgomery County, the coordinated assigned counsel jurisdiction before adding in overhead costs.

Table 1

Fee Per Case and Fee Per Hour for Ad Hoc and Coordinated Assigned Indigent Defense Counsel Systems

Case Type and Mode of Disposition	Fee/Case		Hours/Case		Fee/Hour	
	Ad Hoc	Coord	Ad Hoc	Coord	Ad Hoc	Coord
Assault:	\$304.65	\$460.82	15.4	16.9	\$19.73	\$27.24
Trial	523.11	862.00	25.4	37.8	20.61	22.82
Plea	252.12	420.62	13.2	14.3	19.09	29.25
Dismissal	184.60	274.33	9.1	11.1	20.15	24.71
Drug:	251.90	239.86	12.3	9.1	20.55	26.45
Trial	425.67	---	35.2	---	12.09	---
Plea	243.64	248.64	10.9	9.5	22.39	26.06
Dismissal	193.67	213.50	8.7	7.6	22.18	27.87
Asslt & Drug:	275.88	321.79	13.7	11.9	20.12	26.88
Trial	498.75	862.00	27.8	37.8	17.92	22.82
Plea	247.88	314.40	11.8	11.0	22.50	28.48
Dismissal	188.00	224.24	9.0	8.3	20.89	27.11

1. Jurisdiction A.

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As can be seen in Table 1, for the sample of 88 felony fee requests by ad hoc assigned counsel (aggregating fees for felony assault and felony drug cases), the average fee per case was approximately \$276. Differences in the fee/case for felony assault and drug cases were not statistically significant. There were statistically significant differences in the costs associated with different methods of case disposition (multivariate $F(4,160)=34.78, p<.001, 7$; $F(2,82)=70.20, p<.001$). Trials were more expensive than pleas (Scheffe $p<.05$), and pleas were significantly more expensive than dismissals (Scheffe $p<.05$) (means=\$498.75, \$247.88, \$188.00, respectively). A trial cost almost twice as much as a plea, and a plea cost 1.3 times more than a dismissal.

Table 1 also reveals that ad hoc assigned counsel spent an average of 13.7 hours on the combined sample of assault and drug cases. There were statistically significant differences in the time spent on cases resolved by dismissal, plea and trial ($F(2,82)=34.67, p<.001$), but this difference is qualified by a significant crossover interaction between type of offense (drug vs. assault) and method of disposition (multivariate $F(4,160)=11.54, p<.001$; $(F(2,82)=3.86, p<.025)$). The interaction is such that trials take more time if drug cases are involved ($F(1,82)=12.00, p<.001$) (35 hours for drug cases vs. 25 hours for assaults) while pleas require more time if the charge involved is a felony assault ($F(1,82)=11.32, p<.001$) (10 hours for drug cases vs. 13 hours for assaults).

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The average fee per hour was approximately \$20. On a per hour basis, trials were the least expensive mode of disposition, costing only \$17.92 versus over \$20 per hour for pleas and dismissals. This, however, is not a statistically significant difference. There are no statistically significant differences in fee/hour for ad hoc counsel as a function of type of crime or method of disposition or an interaction of these variables.

Overall, in Jurisdiction A, trials were more expensive than pleas and pleas more expensive than dismissals. Trials required more time if drug cases were involved and pleas required more attorney time if the charge involved a felony assault.

2. Jurisdiction C.

Table 1 also presents the fee/case, hours/case and fee/hour for the sample of 89 felony fee requests submitted by coordinated assigned counsel examined in Jurisdiction C. It appears that the mean fee requested per case (averaging across both assault and drug cases) was approximately \$322. As in Jurisdiction A there are statistically significant differences in the costs associated with different methods of case disposition (multivariate $F(4,154)=6.21, p<.001$; $(F(2,79)=5.71, p<.005)$. Trials are more expensive than pleas (Scheffe $p<.05$) and pleas more expensive than dismissals (Scheffe $p<.05$) (\$864, \$334, \$239, respectively). In Jurisdiction C, representation of an indigent defendant by assigned counsel at trial cost the county over 3.8 times more than a case that was dismissed, and 2.7 times more than a case settled by plea. There are also differences in the fees associated with felony assault vs. felony drug charges (multivariate $F(2,78)=3.47, p<.036$; $(F(1,79)=6.77, p<.011)$.

Examination of Table 1 reveals that representation of felony drug offenders cost less than representation of defendants charged with felonious assaults (average of \$226 vs. \$518 per case, respectively). We urge caution with this finding, however, since our sample did not contain any felony drug cases resolved at trial. This information would certainly have increased the fee/hour associated with drug offenses.

Table 1 also indicates that assigned counsel spent an average of 11.9 hours per case for our sample of felony offenses. There are statistically significant differences in the number of hours associated with different modes of case resolution ($F(2,79)=11.9, p<.001$) and type of offense ($F(1,79)=6.0, p<.016$). Table 1 makes clear that trials required more time than pleas (Scheffe $p<.05$) (mean hours=37.8 vs. 11.7) and pleas more time than dismissals (Scheffe $p<.05$) (mean hours for dismissal=8.8). In addition, felony drug cases required fewer hours than felony assault cases (9.1 vs. 16.9 hours). Again, caution is urged in interpreting this latter finding due to the lack of data about drug cases resolved at trial.

As in Jurisdiction A, representation by coordinated counsel cost less per hour if the case went to trial than if it were pled or dismissed, but again, this is not a statistically significant difference.

In sum, in Jurisdiction C, trials are more expensive than pleas and pleas more expensive than dismissals. Trials required more time than pleas and pleas more time than dismissals. There is an indication that felony drug offenses cost less than felony assaults and required fewer hours.

3. Comparison of Jurisdiction A and Jurisdiction C.

Statistical analysis reveals that fee per case is significantly greater for the coordinated assigned counsel of Jurisdiction C than the ad hoc assigned counsel of Jurisdiction A (multivariate $F(2,160)=10.90, p<.001$; $F(1,161)=8.81, p<.003$). This is clearly true for each type of disposition of felony assault cases. Overall, the data reveal a 17% higher fee per case for the co-ordinated system. Ignoring trial data, the co-ordinated system's fee per case was only 2% greater for drug pleas (the smallest percent difference). Assault plea fee per case was 67% more expensive for the co-ordinated system (the greatest difference). We are reluctant to make inferences about comparative costs for drug cases since we lack data about drug cases resolved at trial.⁸

Analyses reveal no significant differences in the hours devoted to cases by attorneys in the two systems. The analyses do reveal that fee per hour costs are greater for the coordinated than the ad hoc indigent defense system.

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C. Overhead Costs

1. Jurisdiction A.

The overhead costs for running the ad-hoc assigned counsel system consist of two types of costs: those associated with the process of assigning counsel to cases and those associated with the process of paying attorneys. The assignment process uses (roughly) approximately five minutes of a judge's time to select an attorney and ten minutes of a court clerk's time to telephone the attorney and verify that he or she is willing to accept the appointment. Using a salary of \$50,000 per year for the appointing judge and \$20,000 per year for the court clerk, the assignment process adds a cost to the case of \$2.10 for judicial resources expended and \$1.70 for court clerk resources expended. Roughly speaking, then, an additional \$3.80 resources are used, representing county cost per case for the assignment process.

The payment process uses approximately five minutes of a judge's time to review and approve the voucher. On the basis of the above judicial salary, the cost of the judge adds \$2.10 to each case. In addition, a part-time accounting clerk is used to fill out forms for the county to authorize payment and to keep a filing system. The cost of the clerk was estimated in the following way. It appears that the accounting clerk spends 40% of her time on the assigned counsel system accounting from February through December. In January, when special accounting procedures are followed, the clerk spends 90% of her time on

assigned counsel issues. Since the accounting clerk earns \$14,000 per year, we calculated the amount of the accounting clerk's salary attributable to work on the assigned counsel system to be \$6201. Since 1037 assigned counsel cases were handled in this year, we calculate that the cost per case of the accounting clerk is \$5.98. In sum, roughly speaking, it costs the county an additional \$8.08 beyond the fee charged by counsel for the process of paying counsel. Overall, it costs the county an additional \$11.88 per case for both assigning and paying counsel for indigent defense.

2. Jurisdiction C.

The overhead costs associated with the coordinated assigned counsel system are also composed of costs associated with the assignment process and the payment process. In this Jurisdiction, however, almost all the assignment is performed by an Assignment Commissioner. The Commissioner appoints attorneys from a set of lists: one for each major category of crime, and each specifying the attorneys who have been qualified to defend in this type of case. In addition, the Commissioner handles the attorney fee requests, although judges also review the requests after approval by the Commissioner. The Commissioner earns \$18,000 a year and spends approximately half his/her time on the task of assigning counsel. In this year there were 1298 felony cases handled by the assigned counsel system. It can therefore be calculated that it costs Jurisdiction C approximately \$6.93 per case for the Commissioner to assign and pay counsel.

In addition, it was estimated that a judge has to spend

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approximately five minutes reviewing each voucher. Using the judicial salary of \$50,000, the cost per case for judicial review of the fee request is \$2.10. In sum, the approximate overhead cost per case for the coordinated assigned counsel system is \$9.03.

3. Comparison of Jurisdiction A and Jurisdiction C.

The overhead costs per case, as calculated above, do not differ greatly between the two systems. If any differences do exist, it appears that the ad hoc system, with its greater number of participants employed in the processes of assigning and paying counsel, would be considered slightly more expensive.

Table 2 below depicts the costs per case once the overhead costs are included. It can be observed that in every category of case, cost per case was higher in the coordinated assigned counsel system.

Table 2

Cost Per Case of Assigned Counsel Systems

Case Type and Mode of Disposition	Fee/Case		Overhead/Case		Cost/Case	
	Ad Hoc	Coord	Ad Hoc	Coord	Ad Hoc	Coord*
Assault:	304.65	460.82	11.88	9.03	316.53	469.85
Trial	523.11	862.00	"	"	534.99	871.03
Plea	252.12	420.62	"	"	264.00	429.65
Dismissal	184.60	274.73	"	"	196.48	283.76
Drug:	251.90	239.86	"	"	263.78	248.89
Trial	425.67	--	"	--	437.55	---
Plea	243.64	248.64	"	"	255.57	257.67
Dismissal	193.67	213.50	"	"	205.55	222.53
Aslt & Drg	275.88	321.79	"	"	287.76	330.82
Trial	498.75	862.00	"	"	510.63	871.03
Plea	264.88	314.40	"	"	276.76	323.43
Dismissal	188.00	224.24	"	"	199.88	233.27

* Cost per case for the coordinated system is higher still by an estimated \$11.25 per case. This represents the resources utilized by the office of the public defender for representing these felonies at first appearance in the lower court.

II. Comparison of Costs in Two Michigan Counties

A comparison of costs was made for the two Michigan counties studied. The systems compared here presented a sharper contrast than the two Ohio systems. Berrien County, Michigan employed a "contract system" whereby the county depended upon a single law firm to meet the jurisdiction's requirements for indigent criminal defense representation. That system operated on a budget, much like a public defender system; thus, no individual attorney fee vouchers were available to aid in computing case costs.

The second jurisdiction, Saginaw County, Michigan, did have a coordinated assigned counsel system. Here, the computation of costs was facilitated because the researchers were able to obtain data from the lawyers' fee applications and from the county's fee payment forms.

A. Berrien County Cost Data

Because of the fact that no data were available for each case, the study had to devise other means of obtaining detailed cost information. The first method employed was an "aggregate" cost analysis. This entailed computing the total direct costs of providing defense services and dividing this sum by the number of cases handled by the contract firm. Fortunately, although the contract firm did not maintain detailed records about each individual case, it did have a total annual caseload figure.

The aggregate approach, however, was not sufficient to enable the to fine tune the case costs. Since both felonies and misdemeanors were included in the Michigan study, one wanted to have separate average case costs for these two major categories. In addition, as in the Ohio analysis, one would have liked to analyze separate costs

for cases disposed of by plea versus trial.

The contract firm was not able to supply statistical data on the ratio of felony and misdemeanor cases handled nor about the costs of disposing of trials versus pleas. Therefore, a second method had to be employed -- a "time-related" cost analysis. Costs were calculated by using a formula that computes aggregate cost per case as a weighted average of the cost per case of the different types of cases that were represented. By assuming that cost per hour was the same for all cases, and by knowing the aggregate cost per case (which had been computed using the first method), cost per case for the different types of cases could be solved by knowing only, in addition, the relative hours of attorney time spent per case. This latter piece of information was obtained from interviews with the contract attorneys using a modified "Delphi study" approach.¹ Most overhead costs are implicitly included in these cost per case estimates since the contract firm uses its own personnel to assign attorneys to cases and to handle administrative matters.²

1. Aggregate Costs. Using the aggregate cost analysis, the average cost per case for Berrien County was as follows:

$$\frac{\text{Total direct costs}}{\text{\# cases handled}} = \frac{\$141,576}{1,532} = \$91.41 \text{ Average cost/case}$$

¹This approach uses the ratios of hours rather than the number of hours estimated by the attorneys to make the necessary computations.

²There were some additional overhead costs not computed here such as the cost to the court system of assessing defendants' financial eligibility and the payment of attorneys who handled conflicts cases. However, these costs were calculated at less than \$5 per average case.

2. Time-related cost analysis. In order to compute costs per case for the various case types and modes of disposition, it was necessary to have information about the frequency distributions of the cases and methods of disposition. Information about misdemeanors was reliably obtained from the docket study. Information about non-capital felony trials and felony pleas and dismissals was obtained by drawing inferences from docket study data about assault and drug felonies. Information about capital felony trials was developed from the "delphi" interviews of contract lawyers.

Since the estimate of this crucial frequency was uncertain, an upper and lower boundary estimate was used in this analysis. At the upper boundary, it was assumed that, at most, 8% of the total contract felony caseload was composed of capital felonies. At the lower boundary, 4% was assumed. Tables 1 and 2 below depict the relative frequency distributions assumed for felony and misdemeanor cases.

Table 1

Relative Frequency Distribution of Felonies

Mode of Disposition	Relative Frequency:	
	Low	High
felony capital trial	4%	8%
felony non-capital trial	3%	3%
felony plea and dismissal	93%	89%
TOTAL	100%	100%

Table 2

Relative Frequency Distribution of Misdemeanors

Mode of Disposition	Relative Frequency
misdemeanor trial	7%
misdemeanor plea and dismissal	93%
TOTAL	100%

A detailed description of the formulae used and the calculation of ratios of relative time spent per case is provided in the cost chapter for the site profile report. Table 3 shown below gives the fine-tuned costs per case, broken down for felonies and misdemeanors and for the different methods of disposition.

Table 3

Cost Per Case For Different Types
Of Cases and Methods of Disposition

Case type.	Cost per case:	
	Using first assumpt. about fel. caseload	Using second assumpt. about fel. caseload
Felony Capital Trial	\$ 978.68	\$ 810.98
Felony Non-Captial Trial	466.58	386.63
Felony Plea and Dismissal	91.04	75.44
Misdemeanor Trial	113.80	94.30
Misdemeanor Plea and Dismissal	34.14	28.29
Felony Case	138.27	144.21
Misdemeanor	39.73	32.71
Average cost per case for entire caseload as previously computed:	92.41	92.41

4. Costs per hour. The cost per hour of attorney services was easier to obtain because the contract firm did maintain data on the total number of billable hours spent on contract defender work by its attorneys during 1981. Dividing that number into the total direct costs provides the calculation for cost per firm hour to the county.

$$\text{Cost per hour} = \$141,567 / 4,347.75 \text{ hours} = \$32.56$$

5. Hours per case. Dividing this newly computed cost per hour into the cost per case data above implies what the lawyers'

time allocations were for each type of case. Table 4 below shows the time spent per case.

Table 4
Time Spent Per Case

Case type	Hours per case:	
	1st assumpt.	2nd assumpt.
Felony Capital Trial	30.06	24.91
Felony Non-Capital Trial	14.33	11.87
Felony Plea and Dismissal	2.80	2.32
Misdemeanor Trial	3.47	2.90
Misdemeanor Plea and Dismissal	1.05	.87
Felony	4.25	4.43
Misdemeanor	1.22	1.00
For all case types	2.84	2.84

B. Saginaw County Cost Data

As in Berrien County, two methods were employed to ascertain average costs per case. Aggregate data was obtained from the totals of attorney fees paid by the felony and misdemeanor courts and from the office budget for the Assigned Counsel Administrator. In addition, costs could be broken down for felony and misdemeanor cases because separate data were available for each type of case.

The second method used was an analysis of data taken from a sample of actual attorney fee vouchers and court orders for payment. This sample, although more precise than the first method, was limited in that the felonies that were sampled were strictly assault and drug cases; misdemeanors were sampled across the board.

1. Aggregate Costs. Separate computations were made to obtain felony case costs and misdemeanor case costs. In order to obtain felony case costs, the following was done. The Circuit Court's 1981 expenditures for assigned counsel were used as a basis. From this amount, a percentage was deducted for paternity cases, which were not to be included in the study. The remainder was divided by the number of felony cases handled by assigned counsel (according to reports produced by the Assigned Counsel Administrator) to produce an average cost per felony case. Next, a per case cost allocation was added for proportional costs incurred by the Assigned Counsel Administrator's office for overhead. Next, the cost per case was reduced by a proportional sum of monies recouped from defendants served by the system. And finally, a sum was added for direct costs thought to be sustained by other court and county officials who spent a portion of their time in duties related to the indigent defense system.

The computations were as follows:

Fees paid for Circuit Court cases: \$367,407.58
 Less 5% for paternity cases (\$18,370.38): \$349,037.20
 Divided by the number of indigent felonies (1225): \$285
 Plus \$33/case Administrator's cost: \$318
 Less 5.4% for monies recouped from defendants (\$17): \$301
 Plus other direct administrative costs (\$16): \$317/average felony case

Essentially the same process was employed for misdemeanor cases except that the District Court's 1982 expenditures were used as a basis and were reduced by the percentage of traffic cases included. The computations were as follows:

Fees paid for District Court cases: \$72,095
 Less 46% for traffic cases: (\$33,163.70): \$38,931.30
 Divided by the number of indigent misdemeanors (229): \$170
 Plus \$33/case Administrator's cost: \$203
 Less 5.4% for monies recouped from defendants (\$11): \$192
 Plus other direct administrative costs (\$16): \$208/average misdemeanor

2. Analysis of Sampled Cost Data. For this analysis, 102 cases were sampled; this included 55 misdemeanors, 27 felony assaults, and 20 felony drug cases. This analysis assumed that the average cost of felony assault and drug cases added together was a reasonable approximation of the cost per case for all felonies. The total fees paid for each type of case were divided by the number of each type of case to produce the average cost per felony and misdemeanor case. Next, those costs were adjusted for the two types of administrative overhead and reduced for monies recouped. The computations were as follows for felony cases:

Fee per average indigent felony case: \$262
 Plus \$33/case Administrator's cost: \$ \$295
 Less \$17/case for monies recouped: \$278
 Plus other direct administrative costs: \$294/average felony case

The computations were as follows for misdemeanor cases:

Fee per average indigent misdemeanor case: \$158
 Plus \$33/case Administrator's cost: \$191
 Less \$11/case for monies recouped: \$180
 Plus other direct administrative costs: \$196/average misdemeanor

3. Comparison of Aggregate and Sampled Costs Per Case. The two methods of computing costs in Saginaw show the following comparison:

	<u>Aggregate Data</u>	<u>Sampled Data</u>
Average cost/felony	\$317	\$294
Average cost/misdemeanor	\$208	\$196

4. Fee/Hour; Hours/Case. Information on hours spent per case was available in the attorney requests for fee payment. The number of hours spent per case and the fee per hour is presented in Table 5.

Table 5
 Fee/Hour and Hours/Case

type of case	fee per case	Ave.* #hours	fee per hour	# of valid cases
Felony (Ass.+ Drug)	\$240	7.18	\$33.43	15
Felony Assault	\$219	6.51	\$33.64	8
Felony Drug	\$264	7.94	\$33.29	7
Felony Trial (A + D)	xxx	xxxx	xxxxxx	0
Felony Non-trial (A+D)	\$240	7.18	\$33.43	15
Misdemeanor	\$160	5.76	\$27.844	48
Misdemeanor Trial	\$132	4.53	\$29.07	6
Misdemeanor Non-trial	\$164	5.94	\$27.69	42

C. Comparison of Berrien and Saginaw Cost Data

While different methods were, of necessity, used to estimate costs for the two counties, the estimates do provide for comparisons. The average cost for a felony case in Berrien County ranged from \$138 to \$144/case. This compared with from \$294 to 317 for a felony case in Saginaw County. In other words, a felony case in Saginaw County costs almost twice as much as in Berrien County.

The average cost of a misdemeanor in Berrien County ranged from \$33 to \$40/case. This compared with a range of \$196 to \$208 for a misdemeanor case in Saginaw County. Thus, misdemeanor cases in Berrien County cost less than 20% as much to process as those in Saginaw County.

Comparing the cost of attorneys' fees on an hourly basis could also be done. Dividing the Berrien County contract firm's total annual fee of \$141,576 by the total number of hours spent by the firm's attorneys produced an average hourly fee of \$32.56. This can be compared with the rates shown for Saginaw County in Table 5 which show an average felony case fee to be \$33.43/hour and an average misdemeanor fee to be \$27.84/hour. Therefore, it remains to account for the source of the difference in cost per case between the two counties.

The differences in cost per case appear to stem from the fact that the contract system in Berrien County devotes less time to each case than the coordinated assigned counsel system attorneys in Saginaw County. Table 5 shows that attorneys in Saginaw devote an average of 7.18 hours to each felony case and 5.76 hours to each misdemeanor case. However, Table 4 shows that in Berrien County attorneys devote only 4.3 to 4.4 hours to a felony case and 1 to 1.2 hours to a

misdemeanor case.

While the contract system involved a smaller outlay of county dollars, its attorneys were spending less time on the cases than the attorneys practicing in the coordinated assigned counsel system. If the spending of less time implies a reduction in the quality of services rendered, then it does not follow that the contract system is necessarily more cost effective. If that time savings implies no difference between the services rendered, then the contract system is less expensive by virtue of its being more efficient.

III. Comparison of Costs in Two Illinois Counties

Costs were compared for the system in Boone County, Illinois, which employs an ad hoc assigned counsel approach, and Jo Daviess County, Illinois, which has a part-time public defender. Since these are both rural counties, these methods of representation were the exclusive mode of representation provided for indigent persons accused of crime. For purposes of facilitating the discussion, the ad hoc assigned counsel approach in Boone County will be referred to as "jurisdiction AH," while the part-time public defender system in Jo Daviess County will be called, "jurisdiction PD."

In jurisdiction AH, the study was able to make use of the fee vouchers submitted by assigned counsel for the felony and misdemeanor cases that they handled. From these requests, data were analyzed to estimate: fee per case, time spent per case, and fee per hour. In addition, overhead costs for this jurisdiction were calculated.

In jurisdiction PD, however, the part-time public defender was paid an annual salary. Therefore, data did not exist on fees for individual cases. This was much the same situation that was faced in Berrien County. In order to obtain data about individual cases, data were requested from the part-time defender about: numbers of cases handled, distribution of case types, and the number of hours spent on the average for different types of cases. An estimate of costs per case was constructed from this data. Total costs were computed based upon the public defender's salary, fringe benefits paid by the county, and public defender expenses. Since, as was the case in Berrien County, it was thought that there were negligible overhead costs by the county for this type of system, over-

head costs were not estimated for this location. Following the presentation of cost estimates for each jurisdiction, a comparison is made of costs between the two jurisdictions.

A. Jurisdiction AH

1) Fee/Case, Hours/Case, Fee/Hour. The fees paid to assigned counsel in Boone County for each category of case and type of disposition, the hours spent by attorneys for the average case, and the average fee received per hour are shown on Table 6.

Table 6

Fee Per Case, Hours Per Case, Fee Per Hour,
Overhead and Cost Per Case for Ad Hoc Assigned
Indigent Defense Counsel System

Case Type and Mode of Disposition	Fee/Case	Hours/Case	Fee/Hour	Overhead/Case	Cost/Case
Felonies:	\$284.15	11.5	\$24.71	\$9.16	\$293.31
Trial (7)	1080.67	38.9	27.73	9.16	1089.83
NonTrial (91)	229.22	9.3	24.59	9.16	238.38
Misdemeanor:	112.03	4.4	25.29	9.16	121.19
Trial (4)	139.75	5.3	26.72	9.16	148.91
NonTrial (30)	108.33	4.3	25.08	9.16	117.49

As can be seen in Table 6, for the sample of 98 felony fee requests by ad hoc assigned counsel (aggregating across trial and nontrial methods of disposition), the average fee per case was approximately \$284. The average fee per hour was approximately \$24. While the sample of felony trial cases is admittedly very small (7), it appears that trials were more expensive than non-trial dispositions. A trial cost over 4 times as much as nontrial (plea and dismissal) disposition. The higher cost of a trial is attributable to either the greater time spent or greater cost per hour, or both, as is evident from Table 6, since trials required more hours of work from assigned counsel. But the fee per hour for a felony trial is only slightly greater than the fee per hour for a felony non-trial. The much greater fee per case for a felony trial case is a result of the greater amount of attorney time spent on that type of case.

For the entire sample of 34 misdemeanor case fee requests, average fee per case was \$112 and the average fee per hour was \$25.59. Assigned counsel spent on average 4.4 hours on misdemeanor cases. While there are extremely few misdemeanor trial cases (4), Table 6 does show that misdemeanor trial cases were almost three times more expensive than misdemeanor non-trial cases. This difference is less than the cost difference in trial vs. nontrial modes of resolution for felony cases. However, as in felony cases, the fee per hour for cases resolved at trial is only slightly greater than the fee per hour for non-trial cases.

The difference in cost per case is again due to the relative number of hours devoted to each type of case.

A comparison of felony cases in general to misdemeanor cases reveals that felony fee per case is approximately 2 and a half times greater than misdemeanor cases. The difference appears to be primarily a result of the greater number of hours required for the disposition of felony cases.

11) Overhead Costs and Cost Per Case

The overhead costs associated with this ad-hoc assigned counsel system consist of costs associated with the assignment process and the payment process. The assignment process requires approximately five minutes of a judge's time to select an assigned attorney and ten minutes of a court clerk's time to telephone the attorney and mail him/her the Notice of Appointment and Complaint. Using an annual salary of \$60,000 for the judge and \$20,000 for the court clerk, the assignment process adds a cost of \$2.50 for judicial resources and \$1.67 for court clerk resources expended. Thus, for the assignment process, we roughly estimate that each case costs the jurisdiction an additional \$4.17.

The payment process requires approximately five minutes of a judge's time to review and approve the voucher submitted by the appointed attorney. In addition, the payment process requires: five minutes of a court clerk's time to transmit the attorney's claim form to the treasurer's office, five minutes of a clerk's time in the treasurer's office to submit the claim for approval at the monthly county board meeting and five minutes of a county

clerk's time to enter the transaction into the county budget book and cut the check. Using the same values as above about judicial and clerical salaries, the value of the judge's time can be imputed to be approximately \$2.50 and the value of each five minutes of clerks' time \$.83. The per case cost of the payment process is then roughly estimated to be \$4.99.

The total overhead cost per case would be equal to: the cost of the appointment process (\$4.17) plus the cost of the payment process (\$4.99), or approximately \$9.16. Each case is attributed the same overhead cost. Returning to Table 6, one can see the estimated cost per case for each case type as a function of fee per case plus overhead per case.

B. Jurisdiction PD

The methodology used to calculate the costs associated with the part-time public defender system necessarily differed from that utilized in the jurisdiction employing ad hoc assignment of counsel. A part-time public defender is paid an annual salary for the entire caseload. He/she does not submit vouchers indicating hours worked and requested reimbursement for each case. However, data were obtained from the part-time public defender about: salary, number of cases represented, distribution of cases and number of hours spent on average on different types of cases. On the basis of this information we were able to estimate cost per case. To calculate this we used a weighted average formula using only "relative" time per case.* The cost of a case is considered to be determined by the number of

*The weighted average formula used was: $\text{Cost/case} = (\text{Hours/case} \times \text{cost/hours} \times \% \text{ caseload})$ where M is the number of case types.

attorney hours required for that type of case multiplied by the cost per attorney hour. For purposes of this analysis, it was assumed that the cost per attorney hour was the same for all types of cases. It needs to be emphasized that while data on absolute hours spent per case types were provided by the part-time defender, only relative hours are entered into the analysis.

In both jurisdictions, cases were gathered from each of two years. Since the public defender's salary and the number of cases represented varied in the two years, costs had to be calculated separately for each of the two years. Table 7 reports the time data provided by the part-time defender with respect to the average number of hours required by each type of case. It will be noted that the part-time defender also provided information about time spent on cases other than adult criminal cases: traffic, juvenile, ordinance violation and family cases. Since the part-time defender's salary is expected to encompass work on these types of cases, information on the frequency and time required by these cases had to be obtained so that these cases could be partialled out in estimating the cost of the adult criminal case load.

Using "misdemeanor non-trial" as the arbitrary base of one, the string of ratios describing the relative time required per type of case is (in order of Table 7): 3.2: 3.2: 1.2: 1: .62: .44: .2: 1.6. This string of ratios can be interpreted as, for example: a felony case, on average, takes three and a fifth as much time as as a misdemeanor non-trial case, a felony trial case,

Table 7

Hours per Case and Distribution of Caseload
Reported by Public Defender in Jurisdiction PD

Case Type	Hours/Case	1981		1982	
		Freq.	Rel.Freq.	Freq.	Rel.Freq.
Felony Trial	8.0	3	1.3%	2	1.0%
Felony Non-Trial	8.0	53	23.1	37	19.3
Misdemeanor Trial	3.0	5	2.2	5	2.6
Misdemeanor Non-Trial	2.5	74	32.2	60	31.3
Traffic	1.5	58	25.3	40	20.8
Juvenile	1.1	27	11.8	35	18.2
Ordinance	.5	9	3.9	9	4.7
Family	4.0	0	0.0	4	2.1
Total		229	100%	192	100%

on average, takes as much time as a felony non-trial case, or a misdemeanor trial takes twenty percent longer than a misdemeanor non-trial case.

Using the frequency distributions presented in Table 7, the ratios of relative time spent per case and a weighted average formula, cost per case was calculated for each of the six case types for which cost data was calculated in jurisdiction AH. These cost per case estimates are presented in Table 8.

C. Comparison of Jurisdictions AH and PD

The overall conclusion is that cost per case is only a little greater in jurisdiction AH. Cost per hour is essentially the same for the two counties (see Table 9). Therefore, the higher cost per case in jurisdiction AH is attributable to the extra time that the attorneys in that system report devoting to their cases.

By comparing the cost/case columns in Tables 6 and 8, it can be observed that a felony case cost more to defend for the ad hoc assigned counsel system (\$293.31 vs. \$249.56). This constitutes a 16% difference in costs. This type of difference would occur even if one excluded the estimated overhead costs. However, if one disaggregates by disposition mode, a more complex pattern appears. Felony trials are more expensive in jurisdiction AH (\$1089.83 vs. \$249.56) but felony non-trial cases are less expensive in jurisdiction AH (\$238.38 vs. \$249.62).

Table 8

Cost Per Case in Jurisdiction PD

Case Type	1981	1982	Combined 1981 + 1982
Felonies	\$218.72	\$293.84	\$249.56
Felony Trial	218.72	293.84	248.77
Felony Non-Trial	218.72	293.84	249.61
Misdemeanors	69.21	93.25	80.06
Misdemeanor Trial	80.02	110.19	96.11
Misdemeanor Non-Trial	68.35	91.83	78.87

Table 9

Cost Per Hour for Jurisdictions AH and PD

Case Type	Cost Per Hour	
	Jurisdiction AH	Jurisdiction PD
Felony Trial	\$27.97	\$27.34
Felony Non-Trial	25.58	27.34
Misdemeanor Trial	27.99	27.34
Misdemeanor Non-Trial	27.20	27.34

By comparing the cost/case columns in Table 6 and 8 it can also be observed that misdemeanors cost more to defend in jurisdiction AH (\$121.19 vs. \$80.06). This constitutes a 41% difference in cost per case. When one disaggregates by mode of disposition, the same pattern holds. Ad hoc counsel is more expensive per misdemeanor case, regardless of mode of disposition.

A comparison of Tables 6 and 7 allows an assessment of the time devoted to cases by attorneys in the two jurisdictions. It appears that assigned counsel spend more time on cases. The greatest difference is for felony trial cases (38.9 hours vs. 8 hours). By dividing cost per case data by time spent data, one obtains estimates of cost per hour. These estimates are presented in Table 9. The estimates reveal that the costs per hour are roughly similar for the two jurisdictions. They are a few cents more in jurisdiction AH for trial cases and a little lower in jurisdiction AH for non-trial cases. The only substantive difference (and that is still small) is for felony non-trial cases. Cost per hour was \$1.83 less in jurisdiction AH. This similarity in cost per hour again implies that cost per case differences are due to differences in time spent per case.

PART VIII
SIX DESCRIPTIVE SYSTEM PROFILES

PROFILE OF THE ONONDAGA COUNTY, NEW YORK
MIXED COORDINATED ASSIGNED COUNSEL PROGRAM

The Environment of the Indigent Defense System

Located in the central portion of New York State, Onondaga County has a population of 463,324 and a population density of 595 persons per square mile. The county stretches over 794 square miles.

About 1570, the Indian Chief Hiawatha recognized the advantages of the site. He chose the village of the Onondagas as the location of the capital of the Iroquois Confederacy. In their longhouse were the council fires of the Five Nations that dominated northeastern North America for over two centuries. In 1656 the Jesuits founded a mission and fort called Fort Ste. Marie de Gannentaha. Indian hostility caused the fort to be abandoned after 2 years.

Salt first brought the Indians and the French to the shores of Onondaga Lake. The first Anglo-American settlers came to boil the brine in 1788.

The city of Syracuse, which is the county seat, was founded in 1805 and for many years the bulk of the salt used in America came from there. Today, the area is the home of Syracuse University, and its basic industries include chemicals, steel, and electrical equipment.

The 1974 per capita income was \$4,691 and the 1981 crime rate per 1,000 persons was 5,682. As of the 1970 census, there were 6.6% of the population living below the poverty level. The county's population was 6.5% black in 1980, and had experienced a negative population growth of -2% since the last census.

The County Executive, an elected official, is responsible for the management of all financial and administrative services in the county. He oversees the county budget which was set at \$323,112,374 for 1982, and has a large staff divided into 3 departments.

Approximately 1,000 lawyers practice in the county. The county had a total of 2,387 felony arrests in 1981 of which 1,167 resulted in indictments. In addition, there were 5,325 misdemeanor charges filed of which 2,097 arose in Syracuse and 3,228 in outlying courts.

The Criminal Justice System

The Courts

The courts in New York State are technically under the central administration of the Office of Court Administration, the Court of Appeals, and the Administrative Board of the Courts. The Office of Court Administration is run by the Chief Administrative Judge who is directly accountable to the Chief Judge of the Court of Appeals.

Although the system purports to be a unified court system, there are a plethora of different courts having apparent autonomy and varying names. These include town justice courts and village justice courts which often have lay judges, city courts, district courts, county courts, and supreme courts, all of which have trial level jurisdiction. Appellate jurisdiction is had in the Appellate Divisions and the Court of Appeals, which is the state's court of last resort. There are four appellate divisions, one in each of the four judicial departments of the state.

Onondaga County has 4 County Court judges and 55 justices in its 9 Village Courts, 19 Town Courts, and 1 City Court.

Jurisdiction in the trial courts is as follows. Misdemeanors and preliminary hearings in felony cases are heard in the Syracuse City Court, the Town Courts, and the Village Courts. There is concurrent jurisdiction of felonies and of misdemeanors which are prosecuted by indictment in the County Court and the Supreme Court. However, as a matter of practice, almost all felony cases are tried in the County Court. Cases which are heard in the Supreme Court are generally those where the Attorney General is attempting to establish some sort of principle or set a policy.

In addition to trial level jurisdiction over felonies, the County Court has appellate jurisdiction over cases heard in the lower courts. The Supreme Court, however, has no such jurisdiction. Onondaga County is in the Fourth Judicial Department, Judicial District 5.

Both the Supreme Courts and the County Courts are wholly funded by the State of New York.

The Prosecution

The 1982 budget for the District Attorney's office was \$1,282,608 in county funds. In addition, the office received state funding of \$169,872 for a State Felony Program (formerly called the Emergency Dangerous Drug Program), \$143,920 for a Career Criminal Program, and \$197,010 for the violent felony program. The District Attorney also has a special DWI program which cost \$94,697 in 1982 and receives support from the Fraud and Child Support Program, which is a joint program with another department.

Pretrial Release

There are 3 bail bondsmen in the county. In addition, In addition, there is a pretrial release program operating out of the Probation Department. There is no rule allowing the defendant to put up only a 10% bond.

According to one informant, release on recognizance is used frequently by judges in this jurisdiction. The defense attorney may speak to judges ex parte to change a defendant's bail status after the City Court judge has set bail; they do not necessarily file a formal motion to change the conditions of bail.

However, there are laws which restrict the ability to obtain pretrial release in felony cases. For example, the District Attorney must be heard before a person charged with a felony can be released. There is no bail in City Court for a predicate felon or a person charged with a Class A felony. If the defendant is on bail for a violent felony and is charged with another felony, there is a hearing to see if his bail should be revoked. In a Class B felony, bond will be set at about \$7,500 (no 10% bond is allowed).

Right to Counsel Advisements

With regard to advisements as to the right to counsel, the Citizen Court Observers issued a report in 1980 alleging that lower court judges were not properly fulfilling their obligation to advise criminal defendants about their right to counsel and were accepting guilty pleas without a lawyer. On November 17, 1982, while the National Defender Institute's research team was on-site, an article appeared in a local newspaper which reported that a Syracuse City Court judge had been suspended from the bench because of misconduct which included failing to advise defendants of their rights, including their right to be represented by a lawyer. A second judge was censured rather than removed.

New York's Sentencing Scheme

New York has established the following sentences of imprisonment for felony cases. All felonies are divided into classes A through E with A being the most severe. Each class has a maximum which varies and a minimum of at least 1 year of imprisonment. The maxima are as follows: Class A - life; Class B - 25 years; Class C - 15 years; Class D - 7 years; and Class E - 4 years. The minima are as follows: Class A-1 - 15-25 years; Class A-2 - 3-8 years; Class B and Class C violent felonies - 1/3 of maximum; some Class C offenses, Class D, and Class E - the court may fix a definite (as opposed to indeterminate) sentence of less than 1 year.

There are "enhancements" for second and persistent felons as well as for violent felonies.

The Criminal Justice Process

The law requires that defendants charged with felonies be indicted unless they waive indictment. Very few defendants in this jurisdiction receive preliminary hearings. The only sanction available in the law for failure to give a defendant a preliminary hearing is that, if the defendant is incarcerated pending trial, he must be released from custody if he is not granted a preliminary hearing within 5 days of arrest. Often, the District Attorney is not ready, and will delay the preliminary hearing until after the defendant is indicted.

There appears to be a good deal of delay in the system because of bifurcation is the District Attorney's office in that District Attorneys in the City Court are not authorized to dispose of felony cases because the District Attorneys from County Court are in charge of those cases. The District Attorneys may confer about a case for

a long time before it is disposed of as a misdemeanor in the City Court. It may take 3 to 4 weeks before a felony case is assigned to a County Court District Attorney, and meanwhile, a defense attorney has no prosecutor to confer with about the case.

Thus, there is "vertical prosecution" of felony cases in that the felony prosecutor is responsible for the case even while it is in City Court. In addition, there is vertical judging in that the same judge hears the case who was involved in the pre-trial conference on the case.

Only about one-tenth of the trials that take place in Onondaga County are bench trials. Most of the trials are jury trials.

According to the District Attorney, pleas are usually completed in about 25 days. Pleas are seldom taken before preliminary hearings which, if they occur, are generally within 4 days.

If the case has already been the subject of a felony plea bargain, it will go up to the County Court on a "Superior Court Information." Otherwise, there will be an indictment. There can be no trial in County Court on an Information. Thus, where there is an Information, it means that a deal has already been worked out in the lower court, and there will be a plea taken in County Court.

The prosecutor offers incentives to defense counsel to waive the preliminary hearing. For example, the District Attorney will give better deals and will deal earlier if the preliminary hearing is waived.

There are restrictions upon the District Attorney's ability to grant plea bargains in VRO's (Violent Felony Offenses) such as attempted murder, arson, rape, kidnapping, sodomy, aggravated sex

cases, burglary 1 and 2, robbery 1 and 2, attempted robbery, and assault 1 and 2. There are also plea restrictions in drug cases. Predicate felons and VFO's have mandatory minimum sentences. The trial court must fix a mandatory minimum on each sentence. Drug offenses also carry mandatory minimum sentences, although the "Rocherfeller law" has been eroded.

Among the types of sentences employed in Onondaga is "ACD," or Adjournment in Contemplation of Dismissal. This may be given to a defendant who has no prior record. There may be some community service involved. If the defendant commits no crimes in the interim, charges will be dismissed in 6 months. This sentence has been upheld by the Court of Appeals.

The Indigent Defense System*

An Overview of the Indigent Defense System

Onondaga County's indigent defense system can best be characterized as a "mixed" system in that indigent criminal cases are divided between two components -- a coordinated assigned counsel program and a full-time staffed defender program operated by the local Legal Aid Society.

Since this research does not deal directly with the full-time defender system, this report focuses on the coordinated assigned counsel component.

*Due to the fact that New York State law requires the sealing of certain criminal court records, an in-depth study in this site could not be completed, and the examination of this site was limited to the 2-day pre-site visit. As a result, the extent of information furnished about this site is not comparable to that of the 6 in-depth sites. It was nevertheless included in the report as being representative of the many long-standing coordinated assigned counsel systems which predominate in New York State. Few parts of the country employ coordinated assigned counsel systems as extensively as does the state of New York.

The Onondaga County coordinated assigned counsel program is at once typical of many New York State programs and different from most coordinated assigned counsel systems in other states in that it lacks one of the features commonly associated with coordination -- the right to select the attorneys to handle each case. Here, judges retain the right to appoint.

On the other hand, the program has a degree of sophistication in that it includes such features as mandatory training, experience prerequisites for felony appointments, political independence, record-keeping, and removal of attorneys from the panel for cause.

The indigent defense system handles approximately 75% to 90% of all felonies processed in the County Court.

History and Goals of the Program*

A "modified coordinated assigned counsel program" whereby the county began to contract with the local bar association for certain services began approximately 10 years ago. Pursuant to that system, the bar association in turn contracted with the local Legal Aid Society, and played no direct role in the program's management or administration.

The system worked as follows. The Legal Aid Society, through its staff attorneys, handled appeals and misdemeanors that arose in the Syracuse City Court. However, the bulk of the criminal defense work, i.e., felonies and misdemeanors in the outlying courts, were assigned out to the private bar. Although the funds were funneled through the Legal Aid Society, the system for handling felonies and non-city misdemeanors was tantamount to a random, or ad hoc, assignment approach.

*The research team visited the site in November of 1982, which was less than a full year after the start of operations for a newly restructured coordinated assigned counsel program.

The Legal Aid Society had no control over the methods used for the appointment of counsel. Counsel were appointed by judges using one of three approaches: a) the judge would simply appoint an attorney who happened to be present in the courtroom at the time the need for an appointment arose; b) the judge would ask the Court Clerk to handle the appointment; or c) the judge would consult a list of attorneys furnished by the Legal Aid Society. That list had no training or experience prerequisites; it was simply a listing of all attorneys wishing to accept court appointments. The judges did not appear to use the list in any systematic fashion.

There were two features of the old system which distinguished it from the random, or ad hoc, approach. The Legal Aid Society had the responsibility for making client eligibility determinations and for processing the attorney fee vouchers. According to one informant, the Society did not review the vouchers for "reasonableness;" they simply readded the hours shown and maintained records for state reimbursement before issuing the checks.

As early as 1980, there were calls for change in this system from the Bar Association's Committee on Representation of Indigents as well as from other quarters. The bar committee wanted more uniformity regarding advisements as to the right to counsel and saw problems in the failure of appointed lawyers to visit detainees. However, the change in the program came about primarily because of budgetary problems.

The program ran into trouble because of a large deficit which resulted in nonpayment of many attorneys who had handled the assigned cases. One explanation given was that the deficit occurred because the state raised the allowed rates for assigned counsel payment, but the county had not increased the appropriations accordingly. Other reasons

cited were an increase in caseload and the need to pay off a deficit from the previous year.

Because of this problem, a lawsuit was filed by 20 private attorneys asking that the county pay their back fees owed and that the program be properly funded. This lawsuit was eventually settled. While the budget deficit was \$750,000, the lawsuit was settled for \$600,000.

As a result of the apparent need to increase funding for the program, the county was amenable to changes in the indigent defense system. Two proposals were submitted to the county board, one by the Legal Aid Society and one by the Bar Association itself.

The County Executive had wanted to contract with the Legal Aid Society to have a straight staff program and abolish the assigned counsel approach entirely. However, the county decided to set up a study commission consisting of legislators and people from outside county government including judges, a priest, a representative of the Legal Aid Society, and the County Human Rights Commission. The commission studied alternatives and came up with recommendations.

In the end, the county selected the proposal submitted by the Bar Association, which had made the lower bid. Pursuant to the recommendations of the commission, the Bar Association established a new Assigned Counsel Committee, thus splitting the Committee on Representation of Indigents into two committees, one criminal and one civil. The new committee was to have the responsibility for monitoring the program. Their duties were to include making recommendations to the Board of Directors of the Bar Association for hiring the program's new administrator and reviewing attorney fee vouchers that are appealed.

Pursuant to the new plan, the previous director of the program, who was also the director of the Legal Aid Society, was replaced with a part-time plan administrator. However, a compromise was struck with the Legal Aid Society whereby the Society would handle all of the misdemeanors arising in the Syracuse City Court for a fixed rate of \$30,000 to be paid out of the indigent defense contract between the county and the Bar Association. In addition, the Legal Aid Society was to continue to coordinate the criminal appeals.*

Terms of the Contract

The new plan was to be governed by the contract between the County and the Bar Association. The key requirements of the contract were as follows:

1. The Bar Association was to review the attorney fee vouchers for reasonableness.
2. The amount of the contract would be \$1,190,000 for calendar year 1982, to be paid in quarterly installments. Of that amount, \$150,000 would be applied to the 1981 deficit.
3. The Bar Association must file an annual financial report with the county detailing expenditures.
4. Administration, monitoring, and policy-making for the program were vested in the Assigned Counsel Committee of the Bar Association whose policies must be approved by the Board of Directors of the Bar Association.
5. The director of the program must be a lawyer employed by the

* During 1981, appeals were handled as follows. Legal Aid Society staff attorneys prepared some appeals in their entirety. In other appeals, private attorneys would research and prepare the brief. In those latter cases, Society attorneys nevertheless prepared the filed initially, reviewed the contents of the brief, and duplicated it. Thus, unlike the felony cases, the Legal Aid Society staff assumed the responsibility for the final product.

plan on a part-time basis.

6. The director's duties were to include budget coordination, review of all vouchers submitted by assigned counsel, preparation of periodic newsletters to Assigned Counsel Panel members, supervision of staff employees, coordination of a Continuing Legal Education Program for Panel Members, and an evaluation of all services and responsibilities created by the contract.

7. The Bar Association was given the exclusive responsibility for all segments of legal representation for indigents in the county, including representation in Town Justice Courts, Village Justice Courts, County Court, the Criminal Term of the Supreme Court, and Family Court. The Legal Aid Society was to provide services in City Court misdemeanors and violations except in cases of conflict.

8. The Assigned Counsel Committee was responsible for recommending minimum prerequisites for Assigned Counsel Panel members including training and minimum experience levels and to sub-divide the panel into categories commensurate with the type or magnitude of the matter involved.

9. Assignment of attorneys was to remain with the judges with the exception of cases handled by the Legal Aid Society's staff lawyers.

10. The Assigned Counsel Committee was given the responsibility for establishing a continuing legal education program which was to be mandatory for membership on the Assigned Counsel Panel.

Operation of the Program

1. Administration. The program is directed by an attorney who is employed half-time by the Bar Association. His duties include preparing and analyzing the program's budget, screening and paying all assigned counsel fee vouchers, determining client eligibility, preparing newsletters sent to assigned counsel members, coordinating continuing legal education programs, and evaluating the subcontract for misdemeanor representation with the Legal Aid Society. The Administrator operates directly under the supervision of the Bar Association's Committee on Assigned Counsel.

2. The Assigned Counsel Panel. There are approximately 200 lawyers on the Assigned Counsel Panels. The assigned counsel program is divided involves two panels: a Criminal Court Panel and a Family Court Panel. The Criminal Court panel is divided into classifications for felonies only, misdemeanors only, and all cases. While in the past, there were no criteria for attorney participation, there are now mandatory training requirements plus a one-year experience requirement for those who handle felony cases. At the time of the site visit, plans were under consideration for further stratifying the Criminal Court Panel.

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

3. Appointment of Counsel. The appointment of lawyers in each case continues to fall under the jurisdiction of the judges. Judges are not required to appoint from the carefully screened and prepared

lists submitted by the new program. Moreover, there is no monitoring of how many cases a particular attorney receives; the same attorney might conceivably receive as many as 30 assignments per week. The program's Administrator has no information about or control over how the judges exercise their appointment function or how often they employ the list in strict rotation. One judge stated that he generally picks a lawyer whom he knows from the list, and does not assign in rotation.

As a result, the bar's efforts to instill quality control over the appointment of counsel may be considerably undermined.

4. The Training Program. All 200 members of the assigned counsel panels have been required to attend an orientation program which was held in April of 1982. They were also provided with a Handbook which included sample pre-trial motion forms and covered a wide scope of information on criminal practice and procedure. In addition, additional programs of continuing legal education were to be provided for panel members in the future. Panel members must attend 2 sessions per year.

5. Eligibility Determination. It is the responsibility for the attorney assigned to each case to fill out an eligibility affidavit for each client. The program's secretary then reviews the form which is submitted to the office by the attorney using written guidelines. These are the guidelines which are employed by the civil Legal Services program. The secretary then marks "yes" or "no" on the form. The Administrator makes the initial eligibility determination based upon this information. However, the defendant can appeal the program's finding of ineligibility to the judge.

6. Assigned Counsel Fees and Processing of Vouchers.

a. Fees and Expenses. New York State law authorizes the payment of \$25/hour for in-court and \$15/hour for out-of-court work with maximum fees of \$500 per misdemeanor and \$750 per felony.

However, these maxima can be exceeded in extraordinary circumstances.

Attorneys are also reimbursed for expenses such as long distance phone calls, travel mileage outside of the county, and payment for obtaining such items as hospital records, but do not receive reimbursement for xeroxing and transcript fees.

b. Processing of Vouchers. Assigned counsel must submit all vouchers to the assigned counsel program's Administrator for approval on forms supplied by that office. Billing must be done in increments of 1/10th hour and may include travel time to court and other out-of-court time. However, in accordance with one of the recommendations made by the study commission, the program discourages paying attorneys for time spent in obtaining continuances, and urges them to do this by phone.

Vouchers will not be paid unless bills are submitted within 60 days after disposing of a case. A separate bill must be submitted for each charge made against the defendant.

Once the bill is submitted to the plan's office, a secretary reviews it for accuracy. The Administrator then checks for reasonableness of the time spent and submits his recommendation to the trial court judge, since, by law, the trial court judge must approve the bill. The judge returns the bill to the Administrator's office for payment.

In cases where an attorney requests payment for extraordinary fees above the statutory limit or wishes to contest the Administrator's findings, the bill is referred to the Assigned Counsel Committee of the Bar Association.

The average attorney fee voucher takes about 4 weeks from submission until payment by the Assigned Counsel Program. All attorney fee vouchers are then filed in the program's office by attorney name and year.

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

System Costs

The costs of the indigent defense system in Onondaga County are difficult to assess for a number of reasons. There are no accurate data on the numbers of cases handled. The Office of Court Administration reported that there were 1,746 felonies, 2,624 misdemeanors, 238 violations, 2 habeas corpus matters, and 1,635 family court cases. There were 1,605 felonies, 2,410 misdemeanors, and 318 violations disposed in 1981.

However, the Legal Aid Society reported the following new assignments in 1981: 5,234 "regular cases," 89 appeal cases, and 1,066 city court misdemeanors for a total of 6,389 cases. "Regular cases" are further broken down into 1,668 felonies, 1,694 misdemeanors, 92 violations, 19 extradition hearings, and 130 violation of probation or parole cases. Closed case dispositions are shown at a total of 3,455 as compared to the 4,333 cases shown on the previous report.

A further complication in assessing costs relates to the way that cases appear to be counted. If a single defendant has multiple charges which are disposed of in several courts or is the subject of separate indictments in the same court, billing must be done separately, and, presumably, these are counted as separate cases even though they

may have arisen as part of a single incident which involved a single defendant. As a result, it appears that the number of cases reported is an inflated figure.

The actual cost of the assigned counsel program in 1981 was \$1,491,925*including appeals and misdemeanors handled by the full-time staff of the Legal Aid Society. However, this figure does not include the deficit that was incurred.

The difficulty of obtaining reliable data was confirmed by the Administrator of the program, who reported that he had been unable to obtain consistent figures from the previous year for use in developing a projected budget.

Given these difficulties, no attempt was made by the research team to develop a cost per case figure. However, it is interesting to note that a representative of the Bar Association reported the bar's estimate that the average case cost was from \$200 to \$215 and that there were about 400 cases per month to be handled by the assigned counsel program. The study commission, on the other hand, estimated the average case cost to run at \$260 per case.

The 1982 budget was prepared using the zero-based budgeting approach in that both proposals that were submitted to the County Legislature were based upon estimated costs per case.

*Almost one-third of that budget was estimated to be consumed by Family Court cases.

PROFILE OF THE ALBANY COUNTY, NEW YORK

PART-TIME PUBLIC DEFENDER SYSTEM

The Environment of the Indigent Defense System

Located in the eastern section of New York State, Albany County has a population of 285,909 and a population density of 547 persons per square mile. The county, which stretches over 526 square miles, includes the state capitol of Albany.

The area is dominated by democratic machine politics. This is not surprising, since the Albany Regency, a group of politicians who controlled the Democratic Party in New York State, was the first effective American political machine.

The 1974 per capita income was \$5,034 and the 1975 crime rate was 3,493 per 100,000 persons. By 1981, the crime rate had increased to 5,104 crimes per 100,000 persons. The FBI Crime Reports showed 1,134 Part I crimes in 1981 for Albany County. Albany County had 10,114 adult arrests in 1981, up from 9,705 in 1980. There were 368 indictments and 46 informations filed in the Albany County felony court during 1981, for a total of 414 new felony cases. In all, the county had approximately 1700 felony arrests during 1981.

As of the 1970 census, there were 5.9% of the population living below the poverty level. The county's population was 6.6% black in 1980, and had experienced a negative population growth of .3% since the previous census. The county boasts some 1,100 lawyers, of whom about 800 are members of the county bar association.

Albany County has had a County Executive type of government for the past 6 years. The County Executive is elected, and serves as the chief budget officer for the county.

The 1983 county budget was set at \$151,188,607.

The Criminal Justice System

The Courts

Unlike some of the jurisdictions visited, New York State's trial courts are not unified. As a result, Albany County has some 3 city courts, 12 town courts, and 1 county courts. This plethora of courts complicates the systems for judging, prosecuting, and defending crimes. For example, one of the courts is some 40 miles from the city of Albany.

All criminal cases commence in the lower courts which consist of the city and town courts. In Albany, the city court is known as the Albany Police Court. The lower courts have jurisdiction to dispose of misdemeanor cases, including felonies which are pled to misdemeanors. In felony cases, they have jurisdiction to hold initial arraignments and preliminary hearings.

Judges in the lower courts are part-time. They work 22 to 25 hours per week and have a private practice. The town courts have lay judges. The judicial salary in Albany Police Court is \$33,500.

Most felonies are heard in the county courts, although, in some cases, felonies may be heard in the supreme courts, which are trial courts in New York State. After the preliminary hearing in lower court, a felony is bound over to the county court.

The county courts are 100% funded by the state. Judges are full-time, and earn about \$60,000 per annum. The two Albany County Court judges hear mainly criminal cases; less than 1% of their case-loads are civil. The court's jurisdiction is congruent with county boundaries. The county court judges in Albany County have a reputation for harsh sentencing policies.

The Criminal Justice Process

Felony cases proceed to the County Court in two ways: a) by information, and b) by indictment. If the case comes up to the County Court via information, this means that a plea bargain was arranged in the lower court. Otherwise, there will be an indictment.

Felony cases in this jurisdiction use "omnibus" pre-trial motions. These are normally "boilerplate" motions both on the part of the prosecutors and public defenders. They are done pro forma in every case, and include the entire range of motions to suppress evidence. The District Attorneys employ a mag-card machine to churn out the motions and insert names and other variations.

The New York sentencing scheme has "enhancements" for people who commit more than 1 felony. If the defendant has been convicted of one prior felony within 10 years, he or she is labelled as a "predicate felon," and receives a minimum which is one-half the maximum sentence. Persons who have committed more than one prior felony are labelled as "persistent felons" and receive a minimum of 15 or 25 years to life. A person convicted of murder receives the same sentence as does a persistent felon.

The term "Y.O." is often heard in this jurisdiction. This means "youthful offender," and a person receives no prior criminal record if he is a youthful offender. In addition, all records are sealed. Records are also sealed for the cases of adults whose cases were dismissed or who were acquitted.

Procedures in the Albany Police Court are geared toward rapid disposition of cases. At 8:00 a.m. in the morning, there will be a pre-trial conference where the judge, prosecutor, and public defender discuss each case on that day's court call. The purpose of this conference is to determine which cases will be plea bargained.

The average age of a case in the Albany Police Court is about 18 days. Each of 4 public defenders manning that courtroom on a part-time basis disposes of approximately 25 cases per week. A drunk driving case was estimated to consume approximately 5 minutes.

The Prosecution

The 1982 adjusted budget for the prosecution was \$1,153,792 exclusive of rent and fringe benefits. The office is full-time, unlike the public defender system. There are 19 full-time attorneys of whom 7 handle felonies, 7 handle misdemeanors, 4 handle appeals, and 1 is the Director.

The Director, known as the District Attorney, is elected for 4 year terms. Both felonies and misdemeanors are handled out of the same administrative office. The prosecutor's staff includes 6 investigators apart from the police and sheriff's personnel.

The majority of the prosecutor's budget comes from the County. However, the office also receives state funds for the Major Offense Prosecution Program (career criminals); \$89,443 was received in fiscal year 1983 for 2 lawyers and 1 support staff member.

The prosecutor's 1982 budget included \$13,537 in contractual expense for the PROMIS system and another \$5,000 to INSLAW for consulting on PROMIS. In addition, there was \$15,130 for PROMIS equipment.

The prosecutor's office is located in the County Courthouse.

Other support staff include stenographers, accounting clerks, receptionists, law interns, systems analysts, data entry clerks, clerk-typists, paralegals, legal aides, and temporary help.

The Indigent Defense System*

The Albany County Part-time Defender System - An Overview

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

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

The public defender agency is a department of the county, and public defender staff are county employees, while judges are paid by the state.

Budget and Staffing

The public defender's budget includes everything except office space, utilities,^{fringe benefits,} and accounting services, which are provided in-kind by the county. The total public defender budget for calendar year 1982 was \$527,290. If one projects fringe benefits, which are paid at the rate of 25% of salaries, one can add to this total \$90,607. While there are no figures available for the amount of space leased to the public defender for offices, if we project an approximate number of 1,000 square feet (a conservative estimate) at the rate of

*Due to lack of cooperation from the public defender, the research team was unable to interview the director or members of the public defender's staff. As a result, the site visit was limited to 2 days and complete information could not be provided. No follow-up visit could be scheduled.

\$7.50/square foot, an additional \$7,500 can be added to the public defender system's cost. This would come to a total public defender expense, exclusive of accounting services, of \$625,398 for 1982.

The 1982 adjusted county budget shows a total of 20 part-time public defenders plus a Coordinator of Assigned Counsel who apparently spends considerably less than one-half time at his assigned counsel duties. While it is possible that, in practice, some of these budgeted positions are combined so that one or two attorneys are, in effect, full-time staff, no public defender attorneys are prohibited from engaging in private criminal or civil practice. It was reported that a full-time position is considered to be anything over 30 hours of work, so that all public defenders would have some time to handle private cases.

The chief public defender earns \$23,270 for his part-time slot. The other assistant public defenders earn from \$9,300 to \$16,349 for their part-time work.

The 1982 public defender budget also shows support staff consisting of 4 full-time investigators, an administrative assistant, and six secretarial/clerical personnel, some of whom are part-time. A sum of \$23,400 is also allocated for temporary help.

Budgeting Process and System Costs

As a department of the county, the Public Defender prepares and justifies his own department's budget. Budgeting in this county is done via an incremental rather than zero-based approach. As a result, no cost per case figures are maintained.

Unlike the contract defender system studied in the present research project, this public defender agency does not simply draw down 1/12 of

its allotted funds each month. As a county department, the county pays each public defender staff member's salary directly.

In order to submit his budget request to the county, the public defender is required to complete budget forms requested by the County Executive's office. The County Executive incorporates this into the budget proposal submitted to the County Board.

In the event of a shortfall of funds in the public defender agency, the public defender can approach the County Executive and request additional funds after the appropriation has been expended. According to the County Executive, this has happened in the past. By and large, however, the public defender's budget has proved to be fairly predictable for the county.

Most of the public defender's funds are provided by the county. However, the state does provide some funding for representation at parole hearings and for additional personnel to meet the requirements of the state's mandatory drug case sentencing law.

Given the superficial nature of this phase of the study, no accurate cost data is available as it is for the 6 in-depth study sites. However, tentative information is available for 1980. The 1980 calendar year budget for the public defender agency, exclusive of fringe, office space, utilities, and accounting services, was \$428,000. The public defender's caseload that year consisted of 664 felonies, 2,104 misdemeanors, and 173 violations, for a total of 2,941 cases. At this rate, the average cost per case would be \$145.52.

The figure of \$145.52 approximates an estimate compiled by the 1982 Proposed Report of the New York State Bar Association to the Committee on Legal Representation of Indigents in the Criminal Process

prepared by the Defense Services Assessment Project. That project estimated the 1978 cost per case for the Albany Public Defender Office to be a gross figure of \$147.80. However, that study qualified the figure by stating, "As can be seen from the OCA-195 form..., current record-keeping and reporting practices are unsuited to the making of any meaningful comparative cost assessments..."*

Facilities and Support Services

The main office of the public defender is located in an office building located in the downtown section of Albany. The building is separate from the courts, and also houses the offices of the County Executive. In addition, the office building houses the private law offices of the chief public defender and other staff members. Office space is also provided for the public defenders in Police Court, a city owned building.

As noted above, the public defender's staff includes the supporting services of investigators and administrative and clerical personnel. No social service staff are included. However, the budget does include a sum which can be used to retain experts. The Albany County public defender office is not required to seek prior approval from the court in order to hire an expert to assist in case preparation or to give testimony.

Office equipment includes an IBM 100 memory typewriter which was purchased in 1980 for \$5,000. However, the office does not have any system such as the PROMIS system purchased by the prosecution.

The office also has funds to rent xerox equipment, purchase law books, travel, and pay auto insurance.

* The task of making accurate cost per case assessments is further complicated by the fact that the office handles appeals as well as trial level cases. Also, as noted above, the public defender's budget does not include office space, utilities, or fringe benefits.

Operation of the Public Defender Office

The public defender system in Albany County has been in existence for approximately 15 years.

The chief public defender is appointed by the county legislature. One interviewee volunteered his opinion that you don't get appointed to any office in the county without the approval of the mayor or a judge who ranks very high in the political arena. The implication was that the public defender is appointed based upon democratic party politics.*

Cases are handled horizontally. The office has a duty officer assigned to court each day to handle all miscellaneous matters such as motions under the 45 day rule (where the case has not been submitted to the grand jury in time.) When testimony is taken, the public defender office assigns a particular attorney, e.g., when handling a motion to suppress. Suppression hearings are not done at Special Term, but are set down for separate hearings. The lawyers are assigned to "Parts" or courts and not to individual defendants. For example, certain public defenders are stationed at the Albany Police Court and at the lower court in Colony. However, once a felony case is bound over to County Court, the defendant will have a different lawyer. The office serves the 2 County Court's judges, 3 City Courts, and the 12 Town Courts. One of the attorneys in the office also handles appeals.

*Another interviewee stated that the public defender is a former member of the County Legislature.

Timing of Case Entry, Determination of Financial Eligibility, and Recoupment

The public defender is appointed at the time of the first court date unless there is a question as to the defendant's financial eligibility. If the defendant's eligibility is uncertain, appointment of counsel will not be made until after the public defender office assesses the individual's financial status. However, according to one informant, an accused may approach the public defender prior to court appointment in some cases.

In cases where the defendant is determined to be ineligible for appointed counsel and the defendant has been unable to retain counsel, the court may request the public defender to reassess the eligibility of a person who has been accused of a felony. If the judge does not believe the defendant's representations that he could not afford to retain counsel, the defendant may be required to represent himself. However, this rarely occurs in felony cases.

The procedure for making the eligibility determination is as follows. The judge who is sitting in arraignment court questions the defendant regarding his financial ability to retain counsel. The judge then asks the public defender to check it out. The public defender requires the defendant to fill out a financial affidavit in cases where there is a question about eligibility and makes a recommendation to the court based upon the affidavit.

There are no formalized or written criteria for eligibility determination. These decisions are in the judges' discretion, and may vary from court to court.

Reports of the leniency of such determinations varied. One informant described eligibility criteria in the Albany Police Court as "generous." However, a court-watching project found that approximately 40% of all persons charged with misdemeanors went unrepresented.

Albany County does not practice recoupment. There is no system for recouping any or all of the cost of representation provided to persons represented by the public defender office.

Monitoring of Public Defender Representation

There is no formalized system for monitoring the performance of the public defender staff in Albany County. However, judges questioned about this responded that, if they noticed a problem, they would discuss it with the chief public defender and that the public defender talks with the judges regularly. In addition, there are occasional court-watching projects sponsored by community organizations.

The Assigned Counsel Component of the Indigent Defense System

Apart from representation by the public defender's staff lawyers, members of the private bar are appointed in cases which pose a conflict of interest to the public defender office. One observer believed that a private attorney is appointed in any case where there are indigent co-defendants.

1. Assigned Counsel Administration. The assigned counsel panel is administered by a staff lawyer in the public defender's office; his salary is included in the public defender's budget. According to one informant, this attorney also handles public defender cases as a trial attorney in the office.

The assigned counsel coordinator is responsible for compiling the list of attorneys who serve on the panel. At one time, the bar association had been requested to assemble the names of all persons willing to serve as assigned counsel. More recently, the bar association had not been consulted about the list.

When a conflict has been declared, the coordinator

makes a recommendation to the judge and the judge appoints counsel.

The coordinator of assigned counsel is also responsible for reviewing the attorney fee vouchers and making final determinations as to the amount that the attorneys receive.

Attorney fee vouchers take about 3 weeks to process. Once they are submitted to the public defender's office they are sent to the county controller. The county's Finance Department draws the checks. All accounting for the county is performed by the controller's office.

Respondents were uncertain as to whether the costs of paying assigned counsel were included in the public defender's budget. No separate line item for assigned counsel fees could be found elsewhere in the county budget, and the public defender's 1982 adjusted budget included an amount of \$104,000 for "fees for services."

2. Assigned Counsel Fees. It was reported by one informant that New York state law governs the rate of fees for assigned counsel. The law provides rates of \$25/hour in-court and \$15/hour for out-of-court time/ with maximum fees of \$500/misdemeanor and \$750/felony. However, a judge responded that assigned counsel in Albany County were paid \$15 per hour across the board.

Local Perspectives of the Public Defender System

1. The Bar. A representative of the bar association reported that the bar association was "not interested in rocking the boat." It was pointed out that the public defender office does have some of the best criminal lawyers on its staff. There had been some criticism from civil rights defense groups, but it had been rather muted. The public defender office was said to have a mix of both younger and older attorneys. According to the respondent, the private bar was not interested in handling indigent criminal defense cases; on

the other hand, when asked about the employment picture for attorneys in Albany County, it was reported that people are looking for work and that the bar association had itself started an employment bureau. There were no complaints about the eligibility criteria employed by the courts from the bar association.

Perhaps the lack of interest in criminal defense work is confirmed by the fact that the bar association has no criminal law section.

2. The Judges. The judges appeared especially pleased with the public defender service. They thought that the public defender was very cooperative and were happy that the public defender was able to serve all of the various courtrooms in the system. It was suggested that the strengths of the system were consistency, good staff, willingness to work, knowledge of law and procedures, and a lower cost than an assigned counsel system.

3. Fiscal Personnel. The individual responsible for the county's budget reported that the public defender system provided predictability of costs.

3. Community Agencies. The greatest complaints about the public defender system came from community agencies. One group complained that it was inadequate and overburdened and characterized it as "the plea bargaining capitol of the world." It was alleged that the public defender appears once at arraignment and then again two days before the preliminary hearing at which time there was a 15 minute plea bargaining session with the client. It was said that even the jail personnel were upset that the lawyers never visited their clients. The complaint was made that "they budget for plea

bargaining" and that there were not enough lawyers. On the other hand, it was acknowledged that there were some quality lawyers in the public defender office. It was also charged that there was political influence over the office.

A second agency provided a litany of complaints about the public defender office as follows. Defendants were not visited in jail and didn't get interviewed until the eve of trial. There was a low quality of contact between lawyer and defendant at the Police Court level, i.e., clients didn't understand their pleas and it wasn't explained to them; defendants were talked to by a non-lawyer legal assistant; and contact between the lawyer and defendant was minimal. The office had a small investigative staff; cases were inadequately investigated and witnesses weren't interviewed. There was a problem in cases which were appealed on the grounds of incompetency of counsel because the public defender office provided both the representation complained of and also handled the appeals. Public defenders took no initiative in developing sentencing alternatives and had failed to develop a record which would challenge the extremely harsh sentencing policies of the County Court judges. There was a pervasive attitude in the public defender's office that encouraged plea bargaining and militated against providing a vigorous defense. It was thought that this attitude stemmed from the fact that the office was wedded to the political system. And finally, it was charged that the public defender's system of assigning lawyers to courtrooms rather than to defendants hampered effective services. Again, it was observed that the office does have some competent trial lawyers.

Statistical Comparison of Public Defender And

Retained Counsel Performance

Given the restrictions under which the study was placed, it was not feasible to conduct a full-blown docket study as was had in the six in-depth sites. However, a certain amount of information was available from a preliminary tabulation made of felony assault and felony drug cases taken from the court's records.

Information was tabulated on a total of 151 cases. These were broken down as follows:

	Felony Assault	Felony Drug
Part-time Defender	74	5
Retained Counsel	54	18

The data showed that retained counsel had a higher rate of dismissals than did the public defenders. Of the 74 felony assault cases handled by the public defenders, 44, or 59% were plea bargained and 27, or 36% were dismissed. Of the 54 felony assault cases handled by retained counsel, 27, or 36% were plea bargained and 26, or 47% were dismissed. The number of felony drug cases found in the 1981 court records was too small to conduct a statistical comparison of case outcomes.

Retained counsel took longer to dispose of cases than did the public defender. For felony assault cases, the number of days from the time that the case was filed until the date of case disposition was computed as follows:

DISPOSITION TIME OF FELONY ASSAULTS

	Retained Counsel	Public Defender
mean time	116.81 days	75.25 days
mode time	43 days	32 days
median time	50 days	91.5 days
midrange (low/high)	276.5 days	148.5 days

Similarly, for the small group of felony drug cases, retained counsel appeared to take longer than the public defenders. For retained counsel, the results were: mean - 90.94; mode - 62; median - 62; and midrange - 130. For public defenders, the results were: mean - 68.2; no mode; median - 16; and midrange - 140.

In sum, while a scientific docket study and analysis could not be performed, the tentative data indicate that retained counsel produce better results for their clients, but the part-time public defender system produces speedier dispositions.

PROFILE OF THE SANTA CLARA, CALIFORNIA
MIXED COORDINATED ASSIGNED COUNSEL SYSTEM

Overview

The indigent defense system in this county of almost 1.3 million (1,295,071 according to the 1980 census) consists of a full time public defender system augmented by a coordinated assigned counsel program, consisting of several panels of private attorneys, supervised by a full time lawyer-administrator. The coordinated assigned counsel system is responsible for the representation of defendants in multiple defendant cases where the public defender's office is representing one of the defendants, and declares a conflict of interest. Any lawyer is eligible to join the "conflicts" panel at the entry level, but he or she is required to participate in the training sessions and meet certain requirements before he or she may advance to the second, third, or fourth level. Cases are assigned by the administrator to lawyers on the basis of their experience, and all fee vouchers are approved by the administrator as well. The coordinated assigned counsel administrator is supervised by a governing board appointed by the County Board of Supervisors, the county Bar Association, and representatives of the Court system.

History and Goals of the Program

Since the decision of the United States Supreme Court in Holloway v. Arkansas , 435 U.S. 475 (1978) which held that a single public defender could not represent more than one defendant at a time, the county of Santa Clara has been wrestling

with the problem of how to redesign their indigent defense system to meet the mandate of that decision. In fiscal 1978-79, the Public Defender office was appointed to 27,140 cases. With a staff of fifty four lawyers representing accused felons, misdemeanants, and juveniles, the average felony caseload per lawyer was 159, the average misdemeanor caseload, 612, and the average juvenile caseload, 776. Although this caseload was high according to national standards, the first suggestion was to split the office into two parts, and add seven lawyers. The purpose of the split was to allow each "new office" to represent separate co-defendants in multiple defendant cases, thus sparing the county further expense by avoiding the necessity of appointing private counsel for the second defendant. This plan was opposed by both the existing public defender and by the private bar on two grounds: a) it would weaken the existing public defender program, and b) it would effectively exclude the private bar from representing the indigent accused in Santa Clara county.

Instead, on October 30, 1979 a joint resolution was adopted by the County Board of Supervisors, the Bar Association, and both the Municipal and Superior Court Judges, establishing a new program, the Conflicts Administration Program. It was to be headed by a full time administrator and supervised by a Governing board of representatives of each group. In March, 1980 a full time lawyer-administrator was appointed to recruit a panel of private attorneys to accept appointments in multiple defendant cases or other cases where the Public Defender declared a conflict of interest. The administrator was authorized to hire a small administrative staff consisting of a secretary, paralegal, and part time bookkeeper, and given an initial budget of \$485,000.

Features of the Plan

There are several important features of the Conflicts Administration Plan which are noteworthy. They are: the Governing Body, the functions of the Administrator, the stratification of the panel, the training program, and the fee schedule. Each of these will be discussed below seriatim.

The Governing Body

The administrator reports to a Governing Body, composed of representatives of each of the agencies involved in criminal defense in the county. The board consists of two representatives named by the Board of Supervisors, two members of the county bar association, two Municipal Judges, and two Superior Court Judges.

The Governing Body set the criteria for the administrator of the program, screened applicants, and submitted their selection to the County Board of Supervisors for appointment. In addition, they meet periodically and receive reports from the program administrator on its problems and progress. The use of this representative board allows each of the interested agencies input into the concerns of the indigent defense system and provides feedback and an opportunity for exchange of ideas in addition to allowing it a role in policymaking.

Functions of the Administrator

1. Nature of Employment- Instead of making the Administrator of the program a county employee, the Governing Body opted to offer him a 28 month contract for \$145,232. This amount would also include the salary of his secretary during that period. This avoided some of the liabilities the county ususally incurred with expanding government such as pensions, insurance, etc. Also, since this was an experimental program, such an arrangement did not lock the county into a long term commitment at such an early stage.

2. Qualifications- The minimum standards for application for the position of Administrator included membership in the State Bar and either certification or eligibility for certification as a criminal law specialist. In addition, the Governing Body mandated that the applicant possess experience, knowledge, ability, and skills in the following areas: administration; understanding of the criminal law process; ability to deal with high volume criminal law calendars; ability to develop and maintain a good working relationship with other actors in the criminal justice system of the county; ability to train, supervise, and evaluate other lawyers and staff; and develop and administer fiscal and budget matters in a cost efficient and effective manner.

3. Duties of the Administrator- The Administrator of the Program performs eight major functions. These include: appearing at the master calendar call; assignment of cases; approval of vouchers; training and monitoring of panel attorneys; eligibility screening; appearing for attorneys in Court; and administrative functions such as budget, etc.

Master Calendar Call- The Administrator accepts appointments personally to all cases where the Public Defender declares a conflict of interest, or cannot handle the case due to the fact that the defender office is saturated with all the cases it can handle at the present time. He appears at the Master Calendar Call to accept these appointments, and then immediately reassigns them to the panel attorneys.

Assignment of Cases- Cases are assigned to members of the panel based upon two factors, a) the gravity of the case, and b) the experience level of the panel attorney. Cases are assigned in accordance with which of the four panels the attorney is on.

Approval of Vouchers- The administrator and his staff approve all vouchers submitted by the attorneys and pay according to a prescribed fee schedule, which will be discussed more fully below. Fee requests are not cut in this jurisdiction. All fee claims must be submitted by the panel attorney within two weeks of the final disposition of the case. If it is approved, it will be done so within two working days. If the Administrator chooses not to approve the voucher for any reason, the matter will go to the Governing Body for resolution.

Training and Monitoring of the Panel- Two of the most important functions an administrator can perform are training and monitoring of the panel attorneys. The training function will be discussed in more detail below. With respect to monitoring, the Administrator observes the attorneys in Court, reviews motions filed by them, reviews the disposition of their cases with the dispositional information he receives from them on their fee voucher forms, receives information on their performance from Judges, clients, etc. and examines Court files on cases they have worked on. This is helpful to him in deciding what kind of training they need, as well as in determining when an attorney may move up from one panel to the next. The compositions of the panels and requirements for each will be discussed in the next main section.

Eligibility Screening- Although the Defender office does the bulk of the eligibility screening prior to transferring the cases to the Conflicts Program, there are some instances in which the Program must conduct eligibility screening. This occurs when the Public Defender declares a conflict of interest later on in the process. At that point the Conflicts Program conducts its own eligibility inquiry.

It is important to note that if a defendant is declared ineligible by either the Defender office or the Conflicts program, he may appeal to the Court at the next hearing.

Court Appearances- In addition to appearing at the Master Calendar Call to accept appointments, the Administrator also appears in Court in place of the panel attorneys for continuances and routine matters. This operates both as a convenience for the panel attorneys and as a cost savings measure for the program.

Other Administrative Functions- Apart from these special duties, the Administrator is expected to perform all of the usual administrative tasks expected of any county employee or contractor. These include preparing and monitoring the Conflicts budget, filing monthly reports to the County Board of Supervisors, the Courts, and his governing board, and complying with all affirmative action and equal opportunity regulations.

Stratification of the Panel

Instead of utilizing full time staff attorneys who would be county employees, the plan was to retain the input and participation of the private bar by placing those attorneys who were interested in Court appointments in indigent cases on panels. All assignments to indigent criminal defendants would be made to those on the list. It was hoped that this would combine the benefits of organization which a public defender model confers without the concomitant loss of private bar utilization in criminal defense. Also, it was hoped, this new plan would solve some of the problems which existed prior to its establishment, e.g. little control over the attorneys appointed accompanied by skyrocketing costs. As of December, 1981, or only fourteen months after the program began, 235 attorneys were enrolled.

That is not say that all of the attorneys were placed on the same list. One of the features of the new plan was an attempt to categorize attorneys by level of experience to maximize effective case handling, and to insure that lawyers appointed to complex criminal cases were competent to handle them. To that end, four categories of lawyers were established, with Class I, the lowest, and Class IV, the most experienced. The criteria for each panel is summarized below. For a complete list of the criteria and a list of the crime categories in California, see the Appendix to this report. California crimes are divided into four main categories.

Description of Four Panels- Class I- Admission to Bar and completion of entry level training course

Class II- trial of three criminal cases and assisting Class III lawyer in felony case

Class III- handling at least 7 class 2 offenses, including two jury trials, assisting in training program, etc.

Class IV- trial of two complicated felony cases, of which one was jury trial, etc.

Once a lawyer is placed on a panel, assignments are made to that panel of certain specified offenses, based upon the gravity of the offense. See the Appendix for a copy of the Application form for the panel as well.

The Training Program

Training is a mandatory part of the panel program. There are from seven to ten hours per month of training programs scheduled. These include sessions on plea bargaining, creative sentencing, motions in limine, eyewitness identification, voir dire, cross examination, final argument,

representation in Juvenile Court, etc. The training programs are conducted on two levels. The first is an entry level program which meets twice monthly on Wednesdays at the noon hour, and the second is an intermediate training program which meets once monthly for several hours. The program for the entry level lawyers in 1980-81 included the following topics: case preparation, voir dire, motions in limine, direct examination, cross examination, objections, final argument, sentencing, plea bargains, and appeals.

The intermediate program included, among others, sessions on search warrants, motions to suppress, psychiatry and the law, felony sentencing problems, etc.

In addition, a video cassette recorder was purchased to assist in training for the following year.

Fee Schedule and Structure

The fee schedule is graduated so that higher fees are paid for more complex cases. In addition to the basic fee paid for each case, reimbursement is available for the use of support services, such as investigators, expert witnesses, polygraph examinations, social workers, etc. Class I cases pay \$150 plus an additional \$150 per day for each day of trial. Class II cases pay \$300 plus \$200 per day for each day on trial. Class III cases pay \$350 per case plus an additional \$250 per day for each trial day, and Class IV offenses pay \$400 per case plus an additional \$300 for each trial day. (For complete Fee Schedule, see Appendix) For extraordinary cases, the Attorney may bill \$30.00 per hour for out of court time and \$40.00 per hour for in court time. If the sum asked for is over a certain amount, the Administrator will have to take it to the Governing Body for approval. Appellate work is also billed at \$30.00 per

hour for out of court and \$40.00 for in-court time. Investigators could bill at \$15.00 per hour plus 20¢ per mile for travel. However, all investigation claims had to be approved by the Court in advance.

Caseload Statistics

For the initial period of October, 1980 until June, 1981 the program accepted 152 cases for the eight months. This included appointments in felonies, misdemeanors, juvenile cases, child support, appeals, probation revocations, etc.

Summary and Conclusion

This program has achieved its goal of maintaining a significant role for the private bar in the provision of indigent defense representation in Santa Clara county. Operating, as it does, in conjunction with a strong defender program in the county, it is an example of the mixed system of representation with a highly coordinated assigned counsel system.

APPENDIX CONFLICTS ADMINISTRATION SANTA CLARA, CALIFORNIA

1. CATEGORIES OF ATTORNEYS
2. CLASSIFICATION OF CRIMES
3. FEE SCHEDULE
4. PAYMENT PROCEDURE
5. APPLICATION FORM FOR PANEL ATTORNEYS

ATTORNEY CATEGORIES

CLASS I ATTORNEYS

Eligibility Standards

1. Admission to practice law in the State of California.
2. Continuous attendance and completion of the entry level training program sponsored by the Conflicts Administrator and approved by the Governing Board.

Offense Categories Eligible for Assignment

1. All Class One offenses upon entry into the program.
2. Class Two offenses after 12 months in the program, if the following conditions are met:
 - a. The attorney has assisted a Class III attorney or higher in the handling of one felony case from the preliminary examination to disposition;
 - b. The attorney has successfully completed the entry level training program;
 - c. The attorney has submitted at least three cases on either a jury trial or court trial for determination of guilty or not guilty;
 - d. The attorney has submitted a motion with points and authorities.

CLASS II ATTORNEYS

Eligibility Standards

1. Completion of the Attorney I program, or substantially equivalent experience.
2. Successful completion of the training program.

Offense Categories Eligible for Assignment

1. Class II offenses immediately upon entry into the Attorney II category.
2. Class III offenses after 18 months in the Attorney II category, and with the following conditions met:
 - a. The handling of 7 class II offenses, including two cases submitted to a jury for decision;
 - b. Assisting a Category III or IV Attorney in the handling of one de novo motion to suppress;
 - c. Regular attendance at training programs designed for the Class II and III Attorneys.

CLASS III ATTORNEYS

Eligibility Standards

1. Completion of the Attorney II program, or substantially equivalent experience.
2. Participation in the intermediate training program.
3. Participation in "second chair" of Attorney I in one case per year, or lecturing in one training program per year.

Offense Categories Eligible for Assignment

1. Class III offenses immediately upon entry into the Attorney III category.
2. Class IV offenses after 18 months in the Attorney III category, and with the following conditions met:
 - a. The handling of 10 Class III offenses through final disposition, with at least two cases submitted for jury verdict;
 - b. The submission of at least two de novo motions to suppress.
 - c. Regular attendance at the training programs designed for this level.

CLASS IV ATTORNEYS

Eligibility Standards

1. Completion of the Category III program, or the substantial equivalent thereof, which the Conflicts Governing Board has determined to be any one of the following:
 - a. At least five years of practice of law with a substantial portion thereof devoted to criminal law;
 - b. At least four years of practice in a Public Defender or District Attorney office;
 - c. A combination of (a) and (b);
 - d. Certification as a criminal law specialist by the State Bar of California.
2. The handling of two complicated felony cases, one of which was submitted to trial after at least five days of in court work.

Offense Categories Eligible for Assignment

1. Class IV offenses immediately upon entry into the Attorney IV category.
2. Eligibility for assignment to special circumstance cases after 18 months in the category, and the handling of two homicides, one of which has gone to jury verdict.

Special Conditions for Remaining in Attorney IV Category

1. Agreement to fill in for the conflict administrator on one calendar per year as needed with two weeks advance notice.
2. Either working with one Attorney I per year on a case of the Class IV;
3. Attendance at all advanced training seminars;
4. Lecturing to one training per 18 months.

CLASSIFICATION OF CRIMES

CLASS I

All misdemeanors and juvenile proceedings alleging W&I Section 602, except where the minor may be certified from juvenile court.

CLASS II

All felonies where the punishment is:
16 months, 2, 3 or
2, 3, 4.

This calculation excludes the possibility of prior convictions. Accordingly, if an individual is charged with a burglary with one prior, it remains a Class II case. Fitness Hearings in Juvenile Court.

CLASS III

Any crime that is punishable by the following ranges:

2, 3, 5;
3, 4, 5;
2, 4, 6;
3, 4, 6;

Any petition in Juvenile Court which alleges W&I Secs. 300 or 232.

CLASS IV

Any crim which is punishable by the following terms:

3, 5, 7;
3, 6, 8;
5, 7, 9;
5, 7, 11.

EXTRAORDINARY

1. Special circumstance cases;
2. Murder cases;
3. Complex business litigation (e.g., computer crimes, stock frauds, etc.);
4. Any other appearance that does not fall in any other class.

FEE SCHEDULE

CLASS I

\$150.00 case fee
\$150.00 per day in trial (\$75.00 each session, including the first ½ day)
(Juvenile: contested jurisdictional hearings, \$75.00 each ½ day session)

CLASS II

\$300.00 case fee
\$200.00 per day in trial
\$100.00 per session (morning session of the first day is included in the case fee)

CLASS III

\$350.00 case fee
\$250.00 per day in trial
\$125.00 per session (morning session of the first day is included in the case fee)

CLASS IV

\$400.00 case fee
\$300.00 per day in trial
\$150.00 per session (morning session of the first day is included in the case fee)

EXTRAORDINARY CASES

Hourly rate of \$40.00 in court; \$30.00 out of court shall be up to a maximum set by Administrator and if amount exceeds the approved maximum, the Board must approve.

PRELIMINARY EXAMINATIONS

Class II - \$100.00 per day; each session thereafter \$50.00
Class III - \$150.00 per day; each session thereafter \$75.00
Class IV - \$200.00 per day; each session thereafter \$100.00

Certification and preliminary examination waiver - paid the same as the prelim itself.

MOTIONS

Substantial motions are paid at the session rate per class case (includes in limine motions which are briefed.)
Certain pro forma motions are included in the case fee
Writs and Petitions for hearings are compensated separately by the Administration utilizing all factors under PC sec. 987.3
PV's - (unconsolidated) with evidentiary hearing - same as case fee
PV's - (consolidated) - included in the substantive case.

FEE SCHEDULE (cont'd.)

INVESTIGATION RATES

All claims for investigative fees must be approved prior to submission, by the court.
Standard rate is: \$15.00 per hour plus .20¢ per mile.

CLASSIFICATION OF CRIMES - INTERNAL PROCEDURE

1. When the appointment is requested from Juvenile Court, the appointment will be made from the Attorney I list, except when the minor is 16 years of age and charged with the following crimes: Penal Code Sections; 187; 447a; 211 with either 12022a or b or 12022.5; 261(2) or (3); 286(c); 288b; 288a (c); 289; 207; 209; 217; 245a; 246; any offense listed under the purview of 1203.09.
2. when any complaint or information charges an offense and any of the following enhancements, the case automatically goes to an Attorney III or IV:
 - a. 12022.5/1203.06
 - b. 12022.7
 - c. 12022.8/1203.065
 - d. 1203.09
3. In cases where the most serious crime is charged, the most serious crime will be the class billed.
4. In any case where two or more felony priors are charged, or the case is being prosecuted as a career criminal case, the case will automatically be jumped one class.
5. This office will not accept any conflict appointments made by judges who have not gone through this office for appointment.

PAYMENT PROCEDURE

General Rule

Claims for payment for legal services provided in conflict cases shall not be submitted until there is a final disposition in the case.

For purposes of the general rule, a final dismissal of all the charges, or the imposition of judgment and sentence shall be deemed a final disposition of the case.

Exceptions

Extraordinarily complicated and protracted cases including those which involve unusual circumstances, such as certain business frauds and Class IV crimes may be paid on a periodic or interim basis. In such cases, the Governing Body shall approve rules developed by the Administrator allowing for interim payment of claims for legal services already provided.

Approval of Claims

Within two weeks after the final disposition of the case, the assigned attorney shall submit a claim for services, in accordance with the fee schedule, and containing all of the information required by the Governing Body, to the Administrator. Within two working days after receipt of the claim by the Administrator, the claim shall be approved or disapproved. Approved claims will be forwarded to the Controller's Office for payment every Friday.

If the claim is not approved as submitted, it will be handled as provided in the policies and procedures adopted by the Governing Body.

Experience:

Are you a Certified Criminal Law Specialist? _____ Have you applied? _____

Public Defender _____ County _____ Date of Termination _____

Prosecutor _____ Agency _____ Date of Termination _____

Private Practice _____ Years _____ Perc. _____

Were you previously on the Conflicts List? _____

I estimate my felony/misdemeanor experience to be (num _____)

Total trials: jury _____ court _____ Felony trials: jury _____ court _____

Nature of Cases: Murder _____ Robbery _____ Sex Crimes _____ Drug Cases _____ Burglary _____

Hearings and Motions: Prelim Exams _____ Dispos w/o trials _____ 1538.5's _____ 995's _____

Five most recent felony trials: (List from most serious to least serious. If none, list misdemeanor or juvenile)

<u>Defendant's Name</u>	<u>Case Number</u>	<u>Charge</u>	<u>Judge</u>	<u>Prosecutor</u>	<u>Co-counsel</u>	<u>Date</u>	<u>Result</u>
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I apply for rating on the Class: I _____ II _____ III _____ IV _____ list. I request appointment in the
the following cases: Appellate _____ Felony and Misdemeanor _____ Felony only _____ Misdemeanor only _____

Please exclude me from: Juvenile cases _____ the following Municipal Court Facility _____

I am willing to undertake Death Penalty Defense Yes _____ No _____

I understand that the application will allow inquiry of judges before whom I have practiced. I understand that these
inquiries are going to occur, and that the Conflicts Administrator will keep all responses confidential.

Date _____

Attorney at Law

PROFILE OF THE SAN MATEO COUNTY, CALIFORNIA
COORDINATED ASSIGNED COUNSEL PROGRAM

Overview

The indigent defense system in this county of slightly under 600,000 population (588,164 according to the 1980 Census) is characterized by a contract between the county and the San Mateo Bar Association whereby the Bar Association represents all of the indigent criminal accused in the county for a set fee per case. The Bar Association provides this service through a panel of private attorneys administered by a director, who is a highly experienced criminal defense attorney, and a small core staff. In fiscal 1981-82 the budget appropriated by the County Board of Supervisors for this program was \$2,395,584 for a projected caseload of 13,104 adult offenders and an unspecified number of juveniles.

History and Goals of the Program

This co-ordinated assigned counsel program began in 1968. Prior to that time lawyers were appointed to indigent cases by individual judges. These judges reviewed requests for fees and reimbursements. Certain problems were perceived to be associated with this "ad hoc" system. First, only certain lawyers were appointed to these indigent cases. Secondly, although in some cases the judges cut the fee requests of the lawyers they appointed, in others the costs ran higher. Third, lawyers were not necessarily matched with the type of case they were appointed to, so that a lawyer with less experience might be given a highly complex case and vice versa. Hearings were held by the County Board of Supervisors. They initially considered a public defender system. However, after hearing testimony from a public

defender in a neighboring county, the Board decided on the private defender system described below, in which the county bar association would take responsibility for the representation of the indigent who were criminally accused. The goal of the program was to provide quality criminal representation to the indigent through the use of private attorneys. A secondary goal was to combine the best features of an organized public defender system, such as training, supervision, research assistance, support services, and coordination, with the private panel approach. After the program was launched by the County Board of Supervisors in 1968, over one hundred lawyers signed up for the panel, which is approximately one sixth of the bar in San Mateo County.

Features of the Program

There are several salient features of the program which are worthy of note and further discussion. They are: the fee arrangements with the county and the fee structure established for the lawyers on the panel; the functions of the director and his core staff; the sponsorship and administration of the program by the San Mateo County Bar Association; the establishment of a Private Defender Committee to provide oversight to the program and advice to the Board of Directors of the Bar in this area; the operation of the panel; and the training and monitoring of that panel. Each of these areas will be explicated in fuller detail below.

Fee Arrangements and Fee Structure

The County reimburses the Bar Association \$149.00 for every Municipal case, \$337.00 for every Superior Court case, and \$183.00 for every mental health case. In addition, the county paid a flat fee to the Bar Association for representation of juvenile cases. For fiscal year 1981-82 that amount was \$223,000. The Bar Association may also bill the county for extra-ordinary legal, investigative, and expert witness fees. In the fiscal year 1980-81, for example, that amount was \$257,669. The total contract costs to the county in fiscal 1980-81 were \$2,251,977. For this amount the program represented 11,346 adult clients in addition to its juvenile caseload for which it was reimbursed \$217,000 for that fiscal year. The average cost per adult case for fiscal 1980-81 was \$179.35. Naturally, these amounts are not fixed and are subject to negotiation every year at the time of the renewal of the contract.

Lawyers are paid on a different schedule. The fee structure is based upon activity fees. When a lawyer performs a specific activity in a case, he is compensated for that work. For example, a lawyer would receive \$60.00 for disposing of a felony or misdemeanor case, if that case did not involve a trial, preliminary hearing, or evidentiary motion. If the case went to trial before the court, the lawyer would receive \$35.00 per hour for his court time in addition, and \$40.00 per hour if the case were being tried before a jury. For a complete review of the fee schedule see Appendix A. Higher fees are available for special cases involving complex questions of law, multiple charges, murder cases, etc.

The Director and Core Staff of the Private Defender Program

The director and his staff are employees of the San Mateo Bar

Association. His staff, as stated earlier, consists of two attorneys in addition to himself, four and a half secretaries and a half time bookkeeper. One of the attorneys answers the calendar call in Juvenile Court, represents some cases, and interviews mental health defendants. The other attorney, who acts as assistant administrator of the program, is responsible for continuing legal education, court appearances in Superior Court, and for appearances in other courts as a convenience to attorneys who could not be present. The director helps recruit and monitor the 100 to 120 attorneys who comprise the panel. The panel is not stratified in any formal sense, but there are separate panels for criminal, juvenile, and mental health cases. The director maintains a mental list of each of the lawyers on the criminal panel, and although case assignments are generally made in order on a rotational basis, the director makes the assignment in homicide and other special cases.

In addition, the director is responsible for approving all voucher forms from the attorney, approving the use of support services, preparing the program budget, maintaining statistics, dealing with the Private Defender Committee (to be discussed in more detail below) and other bar committees, hiring and firing of staff, and representing about twelve defendants a year.

The Private Defender Committee and other Bar Committees

The San Mateo Bar Association is governed by a Board of Directors. That Board appointed a special committee to provide oversight to the Private Defender Program (PDP). The committee, known as the Private Defender Committee, is composed of seven attorneys. This committee is advisory in nature and does not make policy, but deals with procedures and policies of the program. The director of the Private Defender Program

is appointed by the Board of Directors of the Bar Association.

The Private Defender Committee appoints a subcommittee to deal with special fee requests, but the committee that negotiates the contract with the county is a separate committee appointed by the Board of Directors. For a schematic diagram of the Bar supervisory superstructure, see Appendix B.

Operation of the Panel

Criteria for admission to the panel include membership in the Bar, a willingness to serve on the panel, and at least one year's experience. Although the criminal panel is not formally stratified, there is a special group of the most experienced attorneys who are designated as calendar attorneys. They are utilized on a rotational basis to receive the case assignments by the Court. They report to the director of the program when the daily calendar call is completed with a list of all of the cases in which the program has been appointed that day. They are allowed to choose five of the cases for themselves, and the rest are assigned to regular panel members according to the list. Homicides and other special cases may be assigned to specific lawyers on the list, but all other cases are assigned in order by the secretary. Occasionally, a judge will appoint a lawyer on the panel directly to a case if he knows, for example, that the defendant is being represented by that lawyer on another matter. Otherwise, the calendar attorneys receive all the appointments for the program.

Once assigned to a case, the attorney may request compensation according to the fee schedule by turning in a voucher to the program. At this time he must include information on the disposition of the case, the date of disposition, method of disposition, whether by trial or plea, etc. Payment is usually forthcoming by the 10th day of the month following submission of the billing form.

Support staff is available, such as investigators, expert witnesses, etc. Payment is made to investigators directly through the director's office. The program contracts out for investigative services and receives a volume discount so that investigative services cost about \$20.00 per hour.

Panel members are also given specialized training and may seek advice on the handling of cases from the director of the program, who is himself a highly experienced and competent trial attorney, or from his staff. Form motions and briefs on microfilm are also available.

Training and Monitoring of the Panel

There is both entry level training and continuing legal education available for panel members. Prior to admission to the panel, lawyers are required to watch a set of videotapes on all aspects of a trial. They are also observed in Court by the director or assistant director before they are allowed to accept their first appointment. Training seminars thereafter last for approximately one hour, once a month. Sometimes the sessions last three or four hours.

Monitoring of the panel is conducted by the director who observes the performance of panel members from time to time. He also receives reports on their performance from the judges, assistant district attorneys, clients, and other panel attorneys. In addition, he maintains a file on every panel attorney, listing each case he or she was assigned, the disposition of these cases, the dates the cases were opened and closed, the method of disposition, the amounts paid to each lawyer, and a record of the director's observations of the lawyer's performance in court.

Eligibility and Recoupment

In this jurisdiction, eligibility for indigent defense services is determined initially by the Court at the first Arraignment. The program, however, conducts its own eligibility review thereafter, and if the director disagrees with the Court's determination, he can go back to Court and ask to be relieved from the case.

At the end of the case however, the defendant is asked to go to the County Collector's office for possible recoupment of lawyer's fees. Historically, less than \$30,000 has been collected annually in recoupment fees, or less than 2% of program costs.

Summary and Conclusion

This program has achieved its goal of serving the indigent accused of San Mateo county through maximum utilization of the private bar. Conflicts of interest problems which are found in counties with public defender offices are avoided here since all cases are distributed to private lawyers who are not associated. The program is well funded compared to other assigned counsel programs in other parts of the country, and the coordination, training, and supervision provided by the director and his staff are more than comparable to other coordinated assigned counsel programs. The fact that this program is operated by the Bar Association through a contract with the county makes it an interesting model for the delivery of criminal defense services to the poor.

APPENDIX

A. FEE SCHEDULE

B. BAR SUPERVISORY STRUCTURE (DIAGRAM)

APPENDIX A
FEE SCHEDULE

I. GENERAL

1. Basic Fee

When a case is concluded without trial, preliminary hearing or extended evidentiary hearing (i.e., in excess of one day) 60.00

2. Basic Hearing Fees

Applies to all evidentiary hearings other than trials

- A. Up to 2 hours 80.00
- B. Each additional hour on same or subsequent days 30.00 per hr.

3. Trial Fees

A. Court Trial Fee

(fractional hours to be paid in 10ths of an hour) 35.00 per hr.

B. Jury Trial Fee

(fractional hours to be paid in 10ths of an hour) 40.00 per hr.

4. Basic Calendar Fees

- A. 2 hours or less 50.00
- B. Over 2 hours 75.00

5. Basic Hourly Rate

(fractional hour to be paid in 10th's of an hour) 30.00

Note: Applies where hourly rate is allowed but no specific amount is stated.

Note: Where hourly rates are allowed, such rates do not include travel time or waiting time (which could be billed as special fee in appropriate cases); Except in Juvenile Court Dependency Cases, up to one hour of waiting time is compensable, if attorney appears at the designated hour, ready to proceed, and, through no fault of counsel, the commencement of the proceeding is delayed.

II. CRIMINAL MATTERS

1. Arraignment Calendar

- A. 2 hours or less 50.00
- B. Over 2 hours 75.00
- C. Cases closed on calendar (up to five) 50.00 each

2. Preliminary Hearing

- A. Separate evidentiary hearing Basic Hrg. Fee
- B. Combined with 1538.5 or other compensable motion with written P & A's ADD 70.00
- C. Final Municipal Court disposition - in lieu of A (e.g. 859a P.C.; Reduced to a misd. and sent. dismissal) -- Basic fee, plus. 25.00

3. 1538.5 P.C. Motions

- A. Separate evidentiary hearing Basic Hrg. Fee
- B. Separate appearance with written P & A's only - in lieu of 3.A 70.00
- C. Combined with P/H See 2B Above
- D. Combined with 995 P.C. or other compensable motion supported by separate written P & A's 70.00 for each
- E. Where 995 & 1538.5 are based solely on legality of evidence supported by one dual purpose memo 70.00
- F. Where motion made in Muni and repeated in Superior relying on transcript, and without substantially new P & A at separate hearing - 25.00
- If combined with P/T See 6

4. 995 P.C. Motions

- A. Separate appearance supported by written P & A's 70.00

B.	Combined with 1538.5 P.C. motion	See 3D or 3E Above
C.	Combined with other compensible motion supported by separate written P & A's	70.00 for each
5.	Non-Routine Miscellaneous Motions (including pretrial and post conviction motions)	
A.	Evidentiary hearing	Basic Hrg. Fee
B.	Separate appearance with written P & A's in lieu of 5.A	70.00
C.	Combined with P/H	See 2B Above
D.	Combined with 1538.5 P.C. motion	See 3D Above
E.	Combined with 995 P.C. motion	See 4C Above
6.	<u>Pretrial Conference(s)</u> (by whatever designation) ADD	25.00
7.	<u>Trial</u>	
	Court Trial	Court Trial Fee
	Jury Trial	Jury Trial Fee
8.	<u>Sentence</u>	
A.	Separate appearance(s) after trial ADD	25.00
B.	Evidentiary hearing (mitigation or aggra- vation) -- in lieu of A	Basic Hrg. Fee
9.	<u>Trailing:</u> If case goes to trial after attorney, without fault, is required to trail to a later date or dates.	25.00
10.	<u>Probation or Diversion Violations</u>	
A.	Non-evidentiary hearing	60.00
B.	Evidentiary hearing - in lieu of 10.A.	Basic Hrg. Fee

11.	<u>Return to Court after suspension of proceedings under 1203.03, 1367-68, 3050-51, 1168 P.C., or 6300, et. seq., W&I Code</u>	
A.	Non-evidentiary hearing	60.00
B.	Evidentiary Hearing - in lieu of 11.A.	Basic Hrg. Fee
12.	<u>Miscellaneous Special Assignments</u> by PDP Office Line-up, interrogation, consultation, advising witness, etc.	30.00 per hr.
13.	<u>Multiple Appearances</u> Where 3 or more separate and otherwise non- compensible appearances are required, ADD	25.00
14.	<u>Collateral Matters</u> (Separate proceedings after case is closed or suspended, which are not otherwise specifically provided for in this schedule e.g., motions pursuant to Sections 1203.3, 1203.5, 1203.4a P.C., etc.) - up to a maximum of 7 hours.	30.00 per hr.
15.	<u>MAXIMUM Fees without trial or extended evidentiary hearing</u>	
A.	Superior or Municipal Court criminal proceeding	160.00
B.	Superior Court felony proceeding	200.00

III. JUVENILE MATTERS

1.	<u>600 and 602 W&I Cases</u>	
A.	Calendar Coverage (Detention/To Set)	
	(1) 2 hours or less	50.00
	(2) Over 2 hours	75.00
B.	Separate appearance for detention hearing or to set hearing	30.00
C.	Fitness hearing	
	(1) Without evidentiary hearing	60.00
	(2) Evidentiary hearing	Basic Hrg. Fee

D. Jurisdictional Hearing(s)

(1) Initiating petition:

(1) Without evidentiary hearing 60.00

(11) Evidentiary hearing Basic
Hrg.
Fee

(2) Additional petitions:

(1) If combined with initiating petition,
not requiring separate preparation
and/or appearances 30.00

(11) If not combined with initiating
petition, so as to require separate
preparation and/or appearances Same fee
for D(1)
Above

(3) Return to court for disposition ADD 30.00

E. Maximum (without multiple day hearings) 200.00

2. 300 W&I Cases

A. Child representation (one or more children)
hourly rate 30.00
per hr.

B. Parent representation (either or both
parents -- one or more children - hourly rate 30.00
per hr.

3. Motions - see schedule of motions for criminal
matters

IV. MENTAL PROCEEDINGS

1. LPS Calendar

A. Calendar Preparation prior to date of calendar

(1) 1 hour or less 30.00

(2) Over 1 hour 50.00

B. Hearing calendar (including time in prepara-
tion on day of calendar)

(1) 2 hours or less 60.00

(2) Over 2 hours 85.00

(3) Return appearance for disposition ADD 25.00

(5)

2. Separate Petition (e.g. Review of Status, etc.)

A. Non-evidentiary hearing 70.00

B. Evidentiary hearing Basic
Hrg.
Fee

C. Return for disposition ADD 30.00

D. Writ of Habeas Corpus - See Section V.1. Writs

3. Trials

A. Notice of trial, preliminary preparation
where case is resolved without commencement
of trial 80.00

B. Notice of trial, preliminary preparation
where case proceeds to trial - trial fee plus...60.00

C. Court Trial Court
Trial
Fee

D. Jury Trial Jury
Trial
Fee

4. Maximum without trial or extended evidentiary
hearing 200.00

V. OTHER SERVICES

1. WRITS (including preparation and hearing) -
hourly rate (up to maximum of 7 hours) 30.00
per hr.

2. APPEALS from Municipal to Superior Court
Appellate Department - hourly rate (up to
maximum of 10 hours) 30.00
per hr.

3. CIVIL MATTERS (including contempts, probate
guardianship and conservatorship, petitions to
free minors from parental custody and control,
paternity suits)

A. Without trial, hourly rate (up to maximum
of 10 hours) 30.00
per hr.

B. Trial

(1) Court Trial Court Trial
Fee

(2) Jury Trial Jury Trial
Fee

(6)

SPECIAL FEE RULES

The initial determination to be made is whether the case under submission is in fact a case which should receive special fee consideration. In that regard reference is to be made to the format for special fee requests contained in Appendix B, herein.

CLASS 1 CASES

These are cases where the extraordinary amount requested is one hundred dollars (\$100.00) or less. Any such case shall not be considered as a special fee case and shall be referred to the Administrator for handling in his discretion.

CLASS 2 CASES

TYPE A - These are cases which contain one or more of the criteria for special fee consideration contained in the March 1, 1974 format, but for any of a variety of reasons do not qualify, in the committee's judgment, for treatment according to the schedule set out for Type B cases. These reasons might include, amongst others, 1) the short duration of the case, 2) the relative seriousness of the charge, 3) unanticipated delays occurring during a trial, 4) unanticipated research, investigation or witness problems during trial, etc. In these cases a lump-sum award shall be a percentage of the earned fee schedule amount. The percentage can be any figure agreed upon by a majority of the Special Fee Committee within a range of twenty to fifty percent (20% - 50%).

TYPE B - These are the extremely serious, difficult, complex and lengthy cases handled by panel members. Cases determined by the Special Fee Committee to be within this category shall receive premiums from among the ranges set forth below, as applicable, and as determined in the judgment of the Special Fee Committee.

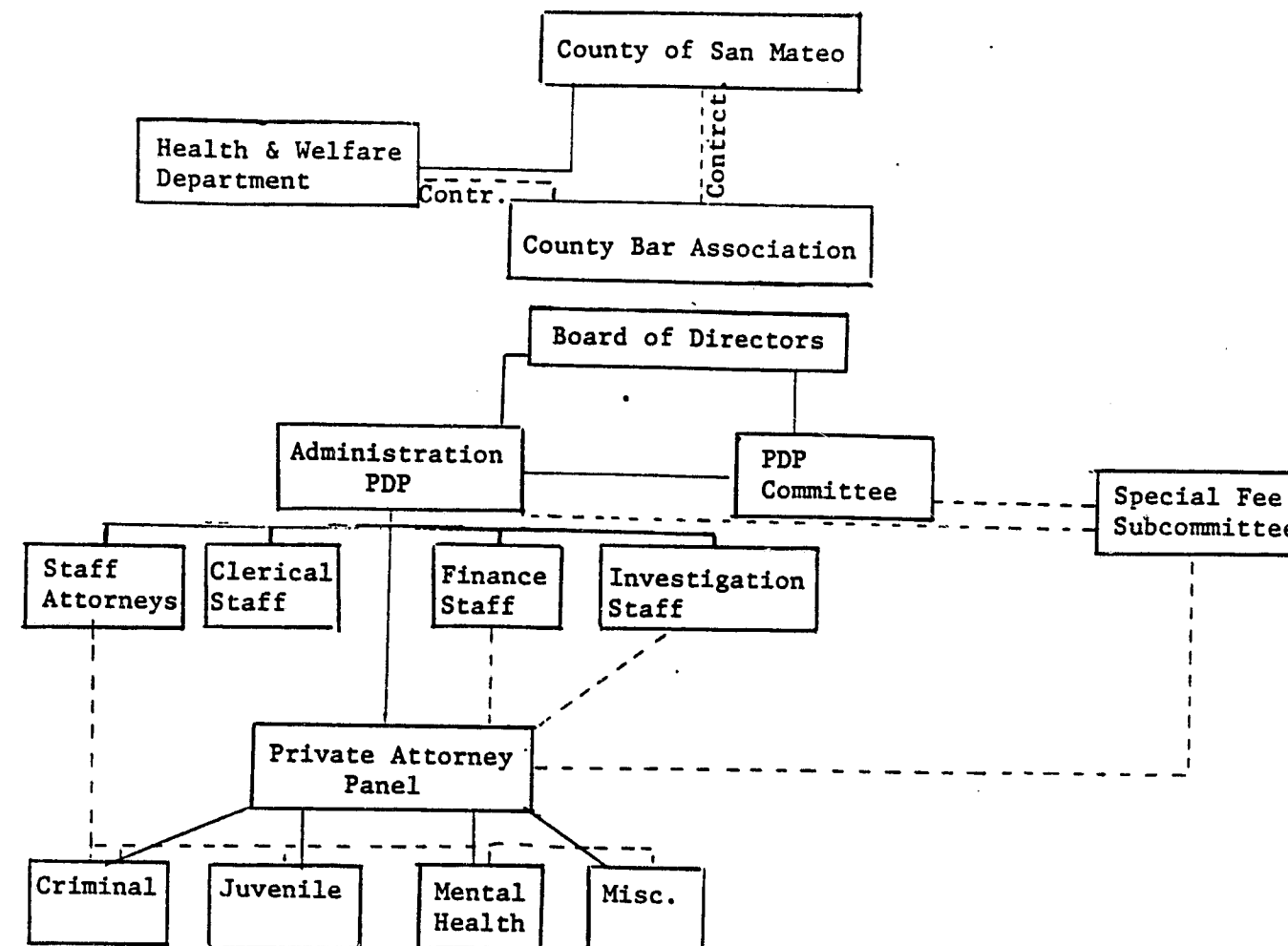
1. Per Diem - court appearances - trial \$50 - \$35 - \$25
2. Per Diem - court appearances - non-trial \$50 - \$35 - \$25
3. Per Hour - non-trial, non-court \$35 - \$30 - \$25

Obviously, the highest figure should be applied to the most serious, complex or lengthy case, e.g. homicide cases where the death penalty is sought; extremely complicated business fraud cases, etc.

The per diem rate for non-trial court appearances (usually motions) should be considered separately from the per diem rate for trial appearances and the appropriate rate should be fixed according to the seriousness, complexity or length of particular motions or appearances.

APPENDIX A

APPENDIX B



Administrator:

- a. Helps negotiate contract
- b. Helps formulate budget
- c. Helps formulate fee schedule
- d. Overall administrative responsibility
 1. Selects panel/Structures panel
 2. Assigns cases
 3. Approves administrative Special Fees
 4. Member of Special Fee Subcommittee
 5. Approves costs/Investigative Services
 6. Liaison with other elements of Criminal Justice System
- e. Some case work

PROFILE OF THE ALAMEDA, CALIFORNIA
MIXED COORDINATED ASSIGNED COUNSEL SYSTEM

Overview

The indigent defense system in this county of almost 1.1 million inhabitants (1,098,500 according to the 1980 census) is characterized by a full time defender system operating alongside of a coordinated assigned counsel system for multiple defendant cases and other cases where the public defender would have a conflict of interest. Per capita expenditures for indigent defense are higher in Alameda county (\$7.93) than in neighboring San Mateo (\$3.24). However, Alameda county has a large poor population, especially in Oakland, its major city. The major feature of this program which differentiates it from those in neighboring counties is its reliance on a committee of the Bar Association which determines which lawyers are to be on which panels. These panels are stratified according to experience, and appointments are made to panel members in strict rotation within the panels.

Staff of the Program

The program staff consists of a director who was not an experienced criminal lawyer (unlike the directors in neighboring San Mateo, Santa Clara, and to some extent San Francisco who were experienced criminal practitioners), and two clerks. These clerks receive phone calls from the Court after a conflict of interest has been declared, and then after taking down information over the phone as to name of case, charge, which court, etc. contact the appropriate panel attorney whose name is next on the appropriate panel list. These clerks also maintain information on the types and numbers of cases handled by each attorney and those matters for which counsel was paid. However, no records are kept of dispositional data on each case.

The director is part time, but also works for the civil referral program of the Bar Association. He reports to the Defender Committee of the Bar Association.

Defender Committee

The Bar Association provides oversight to the assigned counsel program through a defender committee, composed of nine members. This committee determines the qualifications for each panel. It is composed of two criminal law specialists, four attorneys with substantial criminal experience, one attorney with less than five years experience, and two civil attorneys. There is also an evaluation committee that conducts annual evaluations to determine who should move up to the next panel level.

Operation of the Panels

There are approximately 200 attorneys on the panels. There are five basic panels, those who qualify for the representation of capital cases, murder cases, felonies with possible sentences over four years, other felonies, and misdemeanors. For each there are specific qualifications based upon the number of trials and criminal cases handled. If a lawyer cannot accept appointment when called, he is called again for the next appointment. However, if he refuses three times in a row, he drops to the bottom of the list.

Costs, Budgets, and Fees

The annual budget for the assigned counsel program was \$1,457,000 in fiscal 1980-81. More than forty lawyers received \$10,000 or more from the program that year, with some lawyers earning as high as \$50,000. There is a basic fee per case, ranging from \$100 in a simple felony case to \$1,000 in a case involving a possible death sentence. In addition, lawyers may bill for motions argued, days on trial, and special hearings.

Support services are reimbursable, but it is preferred that approval be sought from the committee in advance for investigators and other support services. Fee requests are approved by the program.

Every year the Bar Association negotiates a contract with the County Board of Supervisors. This contract must include the Bar's administrative costs. For 1981 the Bar estimated its administrative cost at \$76,000.

Summary

This program exemplifies a coordinated assigned counsel system where volunteer members of the Bar Association Committee exercise strong control and oversight over the program. It works in conjunction with a full time defender program in the county and utilizes almost every member of the private criminal bar in Alameda County.

Court-Appointed Attorneys' Program Evaluation Questionnaire

Attorney:

Class status to be evaluated: 1 2 3 4

Rating: S - satisfactory N - unsatisfactory

Evaluator: _____ Judge _____ Staff DA _____ Staff PD _____ Co-counsel

Based on your observation and personal knowledge, please rate the above-named attorney in the categories listed. Place an "S" in the box if you consider the attorney satisfactory in that category or an "N" if unsatisfactory. Then comment, please, and check your recommendation.

	S	N		S	N
Integrity			Ability to handle clients		
Temperament			Understanding/application of the law		
Promptness			Rapport with judges/court personnel		
Courage			Ability to try a case (or hearing)		
Judgement			Ability to select a jury		
Health			Presentation of evidence		
Willingness to work			Cross-examination of witnesses		
Stability			Ability to argue the case		
Develop case theory					

Comment: _____

Recommendation: _____ classify as _____ do not classify as 1 2 3 4

(signature)

(Please print or type)

(over)

CONTINUED

5 OF 6

Support services are reimbursable, but it is preferred that approval be sought from the committee in advance for investigators and other support services. Fee requests are approved by the program.

Every year the Bar Association negotiates a contract with the County Board of Supervisors. This contract must include the Bar's administrative costs. For 1981 the Bar estimated its administrative cost at \$76,000.

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Based on your observation and personal knowledge, please rate the above-named attorney in the categories listed. Place an "S" in the box if you consider the attorney satisfactory in that category or an "N" if unsatisfactory. Then comment, please, and check your recommendation.

Integrity
Temperament
Promptness
Courage
Judgement
Health
Willingness to work
Stability
Develop case theory

S	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Ability to handle clients
Understanding/application of the law
Rapport with judges/court personnel
Ability to try a case (or hearing)
Ability to select a jury
Presentation of evidence
Cross-examination of witnesses
Ability to argue the case

S	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Comment: _____

Recommendation: ___ classify as ___ do not classify as 1 2 3 4

(signature)

(Please print or type)

(over)

E. CATEGORIES OF CRIMES - Crimes shall be separated into five (5) categories.

- (1) Capital cases
- (2) Class one: Non-capital homicides and all life sentence crimes including life without possibility of parole.
- (3) Class two: All crimes for which the penalty range is 4 years or more.
- (4) Class three: All other felonies.
- (5) Class four: All misdemeanors.

F. EXPERIENCE REQUIREMENTS FOR THE CATEGORIES OF CRIMES

The categories shall be:

(1) Special Circumstances: The member must qualify for Class I; must have had three trials (two of which were jury trials) where the charge was homicide and the case went to verdict, decision or hung jury; must have had two trials of any kind where the member presented psychiatric testimony by use of an expert; and must have handled an appeal civil or criminal, from beginning to decision by an appellate court.

(2) Class One: Certified criminal specialists and those members who have the equivalent experience.

(3) Class Two: Those who have handled as chief counsel twenty-five (25) crimes charged as felonies, three (3) of which were felony jury trials where the cause was submitted to the jury for decision, and three (3) of which were 1538.5 hearings in which evidence was taken before a superior court judge. Juvenile cases charged as felonies, up to a maximum of ten (10) may be counted toward the requirement of twenty-five (25) felonies.

(4) Class Three: Those who have handled as chief counsel fifteen (15) criminal cases, three (3) of which were submitted to a jury for a decision; an additional five (5) of which were contested factual hearings; and the remainder of which proceeded to disposition. A maximum of five (5) juvenile cases charged as felonies may be counted toward the requirement of the said fifteen (15) cases.

(5) Class Four: All attorneys who are members of the panel.

(6) Eligibility for juvenile cases will be based on the same criteria as adult cases. An attorney appointed to represent a minor will be reappointed to represent that person in the event the minor's case is remanded to the adult court.

(7) Upon a proper showing a person may be eligible for a class by virtue of a showing of equivalent experience as determined by the Committee.

**RULES AND REGULATIONS OF THE
ALAMEDA COUNTY COURT-APPOINTED ATTORNEYS' PROGRAM
AS AMENDED FEBRUARY 1, 1981**

A. ADMINISTRATION OF THE PROGRAM

(1) The Program shall be operated under the auspices of the Alameda County Bar Association, hereinafter referred to as the "Bar Association." The responsibility for the administration of the Program shall vest in the Board of Directors of the Bar Association. To assist in carrying out this responsibility the Board shall authorize the President of the Association to appoint a committee of nine (9) active members of the Association.

(2) The terms of the Committee members shall be alternated so that three (3) members shall be appointed each year, each member to serve a three (3) year term, except initially, when three (3) members shall be appointed for one year, three (3) members for two (2) years and (3) members for three (3) years. The composition of the Committee shall be: Two (2) members who are certified specialists in criminal law; one (1) member who is a trial attorney in civil law; one (1) member whose practice is predominantly civil law; one (1) member who has been admitted to the Bar for less than five (5) years and whose practice is, in part, criminal law; and four (4) members who have, or have had, a substantial practice in criminal law.

(3) Five (5) members of the Committee shall constitute a quorum.

(4) The Committee shall establish a liaison with the Municipal and Superior Courts of Alameda County.

(5) Any member of the Committee may be removed at any time without cause by the Board of Directors of the Bar Association.

(6) The Committee shall have the responsibility to regularly review the rules and make such changes or additions thereto, as may, from time to time, be deemed appropriate to carry out the purposes of the Program, subject to approval of the Board of Directors of the Bar Association.

B. ESTABLISHMENT, MEMBERSHIP AND ELIGIBILITY IN THE PANEL

(1) The Program shall be operated as a panel consisting of lawyers eligible for membership as hereinafter set forth.

(2) Each member of the panel must be an active member of the State Bar of California.

(3) Each member must agree in writing to abide by the rules of the Program.

(4) Each member must sign a declaration under penalty of perjury that he maintains his principal office in Alameda County, and that the majority of his practice is in Alameda County.

(5) Each member who maintains more than one office in this County must designate which office shall be his principal office for the geographical qualification as hereinafter set forth.

(6) Each member of the panel shall agree to indemnify and hold harmless:

a) The Bar Association, its officers, directors, members, and employees.

b) the Committee and

c) the County of Alameda, its officers and employees from any and all claims, demands, actions, liability or loss which may arise, or be incurred because of any and all referrals, assignments, activities and appointments resulting from participation in the Program.

(7) Each member of the panel shall pay an annual fee. For those who are members of the Alameda County Bar Association, it will be Twenty-Five (\$25) if in practice less than five (5) years and Fifty-Dollars (\$50) if five (5) years or more. All others will pay Fifty-Dollars (\$50) if in practice less than five (5) years and Seventy Five Dollars (\$75) if five years or more.

C. APPLICATION AND RECERTIFICATION

(1) Membership on the panel shall be by written application only submitted on the form provided by the Committee and shall include provisions for requiring each applicant to:

a) State applicant's eligibility for membership, for handling the different categories of crimes, and geographical choice.

- b) Declare familiarity with and agree to abide by the contract between the County of Alameda and the Alameda County Bar Association and all of these rules and regulations and such other further rules and regulations as may be adopted by the Committee.
- c) Waive any and all claims against the Alameda County Bar Association and its officers, directors, members, employees and the Committee for any liability or loss arising out of the operation of the Program or of referrals, assignments and appointments.

(2) Each applicant shall remit the annual membership fee with the completed application.

(3) All panel members shall be required to renew their panel membership each year.

(4) Panel members may, at any time, submit an amendment to their application for eligibility as panel members in a higher category.

(5) All applications for membership in the Court-Appointed Attorneys' Program, and all members seeking an elevation in class or category, will be evaluated for certification upon the return of a completed application. Members renewing their annual membership will be evaluated for re-certification of their various classes at the beginning of each membership year. Also, a member may be re-classified at any time.

(6) The Evaluation Committee, which shall be selected by the Court-Appointed Attorneys' Program Committee and be composed of Superior and Municipal Court judges and attorneys who practice criminal law, will make certification recommendations for the various classes to the Court-Appointed Attorneys' Program Committee whose decision will be final. If, however, the subject of an evaluation is a member of the Court-Appointed Attorneys' Program Committee, the decision of the Evaluation Committee will be final.

(7) Any applicant or member of the panel who has been denied certification in any class or category shall, upon written request to the Court-Appointed Attorneys' Program Committee, have the right to appear and be heard and to present evidence of having met the standard of care in the community for the representation of criminal defendants in the class or category for which certification was denied. The decision of the Court-Appointed Attorneys' Program Committee will be final; except that, if a hearing is requested by a member of the Court-Appointed Attorneys' Program Committee, it will be conducted by the Evaluation Committee whose decision will be final.

D. GEOGRAPHICAL ELIGIBILITY

(1) The geographical basis for appointment shall, wherever feasible, be the location of the occurrence of the crime. Attorneys, otherwise eligible, who maintain a principal office in a given judicial district, as designated in B (5) above, shall be eligible for appointment in cases arising as a result of crimes committed in that judicial district.

(2) Juvenile cases shall, wherever feasible, be assigned to attorneys eligible in the judicial district of the residence of the minor. In cases where the minor resides out of the County, those cases heard in Juvenile East shall be assigned to attorneys in the Hayward-San Leandro, Fremont, or Pleasanton judicial districts and those cases heard in Juvenile West shall be assigned to attorneys in the Berkeley, Oakland or Alameda judicial districts.

(3) Notwithstanding any provision relating to geographical eligibility, if an attorney has been appointed to represent a defendant in this county, such attorney shall be appointed to represent said defendant in any case which may arise in any court in the county while the original charge is pending and judgement has not been imposed, provided said attorney meets the necessary experience standards. If he or she does not, the case shall be assigned to an attorney eligible and qualified to handle such case, and who shall then represent the defendant in all of his or her cases.

E. CATEGORIES OF CRIMES - Crimes shall be separated into five (5) categories.

(1) Capital cases

(2) Class one: Non-capital homicides and all life sentence crimes including life without possibility of parole.

(3) Class two: All crimes for which the penalty range is 4 years or more.

(4) Class three: All other felonies.

(5) Class four: All misdemeanors.

F. EXPERIENCE REQUIREMENTS FOR THE CATEGORIES OF CRIMES

The categories shall be:

(1) Special Circumstances: The member must qualify for Class I; must have had three trials (two of which were jury trials) where the charge was homicide and the case went to verdict, decision or hung jury; must have had two trials of any kind where the member presented psychiatric testimony by use of an expert; and must have handled an appeal, civil or criminal, from beginning to decision by an appellate court.

(2) Class One: Certified criminal specialists and those members who have the equivalent experience.

(3) Class Two: Those who have handled as chief counsel twenty-five (25) crimes charged as felonies, three (3) of which were felony jury trials where the cause was submitted to the jury for decision, and three (3) of which were 1538.5 hearings in which evidence was taken before a superior court judge. Juvenile cases charged as felonies, up to a maximum of ten (10) may be counted toward the requirement of twenty-five (25) felonies.

(4) Class Three: Those who have handled as chief counsel fifteen (15) criminal cases, three (3) of which were submitted to a jury for a decision; an additional five (5) of which were contested factual hearings; and the remainder of which proceeded to disposition. A maximum of five (5) juvenile cases charged as felonies may be counted toward the requirement of the said fifteen (15) cases.

(5) Class Four: All attorneys who are members of the panel.

(6) Eligibility for juvenile cases will be based on the same criteria as adult cases. An attorney appointed to represent a minor will be reappointed to represent that person in the event the minor's case is remanded to the adult court.

(7) Upon a proper showing a person may be eligible for a class by virtue of a showing of equivalent experience as determined by the Committee.

G. THE PANEL

(1) The panel of member attorneys shall be arranged in accord with each member's eligibility, and geographically by the county's judicial districts. Referrals for appointment shall be made from each panel on a rotating basis.

(2) Upon receipt of a request from a judge of a court or the Clerk thereof, or upon receipt of written notice from the Public Defender that a conflict exists, or that for some other valid reason the Public Defender cannot represent the defendant in a particular case, the committee shall provide names of the eligible attorneys to the court for assignment. Referrals for appointment shall be made from each panel on a rotating basis.

(3) If a member refuses an appointment he shall maintain his position on the panel list, but if he refuses three (3) appointments within a fifteen (15) day period, he shall be placed at the bottom of all of the panel lists on which he is registered.

(4) An attorney appointed shall be responsible for the case and shall not delegate its handling to any other attorney except for continuances and settings. In an emergency, with the approval of the Program Administrator, the attorney may cause or allow another attorney to make other appearances and do any other act regarding the case; provided, the other attorney is a member of the panel and eligible to handle the class of case. The Program will pay only the attorney appointed in the case.

H. APPEALS (Deleted)

I. VOLUNTEER SERVICES

(1) A member may volunteer to handle a case for which he is eligible. In such event, the member shall receive no pay. Such service may count toward eligibility for classification to handle more serious crimes. A member volunteering for a case for which he is eligible shall immediately be placed at the top of the list in that classification in order to receive an appointment as a volunteer. A member shall not lose his regular place on the rotation list by volunteering.

(2) A member may continue to volunteer to handle cases provided, however, no member shall be assigned more than three (3) volunteer cases at any time.

(3) If any more than one member volunteers within a classification and geographical location, the members' names shall be placed at the top of the list for his classification in the order in which the Program receives his request to volunteer.

J. OPERATIONS

The board of directors shall designate an administrator whose duty it shall be to administer the program under the supervision of the Committee pursuant to these Rules. He shall be responsible for the referral and assignment procedures, the keeping of the program records, the development of whatever statistics may be required by the Committee, periodical reports to the Committee and the Board and he shall perform whatever other administrative functions may be delegated to him by the Committee and the Board consistent with the spirit and purposes of the program.

K. SUSPENSION, TERMINATION AND RECLASSIFICATION

(1) A member will be subject to suspension, termination or reclassification for any of the following reasons:

- a) Willful failure to pay any fee, render any report, or otherwise abide by the rules and regulations of the Program.

b) For good cause.

c) Inability to function as an effective criminal attorney.

(2) The Court-Appointed Attorneys' Program Committee, its discretion, may at any time re-evaluate and reclassify a member to a lower class.

(3) A member who is suspended, terminated or reclassified is entitled to a hearing upon request.

(4) A member may withdraw from the Program at anytime upon written notice to the Administrator, but no portion of any fee paid to the Program will be returned, nor will any unpaid fee due the Program be discharged. The member resigning will be expected, whenever possible, to complete the cases to which the member has been appointed.

L. ATTORNEY'S FEES AND EXPENSES

(1) All lawyers as a condition to becoming eligible for appointments on any of the panels shall agree to handle all cases to which they are appointed on the fixed fee schedule hereinafter set forth; except,

a) If the attorney appointed or being considered for appointment believes that the case is of such a special or unusual nature that it is not possible to render services in accord with the fixed fee schedule, the attorney must file an affidavit to that effect, giving the reasons for that conclusion and requesting the payment of an equitable fee and reasonable expenses. If the Committee and the attorney reach an agreement, the Committee shall recommend to the County what it considers to be an equitable fee and reasonable expenses. If the County accepts the recommendation, the attorney will represent the defendant at the agreed fee. If the County is unwilling to accept the recommendation, the Committee, the attorney or the County shall notify the judge presiding in the case who shall then set a fee, allow expenses and arrange for representation of the defendant.

b) When a felony trial and/or substantial other fees exceeding \$1,000 are avoided due to the skill, effort and expertise of an individual attorney, the Committee may increase the payment to an attorney on a case by an amount not to exceed \$500. When a misdemeanor trial and/or substantial other fees exceeding \$500, are avoided due to the skill, effort and expertise of an individual attorney, the Committee may increase the payment to an attorney on a case by an amount not to exceed \$250. These costs will be offset by savings in the funds allocated for trial time and will not serve as the basis of an augmentation of the contract. The Committee will send the County a monthly listing of all such payments made.

(2) Reasonable and necessary expenses incurred during the course of representation of a defendant shall be reimbursed by the County only on approval by the Committee or by Court order. All expenses must be authorized prior to the attorney incurring the expense. Expenses which are incurred during the course of a trial or juvenile hearing without prior authorization by the Committee or by the Court may be approved by the Committee on a showing that the expenditure was reasonable and necessary and the request for expenses could not have reasonably been made prior to the trial or hearing. No payments shall be allowed for travel expenses or travel time of the attorney, telephone calls or normal overhead expenses unless special or unusual circumstances exist which, in the opinion of the Committee, can justify payment of such expenses.

(3) The procedure, to be followed for filing special expenses claims in capital cases by the Bar Association is as follows:

a) The panel attorney in the capital case shall secure a court order for expenses pursuant to Penal Code Section 987.9 and present the order to the Auditor-Controller's office for payment.

b) A copy of the order or a statement of the amount approved by the order shall be sent to the Court-Appointed Attorneys' Program Committee.

c) The attorney shall complete a declaration for attorney's fees and shall attach a copy of the order for expenses and a complete accounting of the expenditures pursuant to it and forward it to the Committee.

d) The Committee, upon approval of the declaration, order and accounting shall send it under separate cover letter to the Auditor-Controller's Office for payment.

e) The Auditor-Controller shall make a claim for reimbursement from the State and credit the Program's expenditures.

(4) Declarations for fees shall be subject to the following provisions:

a) The Committee shall provide standard declaration under penalty of perjury forms for the payment of fees and expenses.

b) The member shall, within 30 days after completion of the case, submit a completed declaration to the Committee requesting payment of attorney's fees. With prior approval of the Committee, the declaration may be submitted before the case is completed. The Committee shall review all such declarations to determine whether or not they should be approved or modified. Declarations approved as submitted shall thereafter be endorsed and forwarded to the authorized county agency for payment.

c) In the event a declaration is modified, the attorney shall be notified by the Committee. If the member wishes to dispute the modified declaration he or she may apply for a hearing with the Committee within fifteen (15) days after the mailing of the notice of the Committee's action. At such hearing the Committee may re-affirm or alter its original decision. The declaration, as finally approved, shall then be endorsed and forwarded for payment.

d) All declarations must be in within thirty days after the case has been closed or a defendant in a felony has been held to answer. Failure to submit the declaration within that period will result in a penalty against the attorney's fee as follows:

(1) If the declaration is submitted between thirty-one and sixty days after the case has been closed, there will be a 25% reduction in the amount of fee paid.

(2) If the declaration is submitted between sixty-one and ninety days after the case has been closed, there will be a 50% reduction in the amount of fee paid.

(3) If the declaration is submitted between ninety-one and one hundred twenty days after the case has been closed, there will be a 75% reduction in the amount of fee paid.

(4) If the declaration is submitted a hundred and twenty days or more after the closing of the case or the defendant in a felony has been held to answer, the attorney will receive no payment whatsoever.

e) A cumulative earnings list of the fees paid each attorney will be compiled at the end of every quarter. If an attorney has \$5,000.00 or more above the cumulative earnings of the sixth highest on the list, the attorney will be removed from the rotation list for the next succeeding quarter and each successive quarter thereafter until such time as the attorney's cumulative earnings, upon a quarterly check, are below the \$5,000.00 limitation; except that, an attorney shall not be removed from rotation for more than one year, after which the attorney shall not be subject to removal again for six months. The last eight quarters of the attorney's participation in the Program will apply in the preparation of the quarterly cumulative earnings list.

f) If an attorney wishes to withdraw from a case, with Court approval, the Committee may refuse to authorize payment or may authorize payment of such fees as circumstances warrant.

FEE SCHEDULE

Court-Appointed Attorneys' Program

FELONIES

MUNICIPAL COURT

Special Circumstances Cases

\$500.00 - base per case

75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

\$125.00 - per session for preliminary examination.

Other Felonies

No Preliminary Examination

\$200.00 - base per case

75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

Preliminary Examination

Class I

- \$300.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 100.00 - per session for preliminary examination.

Class II

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 75.00 - per session for preliminary examination.

Class III

- \$100.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 75.00 - per session for preliminary examination.

Misdemeanor Probation Violations

- \$ 50.00 - if with existing case in the same court.
- \$100.00 - if independant proceeding in another court.

Miscellaneous Representation

- \$ 50.00 - per session

SUPERIOR COURT

Special Circumstances Cases

Disposed of Without Trial

- \$1,000.00 - base per case
- 100.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

Jury Trials

- \$750.00 - base per case
- 100.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances:
- 200.00 - per trial session for first 20 sessions.
- 225.00 - per trial session for 21st session and thereafter.

Other Felonies

Disposed of Without Trial

Class I

- \$500.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

Classes II and III

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

Jury Trials

Class I

- \$500.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 175.00 - per trial sessions for first 20 sessions.
- 200.00 - per trial session for 21st session and thereafter.

Class II

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 150.00 - per trial session for first 20 sessions.
- 175.00 - per trial session for 21st session and thereafter.

Class III

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 125.00 - per trial session for first 20 sessions.
- 150.00 - per trial session for 21st session and thereafter.

Court Trials

Class I

- \$500.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 175.00 - per trial session for first 20 sessions.
- 200.00 - per trial session for 21st session and thereafter.

Class II

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 150.00 - per trial session for first 20 sessions.
- 175.00 - per trial session for 21st session and thereafter.

Class III

- \$200.00 - base per case
- 75.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.
- 125.00 - per trial session for first 20 sessions.
- 150.00 - per trial session for 21st session and thereafter.

Felony Probation Violations

- \$ 50.00 - with existing case in the same court; \$100 per session if there is a hearing.
- 100.00 - if independent proceeding in another court; \$100 a session if there is a hearing.

Miscellaneous Representation

- \$ 50.00 - per session

MISDEMEANORS

MUNICIPAL COURT

Disposed of Without Trial

- ~~150.00~~ ~~\$125.00~~ - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail or continuance motions which will be paid only under unusual circumstances.

Jury Trial

- ~~150.00~~ ~~\$125.00~~ - base per case
- \$ 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.
- 100.00 - per trial session for first 20 sessions.
- 125.00 - per trial session for 21st session and thereafter.

Court Trial

- ~~150.00~~ ~~\$125.00~~ - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.
- 75.00 - per trial session

Misdemeanor Probation Violations

- \$ 50.00 - if with existing case in the same court.
- 100.00 - if independent proceeding in another court.

Miscellaneous Representation

- \$ 50.00 - per session

JUVENILE COURT

No Hearing

- ~~200.00~~ ~~\$100.00~~ - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.

Hearings (Jurisdictional, 707 W&I and 637 W&I)

Classes I and II

- ~~200.00~~ ~~\$100.00~~ - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.
- ~~100.00~~ ~~75.00~~ - per hearing session for first 20 sessions.
- 100.00 - per hearing session for 21st session and thereafter.

All Other Classes

- ~~200.00~~ ~~\$100.00~~ - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.
- ~~75.00~~ ~~50.00~~ - per hearing session for first 20 sessions.
- 75.00 - per hearing session for 21st session and thereafter.

Miscellaneous Representation

- \$ 50.00 - per session

300 W&I Cases

- \$200.00 - base per case
- 50.00 - per session for each substantial motion accompanied by points and authorities, except discovery, bail and continuance motions which will be paid only under unusual circumstances.
- 75.00 - per hearing session

MISCELLANEOUS

Writs

- \$100.00 - each writ in any court

Appeals

Program does not pay for appeals

For C.A.A.P.'s

Amount Paid _____

Date Paid _____

Active Date _____

ATTORNEY'S APPLICATION FORM

THE ALAMEDA COUNTY COURT APPOINTED
ATTORNEYS' PROGRAM
THE ALAMEDA COUNTY BAR ASSOCIATION
405 - 14th Street, Suite 208
Oakland, CA 94612

Name: _____ Telephone: _____
(Print or Type)

Principal
Office Address: _____
Number and Street Suite No. Zip

Judicial District: _____

Date admitted to practice in California: _____

I am am not a member of the Alameda County Bar Association (Circle)

I hereby request membership in The Alameda County Court Appointed Attorneys' Program.

Annual membership fee: In practice less than 5 years \$25.00
Non-members of ACBA \$50.00
In practice 5 years or more \$50.00
Non-members of ACBA \$75.00

AN ATTORNEY WHO CANNOT MEET THE REQUIREMENTS SET FORTH BELOW MAY FILE A PETITION WITH THE COMMITTEE CONTAINING A DETAILED STATEMENT OF EQUIVALENT EXPERIENCE, AND, SUBJECT TO A DETERMINATION UPON IT BY A MAJORITY OF THE COMMITTEE, MAY BE APPOINTED TO HANDLE CASES IN THE REQUESTED CATEGORY.

I declare under penalty of perjury that the following is true and correct:

1. I am an active member in good standing of the State Bar of California, and I maintain my principal office for the practice of law in Alameda County.
2. I have read and understand the Rules and Regulations of The Alameda County Court Appointed Attorneys' Program and will abide by them and by such other and further rules and regulations as may be adopted by The Alameda County Court Appointed Attorneys' Program Committee of The Alameda County Bar Association.
3. I agree to indemnify and hold harmless a) The Alameda County Bar Association, its officers, directors, members, and employees, and b) The Alameda County Court Appointed Attorneys' Program Committee of The Alameda County Bar Association, and c) The County of Alameda, its officers and employees, from any and all claims, demands, actions, liability or loss which may arise, or be incurred because of any and all referrals, assignments, activities and appointments resulting from participation in The Alameda County Court Appointed Attorneys' Program.
4. I waive any and all claims against The Alameda County Bar Association and its officers, directors, members, employees and The Alameda County Court Appointed Attorneys' Program Committee for The Alameda County Bar Association, for any liability or loss arising out of the operation of The Alameda County Court Appointed Attorneys' Program, in referrals, assignments, or appointments.
5. I have read and understand the classifications of crimes and the eligibility standards for the categories of crimes as set forth in the Rules and Regulations of The Alameda County Court Appointed Attorneys' Program, and I elect to accept cases in the following categories of crimes for which I state my eligibility as follows:

SPECIAL CIRCUMSTANCES HOMICIDE CASES

- A. ☐ I am a registered Class I attorney in the Program.
- B. I have been attorney of record in three (3) trials where the charge was homicide, all of which went to verdict, decision or hung jury. Two of the three trials must have been jury trials.

CASE AND FILE #	JURY (✓)	COURT	DISPOSITION & DATE
1. _____			
2. _____			
3. _____			

- C. I have been attorney of record in two (2) trials of any kind where the attorney prepared psychiatric testimony.

CASE AND FILE #	COURT	DISPOSITION & DATE
1. _____		
2. _____		

- D. I have been the attorney of record in one (1) appeal, civil or criminal, from beginning to decision in an appellate court.

CASE AND FILE #	CIVIL/CRIMINAL	COURT	DISPOSITION & DATE
1. _____			

CLASS I

☐ I am a certified criminal specialist. Date certified: _____

CLASS II (25 FELONIES)

CASE AND FILE #	CITY-COURT-JURY/COURT/PLEA	DECISION AND DATE
<u>Felonies to Jury Decision:</u>		
1. _____		
2. _____		
3. _____		
<u>1538.5 Hearings:</u>		
4. _____		
5. _____		
6. _____		

Other:

CASE AND FILE #	CITY-COURT-JURY/COURT/PLEA	DECISION AND DATE
7. _____		
8. _____		
9. _____		
10. _____		
11. _____		
12. _____		
13. _____		
14. _____		
15. _____		
16. _____		
17. _____		
18. _____		
19. _____		
20. _____		
21. _____		
22. _____		
23. _____		
24. _____		
25. _____		

CLASS III (15 CRIMINAL CASES)

CASE AND FILE #	CITY-COURT-JURY/COURT/PLEA	DECISION AND DATE
<u>Criminal Cases to Jury Decision</u>		
1. _____		
2. _____		
3. _____		
<u>Contested Factual Hearings:</u>		
4. _____		
5. _____		
6. _____		
7. _____		
8. _____		
<u>Proceeded to Disposition:</u>		
9. _____		
10. _____		
11. _____		
12. _____		
13. _____		
14. _____		
15. _____		

CLASS IV (MEMBERSHIP IN THE PROGRAM)

Executed at _____, California, this _____ day of _____, 19 _____.

Signature of Attorney Applicant _____

PROFILE OF THE SAN FRANCISCO, CALIFORNIA
MIXED COORDINATED ASSIGNED COUNSEL SYSTEM

Overview

The indigent defense system in this county of 678,974 inhabitants consists of a full time public defender system augmented by an assigned counsel system operated by the San Francisco Bar Association. The assigned counsel system is characterized by several panels of private attorneys, stratified by experience level, assignment of counsel by a part time staff that also administers the civil referral program of the Bar Association, and review of fee vouchers by the Court. All funds are paid directly to panel attorneys upon court authorization, so that unlike neighboring Santa Clara or San Mateo Counties, funds do not pass through the Bar Association or the program.

Operation of the Program

The county bar association operates an extensive civil bar referral service. The criminal assigned counsel panel program is housed in the Bar Association along with the civil program. The Administrator, who had some experience as a private criminal practitioner, spends about five hours per month on the program. The actual assignment of attorneys each month is done by a manager who spends the equivalent of about five working days per month or 25% of her time on the criminal panels. In addition, a law student spends about 20 hours per month on administrative tasks associated with the program.

In order to facilitate the actual appointment of counsel for multiple defendant cases and other cases in which the Public Defender staff would have a conflict of interest, the program staff prepares a monthly list of available attorneys with their phone numbers. These attorneys have all indicated their availability to accept cases on specific duty days. There are separate panels for misdemeanor, felony, misdemeanor, and murder cases with 145 attorneys on the panels. Asterisks are placed next to the names of those attorneys on the list who are qualified to accept murder or death penalty cases. The list is then transmitted to the Court for the convenience of the Judges in making appointments as the need arises.

Fee Schedules

The fee structure, like the Court system in San Francisco, is two tiered. In Superior Court, where felonies are disposed of, lawyers may bill at a rate of \$36.00 per hour for in-court time and \$24.00 per hour for out of court time. In addition, if the case goes to trial, the lawyer may bill \$300.00 per day for each day the defendant is on trial. In the Municipal Court, there is a base fee of \$100 per case with additional increments for motions, etc. plus \$100 per day if the case is tried before the Court, and \$150 per day for each day of trial before a jury. The Court reviews all vouchers and approves payment direct to the attorneys. The trial judge may not approve the entire amount requested by the attorney. If that occurs, the lawyer may appeal to the Administrative Committee of the Court. For a copy of the fee schedule, see Appendix A.

Eligibility

Eligibility for appointed counsel is determined at the arraignment in Municipal Court. The Presiding Judge issued a memorandum to the other judges suggesting guidelines for eligibility, e.g. an individual defendant with three dependents could earn up to \$950.00 per month and still be

eligible. For a copy of the eligibility guidelines, see Appendix B.

Qualifications for the Panel and Reporting Procedures

There are three trial panels and three appellate panels. The first trial panel is for appointment to misdemeanor cases and requires either certification as a criminal law specialist or representation of criminal defendants in ten cases, two jury trials, and a current criminal practice of at least 20%. For appointment to a felony case, three jury trials, five preliminary hearings, five motions to suppress, etc. or certification as a criminal law specialist is necessary. Appointment to a murder or death penalty case requires experience in three prior death penalty or murder cases, etc. Appointment in appellate cases requires requisite trial experience in addition to appropriate appellate experience.

For a copy of the application form, see Appendix C.

After appointment by the Court in a conflict of interest case, the attorney sends a copy of a daily report form back to the program, informing the Administrator which cases he was appointed to that day.

For a copy of that report form, see Appendix D.

Budget and Costs of the Program

The Public Defender budget for the county is approximately 3.8 million. The total assigned counsel budget is about 1.2 million. Of this figure, only \$12,000 is spent in administrative costs. The average cost per case for felonies was estimated at \$651.00 and the average misdemeanor cost at \$217.00. This latter cost however, included felonies disposed of as misdemeanors.

Summary and Conclusion

This program operates with a stratified panel under the supervision of the Bar Association and represents all cases in which the Court determines that the Public Defender has a conflict of interest. It is coordinated by a part time staff that keeps minimal records, and whose primary role

is to prepare a monthly list of those attorneys available to accept appointments in criminal cases. All fee vouchers are reviewed by the Court and paid according to a specific fee schedule.

ADMINISTRATIVE PROCEDURES

35

Procedure 3006.

Court Appointed Counsel Compensation Schedule

Effective with Counsel appointments January 1, 1981 and thereafter.

a. Felonies.

(1) No Preliminary Hearing

- (a) \$100 per case, plus
- (b) \$50 per session for each substantial motion accompanied by points and authorities.

(2) Preliminary Hearing

- (a) \$250 base per case for special circumstance case;
- (b) \$100 base per case for non-special circumstance case, plus
- (c) \$50 per session for each substantial motion, plus
- (d) \$75 per session (½ day).

(3) Misdemeanor Probation Violation

- (a) \$25 with existing preliminary hearing.

(4) Compensation for Extraordinary Services

- (a) \$20 out of court;
- (b) \$30 in court.

NOTE: Factors in Penal Code §987.3 to be considered in applying schedule.

Effective with Counsel appointments January 1, 1981 and thereafter.

b. Misdemeanors

(1) Disposed of Without Trial

- (a) \$100 base per case (except \$35 for a diversion case), plus
- (b) \$35 per session for each substantial motion accompanied by points and authorities.

(2) Jury Trial

- (a) \$100 base, plus
- (b) \$35 per session for each substantial motion, plus
- (c) \$75 per jury session (½ day).

(3) Court Trial

- (a) \$100 base, plus
- (b) \$35 per session for each substantial motion, plus
- (c) \$50 per court trial session (½ day).

ADMINISTRATIVE PROCEDURES

(4) Misdemeanor Probation Violation

- (a) \$25 if with existing case in same court;
- (b) \$50 if independent proceeding.

(5) Compensation for Extraordinary Services

- (a) \$20 out of court;
- (b) \$30 in court.

NOTE: Factors in Penal Code §987.3 to be considered in applying schedule.



APPENDIX B

The Municipal Court

San Francisco, California

DOMINIQUE OLCOMENDY, JUDGE

MEMORANDUM

TO: All Judges FROM: J. Dominique Olcomendy
RE: Eligibility -- Court Appointed Counsel DATE: May 26, 1981

Effective June 1, 1981, the following schedule of gross monthly income will qualify an individual for court appointed counsel if the gross income is less than:

		GROSS Income
Individual	----	\$500
with 1 dependent	----	650
with 2 dependents	----	800
" 3 "	----	950
" 4 "	----	1150
" 5 "	----	1250
" 6 "	----	1400
" 7 "	----	1550
" 8 "	----	1700

If spouse is employed gross monthly income of spouse is to be added to individuals to determine qualifying amount for individual and dependent spouse. For example, total of both incomes cannot exceed \$650 to qualify an individual with one dependent (spouse).

Individuals receiving financial assistance from SSI, SSP, AFDC, Food Stamp Program, County Relief, General Relief or General Assistance (G.A.) will qualify for court appointed counsel.

As to property owned by an individual, it is recommended that assets such as home, automobile, jewelry, be considered in determining whether an individual qualifies.

memo

5-26-81

The preceding is meant as a guideline and each judge should determine whether or not, based on the Statement of Financial Condition, an individual qualifies. The expediting of court calendars shall not be considered as a basis for approving court appointed counsel.

Also, as a reminder, Penal Code Section 987.8 hearings should be considered in all cases where an individual has been approved for court-appointed counsel, especially in cases approved as "Questionable".

JDO/tw

SAN FRANCISCO SUPERIOR COURT, CRIMINAL DIVISION

P. v. _____

No. _____

Court Appearances: _____

hrs. \$36/hr. \$ _____

Out of Court Time: _____

hrs. \$24/hr. \$ _____

TOTAL HOURS: _____

SUB TOTAL: \$ _____

Expenses: _____ (auth: \$ _____) \$ _____

Trial: _____

Timely? yes no

days \$300/day \$ _____

Number of days late: _____ days

TOTAL \$ _____

Date submitted to Judge: _____

LAWYER REFERRAL SERVICE
THE BAR ASSOCIATION OF SAN FRANCISCO
220 Bush Street — 21st Floor
San Francisco, CA 94104
(415) 391-6102

APPENDIX C

\$10.00 Required with Appl.

PAID _____
(date rec'd)

Internal use only — do not fill out

**APPLICATION AND QUALIFICATION
STATEMENT FOR
CRIMINAL LAW PANEL**

NAME: _____ TELEPHONE: _____
OFFICE ADDRESS: _____
Number of years of practice in California: _____

You must be attorney of record and have done substantial amount of work on each case listed in this application. Jury trials count only after submission to jury. If your experience is outside of California, you must state how and why your experience is equivalent to the stated requirements.

CLASS ONE — Regular Criminal Panel

Part A — Misdemeanors

In order for you to be referred any misdemeanor case, you must be certified as a Criminal Law Specialist, qualify for Part B or must have handled at least two (2) criminal jury trials, ten (10) criminal matters all within the past 3 years and certify that twenty (20) percent of your current practice is criminal law work.

Please list your two (2) criminal jury trials:

Case Number	Court	Date
_____	_____	_____
_____	_____	_____

Please list your ten (10) criminal matters:

Case Number	Court	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

I hereby certify that twenty (20) percent of my current practice is criminal law work.

Signature of Applicant

Page Two

Part B — Felonies

In order to be referred any felony cases (except Part C cases), you must be certified as a Criminal Law Specialist or have handled at least three (3) Superior Court or Federal District Court criminal jury trials in the past three years, five (5) preliminary hearings in the past 3 years, five (5) motions to suppress in the past 3 years and certify that twenty (20) percent of your current practice is criminal law work.

Please list your three (3) Superior Court or Federal District Court criminal jury trials: (If you do not have the jury trials within the past 3 years, then list earlier ones or list the information in accordance with the requirements of substantial, equivalent experience. See paragraph at end of form.)

Case Number	Court	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____

Please list your five (5) preliminary hearings:

Case Number	Court	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Please list your five (5) motions to suppress, to set aside on 995, extraordinary writs, or combination of these:

Case Number	Type of Action	Court	Date
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

I hereby certify that twenty (20) percent of my current practice is criminal law work.

Signature of Applicant

Part C — Murder/Death Penalty

In order to be referred any murder or death penalty case, you must be certified as a Criminal Law Specialist or must have handled at least three (3) murder or death penalty cases and qualify for Part B of this panel.

Please list your three (3) murder or death penalty cases:

Case Number	Court	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____

CLASS 2 — Appeals

PART A — In order to be referred an appeal arising out of a misdemeanor matter, a panel member must qualify for Class 1 Part A* and, in addition, have completed work on an appeal or have been attorney of record in at least one extraordinary writ filed in Superior Court or Court of Appeal in which an opinion was rendered.

Case Number	Court	Date
_____	_____	_____

PART B — In order to be referred an appeal arising out of a felony matter, a panel member must qualify for Class 1 Part B* and, in addition, have completed work in at least 2 appeals or have been attorney of record in at least 2 extraordinary writs in which an opinion was rendered.

Case Number	Court	Date
_____	_____	_____

PART C — In order to be referred an appeal arising out of a murder or death penalty matter, a panel member must qualify for Class 1 Part C* and, in addition, have completed work in at least 2 murder or death penalty extraordinary writs in which an opinion was rendered.

Case Number	Court	Date
_____	_____	_____

CLASS 3 — Low Fee Criminal Panel

Attorneys who serve on this panel must agree to charge less than the customary rate and should not exceed, wherever possible, a maximum fee of \$300 plus costs.

I agree to serve on the low fee panel for ☐ misdemeanors ☐ felonies.

CLASS 4 — Court Appointment Panel

In order to be a member of this panel, an attorney must be a member of the Regular Criminal Panel and agree to the following:

- To appear in court on the assigned date at the assigned times;
- To accept, as sole compensation, the monies awarded by the court and pay \$20.00 therefrom to the Lawyer Referral Service as a referral fee; no referral fee is due if attorney is paid \$75. or less.
- To assist the court, when possible, in determining the monies, if any, to be paid to the City and County of San Francisco pursuant to Sections 987.4 and 987.8 of the California Penal Code;

I, the undersigned, have read the foregoing conditions for membership to the Criminal Law Court Appointment Panel and agree to abide by them.

Signature of Attorney

Date

VERIFICATION

I submit the above information in support of my application for membership on the above Experience Panel. I agree to cooperate with the Service in facilitating reasonable verification thereof and otherwise reviewing my qualifications for the named Experience Panel. I have read and am familiar with the Bar Association of San Francisco Lawyer Referral Service Rules and agree to abide by them.

I had full responsibility for all matters listed on this application: ☐ yes ☐ no. If no, please explain on attachment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, on the _____ day of _____, 19____.

Signature of Applicant

Substantial, Equivalent Experience

If you cannot meet the foregoing requirements for Panel membership, but believe that you qualify by reason of substantial, equivalent experience, please outline such experience on a separate sheet of paper and attach to this application, as provided for in Rule 7 of the Lawyer Referral Service Rules. Substantial, equivalent experience may include other actions, experience or seminars. If you have any questions concerning this application or your equivalent experience, contact the attorney director at the above address or telephone 391-6102.

220 Bush Street • Twenty-First Floor • Mills Tower • San Francisco, CA 94104 • (415) 391-6102

APPENDIX D

Janine M. Garvey
President

Stanley J. Friedman
President-Elect

Art H. Spiegel
Treasurer

Judith G. McKelvey
Secretary

Irving F. Reichert, Jr.
Executive Director &
General Counsel

Joan Evjenth
Deputy Director

Thomas H. Gee
Assistant General Counsel
Administration of Justice

Larry Long
Assistant General Counsel
Lawyer Referral Service

Jayne Tyrrell
Director, Volunteer
Legal Services Program

Board of Directors:

Kenneth Drexler
Christopher F. Emley
Dirks B. Foster
Cynthia W. Hecker
John Wynne Herron
James P. Kleinberg
Michael G.W. Lee
August B. (Tony) Rothschild, Jr.
Roger S. Ruffin
James Seff
Bruce S. Silverman
Nancy L. Simpson
William Kwok Sing
Frank D. Winston
Shirley C. Yawitz

Ex-Officio Members
Barriers Club
(January-June, 1981)

Candall I. Barkan
President

Virginia Jung Lum
Vice President

Robin Page Donoghue
Treasurer

John A. Taylor

ATTORNEY:

IMPORTANT

Please inform the judge, clerk, and the public
defender that you are the conflict attorney for the day.

CRIMINAL COURT APPOINTMENT FORM

This is to remind you that you are to appear for _____
court on _____ at _____.

After you have appeared in court, please list below the
name(s) of the defendants you represented and IMMEDIATELY
send this form back to the Lawyer Referral Service, even
if no cases were appointed. Thank you

Defendant

Department

N.B.- A \$10.00 fee per defendant is due and payable at this time.

FINDINGS

FINDINGS

I. Factors Affecting Cost

A. The Type of Indigent Defense System

1. The Part-Time Defender vs. the Ad Hoc Assigned Counsel Approach

Finding: The part-time defender system in a rural county cost less than the ad hoc assigned counsel approach.

2. The Mixed Ad Hoc Assigned Counsel vs. the Hybrid Coordinated Assigned Counsel

Finding: In two mixed systems, each having both a full-time defender program and appointed counsel, the ad hoc assigned counsel approach was less costly than the coordinated assigned counsel program.

3. The Contract vs. the Coordinated Assigned Counsel

Finding: A contract system whereby a single law firm provided all indigent defense services for the county was less costly than a coordinated assigned counsel system.

B. Rate of Compensation for Appointed Counsel

Finding: The cost savings achieved by the ad hoc assigned counsel approach over the coordinated assigned counsel in the two mixed systems were primarily due to the fee rates paid rather than to the number of hours expended by counsel or to the overhead of the system.

C. Time Spent in Representation

Finding: The lower cost per case achieved by the contract system was the result of fewer attorney hours spent per case rather than a lower attorney fee per hour.

II. The Relationship Between Cost and Quality of Services

A. The Contract System

Finding: 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.

Commentary: The contract system which was studied performed poorly with regard to 5 indicators of performance when compared with the control group of retained counsel in the same jurisdiction and achieved better results than retained counsel only with respect to speed in disposing of cases. When compared with the coordinated assigned counsel system in the same state, the analysis showed that the contract system disposed of cases faster (35.5 days for the average felony case) and with fewer court appearances (1.6 court appearances in the average felony assault case) than the coordinated assigned counsel system. These results were interpreted as going beyond the point of efficiency to indicate inadequate case preparation and expenditure of effort.

B. The Hybrid Coordinated Assigned Counsel System

Finding: The coordinated assigned counsel system in a jurisdiction 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.

Commentary: The coordinated assigned counsel system, which was considered a "hybrid" system because of the fact that the local full-time defender office is available in the lower court at arraignments and preliminary hearings for all felony cases, outperformed all other systems in the statistical analysis. There were no areas in which retained counsel excelled, and the assigned counsel appeared to show more effort in processing the cases than did retained counsel.

D. Processing Time for the Entire Court System

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

Commentary: In four of the sites studied (2 in Michigan and 2 in Illinois), the data showed that both assigned and retained counsel took less time to complete a case in the first site than assigned and retained counsel each consumed in the comparison site. In both sets of comparisons, the indigent defense system was less costly in the county where the entire court system moved faster. This suggests that the court system's processing time may be a significant factor in the cost of the indigent defense system, and that the choice of the indigent defense system model is only one of the factors that must be considered in controlling indigent defense system costs.

The only counties where this phenomenon did not occur were the 2 Ohio counties, where the slightly faster county was costlier. The costlier county was also the one where the attorneys were paid at higher rates than in the less expensive indigent defense system.

E. Staffed vs. Fee Per Case Approach

Finding: Staffed programs, whether they be through contracts with a private law firm or through establishment of a part-time defender system, appeared to be less costly than fee per case assigned counsel systems.

Commentary: The part-time defender system and the contract system studied showed the lowest costs per case of the six sites studied, and each of them was less costly than its comparison site. One hypothesis to explain this result is that there are economies of scale in a staffed program even in comparison with sites where very low fees are paid to assigned counsel for "piecework." However, reliance upon this conclusion must be tempered by a consideration of the effectiveness of the services received.

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

Commentary: The greatest difference found in comparing two different types of indigent defense systems using private lawyers within a single state was between the ad hoc assigned counsel approach in Boone County, Illinois and the part-time defender system in Jo Daviess County, Illinois. The Boone County ad hoc system excelled only with regard to speed, while the Jo Daviess County, part-time defender received more favorable results with regard to trial rate, higher pre-trial release rates in misdemeanor cases, extent of pre-trial motion practice in felony cases, and securing a higher percentage of sentencing alternatives to incarceration.

III. The Relationship between the Existence of Quality Controls and Performance Measures

A. The Hybrid Coordinated Assigned Counsel System

Finding: 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.

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

When compared to retained counsel in the same site, the hybrid coordinated assigned counsel system was the only jurisdiction studied that compared favorably in all respects, and appeared to outperform retained counsel in one area as well.

B. The Pure Coordinated Assigned Counsel System

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

Commentary: The coordinated assigned counsel system operating in a jurisdiction where it handled all of the indigent defense representation (the jurisdiction had no defender organization) lacked any quality controls.

This system performed poorly when compared with retained counsel in four areas versus one area where assigned counsel excelled. In addition, there appeared to be a "draw" with respect to the speed of disposition: assigned counsel were faster for felony drug cases, while retained counsel processed misdemeanors more quickly.

IV. Comparison of Performance Between Indigent Defense Systems Using Private Lawyers and Retained Counsel Representation.

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

Commentary: In four out of the six sites studied, retained counsel performed considerably better than the lawyers who provided representation for indigents accused of crime. The two exceptions were the Montgomery County Hybrid Coordinated Assigned Counsel System and the Jo Daviess County Part-time Defender System. In Montgomery County, there were no areas where retained counsel excelled, and there was one area where assigned counsel appeared to excel. In Jo Daviess County, there were mixed results, since the part-time defender was speedier in disposing of misdemeanors and engaged in more motion practice in misdemeanors, while retained counsel did better in obtaining pre-trial release and alternatives to incarceration for persons charged with misdemeanors. There were no differences in the handling of felony cases in Jo Daviess County. One possible hypothesis for explaining why these two sites performed better than the other four sites where private lawyers were used is that jurisdictions that have a defender system tend to perform better than jurisdictions which employ other models for providing defense services.

V. Comparison of Performance Between Different Indigent Defense Systems Using Private Lawyers Within the Same State

Finding: 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.

Commentary: In general, the study showed greater differences between the indigent defense systems using private lawyers in different states than between the comparison sites operating within the same state. If one county in a state provided representation that was not on a par with retained counsel services, then another county in the same state tended to provide equally substandard representation to the indigent accused. On the other hand, where the level of services in another state more closely approximated that of retained counsel, a second county in the same state tended to follow suit. This occurred in two of the three comparisons made.

VI. Assigned Counsel Fees

Finding: The rates paid to private lawyers for handling indigent defense cases were well below comparable private bar rates in all of the sites using a fee per case method of payment.

Finding: The fees received by appointed counsel often failed to provide any net income after paying their office overhead expenses.

Finding: The stated hourly rates did not necessarily reflect the fees paid because of frequent fee-cutting by judges.

Finding: Most of the counties using a fee per case method of payment employed cumbersome and time-consuming fee processing procedures, and some also employed Draconian rules regarding late submission of fee requests.

VII. Budgeting and Planning for Indigent Defense Systems Costs

Finding: 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 or agency with the responsibility for knowing the 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.

VIII. Other Indigent Defense System Costs

Finding: 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.

Commentary: Of the 8 sites visited outside of California, only one, a part-time defender system located in Albany, New York, had any budgetary allotment for investigative or expert services. Moreover, with the exception of the Albany office and the contract system in Berrien County, Michigan, neither the part-time defender or assigned counsel systems had access to secretarial services paid for by the county. None of the indigent defense systems using private lawyers were furnished with social services staff, although the part-time defender in Jo Daviess County, Illinois was able to make use of social service agencies available without fee in the community.

IX. The Effect of Inadequate Indigent Defense System Funding Upon Counsel for the Indigent; Financial Disincentives

Finding: The low fee rates paid to the lawyers, 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 by providing 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 because new lawyers will always be willing to accept the appointments.
6. The failure to conduct investigations in the majority of cases or to refute the prosecution's evidence through the use of experts or forensic tests.

X. Comparison of Private Lawyer Indigent Defense Systems with the Prosecution

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

1. Provide a lower rate of compensation, whether organized on 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 generally dependent upon the judiciary for their appointment.

Commentary: In none of the systems visited outside of California did an indigent defense system other than a full-time defender program hold equal status or credibility with the office of the prosecution. The private bar indigent defense systems tended to be far more dependent upon judicial and political officials for their budgets and appointments, and lacked any independent backing in their fight for adequate salaries and fees. They were less well-established, poorer paying, had fewer professional and support staff, and had lower status in the court system and in the eyes of the public. In none of the sites visited outside of California was the appointment process entirely divorced from the judiciary. Even in the sites which used an assigned counsel administrator, the courts retained control over the appointment process in the other states, either by making the appointments themselves or by having a major influence over the hiring of the administrator. In most jurisdictions, the budget for indigent defense services was not a separate budget presented to the county board, but merely a portion of the court's budget. Indeed, funding for indigent defense services often competed with judicial salaries for county dollars. None of the systems studied outside of California possessed an independent board or commission to advocate for improved conditions or to serve as an insulator from judicial and political pressures. Attorneys were often placed in the awkward position of having to choose between vigorous advocacy for their clients and future benefits of employment and adequate fee awards.

XI. Gaps in Providing Misdemeanor Representation

Finding: The right to counsel as required by the Argersinger decision was often chilled by court practices in rendering advisements.

Finding: Docket study data indicated that counsel was not being provided to indigent defendants accused of misdemeanors in a significant percentage of cases where some jail time was imposed.

Commentary: Docket study data in two jurisdictions indicated that counsel had not been appointed in close to 20% of all misdemeanor cases where defendants received some jail time. Of a total of 2,831 misdemeanors opened in one jurisdiction's (lower) District Courts during 1981, the court's computer system showed that 62% of all defendants were not represented by counsel (that computer system did not show what percentage of those defendants received sentences of incarceration). In a second jurisdiction, respondents interviewed estimated the rate of appointments in misdemeanor cases to be from 5% to 10%.

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

Court practices with respect to appointing counsel in misdemeanor cases were open to question. In one site, judges preferred to err on the side of not appointing counsel for a given defendant. Then, if the judge, after hearing the case, changed his mind about incarcerating a defendant who had not been represented, he would declare a mistrial, appoint counsel, and recuse himself from the case. In a second site, the judge required all misdemeanor defendants to read a long page of rights and to sign it at the bottom before stepping up to the bench. Once the defendant stood before the bench, the judge inquired, "You have certain rights given to you in written form. Do you understand those rights?" If the defendant said, "Yes," the judge simply asked, "How do you wish to plead?" without making any reference to counsel. While the study team was informed that the form did not constitute a waiver, there was apparently some confusion about its meaning, as one local felony court judge, many defendants, and, initially, those conducting the docket study construed it as a waiver.

XII. Differences Between Representation in Misdemeanor and Felony Cases

Finding: 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.

Commentary: The data analyzed in the six in-depth study sites clearly showed greater differences between assigned and retained counsel performance for misdemeanor than for felony cases. In sites where the study included both felonies and misdemeanors, there were more differences in the misdemeanor cases. In the two Ohio sites where no misdemeanor cases were included in the samples, there were few differences found between retained and assigned counsel.

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

Finding: The attorneys who provide representation to the indigent accused in murder and other very serious cases are more qualified than the average ^{of the} attorneys providing representation in other felony cases.

Commentary: The interviews revealed that many experienced criminal trial attorneys will refuse to handle any but the most serious appointed cases due to the fact that the maximum fees allowed in those cases are considerably higher.

In counties where there were a dearth of highly qualified criminal defense specialists, judges sometimes appointed an attorney who practiced outside of the county for a very serious criminal case.

XIII. Determination of Financial Eligibility for Appointment

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

Commentary: Only 2 of 7 jurisdictions studied outside of California employed written criteria for determining indigency. In both of these jurisdictions, the written criteria were employed by a coordinated assigned counsel system, and the criteria used had been developed by the Legal Services Corporation for use in providing civil legal services.

XIV. Recoupment

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

Commentary: Only two of the sites visited obtained any reimbursement from defendants for whom counsel had been provided at public expense. In one jurisdiction, recoupment was one of the duties of the assigned counsel administrator. In the second jurisdiction, an ad hoc assigned counsel county, recoupment had only recently commenced as the result of a change in the law that had previously prohibited the practice.

XV. Training

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

Commentary: In five out of 7 indigent defense systems outside of California, no training was provided for the lawyers who represented the indigent accused, and no funds were made available for attendance at seminars outside of the jurisdiction. In the remaining two jurisdictions, only entry level training had been provided prior to the time of the study. Only in the California sites were programs already in existence where continuing legal education was afforded to appointed counsel.

XVI. Monitoring of Performance

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

Commentary: Of the systems visited outside of California, only one, the coordinated assigned counsel program in Onondaga County, New York, made any affirmative attempt to provide for monitoring of assigned counsel performance.

XVII. Use of Independent Board or Commission

Finding: 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.

Commentary: Outside of California, the only program having a supervisory body separate from the judiciary or county politics was the bar association's program in Onondaga County, New York.

XVIII. Lack of Early Representation

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

Commentary: It did not appear that counsel was available for custodial interrogations in any of the jurisdictions visited; indeed, this was one of the complaints frequently heard during the site visits. Very few jurisdictions had any provision for counsel at line-ups. One of the few counties where defendants were visited prior to going to court was Montgomery County, Ohio; however, this function was performed by staff of the full-time defender office rather than by appointed counsel. Outside of California, few jurisdictions provided attorneys until after the first court appearance where bond had been set. This was particularly troublesome in one county where defense counsel had a heavy burden of proof required for reversing the bond decision made at the first, counselless, court appearance.

XIX. The Problem of Access to Counsel for Pretrial Detainees

Finding: In a large percentage of cases, counsel appointed to represent the indigent accused fail to interview persons who are in custody prior to their return to court.

Commentary: One of the most frequent complaints heard from defendants, corrections personnel, and reform-minded attorneys was that many attorneys do not interview or visit their clients until they are brought to the court's holding cell for their preliminary hearing or, in the case of a misdemeanor, second court appearance. When the clients attempt to telephone their attorneys from the jail, their collect phone calls are routinely refused. One program failed to assign any attorney in the office until the day of court, and when an indigent defendant phoned to request to speak to an attorney, was deliberately given the run-around.

XX. Choice of Counsel

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

Commentary: None of the interviewees thought that their system provided defendants with the counsel of their choice. Although the Ohio public defender statute grants this right to defendants, the law is evidently practiced in the breach. However, some judges responded that, in a case where a defendant is vociferous in opposition to a particular assigned counsel, contract lawyer, or defender and provides good reasons, the judge may assign a different lawyer or request that the program do so.

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