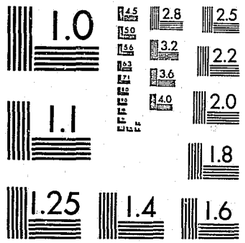

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MONEY AND CRIMINAL DEFENSE: 91548

A Comparative Analysis of Public Defenders, Court Appointed Counsel, and Privately Retained Attorneys In Three Jurisdictions

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January 1983

National Institute of Justice, OJARS
Grant #80-IJ-CX-0044
U.S. Department of Justice

Prepared under Grant # 80-IJ-CX-0044, National Institute of Justice, U.S. Department of Justice.

ABSTRACT

This study focuses on the role that money plays in the outcome of criminal cases. Do similar cases, represented by different attorney types, receive similar case outcomes? Is case outcome related to fees and salaries received by attorneys?

A study of indicted robbery and burglary cases represented by three attorney subgroups (i.e., public defender, court appointed counsel, privately retained attorney) was undertaken in three high crime jurisdictions (Washington, D.C., Prince George's County, Maryland and Alexandria, Virginia), each with a different defense system ("mixed," defender office and ad hoc, respectively). Statistical data was gathered from 642 case files. Fifty-one (51) interviews were conducted.

Data indicate that differences in charge outcome (i.e., guilt vs. non-guilt, severity of final charge) among cases represented by different attorney subgroups are not statistically significant. Prosecutor policies and the court workgroup "equalize" justice. In no jurisdiction, for either robbery or burglary cases, was severity of sentence (i.e., confinement vs. probation) related to the type of attorney representing the case. Some sentencing differences appeared in two jurisdictions with the clients of the privately retained attorney receiving shorter sentences of probation and/or confinement for the charge of burglary. A constellation of defendant characteristics which distinguish clients of private and publicly paid attorneys, and court mores on sentencing serious crimes account for these

results. Differences in financial incentives received by different attorney subgroups were not related to differences in case outcome.

Recommendations focus on reviewing eligibility standards for indigent services, examining the work conditions of the court appointed attorney, and encouraging closer scrutiny of the specialty of criminal defense by the private bar.

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PREFACE

The sociologist who studies the criminal justice system frequently comes to very different conclusions from the lawyer who practices within that system. The dictates of sociology require the researcher to examine large numbers of cases; the lawyer focuses on the individual case before him or her. The sociologist studies the interactions of groups of individuals over time who establish routines of behavior. The lawyer concentrates on the facts of the specific case, the evidence on hand, the technical defenses available.

As a trained sociologist, I have tried to "hear" what the lawyers interviewed said about facts, evidence, case uniqueness and integrate it with the methodological requirements of my discipline. The range of opinions offered by lawyers on every topic--without some hard data as an anchoring point--would have led into a maze from which I might never have emerged. By study's end it was clear that a picture of money and its relation to case outcome could not have emerged without attending to both perspectives.

An immense amount of data were gathered in the course of this project; more than could be used for any one report which hoped to maintain a focus. Thus, the decision was made <u>not</u> to arrange the data for three-way jurisdictional comparisons, but to understand each jurisdiction on its own terms--and then see if the information created patterns. Remarkably,

both quantitative and qualitative findings are similar across jurisdictions.

I would like to thank Cheryl Martarano, Linda McKay and Pat Langon of the National Institute of Justice for their substantive suggestions and moral support throughout the study. Debra Kelley played a particularly important role as my assistant throughout the many stages of this study. She remained stoic as she nearly froze in the poorly heated library of Prince George's County Courthouse, gathering data from case files; she was insightful as we discussed our "sense" of the differences and similarities of the jurisdictions studied; she contributed to the first draft of several sections of this report. Professor Richard Bennett, of the School of Justice at American University, acted as my statistical consultant and was always there with both assistance and a pleasant word when numbers were being crunched and recrunched. To all the lawyers who donated their time and truthfulness, I owe a large debt of gratitude. My husband, Dr. Steve R. Pieczenik, with me through another project, never ceased to move me toward completion with his daily question, "when will it be done?"

The project is now completed and all mistakes and errors, of course, are mine.

EXECUTIVE SUMMARY

The business of America is business. Big business. Building a B-1 bomber at a cost of $1 billion. Filming a movie for $11 million and expecting it to gross $80 million. Merging a retail corporation with an investment company to combine assets totalling $40 billion. While few Americans think of publicly funded operations from a "bottom line" perspective, $26 billion a year in public funds goes into the criminal justice system. Big business for taxpayers.

Estimating conservatively, the criminal justice system costs the taxpayer in 50 states almost $450 million. Police protection accounts for 53.2% of this figure; corrections, 24.7%; the judiciary, 13.1%; prosecution, 5.9%; defense, 1.5%. Any criminal defense lawyer--public defender, court-appointed, or privately retained--would argue that defense is last on the list because defendants are not "popular" people, and that free representation smacks of fraud being perpetuated on the law-abiding.

The cost of public defense systems across the country--or perhaps more correctly stated, the amount of money a particular governmental level is willing or able to spend on public defense--varies widely from state to state. Alabama pays a low of 45¢ per capita while the District of Columbia pays $10.28 per capita. California pays $3.94 per capita while Alaska pays $8.18 and Utah, $.95. The relationship

between per capita cost and quality of representation, however, is a continually elusive problem which cannot be resolved by the information thus far available. The only certainty is that money is important in making the wheels of the system turn.

At every level of government, a concern for money lies close to the surface of every decision, and has begun to force lawyers to consider their own financial interests in the decisions they make. For example, where appointed counsel has to receive court approval prior to incurring expenses, the effect is to discourage requests. When compensation to the appointed attorney is based on events, rather than work performed, it encourages attorneys to curtail preparation time, make quick plea bargains--and discourages efforts not remunerated.

While theoretically, the salaried public defender is able to give each case the time and effort it needs, regardless of money, techniques to decrease excessive case volume frequently take precedence in managing client representation. Where public defender offices exist, they may be so insufficiently funded that space, equipment, staff and training may be grossly inadequate, or have virtually no money for investigative services, expert witnesses or transcripts.

Being a privately retained criminal defense attorney may be less glamorous and lucrative than popular mythology

holds. Even with fees considerably higher than those of the public defender and court appointed attorneys, one criminal defense attorney who is trying to surface the issue of money and case management for the entire legal profession lists seven reasons "why it's hard to make a living practicing criminal law":

1. The criminal defense economy is built on an unsteady foundation, criminal defendants;
2. The legal profession is overpopulated, resulting in excessive competition for clients;
3. The high degree of transiency in the practice of criminal law has made the specialty a professional "slum";
4. Poor working conditions make life--and pocketbook--unpleasant for attorneys;
5. No one helps lawyers understand how to price their work;
6. The existence of free legal services for indigent defendants depresses fees for private attorneys;
7. Attitudes about criminal defense attorneys are obsolete.

Study Focus and Methodology

It is the primary objective of this report to offer the reader a look at the role money plays in case outcome. Do similar cases, represented by different attorney types--public defenders, court appointed attorneys, privately retained counsel--receive similar case outcomes? Is case

outcome related to fees and salaries received?

Three sites were selected for the collection of both quantitative and qualitative data. The Washington, D.C. Superior Court operates a "mixed" public defender-appointed counsel system in which the public defender accepts approximately 15% of all indigent cases appearing before the court. The Prince George's County Circuit Court (Maryland) operates within a statewide public "defender system," with the defender office handling approximately 85% of the indigent case load. The Alexandria Circuit Court (Virginia) operates an ad hoc or random appointment system for indigent defense. Under this system, each judge controls his or her own appointments from a listing of attorneys who have registered for criminal court appointments. These three sites represent three of the four major defense systems in operation around the country today.

Two charge categories were selected for which statistical data were gathered: Robbery and Burglary, both as indicted felonies. The decision to select Robberies and Burglaries was made for several reasons: (1) These are crimes of grave concern to the public, usually occurring between individuals who are not acquainted (in contrast to assaults and homocides). (2) Each of these crime types is among the most frequently occurring felony in each court studied. (3) Stakes are high for the defendant, in terms of potential final charge and

sentence; comparisons among what different attorneys "can do" for their clients might be particularly visible. (4) There existed a good two-way and three-way comparison among attorney groups studied on each of these charge categories.

Statistical information was gathered on 206 cases in the District of Columbia, 265 cases in Prince George's County, and 171 cases in Alexandria. The differences in case numbers per jurisdiction are related primarily to whether a comparison among two or three attorney types could be made. The information covered data on the defendant's background (e.g., age, race, prior convictions), the criminal action (e.g., nature of the offense, weapon present), case management (e.g., bail status, time interval from indictment to final charge) and case outcome (e.g., outcome of a plea or trial, sentence imposed).

Fifty-one (51) interviews were undertaken: District of Columbia-16; Prince George's County-18; Alexandria-16. Defense attorneys, prosecutors and judges were spoken with at each location. Questions focused on case management and outcomes of typical robberies and burglaries. Interviewees were also asked to comment on their perception of defense attorney differences in handling such cases.

Public Defenders

The public defender systems utilized by the jurisdictions studied differ not only in structure but in history and personality. The Public Defender Service of the District of Columbia began 12 years ago, and continues to operate more as a private law firm than as a public bureaucracy. Recruitment of staff is national. The ability to limit caseload is a priority. Legal innovation is encouraged. The operations are considered "exemplary" by the government.

In Prince George's County, the Office of the Public Defender is struggling with the host of problems which typically accompany a defender office which represents the large majority of indigents. Caseloads grow without the increase in staff. Resources are stretched thin. Local attorneys lose interest in the practice of criminal law. Fortunately, a history of excellent leadership at the top has minimized some of the problems for the defenders and maintained the appearance of competency among attorneys in the private bar.

In Alexandria, Virginia, the strength of the traditional ad hoc system has resulted in a resounding defeat to a proposed defender office. To some extent, the defeat was aided by the poor "approach" of the State government's representatives. In a second attempt, however, the proponents of greater efficiency in cost and operation which are trying to impose

an experimental public defender office may not be so easily defeated.

Court Appointed Counsel

The attorney who takes court appointments is at the mercy of a system which has "fixed" the payment schedule and the payments mechanism. In all jurisdictions studied, the attorneys interviewed find both the payment schedule and mechanism unacceptable.

Low fees, arbitrary reductions in vouchers and delayed payments have forced attorneys to make their own compromises with the justice systems within which they work. In the District of Columbia, the fee problems, mixed with an inefficient court system, has resulted in a small core of private attorneys who take court appointments on a full-time basis. To have less than a full-time appointments practice would be financially impossible. In Prince George's County, the fee problems led to a 25% reduction in attorneys who are now available for appointments, and the disappearance of a large group of attorneys whose criminal practice used to be significant (30%). In Alexandria, the attorneys may think that payments are too low, but the absence of a public defender system has kept the level of court appointments high. In this

jurisdiction it is the free market economy, one's knowledge of system actors, the influx of large numbers of new law school graduates, and an individual attorney's needs which determine the extent of a court appointments practice.

Privately Retained Counsel

Fee setting by the privately retained attorney is anything but an exact science. The primary factors which go into establishing the fee include: (1) time and amount of work; (2) the client's ability to pay; (3) seriousness of the charge; and (4) the likelihood of collecting the fee. Added to these are such variables as the attorney's reputation, expected level of client demands, the referral source, the attorney's caseload, and publicity that a case is likely to generate.

For very idiosyncratic reasons, the privately retained defense attorney is having an increasingly smaller role to

play in the criminal courts in each of the jurisdictions studied. In the District of Columbia, the defendants simply can't afford one; and those who can aren't pressured to do so. In Prince George's County, the Public Defender Office also is generous in its application of the eligibility standards, and the large percentage of cases the Office handles leaves a very small pool of available clients. In Alexandria, the private bar is relatively healthy, with vague eligibility standards for a free defense and conservative judges, although the spector of an experimental office of the public defender looms in the city's future.

Case Outcome: Final Charge of Guilt

There are several schools of thought on the subject of whether money influences case outcome. Polarizing them into the "a-good-attorney-is-a-good-attorney" group and the "you-get-what-you-pay-for" group, is instructive.

The first group believes in an explanation of the nature of man which is inherently idealistic.

> (Defense attorney) competence or incompetence, their preparation or lack of preparation, would depend solely on the individual . . . . (Judge, PG)

Using this approach, problems which flow from inefficiencies in court administration or inadequacies in the structure of the defense system can be surmounted through the inherent qualities of the individual attorney. A good attorney will provide good representation whether the client is paying $2500 for representation, whether the attorney will be reimbursed by the State at $298 for handling the case, or whether the public defender is receiving the equivalent of $100 for the case.

The second group assumes that only the basest elements in man's nature control his behavior. One gives only to the degree one gets. The client knows it . . .

> The expectation by the client is that if you charge more money, there is more expectation. (Defense Attorney, Va.)

and the attorney knows it . . .

> The (free or low fee) case goes to the back burner and you work on the things you get paid for. It's only normal . . . if you have clients that are paying you money and they are the ones that are keeping you alive--so that you can pay your bills at home--you are going to dedicate yourself to those people . . . . (Defense Attorney, PG)

This group cites many areas in which money influences case management by the criminal defense attorney, including: (a) motions work; (b) investigations; (c) actual time spent on a case; (d) the decision to offer a plea or go to trial; (e) the ability to secure expert testimony; (f) the ability to develop an individualized sentencing plan; and, (g) the ability to undertake legal research.

Although there are exceptions to every rule, the large majority of clients also assume that you get what you pay for. That perception effects the likelihood of the client: (a) following the attorney's advice; (b) setting and keeping appointments; (c) taking an active interest in his or her own case; (d) maintaining a serious attitude about the case; (e) having faith in the attorney's ability; and, (f) expecting a certain level of effort from the attorney.

Despite quite varied opinions from attorneys, judges, and prosecutors in the three jurisdictions studied, differences in charge outcome (i.e., guilt vs. non-guilt, and severity of final charge) among cases represented by public defenders, court-appointed attorneys, and privately retained counsel, are not statistically significant. In the one exception, for robbery cases in the District of Columbia, idiosyncracies of case assignment appear to explain the statistics rather than the quality of the representation given by different attorney types.

What is responsible for the appearance of "equal" justice at the final charge stage? Interviews and observations lead us to conclude that it is related to: (1) prosecutor's policies in each of these jurisdictions that are well-established, uniformly implemented, and widely known by practicing attorneys; and (2) a process of adjudication which is accepted and routinized in the daily interaction of defense counsel, prosecutors and judges (i.e., court workgroups) who share similar operational concerns.

Case Outcome: The Sentence

Sentencing is always "the bottom line" in a criminal case. As one public defender-turned-privately-retained attorney said:

> Most of these guys aren't going to med school next year. So that the felony or the misdemeanor doesn't mean squat! We're talking business. Is a guy going to jail? If he's going to jail, how much time are you talking about? (Defense Attorney, PG)

But sentencing the convicted criminal is anything but an exact science. Rather, the apparent inconsistencies of sentences given for similar offenses have forced some systems, including Prince George's County, to consider sentencing guidelines in order to achieve some uniformity among cases.

What variables account for sentencing inconsistencies? Attorneys will tell you: (a) a given judge's sentencing

philosophy; (b) a judge's stereotype of defendants; (c) an attorney's sentencing tactics; (d) an attorney's experience in court; (e) a prosecutor's decision to take an active role in sentencing; and (f) the defendant's behavior at sentencing.

But just as opinions regarding favorableness of final charge are polarized into the "you-get-what-you-pay for" group and the "a-good-lawyer-is-a-good-lawyer" group, attorney opinions on sentencing are also divided. The former group pegs its opinion that the client-paid-for-attorney does a better job at sentencing on: (1) the additional resources money can buy (e.g., an individualized work-up of program alternatives for the defendant from a center like the National Center on Institutions and Alternatives, or a psychiatric evaluation and the promise of treatment); and (2) the fact that the fee paid to the private attorney is viewed by the court as punishment in itself.

According to our statistics, in no jurisdiction, for either robbery or burglary cases, was severity of sentence (i.e., confinement vs. probation) related to the type attorney representing the case. Some statistically significant sentencing differences appeared in terms of length of confinement and length of probation. Clients of the privately retained attorney, indicted for burglary, in both Prince George's County and Alexandria, were more likely to receive shorter periods of confinement and/or probation. There is no indication, however, that money "buys" better lawyering from attorneys. Rather, money is an attribute which distinguishes defendant from defendant, rather than lawyer from lawyer.

Why do these statistically significant relationships occur in only two jurisdictions, and only for burglary cases? It is our opinion that: (1) a constellation of defendant characteristics exist together which distinguish the clients of private and court-appointed attorneys, giving the clients of the private attorney a sentencing "edge"; (2) but that the "edge" does not work for crime(s) which are perceived as particularly serious by the court, such as robbery.

Where the defendant has money to hire an attorney, he or she is also likely to have a job--and a supervisor who can testify at the sentencing hearing. If the defendant has a family which has managed to scrape together the money to hire an attorney, they can probably also come up with a minister or other people in the community to swear that the defendant is not a threat. Where the defendant has money to hire an attorney, the attorney can make use of such fee charging resources as the National Center on Institutions and Alternatives and the packaged program they will develop for the individual. So money wins out. But not for its ability to "buy" justice. And not for its ability to spark an attorney towards better results. Rather, money wins out for the range of variables that money attracts--security, stability, employment, family. Variables which are important in sentencing but which are difficult on which to gather statistical data.

Only in the District of Columbia, where no statistical significance was found, was our comparison only between the public defender and the court-appointed; attorneys whose clients do not differ on the employment variable.

Conclusions and Recommendations

As goes the Washington metropolitan area, so goes the nation? We have no evidence to conclude that criminal defense services around the country are either as high in caliber as they are in the jurisdictions studied, or that the systems are as uniform in dispensing justice to the majority of cases, irrespective of whether the defending attorney is getting paid by the client, the court, or the state.

We are saying, however, that in the three jurisdictions studied, the ability of a client to pay for his or her own attorney does not alter case outcome to any statistically significant degree. In fact, when case management techniques could change with the amount of money available--such as providing expert witnesses, doing in-depth investigations--system constraints conspire to regress the extremes towards the mean. Any peaks in the curve of individual attorney differences in financial "incentives"--and possible concomitant differences in case outcome--are flattened out by consistently applied prosecutor policies and the routinized work styles and understandings of criminal justice actors who interact on a daily

basis. In the few cases where sentencing differences statistically favor the client retaining his or her own attorney, the fact that the defendant has and spends the money is more important than the fact that the attorney is receiving the money to spend on the case. Money is an attitude that attaches to the defendant and not the attorney. It is an attitude that influences the sentencing judge and the probation officer who writes the pre-sentence investigation report. It enables the attorney to marshall the support of the community--the employer, the minister, the friend. Money and its accoutrements attaches mainly to the defendant, not the defender.

Looking at the data and the meaning we take from it, it is the defense system and the defense attorney that are taking the beating, not the defendant. It may be time to shift from worrying about uniformity of case adjudication for the garden variety criminal case for a while, and start worrying about the system which provides lawyers to its citizens.

A Career in Criminal Law: Unrewarding

It is hard to make a living as a private lawyer practicing criminal law. The criminal defense economy is built on an unsteady foundation--the criminal defendant. The legal profession is overpopulated--and the overpopulation finds its way to criminal law. Poor working conditions, such as courthouse inefficiencies, affect a lawyer's pocketbook. The

existence of free legal services depresses fees--and no one helps lawyers understand how to "price their work" in the first place. Given the fact that criminal defense lawyers are facing greater complexities and requirements in the criminal process, more stringent standards in many states for the effective assistance of counsel, and a U.S. Supreme Court decision denying the public defender immunity from suit in malpractice cases, it is a wonder why lawyers who specialize in criminal defense still do.

What is the result? A legal speciality which attracts a large number of young, inexperienced law school graduates for a very short period of time. As soon as a referral base can be built, and a more general practice can be established, a speedy exit from the practice of criminal law is made.

The Speciality of Criminal Law: Endangered

The legal specialty of criminal law is in jeopardy. This was least visible in the District of Columbia, perhaps, where the Public Defender Service represents a small proportion (15%-20%) of indigents. But upon closer inspection, an inefficient court system (with waiting time unpaid), court fees established ten years earlier (and not increasing with inflation), indigency criteria which create a large pool of defendants who are eligible for "free" advocacy, a lengthy adjudication process (which puts fee collection for appointed

attorneys off for 1 1/2 years), and arbitrary cuts in vouchers submitted by court appointed attorneys, are only some of the reasons for an impaired system of private practice. What remains of a private "system" is a core of 40-50 attorneys who represent the large majority of court-appointed cases on a full-time basis, and a smaller group of attorneys who "go where the bucks" are: gambling, drugs, prostitution. The remainder of the attorneys drift into the system for their own personal and professional reasons and drift out again as quickly as they can build up a general practice.

Most visible was the shift over a ten year period in Prince George's County from a system based 100% on private advocacy to one in which the Office of the Public Defender now represents 85% of the criminal cases. Here, polarization among privately retained practitioners was most evident: the small group of attorneys whose practice is almost entirely criminal law, and the large group of attorneys who used to have a 40%-50% criminal law practice which has currently slipped to 10% to 20%. With fees to court-appointed attorneys especially low ($15 per hour out-of-court, $20 per hour in-court), even the District Public Defender is having difficulty recruiting attorneys for the panel.

In Alexandria, it is the spector of danger for the private practitioner which has raised its head in the form of the State's overture to the city to establish an experimental

public defender office. The local bar association won "round one," with the City Council tabling the issue; how many more rounds it can win is unknown, in an atmosphere of cost efficiency and a small bureaucracy advocating public advocacy already in place at the State level.

In short, the number of criminal cases available for representation by either the court appointed attorney or privately retained attorney is shrinking. Private advocacy is giving way to public advocacy.

The System of Providing Defense Services: Searching

In metropolitan areas, new or expanding public defender programs, using vague eligibility criteria and unchecked personal data, are swallowing many clients who, in the past, might have retained their own attorney. Since the 1963 landmark decision in Gideon v. Wainwright, organizing the practice of criminal law into public defender offices has been the "growth industry" of criminal law. By 1973, a nationwide survey of defense services estimated that there were 573 defender agencies providing representation at the trial level in the state courts. At that time, the offices served approximately two-thirds of the nation's population. Today's figures are undoubtedly higher.

Yet, while many of these offices are thriving at the expense of court appointments and privately retained cases,

a lack of funding is placing severe restraints upon even these organizations. While many of these restraints impact upon an office's resources, funding cutbacks are also forcing defender offices to decrease their number of staff attorneys. Increasing staff turnover as salary requirements are not being met, comes with the times. Entire programs have already begun to vanish at the state and county level with no replacements in sight. According to the current director of the National Defender Institute, "local governments have begun to push for drastic reductions in defender agency spending . . . ." Defenders are being advised to "make a concerted effort to master the art of obtaining money."

Where local public defender offices do not exist, assigned counsel jurisdictions are considering, or have just begun, them. Increasingly, pressure is being exerted on state governments from community groups, county administrators, bar associations, to assist in the funding and development of statewide systems.

Given the trend to defender offices, the majority of counties nationwide still use the ad hoc method (used in Alexandria) of assigning counsel and are still responsible for the complete funding of their respective systems. Where will the money come from in the future? What system is most efficient? In an era of decreasing personal and property

taxes, anyone who can answer these questions has a bright political future.

The Future

The question of what type of defense system a jurisdiction should have must be viewed from the psychological, professional, and economic perspectives as well as the legal one. How good is a system which affords equal justice to the overwhelming majority of defendants yet gives the impression to one group of defendants that they are being railroaded by public defenders (even when they are not)? Perceptions are frequently more powerful change mechanisms than reality. How good is a system of defense when it is losing an entire group of attorneys who, to quote one of our interviewees, "will never get the opportunity to go ahead and show what they can do"? Especially when the specialty is partly being lost because of a lack of interest on the part of the non-criminal bar. And how good is a system of defense when its primary goal becomes "How much does it cost" rather than "Did the attorney enter the case at an appropriate state" or "Were there enough resources for a proper investigation"?

In short, it is reassuring to be able to state that in the jurisdictions studied, for the crime categories studied, the defense system, fees and payment schedules, and attorney type, do not necessarily bring with them disparaties of case outcome. But they do bring attorneys who are losing their

profession, defendants who feel like second class citizens and politicians whose primary loyalty is to their sense of economic mandate from the people who elected them, and not justice for all.

A study of this nature and scope is not equipped to generalize its findings too far afield, nor present an agenda for national debate. It can, however, take what has been observed in the three jurisdictions studied and recommend specific areas of consideration.

A. Review Eligibility Standards for Indigent Services

Be it sour grapes or otherwise, the area of appropriate eligibility standards for the indigent and marginally indigent, and the resources available for checking data supplied by prospective clients of public defense, is an area in need of attention.

In each jurisdiction studied, private and public attorneys estimated that anywhere from 10% to 30% of those receiving free counsel were not qualified to do so. This is a sizeable percentage of potential clients who might be more appropriate in the free market.

On one side, the debate is an economic one: given a gap between the "going rates" charged by private attorneys for representing specific crimes (and individuals) and the defendant's assets, what are appropriate standards to establish

for full or partial eligibility. Programs for the employed defendant, for whom a $2,000 bill for a defense against a burglary charge would be difficult to afford--the working class poor--are virtually non-existent. This is one area with which the private bar must come to terms if it is at all interested in saving the criminal law specialty.

The debate, however, is as much philosophical as it is economic. How much of a responsibility should the state assume for an individual's legal-financial obligations? How much of a responsibility should the individual assume--even if hardship ensues? An American Bar Association survey found that unmet legal needs of America no longer lie with the poor. Rather, with the 70% of Americans who fall into the middle class--those who don't qualify for free legal assistance and who feel they can't afford standard legal fees.

B. Examine Conditions for Court-Appointed Attorneys

The problems that attorneys all around the country are having with (a) the amount of money fixed for court-appointed cases and (b) the manner in which payments are reviewed and made, raise fundamental questions about money spent helping attorneys defend accused criminals. The federal government, in its efforts to eliminate the Legal Services Corporation and its general interest in fostering volunteerism, has established its disinterest in providing free services and

its interest in pro bono work. But with constitutional decisions which have expanded the rights of citizens to free counsel, the concentration of the poor in metropolitan areas, and the growth of the legal specialty of criminal law, precisely due to its complexities and frequent changes, a modern solution is needed to an old problem. The majority of lawyers are not in the position to offer pro bono services on a large scale.

> No policeman or fireman works without pay from a sense of duty. Yet criminal defense lawyers daily assume burdens which properly belong on the collective shoulders of the public. (Defense Attorney, Dallas)

The point is not that court-appointed attorneys should necessarily be remunerated at higher rates. Or that the growth of public defender offices should be contained. The point is that looking closely at court-appointed attorneys--trends in money, resources, numbers, individual demographics--may provide a key to predicting the future of the specialty of criminal law, and a better focus on options that defense systems will have to consider if it is to meet the needs of the citizens.

C. The Role of the Private Bar

Is the criminal specialty worth saving as a specialty for lawyers other than those willing to be paid for and attached to public service departments? If so, it seems that the private bar must take an active interest in its "criminal" colleagues.

Taking an active interest, however, doesn't mean that the delivery of criminal defense services need look like it does today. For example, the concept of prepaid legal service plans is only just being explored. While the overwhelming percentage of Americans have some form of health insurance, the concept of prepaid legal services is in its infancy. While most plans envision offering easy access to an attorney at a reduced rate, they are still at the level of development in most states. And the use of prepaid legal service plans to provide criminal defense services is perhaps its most shaky aspect.

Legal clinics are also only just in their infancy. Essentially, they operate in the same way as the typical law firm, except that the services they provide are focused on the low and middle income family.

We are not advocating either legal clinics or prepaid legal services or phasing out legal services for the poor. Rather, we are making a plea for an increasing role for the private bar in criminal defense--to study the shift toward public advocacy and the impact it is having on its own members.

CHAPTER 1 -- CRIMINAL DEFENSE AS A BUSINESS

Introduction

Case #1

On the evening of October 18, 1978, William Jackson entered a Giant Food Store in suburban Maryland, walked up to the manager's cage with a four-inch dark barrelled revolver in his hand, and said to Betty Harris, "Give me all the money or I'll kill you." Harris emptied the contents of the safe, $1713, into a white plastic bag she was given by Jackson and returned the bag. Jackson fled on foot.

Later that evening, Jackson was identified by Harris and another witness from a photographic line-up, and arrested on warrant two days later. After being advised of his constitutional rights, and refusing to make any verbal or written statement, Jackson was photographed, fingerprinted, placed on $25,000 bond and booked into the County Detention Center. He qualified for Public Defender representation.

Case #2

At approximately 7:30 a.m. on a cold December morning in 1978, David Mundey, Raymond Paul, and Darrell Allen broke into and stole a 1974 Oldsmobile Cutlass parked on the 1700 block of Southview Drive. As they drove around they noticed Marie Angeles and Nancy Roberts hitchhiking. Paul pulled the vehicle over and picked up the girls. After driving a few hundred yards, Allen turned around from the front passenger's

seat, faced the girls with a small caliber revolver, and told them it was a holdup. Munday, who was sitting in the back seat behind the driver, pulled a sawed-off thirty-thirty rifle from under the seat and pointed it at the girls. After the girls gave Mundey their money and jewelry they were dropped off, unharmed, at the side of a relatively untraveled road.

Using the girls' description of the vehicle, a Metropolitan-wide police broadcast resulted in a fast speed chase and the arrest of Mundey, Paul and Allen. The stolen property was found in the car. When interviewed by the police, Paul, the driver of the car, adamantly denied that he participated in the offense, stating, "I didn't do it, but they say I did. I don't like getting arrested for something I didn't do." Each of the defendants was booked, arraigned, and chose to hire his own attorney.

Case #3

Mid-afternoon, January 10, 1979, the Royal Service Station on George Palmer Highway was not busy. Larry Farms, an employee, was approcahed by two young men who said that the cigarette machine had taken their money without depositing the cigarettes. The men followed Farms to the office to retrieve their lost change, pulled out a pistol, and forced Farms to turn over $62.00 of the Station's money. The men fled out the front door toward the rear of the service station.

A few minutes later, a driver for the Yellow Cab Company, who was on a routine call to an address near the Service Station, was stopped by a police officer and told about the robbery. When one of the two young men who entered the cab said to the other, "I don't see any fuzz around," the driver contacted his dispatcher over his radio and stated that he thought his passengers were suspects in a gas station robbery. The cab was stopped by police officers, the money was recovered (as well as a .32 caliber revolver), and an arrest made. One of the suspects, Dewey Manhall, was given a Public Defender attorney; the other, Samuel Jones, was given a court-appointed attorney to avoid a conflict-of-interest on the part of the Public Defender's Office.

* * * * * *

In each of the above cases, justice demanded that the defendant was innocent until proven guilty, and entitled to the best defense possible. Mr. Jackson (Case #1) received a lawyer from the Office of the Public Defender, salaried at $23,000 annually (approximately half of what his counterpart in private practice earns). Mr. Mundey and his co-defendant (Case #2) each retained an attorney privately. Mr. Mundey's attorney charged him $2500--"up front"--for whatever work on the case would be needed, and an additional $1000 if the case went to trial. Mr. Jones (Case #3) was represented by an attorney appointed by the court. The attorney received $385 for his

representation, based on a payment schedule established by the State.

Mr. Jackson (Case #1) was indicted by the Grand Jury, and subsequently pled guilty to (a) Robbery with a Deadly Weapon and (b) Use of a Handgun. The pre-sentence investigation report recommended a 10 year sentence. At the time of sentencing, Mr. Jackson was in violation of his parole on one earlier robbery conviction.

Mr. Mundey (Case #2) was indicted by the Grand Jury, and found guilty by a jury trial of (a) Armed Robbery, (b) Use of a Handgun and (c) Unauthorized Use of a Motor Vehicle. The defendant, with a prior record of five convictions (including breaking and entering a vending machine, forgery, armed robbery) was sentenced to 20 years, the maximum period of incarceration.

Mr. Jones (Case #3) had a trial before a judge and was found guilty of (a) Armed Robbery and (b) Use of a Handgun. The pre-sentence investigation report recommended a moderate period of incarceration, to be suspended after 60 days time-served. Mr. Jones had had several juvenile convictions (trespassing, robbery) and one prior robbery conviction as an adult.

Were the final charges and recommended sentences "just"? Were they comparable, for these similar charges? Should

the defendant in Case #1 have gone to trial, rather than have the public defender allow him to plead guilty to all counts of the indictment? Would the defender have taken the case to trial if he had been privately retained (and without an excessive caseload), as did the attorney representing the defendant in Case #2? On the other hand, would a plea in Case #2 have been more advantageous to the client, but less remunerative to the privately retained attorney? Did the court-appointed attorney in Case #3 choose the "fast" trial system--before a judge rather than a jury--to raise the fee he was entitled to by the court, but limit his work hours?

Most importantly, was the outcome of each case--the final charge and sentence--related to the type of defense attorney representing the defendant? Each attorney--public defender, privately retained, and court-appointed--was working within a different set of financial incentives. Was case outcome related to these differing fee arrangements? The questions shape the report which follows.

Criminal Defense As Big Business

The business of America is business. Big business. Building a B-1 bomber at a cost of $1 billion. Filming a movie for $11 million and expecting it to gross $80 million. Merging a retail corporation with an investment company to combine assets totalling $40 billion. While few Americans

think of publicly funded operations from a "bottom line" perspective, $26 billion a year in public funds goes into the criminal justice system. Big business for taxpayers.

Estimating conservatively, the criminal justice system costs the taxpayer in 50 states almost $450 million.[1] Police protection accounts for 53.2% of this figure; corrections, 24.7%; the judiciary, 13.1%; prosecution, 5.9%; defense, 1.5%. Any criminal defense lawyer--public defender, court-appointed, or privately retained--would argue that defense is last on the list because defendants are not "popular" people, and that free representation smacks of fraud being perpetuated on the law-abiding.

The defense of indigents captures a significant proportion of any criminal defense budget. Because the right-to-counsel decisions of the Supreme Court have never directly discussed payments for defense services, state and local governments have been free to determine for themselves both level and manner of financing these services. Information gathered in the spring of 1981[2] indicates that 38% of the criminal defense funds come from the state level, 61.5% from the county level, and .5% from the municipal level. Monies from the Law Enforcement Assistance Administration almost matched the total amount contributed by all non-federal governments combined, although the termination of that agency by the federal government in April 1981 has all but ended this subsidy.

The cost of public defense systems across the country--or perhaps more correctly stated, the amount of money a particular governmental level is willing or able to spend on public defense--varies widely from state to state. Alabama pays a low of 45¢ per capita while the District of Columbia pays $10.28 per capita (Appendix A).[3] California pays $3.94 per capita while Alaska pays $8.18 and Utah, $.95. The relationship between per capita cost and quality of representation, however, is a continually elusive problem which cannot be resolved by the information thus far available. The only certainty is that money is important in making the wheels of the system turn:[4]

> The criminal justice 'system' is one of the leviathans of modern American civilization. Like education, health, and transportation, it depends on tax dollars, and each of its constituent elements competes for the largest share. Knowing how to get the dollars is as important as knowing how to do the job.

Set against the statistics presented above, the remainder of this chapter explores the high and continually growing cost of criminal defense, and the focal questions of this study.

Rising Criminal Defense Costs

Just as the cost of criminal defense has climbed steadily over the last decade, it is likely to continue to do so in the decade to come. Inflation and increasing caseloads seem to be constants which annually squeeze a decreasing property

tax base which supports the majority of criminal defense programs. Although the money to meet the costs may not be made available, the cost demands will necessarily exist. A crisis of epidemic proportions is likely to result.

The real villains in the cost/payment imbalance are the requirements set by constitutional decisions, state statutes and case decisions. The Sixth Amendment to the Constitution has received more than its share of attention over the last two decades:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of Counsel for his defense.

In some states,[5] the right to counsel <u>before</u> <u>trial</u> has been extended to post-arrest interrogation, line-ups and other identification procedures, preliminary hearings, bail hearings and grand jury hearings. In addition to constitutional mandates for <u>trial</u> representation in felony, misdemeanor and juvenile cases, some states must also provide counsel for mental commitment hearings, deportation proceedings and extradition hearings. <u>Post</u> <u>trial</u>, several states have been covering prison disciplinary hearings, probation and parole revocation hearings, first appeal, and collateral attack.

Sounds good, yet:

> The Constitutional mandate to provide counsel . . . is simply not being followed in many jurisdictions and those few criminal defense

> agencies that meet even a handful of the national standards can be counted on our fingers and toes.[6]

At the state and county level programs have already begun to vanish--with no replacements in sight.[7] Local governments have already begun to push for reductions in defender agency spending--for such things as training, technical assistance, and pilot programs. And federal funding, which has been critical in the past, for economic, philosophical and emotional support, has all but been eliminated.

So the race for limited funds is on. As LEAA monies are eliminated, supporters of quality defense systems are suggesting another look at private foundations, at using funds from Title XX of the Social Security Act, and at investigating CETA (Department of Labor) and Action (VISTA) as realistic sources for funding.[8] States are scrutinizing their existing systems in an effort to curtail the dramatic rises in cost. West Virginia, for example, has had a statewide public defender system under consideration for more than seven years. The system currently proposed is expected to substantially improve the quality of representation, assure that costs are stabilized and controlled over time, and provide defendants with representation required by the U.S. Constitution and West Virginia law.

In states where counties are free to determine which types of delivery models are suitable in their jurisdictions,

contract criminal defense systems are taking on "bandwagon proportions."[9] The controversy that "contract" offices is arousing within the defender area usually pits price against quality. In a city such as Alexandria, Virginia where the state proposed to establish an experimental office of the public defender, the local criminal defense bar voted against such an office using reasons which included loss of potential income to the private bar.

In short, at every level of government, a concern for money lies close to the surface of every decision, and has begun to force lawyers to consider their own financial interests in the decisions they make. For example, where appointed counsel has to receive court approval prior to incurring expenses (e.g., Detroit, Michigan), the effect is to discourage requests.[10] When compensation to the appointed attorney is based on events, rather than work performed, it encourages attorneys to curtail preparation time, make quick plea bargains--and discourages efforts not remunerated (e.g., Jackson County, Oregon).[11] Where jurisdictions routinely refuse to pay for investigations, research, interviews, or pretrial motions (e.g., Michigan), most counsel do not request these resources and most requests are denied.[12] Where investigative services are available to the appointed attorney through the resources of the public defender, they are infrequently used (e.g.,

Washington, D.C.).[13] To increase their income, appointed attorneys frequently have no choice but to decrease the number of assignments they accept for the court, or "load up" on cases to establish a profitable volume operation which offers less vigorous advocacy, fewer motions, fewer objections and less creative defenses for each client.[14]

While theoretically, the salaried public defender is able to give each case the time and effort it needs, regardless of money, techniques to decrease excessive case volume frequently take precedence in managing client representation. Where public defender offices exist, they may be so insufficiently funded that space, equipment, staff and training may be grossly inadequate (e.g., San Francisco, Ca.),[15] or have virtually no money for investigative services, expert witnesses or transcripts (e.g., Marion County, Indiana).[16] Where resources exist in a public defender's office, they may be underutilized (as in Detroit, where attorneys do not trust the abilities of the investigators).[17]

While the economics of the criminal defense attorney who maintains a private practice has received consistent attention over the last few years, the literature is largely: (1) anecdotal, where a practitioner advises his colleagues on how he/she sets fees, (2) issue oriented, as in discussions of minimum fee schedules set by local bar associations (which

are currently under attack in anti-trust suits), or (3) examinations of the ethical considerations involved in the attorney-client relationship advised by the Code of Professional Responsibility. Specific fees, office management and unique fee problems rarely focus on the criminal attorney.

Even with fees considerably higher than those of the public defender and court appointed attorneys, one criminal defense attorney who is trying to surface the issue of money and case management for the entire legal profession lists seven reasons "why it's hard to make a living practicing criminal law":[18]

1. The criminal defense economy is built on an unsteady foundation, criminal defendants;
2. The legal profession is overpopulated, resulting in excessive competition for clients;
3. The high degree of transiency in the practice of criminal law has made the specialty a professional "slum";
4. Poor working conditions make life--and pocketbook--unpleasant for attorneys;
5. No one helps lawyers understand how to price their work;
6. The existence of free legal services for indigent defendants depresses fees for private attorneys;
7. Attitudes about criminal defense attorneys are obsolete.

Hardly a list to encourage the new criminal defense attorney or the law student who thinks he or she can be the next William Bennet Williams.

Study Focus and Methodology

It is the primary objective of this report to offer the reader a look at the role money plays in case outcome. Studies which focus on money and criminal defense--whether on an individual attorney's fees, public defender salaries, or a system's resources--are rare, and are likely to exist in isolated pockets at the local level. By gathering statistically sound data on case outcome by different attorney subgroups (i.e., public defender, court-appointed counsel, and privated retained attorney) and relating it to data on fees and financial incentives, this study attempts to broaden the use of the case file data gathered. By conducting a study in three high crime jurisdictions (Washington, D.C., Prince George's County, Maryland and Alexandria, Virginia), each with a different criminal defense system ("mixed," defender office and ad hoc, respectively), we are hoping to expand our ability to generalize findings. Approximately seven hundred cases and sixty interviews later, we are in a position to offer a few comments on the subject of money and defense counsel performance which is not necessarily confined to the jurisdictions studied. As the reader shall see, the trends in the data are too strong for such limitations.

Relevant Literature

What have previous researchers concluded about differences and similarities in case representation by different attorney groups? One set of research on case disposition has concluded that one type of defense attorney is likely to do "better" for the client.[19] Another set of studies concluded that one type of defense attorney does not necessarily perform better than another but that each performs a different role.[20] Conflicting conclusions also exist among studies focused on sentences clients received.[21]

Studies of the incentive structure within which attorneys work are almost non-existent, other than for authors to have noted, in passing, the importance of the fee for both the privately retained and court-appointed attorney in shaping case-related attorney behavior. A study by Levin, for example, appeared to find almost accidentally that: (1) talk of the fee dominated many interviews with attorneys; (2) judges and prosecutors frequently described private attorneys' goals in financial terms; and (3) private defense attorneys made statements concerning strategies and behavior which inferred they were motivated by money.[22] Levin concluded that the twin goals of maximizing a fee and minimizing the time spent on a case were held by these attorneys.

In another study not focused on finances, Eisenstein

and Jacob in Felony Justice, found that the private attorney in one large city attempted to ration his or her preparation time and courtroom time according to probability of payment at different case processing stages.[23] Although the court-appointed attorney, being paid by the public defender's office, had no problems getting paid, differences in hourly billing rates for preparation time and courtroom time appeared to influence the manner in which a case was handled. Katz found something similar in a different city, ". . . since the fee (of the court-appointed attorney) cannot be increased regardless of what he accomplishes, another of the attorney's goals in the criminal court is to minimize the time he devotes to a case . . . ."[24]

Much research and consideration has been given to the organizational mode of analyzing criminal court decision-making. Beginning with Blumberg's attempt to develop a conceptual framework for criminal courts based on theories of large organizations (the court as a closed community),[25] subsequent debate developed around whether courts could be categorized as bureaucracies when they had neither the hierarchical structure nor a central management to control rewards and sanctions.[26] Burstein concludes that the organizational approach has become a catch-all:[27]

> . . . an eclectic theoretical orientation rather than a uniform or systematic framework . . . Some works employ classical bureaucratic concepts, others use organization decision making and choice theories; still others use contingency theories and elements of small group theory, role theory and exchange theory.

We introduce the organizational perspective at this point because the concept of the "subculture of justice" and the "court workgroup" will play a larger role in later chapters: the idea that accommodations, mutual goals and shared expectations arise among key court actors as these actors interact daily.

Methodology

There are two basic interests which have shaped the methodology of this project. The first is a theoretical concern which attempts to understand how the court "work group" concept of shared goals of defense, prosecution and bench manages, if it does, to survive the divergent needs of public, court-appointed, and privately retained attorneys. The second is a methodological concern which forces the researcher to look at prior studies of criminal defense and shudder. Studies have gathered data on final charges and sentences and omitted case processing variables. Empirical studies have limited or missing qualitative data from interviews to adequately explain statistical information. Qualitative studies have more-than-you-can-digest insights, without supporting quantitative data.

Findings vary, conclusions are difficult to integrate.

While this study cannot be all things to all readers, in its own limited way it attempts to look closely at one actor in the court workgroup (the defense), in his or her several operational manifestations (public, court-appointed, private), functioning in different defense system structures (mixed, ad hoc, defender office) under divergent financial reward systems (salary, statutorily regulated fee, free market economy) and constrained by the needs of an overall system and ongoing relationships with other actors in that system. The result has been to select three jurisdictions, 642 cases for quantitative analysis, 51 individuals for qualitative analysis and analyze the findings.

Jurisdictions. Three sites were selected for the collection of both quantitative and qualitative data. The Washington, D.C. Superior Court operates a "mixed" public defender-appointed counsel system in which the public defender accepts approximately 15% of all indigent cases appearing before the court. The Prince George's County Circuit Court (Maryland) operates within a statewide public "defender system," with the defender office handling approximately 85% of the indigent case load. The Alexandria Circuit Court (Virginia) operates an ad hoc or random appointment system for indigent defense. Under this system, each judge controls his or her own appointments from

a listing of attorneys who have registered for criminal court appointments. These three sites represent three of the four major defense systems in operation around the country today.[28] Hopefully, this selection of differing defender systems offers another level of data analysis which will increase the significance of any findings.

Charge Categories. Two charge categories were selected for which statistical data were gathered: Robbery and Burglary, both as indicted felonies. The decision to omit a consideration of cases coming into the courts as misdemeanors was done largely: (1) to "up the ante," in terms of the amount and nature of preparation attorneys would be likely to put in on a case; and, (2) to avoid having a large percentage of our sample "fall out," as nolle prosses or dismissals, as misdemeanors are wont to do, for reasons not related to attorney performance.

The decision to select Robberies and Burglaries was made for several reasons: (1) These are crimes of grave concern to the public, usually occurring between individuals who are not acquainted (in contrast to assaults and homocides). The robbery in this study, for example, might have occurred as follows (taken from an official written statement of a district attorney):

> On June 3, 1978, the defendant and other persons approached (the victim) as he was walking on King Street. The defendant and his companions grabbed (the victim), threw him to the ground, beat and kicked him, and took his wallet. They were interrupted in this by an approaching vehicle. They returned to (the victim) and completed the robbery.

(2) Each of these crime types is among the most frequently occurring felony in each court studied. (3) Stakes are high for the defendant, in terms of potential final charge and sentence; comparisons among what different attorneys "can do" for their clients might be particularly visible. (4) There existed a good two-way and three-way comparison among attorney groups studied on each of these charge categories.

The decision not to look into other charges was based as much on the issues of (1) project feasibility in gathering data on large numbers of comparable case types, and (2) specific information known about other charge types (e.g., felony drug cases handled by private or court-appointed attorneys are not likely to be comparable; a large majority of felonious assault charges are dropped or reduced on the basis of information unrelated to defense attorney performance; grand larceny is frequently reduced by the prosecutor on a re-evaluation of the value of the property taken).

The decision to choose cases which were already indicted

was a key one; it put the different types of defense attorneys as much on a par as can be expected when trying to control differences among cases. Differences in the quality of the case, in terms of evidence, and the impact of early appointment to the case (vs. late appointment) were also minimized by this decision, as attested to by interviewees:

> I think the impact of the defense counsel at (and before) the indictment stage is minimal . . . In the exceptional case they can have impact if, in fact, you've got a bad charge and the defense gets on it quickly . . . They know that . . . we're square shooters and have no interest in indicting a bad case . . . But usually I'd say their impact is minimal. (Prosecutor, D.C.)

We asked:

> Q. Does the lawyer in district court make a difference in having a case indicted? Or at least getting to the Grand Jury?
>
> A. I think maybe that once (in 15 years) I prevented an indictment . . . But generally, no. (Defense Attorney, PG)
>
> If an attorney gets into a case on the day of presentment, and if he does some immediate investigation and if he thinks the prosecutor's case is weaker than the prosecutor does, he may go into the U.S. Attorney's office saying, 'Look, I've done an investigation in this case. I don't think that you've got very much to talk about.' Sometimes you can divert it from the Grand Jury. But that's . . . a rare instance. (Defense Attorney, D.C.)

Cases and Interviews. Statistical information was gathered on 206 cases in the District of Columbia, 265 cases in Prince George's County, and 171 cases in Alexandria. The differences in case numbers per jurisdiction are related primarily to whether a comparison among the three attorney types could be made or whether it would be between two attorney groups (Appendix B). The information covered data on the defendant's background (e.g., age, race, prior convictions), the criminal action (e.g., nature of the offense, weapon present), case management (e.g., bail status, time interval from indictment to final charge) and case outcome (e.g., outcome of a plea or trial, sentence imposed) (Appendix C).

Fifty-one (51) interviews were undertaken: District of Columbia-16; Prince George's County-18; Alexandria-16. Defense attorneys, prosecutors and judges were spoken with at each location (Appendix D). Questions focused on case management and outcomes of typical robberies and burglaries. For example, the robbery case presented was of a stranger, in a dark street, at gunpoint, with minimal property taken and no physical injury to the victim. One burglary case presented was of a home while the residents were away. For purposes of discussion, variables were altered (e.g., armed robbery vs. unarmed, home burglary vs. store burglary). Interviewees were asked to comment on their perception of defense attorney differences

in handling such cases. In all cases, data on attorney background in law was discussed, as well as current trends in the criminal justice system which might be affecting attorney performance.

Conclusion

This study, in an attempt to understand one particular problem of working as a criminal lawyer, looks into an issue which any professional would be hesitant to discuss--money as it relates to performance. Do similar cases--managed by different attorney types--public defenders, court-appointed, and privately retained attorneys--receive similar case outcomes? And is case outcome related to fees or salaries received? To ease into interviews, the researcher frequently had to take the interview out of the first person and ask questions about "your colleagues." In that context, interviewees were remarkably relaxed and, across jurisdictions, responses were remarkably similar. Since the language the attorneys used was frequently both precise and graphic in explaining attorney performance, the attorneys "do the talking" through large portions of this report.

CHAPTER 1

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2. Criminal Defense Technical Assistance Project, Abt Associates, Inc.: Cambridge, Massachusetts. Information is based on either fiscal 1980 or 1981, depending on which figures were available to the Abt Project.

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5. For a thorough discussion of the right to counsel, see Ron Brandt, The Right to Counsel, Abt Associates, Inc.: Cambridge, Massachusetts, 1980.

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CHAPTER 2 -- PUBLIC DEFENDERS

Introduction

Each of the jurisdictions studied has a similar court structure: a lower court, Grand Jury, and superior court. In the lower court of limited jurisdiction, the felony cases selected for this study were initially arraigned. In each jurisdiction, the lower court was held in contempt by interviewees, viewed as a "circus," a "disgrace," a "free-for-all." A place where little law was practiced.

Each system also uses a Grand Jury to indict its felons, a procedure which has come under periodic attack around the country and which has been abolished in some court systems. In each jurisdiction, interviewees agreed that the Grand Jury served the purposes of the prosecution, and that there was little an individual attorney could do to alter the prosecutor's decision to treat a case as a felony or misdemeanor, or to dismiss the charges altogether.

The superior court is the trial court in each jurisdiction. In the District of Columbia it is called the Superior Court; in Prince George's County, Maryland and in Alexandria, Virginia it is called the Circuit Court. After a felon has been indicted by the Grand Jury, he or she is arraigned again in the superior court. The charges or "counts" of the indictment are read aloud, bail is set (or reset), the appearance of an attorney is entered, and the case is marked for further court action.

The manner in which each jurisdiction handles its plea negotiations currently differs (primarily on the role that the judge plays in promising a "cap" on a sentence). During the time period for which cases were sampled, however, each jurisdiction operated similarly; judges played no role in plea negotiations. The defense had to make its "deal" with the prosecutor, who did or did not offer to make recommendations to the judge. Only recently have some judges in Prince George's County begun to take an active role in what is known as a "pre-trial conference" in the hopes of avoiding trials and speeding up case dispositions.

According to a much utilized classification system of the manner in which the needs of indigent defendants are met,[1] the District of Columbia qualifies as an example of the "mixed" defender and assigned counsel system. While defender offices have always used the private bar to represent some small percentage of cases, the true "mixed" system is more than use of appointed counsel to augment an existing defender office staff; it is a structured, organized and coordinated blend of the two, where there is substantial participation of the private bar. In the District, the Public Defender Service (PDS) represents approximately 15% to 20% of the indigent caseload; CJA attorneys (court appointments) handle the remainder.

Prince George's County qualifies as a "defender office";

this defense delivery mechanism is defined by public or quasi-public officials, appointed or elected, rendering defense services through a salaried, full-time or part-time staff. This system is the one which has achieved the most rapid growth across the country over the past decade. However, even where defender systems exist, non-defender attorneys are always in need for conflict of interest cases, for cases in which a legal specialty is needed (e.g., wiretapping), or where resources dictate a sharing of the defense function for reasons of efficiency. In P. G. County, the public defender handles approximately 85% of all felony cases, but "panels out," using a list of private attorneys, approximately 30% of those cases. Most of those panelled out are lower court cases.

The oldest method of providing defense services is the ad hoc method, or random appointment of counsel by the court from a list of local attorneys compiled by either individual judges or by the local bar. The defense system of Alexandria, Virginia fits into this category. In other words, the private attorneys in the city will be representing all of the indigents along with their privately retained cases.

The Public Defender Service (PDS)--
Washington, District of Columbia (DC)

Washington, District of Columbia, the nation's center of political power, shows its big city face through the huge, modern glass and chrome structure that houses the Superior Court. The lobby is the center for an elaborate surveillance network of television monitors which cover all corridors of the courthouse and security guards who police the judges' chambers. The courthouse, itself, stands in the midst of a high crime area.

All of the statistics in D.C. are "big city." The 1981 crime rate was 86 crimes per 100,000, according to the police department's Office of Crime Analysis. The prosecutor

has a staff of 30 attorneys who consider for prosecution approximately 16,000 alleged crimes each year: 7500 felonies and 8500 serious misdemeanors. Fifteen judges sit in the lower court; 44 sit in the superior court. The Public Defender Service consists of 56 salaried attorneys and 54 support personnel (including investigators, legal interns and secretaries).

Prior to 1970, the court "system" in the District was composed of several separate courts with overlapping jurisdictions. The 1970 Court Reform Act produced one trial court of general local jurisdiction (the Superior Court) and one appellate court of general local jurisdiction (the D.C. Court of Appeals). All non-federal felonies committed in the District (and serious misdemeanors) are now within the jurisdiction of the Superior Court. The D.C. courts themselves remain unique, operating under Federal Rules of Procedure. This discourages attorney cross-overs from other jurisdictions:

> The private attorneys in Prince George's County won't cross the line and try cases downtown (in D.C.). It's referred to as the zoo and they don't want to get involved in it. And it's because the system is so confusing. (Defense Attorney, D.C.)

* * * * * *

The Public Defender Service (PDS) was also established in 1970,[2] succeeding the Legal Aid Agency (founded in 1960). By statute, the PDS is required to assist the courts in

coordinating a system for appointing private attorneys to represent indigents in criminal, juvenile, mental health and other cases where the client is not represented by PDS. The program is authorized under the Federal Criminal Justice Act, and private attorneys appointed to represent indigents under this Act are known as CJA attorneys.

PDS statutory authority covers representation for indigents in a wide variety of cases: (1) criminal offenses punishable by imprisonment of six months or more; (2) parole and probation violations; (3) mental health commitment proceedings; (4) civil commitment proceedings under the Narcotic Addict Rehabilitation Act; (5) juvenile proceedings; (6) proceedings for commitment of chronic alcoholics; and (7) proceedings related to confinement of persons acquitted on the ground of insanity. According to the PDS's own propaganda, the attorneys handle the most serious felony cases, and special requests from judges, requiring enormous amounts of time--substantially more than the prosecution of such cases or the defense of less complex ones:[3]

> Serious felony cases require continuous and intense attorney-client consultation . . . the development of effective and innovative pre-trial release proposals; the careful framing of legal issues--often at the 'frontier' of current jurisprudence--for an intensive pretrial motions practice and during trial; on the scene investigation by attorneys to attain a full understanding of the facts of the case; exploration of a broad

> variety of defenses, many of which entail especially time-consuming preparation . . .; delicate plea bargaining negotiations; careful preparation of alternative proposals on behalf of each client at sentencing . . .

The average number of open cases for any one attorney at a given time is 35 cases, a limitation set by the Board of Trustees and internally controlled by monthly work load reports to the Director. While the Public Defender is authorized by statute to take up to 60% of "persons who are annually determined to be financially unable to obtain adequate representation," their actual caseload ranges between 15-20% of the indigent cases in Superior Court. The rest of the caseload is assumed by the CJA attorneys. The PDS's ability to limit its caseload is due in part to a politically powerful Board of Trustees who wish to ensure the consistently high standards which in the past have earned the status of "exemplary" program for the office.[4] The Board is selected by a panel composed of the Chief Judges from the various courts in the District; however, no judge serves on the Board. The Board was intended to be an independent, autonomous, supervising unit.

The budgetary provisions for the Public Defender Service are part of the budget for the District of Columbia and are reviewed and approved by both the city and Congress.

The salary for an assistant public defender ranges

between $24,400 for the inexperienced attorney and a ceiling salary of $50,000, comparable to that of the U.S. Attorney. The issue of a salary increase, however, is not the highest priority of the office. Most PDS attorneys interviewed said they would prefer to see the agency supplied with more staff attorneys and support personnel.

For attorneys interested in practicing criminal law, the Public Defender Service offers an excellent training ground. Incoming attorneys are given a six week training program, supervision for two years by a senior staff attorney, and continuing legal educational seminars. They are able to gain court experience to a greater degree than if they were employed by a law firm because the Public Defender affords them the opportunity to be in court often, to develop their skills and have control over a manageable case load.

> We have established a tradition and I think it's a firm tradition that the number of cases that we handle will be suitable to our own individual capacities and our own needs to serve the client that we have. (Public Defender, D.C.)

The camaraderie which exists within the PDS is a commodity which is envied by the appointed attorneys, who largely practice law as solo practitioners.

> One of the most important things is that we are like a law firm here. We talk to each other a lot, we generate ideas among each other very easily, because we're right down the hall from

> each other. We have a very close and in my opinion camaradic relationship here. (Public Defender, D.C.)

Perhaps there is no higher accolade for the PDS than what was said in an interview with a Superior Court judge:

> The Public Defender Service is head and shoulders above everybody else in every stretch of the imagination in terms of quality of defense, adequate defense work, . . . they work together, are salaried so they're not hustling the buck . . . Obviously wisdom comes with age, one hopes, and experience. And the more you've been doing it in a first class manner the odds are you're going to do it better in a tough situation. (Judge, D.C.)

The Office of the Public Defender--
Prince George's County, Maryland

The Upper Marlboro area of Prince George's County is rural, tobacco country with the appearance of a "sleepy hollow," according to one prosecuting attorney. Located on the narrow main street is the courthouse, occupying an old red Victorian brick building (circa 1880), built at a cost "not to exceed $20,000" which included landscaping and the purchase of new furniture.[5] Designed to serve the small community which inhabited Prince George's County in the late nineteenth century, numerous extensions and additions have since been constructed to accommodate the dramatic population and case volume growth as the largest suburban county in the District of Columbia metropolitan area. The building currently sports massive white Greek columns and portico (circa 1940). Since big city crime

has come to Prince George's County, to enter the courthouse the visitor must now pass through a metal detector. According to an article which appeared in The Washington Post in 1981, the metal detector resulted in the confiscation of the following items from visitors to the Maryland county courthouse during that year: 3,385 knives, 34 handguns, 522 cans of Mace, 95 scissors, 74 razors, 4 putty knives, 4 cork screws, 3 letter openers, 3 slapjacks, 2 blackjacks, 3 brass knuckles, 7 darts, a night stick, baseball bat, hoof pick, awl, teargas gun, fork, syringe, hammer, ice pick and a pair of Nunchukas.

The handsomely panelled interior supports the atmosphere of familiarity which characterizes the working courthouse and its legal community. A small network of defense attorneys, prosecutors and judges know each other well; many have changed roles among judge, prosecution, public defense and private defense, a situation which is relatively uncommon in the degree to which it occurs in Prince George's County.

Unique to the Prince George's County court system is the de novo appeal, which gives the defendant an automatic right of appeal from a lower district court to the circuit court. The office of the prosecutor (i.e., State's Attorney), in order to discourage frivolous appeals, has recently instituted a policy of not accepting pleas on de novo appeals. Thus, those cases are forced to trial.

The pretrial conference, which involves the judge in both plea negotiations and sentencing guidelines were recently introduced into the system. Neither of these procedures, however, were in existence during the years from which our data were drawn.

* * * * * *

The Office of the Public Defender operates within the executive branch of the Maryland state government. Under the Public Defender Act of 1971,[6] the state embarked on what was then a new concept--an office which extended representation through all stages of criminal proceedings, including initial custody, interrogation, preliminary hearings, arraignment, trial, appeal and certain post-trial matters. The governor appointed a three-member Board of Trustees to oversee the operations of the Public Defender Office and to appoint the Public Defender of the State. This Public Defender, in turn, and with the approval of the Board, appointed one District Public Defender for each of the twelve court districts in Maryland. The Prince George's County Public Defender Office falls within the Seventh Judicial Circuit.

The first public defender, one of the leading opponents to the establishment of such an office, set a standard for high quality defense representation which continues to remain a "benchmark" of the Office:

> When you institutionalize, at least governmentally speaking, functions of legal practice, you remove a lot of the motivation for excellent performance. First of all, if you hire me and you pay me $20,000 to defend you in a murder, you're going to get everything you possibly can get. And the reason is not because I'm in love with you, but I'm in love with your money. And to be known as a goddamn loser is going to put you out of business quick. When you governmentalize it (defense) then you insure the pay check of the individual who is responsible for performing. It is the exceptional individual who can be totally motivated out of pride and pride alone. In this county, I tell you we are blessed. You would actually believe that some of these public defenders themselves were going to go to jail. (Judge, PG)

Initially, the Public Defender Office was staffed with four attorneys, and no investigators. At the time this study was undertaken, the staff had increased to eleven attorneys, three investigators and support personnel. By July 1, 1982, the Office was expecting to hire three new staff attorneys.

Staff attorneys handle an average of two new cases a week, approximately 110 annually, relying on a panel of private attorneys to take case overflow, conflict-of-interest cases, and specialty cases on an appointment basis.

Eligibility for services of the Office of the Public Defender is established by guidelines published by the State Public Defender's Office, although the term "indigent" is broadly defined, and clear-cut points which might distinguish indigents from non-indigents do not exist. Defendants who wish to apply for public defender eligibility are required

to complete a form which asks about (1) the disposable income of the person, (2) the nature, extent and liquidity of assets,[7] and (3) the number of persons in the family. The State office publishes a scale which sets down an income allowance (disposable income after normal deductions) and relates it to the number of family members. For example:

Number of Family Members	Income Allowance
1	$ 86 per week
2	113 per week
3	126 per week
4	139 per week

Persons or families whose incomes are at or below the income allowances and have no other liquid assets or interest in other assets are eligible for Public Defender assistance.

In operation, the Office works on an honor system in regard to eligibility, not having the resources to check the validity of the information on the application. Interviewees suggest that up to 1/3 of those given free representation may not really be eligible

When defendants fall within the "gray area" of eligibility, either because they are initially borderline in their qualifications or because they become ineligible prior to trial (e.g., they become employed), a fee reimbursement agreement is entered into with the Office. A contract is negotiated with the Office whereby the defendant reimburses the Office an agreed upon amount over a perior of time. Such reimbursements are usually moderate in their conditions, such as an

amount not to exceed $125, payable at $10 a month. This reimbursement is usually made a condition of probation by the Court. Prince George's County collects anywhere from $1,000 a month to $4,000 a month from these arrangements.

The starting salary for an assistant public defender, $24,714, is slightly higher than that of a prosecutor. However, because the prosecutor's pay scale differs in its amount of increases, after a short period of time the salaries are no longer comparable. But the Public Defender is afforded an option in Prince George's County that the prosecutor is not; an outside civil practice. While time may not permit maintaining such practice, the option is a "selling point" to prospective defenders and is available provided it does not interfere with the primary job.

Assistant Public Defenders usually start their career in the District Court; with experience comes "promotion" to the Circuit Court. Frequently, staff attorneys become self-designated experts in certain areas of criminal law; capital cases, juvenile cases, rape, child abuse. Case assignment, however, is always within the discretion of the Public Defender, a job for which the current Defender is given high marks:

> I can't imagine the Public Defender putting up with someone who doesn't do a good job. A defendant who ends up with a full time public defender is probably, on a statistical basis, better off than his counterpart who's paying the

> fee. A poor defendant who comes to the Public Defender Office is better off with a panel attorney who's picked by the Public Defender than (one) who might be picked by his family or by him through a random selection of counsel. (Defense Attorney, PG)

The Public Defender Issue:
Alexandria, Virginia

Few American cities can claim a hold on tradition like Alexandria, Virginia. Only nine miles from the nation's capitol, Alexandria combines the leisurely pace of a small southern town with the charm of 18th century Europe. Yet modern times has come its way. In the last 30 years more than 2000 buildings, ranging from stately Georgian to gingerbread Victorian have been renovated. The courthouse, once housed in an area of residential townhouses converted into small boutiques on cobblestone streets, was moved into a new commercial building as of summer 1982. According to a recent survey, Alexandria had the highest per capita crime rate of 12 jurisdictions in northern Virginia.[8]

Virginia is unique among the three jurisdictions with regard to jury trials; when a jury tries a case it also sentences. In order not to have a jury trial, defense, prosecution and judge must all concur. If the government wants a jury trial, it is entitled to one. In daily operation the Commonwealth Attorney's Office asks for a jury trial only in serious crimes of violence.

Additionally, a jury can neither suspend a sentence nor grant probation. And while the judge has the authority to reduce a jury sentence, the "conscience of the Community" is rarely countermanded. When a defendant has a jury trial, he or she will usually live with the jury sentence. So in cases where the defense feels there is a good chance for probation, a jury trial is a disadvantage.

* * * * * *

Voting down a proposed public defender office for Alexandria, Virginia perhaps best illustrates the vigilance with which the private bar maintains tradition. The State of Virginia, in 1972, created the Virginia Public Defender Commission and established Public Defender offices in three jurisdictions: Staunton, Roanoke, and Virginia Beach. A fourth office, serving Petersburg, was formed in 1979. The Commission selected Alexandria to be the site of a fifth office in 1980. However, the overwhelmingly negative vote of the Alexandria Bar Association was the primary reason for the City Council's decision to take no action on the proposal during the 1980 legislative session.

The scenario unfolded as follows: A proposal to the city was made, recommending that Alexandria become the fifth experimental site for an Office of the Public Defender; that is, for full-time, salaried attorneys to take all of

the indigent caseload. The committee formed by the local bar association to investigate the proposal advocated its acceptance for several reasons: (1) long-range economies were foreseen, although no immediate savings would result; (2) resources and services would be available to the defender which were not currently available to court-appointed attorneys; and (3) in-service training would yield a pool of expert defense attorneys.

The Commonwealth Attorney's Office was also in favor of establishing a public defender office, accepting the arguments for long term economic savings, the availability of investigators, a sense of camaraderie among defense attorneys who could exchange information, and for a centralized office where a defendant could go for assistance and be screened on the basis of established eligibility criteria. Under the present system, according to one attorney, anyone who has been through the courts knows what has to be done to "appear indigent."

None of the above arguments swayed the local bar. Criticism of the existing quality of indigent representation, which the proposal implied, offended the legal community. Nor was Alexandria characterized by a crisis in court scheduling; rather, the courts were efficient in case handling, with a six to eight week turnaround time from Grand Jury to indictment to final disposition. According to one attorney:

> Most defense lawyers would not want a case to go faster than it's going to go in Alexandria. (Defense Attorney, Va.)

When a case goes to trial, it is rare for the trial to take even two days to close:

> Things do not drag out here. You have to practically beg to extend the time. Speedy trial is not a problem in Virginia. We get things done. (Defense Attorney, Va.)

On the other hand, the defender system was viewed as one which offered no incentive to excellence:

> Whether it's a good job or a bad job, the check is going to look the same on Friday one way or the other. The (public defender) doesn't have that monetary incentive to do a good job and make an impression on the client and try to get that client off. If for no other reason than to have him come back. (Defense Attorney, Va.)

> In theory, the public defender doesn't have to worry about cost so he should be able to do all kinds of things. But he'll have so many cases that he won't be thinking about cost. He'll be thinking about time . . . (Defense Attorney, Va.)

Perhaps the greatest fear expressed was that the system would no longer be adversarial in nature. If the criminal defense mechanism was institutionalized, the argument went, it would become one (defender) bureaucracy working with another (prosecutor) bureaucracy. The public defender and prosecutor would become "bedfellows," and in the process, the defendant's rights would be bartered for bureaucratic purposes. A closed system would result:

> You're the public prosecutor and I'm the public defender. So now, look, we got a hell of a crowd of cases here. I been pleading these people right and left, it's time for you to give me a few nolle prosse's. Nobody is going to think I'm doing worth a damn. So he says, 'all right, I'll give you . . .' and all of a sudden you're dealing with numbers instead of people. It's inherent. Even the best of people. So we don't want to do that at all. The mistake is that we have so institutionalized the prosecutor's job. Oh my God, and the police are building right up along side of it. The defense doesn't need an institution to battle the power of the state. (Judge, Va.)

The result of the discussion among bar members was best summarized by one defense attorney: if it's not broken, don't fix it. The Alexandria City Council voted to take no action on the proposal.

Postscript: In 1982 the Virginia legislature was to consider a bill to expand the public defender system statewide. The bill was never reported out of committee, with opponents contending that more experience was needed with the existing defender systems. A study which focused on comparing public defender performance and assigned counsel performance in the experimental jurisdictions in Virginia felt that the factors leading to a postponement of consideration of the bill were related to the recent mood of the nation and Virginia--on limited government expansion, a strong anti-crime attitude and lawyers fears of a loss of income from assigned cases.

Conclusion

The public defense systems utilized by the jurisdictions studied differ not only in structure but in history and personality. The Public Defender Service of the District of Columbia began 12 years ago, and continues to operate--as a law firm. The draw of staff is national; the ability to limit caseload is a priority; legal innovation is encouraged; the operations are considered "exemplary" by the government.

In Prince George's County, the Office of the Public Defender is struggling with the host of problems which typically accompany a defender office which intends to--and does--absorb the large majority of representation of indigents. Caseloads grow without the increase in staff. Resources are strung thin. Local attorneys lose interest in the practice of criminal law. Fortunately, a history of excellent leadership at the top has minimized some of the problems for the defenders and maintained the appearance of competency among the private bar.

In Alexandria, Virginia, the strength of the traditional ad hoc system has resulted in a resounding defeat to a proposed defender office. To some extent, the defeat was aided by the poor "approach" of the State government's representatives. In a second attempt, the proponents of efficiency in cost and operation may not be so easily defeated.

CHAPTER 2

1. Nancy Albert Goldberg and Jay Lawrence Lichtman, Guide to Establishing a Defender System, National Institute of Law Enforcement and Criminal Justice, LESS, May 1978.

2. The Public Defender Service was established pursuant to and Act of Congress (P. L. 91-388) now codified as D.C. Code §2-2201 et seq. (Supp. II, 1975).

3. Public Defender Service for the District of Columbia, Eighth Annual Report, Fiscal Year 1978, Public Defender Service: Washington, D.C., 1979.

4. In 1974, the United States Law Enforcement Assistance Administration designated the PDS an exemplary defender office, recommending that other jurisdictions provide comparable services, and distributing PDS training and administrative materials nationwide as a model for other defender offices.

5. M. L. Radoff, The County Courthouses of Maryland, 1960, p. 123. Taken from the Technical Assistance Reporter, Courts Technical Assistance Project, American University, Washington, D.C.

6. Annotated Code of Maryland, Article 27A §1-10.

7. It is specifically noted that no person will be expected to sell his or her residence to generate funds for a defense.

8. Sandra Hemingway, "Alexandria Crime Rate Highest in Area," The Alexandria Gazette, June 18, 1981.

CHAPTER 3 -- COURT APPOINTED ATTORNEY

Criminal Justice Act Attorneys (CJAs), Washington, District of Columbia

"Fifth Street" is as much the location of the Superior Court in downtown Washington, D.C. as it is a state of mind. Being a "fifth streeter" connotes court-appointed attorneys who practice hip pocket law, of attorneys who operate out of their briefcases, out of empty case file jackets, who offer quick pleas. This type of attorney is not, however, unique to D.C., but exists to a differing extent across the country.[1]

> In most urban areas the practice of criminal law by the private bar has been left to two types of practitioners. The first type is the well-known lawyer who has relatively few court assigned cases. This attorney's primary clientele will be criminal defendants who are able to retain counsel; persons charged with drug-related offenses; persons alleged to have organized crime connections; persons charged with white collar offenses . . . The second type of practitioner is the attorney who does a high volume, state court, street-crime type representation. This attorney will receive a significant number of court assignments. Few of this lawyer's cases will go to trial. Such an attorney may be quite adept at quickly disposing of cases in a way favorable to his or her client. He or she does not usually file motions or do extensive investigation.

In Washington, a new young group of "fifth streeters" is said to be lifting the quality of defense practice among court appointed "ol' timers." But because of the low rate of compensation, and the amount of time necessary to be spent in court, these attorneys "tend to get married to the court"

(Defense Attorney, D.C.). Economic considerations and time constraints force them to carry their practice in a briefcase and maintain offices near the court:

> So you got a whole bunch of guys in one room with one desk. And they try and share it over there across from the courthouse. And they're charging each other $50 a month to stay there. And they're living out of their briefcases. And their main office is in their home. And they have the wife doing their typing for them. And that's the only way to survive. (Defense Attorney, D.C.)

Some of the problems encountered by the attorneys on Fifth Street were summed up in a recent article on the group:[2]

> The Criminal Justice Act program forces attorneys to endure the bureaucratic hassles inherent in any government-administered effort. Fifth Street lawyers must cope with a case assignment that fosters favoritism, administrative paper shuffling, that wastes time and energy, and pay that they find inadequate and at times unfairly subjected to additional cuts by reviewing judges.

Since the primary concern of a lawyer fresh out of law school is to establish a practice, court appointments is one such means to gain experience, acquire clients, pay the overhead, and establish a private practice. So, Fifth Street isn't entirely undesireable.

> Fifth Street is a delightful place to practice. You got to love it. Fifth Street can be managed and handled. You can have a good decent practice there as long as you're willing to put up with the financial inconsistencies of it and are able to survive that without going into bankruptcy and getting into tax trouble. (Defense Attorney, D.C.)

Because of the small percentage of indigent cases represented by the PDS (i.e., 15-20%), the attorneys who are appointed under the Federal Criminal Justice Act take the bulk of the indigent caseload. They are paid for appointed cases at a rate which was established ten years ago; it is said that the $20 an hour out-of-court and $30 an hour in-court rate mitigates against the commitment of extensive resources to any one case.

> You can't do a quality job for those kinds of rates any more. (Defense Attorney, D.C.)

> I don't have any great desire to get involved in a homicide case or something like that (as a court appointed attorney). There would be a lot of work involved. And the anxiety around it isn't worth the kind of money I make under CJA doing it. (Defense Attorney, D.C.)

According to Paul Wice, who included D.C. as one jurisdiction among nine studied for Criminal Lawyers, "about 40-50 regulars dominate the system and make their living off their appointments."[3]

The matching of attorneys with defendants works as follows: between 8:00 a.m. and 9:00 a.m. each weekday morning, a staff member from the public defender's office interviews each person in the cell block to decide: (1) who is eligible, without contribution, for a public defender; (2) who is eligible, with contribution; and, (3) who is not eligible. At the same time, attorneys who are available to receive one

or more cases telephone the court and have their names placed on a call-in list.

The PDS compiles a daily list of attorneys available for appointment and submits it to the arraignment judge along with information from the lock-up sheet with the name of each defendant, the charge against them and their eligibility status. Whichever judge sits in Courtroom 17 for a one month period--in conjunction with the public defender's representative--will assign attorneys to cases. Between the judge and the public defender there exists a great deal of knowledge on different attorneys' capabilities.

In general, the PDS takes an average of 10 new cases a day. The remaining cases are assigned to the attorneys who have requested appointments, although these assignments are not randomly made. According to one public defender:

> (We) know who the Felony I and II attorneys are on the list and know who is not doing a damn thing. Ninety-nine percent of the time we'll (PDS and judge) peruse the list and appoint according to charge and skill of attorneys. (Public Defender, D.C.)

Although critics of the system remain . . .

> It certainly helps to be more popular and well thought of by the representative (of the PDS) making appointments. (Defense Attorney, D.C.)

> It's hard to predict. You'll be getting a whole bunch of felonies and all of a sudden you'll get a prostitution case (misdemeanor) and you wonder, 'Did I say something wrong to the judge . . .?' (Defense Attorney, D.C.)

> Unfortunately, you have forty-some judges and forty-some ways of making appointments. (Public Defender, D.C.)

. . . the prevailing sentiment of attorneys indicates a good match of skills needed and cases assigned:

> Justice is blind, but every now and then she picks up the corner of her blindfold to look to see who the counsel is. I think that's fair. I think it results in better representation and more equitable results because all counsel down there (at the court) is not as competent. That's just a fact of life. (Defense Attorney, D.C.)

As noted earlier, for reasons of cost efficiency, it is likely that the PDS will take the "harder" cases; that is, the cases in which the charge is more serious (e.g., homicide) and the legal issues more complex. For example, for the fiscal year 1978, the PDS estimated that "serious" felonies accounted for 65% of the Service's felony caseload.[4] Although the PDS "may furnish technical and other assistance to private attorneys appointed to represent persons" accused of crime,[5] most attorneys interviewed said that they didn't use it; it took too long, for example, to wait for an investigator to be available.

While the ceiling on CJA attorney's annual fees has increased from the 1979 figure of $27,000 to the current figure of $43,000, the hourly rate has remained the same ($20/hour out-of-court, $30/hour in-court), so that attorneys "have got to just be willing to work 70 hours a week" (Defense

Attorney, D.C.) A joint study of the Judicial Conference of the D.C. Circuit and the D.C. Bar provides some insight into why fees have not increased.[6]

> The legislative history of the Criminal Justice Act indicates that compensation to attorneys representing indigent defendants was never designed to be on a par with fees charged in retained criminal cases. Congress evidently intended--and the courts have so interpreted the Act--that attorneys taking CJA cases are discharging, at least partially, a pro bono junction.

In order to receive payment, attorneys must submit detailed vouchers to the court. The attorney submits the voucher to a CJA office which checks it for mathematical accuracy and forwards it to the Public Defender Service for signature; it ends up in front of the judge who took the plea or heard the trial. This judge has the ultimate authority to approve the voucher or to cut it. If a voucher is reduced by a judge, the attorney generally does not learn of it until receipt of his or her check. No formal grievance procedure exists, and the only line of inquiry for attorneys who have had their vouchers reduced is through the approving judge. The potential problems of such a system--and the potential abuse of authority--are obvious. Concerning voucher approval by judges, the Joint Committee report had this to say:[7]

> . . . there is a tendency to play Monday morning quarterback, to make judgments about counsel's tactics and expenditures of time, and then to cut vouchers in accordance with those judgments. Given the widely differing backgrounds and attitudes of Superior Court's 44 judges, there is inevitably an equally wide divergence of views as to what is a legitimate expenditure of time and what is not. The end result is a patchwork of inconsistent policies and practices.

Following approval by the judge, the voucher goes to the Court's administrative office for check disbursement. It is generally agreed that attorneys are not promptly paid. According to one defense attorney, "It's the lowest priority thing in chambers, to fool with vouchers." While statutes provide for compensation in excess of the hourly rate, the procedure necessary in order to obtain this is cumbersome and time consuming.

Panel Attorneys--
Prince George's County, Maryland

According to the Annotated Code of Maryland,[8] each District Public Defender maintains a confidential list of private attorneys-at-law who are available as counsel to indigents. The Code states that the attorneys should be classified into panels according to attorney qualifications (e.g., previous trial or appellate experience). Currently, the Public Defender Office has approximately 100 attorneys on its panel. In order to solicit new attorneys to the panel,

the Public Defender recently placed an application in the local bar association newsletter inviting all interested attorneys to respond.

The factors which influence the decision to panel out cases are largely legal, administrative and financial in nature. They include cases which involve co-defendants, cases which are unusually complex and require the skills of highly experienced and specialized attorneys, and cases which are excessive in number; that is, when the office feels it can't handle the volume and do a good job. In this study, for example, all burglaries were "panelled out" during the year in question and the more serious cases of robbery handled by the Defenders.

But financial considerations are a major factor as well. Says a former public defender who occasionally handles serious cases on an appointment basis:

> The PDs do it economically. So you try to keep in the office the serious cases which they know that if you farm it out, will require a lot of money. Most of the cases that they panel out are pleas . . . . (Defense Attorney, PG)

In general, panel attorneys are content with the quality of the appointments:

> They (the PDs) know what the score is. They're not going to take someone who's a rooky and give him something that he's never tried before or anything like that. Most of the time they're pretty . . . conscientious. In the years I've been doing this I've seen very few of what I consider slip-ups, where I knew that somebody was clearly mismatched for the type of case . . . (Defense Attorney, PG)

The statewide fee schedule approved by the Maryland Office of the Public Defender provides $25 per hour for in-court representation and $20 per hour for time spent out-of-court, with a maximum of $500 for Circuit Court non-capital offenses (our charge categories). Claims exceeding these sums must be approved by District Advisory Boards, which are established by statute in each public defender district. Unfortunately, Prince George's County is not operating under those regulations.

During the summer of 1980, because of an insufficient legislative appropriation, the P. G. County defender office was directed to reduce by 10% all voucher claims submitted by private counsel. Later in 1980, further reductions were ordered. Currently, panel attorneys are compensated at the rate of $20 per hour for in-court time and $15 per hour for time spent out-of-court. When rates were reduced, approximately one-fourth (1/4) of the county's panel attorneys withdrew their names from the court-appointed list.

Because of the low fee currently being paid, the Office's decision to handle most cases in-house may be best for all concerned:

> It's awful hard to farm out a major trial to a privately retained counsel for $15 an hour when the normal fee varies anywhere from $100 to $150 an hour. (Judge, PG)

> But there's a point of no return, I guess (in accepting appointments) where you feel like you're maybe cutting your own throat. Because to take one of the serious cases, you're obviously divesting yourself of much needed time to devote to your private cases. (Defense Attorney, PG)

When the defendants in a major case have to be farmed out for one or another reason, several of the known trial attorneys indicated that such cases may be handled pro bono, as an obligation to the Bar . . .

> I think several attorneys have had the attitude that they owe somewhat of an obligation to the Bar and the county and that's the reason they take them. (Defense Attorney, PG)

. . . or as an intellectual challenge:

> I only do it to keep my mind going. We're (the firm) not doing it for the money. (Defense Attorney, PG)

The reduction in fees, however, has greatly endangered the practice of criminal law by the private bar. The high percentage of cases which the Public Defender considers indigent makes the entry of new attorneys into the criminal system difficult. Experienced attorneys who have had a 50% criminal practice now find this percentage down to 20%. By virtue of their experience they may still acquire "plum" appointed cases. However, those attorneys with a practice which was at best 20-30% cannot afford to continue as panel attorneys. Infrequent appointments prohibits them from court experience needed to keep abreast of changes in the law; post-conviction appeals

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for ineffective representation have become an increasing worry. Considering this risk factor associated with panel appointments, and the current low rate of compensation, attorneys are justifiably less than enthusiastic to take cases on a panel basis.

> And you weigh all this (post conviction appeals) with the penny ante fee that is being charged, as opposed to having all this bad publicity for something you never did. Really in many respects, then that's why a lot of lawyers say I don't need it. I don't need the grief. (Defense Attorney, PG)

Court Appointments--
Alexandria, Virginia

Since the recommendation for an experimental office of the public defender was not acted upon by the City Council, private attorneys in Alexandria only need be concerned with (1) whether a judge determines the defendant eligible for free counsel and (2) the judge's method of appointing defense counsel. The rest is private enterprise.

The majority of court appointments in Alexandria are made in the District Court by one of two judges. Each has his own method of determining indigency and appointing counsel. One judge asks every defendant who asks for a free attorney to (1) locate three private attorneys, (2) ask their prices and conditions of payment, and (3) decide whether one of the attorneys is affordable. The judge continues the case for

one to two weeks while the defendant does the "research." Although this judge likes to release defendants pending trial, if they are in jail they are expected to make the necessary telephone calls from jail or obtain the help of friends. When the defendant returns to court he has to convince the judge--if he wants to receive free representation--that he is eligible. If the judge is convinced, he will refer to a card file of attorney names and use them on a rotation basis, regardless of level of attorney experience.

The other District Court judge maintains a list of attorneys, but is noted for looking around the courtroom on arraignment day and seeing who is sitting in court waiting for an appointment. According to interviewees, this judge tries to match skills and experience with case type.

Appointments remain unless there is a post indictment problem. According to interviewees, the few appointments made in the Circuit Court appear to be going to the same attorneys--those who sit in court and wait.

Is the system abusive? According to one attorney, the court can't afford to have the system work badly. Appointing a poor counsellor jeopardizes a conviction and only encourages suits for ineffective assistance of counsel.

> It's to everybody's benefit to see the guy has a good lawyer, and they (the judges) know the good lawyers and the bad lawyers. (Defense Attorney, Va.)

According to one prosecutor, the judges are "paying more careful attention to who they appoint to what case." If anything, the large group of lawyers wanting appointments--due to the increase in law school graduates--has fostered a better group of appointments through stiffer competition.

Since the number of attorneys who will accept appointments has tripled over the last ten years, there are fewer appointments for individual attorneys. So the courts are more sensitive to spreading the appointments across a larger group. If an attorney feels overlooked, he merely has to signal the court he would like some appointments.

Defendants not entitled to full appointed counsel may qualify for partial fee arrangement. In this situation, a portion of the appointed attorney's fees are paid to the court by the defendant. If the defendant is convicted--placed on probation or when released from jail--he or she may be required to pay these court costs. According to the Commonwealth Attorney's Office, several thousand dollars are collected this way monthly.

Fees

Appointment systems, as Chapter 1 noted, have recently brought criminal defense attorneys into legal battles against the criminal justice systems within which they work. Even The Lawyer's Handbook counsels attorneys that in those cases

where appointments by the court have become so numerous that representation places "an unfair disadvantage" on the lawyer, his law firm or his family, "the attorney and their bar associations should make this known to the appropriate quarters."[9]

Fee Schedules

Attorneys interviewed who practice in the three jurisdictions studied are uncomfortable with the low fees they felt they received from appointments. In Virginia, fees are calculated on a flat rate basis and are directly related to the number of counts in an indictment. For the typical armed robbery or burglary in our study, the maximum fee is set at $200 per count. The total amount a court-appointed attorney receives for such a felony case accumulates depending on the number of counts in the indictment. In the District of Columbia, fees for felony cases are set by statute, as we have noted, at $20 per hour for out-of-court time and $30 per hour for in-court time, with a maximum of $1000 per case. In Maryland, the fees are set by statute, but PG County attorneys are working at a lower rate than those the rest of the state; again, $15 per hour for out-of-court time and $20 per hour for in-court time. The statutory maximum for non-capital offenses such as armed robbery and burglary is $500. In other jurisdictions attorneys work by combinations of fee and hours, and by contract.

In most cases, the representation of indigents is not a money-maker for attorneys. One attorney who applied professional accounting and management techniques to assigned counsel cases in his practice in Dallas, Texas concluded:[10]

> Many lawyers will be shocked at the results of applying (overhead) to fees in cases where they are appointed to represent indigent defendants. Lawyers who think they make a modest return on such court-appointed cases will be dismayed to learn how frequently they make no profit at all. Others, who believe at worst they contribute only time, will be disturbed at the revelation they donate money as well--disguised in the form of law office overhead. It is a good thing that assigned-counsel cases provide valuable experience; as often as not the lawyer is paying (not receiving) a fee to get it.

Given this state of affairs in more places than in Texas, how does the system continue to survive? Why would attorneys be part of this loosing proposition? Perini[11] mentions such things as: (1) poor bookkeeping practices of criminal defense attorneys, which masks the extent of the problem; (2) the tendency of criminal defense attorneys to accept, by tradition, a hand-to-mouth existence while looking for the "big case"; (3) the rapid movement of young attorneys in and out of criminal practice.

It is interesting to note that a very similar payment schedule to that of Prince George's County, which exists in Calhoun County, Alabama, has sparked a legal controversy based upon the issue of "involuntary servitude." The system that

Gary Sparks and the Calhoun County Bar Association fought at every court level is a system which Sparks says "encourages, requires and demands incompetent" legal assistance because of the extreme burden it places on lawyers, without regard for the impact of the assigned counsel system on their ability to earn a livelihood through paying-client work. A local trial judge agrees: "The cases are voluminous, the burden is heavy (attorneys devote approximately 20% of professional time to representing indigents, by Sparks estimate), the compensation is poor to nonexistent."

Starting Practice

Taking court appointments is a frequently desirable beginning for the practice of criminal and/or civil law.

If court paid fees--usually very low--are ever viewed as an asset of practice, it is when one begins the practice of law without the cushion of being part of an ongoing law firm. It is perhaps the only time in an attorney's career that the money offered by the courts seems reasonable compensation for developing a pool of clients from which to expand one's practice . . .

> Criminal defense is a referral business. If you have satisfied customers either they come back again--if they're available--or their friends or relatives or whatnot come back. (Defense Attorney, Va.)

> Every person that you come in contact with will effect 7 to 10 other people. (Defense Attorney, Va.)
>
> Somebody you represent on an assault and battery case, later on might have an automobile accident or might need a divorce . . . or may know somebody who does. And they refer them to me. (Defense Attorney, PG)

. . . having one's legal education subsidized . . .

> The only way you can get any experience in practicing criminal law is to practice criminal law. So what I am basically doing is subsidizing my own education to work for $10 or $5 an hour. (Defense Attorney, VA.)
>
> (Learning things like) what kind of pleadings to file, how it's supposed to look. You know, what size paper to use; things like that that nobody who is fresh out of law school knows anything about. (Defense Attorney, DC)

. . . learning the courthouse ropes . . .

> . . . got my feet wet, made some mistakes, learned things like where the courthouse is and how to talk to judges, how to talk to clients . . . (Defense Attorney, PG)

. . . and acquiring personal and professional contracts with court personnel . . .

> Experience, and contacts too. Because then the judges know you . . . and that kind of thing. (Defense Attorney, Va.)
>
> I know if somebody is sitting in there (the court room) waiting for an appointment, they (the judges) will appoint them. But I think they also call on their favorites. (Defense Attorney, Va.)

Primarily, however, money is the motivation for court appointments:

> Young people starting in a practice say, 'Look, it's money coming in. I don't have ten other clients sitting in the office waiting for me. So if I spend the time on this case, at least I know I'm going to get some money out of it, even if it's only $10 an hour. (Defense Attorney, PG)

Money to pay office overhead. Money to pay a mortgage. Money to keep the attorney in business while the shape of his or her future legal practice forms. This comes at a time when the Bureau of Labor estimates that by 1985 there will be 100,000 surplus lawyers. Law is the country's fastest growing profession.

Giving Up Court Appointments

All too frequently, however, a career in criminal law is short-lived. The court-appointed defense attorney soon finds it impossible to maintain a practice on the low fees generated by court appointed cases.

> The last one, a misdemeanor. The family was very hyped up about it. I spent quite a bit of time on the phone with the family. I went to jail four or five times to talk with this kid (client). And the long or short of it was that I don't think I made $10 an hour on the case. (Defense Attorney, Va.)

In none of the jurisdictions studied were court fees felt to be related to the work put in on a case.

In Virginia, for example, a murder case of two Grand Jury counts which will go to a five day trial could theoretically bring a maximum of $400, while a fraud case of five counts which is plea bargained after the preliminary hearing

could bring much more. In short, there is no correlation between work put in on a case and compensation received. So as referrals for civil work come in, attorneys begin to take the time from their criminal appointments. The younger, less experienced attorney is still taking the large majority of court-appointed cases. The lawyer with greater experience in the system has more ability, and desire, to control the number of appointments. Virginia attorneys, in particular, view court appointments as an important way to maintain and socialize the newer, younger members of the Bar until their "real" practice takes shape.

In Prince George's County, a telephone call to the Office of the Public Defender, or a completed form advertised in the local Bar journal, can remind the Defender that an attorney is interested in receiving cases--or having his or her name struck from the appointments list. But because of the drastic cuts in court appointed fees, and the tendency of the PD to take 70% of the criminal cases (excluding appointments), there is currently little room for some of the attorneys who formerly maintained a small practice in criminal law. The number of those lawyers who still take criminal cases on any regular basis is diminishing due to a vicious cycle; fewer referrals from the PD means less chance to keep abreast of constitutional changes and maintain skills; which leads to

greater risk of post conviction appeal for ineffective assistance of counsel.

> With constitutional law and prisoners the way they are, you have to file every frivolous motion you can and sit around the court waiting, just to protect yourself. (Defense Attorney, PG)

So polarization in criminal practice takes place among attorneys who build a close to full-time private criminal practice and attorneys (the large majority) whose criminal practice is decreasing (20% or less).

> I know a couple of pretty well-established attorneys who take PD cases (appointments) and don't send a bill. They figure their secretarial time and what it takes to prepare that bill, versus the fact they know it's going to be cut when it gets there (PD's office). (Judge, PG)

> I handle very few PD (appointed) cases. They don't want to pay anything but $20 an hour and I don't consider that a sufficient sum to enable me to go out and do the work and survive. (Defense Attorney, PG)

> I got to the point where I said 'the hell with the damn . . . You know, I can't fill the forms out. I can't keep those records. Let's do the damn case for nothing. It's easier than worrying about getting paid. Let the private cases carry it and chalk it up to pro bono work. (Defense Attorney, PG)

> Many of the people who I consider to be competent trial attorneys in this county have deleted themselves from the public defender's panel. Because your average legal fee on an hourly basis may be . . . $60 to $75 an hour . . . and yet the Public Defender's fees vary from $15 to $20 an hour. And you know when you send the bill they're going to go ahead and cut it down substantially anyway. (Defense Attorney, PG)

There was no doubt in any attorney's mind that the State's reduction in panel fees played a major role in reducing the list of those attorneys willing to accept appointments from the Office of the Public Defender. Conversely, with a higher rate of pay, "you'd see several good attorneys come back." (Defense Attorney, PG) To an unhealthy extent, the criminal attorney in Prince George's County is an endangered species.

Only in the District of Columbia are court-appointed fees not deterring the practice of criminal law as a full-time practice. Rather, it is because of the low fees, the high volume of cases available for court-appointments, and the inefficient operations of the court itself that a high volume practice of criminal cases (appointed and privately retained) is imperative.

> Right now I try to call in one or two days a week (for a court appointment), try to set it up so when I go down there (to the court) I got three or four other cases going on. It doesn't pay to be down there for one case. The judges are not going to pay you for your waiting time. (Defense Attorney, DC)
>
> That's why if you want to practice 5th Street law you got to have three to five cases (on the docket each day). So you can go and check into three to five courtrooms. And then you just work them. Your job is to work them. You just keep moving. You get the judge to keep them open and you go on. And it works out real well and you get paid for that day in court. . . . Otherwise, you come down here and you spend $40 worth of time waiting for a five minute or $2.50 thing, and the judges hate (to pay for) waiting time and cut it. (Defense Attorney, DC)

> Some lawyers down there (in D.C.) don't even have offices. Really. (Defense Attorney, Va.)

The D.C. system is one that discourages lawyers from surrounding counties from accepting D.C. clients--it just doesn't pay. As one attorney who switched his criminal practice from D.C. to Virginia said, "I suspect that if the money were higher you might deal with the frustrations."

Receiving Payment

In all the jurisdictions, court-appointed attorneys may submit a request to the court for excess compensation in a case where they have exceeded the statutory limit. Where payment to appointed counsel gives judges authority to review vouchers, the system is akin to giving the umpire of the baseball game power to renew player contracts as well. The potential for abuse of this discretionary role is not only possible--but has been documented to be real.

Conceptually, the issue of discretion has received a great deal of discussion and thought as it applies to the prosecutor's discretion to proceed with a case. Judicial discretion in the payment of lawyers' fees has not yet surfaced. Certainly it has had its practical effect, particularly where the appointments judge is also the paying judge, on: the diminishing practice of criminal defense; the decreasing number of attorneys willing to accept appointments; the rising age of those accepting appointments; the lack of

relationship between attorney skills and experience and fees collected.

The problems of fee collection are nationwide.

° An evaluation of the California statewide defense system concluded that judges frequently reimburse assigned counsel at rates which reflect their own assessment of how many hours should have been spent, instead of hours the attorneys stated were spent.[13]

° An evaluation of the District of Columbia's court system requested by the local bar association found that judges regularly cut pay vouchers to eliminate what the judges claimed were excessive claims for time.[14]

° A report on criminal defense services to the poor in Massachusetts said that local elected officials sometimes pressured judges who handled payment to appointed counsel, to limit fees and reduce costs.[15]

° Criminal attorneys interviewed for a study of the Michigan defense system felt that some attorneys were reluctant to confront judges on legal matters for fear of pay reductions and loss of future assignments. Some counsel interpreted reductions in fee requests as a message "not to defend too hard."[16]

° Arbitrary reductions of fees in North Carolina, the state bar association concluded, led to a reduction in the

number of attorneys willing to accept court appointments.[17]

° In New Hampshire, judges are reluctant to force the more experienced or busy law firms to accept indigent cases, so they give most appointments to the lawyers who seek them. This results in a handful of inexperienced lawyers responsible for most of the cases.[18]

The issue of arbitrary voucher cuts was particularly acute in the District of Columbia. The vouchers attorneys are required to complete for payment are extremely detailed, and judges will frequently require a voucher completed for five minute increments.

> Hell, we require them to fill out forms that make income tax look like child's play; they have to keep track of time down to ten minutes. (Judge, DC)

Judges are particularly skeptical of such expenses as travel and waiting time, which are difficult to verify. These expenses are frequently subject to reduction. So a vicious cycle results: attorneys pad vouchers in order to gain compensation for this time. Which is the cause of the other--padding causes reductions or visa versa--was impossible to determine.

The amount of time taken to approve a voucher in D.C. varied with each judge. A judge may review the voucher and approve it minutes after it appears on the desk; or it may take months. Requesting compensation in excess of the statutory limit involves submitting the voucher for approval to the

trial judge with a detailed memorandum, and final approval to the Chief Judge of the Superior Court. According to interviewees, attorneys are discouraged from requesting excess compensation by this lengthy procedure. In fact, vouchers in general are one of the major headaches associated with practicing criminal law on an appointed basis in the District of Columbia: lawyers feel the system can "either have an effective timekeeper or an effective attorney," but not both.

The District of Columbia Bar has not been blind to the problems encountered by the voucher system specifically, and the appointment system, generally. Several committees have formulated plans for improving the system.[19] The major recommendation of all of these reports has been the establishment of an independent agency to appoint counsel in indigent cases and to assume responsibility for the administration and authorization of payment. The implementation of this agency would remove the power of appointment and voucher approval which currently lies within the discretion of judges.

Conclusion

The private attorney who takes court appointments is at the mercy of a system which has "fixed" the payment schedule and the payments mechanism. In all jurisdictions, the attorneys interviewed find both the schedule and mechanism unacceptable.

The low fees, arbitrary reductions in vouchers and delayed payments have forced attorneys to make their own compromises with the justice systems within which they work. In the District of Columbia, the fee problems, mixed with an inefficient court system, has resulted in a small core of private attorneys who take court appointments on a full-time basis. To have less than a full-time appointments practice would be financially impossible. In Prince George's County, the fee problems led to a 25% reduction in attorneys who are now available for appoinements, and the disappearance of a large group of attorneys whose criminal practice used to be significant (50%). The full-time criminal attorneys are only those who are privately retained. In Alexandria, the attorneys may think that payments are too low, but the absence of a public defender system has kept the level of court appointments high. In this jurisdiction it is the free market economy, one's knowledge of system actors, the influx of large numbers of new law school graduates, and an individual attorney's needs which determine the extent of a court appointments practice.

CHAPTER 3 - Notes

1. National Center for Defense Management, "Evaluation of Defense Services, Dallas County, Texas," National Legal Aid and Defender Association, May 1978.

2. Emily Wadlow, "A Fresh Look at Fifth Street: Washington's New Breed of CJA Lawyers," The District Lawyer, Vol. 4, No. 1, August/September 1979.

3. Paul Wice, Criminal Lawyers: An Endangered Species, Sage Publications: Beverly Hills, California, 1978, p. 268.

4. Public Defender Service for the District of Columbia, Eighth Annual Report, Fiscal Year 1978, Washington, D.C.

5. District of Columbia Code 2-2222(a).

6. Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (unified). Report on Defense Services in the District of Columbia, Washington, D.C., 1975, p. 49. This is frequently referred to as the Austern/Reznick report, using the names of two principals who worked on the study.

7. Ibid., p. 41

8. Annotated Code of Maryland, Article 27A, §6(d), 1976.

9. The Lawyer's Handbook, edited by Garth C. Grissom, Austin G. Anderson, Mary I. Hiniker, The Institute of Continuing Legal Education, Ann Arbor, Michigan, 1980, pp. C3-1.

10. Vincent Walter Perini, "Calculating the Profit-Loss Break-Even Point in Assigned Counsel Cases," Dallas, Texas, 1980, pp. 1-2.

11. Ibid.

12. Sparks v. Parker, 368 So. 2d 528, 533 (Ala. 1979). Quotations taken from "Lawscope," American Bar Association Journal, 65 November 1979, 1627.

13. National Center for Defense Management, "Evaluation of the California State Public Defender," National Legal Aid and Defender Association: Washington, D.C., April 1979.

14. Criminal Courts Technical Assistance Project, "An Overview of Recent Proposals Regarding the Provision of Indigent Criminal Defense Services in the District of

Columbia," American University Law School: Washington, D.C., September 1979.

15. "Action Plan for Legal Services Part Two: Report on Criminal Defense Services to the Poor in Massachusetts," Boston Bar Association: Boston, Massachusetts, June 1978.

16. National Center for Defense Management, "Michigan Statewide Study--Phase I Survey," National Legal Aid and Defender Association, December 1978.

17. "Final Report of the Special Committee on Indigent Legal Services Delivery System," North Carolina Bar Association Foundation, February 1976.

18. "Defense Services in New Hampshire," National Center fo State Courts: Williamsburg, Virginia, February 1976.

19. See Report to the Board of Governors--District of Columbia Bar, from the Committee on Appointment of Counsel in Criminal Cases, Herbert E. Forrest, Chairman, May 1980 (known as the Forrest-Bremen Report). See Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (unified), Report on Defense Services in the District of Columbia (1975), (known as the Austern/Reznick report).

CHAPTER 4 -- PRIVATELY RETAINED ATTORNEYS

Introduction

> Although the practice of law is a profession and not merely a money-making trade, the economic realities require that a great deal of emphasis be placed upon proper methods of determining fees and billing. Historically, this has been extremely unpalatable to individual lawyers and, as a result, members of the profession have developed a reputation for being poor businessmen . . . If the lawyer is to survive and if the profession is to continue to exist as a profession, there must be a steady flow of income from fees sufficient to support the costs of operating the law office, to supply the lawyer and his family with adequate income and to provide sufficient incentives to attract capable people into the profession.[1]

This quotation begins a section on fees and billing in a lawyer's handbook for the general practitioner; its message is essential for the criminal defense lawyer.

The great majority of law school graduates have no desire to practice criminal law. It is a business one leaves as quickly as one can. At its best, a career in criminal law offers national press coverage in notorious cases. Instant name recognition. A person who can intimidate the State and make even the guilty believe in their innocence. At its worst, defense attorneys have to represent a parade of unpopular, ungrateful clients who are usually convicted, jailed, and delinquent in paying bills. Most often, however, the attorney is merely assigned some of the onorous characteristics attributed to his or her clients by reason of association,

and is the butt of the raised eyebrow from anyone who has ever had his or her pocket picked in a department store. So why do lawyers specialize in the practice of criminal law? Our interviews support Paul Wice's national study findings that "the primary reason they entered the practice of criminal law was economic necessity."[2] They leave or decrease the practice of criminal law as soon as they are able:[3]

> Criminal defense practice is a kind of slum. One of the characteristics of a slum neighborhood is that the slum dwellers do not regard it as home, and all of their energies are devoted to escaping instead of improving it. Those lawyers who rise above the criminal practice manifest the same characteristics, taking what they can from the criminal practice before leaving, with little concern for posterity.

Fee Setting

In 1969, the American Bar Association adopted the Model Code of Professional Responsibility, which among its many canons, ethical considerations, and disciplinary rules, lists the following variables as worthy of consideration when a fee is set.[4]

1. The time and labor required, including the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The likelihood that acceptance of the client will preclude other employment;

3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the results obtained;

5. The time limitations imposed by the client or by the circumstances;

6. The nature and length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer or lawyers performing the services;

8. Whether the fee is fixed or contingent.[5]

Given the general nature of these suggestions, it is particularly striking that in the three jurisdictions studied, the fees quoted by defense attorneys for robbery and burglary offenses were very similar. For an armed robbery (most robberies involve a weapon) the average fee ranges from $2500 to $3500 with figures quoted as high as $5,000 and $10,000. For a burglary, the average fee was slightly lower, ranging from $1,000 to $2,500 with figures quoted as high as $3,500 to $5,000.

Wice, in Criminal Lawyers,[6] found national trends for fees which were similar to those in the jurisdictions studied. This leads us to believe that the A.B.A.'s third suggestion for fee setting, the "going rate," in a given region at least, is a norm around which the extremes do not vary greatly.

When a private attorney sets a fee for a client--although Wice found that setting a "proper and just fee" was the "lousiest" aspect of an attorney's job[7]--what factors influence what that fee will be? According to our interviews,

the primary variables in fee setting are: (1) time/amount of work the case will take; (2) ability of the client to pay the fee; (3) seriousness of the charge against the client; and (4) the likelihood that the attorney will collect the fee.

Major Factors

A. Time/Amount of Work

Most attorneys estimate the amount of time they will be required to spend on a given case within the first half-hour of the initial interview with a potential client.

> You get the feel for a case very easily. And you have an idea where you're going with the case. (Defense Attorney, PG)
>
> You have a gut feeling or what a case is worth. (Defense Attorney, PG)
>
> I don't have standardized fees. I try to appraise each case when it comes in and try to estimate the amount of time involved and try to set a fee based on that. (Defense Attorney, DC)
>
> Well, if I was going to set a fee, the first thing I would do on a felony case is try to determine from talking with the fellow how much time I would have in the case. (Defense Attorney, Va.)

While this may suggest an image of lawyers as psychologist bordering on the clairvoyant, fee setting is one of those intangible and inexplainable skills that comes with knowing a given court system. Knowing the likelihood of a plea. Knowing whether this is the type of case to take to trial. Knowing the prosecutors and judges. In short, knowing the "nuts and bolts of the court system." (Defense Attorney, Va.)

This allows the attorney to rapidly consider the amount of work involved and translate it into time. Time, the commodity central to the legal service industry.

> Time is a lawyer's stock and trade.
> (Abe Lincoln, courtesy of Defense Attorney, Va.)
>
> You got a basic overall idea of how the system works, so from that standpoint you know that it's going to take X number of hours if the case goes to trial. And probably X minus whatever, depending upon at which point in the continuum of time a plea is entered. . . . You know that you will be up in court on that case probably once for a preliminary hearing--that never comes off--probably once for motions . . . another time for a status conference on the case, and finally for the trial. So you know that you got 3 or 4 court appearances that you're going to be making in the case. Your time can roughly go from there. (Defense Attorney, PG)
>
> In the initial interview, I'll listen to what kind of case it is and what the charge is, try to make a determination of how strong the evidence is, whether it is going to go to trial or whether it's going to be the kind of case you plead out. Obviously, if it looks like the kind of case where you're going to go to trial, you are going to charge more money. So basically I think it's just look at how much work am I going to have to do on this case. Is the guy denying his guilt? Are there a lot of witnesses? Is it the kind of case the prosecution is not going to be inclined to drop? And if it's the kind of case that looks like it's going to trial. (Defense Attorney, DC)

Time and amount of work, however, are not always readily equatable.

> In criminal cases you can't do it (take an hourly rate) because you might take a robbery case and you might go over there and just because you know the right people to see--and I'm not saying a fix or anything like that--but just because you know the

> right people to see, the right things to say and the right evidence to point at to show them they've got no case, you may well resolve it in a couple of hours. So you can't charge (an hourly rate) strictly for something of that nature. (Defense Attorney, Ca.)

Attorneys gauge the amount of work necessary in a case on the expected extent of pre-trial preparation; that is, motions to be filed, witnesses to be located and interviewed, court appearances. Knowing the court system, particularly its inefficiencies, is essential knowledge for estimation purposes. Even the prior record of the offender will "count."

> If it was going to be a first offender treatment, where I just know what we're going to do in the case, the fee would be (less). I know my work is going to be minimum. (Defense Attorney, DC)

The need for outside resources, such as lie-detectors and expert testimony, can only increase costs.

> If you're liable to spend a lot of money on court costs, or if you want to have lie-detector tests, or say there's an insanity defense and you have to bring in a psychiatrist to testify--I would think a psychiatrist would have to charge at least $500 to make a court appearance and of course that doesn't count the pre-trial evaluation or the reports to the lawyer--those are all things that . . . somebody has to pay for . . . (Defense Attorney, Va.)

The expectation that a case will be tried, rather than pled, is a major consideration. And frequently creates a 2-stage payment process:

> I try to give clients a fee range if we're going to go to trial, and a fee range if we do not go to trial. Basically you have to prepare whether you go to trial or not. The only thing that's different is that you don't have to be at trial. (Defense Attorney, PG)

> (In an armed robbery) the possibility is that the State might be willing to keep it in District Court so the fee would be a little less. But if they (State) decide that because it was a gun they want to indict, then it's going to be a high fee because you know you're going to go to jury trial. (Defense Attorney, D.C.)

Sometimes the time differential between pleas and trials are minimal:

> . . . I'm thinking of several instances in which the negotiation of the plea required virtually as much time as trying the case. Putting the case on is easy. I mean there's always only so many witnesses, there's only so much evidence, and it only takes so much time. But the plea can drag on for a long time. (Defense Attorney, Va.)

Does the practice of setting fees on the basis of trial versus plea indirectly force the defendant into making a choice of case resolution based on money? Several attorneys felt that a fee should not be based on whether a case goes to trial or is pled out; otherwise, the right to a trial becomes contingent on the client's ability to afford the higher end of the fee range or step two in the fee schedule.

> You cannot condition your fee, ethically, on success. If I win I get paid X amount. And going in if you commit yourself to be in the case you cannot condition your fee on whether or not there is a trial or whether or not it's a plea. That basically says if you plead that

> will only cost you X amount of dollars, but if you want a trial that's going to cost you 10 times that. That inherently forces someone to make a decision on his right to trial based on whether he can afford it. And that's not the way it should work. It should work on whether or not you want a trial. (Defense Attorney, Va.)
>
> It may be in the guy's best interest to enter a plea, you know. But if the lawyer's going to get paid more if he goes to trial then he's got a conflict of interest with his own client. So what I do is I charge a flat fee and if we go to trial we go to trial. (Defense Attorney, PG)

For the most part, interviews suggest that most fees are set as if the case were going to go to trial.

B. Ability to Pay

During the initial interview, the private attorney will assess the potential client in terms of how much he or she can afford to pay. This assessment may include asking the individual about his current job and salary, but is usually made through more indirect questioning:

> Rarely do I ever ask anybody what they make on the job. Really, I don't care. You know, do you own a house? Do you rent . . . You'll get some idea from that whether they have money or not. (Defense Attorney, PG)

But one cardinal principal generally holds: The more an individual can afford to pay, the higher the fee is set.

> If I told you today that a burglary, I'd take for $1,500, $2,000 or $2,500 and tomorrow Joe Blow would come in here and he'd be making--I don't know how many bucks--and I'd say to him, 'Okay, I want $3,500,' or 'I want $4,500' and he'd say 'okay.' What are you going to do?

> You just try to figure what the traffic can bear. That's a cardinal principle, what the traffic can bear in relationship to the crime. That sounds awfully cynical but that's basically it. (Defense Attorney, Va.)
>
> In robbery cases we try to get as much as the traffic will bear. As far as fees are concerned we try to get as much as we can out of it. If I feel I can't get anything out of it, the person doesn't have the money, I just won't take the case. (Defense Attorney, PG)
>
> It's almost what the market will bear kind of thing. If you know somebody or if you have a family who's coming in with their son or daughter to retain you, it's obviously different than if you have somebody else. (Defense Attorney, Va.)

When the fee is particularly high, the attorney may intimate that the fee is related to the quality of defense the client will receive. A fear of poor quality is instilled; shopping around for a bargain is considered suspect:

> The first lawyer will say, 'Look, if you go to a guy who's allegedly very good, he's going to charge you to do the job. If you want to go to somebody who may not be as good, they may charge you less. But you will not be getting the same kind of quality representation.' (Defense Attorney, PG)

C. Seriousness of Charge

Private attorneys also use seriousness of the charge as a factor in setting their fee. By definition, "seriousness" is equated to the penalty attached to the offense. If the defendant has a prior record (which will increase the severity of a sanction imposed) the cash register goes up some more.

> If there's a prior record, and he's facing a more serious sentence, the fee would go up substantially. I'd be spending more time. And the seriousness is a selling point. The need of the defendant is related to the fee. And I'm less likely to go soft on a fee with a second offender. With two priors they just pay what I set--which is high--or they go elsewhere. (Defense Attorney, PG)

Violent crimes are more serious than non-violent crimes. Armed robbery is considered a more serious offense than burglary, for the likelihood of a weapon present, the potential for violence, the personal violation.

> And there is (a higher fee) any time you're dealing with a crime of violence. That's going to be a significant kind of prosecution and a significant kind of defense. And conviction is very likely (to bring) a serious kind of punishment. (Defense Attorney, Va.)

So seriousness of a charge becomes a "selling point" for the value of the service:

> Okay, now when people come in to me and say 'that's really high, man,' I say, 'High is a relative figure . . . you're asking me to keep your backside out of jail for the rest of your life' or whatever. 'How much is that worth to you?' So I don't think (my fee) is a lot of money any more, in relationship to what everybody else is charging me for things that I do not view as critical. (Defense Attorney, PG)

The attorney applies pressure on the defendant to see that a "hefty" fee is a small price to pay for freedom.

> But if you're going to pitch in and try to make your money out of it, you're whooping about 'that's life in prison; do you understand what life means? The rest of your natural life? That's $10,000.' You know, put the pressure on the defendant. Shoplifting, you say 'well Christ, I ain't going to jail anyway.' It would be awfully tough to say

> it was a $10,000 case when the guy knows he's going to walk. The possibility of him going home at the end of the day is very strong. (Defense Attorney, PG)

Because seriousness of a charge is always relative to the individual involved, a different type of pressure is brought to bear on a defendant who has status in the community and a prestigious job. When the defendant has a great deal to lose by a felony conviction, the fee will be high, but the client's concern about the fee may be less because the stakes are so high.

> For example, I have a client who has committed a few armed robberies. He has a long list of prior convictions, he's only been out of jail one and a half years. I'm not scratching to keep him out of jail. But if I'm representing a white, middle class preppy whose parents are upset, it's a different kind of pressure. So there are both internal and external pressures. It's an inexact, arbitrary way to set a fee. No one ever taught me how. I just pick it up by osmosis. (Defense Attorney, PG)

> Maybe somebody who is in the government, you know, might lose his top security clearance. But to a guy like that you could say that's $2500, this is a tough case. And to that guy, $2500 ain't nothing if I can keep my job. If I lose my job, I'm nothing. So you (pressure) a guy like that (with) the loss of . . . freedom. (Defense Attorney, PG)

D. Fee Collection Potential

A fee is often set on the basis of the attorney's anticipation of collecting it. Lawyers organized as sole practitioners or in small firms are generally least prepared

for the business side of being a lawyer. Collecting fees is viewed as an unpleasant and difficult task. Because attorneys have learned from experience the difficulties of collecting from criminal clients they often set a retainer which they collect before they enter an appearance in court as the attorney of record. This retainer is frequently viewed as the entire fee the attorney may get for the case, despite assurances about monthly payments for the remainder.

> You got to get whatever fee you expect up front. I just try to estimate how much time it's going to take and that's what I ask for as a retainer. (Defense Attorney, Va.)

> You learn every con line that can come about. And you say fine, when I see the money, I will enter my appearance in the case. (Defense Attorney, PG)

At times, attorneys will set a retainer which they regard as a percentage of the fee and which may be anywhere from a quarter to a half. They will then expect to collect the remainder of the fee by the time of the trial date or they will send monthly statements. Most interviewees, however, set the retainer at the minimum the attorney feels the case is worth, which ultimately insures that they are "reasonably compensated, whatever happens." (Defense Attorney, Va.)

> A big difference, and I'm not proud to say this, is if they walk in with money in their hand . . . (Defense Attorney, Va.)

The attorney's motto: Get as much as you can "up front."

The history of being a criminal defense lawyer is a history of hearing monetary promises from a client which frequently go unfulfilled. "My mother's getting the money together." "I'll pay you when my check comes in." That's why the lawyer's magic words become "as soon as you pay me X amount of dollars I will be happy to represent you." (Defense Attorney, Va.) While the attorney isn't proud of this approach, he knows that getting paid is sometimes a Catch-22: if he "wins" the case, his client will accept it as only just and right--occasionally due to innocence in the matter--and not because of the attorney's efforts. If he "loses" the case (especially if the client is jailed), his client will blame him and be unavailable for payment. So an all-too-quick acceptance of a case, under less than the right conditions, presents a problem, for "it's very difficult once you've entered an appearance to then leave the case." (Defense Attorney, Va.) Each attorney interviewed stated a facsimile of, "I've been burned too many times."

Collecting the fee is knowing the A, B, C's of psychology. If at all possible, get a large enough retainer to cover the fee acceptable for the work probably to be done. But if this doesn't work, before the trial or the final plea is negotiated, there is another pressure point when the client is extremely dependent on the attorney. Once the sentence is imposed, or

the defendant is acquitted, all pressure is removed.

> Experience has taught me that in criminal cases, no matter what kind of result you get, acquittals or otherwise, if you haven't got your money before you get to that courtroom, you'll never see it. So you know, it's like everything else. Particularly people involved in criminal activity, once they're under the gun, they're scared to death, they'll do anything. But once you lift that vail, lift that pressure off their back, it doesn't matter what happened. Once the pressure is off and they're free as birds, they don't care. (Defense Attorney, Va.)

> But it seems to me that if somebody goes to jail, he's not going to pay his attorney for that. And if he was acquitted he probably figures he deserved it. I think it works both ways. Maybe if you catch them the day after, when they're in this big glow of gratification . . . (Defense Attorney, Va.)

Most attorneys will tell you that not collecting the fee, as agreed, does not influence their work. But occasional statements to the contrary are problematic in coming to any conclusions on the matter.

> Collecting is a real pain in the ass. I find that the most unpleasant part of doing this . . . On the one hand, you're supposed to be representing your client to the best of your ability. On the other hand, if you've got some deadbeat that's not paying you, you say 'why the hell should I be busting my ass for him.' It's just real hard to do and I don't like hassling people for money. And yet if I don't get the money I can't pay the rent. (Defense Attorney, DC)

> . . . they'll do a better work for the people that pay up front. If you have money problems with a client it's bound to cause some form of antagonism and it's going to hurt one or the other. (Prosecutor, PG)

Rather than allowing the business aspects of being a fee collector to interfere with their defense of a client, attorneys would often rather not take the case. If the client cannot pay the retainer, the lawyer sees him as a high risk case. It may be more practical to forget the case rather than depend on payment sometime in the future.

> It has been my sad experience that if you have a criminal case and you don't get paid all you feel you're entitled, all that you are going to spend in terms of time, it is sometimes very difficult to get the rest, no matter what the results are. So if you can't get enough money right up front, so that if you never get another dime you make a profit, or you make a satisfactory amount on the case, you shouldn't take a criminal case. You're better off having them walk out of your office than to take less. (Defense Attorney, DC)

> And basically because of some bad experiences, I have turned down cases recently where it was, 'you will get paid at some point in the future.' Well, I'm owed too much money. I've been burned too many times. I never cease to be amazed at the gall of people trying to get something for nothing. I think it is the function of the role of lawyers and the image of lawyers. I do not believe that physicians are treated the same way. (Defense Attorney, Va.)

In an effort to insure against losses, some attorneys make the initial retainer very high. If they collect more than the retainer, they've made a larger profit. If they don't collect any more, they have at least collected a minimum which they felt their time was worth.

> I don't like people crapping all over me when they don't pay you the money, and you've done what you consider a very nice job. But I'm not a good

businessman and I don't like to get involved in trying to shake them down for what they owe. So I try to set half (as retainer). If I can get it, great, I'm on my way there. And a lot of guys will charge, say $10,000, because they never expect to collect it. Never expect to collect it. Maybe they'll get $5,000 of it, and that's what the case was worth anyway. (Defense Attorney, PG)

Some attorneys will even make allowances, take less for a case if the defendant is prepared to pay the fee immediately.

> A big difference and . . . I'm not proud to say this, the big difference is if they walk in with the money in their hand. If someone walks in my office, I will certainly take half as much money today, versus an expectation of getting paid sometime in the future. (Defense Attorney, Va.)

Given the extent of the collection problem, it should not be surprising that legal advise may soon become just another charegable item in our lives.

> I fully intend to start taking Master Charge. Not because I'm particularly enamored with Master Charge. I don't like fooling with the money. But that way I take a plastic card and it's somebody else's problem. And that will relieve a lot of anxiety on my part over the attorney-client relationship. (Defense Attoryen, Va.)

Minor Factors

Secondary to the factors previously mentioned are a variety of "minor" concerns which help establish the fee.

A. Attorney Reputation

As in most jobs, reputation commands price. Attorneys who are beginning a criminal, or civil, practice, need as much court experience as possible. This may mean taking as

many cases as they can manage for low fees:

> When you first start out you might almost be willing to pay the somebody for the opportunity to get into court and for the experience. (Defense Attorney, Va.)

In contrast, are the established lawyers with the established reputations. This group has no need to take cases for experience. And no need to accept clients who are unable to afford the fee quoted.

> Our firm enjoys a good reputation, I believe, in the field of criminal law. So when they come to see us, we set the fee. And if they do not have it, then we don't want to get involved in the first place, because we know we've got a prospective deadbeat. It's just, you know, there are people that want to put up the retainer. So if you don't put up the retainer, then 'sorry.' We are fully occupied anyway. (Defense Attorney, DC)

Occasionally, for those attorneys who consider themselves good trial lawyers, there are incentives for representing defendants for below "normal" fees: an interest in a particular case, a chance for intellectual stimulation, the fun of working with colleagues for co-defendants, the feeling that the defendant just might be innocent. Or sometimes just to keep in practice. In the attorney's own words:

> I've taken them (armed robberies) for as little as $1,250. And I know that it's going to end up . . . I'm going to end up losing money. But you have to take them to preserve your reputation as far as being a criminal lawyer. (Defense Attorney, PG)

> I'm a trial lawyer. The last thing in the world I'm concerned about is the money. I'm a bad businessman. I'm commonly known as a sucker for a good cause. (Defense Attorney, PG)

I'd say over half the time I'm going to end up with a case that I'll get far under my hourly rate. But again you got to weigh in two factors. Number one, I consider criminal law mainly my bread and butter. The one nice thing about criminal law is it is something that is changing, and you never know what's going to happen. And it's a challenge, to see what you can do with a case. (Defense Attorney, Va.)

And then, there are the $10,000 lawyers:

The gheory basically is . . . that you should get a fee, a $10,000 fee, because nine people out of ten will say '$10,000? I was a thousand dollar case. I'm going to take my business elsewhere.' And you say, 'fine, thank you very much.' The tenth person is going to say 'fine, here's $10,000,' in which case you will, number one, make ten times the money on one case with a tenth of the work. And secondly, you're a $10,000 lawyer. Then you say my normal fee is $10,000. (Defense Attorney, Va.)

In every jurisdiction studied there were the "big guns" of criminal defense work. Does the fee wind up having any correlation to case outcome? The next chapters will address this issue.

B. Client Demands

If the client appears to be someone who will be difficult to work with, the attorney may try to discourage the individual or over-compensate himself for the continuous demands that will be made on his or her time and patience, by setting a high fee:

> If somebody . . . is calling me up every day, and demanding that I do certain things that I don't feel are appropriate for the case, and making demands I don't feel are appropriate, I'm going to figure I don't need the case that badly

> and charge him an exorbitant fee. And they're going to have to pay it or they can get somebody else. (Defense Attorney, Va.)
>
> Every once in a while I can see that this case is going to take considerably more time because the client is a turkey. He calls me every day and I can see, 'Am I going to have trouble with this guy. He wants every hour I got.' I'm going to up the fee 'cause I know that he's just cranked in a variable--a time thing--I didn't expect. (Defense Attorney, PG)

C. Referral Source

Attorneys, no different than other professionals, make allowances in their fees depending on how a client came to call. The friend, friend of a friend, or relative, may not be quoted the same fee as the total stranger who comes in off the street.

> If the client was a stranger . . . the fee would probably be larger than if it were my secretary's brother coming in. And she says 'hey, he got in some trouble.' The fee would be a little different. It just depends on who the person is, what the relationship is and how he got to me. (Defense Attorney, DC)

D. Current Caseload

When attorneys are plagued--or thrilled--by high caseloads, they may be inclined to set a higher than average fee. During a time when they have a significant number of paying cases, they cannot afford to spend time on a case for a low fee. Their time becomes more valuable.

E. Publicity Value

The commodity of time may also become more valuable in a case which is receiving the attention of the media. Where publicity surrounds a case, the attorney may need to put in more time and work, and will base his fee accordingly.

Being Affordable

How easily can the clients of these attorneys afford a $2500 or $3500 fee? In many cases, not easily; but that isn't the attorney's worry":

> Some can't afford it. Others can't get out of jail, so they can't go out and steal it. (Defense Attorney, PG)

> Most of the people who are charged with street types of crimes are marginal financially. It just depends on whether they're working at the time or not working. (Defense Attorney, DC)

> (For young people) it's often simply a question of whether the parents are willing to make the financial commitment. (Defense Attorney, DC)

> There's a syndrome. Especially for the inner city black, whose mother will stand by them no matter what. You know, for the 15th armed robbery. And she can't afford it. She's working as a maid or something, and every dollar she gets goes to the lawyer bin. You know, she should have written her kids off five years ago. She can't afford it, but she pays. She'll do without Lord know what, but she'll pay for that lawyer. (Defense Attorney, PG)

Which explains why criminal defense attorneys usually fill out their practice with personal injury cases, real estate closings and divorce settlements. They use these cases to pay the bills. Most attorneys pointed to an imbalance between the

percentage of criminal cases they represent in their practice and the proportion of their income those cases provide. For example, an attorney whose practice is 30% criminal, may expect to receive only 15% of his yearly income from the criminal cases.

In all jurisdictions, the privately retained counsel is pricing himself or herself out of existence--especially for the garden variety street criminal. While the prostitute, gambler, drug pusher, and white collar offender is able to afford the private attorney, the majority of those arrested cannot or will not pay fees from $1500 to $5000 for a burglary, robbery, larceny or assault charge, or the equivalent of $60 to $75 an hour.

Garden variety, street criminals are not likely to use the services of privately retained counsel in Washington, D.C. For this reason, we have omitted analyzing the data gathered on the few private attorney cases reviewed. Although an individual's eligibility for a PDS or CJA attorney is determined by a formula which includes income, assets, and number of dependents, the standards of eligibility are not rigidly adhered to and it is common knowledge that "anyone who wants a free attorney can get one." A category of "eligible with contribution" exists for those defendants who can afford to contribute toward their defense, but our data indicate that this is a category which is infrequently used.

Unlike the District of Columbia, many private attorneys in Prince George's County devote a percentage of their practice (typically 20%) to criminal law, and do handle street crimes such as robbery and burglary. Thus, these attorneys are concerned whether the Public Defender determines that a defendant is eligible for a "free" defense attorney (e.g., 600 Public Defender acceptances occurred during an average month, 135 declines). Attorneys hazard guesses that at least a third of those found eligible could afford to pay an attorney.

> Typical (fraud) case. Victim may complain, particularly if the defendant is acquitted. 'Well that guy got off and he had a free lawyer. And did you know that he had a Cadillac and he had this, and . . .' No, we didn't know. (Public Defender, PG)

> How do they (the defendants) sneak in? They lied about having a job. (Defense Attorney, PG)

> I've had people that I've represented as a panel attorney for the public defender's office who would have diamonds on each--not diamonds on each finger, but you know--just hands full of jewelry, and driving, you know, large cars. And well dressed. That I knew could afford a private attorney. (Defense Attorney, PG)

> And a lady may live with her husband and tell you that she doesn't work. And he can be making $25,000 or $30,000 a year. And the public defender's office may take her because they feel that the husband doesn't have any responsibility towards defending her on a criminal action. (Defense Attorney, PG)

In Virginia, as in Prince George's County, the cases are still there to keep private attorneys active in garden

variety criminal defense. Partly because of vague and ill-defined eligibility standards for a free defense. Partly because of judges' inclinations towards conservative decisions regarding eligibility. Partly because of the absence of an office of the public defender and the larger existing pool of potential clients needing representation.

Conclusion

Fee setting by the privately retained attorney is anything but an exact science. The primary factors which go into establishing the fee include: (1) time and amount of work; (2) the client's ability to pay; (3) seriousness of the charge; and (4) the likelihood of collecting the fee. Added to these are such variables as the attorney's reputation, expected level of client demands, the referral source, the attorney's caseload, and publicity that a case is likely to generate. The following statement, when all is said and done, is typical of many attorneys interviewed:

> I've sort of developed my own fee structure, which is half looking at somebody across the table. You know, if somebody can tug at my heart, the price goes down. If they're a turkey, the price goes up a little. If it's a fun case and I really want it, the price goes down. If I'm really hassled in here and I got a ton of work, the price goes up. (Defense Attorney, PG)

For very different reasons, however, the privately retained defense attorney is having an increasingly smaller

role to play in the criminal courts in each of the jurisdictions studied. In the District of Columbia, the defendants simply can't afford one; and those who can aren't pressured to do so. In Prince George's County, the Public Defender Office is generous in its application of the eligibility standards, and the large percentage of cases the Office handles leaves a very small pool of available clients. In Alexandria, the private bar is relatively healthy, with vague eligibility standards for a free defense and conservative judges, although the spector of an experimental office of the public defender looms in the city's future.

CHAPTER 4 - Notes

1. The Lawyer's Handbook, edited by Garth C. Grissom, Austin G. Anderson, Mary I. Hiniker, The Institute of Continuing Legal Education: Ann Arbor, Michigan, 1980, pp. C3-20.

2. Paul B. Wice, Criminal Lawyers: An Endangered Species, Sage Publications: Beverly Hills, 1978.

3. Vincent Walker Perini, "Seven Reasons Why It's Hard to Make a Living Practicing Criminal Law," Voice for the Defense, Vol. 9, No. 9, March-April 1980, p. 60.

4. Model Code of Professional Responsibility and Code of Judicial Conduct, American Bar Association, February 1980, DR 2-106, p. 13.

5. Contingency fees in criminal cases are considered unethical and have little practical meaning.

6. Op. cit., Wice, p. 113

7. Ibid., p. 111.

CHAPTER 5 -- CASE OUTCOME: FINAL CHARGE OF GUILT

Introduction

There are several schools of thought on the subject of whether money influences case outcome. Polarizing them into the "a good attorney is a good attorney" group and the "you get what you pay for" group, is instructive.

The first group believes in an explanation of the nature of man which is inherently idealistic.

> (Defense attorney) competence or incompetence, their preparation or lack of preparation, would depend solely on the individual . . . . (Judge, PG)

Using this approach, problems which flow from inefficiencies in court administration or inadequacies in the structure of the defense system can be surmounted through the inherent qualities of the individual attorney. A good attorney will provide good representation whether the client is paying $2500 for representation, whether the attorney will be reimbursed by the State at $298 for handling the case, or whether the public defender is receiving the equivalent of $100 for the case.

The second group assumes that only the basest elements in man's nature control his behavior. One gives only to the degree one gets. The client knows it . . .

> The expectation by the client is that if you charge more money, there is more expectation. (Defense Attorney, Va.)

and the attorney knowsit . . .

> The (free or low fee) case goes to the back burner and you work on the things you get paid for. It's only normal . . . if you have clients that are paying you money and they are the ones that are keeping you alive--so that you can pay your bills at home--you are going to dedicate yourself to those people . . . (Defense Attorney, PG)

This group cites many areas in which money influences case management by the criminal defense attorney, including:

(a) motions work,

> You're never going to see the (public defender), or very rarely I think, not file a motion because they got too busy or forget or just didn't want to bother. Whereas the private attorney just won't do it just because it's extra work. (Defense Attorney, DC)

(b) investigations,

> If it's a paying case and lots of witnesses, I'll get them an investigator. But with a (free or court-appointed) case you don't have the time to do more than talk to witnesses on the phone. You don't go to the scene . . . It's a question of economics. (Defense Attorney, PG)

(c) actual time spent on a case,

> The (court appointed) lawyer . . . has to determine whether an expenditure of X number of hours on some particular motion to suppress . . . whatever it might be . . . isn't worth the effort. Should I spend that effort to get paid $20 an hour on what in my judgment is a long shot? (Defense Attorney, DC)

(d) the decision to offer a plea or go to trial,

> I have one now, a burglary, where the individual confessed and understood his confession . . . And for my $150 for a plea I can probably plead him out in 20 minutes and not really do any investigation. (Defense Attorney, Va.)

(e) the ability to secure expert testimony,

(f) the ability to develop an individualized sentencing plan,

(g) the ability to undertake legal research.

Although there are exceptions to every rule, the large majority of clients also assume that you get what you pay for.

> Somehow or another the image has been put forth out there that you are going to get a lousy shot from the public defender; all he's interested in doing is pleading you guilty. You know, he's got too many cases to worry about you, he's burnt out. And you'll do better with anybody you pay. (Defense Attorney, PG)

> Some of them (defendants) say 'I want a real lawyer, not a court appointed lawyer.' And I think the mythology among the defendants is 'well, you get more if you pay for it.' (Judge, DC)

That perception effects the likelihood of the client following the advice of the "free" attorney . . .

> No matter what they paid you, if they paid you they tended to listen to your advice and they tended to level with you. (Defense Attorney, PG)

> . . . I think they listen better. (Defense Attorney, DC)

. . . setting and keeping appointments with the attorney . . .

> You know, getting to interviews. Some of these guys just don't show up. They just don't come. Until the day of trial . . . They ought to have some stake, or feel they have some stake. Something to lose in terms of their counsel . . . . (Defense Attorney, PG)

> I've never had a retained client come in and give me a thousand dollars and not show up until the day of court. Where I have had court appointed clients do that. (Defense Attorney, Va.)

. . . taking an active interest in his or her own case . . .

> If somebody is paying you, obviously they're more interested in what's going on. Take a little more of the . . . initiative. Take more of an interest in the case . . . . (Defense Attorney, Va.)

> And maybe they are a little bit more highly motivated than somebody who takes a court appointed lawyer because, you know, they seem to be a little bit more concerned about what's going to happen to them and want to have some control over that. (Defense Attorney, Va.)

. . . playing games with the attorney . . .

> This has happened, I don't know how many times. He (the defendant) may cooperate with his (court-appointed) lawyer and they may be getting along fine. And then he just ups and decides, one, to delay the case and, two, to get a change in lawyers--hoping he might get a better deal. He'll say (in court) 'this lawyer is crazy, he doesn't do what he's supposed to do for me.' And the poor lawyer, he can't do anything. He stands there and looks at the judge . . . . Everybody knows what the game is about. (Defense Attorney, DC)

. . . maintaining a no-nonsense attitude about the case . . .

> I would say that normally the person that's compensating you out of his pocket has, to a certain extent, a more realistic attitude about his case and a more no-nonsense attitude . . . . Your relationship with the client is on a different basis. (Defense Attorney, DC)

. . . maintaining faith in the attorney's ability . . .

> If he comes to you then he has placed his faith in you more so than having suffered the roulette wheel type of experience of having been arrested and having counsel appointed for him. (Defense Attorney, DC)

> They pick you as opposed to you picking them. They make a substantial investment in your ability to work some, not necessarily miracles, but to do service for them. (Defense Attorney, DC)

. . . and expecting a certain level of effort from the attorney.

> I think the people that pay you expect more from you. They expect more of your time. They expect you to be there when they call. (Defense Attorney, Va.)

> I find that . . . people to whom I am appointed have a limited expectation . . . . People who are paying you money . . . tend to be more demanding, and perhaps less realistic . . . as to the outcome. (Defense Attorney, DC)

These findings support those of an earlier study by Jonathan Casper, who interviewed defendants (rather than attorneys) and found that public defenders were viewed as weaker advocates than private attorneys.[1]

Although some attorneys will say that having the poor defendant in jail during case preparation assures him of a "captive audience," and may even offer some motivation for having his advice followed (in order to get out of jail), attorneys readily suffer the demands of the paying client.

If the demands get too excessive, they only have to up the ante.*

Case management techniques, such as number of defense motions filed, length of adjudication, time spent on investigations, are interesting from a process point of view. The outcome of adjudication, however, in terms of final charge and sentence, are ultimately the "test" of how effectively an attorney represents his or her client. Since it is impossible from the type of records reviewed to reconstruct the management of a case, and decide, for example, if one group of attorneys

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*The "middle ground," purposefully ignored, would reflect many attorneys' responses: patterns in case management do not exist. Every attorney is his own master. Every case is unique. Every situation in court is different.

> Well, the ingredients are several (to case management). I mean one is the strength of the government's case. One is the strength of the defense's case. One is the perception by the government of the defense lawyer. How good he is. How much trouble he's going to cause. Or on the other hand, the defense lawyer's perception of the government's lawyer. How good he is. All of those fit in. Who the judge is. All of those are mixed up in some inarticulable way in the decision of what resolution or what solution and what plea bargain is finally reached between the defendant and the prosecutor. (Defense Attorney, DC)

This viewpoint would put the researcher out of business in no time. For purposes of legitimizing this study, and the author's profession, this viewpoint is being summarily dismissed.

crafted more skillful and legally persuasive motions, the focus of this and the following chapter is on case outcome:

(1) Do similar cases represented by different attorney types result in similar final charges?

(2) Do similar cases represented by different attorney types result in similar sentences?

Data on final charge will be presented in the following sections; data on sentencing is in Chapter Six.

Final Charge: Guilt or Innocence

District of Columbia

In order to assess differences among attorney types on the final charge received by their clients, we first dichotomized all charges into (1) defendants found guilty of the charge (or lesser charge) and (2) defendants found not guilty (or were nolle prossed). Robbery and burglary cases were looked at separately in each jurisdiction. Tables 1 and 2 present the data from the District of Columbia.

Table 1

Attorney Type and Final Charge of Guilt, Robbery, District of Columbia, 1978 and 1979

Attorney Type	Final Charge: Guilty	Final Charge: Not Guilty or Nolle Prossed
Public Defender	96.1% (49)	3.9% (2)
Court Appointed	83.7% (41)	16.3% (8)

Raw chi square is 4.2728.
Chi square is significant at .0287 level.

Table 2

Attorney Type and Final Charge of Guilt, Burglary, District of Columbia, 1978 and 1979

Attorney Type	Final Charge: Guilty	Final Charge: Not Guilty or Nolle Prossed
Public Defender	96.4% (53)	3.6% (2)
Court Appointed	96.1% (49)	3.9% (2)

Raw chi square is 4.2728.
Chi square is not significant at .9386 level.

According to Table 1, the court appointed attorney does a statistically significantly "better" job for a client indicted for robbery than does the public defender; 16.3% of the court appointed attorney's clients were either found not guilty (none were nolle prossed) while this occurred to 3.9% of the public defenders' cases.

In contrast, Table 2 presents similar data on burglary cases, and indicates no differences of statistical significance between case outcome for the court appointed attorney and the public defender.

How can the data on robbery cases be reconciled with the majority of opinions on the high quality of the work of the public defender? Precisely because of the Public Defender Service's well-designed training program, its structuring of practical experience for its new attorneys, its esprit de corp, its internal investigative and rehabilitation resources, and its decision to limit case representation to what is manageable for each attorney, interviewees uniformly claimed that the PDS does a first-rate job:

> They (the PDS) take a very small amount of cases, proportionately, so they can have more of an elite practice. Not so much in what they get but how they handle what they get. (Judge, DC)
>
> On a case-by-case basis they can generally be as good or better than the prosecutor. Their bargaining power is significant. (Judge, DC)

> We just feel that it's important (to visit the client frequently in lock-up). And we have more time and we're trained to do that. I mean, it's all a matter of a combination of attitude and resources. (Public Defender, DC)
>
> All those good lawyers (public defenders) sitting under one roof. And if you got a problem or you're thinking about something and want to talk to somebody about it . . . . It's amazing how much you learn and think of and get good ideas how to approach a case from talking to a couple of attorneys about it. (Defense Attorney, DC)

While these statements represent only the perceptions of other system actors, they are the perceptions of individuals who watch both types of attorneys perform on a daily basis.

It is our conclusion that the differences which appear for robbery cases are not differences in quality of performance. Rather, they are related to a point made in Chapter 2; the Public Defender Service is given the more serious cases, the more complex cases, the more unusual cases to represent. While this in large measure reflects both the trust the court has in the ability of the attorneys to provide good defense assistance and economical use of limited resources, this "selecting out" of the difficult cases at the start of adjudication results in "bad" statistics for the Office. In short, the Public Defender's cases are less likely to look not guilty, or, according to our statistics (all jury trials), be not guilty.

Prince George's County

Tables 3 and 4 present the data from Prince George's County. For the charge of robbery (Table 3) it was possible to make a three-way comparison among public defenders, court appointed attorneys and privately retained attorneys. Since the public defender office had made a policy decision to panel out all burglary cases, the comparison is between court appointed and privately retained attorneys. For neither charge, however, are differences among case outcomes for attorney types statistically significant when it came to the final charge of guilt.

Table 3

Attorney Type and Final Charge of Guilt, Robbery, Prince George's County, 1979

	Final Charge	
Attorney Type	Guilty	Not Guilty or Nolle Prossed
Public Defender	69.4% (34)	30.6% (15)
Court Appointed	83.6% (46)	16.4% (9)
Private	67.4% (29)	32.6% (14)

Raw chi square is 4.1714.
Chi square is not significant at .1242 level.

Table 4

Attorney Type and Final Charge of Guilt, Burglary, Prince George's County, 1979

	Final Charge	
Attorney Type	Guilty	Not Guilty or Nolle Prossed
Court Appointed	90.2% (46)	9.8% (5)
Private	88.2% (45)	11.8% (6)

Raw chi square is .1019.
Chi square is not significant at .7496 level.

The Office of the Public Defender in Prince George's County offers a striking contrast to the District's system. Rather than having the luxury of operating like a private law firm, it better represents public defender offices around the country: high case volume, insufficient money to pay for all outside resources the attorneys request, the need for fast case turnover.

Yet the history of the public defense system in the county (i.e., a string of some of the best local attorneys to head the office, gathering excellent staff with them) and the evolving shape of the structure of defense services (i.e., the office taking most cases and paneling out the cases it

chooses to) has resulted in a public defender office which also gets high marks from the private bar.

> I don't think that, at least here, the private practitioners are as good as the public defenders. And I think that among the court, among the judges, they agree with that. Very few private lawyers just don't have the volume of criminal work. (Public Defender, PG)
>
> A lot of us in this office are going to try the case no matter what. I have a theory. If they're (prosecutors) not giving me shit, I'm going to go ahead and try the case . . . . My time, it's their money. (Public Defender, PG)
>
> I don't think that (the heavy case load) necessarily affects their performance because they're a pretty dedicated . . . pretty competent individuals, for the most part. (Judge, PG)
>
> Since the public defender service is not under any (fee) constraint, he can spend 50 hours on a case and get paid the same salary when he spends 10 hours on a case. (Defense Attorney, DC)

Given, the head of the Office would like to have his attorneys enter the case at an earlier point. Given, the high case volume forces a "keep them moving" attitude which could result in a diminution of representational quality. Still, it seems that case outcome does not favor one type of attorney at the "expense" of another attorney type.

Alexandria

Tables 5 and 6 present the data on final charge of guilt for Alexandria, Virginia.

Table 5

Attorney Type and Final Charge of Guilt, Robbery, Alexandria, Virginia, 1978, 1979 & 6 mos. 1980

Attorney Type	Final Charge: Guilty	Final Charge: Not Guilty or Nolle Prossed
Court Appointed	69.8% (37)	30.2% (16)
Private	81.8% (18)	18.2% (4)

Raw chi square is 1.1461.
Chi square is not significant at .2844 level.

Table 6

Attorney Type and Final Charge of Guilt, Burglary, Alexandria, Virginia, 1978, 1979 & 6 mos. 1980

Attorney Type	Final Charge: Guilty	Final Charge: Not Guilty or Nolle Prossed
Court Appointed	81.1% (43)	18.9% (10)
Private	81.0% (34)	19.0% (8)

Raw chi square is .0005.
Chi square is not significant at .9823 level.

As is the case in Prince George's County, case outcome is not related to attorney type with statistical significance.

Interestingly, it was in Alexandria that attorneys were most vehement in their sentiment that an-attorney-is-an-attorney-is-an-attorney. That when the private practitioner takes a court-appointed case (no public defender system exists) he or she "defends" in the same manner. There is a reputation to uphold among peers. There are ethical standards to maintain. Almost all the attorneys interviewed felt that differences between the privately collected fee for handling the typical burglary ($1000-$2000) or robbery ($1500-$3000) and the average court appointed fee (burglary $270; robbery, $360) does not make a difference in case management.

> For me there is no distinction between a court appointed case and a retained private paying case. They are all clients. And if I'm going to do a case, if I'm going to sign my name . . . . It kind of balances out . . . because some of my paying clients can pay me enough so that I can kind of balance that off in a court appointed case. (Defense Attorney, Va.)
>
> I don't know whether they are appointed or retained (when they are in front of the bench) unless I happen to remember appointing them. A lawyer that's good, a lawyer that is a lawyer . . . will handle it the same way . . . . (Judge, Va.)
>
> Prosecutors around here have made the statement publicly that they would defy anybody to come into court and watch a criminal case and be able to tell whether the lawyer is appointed or retained. And I think that's probably true,

> but maybe much for the reason that a bad lawyer with a retained client is going to be a bad lawyer with an indigent client. And a good lawyer . . . . (Defense Attorney, Va.)

Statistics seem to bear out this last opinion.

Final Charge: Severity of Guilt

For each jurisdiction, the final charge for each case was noted and a scale constructed to indicate severity of guilt by ranking the potential sentence received for the charge(s). In no jurisdiction was attorney type related to severity of guilt for either robbery or burglary cases.

District of Columbia

Tables 7 and 8 present the distribution of cases along the Final Charge Scale, and the findings of an ANOVA* analysis for the District of Columbia.

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*ANOVA is a test of statistical significance using a categorical variable as the independent variable (i.e., attorney type) and an interval variable as a dependent variable (i.e., severity of final charge). It tells whether the independent variable has an effect on the dependent variable. To be significant, the means and their variance must differ significantly from group to group (i.e., among attorney types).

Table 7

Attorney Type and Severity of Final Charge,
District of Columbia, Robbery, 1978 and 1979

	Severity of Final Charge (length of confinement)						
Attorney Type	Up to 1 yr. (1)	1+ to 3 yrs. (2)	3+ to 5 yrs. (3)	5+ to 10 yrs. (4)	10+ to 15 yrs. (5)	15+ to 30 yrs. (6)	30+ to life (7)
Public Defender	2.0% (1)	14.3% (7)	- -	8.2% (4)	40.8% (20)	- -	33.3% (17)
Court Appointed	2.0% (1)	2.0% (1)	- -	9.8% (4)	41.5% (17)	- -	43.9% (18)

Table 8

Attorney Type and Severity of Final Charge,
District of Columbia, Robbery, 1978 and 1979

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	49	5.1020	3.1352	1.7707
Court Appointed	41	5.6429	2.1376	1.4621

F-Statistic is 2.4721.
Not significant at .1194 level.

Table 7 indicates that final charges received by cases represented by both attorney types cluster around the scaler values of 5 (10+ to 15 years imprisonment) and of 7 (30+ to life imprisonment). According to Table 8, a mean score of 5.1 for the public defender's robbery cases and 5.6 for those of the court appointed attorney translates into a potential sentence of between 10+ and 15 years confinement (Table 7); the scores do not differ with any statistical significance (.1194).

Table 9 presents the final charges received by burglary cases in the District of Columbia according to the scale of severity of final charge (i.e., potential sentence). Since the crimes of burglary and robbery are scaled separately, the scaler value of (5) is not the same on Tables 7 and 9. A mean of 5.0 for both

the public defender and court appointed attorney's burglary cases (Table 9) is the equivalent of a potential sentence of up to 7-1/2 years confinement (although the modal scaler values are polarized between a scale value of (2) with a potential sentence of 6 months + to one year confinement and a scaler value of (7), with 10+ to 15 years confinement.

Table 9

Attorney Type and Severity of Final Charge,
District of Columbia, Burglary, 1978 and 1979

Attorney Type	Severity of Final Charge (length of confinement)							
	Up to 6 mos. (1)	6 mos.+ 1 yr. (2)	1+ to 3 yrs. (3)	3+ to 5 yrs. (4)	5+ to 7-1/2 yrs. (5)	7-1/2+ to 10 yrs. (6)	10+ to 15 yrs. (7)	15+ to life (8)
Public Defender	5.7% (3)	30.2% (16)	- -	1.9% (1)	- -	9.4% (5)	50.9% (27)	1.9% (1)
Court Appointed	4.1% (2)	30.6% (15)	- -	- -	- -	20.4% (10)	42.6% (21)	2.0% (1)

When Table 10 is reviewed for the charge of burglary, final charges received in cases represented by public defenders and court appointed attorneys do not differ to any statistically significant degree (.9636).

Table 10

Attorney Type and Severity of Final Charge
District of Columbia, Burglary, 1978 and 1979

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	53	5.0189	6.0573	2.4612
Court Appointed	49	5.0408	5.6233	2.3713

F-Statistic is .0021.
Not significant at .9636 level.

Prince George's County

Tables 11 through 14 present data for cases in Prince George's County. Table 11 presents the distribution of final charges for robbery cases along the severity scale constructed; Table 12, the findings of the ANOVA analysis of statistical significance.

Table 11

Attorney Type and Severity of Final Charge
Prince George's County, Maryland, Robbery, 1979

Attorney Type	Severity of Final Charge (length of confinement)						
	Up to 1 yr. (1)	1+ to 3 yrs. (2)	3+ to 4 yrs. (3)	4+ to 10 yrs. (4)	10+ to 15 yrs. (5)	15+ to 20 yrs. (6)	20+ to 30 yrs. (7)
Public Defender	8.8% (3)	2.9% (1)	- -	23.5% (8)	- -	64.7% (22)	- -
Court Appointed	4.3% (2)	- -	- -	23.9% (11)	- -	71.7% (33)	- -
Private	10.3% (3)	- -	- -	13.8% (4)	- -	72.4% (21)	3.4% (1)

According to Table 11, the modal score on the severity of final charge scale is (5) for each attorney type, which corresponds to a potential sentence of from 15+ to 20 years imprisonment. Table 12, as might be expected, reveals that there is no statistically significant difference among attorney types for robbery cases represented (.5941), with mean scores of 4.9 for the public defender, 5.3 for court appointed counsel, and 5.2 for privately retained attorneys.

Table 12

Attorney Type and Severity of Final Charge, Prince George's County, Maryland, Robbery, 1979

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	34	4.9706	2.6355	1.6234
Court Appointed	46	5.3043	1.5942	1.2626
Private	29	5.2414	2.6897	1.6400

F-Statistic is .52321.
Not significant at .5941 level.

Tables 13 and 14 present data for burglary cases in Prince George's County. Table 13 presents the distribution of final charges along the severity scale; Table 14, the ANOVA analysis of statistical significance.

Table 13

Attorney Type and Severity of Final Charge
Prince George's County, Maryland, Burglary, 1979

Attorney Type	Severity of Final Charge (length of confinement)					
	Up to 1 yr. (1)	1+ to 3 yrs. (2)	3+ to 4 yrs. (3)	4+ to 10 yrs. (4)	10+ to 14 yrs. (5)	14+ to 20 yrs. (6)
Court Appointed	10.9% (5)	- -	- -	76.1% (35)	2.2% (1)	10.9% (5)
Private	17.8% (8)	- -	- -	75.6% (34)	- -	6.7% (3)

According to Table 13, the large majority of defendants received a final charge that carries with it between 4 and 10 years in prison. Table 14 indicates that burglary cases represented by different attorney types receive similar average final charge scores (3.9--court appointed, 3.6--privately retained).

Table 14

Attorney Type and Severity of Final Charge, Prince George's County, Maryland, Burglary, 1979

Attorney Type	Number	Mean	Variance	Standard Deviation
	Severity of Final Charge			
Court Appointed	46	3.9130	1.4589	1.2079
Private	45	3.6000	1.7455	1.3212

F-Statistic is 1.3927.
Not significant at .2411 level.

Alexandria

Tables 15 through 18 present data for cases in Alexandria, Virginia. Table 15 presents the distribution of final charges for robbery cases along the severity scale constructed. Comparing this scale of potential sentences, with those for Prince George's County (Table 11) and Washington, D.C. (Table 7), it is obvious that there are fewer sentencing gradations in

Virginia's criminal code for charging purposes. The overwhelming majority of cases represented by court appointed attorneys (89.7%) and all cases represented by privately retained attorneys received final charges which carried with them a potential penalty of 20+ years to life imprisonment.

Table 15

Attorney Type and Severity of Final Charge Alexandria, Virginia, Robbery, 1978, 1979, and 6 months of 1980

Attorney Type	Severity of Final Charge (length of confinement) Up to 1 yr. (1)	1+ to 20 yrs. (2)	20+ to life (3)
Court Appointed	5.1% (2)	5.1% (2)	89.7% (35)
Private	- -	- -	100% (19)

According to Table 16, the differences between final charges received in robbery cases for clients of court appointed and privately retained counsel were not statistically significant (.1774).

Table 16

Attorney Type and Severity of Final Charge, Alexandria, Virginia, Robbery, 1978, 1979, and 6 months of 1980

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	39	2.8462	.23887	.48874
Private	19	3.0000	0.	0.

F-Statistic is 1.8656.
Not significant at .1774 level.

Table 17 presents the distribution of final charges for burglary cases along a severity scale.

Table 17

Attorney Type and Severity of Final Charge, Alexandria, Virginia, Burglary, 1978, 1979 and 6 months of 1980

Attorney Type	Severity of Final Charge (length of confinement)				
	Up to 1 yr. (1)	1+ to 5 yrs. (2)	5+ to 10 yrs. (3)	10+ to 20 yrs. (4)	20+ to life (5)
Court Appointed	5.5% (3)	- -	- -	91.1% (41)	2.2% (1)
Private	11.1% (4)	- -	2.8% (1)	86.1% (31)	- -

According to Table 17, the largest proportion of cases represented by both court appointed and private attorneys receive final charges which carry a potential sentence of 10+ to 20 years confinement; 91.1% of the public defender's cases, 86.1% of the privately retained attorney's cases.

Table 18

Attorney Type and Severity of Final Charge, Alexandria, Virginia, Burglary, 1978, 1979, and 6 months of 1980

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	45	3.8222	.60404	.77720
Private	36	3.6389	.92302	.96074

F-Statistic is .90188.
Not significant at .3452 level.

With such similarities of final charge severity in the above table, it is not surprising that differences among attorney types are not statistically significant (.3452) on Table 18.

To create a greater degree of comparability among cases, in each of the three jurisdictions studied, cases were divided into: (1) robbery with a gun; (2) burglary of a store; and (3) burglary of a house. Tests of statistical significance were run. The findings mirrored those of the more general categories: in no jurisdiction was there a statistically significant difference between attorney type and severity of final charge for the charges of (a) robbery with a gun (Appendix E), (b) burglary of a store (Appendix F), or (c) burglary of a house (Appendix G).

Explaining Final Charge

What is responsible for the appearance of "equal" justice at the final charge stage, for the two garden-variety street crimes of burglary and robbery? Interviews and observations lead us to conclude that it is related to: (1) prosecutor's policies in each of these jurisdictions that are well-established, uniformly implemented, and widely known by practicing attorneys; and (2) a process of adjudication which is accepted and routinized in the daily interaction of court work groups.

Prosecutor Policy

Prosecutorial style differs widely across jurisdictions. In Alexandria, Virginia it is characterized by a great deal of autonomy to Assistant Commonwealth Attorneys and an

elected prosecutor who likes to "keep his hand in" by handling some of the major cases in court by himself. In the District of Columbia, prosecutorial policy has to filter down many bureaucratic levels. According to an earlier study of selected offenses in the District of Columbia Superior Court, the U.S. Attorney's Office has always depended upon strong prosecutorial policies. For example, a policy of not reducing a robbery charge to a misdemeanor for purposes of obtaining a plea.[2] This policy applied to burglary offenses as well, but was not as strongly adhered to in these cases.

In Prince George's County, the head of the Office of the State's Attorney is a veteran of 20 years in the Office. Very explicit policy statements are included in the Annual Report published by the Office. For example, in 1977, strict guidelines were developed regarding plea negotiations in felony cases. According to these guidelines, prior to any negotiations, the prosecutor must have available a current pre-sentence investigation report on the defendant. Further, the defendant is required to plead to the "felony charge or charges that most accurately reflect the major crime or crimes actually committed."[3] These policies were intended to reflect the State's Attorney's strong commitment to accuracy of charge and consistency in punishment.

Of interest is that concerns in each of the three jurisdictions are similar, such as a concern with statistics and

wanting to "look good" on final charge (while giving the judge responsibility for sentencing). Some of the policies for handling burglary and robbery cases are indicated in the following statements:

> And on a weapons charge, the policy is never to drop the weapons charge. It's a mandatory one year. (Prosecutor, Va.)
>
> When it's a drunk climbing in a window looking for a place to sleep, it's a little different than a man with a knife or gun climbing in a bedroom window . . . . (Prosecutor, DC)
>
> There is an office policy that a robbery with a deadly weapon . . . we'll only accept the first count, which is armed robbery. (Prosecutor, PG)
>
> (In an armed robbery with a pistol shot) we are never going to offer misdemeanor pleas in that case. I mean, you can just forget it. (Prosecutor, DC)
>
> Certainly I don't want to denigrate the feelings of loss and invasion of one's nest (in a burglary) but it's a less serious offense (than robbery) to my mind. I think probably in most prosecutors' minds. (Prosecutor, DC)
>
> (Prosecutors) are more likely to treat more leniently a, say, a night time burglary of a warehouse than we are a night time burglary of a home where people just didn't happen to be there but might well have. (Prosecutor, DC)

Depending on the strength of the evidence in a case--which is rarely known by an evaluator looking through a court case file--these policies translate into the way in which the prosecutor approaches the issue of final charge:

> The State's Attorney will not allow the (Assistant) State's Attorneys to reduce a particular plea to less than a first count of an indictment, unless there's a very strong showing that they're going to lose on that first count. (Defense Attorney, PG)

Some defense attorneys believe that there is a large number of factors that could cause inequities in charging. They will tell you that the credibility of an individual prosecutor can make a difference, as well as the defense attorney and prosecutor's experience in handling certain kinds of cases. A prosecutor's confidence in himself. The volume of cases a prosecutor is handling in a given week.

Yet, there is little doubt from the interviews--supported by case statistics--that the prosecutor's policies become the arbiter of consistency.

> I think there's a mag card up there . . . . A mag card in the great prosecutor's office in the sky. And they see the facts come in and you're going to get the same . . . no matter who's in the case. (Defense Attorney, PG)
>
> Their (prosecutors) pleas are pretty well standardized, to a certain extent. (Defense Attorney, PG)
>
> Most of the time the prosecutors, they have set policies in terms of what plea offer they're going to make . . . . So 9 out of 10, in DC, anyway, it doesn't matter who the prosecutor is. (Defense Attorney, DC)

Although Joan Jacoby, in a national study of prosecutorial decision-making, did not focus on the performance or perception of defense attorneys, her conclusions with respect

to prosecutorial style are again supported through our data:[4]

> We can conclude . . . that there are, indeed, factors common to prosecutors that explain their discretionary decisions. They generally agree on priority of cases for prosecution--taking into consideration the seriousness of the offense, the criminality of the defendant and the case's legal-evidentiary strength . . . . They tend to accept a case primarily on the basis of the strength of its evidence and legal sufficiency . . . . They tend to dispose of cases by plea and at a reduced level when they are either inherently complex (thereby taxing system resources) or the legal-evidentiary strength of the case is marginal and the defendant's criminal record is of a less serious nature . . . .
>
> The result is that the decisions being made by the prosecutors . . . are consistent in their application . . . .

In other words, when similar cases are compared, as we did in our studies, deviation from prosecutor policy doesn't occur frequently and consistently enough for statistical significance.

Many attorneys want to see their individual role in a case as unique in case outcome--whether for reasons of experience, skill, good investigative work, high professional standards, or knowing the system (especially the former prosecutor). Yet the degree of difference an individual attorney can make in a run-of-the-mill, garden-variety case, is largely romanticized. The more accurate statements by attorneys were the following:

> Generally speaking, I think it's really less the quality lawyer than it is the circumstances of the case. (Defense Attorney, PG)
>
> Only on the really big cases do the retained attorneys make a difference as far as the kind of trial and pretrial tactics that they usually have. But the end result, I think, is the same . . . . (Prosecutor, Va.)
>
> See, I'm not saying the end result would change in any way (with more investigation). But there are certain things that you should do in every case. (Defense Attorney, PG)
>
> I like to think that for the extra money I charge I'm going to make a difference. It's not always true. A lot of times the guy could do just as well with the public defender in terms of the final outcome. (Defense Attorney, PG)

A lot of times!

Court Workgroups

The second major factor which contributes to the similarity in final charges among public defenders, court-appointed and privately retained attorneys is the court workgroup. The characteristics of this workgroup--especially that of shared goals--are perhaps most precisely explained by Eisenstein and Jacob in Felony Justice:[5]

> Although they may not realize it, all courtroom workgroups share values and goals. These shared perspectives undermine the apparent conflicts generated by the formal rules of workgroup members.

When the membership of a workgroup is stable--prosecutors, judges, and defense counsel who stay "in the business" for years--mutual dependence develops. Familiarity produces

stability. Patterns of formal authority but informal influence are well known. The goal of expeditious case handling surpasses all other goals for each group. Negotiation--accommodating each party--is the most commonly used technique of work. The courtroom workgroup almost always contains some persons (at least two out of three) who are very familiar with one another, either from membership in the local bar association, country club, church, or law school attended.

Our findings in each of the jurisdictions studied can be viewed from a workgroup perspective. In the District of Columbia, the constancy of the appearance of the public defender and prosecutor in court, and the large volume of cases handled by any given private attorney acting as court-appointed counsel, leads to well known reputations among peers. In Prince George's County, the fact that the Office of the Public Defender filters 85% of the cases, that the system is very "ol' boy" insofar as many of the defense attorneys in court have previously been prosecutors or public defenders, or have worked for the same small group of law firms, qualifies this court as stable. The Alexandria system, resting on the oldest of defense system traditions, is similar.

Familiarity, unlike the well known adage, does not breed contempt in court:

> You save a lot of time, I think, in the end. The cases that are represented by former prosecutors, we handle in a quicker fashion--more expeditiously. And we get the kind of result both he and I thought the case was worth in the beginning. (Prosecutor, Va.)
>
> I've been around here long enough that I know what the judge is going to give for a given person for a given crime. It's no use to try to prove five life sentences if you know he's (the judge) not even going to give one. (Prosecutor, Va.)
>
> (In time) it's kind of to where they know what you're capable of and you know what they're capable of, and so you wind up working out dispositions. (Defense Attorney, DC)

While the views expressed here are neither new nor startling, their importance is once again underscored. Although individual attorneys like to speak of the dynamics of each case as a "coincidence of justice," or "the luck of the draw," or a foundation "based on people" with their own foibles and concerns, the large part of courtroom activity involves groups operating with informal agreements on case work and plea possibilities, and using processes of decision-making which attempt to limit adjudicatory uncertainties for all concerned. The result? Final charges that look very similar.

Conclusion

It is noteworthy that studies which have included the subject of fees in their discussions and data collection are quick to point out the importance of fee in attorney behavior.

For example, Martin Levin in Urban Politics and the Criminal Courts points out that defense attorney behavior in case management is more likely to be influenced by fees and time commitments than by courtroom abilities.[6] Since his own goals dominate his behavior, fee collection is a primary motivation. Raymond Nimmer, in System Change,[7] also comments that self-interest, which operationalizes into income and efficiency are choice motivators of a defense attorney's performance. Eisenstein and Jacob, in Felony Justice,[8] noted that both privately retained and court appointed attorneys are entrepreneurs: "They respond to economic incentives and structural features of the environment . . . . But these forces do not operate through an organizational structure: rather, they impinge on defense attorneys through a quasi-marketplace." While our data does not contradict such conclusions, the degree to which personal motivation, including fees, influence final charge is not of statistical significance. It is important to note that most of the writers who have talked about the role of money in case management have not looked at empirical data on management and outcomes over a large number of cases. Rather, they have listened to attorneys. It has been our experience in listening to attorneys that they are better at reasoning on an idiosyncratic basis than they are at projecting across time and numbers. Their daily operational concerns overtake the importance of trends.

Despite quite varied opinions from attorneys, judges, and prosecutors in the three jurisdictions studied, as to whether case representation differences might exist among public defenders, court-appointed attorneys, and privately retained counsel, statistics indicate that, at least for the factors for which there are data, differences which may exist are not significantly different. Where they are, for robbery cases in the District of Columbia, idiosyncracies of the court system explain them, rather than the quality of the representation given by different attorney types.

CHAPTER 5 -- Notes

1. Jonathan Casper, Criminal Courts: The Defendant's Perspective, Law Enforcement Assistance Administration, U.S. Department of Justice, February 1978.

2. Robbery and Burglary, Kristen M. Williams and Judith Lucianovic, Institute for Law and Social Research, Washington, D.C., March 1979.

3. Report to the People, Arthur A. Marshall, Jr., State's Attorney, Prince George's County, Maryland, 1980, pp. 16-17.

4. Joan Jacoby, et al., Prosecutorial Decision Making: A National Study, Bureau of Social Science Research, Inc., Washington, D.C., October, 1980.

5. James Eisenstein and Herbert Jacob, Felony Justice, Boston: Little, Brown and Company, 1977, pp. 24-25.

6. Martin Levin, Urban Politics and the Criminal Courts, Chicago: University of Chicago Press, 1977.

7. Raymond Nimmer, System Change, Chicago: American Bar Foundation, 1978.

8. James Eisenstein and Herbert Jacob, op cit.

CHAPTER 6 -- CASE OUTCOME: THE SENTENCE

Introduction

Sentencing is always "the bottom line" in a criminal case. As one public defender-turned-privately-retained attorney said:

> Most of these guys aren't going to med school next year. So that the felony or the misdemeanor doesn't mean squat! We're talking business. Is a guy going to jail? If he's going to jail, how much time are you talking about? (Defense Attorney, PG)

These sentiments are expressed by others:

> Most of the time (the plea) doesn't matter. They're not concerned about their civil rights. You know, their ability to vote. They'll say, 'Look, man, I don't want to go to jail. I'll take the plea. I don't care what the plea is as long as I don't do any time.' (Defense Attorney, DC)

> What the hell, (sentencing is) the bottom line in criminal defense work. Sentencing. Ninety-eight percent of the cases begin and end with what you do with sentencing. (Defense Attorney, PG)

But sentencing the convicted criminal has been anything but an exact science. Rather, the apparent inconsistencies of sentences given for similar offenses have forced some systems, including Prince George's County, to consider sentencing guidelines in order to achieve some uniformity among cases.

What variables account for sentencing inconsistencies? Included, certainly, are:

. . . a given judge's sentencing philosophy . . .

> Normally, every judge is different . . . . Some judges have a higher regard for more severe penalties . . . than other judges. Which is just personal philosophies, I think, or personal experiences in the system. (Prosecutor, PG)

> (Sentencing inequities are) one reason they're trying . . . in a multiple defendant trial . . . to have all the defendants sentenced by the same judge. For purposes of consistency. If one defendant comes back and says, 'Hey, I got probation, and the other guy got ten years . . . . (Defense Attorney, PG)

. . . a judge's stereotype of defendants . . .

> It (a public defender case) fills the judge's stereotypic view of the free-loading, blood-sucker being defended by public funds. It's at sentencing you'll expect to see its effect. (Defense Attorney, PG)

. . . an attorney's sentencing tactics . . .

> If you want to make the (probation) report seem like the trash it is, you say, 'Your Honor, here's 20 things that this (probation officer) didn't even consider, never bothered to even find out . . . what good is the report? (Defense Attorney, PG)

> I got a whole book of these programs . . . . So when I walk into court I can say, 'Your Honor, (the defendant) is trying to deal with the problem of drugs. He's had a drug program.' Or DWI. 'He's been through all these alcohol rehabilitation things.' . . . I go up there and talk to them, 'let's get some reports, let's get something . . .,' costs goose eggs to the client. (Defense Attorney, PG)

> Yes, they (judges) will change their minds. If you can give them a decent alternative, a realistic reason why they should do this or that. (Defense Attorney, PG)

CONTINUED

2 OF 3

. . . an attorney's experience in court . . .

> I can tell you almost what to expect in PG County for almost any judge that you would have. (Defense Attorney, PG)

. . . a prosecutor's decision to take an active role in sentencing . . .

> So that when we (the prosecutor) choose to file a written report and recommendation with the judge and probation, it's treated as something of significance . . . . (Prosecutor, DC)

. . . the defendant's behavior at sentencing . . .

> (The defendant) could undo all the work that has been done, all the painstaking effort it has taken getting him ready for that fateful moment when he stands up before the judge and says, 'Hey, what happens to me?' If he says that 'hey' the wrong way, he's going down the road much longer than if he says it the right way. (Defense Attorney, PG)

> I've found always that the simple answer to sentencing . . . is you learn how to do a mea culpa. You learn how to get in there and say 'I'm sorry, your Honor! I can tell you . . . of judges who have sentenced dramatically differently with a client who says 'I'm sorry' and a client who says 'I have nothing to say, your Honor.' (Defense Attorney, PG)

But just as opinions regarding favorableness of final charge are polarized into the "you-get-what-you-pay-for" group and the "a-good-lawyer-is-a-good-lawyer" group, attorney opinions on sentencing are also divided. The former group pegs its opinion that the client-paid-for-attorney does a better job at sentencing on: (1) the additional resources money can buy (e.g., an individualized work-up of program alternatives

for the defendant from a center like the National Center on Institutions and Alternatives, or a psychiatric evaluation and the promise of treatment; and (2) the fact that the fee paid to the private attorney is viewed by the court as punishment in itself.

> In the old days, what did you do (to pay the attorney? You went to your family. You took a loan. You went to a friend. You did something. You scrounged, whatever. I'm not saying it doesn't work a tremendous hardship on the family or whoever you're borrowing the money from . . . . The judge may say 'Hey, this guy went out of his way, got this lawyer, did all of these things. I mean, I got to give him something for having taken all these steps,' or I think the whole system falls apart. They're businessmen, too, the judges. (Defense Attorney, PG)

We asked:

> Q. What role does money play in sentencing?
>
> A. Usually, if it's a privately retained case the judge will have some sympathy for the defendant because of the fact that he has to put out a lot of money. (Defense Attorney, PG)
>
> Q. That really does make a difference?
>
> A. I think it does make a difference. And I think that it also serves as a form of punishment as far as the judges are concerned.
>
> Q. I've heard that. Surprised me the first time I heard that.
>
> A. But the judge, when the person is what you might call 'using the public trough,' using the public defender system, well then they feel . . . he's just a deadbeat. (Defense Attorney, PG)

Those who felt that money, per se, did not influence sentencing, based their opinion on the proposition that a good attorney is a good attorney--he or she will be considering sentencing throughout case preparation; he or she will be creative in exploring avenues of sentencing alternatives, irrespective of whether the attorney is appointed, privately retained or a public defender.

Severity of Sentence

Which side is correct? For each of the three jurisdictions, for each of the two crime types, severity of sentence was analyzed in relation to attorney type. In no jurisdiction, for either robbery or burglary cases, was severity of sentence (i.e., confinement vs. probation)* related to the type of attorney representing the case.

Table 19, presenting data for the District of Columbia, indicates that while probation is received less frequently for the robbery-indicted clients of the public defender (which may relate to the more serious cases the office represents), the difference is not of statistical significance (.1958 level). Table 20 indicates more evenly "matched" sentencing for both attorney types (33.3% confined--public defender; 41.5% confined--

*Data on fines and suspended sentences was collected, but initial analysis showed them to comprise less than 1% of any sample and the data were dropped from subsequent analysis.

court appointed) for the charge of burglary, again with no statistical significance (.4439 level).

Table 19

Attorney Type and Severity of Sentence, District of Columbia, Robbery, 1978, 1979

	Severity of Sentence	
Attorney Type	Confinement	Probation
Public Defender	69.8% (30)	30.2% (13)
Court Appointed	82.1% (32)	17.9% (7)

Raw chi square is 1.6734.
Chi square is not significant at .1958 level.

Table 20

Attorney Type and Severity of Sentence, District of Columbia, Burglary, 1978, 1979

	Severity of Sentence	
Attorney Type	Confinement	Probation
Public Defender	33.3% (14)	66.7% (28)
Court Appointed	41.5% (17)	58.5% (24)

Raw chi square is .5861.
Chi square is not significant at .4439 level.

Data for Prince George's County are similar in their non-statistical significance. For the crime of robbery (Table 21), clients of the court appointed attorney are confined more frequently (68.3% vs. 52.8%--public defender and 52.0%--private) but the difference is not of statistical significance (.1386 level). For the crime of burglary, severity of sentence is almost identical for both the court appointed and privately retained attorney.

Table 21

Attorney Type and Severity of Sentence,
Prince George's County, Maryland, Robbery, 1979

	Severity of Sentence	
Attorney Type	Confinement	Probation
Public Defender	52.8% (28)	47.2% (25)
Court Appointed	68.3% (41)	31.7% (19)
Private	52.0% (24)	48.0% (26)

Raw chi square is 3.9525.
Chi square is not significant at .1386 level.

Table 22

Attorney Type and Severity of Sentence,
Prince George's County, Maryland, Burglary, 1979

	Severity of Sentence	
Attorney Type	Confinement	Probation
Court Appointed	52.0% (26)	48.0% (24)
Private	50.0% (25)	50.0% (25)

Raw chi square is .0400.
Chi square is not significant at .8414 level.

Tables 23 and 24, presenting data for Alexandria, indicate that court appointed attorneys receive less "severe" sentences for their robbery indicted clients (64.2% confined vs. 81.8% confined--private) but slightly more "severe" sentences for their burglary indicted clients (59.3% confined vs. 54.8% confined--private). Again, these figures have no statistical significance.

Table 23

Attorney Type and Severity of Sentence,
Alexandria, Virginia, Robbery, 1978, 1979, 6 mos. 1980

	Severity of Sentence	
Attorney Type	Confinement	Probation
Court Appointed	64.2% (34)	35.8% (19)
Private	81.8% (18)	18.2% (4)

Raw chi square is 2.2823.
Chi square is not significant
at .1309 level.

Table 24

Attorney Type and Severity of Sentence,
Alexandria, Virginia, Burglary, 1978, 1979, 6 mos. 1980

	Severity of Sentence	
Attorney Type	Confinement	Probation
Court Appointed	59.3% (32)	40.7% (22)
Private	54.8% (23)	45.2% (19)

Raw chi square is .1953.
Chi square is not significant
at .6585 level.

In addition to whether a sentence consisted of confinement or probation, data on number of months of confinement and number of months of probation were gathered. According to our data (Appendix H), the number of months of confinement received by defendants does not differ with statistical significance among different attorney types, except for the charge of burglary in Alexandria. According to Table 25, the average number of months of confinement for defendants of court-appointed attorneys in Alexandria is 29.4; for defendants of privately retained attorneys, 13.6. In short, the privately retained does "better" for his confined client.

Table 25

Attorney Type and Number of Months of Confinement,
Alexandria, Virginia, Burglary, 1978, 1979, 6 mos. of 1980

	Number of Months of Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	32	29.469	1325.4	36.406
Private	23	13.609	242.34	15.567

F-Statistic is 3.8433.
Significance is at .0552 level.

When data on number of months of probation are analyzed, differences among attorney types for clients indicted of burglary are statistically significant in both Prince George's County and Alexandria (Appendix I).

Table 26

Attorney Type and Number of Months of Probation, Prince George's County, Maryland, Burglary, 1979

	Number of Months of Probation			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	25	40.320	286.56	16.928
Private	30	29. 100	279.47	16.717

F-Statistic is 6.0728.
Significant at .0171 level.

Table 27

Attorney Type and Number of Months of Probation, Alexandria, Virginia, Burglary, 1978, 1979 and 6 mos. 1980

	Number of Months Probation			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	20	53.400	856.04	29.258
Private	25	34.000	680.16	26.000

F-Statistic is 5.4724.
Significant at .0240 level.

According to Table 26, clients of the privately retained attorney in Prince George's County, indicted for burglary, receive shorter probation sentences (29.1 months) than do clients of court appointed attorneys (40.3 months). Table 27 indicates that clients of the privately retained attorney in Alexandria also receive shorter probation sentences (34 months vs. 53.4 months for the clients of court appointed attorneys).

Explaining the Sentence

Why does a statistically significant relationship occur, when it does, between attorney type and burglary cases? It is our opinion that: (1) a constellation of defendant characteristics exist together which distinguish the clients of private and court-appointed attorneys, giving the clients of the private attorney a sentencing "edge"; (2) but that the "edge" does not work for crime(s) which are perceived as particularly serious by the court, such as robbery.

Defendant Characteristics

Perhaps the most important point to be made regarding the sentencing differences that do exist (number of months of confinement, number of months of probation) is that the differences are related more to defendant characteristics than they are to attorney type.

Profile of the defendant who uses court-appointed counsel:

> They don't have good things going for them. They can't afford the lawyer. They don't have the support systems on the side. They don't have a decent family. They don't have the employer, the job, whatever, going for them when you go into sentencing. (Prosecutor, Va.)

> So the people (defendants) with the public defender are going to be poor, probably longer records, probably less of something to pitch to the judge that the person has a redeeming quality. Education? Does he work? Could he go back to the community and be rehabilitated on probation? So when you get the PSI, what are you going to say? He's a 30 or 20-something year old male who's been unemployed for X amount of years who either has a drug habit and has a long juvenile history or committed certain offenses. How do you make your pitch? (Defense Attorney, PG)

Profile of the defendant who retains private counsel:

> A person who is able to retain counsel generally has more things going for him than who is not. In terms of education, job, employment opportunities . . . . (Defense Attorney, DC)

> (The defendant who) has the resources to get and hire an attorney probably has some more things going for him than the person who comes over here (to the public defender's office). I mean, they're going to have a job. Things that the court is going to look for minimizing confinement. They're going to have a job, going to have better family ties. (Prosecutor, PG)

> They (the family) say 'we're going to scrape everything together and we can get you a private lawyer. It isn't because they got a private lawyer that they got a better sentence. It's because of the background, the family background. The guy is riding the crest of the family reputation. (Defense Attorney, PG)

The fact that attorney differences in sentencing do not appear in the District of Columbia only strengthens our conclusions. In the District, the only comparisons were between the public defender and court-appointed attorneys; the clients of these attorneys are essentially the same, in terms of background characteristics. Where the statistically significant differences did occur, the comparisons were between the court appointed and privately retained attorneys.

To further support our conclusions, an analysis was made between severity of sentence (confinement vs. probation) and defendant employment status. According to the data presented in Appendix J, clients of the privately retained attorney who have been indicted for burglary charges in Prince George's County and Alexandria, are more likely to have been employed than are the clients of the court appointed attorney. The differences among attorney types are of statistical significance only for burglary cases in Prince George's County and Alexandria. It is our contention that this factor is related to the shorter probation period received by clients of the private attorney.

When other defendant variables, such as age (Appendix K), race (Appendix L), number of prior convictions (Appendix M), and prior incarceration (Appendix N) are viewed in relation to attorney type, there exists no statistically significant

difference among attorney types and defendants on these variables. In short, only the defendant's employment status upon arrests distinguishes among attorney type to a statistically significant degree, as it does in terms of the number of months of probation received by these same defendants.

Seriousness of Offense

Armed robbery cases chosen for our sample were always perceived as more serious than were burglary cases:

> My problem is he does it with a gun. If he were just a burglar I wouldn't have gone anywhere near as long as I gave him (for a sentence) . . . But go out and stick a gun in someone's face and steal everything they have . . . . Sorry. That's the guy I want in jail. (Judge, PG)

> (One group of attorneys) does even better for its clients in burglaries than in armed robberies in terms of sentences simply because I think judges are more open for persuasion when the crime itself is not as serious. I mean, when you got an armed robber . . . no matter how persuasive the defense counsel is . . . . (Prosecutor, DC)

Statistics bear this out. In the District of Columbia, for example, 76% of those defendants found guilty in robbery cases were imprisoned; 37% of defendants in burglary cases. In Prince George's County, 58% of the "robbers" were confined, 50% of the "burglars." In Alexandria, 69% of the "robbers," 57% of the "burglars."

Conclusion

Sentencing differences which discriminate between clients of court-appointed and privately retained attorneys are (1) more likely to exist for the less serious offense of burglary, when they exist at all, and (2) be based on variables which are linked to the defendant, and not to the attorney. Where the defendant has money to hire an attorney, he or she is also likely to have a job--and a supervisor who can testify at the sentencing hearing. If the defendant has a family which has managed to scrape together the money to hire an attorney, they can probably also come up with a minister or other people in the community to swear that the defendant is not a threat. Where the defendant has money to hire an attorney, the attorney can make use of such fee charging resources as the National Center on Institutions and Alternatives and the packaged program they will develop for the individual. So money wins out. But not for its ability to "buy" justice. And not for its ability to spark an attorney towards better results. Rather, money wins out for the range of variables that money attracts--security, stability, employment, family. Variables which are important in sentencing but which are difficult on which to gather statistical data.

CHAPTER 7 -- CONCLUSIONS AND RECOMMENDATIONS

Introduction

> The system is judged not by the occasional dramatic case, but by its normal, humdrum operations. In order to ascertain how law functions as a daily instrument of the city's life, a quantitative basis for judgment is essential.[1]

Our "quantitative basis" of judgment, to use Justice Pound's and Justice Frankfurter's term, indicates that the ability of money to "buy" justice in the garden-variety street crimes of robbery and burglary is a myth. What might be true for the big-time drug merchandiser or gambler is certainly not true for the cases researched in this study.

As goes the Washington metropolitan area, so goes the nation? We have no evidence to conclude that criminal defense services around the country are either as high in caliber as they are in the jurisdictions studied, or that the systems are as uniform in dispensing justice to the majority of cases, irrespective of whether the defending attorney is getting paid by the client, the court, or the state.

We <u>are</u> saying, however, that in the three jurisdictions studied, the ability of a client to pay for his or her own attorney does not alter case outcome to any statistically significant degree. In fact, when case management techniques <u>could</u> change with the amount of money available--such as providing expert witnesses, doing in-depth investigations--

system constraints conspire to regress the extremes towards the mean. Any peaks in the curve of individual attorney differences in financial "incentives"--and possible concomitant differences in case outcome--are flattened out by consistently applied prosecutor policies and the routinized work styles and understandings of criminal justice actors who interact on a daily basis. In the few cases where sentencing differences statistically favor the client retaining his or her own attorney, the fact that the defendant has and spends the money is more important than the fact that the attorney is receiving the money to spend on the case. Money is an attitude that attaches to the defendant and not the attorney. It is an attitude that influences the sentencing judge and the probation officer who writes the pre-sentence investigation report. It enables the attorney to marshall the support of the community--the employer, the minister, the friend. Money and its acoutrements attaches mainly to the defendant, not the defender.

Looking at the data and the meaning we take from it, it is the defense system and the defense attorney that are taking the beating, not the defendant. It may be time to shift from worrying about uniformity of case adjudication for the garden variety criminal case for a while, and start worrying about the system which provides lawyers to its citizens.

A Career in Criminal Law: Unrewarding

It is hard to make a living as a private lawyer practicing criminal law. The criminal defense economy is built on an unsteady foundation--the criminal defendant. The legal profession is overpopulated--and the overpopulation finds its way to criminal law. Poor working conditions, such as courthouse inefficiencies, affect a lawyer's pocketbook. The existence of free legal services depresses fees--and no one helps lawyers understand how to "price their work" in the first place. Given the fact that criminal defense lawyers are facing greater complexities and requirements in the criminal process, more stringent standards in many states for the effective assistance of counsel, and a U.S. Supreme Court decision denying the public defender immunity from suit in malpractice cases, it is a wonder why lawyers who specialize in criminal defense still do.

Even while receiving fees considerably higher than salaries received by the public defender or fees given to court appointed attorneys, one private criminal defense attorney who is trying to surface the issue of money and case management for the entire legal profession, finds being a criminal defense attorney living a "life at the bottom" of his profession, in terms of money earned and respect received.[2] This attorney concludes that setting (and getting) a fee as

one of the greatest challenges of criminal practice.[3]

> Just like sex, fee setting is a subject surrounded by ignorance, fear and guilt. Everybody does it but nobody talks about it.

While lawyers talk to each other about search and seizure, voir dire, demonstrative evidence and jury argument, they rarely talk about fees.

If setting fees constitutes one set of problems, collecting fees constitutes another. A survey of the Texas criminal defense bar that elicited 300 responses[4] found that: (1) most of the attorneys thought it proper to request postponement of a case in order to collect a fee; (2) most have had to sue--or threaten to sue--a client to collect a fee; and, (3) some have had to take something other than money as payment in kind, such as homemade wine, guns, land, automobiles, jewelry, fence mending. All sorts of methods were worked out to stay one step ahead of clients who attempt to avoid full payment, from techniques of setting fees which overestimate time and expense, or get the money "up front," to working out arrangements with local banks to provide loans to clients. Said one attorney:

> You have to get the fee while the tears are still flowing, or you never will.

In fact, it is a myth that private criminal lawyers earn fabulous incomes. Wice found most lawyers at the low end of the scale, netting $15,000 to $25,000, and a few lawyers at

the high end of the scale, earning $100,000 or more.[5] The median earned was $34,000.

What is the result? A legal speciality which attracts a large number of young, inexperienced law school graduates for a very short period of time. As soon as a referral base can be built, and a more general practice can be established, a speedy exit from the practice of criminal law is made.

The Speciality of Criminal Law: Endangered

The legal specialty of criminal law is in jeopardy. This was least visible in the District of Columbia, perhaps, where the Public Defender Service represents a small proportion (15%-20%) of indigents. But upon closer inspection, an inefficient court system (with waiting time unpaid), court fees established ten years earlier (and not increasing with inflation), indigency criteria which create a large pool of defendants who are eligible for "free" advocacy, a lengthy adjudication process (which puts fee collection for appointed attorneys off for 1 1/2 years), and arbitrary cuts in vouchers submitted by court appointed attorneys, are only some of the reasons for an impaired system of private practice. What remains of a private "system" is a core of 40-50 attorneys who represent the large majority of court-appointed cases on a full-time basis, and a smaller group of attorneys who "go where the bucks" are: gambling, drugs, prostitution. The

remainder of the attorneys drift into the system for their own personal and professional reasons and drift out again as quickly as they can build up a general practice.

Most visible was the shift over a ten year period in Prince George's County from a system based 100% on private advocacy to one in which the Office of the Public Defender now represents 85% of the criminal cases. Here, polarization among privately retained practitioners was most evident: the small group of attorneys whose practice is almost entirely criminal law, and the large group of attorneys who used to have a 40%-50% criminal law practice which has currently slipped to 10% to 20%. With fees to court appointed attorneys especially low ($15 per hour out-of-court, $20 per hour in-court), even the District Public Defender is having difficulty recruiting attorneys for the panel.

In Alexandria, it is the spector of danger for the private practitioner which has raised its head in the form of the State's overture to the city to establish an experimental public defender office. The local bar association won "round one," with the City Council tabling the issue; how many more rounds it can win is unknown, in an atmosphere of cost efficiency and a small bureaucracy advocating public advocacy already in place at the State level.

In short, the number of criminal cases available for representation by either the court appointed attorney or privately

retained attorney is shrinking. Private advocacy is giving way to public advocacy. Which is particularly ironical, coming in a period of expanding rights of defendants.

As the "market" shrinks for the private practitioner, and the amount of time spent in court decreases, the more insecure the attorney becomes about (1) keeping current with the increasing complexities and changing requirements of the criminal process and (2) increasingly stringent standards for effective assistance of counsel. Add to this the problems inherent in setting and collecting fees, and the future of the specialty as practiced by the private criminal bar is bleak.

The following facts speak for themselves: in San Diego, court assigned lawyers are refusing to handle further cases; in Florida and Alabama, they are suing the state because low fees amount to involuntary servitude; in Missouri, lawyers have been cited for contempt of court for refusing to accept appointments; in Kentucky, 13 of 26 counties have no lawyers willing to represent indigents. The reason for each of the above occurrences can be traced back to inadequate compensation for appointed lawyers.

What does the legal profession consider inadequate compensation? Would that definition be the same as the public's? In Alabama, the out-of-court rate set by state

statute is $10 per hour and $20 per hour in court. The maximum for a trial is $500. In Connecticut, any case declared "on trial" in a crime with a penalty of less than ten years was worth $12.50 per hour for both in-court and out-of-court time. In Maine, the flat rate exists of $50 per case in District Court and an hourly rate of $15 per hour in Superior Court.

The realities of such low rates have resulted in the following:

(1) In a North Carolina case in which the death sentence was imposed, the defendant's attorney refused to file a petition for certiorari in the U.S. Supreme Court unless promised payment from the state for doing so. In a letter addressed to the Chief Justice of the North Carolina Supreme Court, the attorney wrote, "I am not an eleemosynary institution . . . I cannot justify working for nothing or at a rate less than received by a garage mechanic."[6]

(2) A Texas criminal defense attorney, in a memo to members of an ABA Standing Committee, tried to explain how lawyers are losing money by taking court appointments.[7] Each of the 62.3 hours he worked on the case of a man indicted for murder cost the lawyer $31 per hour in overhead; which was $650 more than the $20 per hour he received from the court for the case. This was excluding any remuneration for his own time. "It is as if I had written a check to (the county)

instead of visa versa, at the conclusion of the case . . . I received one-fifth of (the going rate) for my work on the Ruberge case, a discount not of 10, 20 or 50 percent but of 80 percent--30% below my cost."

(3) A lawyer from Alabama sued the Alabama Superior Court on his own behalf for such constitutional infirmities as involuntary servitude, deprivation of liberty and property without due process or compensation, denial of equal protection of the law. Behind the suit was the state's fee schedule of $10 per hour out-of-court and $20 per hour in court. Said one attorney about the fee paid, "It encourages, requires, and demands incompetent" legal assistance.[8]

Every state now has a statute that guarantees some payment to counsel. The fee schedule stated, however, is often exceedingly low, rarely, if ever, based on private practice rates, and sometimes not adhered to (especially if funds have already been spent). On this latter point it is noteworthy that as of June 1981 the State of Massachusetts owed $3 million to the private bar for work performed over a three year period; in West Virginia, $170,000 in fees for work performed in 1978 and 1979 were still owed in 1981.

In short, the private bar taking court assigned cases is not being paid for cases assigned, completed and billed. Reasonable compensation for time and efforts,[9] in the words

of the American Bar Association, is the exception rather than the rule. And depletion of the experienced criminal defense attorney from the roster of names around the country of attorneys who are willing to accept court assignments is the result.

The private practice of criminal law is, indeed, endangered. Our study gives further support to Wice's conclusion that the large majority of criminal lawyers will become extinct in the near future,[10] unless major changes insure a place for the private practitioner in the specialty of criminal law.

The System of Providing Defense Services: Searching

In metropolitan areas, new or expanding public defender programs, using vague eligibility criteria and unchecked personal data, are swallowing many clients who, in the past, might have retained their own attorney. Since the 1963 landmark decision in Gideon v. Wainwright, organizing the practice of criminal law into public defender offices has been the "growth industry" of criminal law. By 1973, a nationwide survey of defense services estimated that there were 573 defender agencies providing representation at the trial level in the state courts.[11] At that time, the offices served approximately two-thirds of the nation's population. Today's figures are undoubtedly higher.

Yet, while many of these offices are thriving at the expense of court appointments and privately retained cases, a lack of funding is placing severe restraints upon even these organizations. While many of these restraints impact upon an office's resources, funding cutbacks are also forcing defender offices to decrease their number of staff attorneys. Increasing staff turnover as salary requirements are not being met, comes with the times. Entire programs have already begun to vanish at the state and county level with no replacements in sight. According to the current director of the National Defender Institute, "local governments have begun to push for drastic reductions in defender agency spending . . . ." Defenders are being advised "to make a concerted effort to master the art of obtaining money."[12]

Where local public defender offices do not exist, assigned counsel jurisdictions are considering, or have just begun, them (in Iowa, Massachusetts, West Virginia, Indiana). Increasingly, pressure is being exerted on state government from community groups, county administrators, bar associations, to assist in the funding and development of statewide systems. After only a few months of operation, the Criminal Defense Technical Assistance Project had received more than a dozen requests from states considering this solution to their defense service needs.[13]

Given the trend to defender offices, the majority of counties nationwide still use the ad hoc method (used in Alexandria) of assigning counsel and are still responsible for the complete funding of their respective systems.[14] Where will the money come from in the future? What system is most efficient? In an era of decreasing personal and property taxes, anyone who can answer these questions has a bright political future.

As the data gathered for this study have shown, three criminal courts, serving three jurisdictions dependent upon three different defense delivery systems (D.C.-mixed, Prince George's County-public defender, Alexandria-ad hoc), appear to provide uniform defense services to individuals in specific case types (robbery and burglary) regardless of whether a public defender, private attorney, or court-appointed attorney is handling the case. If quantitative "justice" among defendants is the end goal for systems, it is apparent that various mechanisms can reach that goal.

The Future

The question of what type of defense system a jurisdiction should have must be viewed from the psychological, professional, and economic perspectives as well as the legal one. How good is a system which affords equal justice to the overwhelming majority of defendants yet gives the impression

to one group of defendants that they are being railroaded by public defenders (even when they are not)? Perceptions are frequently more powerful change mechanisms than reality. How good is a system of defense when it is losing an entire group of attorneys who, to quote one of our interviewees, "will never get the opportunity to go ahead and show what they can do"? Especially when the specialty is partly being lost because of a lack of interest on the part of the non-criminal bar. And how good is a system of defense when its primary goal becomes "How much does it cost" rather than "Did the attorney enter the case at an appropriate state" or "Were there enough resources for a proper investigation"?

In short, it is reassuring to be able to state that in the jurisdictions studied, for the crime categories studied, the defense system, fees and payment schedules, and attorney type, do not necessarily bring with them disparaties of case outcome. But they do bring attorneys who are losing their profession, defendants who feel like second class citizens and politicians whose primary loyalty is to their sense of economic mandate from the people who elected them, and not justice for all.

A study of this nature and scope is not equipped to generalize its findings too far afield, nor present an agenda for national debate. It can, however, take what has been

observed in the three jurisdictions studied and recommend specific areas of consideration.

Review Eligibility Standards for Indigent Services

Be it sour grapes or otherwise, the area of appropriate eligibility standards for the indigent and marginally indigent, and the resources available for checking data supplied by prospective clients of public defense, is an area in need of attention.

In each jurisdiction studied, private and public attorneys estimated that anywhere from 10% to 30% of those receiving free counsel were not qualified to do so. This is a sizeable percentage of potential clients who might be more appropriate in the free market. In the District of Columbia, rumor has it that just about anyone applying for free counsel can get it. In Prince George's County, the "liberalness" in eligibility seems more related to lack of resources to validate data provided by the defendant than an attitude of exceptional largesse.

On one side, the debate is an economic one: given a gap between the "going rates" charged by private attorneys for representing specific crimes (and individuals) and the defendant's assets, what are appropriate standards to establish for full or partial eligibility. Both the District of Columbia and Prince George's County maintain programs which

call for a pay back by the marginally indigent. The latter one appears to work, if year end monies received are any criteria. But programs for the employed defendant, for whom a $2,000 bill for a defense against a burglary charge would be difficult to afford--the working class poor--are virtually non-existent. Alexandria makes some attempt to meet this need by its "gray panel" of attorneys who will handle a case for lower-than-normal rates. This is one area with which the private bar must come to terms if it is at all interested in saving the criminal law specialty.

The debate, however, is as much philosophical as it is economic. How much of a responsibility should the state assume for an individual's legal-financial obligations? How much of a responsibility should the individual assume--even if hardship ensues? Both the economic consequences and philosophical issues need visible debate, both within and without the legal system. An American Bar Association survey found that unmet legal needs of America no longer lie with the poor. Rather, with the 70% of Americans who fall into the middle class--those who don't qualify for free legal assistance and who feel they can't afford standard legal fees.[15]

Examine Conditions for Court-Appointed Attorneys

The problems that attorneys all around the country are having with (a) the amount of money fixed for court-appointed

cases and (b) the manner in which payments are reviewed and made, raise fundamental questions about money spent helping attorneys defend accused criminals. The federal government, in its efforts to eliminate the Legal Services Corporation and its general interest in fostering volunteerism, has established its disinterest in providing free services and its interest in pro bono work. No doubt, the legal profession's original sense of its obligation to the poor was not only noble, it also worked in times past, when occasional voluntary service to a poor person could be spread among the entire bar. But with constitutional decisions which have expanded the rights of citizens to free counsel, the concentration of the poor in metropolitan areas, and the growth of the legal specialty of criminal law, precisely due to its complexities and frequent changes, a modern solution is needed to an old problem. The majority of lawyers are not in the position to offer pro bono services on a large scale. The greatest percentage of lawyers do not belong to big city law firms; they are sole practitioners or members of small firms with less than ten lawyers. Perini pinpoints the problem with common sense:[16]

> No policeman or fireman works without pay from a sense of duty. Yet criminal defense lawyers daily assume burdens which properly belong on the collective shoulders of the public.

In the District of Columbia, the fee schedule is ten years old. But worse than this (because this researcher hasn't been convinced that any lawyer should be billing at the $75-$150 per hour rate currently found in civil law), the criminal defense attorneys are being asked to pay for the inefficiencies of court calendaring, the lack of modernization of court procedures (e.g., telephone stipulations vs. courtroom stipulations), the arbitrariness of judges in determining appropriate remuneration. The saving grace of the appointed system here, however, is that a large enough volume still exists for appointments; the high volume is used to replace low individual case profits.

In Prince George's County, the private bar is not as fortunate. A growing public defender's office and a worsening economic situation have combined to decrease volume and lower fees. The result: the loss of experienced private practitioners to the practice of criminal law, and a hastening of the in-out phenomenon of the young, inexperienced lawyer into and out of the specialty of criminal defense.

The point is not that court-appointed attorneys should necessarily be remunerated at higher rates. Or that the growth of public defender offices should be contained. The point is that looking closely at court appointed attorneys--trends in money, resources, numbers, individual demographics--may provide

a key to predicting the future of the specialty of criminal law, and a better focus on options that defense systems will have to consider if it is to meet the needs of the citizens.

The Role of the Private Bar

The National Defender Institute, with funding from the National Institute of Justice, is currently examining the role of private counsel in indigent defense. Its in-depth look into a range of models which use private attorneys for criminal work should be revealing, mostly for its economic implications of costs per case per model. Still, the questions for a legal system such as ours are broader than the concerns of counties, cities and states for saving money.

Is the criminal specialty worth saving as a specialty for lawyers other than those willing to be paid for and attached to public service departments? If so, it seems that the private bar must take an active interest in its "criminal" colleagues. Although we are not taking a position on the final decisions made, Alexandria offered a look at local bar activity in defense of its own.

In contrast, the fears that the opponents of the public defender's office in Prince George's County had a decade ago have now been realized. The day of the private attorney in criminal practice is disappearing. The market has dried up. To parallel the old expression, "The rich get richer . . .,"

private criminal defense in Prince George's County has a few of the attorneys handling most of the cases and the majority of attorneys handling fewer cases. Although most attorneys interviewed in the county felt that the public defender is currently doing a fine job, apprehension for the future was widespread: "Right now you have professional public defenders who are hanging by the strap. And there will come a time when they no longer can do this . . . ." (Former Public Defender)

Taking an active interest, however, doesn't mean that the delivery of criminal defense services need look like it does today. For example, the concept of prepaid legal service plans is only just being explored. While the overwhelming percentage of Americans have some form of health insurance, the concept of prepaid legal services is in its infancy. While most plans envision offering easy access to an attorney at a reduced rate, they are still at the level of development in most states. And the use of prepaid legal service plans to provide criminal defense services is perhaps its most shaky aspect. While the Tenessee Bar Association is sponsoring a prepaid legal services plan that includes criminal cases, a defense attorney from that state noted that one problem will be to ensure that insurance companies refer criminal cases to lawyers who have criminal law experience.[17] Yet one interviewee in Prince George's County who is part of such a service

is optimistic. The American Bar Association, through its House of Delegates, clearly recognized and encouraged the participation of lawyers in group legal service plans.[18]

Legal clinics are also only just in their infancy. Essentially, they operate in the same way as the typical law firm, except that the services they provide are focused on the low and middle income family.[19] In order to survive, they need a high volume business. One interviewee who owned a legal clinic sees that charging less for services rendered was really the only difference between general law practice and what he is engaged in:

> A lot of lawyers that open up what they call clinics are lawyers right out of law school who cannot find work, who have to charge less to build up clientele.

This attorney's operations regarding fees mirror those of the private attorney's:

> We do not bill. Probably 50% of our work is paid in advance . . . . I try to get the money when you come in the first time . . . . We tell them, it's almost cash and carry.

The "legal clinic" or "law store" have become magic words to some. The clinics may become as widespread in large retail stores as Allstate Insurance and optical departments are in Sears.

We are not advocating either legal clinics or prepaid legal services. Rather, we are making a plea for an increasing

role of the private bar in criminal defense--to stop a turn toward public advocacy which in the future will be problematic (as it already is in many cities and states). Our voice is certainly not alone. It is fitting to conclude this report seconding a statement made by the Executive Director of the National Legal Aid and Defender Association (an organization which, in the past, has been a leading proponent of establishing and expanding defender offices):[20]

> The private bar is a natural ally for improving defense systems. We must insist, yes insist, that private counsel be substantially involved in the representation of indigent defendants, even if this means a slower or no growth in the institutional (public) defender office. The bar is a base for political support and pressure that cannot be exerted by defenders, particularly if they are government employees. By having an active and interested defense bar, an institutional defender can assure him/herself of a safety valve for excess cases, a control with which to compare his/her work, an appropriate alternative in the case of conflicts, and a base of support in all types of political and legal controversies.

CHAPTER 7 -- Notes

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4. Ryan L. Petty, "Fee-Setting and Fee-Collecting Practices Among Criminal Defense Attorneys in the State of Texas," Voice for the Defense, Vol. 9, No. 9, March-April 1980, pp. 6-13.

5. Paul Wice, Criminal Lawyers: An Endangered Species, Sage Publications: Beverly Hills, California, 1978.

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9. Standards for Criminal Justice, The Defense Function, American Bar Association, Washington, D.C., Standard 5-2.4., 1980.

10. Paul Wice, op. cit.

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12. Marshall Hartman, Comments, Criminal Defense Newsletter, October 31, 1980, Abt Associates: Cambridge, Massachusetts, p. 5.

13. "A Capsule of Activities," Criminal Defense Newsletter, February 1, 1980, Abt Associates: Cambridge, Massachusetts, p. 3.

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15. John A. Jenkins, "Future Law: Lawyers Confront the 21st Century," The Bureau of National Affairs, Inc. ©1979.

16. Vincent Perini, "Seven Reasons . . .," op. cit.

17. Meeting Minutes, Economics of Criminal Law Practice Committee, American Bar Association Criminal Justice Section, Nov. 14, 1980.

18. Model Code of Professional Responsibility, American Bar Association, Washington, D.C., 1969, DR 2-101, DR 2-103, DR 2-104.

19. "Legal Clinics Today," New Directions in Legal Services, Vol. II, No. 4, July-August 1977, National Resource Center for Consumers of Legal Services, pp. 114-122.

20. Howard B. Eisenberg, "Responses to 'A Call for Action,'" Criminal Defense Newsletter, October 31, 1980, p. 3.

APPENDIX A -- PER CAPITA COSTS OF INDIGENT DEFENSE SYSTEMS NATIONWIDE

STATE	TOTAL COST OF INDIGENT DEFENSE SERVICES*	TOTAL STATE POPULATION**	TOTAL PER CAPITA EXPENSE	RANKING BY PER CAPITA COST
Alabama	$ 1,731,527	3,890,061	.45	51
Alaska	3,274,000	400,481	8.18	2
Arizona	6,693,852	2,717,866	2.46	11
Arkansas	1,367,489	2,285,513	.60	48
California	93,290,267	23,668,562	3.94	3
Colorado	6,087,221	2,888,834	2.11	15
Connecticut	4,184,453	3,107,576	1.35	28
Delaware	1,295,728	595,225	2.18	13
Dist. of Columbia	6,552,246	637,651	10.28	1
Florida	31,971,457	9,739,992	3.28	6
Georgia	3,100,000	5,464,265	.57	49
Hawaii	1,471,415	965,000	1.52	25
Idaho	1,844,082	943,935	1.95	17
Illinois	17,000,000	11,418,461	1.49	26
Indiana	5,800,000	5,490,179	1.06	38
Iowa	4,483,693	2,913,387	1.54	24
Kansas	2,700,416	2,363,208	1.14	36
Kentucky	4,737,700	3,661,433	1.29	30
Louisiana	4,121,531	4,203,972	.98	41
Maine	929,126	1,124,660	.83	45
Maryland	7,777,674	4,216,446	1.84	20
Massachusetts	10,600,000	5,737,037	1.85	19
Michigan	19,105,400	9,258,344	2.06	16
Minnesota	6,827,424	4,077,148	1.67	22
Mississippi	1,209,137	2,520,638	.48	50
Missouri	3,891,597	4,917,444	.79	46
Montana	1,100,000	786,690	1.40	27
Nebraska	1,500,000	1,570,006	.96	42
Nevada	3,097,052	799,184	3.88	4
New Hampshire	1,715,000	920,610	1.86	18
New Jersey	16,225,334	7,364,158	2.20	12
New York	48,313,968	17,557,288	2.75	8
New Mexico	3,798,620	1,299,968	2.92	7
North Carolina	7,861,724	5,874,429	1.34	29
North Dakota	464,114	652,695	.71	47
Ohio	12,458,810	10,797,419	1.15	35
Oklahoma	2,888,429	3,025,266	.95	43
Oregon	9,779,234	2,632,663	3.71	5
Pennsylvania	14,541,427	11,866,728	1.23	33
Rhode Island	1,115,587	947,154	1.18	34
South Carolina	3,269,901	3,119,208	1.05	39
South Dakota	770,000	690,178	1.12	37
Tennessee	4,549,810	4,590,750	.99	40
Texas	18,000,000	14,228,383	1.27	31
Utah	1,381,113	1,461,037	.95	44
Vermont	1,370,567	511,456	2.68	10
Virginia	6,636,706	5,346,279	1.24	32
Washington	11,150,000	4,130,163	2.70	9
West Virginia	3,050,000	1,949,644	1.56	23
Wisconsin	10,229,933	4,705,335	2.17	14
Wyoming	840,382	470,816	1.78	21
Puerto Rico	1,371,102	3,187,570	.43	52

*For most states these figures are FY 80 figures, however some states were able to provide FY 81 data.

**Based on 1980 Census Reports.

Compiled by Criminal Defense Technical Assistance Project, Abt Associates, Cambridge, Massachusetts, 1982.

APPENDIX B -- CASE FILE SAMPLING

It is unbelievably difficult to get a reliable and accurate sampling of information on criminal court cases without an effort of heroic proportions. While agencies of the court cannot be expected to organize their data and activities for the benefit of future sociological analysis, problems encountered in each of the three jurisdictions visited lead us to believe that existing information is not organized well enough for either legal analysis or management analysis.

For example, although the District of Columbia has more sets of computer banks than you can shake the proverbial stick at (the U.S. Attorney's Office, the Pretrial Services Agency, the Police Department), interviewees indicated problems of (a) "questionable accuracy" of the data (due to the lack of training and supervision of keypunchers), and (b) incompleteness of data (due to no interest on the part of lawyers). Data from which the sampling of robberies and burglaries were drawn from in Prince George's County exists only in one, dog-earred ledger book, hand-written and personally controlled by the Clerk of Court. The case files, themselves, are available to anyone walking the corridors of the courthouse and interested in opening a metal file cabinet standing in a line of cabinets along one long corridor. The Alexandria data had to be retrieved in a three step process which moved the coders from working from their laps in the crowded office of the

secretary to the Commonwealth's Attorney to standing before cardboard boxes in the Clerk of Court's office. If it weren't for the constancy of the good will, helpfulness and friendliness of the individuals with whom there was daily contact in each jurisdiction, the job of case file sampling and data collection could not have been done either reliably or validly.

Washington, District of Columbia

The universe of armed robbery and burglary cases for the District of Columbia was obtained from a U.S. Attorney's list of all cases "papered" from January 1, 1978 through December 31, 1979, indicted by the Grand Jury, and subsequently closed. In order to determine whether a public defender, court appointed or privately retained attorney handled the case, it was necessary to go to individual case file jackets stored in the court. Following this, two systematic samples were taken--armed robbery and burglary--within the separate categories of public defender, court appointed and privately retained attorneys. The total number of burglaries taken was 124: 55 public defender, 51 court appointed and 18 cases privately retained. Robberies totalled 107 cases taken: 51 public defender, 50 court appointed, and 6 privately retained. Because there were only a small number of privately retained attorneys in the universe, every case was taken for each of the two charges but the cases were subsequently dropped from most of the analyses. The computer terminal at the Pretrial Services Agency was used to obtain the case information which was missing from the case file jackets in the superior court.

Prince George's County, Maryland

In Prince George's County, the universe of robberies and burglaries was obtained from the Clerk of Court's log book for all such cases opened, indicted and subsequently disposed of in 1979. Information was also obtained from this same source on the type of attorney who handled the case, public defender, court appointed or privately retained. The universe of robberies and burglaries was then systematically sampled within each attorney subgroup by taking every Nth case. Because all court appointed attorneys are indicated as public defenders in the Clerk's records, it was necessary to differentiate between the two by checking the files in the public defender's office. Since all burglary cases represented during the time period in question were panelled out of the office as a matter of policy, it was only possible to get a two-way attorney sample. The total number of burglaries selected was 107: 3 public defenders, 53 court appointed and 51 privately retained. Within the robbery category it was possible to obtain a three-way total sample of 160: 54 public defender cases,

56 court appointed cases and 50 privately retained cases. Case information was obtained from court records. The information on panel attorney fees and any information missing from the file jackets was collected from the files in the public defender's office.

Alexandria, Virginia

In Alexandria, Virginia the universe of robberies and burglaries was obtained from the Grand Jury indictments compiled by the Commonwealth Attorney's office. The two charges were abstracted from this list according to all indicted cases from 1978 through the first six months of 1980 which were subsequently closed. Information was obtained on type of attorney from case files in the Clerk of Court file room. Because Alexandria has no public defender, the universe was systematically sampled for two attorney subgroups, court appointed and privately retained, within the two charge types. A total number of 96 burglary cases were taken: 53 court appointed and 43 privately retained cases (the entire universe of privately retained). For armed robbery cases, a total number of 72 cases were selected: 50 court appointed and 22 privately retained (the entire universe of privately retained). Case information was obtained from the files in the office of the Commonwealth's Attorney. All the information on attorney fees and any missing information was obtained from Clerk of Court files.

Summary

The following chart summarizes the number of cases taken in each jurisdiction for each charge category and attorney type.

Jurisdiction	Charge	Public Defender	Court Appointed	Private
Washington, District of Columbia	Burglary	55	51	18*
	Robbery	51	50	6*
Prince George's County, Maryland	Burglary	3*	53	51
	Robbery	55	56	51
Alexandria, Virginia	Burglary		53	43
	Robbery		50	22

* Omitted from analysis.

APPENDIX C -- CASE FILE DATA ITEMS

Defendant Information

Sex

Age

Race/Ethnicity

Residence

Employment/Education Status

Type of Employment

Current criminal justice status

Number Prior Convictions

Prior Adult Felony Convictions

Prior Adult Misdemeanor Convictions

Prior Convictions for Similar Offense as one Charged

Prior Adult Incarceration

Prior Conviction Within 5 Years

Prior Arrests

Career Criminal (label by prosecutor)

Appointed Attorney's Fee (enter amount $_____.00)

Charge Description

Time of Offense

Location of Incident

Weapon

Type of Weapon alleged/seen/used

Relationship of Defendant and Victim (if robbery)

Relationship of Defendant and Victim (if burglary)

Injury Involved

Damage/Destruction/Theft Estimate

Money Taken

Jewelry Taken

Stereo/TV/Radio/Appliances Taken

Other Merchandise/Property Taken

Number of defendants in incident

Completion of incident

Case Management Information

Number of separate criminal events charged

Number of Grand Jury Counts

Defense Counsel Change During Adjudication

Cost of Attorney to Defendant

Interval between Initial Arraignment and Grand Jury Presentation

Interval between Grand Jury Indictment and Final Disposition

Interval between Final Disposition and Sentence Imposition

Bail Arrangement

Amount of Bail Set

Bail Change During Adjudication

Arraignment Judge

Trial/Final Judge

Sentencing Judge

Number of Defense Motions

Type of Defense Motion

Charge Information

Highest Final Charge

Type of Adjudication (i.e., plea, trial, etc.)

Number of Distinct Final Charges

Actual Disposition (for Robbery)

Actual Disposition (for Burglary)

Determination (i.e., to charge, lesser charge, etc.)

Use of Insanity Defense

Reason for Dismissal/Nolle Pros

Reason for Accepting Plea

Sentence Information

Entire Sentence Imposed

Confinement

Fine

Probation

Restitution

Actual Sentence (for Robbery)

Actual Sentence (for Burglary)

APPENDIX D -- INTERVIEW QUESTIONS

A. Background Information on Lawyer

Jurisdictions in which law is practiced: number of years of criminal practice; percent of practice which is criminal; types of criminal cases handled; evolution of law practice, in general, and criminal law practice, specifically.

B. Case Management

1. Presentation of Hypothetical Cases

Robbery. Robbery of a stranger at gunpoint. On the street. After dark. About $50.00 taken. No injury to victim. Identified by complainant after police arrest.

Burglary. Burglary of a stranger's home. Daytime. Assorted property taken, including jewelry, small appliances, worth $400.00. Identified by neighbor. Some property found on arrest.

2. Typical case management approach; approach when some variables of case altered (e.g., time of day, location, weapon).

3. Typical case outcome; outcome when some variables of case altered (e.g., time of day, location, weapon).

4. Differences in approach and outcome when handling the case for fee (as privately retained) or as court-appointed.

5. Which attorney group they feel does a "better" job. Why? Under what circumstances (e.g., lower court vs. higher court).

C. Fees

1. What are they in different types of cases?

2. How are they set?

3. How are they collected?

4. What aspects of case management/outcome does money influence?

D. Trends in Criminal Justice which affect defense counsel.

APPENDIX E

Attorney Type and Severity of Final Charge for Robbery With a Gun--Washington, D.C., Prince George's County, Maryland and Alexandria, Virginia.

Attorney Type and Severity of Final Charge,
District of Columbia, Robbery With a Gun, 1978 and 1979

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	36	5.1944	3.0183	1.7373
Court Appointed	32	5.7188	2.2087	1.4862

F-Statistic is 1.7654.
Not significant at .1885 level.

Attorney Type and Severity of Final Charge,
Prince George's County, Maryland, Robbery With a Gun, 1979

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	32	4.9688	2.7409	1.6556
Court Appointed	41	5.3902	1.2493	1.1153
Private	27	5.2593	2.8148	1.6777

F-Statistic is .75813.
Not significant at .4712 level.

Attorney Type and Severity of Final Charge,
Alexandria, Virginia, Robbery With a Gun, 1978, 1979, and 6 months of 1980

	Severity of Final Charge			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	31	2.8710	.24946	.49946
Private	14	3.0000	0	0

F-Statistic is .92261.
Not significant at .3422 level.

APPENDIX F

Attorney Type and Severity of Final Charge for Burglary of a Store--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Severity of Final Charge, District of Columbia, Burglary of a Store, 1978 and 1979

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	14	5.5000	5.3462	2.3122
Court Appointed	17	4.8824	5.6103	2.3686

F-Statistic is .53330.
Not significant at .4711 level.

Attorney Type and Severity of Final Charge, Prince George's County, Maryland, Burglary of a Store, 1979

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	1	4.0000	- -	- -
Court Appointed	12	4.1667	.33333	.57735
Private	17	3.8235	.52941	.72761

F-Statistic is .92254.
Not significant at .4097 level.

Attorney Type and Severity of Final Charge, Alexandria, Virginia, Burglary of a Store, 1978, 1979 and 6 months of 1980

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	13	3.7692	.69231	.83205
Private	13	3.3077	1.7308	1.3156

F-Statistic is 1.1429.
Not significant at .2957 level.

APPENDIX G

Attorney Type and Severity of Final Charge for Burglary of a House--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Severity of Final Charge, District of Columbia, Burglary of a House, 1978 and 1979

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	30	4.9667	6.3954	2.5289
Court Appointed	22	5.0909	5.8961	2.4282

F-Statistic is .10318.
Not significant at .7494 level.

Attorney Type and Severity of Final Charge, Prince George's County, Maryland, Burglary of a House, 1979

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	2	5.0000	2.0000	1.4142
Court Appointed	28	3.6429	1.8677	1.3666
Private	23	3.4783	2.7154	1.6479

F-Statistic is .95507.
Not significant at .3917 level.

Attorney Type and Severity of Final Charge, Alexandria, Virginia, Burglary of a House, 1978, 1979, and 6 months of 1980

Severity of Final Charge

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	26	3.7692	.66462	.81524
Private	21	3.8095	.46190	.67964

F-Statistic is .32828 -1.
Not significant at .8570 level.

APPENDIX H

Attorney Type and Number of Months of Confinement--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Number of Months of Confinement, District of Columbia, Robbery, 1978 and 1979

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	30	2.7333	1.8575	1.3629
Court Appointed	32	2.7500	1.6774	1.2952

F-Statistic is .24376 -2.
Not significant at .9608 level.

Attorney Type and Number of Months of Confinement, District of Columbia, Burglary, 1978 and 1979

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	16	5.1250	1.5833	1.2583
Court Appointed	18	5.4444	1.6732	1.2935

F-Statistic is .52994.
Not significant at .4719 level.

Attorney Type and Number of Months of Confinement,
Prince George's County, Maryland, Robbery, 1979

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	28	173.82	14209.	119.20
Court Appointed	41	157.78	6930.7	83.251
Private	26	132.37	8836.8	94.004

F-Statistic is 1.2334.
Not significant at .2961 level.

Attorney Type and Number of Months of Confinement,
Prince George's County, Maryland, Burglary, 1979

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	26	49.269	2067.7	45.472
Private	25	39.120	3324.6	57.659

F-Statistic is .48925.
Not significant at .4876 level.

Attorney Type and Number of Months of Confinement,
Alexandria, Virginia, Robbery, 1978, 1979, and
6 months of 1980

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	34	82.412	3657.6	60.478
Private	18	68.111	3854.9	62.088

F-Statistic is .64620.
Not significant at .4253 level.

Attorney Type and Number of Months of Confinement,
Alexandria, Virginia, Burglary, 1978, 1979, and
6 months of 1980

	Number of Months Confinement			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	32	29.469	1325.4	36.406
Private	32	13.609	242.34	15.567

F-Statistic is 3.8433.
Not significant at .0552 level.

APPENDIX I

Attorney Type and Number of Months of Probation--Washington, D.C., Prince George's County, Maryland and Alexandria, Virginia.

Attorney Type and Number of Months of Probation, District of Columbia, Robbery, 1978 and 1979

	Number of Months Probation			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	13	42.923	191.08	13.823
Court Appointed	7	42.000	180.00	13.416

F-Statistic is .20690 -1.
Not significant at .8872 level.

Attorney Type and Number of Months of Probation, District of Columbia, Burglary, 1978 and 1979

	Number of Months Probation			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	28	33.357	280.90	16.760
Court Appointed	24	30.167	130.97	10.197

F-Statistic is .65933.
Not significant at .4206 level.

Attorney Type and Number of Months of Probation,
Prince George's County, Maryland, Robbery, 1979

Number of Months Probation

Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	8	43.500	532.29	23.071
Court Appointed	6	181.00	.12448+6	352.82
Private	4	48.000	96.000	9.7980

F-Statistic is .88645.
Not significant at .4326 level.

Attorney Type and Number of Months of Probation,
Prince George's County, Maryland, Burglary, 1979

Number of Months Probation

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	25	40.320	286.56	16.928
Private	30	29.100	279.47	16.717

F-Statistic is 6.0728.
Not significant at .0170 level.

Attorney Type and Number of Months of Probation,
Alexandria, Virginia, Robbery, 1978, 1979, and
6 months of 1980

Number of Months Probation

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	15	61.600	1293.3	35.962
Private	1	60.000	- -	- -

F-Statistic is .18558 -2.
Not significant at .9662 level.

Attorney Type and Number of Months of Probation,
Alexandria, Virginia, Burglary, 1978, 1979, and
6 months of 1980

Number of Months Probation

Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	20	53.400	856.04	29.258
Private	25	34.000	680.16	26.000

F-Statistic is 5.4724.
Not significant at .0240 level.

APPENDIX J

Attorney Type and Defendant Employment Status--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Defendant Employment Status, District of Columbia, Robbery, 1978 and 1979

Attorney Type	Employment Status of Defendant*	
	Unemployed	Employed
Public Defender	62.8% (27)	37.2% (16)
Court Appointed	57.1% (24)	42.9% (18)
Private	100.0% (4)	0.0% (0)

Raw chi-square is 2.8762.
Chi square is not significant at .2374 level.

*Missing data, N=17.

Attorney Type and Defendant Employment Status, District of Columbia, Burglary, 1978 and 1979

Attorney Type	Employment Status of Defendant*	
	Unemployed	Employed
Public Defender	47.5% (19)	52.5% (21)
Court Appointed	46.5% (20)	53.5% (23)
Private	31.3% (5)	68.8% (11)

Raw chi-square is 1.3538.
Chi square is not significant at .5082 level.

*Missing data, N=25.

Attorney Type and Defendant Employment Status, Prince George's County, Maryland, Robbery, 1979

Attorney Type	Employment Status of Defendant* Unemployed	Employed
Public Defender	55.8% (24)	44.2% (19)
Court Appointed	47.7% (21)	52.3% (23)
Private	51.3% (20)	48.7% (19)

Raw chi-square is .57154.
Chi square is not significant at .7514.

*Missing data, N=37.

Attorney Type and Defendant Employment Status, Prince Beorge's County, Maryland, Burglary, 1979

Attorney Type	Employment Status of Defendant* Unemployed	Employed
Public Defender	50.0% (1)	50.0% (1)
Court Appointed	60.0% (27)	40.0% (18)
Private	34.1% (15)	65.9% (29)

Raw chi-square is 5.9979.
Chi-square is significant at .0498 level.

*Missing data, N=14.

Attorney Type and Defendant Employment Status, Alexandria, Virginia, Robbery, 1978, 1979, and 6 months of 1980

Attorney Type	Employment Status of Defendant* Unemployed	Employed
Court Appointed	67.4% (29)	32.6% (14)
Private	63.2% (12)	36.8% (7)

Raw chi-square is .10797.
Chi-square is not significant at .7425 level.

*Missing data, N=13.

Attorney Type and Defendant Employment Status, Alexandria, Virginia, Burglary, 1978, 1979, and 6 months of 1980

Attorney Type	Employment Status of Defendant* Unemployed	Employed
Court Appointed	60.4% (29)	39.6% (19)
Private	31.4% (11)	68.6% (24)

Raw chi-square is 6.8124.
Chi-square is significant at .0091 level.

*Missing data, N=13.

APPENDIX K

Attorney Type and Age of Defendant--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Age of Defendant,
District of Columbia, Robbery, 1978 and 1979

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	51	22.196	11.481	3.3883
Court Appointed	49	23.306	24.967	4.9967
Private	6	21.500	9.100	3.0166

F-Statistic is 1.1189.
No significance at the .3306 level.

Attorney Type and Age of Defendant,
District of Columbia, Burglary, 1978 and 1979

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	55	26.691	79.810	8.9336
Court Appointed	51	26.255	51.274	7.1606
Private	18	28.611	68.605	8.2828

F-Statistic is .56317.
No significance at the .5709 level.

Attorney Type and Age of Defendant,
Prince George's County, Maryland, Robbery, 1979

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	53	22.830	41.451	6.4383
Court Appointed	60	23.033	28.134	5.3042
Private	50	21.580	26.616	5.1591

F-Statistic is 1.0171.
No significance at the .3640 level.

Attorney Type and Age of Defendant,
Prince George's County, Maryland, Burglary, 1979

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Public Defender	3	18.333	9.3333	3.0551
Court Appointed	51	23.451	54.613	7.3900
Private	51	22.020	21.900	4.6797

F-Statistic is 1.4423.
No significance at the .2412 level.

Attorney Type and Age of Defendant,
Alexandria, Virginia, Robbery, 1978, 1979, and
6 months of 1980

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	53	28.377	278.93	16.701
Private	22	23.091	14.848	3.8534

F-Statistic is 2.1407.
No significance at the .1477 level.

Attorney Type and Age of Defendant,
Alexandria, Virginia, Burglary, 1978, 1979, and
6 months of 1980

	Age of Defendant			
Attorney Type	Number	Mean	Variance	Standard Deviation
Court Appointed	54	23.130	33.096	5.7529
Private	41	24.707	25.912	5.0904

F-Statistic is 1.9332.
No significance at the .1677 level.

APPENDIX I

Attorney Type and Race of Defendant--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Race of Defendant,
District of Columbia, Robbery, 1978 and 1979

Attorney Type	Race of Defendant		
	White	Black	Hispanic
Public Defender	0% (0)	98.0% (50)	2.0% (1)
Court Appointed	0% (0)	100.0% (49)	0% (0)
Private	0% (0)	100.0% (6)	0% (0)

Raw chi square is 1.0887.
Chi square is not significant
at the .5802 level.

Attorney Type and Race of Defendant,
District of Columbia, Burglary, 1978 and 1979

Attorney Type	Race of Defendant		
	White	Black	Hispanic
Public Defender	0% (0)	100.0% (55)	0% (0)
Court Appointed	4.0% (2)	96.0% (48)	0% (0)
Private	0% (0)	100.0% (18)	0% (0)

Raw chi square is 2.9683.
Chi square is not significant
at the .2267 level.

Attorney Type and Race of Defendant,
Prince George's County, Maryland, Robbery, 1979

Attorney Type	Race of Defendant		
	White	Black	Hispanic
Public Defender	17.0% (9)	83.0% (44)	0% (0)
Court Appointed	23.3% (14)	76.7% (46)	0% (0)
Private	26.0% (13)	72.0% (36)	2.0% (1)

Raw chi-square is 3.6835.
Chi-square is not significant at the .4505 level.

Attorney Type and Race of Defendant,
Prince George's County, Maryland, Burglary, 1979

Attorney Type	Race of Defendant*		
	White	Black	Hispanic
Public Defender	33.3% (1)	66.7% (2)	0% (0)
Court Appointed	31.4% (16)	68.6% (35)	0% (0)
Private	54.0% (27)	46.0% (23)	0% (0)

Raw chi-square is 5.3980.
Chi-square is not significant at the .0673 level.

*Missing data, N=1.

Attorney Type and Race of Defendant,
Alexandria, Virginia, Robbery, 1978, 1979, and
6 months of 1980

Attorney Type	Race of Defendant*		
	White	Black	Hispanic
Court Appointed	13.7% (7)	84.3% (43)	2.0% (1)
Private	9.1% (2)	90.9% (20)	0% (0)

Raw chi-square is .77662.
Chi-square is not significant at the .6782 level.

*Missing data, N=2.

Attorney Type and Race of Defendant,
Alexandria, Virginia, Burglary, 1978, 1979, and
6 months of 1980

Attorney Type	Race of Defendant*		
	White	Black	Hispanic
Court Appointed	24.1% (13)	75.9% (41)	0% (0)
Private	41.5% (17)	58.5% (24)	0% (0)

Raw chi-square is 3.2616.
Chi-square is not significant at the .0709 level.

*Missing data, N=1.

APPENDIX M

Attorney Type and Defendant Prior Convictions--Washington, D.C., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Defendant Prior Convictions, District of Columbia, Robbery, 1978 and 1979

Attorney Type	Number of Defendant's Prior Convictions*		
	None	One	Two+
Public Defender	38.0% (19)	30.0% (15)	32.0% (16)
Court Appointed	44.9% (22)	26.5% (13)	28.6% (14)
Private	83.3% (5)	0% (0)	16.7% (1)

Raw chi-square is 4.8014.
Chi-square is not significant at the .3083 level.

*Missing data, N=1.

Attorney Type and Defendant Prior Convictions, District of Columbia, Burglary, 1978 and 1979

Attorney Type	Number of Defendant's Prior Convictions		
	None	One	Two+
Public Defender	34.5% (19)	10.9% (6)	54.5% (30)
Court Appointed	37.3% (19)	23.5% (12)	39.2% (20)
Private	55.6% (10)	16.7% (3)	27.8% (5)

Raw chi-square is 6.7900.
Chi-square is not significant at the .1474 level.

Attorney Type and Defendant Prior Convictions, Prince George's County, Maryland, Robbery, 1979

Attorney Type	Number of Defendant's Prior Convictions* None	One	Two+
Public Defender	51.0% (26)	15.7% (8)	33.3% (17)
Court Appointed	37.7% (20)	15.1% (8)	47.2% (25)
Private	61.4% (24)	13.6% (6)	25.0% (11)

Raw chi-square is 6.2671.
Chi-square is not significant at the .1801 level.

*Missing data, N=15.

Attorney Type and Defendant Prior Convictions, Prince George's County, Maryland, Burglary, 1979

Attorney Type	Number of Defendant's Prior Convictions* None	One	Two+
Public Defender	100.0% (3)	0% (0)	0% (0)
Court Appointed	47.6% (20)	21.4% (9)	31.0% (13)
Private	55.8% (24)	14.0% (6)	30.2% (13)

Raw chi-square is 3.6768.
Chi-square is not significant at the .4515 level.

*Missing data, N=17.

Attorney Type and Defendant's Prior Convictions, Alexandria, Virginia, Robbery, 1978, 1979, and 6 months of 1980

Attorney Type	Number of Defendant's Prior Convictions* None	One	Two+
Court Appointed	26.0% (13)	26.0% (3)	48.0% (24)
Private	40.0% (8)	20.0% (4)	40.0% (8)

Raw chi-square is 1.3451.
Chi-square is not significant at the .5104 level.

*Missing data, N=5.

Attorney Type and Defendant's Prior Convictions, Alexandria, Virginia, Burglary, 1978, 1979, and 6 months of 1980

Attorney Type	Number of Defendant's Prior Convictions* None	One	Two+
Court Appointed	39.6% (19)	8.3% (4)	52.1% (25)
Private	32.5% (13)	25.0% (4)	42.5% (17)

Raw chi-square is 4.5304.
Chi-square is not significant at the .1038 level.

*Missing data, N=8.

APPENDIX N

Attorney Type and Defendant Prior Incarceration--Washington, C.A., Prince George's County, Maryland, and Alexandria, Virginia.

Attorney Type and Defendant Prior Incarceration, District of Columbia, Robbery, 1978 and 1979

Attorney Type	Defendant's Prior Incarceration* Yes	No
Public Defender	36.0% (15)	64.0% (32)
Court Appointed	30.6% (15)	69.4% (34)

Raw chi-square is .32327.
Chi-square is not significant at the .5697 level.

*Missing data, N=1.

Attorney Type and Defendant Prior Incarceration, District of Columbia, Robbery, 1978 and 1979

Attorney Type	Defendant's Prior Incarceration* Yes	No
Public Defender	36.0% (15)	64.0% (32)
Court Appointed	30.6% (15)	69.4% (34)
Private	16.7% (1)	83.3% (5)

Raw chi-square is 1.0458.
Chi-square is not significant at the .5928 level.

*Missing data, N=1.

Attorney Type and Defendant Prior Incarceration,
District of Columbia, Burglary, 1978 and 1979

	Defendant's Prior Incarceration	
Attorney Type	Yes	No
Public Defender	49.1% (27)	50.9% (28)
Court Appointed	33.3% (17)	66.7% (34)

Raw chi-square is 2.7063.
Chi-square is not significant
at the .1000 level.

Attorney Type and Defendant Prior Incarceration,
District of Columbia, Burglary, 1978 and 1979

	Defendant's Prior Incarceration	
Attorney Type	Yes	No
Public Defender	49.1% (27)	50.9% (28)
Court Appointed	33.3% (17)	66.7% (34)
Private	22.2% (4)	77.8% (14)

Raw chi-square is 5.1820.
Chi-square is not significant
at the .0749 level.

Attorney Type and Defendant Prior Incarceration,
Prince George's County, Maryland, Robbery, 1979

	Defendant's Prior Incarceration*	
Attorney Type	Yes	No
Public Defender	29.4% (15)	70.6% (36)
Court Appointed	37.0% (20)	63.0% (34)
Private	15.9% (7)	84.1% (37)

Raw chi-square is 5.4039.
Chi-square is not significant
at the .0671 level.

*Missing data, N=14.

Attorney Type and Defendant Prior Incarceration,
Prince George's County, Maryland, Burglary, 1979

	Defendant's Prior Incarceration*	
Attorney Type	Yes	No
Public Defender	0% (0)	100.0% (3)
Court Appointed	18.6% (8)	81.4% (35)
Private	20.9% (9)	79.1% (34)

Raw chi-square is .80829.
Chi-square is not significant
at the .6675 level.

*Missing data, N=16.

Attorney Type and Defendant Prior Incarceration, Alexandria, Virginia, Robbery, 1978, 1979, and 6 months of 1980

	Defendant's Prior Incarceration*	
Attorney Type	Yes	No
Court Appointed	56.3% (27)	43.8% (21)
Private	47.1% (8)	52.9% (9)

Raw chi-square is .42673.
Chi-square is not significant at the .5136 level.

*Missing data, N=10.

Attorney Type and Defendant Prior Incarceration, Alexandria, Virginia, Burglary, 1978, 1979, and 6 months of 1980

	Defendant's Prior Incarceration*	
Attorney Type	Yes	No
Court Appointed	41.3% (19)	58.7% (27)
Private	25.0% (10)	75.0% (30)

Raw chi-square is 2.5448.
Chi-square is not significant at the .1107 level.

*Missing data, N=10.

END