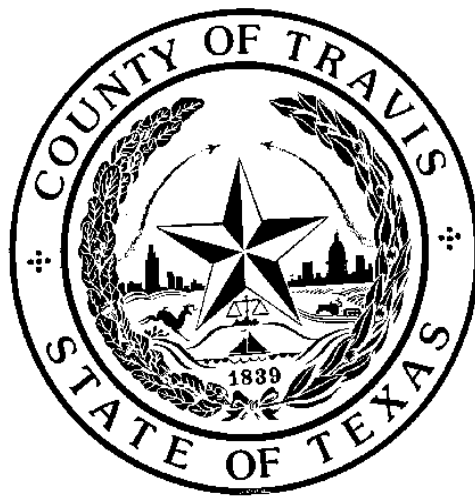


TRAVIS COUNTY PUBLIC DEFENDER'S OFFICE



CASE REPRESENTATION & CASELOAD MANAGEMENT PRACTICES AND POLICIES

I. PURPOSE, IMPLEMENTATION, & REVISIONS

1.1. PURPOSE

The purpose of the Case Representation & Caseload Management Practices and Policies (“Practices and Policies”) is to ensure that all Travis County Public Defender (“TCPD” or “PDO”) clients receive high-quality, client-centered representation consistent with nationally recognized best practices in holistic indigent defense.¹ All TCPD staff involved in case handling must be familiar with these Practices & Policies, including attorneys, social workers, investigators, paralegals, and legal secretaries. In all representation, TCPD will endeavor to leverage the skills, training, and experience of its interdisciplinary advocates in collaborative service of clients’ expressed goals.

¹ The Travis County Public Defender’s Office was created by vote of the Travis County Commissioners Court in May 2019. Travis County sought to create an institutional defender office that would provide excellent representation to its clients. The TCPD was established expressly to achieve the following goals:

- (1) promote a client-centered culture that values and respects client dignity;
- (2) serve as a strong, independent, institutional voice for public defense;
- (3) provide a training ground that produces excellent defenders;
- (4) raise the quality of criminal representation for all people charged with crimes in Travis County who cannot afford an attorney; and
- (5) be resourceful and responsive to the evolving needs of the community.

To achieve these goals, TCPD pursues the following objectives:

- (1) Operate as a scalable, comprehensive PDO providing holistic defense representation and support to indigent people accused of criminal offenses in Travis County, in coordination with the current Managed Assigned Counsel program (the Capital Area Private Defender Service).
- (2) Provide high-quality trial level representation, including robust investigation and mitigation support, for indigent people in the misdemeanor and felony courts in Travis County.
- (3) Through legal representation and advocacy, as well as policymaking, work to limit the unnecessary incarceration and excessive punishment of indigent people in Travis County.
- (4) Develop and provide comprehensive, client-centered training, continuing legal education, and mentorship to public defenders.
- (5) Act as a resource and support to private appointed counsel representing indigent individuals in Travis County.
- (6) Develop reasonable and robust standards for evaluation of the quality of indigent representation, and regularly evaluate the system and make necessary adjustments and improvements to ensure client needs are being met.
- (7) Develop reasonable and robust standards for the evaluation and oversight of PDO employees.
- (8) Act as an institutional representative on behalf of the accused in county groups and other forums and participate in systemic policy development and decision-making.
- (9) Pursue funding from other sources within Travis County, the City of Austin, the state of Texas, and nationally, including for internships, fellowships, and research to support the office’s work.

For complete information on the creation of the PDO, including additional information on goals, objectives, activities, staffing, evaluation, and funding, see Appendix A: TIDC FY2020 Statement of Grant Award: Travis County Public Defender + Mac Enhancements.

1.2 IMPLEMENTATION

These Practices and Policies are incorporated expressly and/or by reference into the Travis County Public Defender’s Office Personnel Manual provided to all employees upon hire.

1.3 REVISIONS

Periodic revision of these Practices and Policies will be made as conditions change or as necessitated by changes in applicable regulations or laws. Revisions may be communicated to staff by memoranda approved by the Chief Public Defender (“CPD”) before formal compilation into the complete Practices and Policies. Any revisions to these Practices and Policies will be submitted to the Texas Indigent Defense Commission (“TIDC”) with regular quarterly progress reports during the duration of any TIDC grant term or with the biennial updates to the Travis County Fair Defense Plan.

II. CASE REPRESENTATION

2.1 GENERAL DUTIES OF ATTORNEYS

TCPD attorneys providing direct criminal defense representation should be guided by the “**Performance Guidelines for Non-Capital Criminal Defense Representation**” put forth by the State Bar of Texas.² However, these guidelines can be specifically supplemented by formal training and/or memoranda approved by the Chief Public Defender. Attorneys providing advice and consultation to TCPD clients regarding possible immigration consequences resulting from clients’ criminal charges should also be guided by the State Bar Guidelines to the extent they are relevant to the performance of their obligations to clients; professional standards specifically relevant to the type of representation provided by these attorneys may also be set out in formal training and/or memoranda approved by the Chief Public Defender. All formal training and memoranda shall be consistent with nationally recognized best practices in holistic indigent defense representation. If there is a discrepancy between the State Bar Guidelines and any formal training or memorandum approved by the Chief Public Defender, the training or memorandum controls.

2.2 CASE ACCEPTANCE

2.2.1 Eligibility

Eligibility for PDO representation is based on a determination of indigence as set out in the Travis County Fair Defense Plan, excluding people whose highest charge is a capital felony or a Class C misdemeanor. Whenever possible, TCPD attorneys should facilitate the ability of individuals to demonstrate their eligibility for representation including assisting them with the Travis County Indigence Application and/or providing other information relevant to a judicial determination of indigence based on an individualized and thorough assessment of the

² See Appendix B

person's circumstances. If the PDO is contacted by an unrepresented individual who was determined ineligible for counsel on a pending case, TCPD staff will conduct a limited inquiry, consistent with the standards detailed in the Fair Defense Plan, to determine if there is a basis for assignment and, where one exists, request assignment as aligned with these Practices and Policies.

2.2.2 *Assignment*

Cases will be assigned to the PDO through processes established in conjunction with the office of the Travis County Criminal Court Administrator ("TCCA") and set out in the Fair Defense Plan. The PDO will accept all assignments with the exceptions noted in this section. The expectation is that TCPD attorneys will represent their clients from initial representation³ through disposition using a vertical representation model.

Per the Fair Defense Act⁴, the PDO, through the Chief Public Defender, may refuse a case assignment pursuant to the conditions below, and the CPD shall file with TCCA and/or the Court before which the case is pending a written statement that identifies any reason for refusing an assignment:

(1) A conflict of interest exists: All potential TCPD clients must undergo a conflict check to determine whether any obvious conflict exists. Representation of any new client must not result in a conflict of interest except that in rare circumstances, as approved by the Chief Public Defender (or their director-level designee), where the PDO has a pre-existing relationship with the client, inquiry may be made to determine whether any conflict is waivable. If the conflict is determined to be waivable, the PDO through the CPD (or their director-level designee) may seek the assignment of independent counsel to advise the client regarding whether the client wishes to waive the conflict. TCPD attorneys have an ongoing obligation to look out for potential conflicts of interest. Whenever an attorney learns of a potential conflict of interest involving an existing client, the attorney should immediately bring it to the attention of the Legal Director (or any other director-level manager where the Legal Director is unavailable), who shall also inform the Chief Public Defender. No attempt to resolve the conflict should be made by the attorney identifying the potential conflict. The Chief Public Defender may create a formal ethics committee to advise on potential conflicts of interest and make recommendations on an appropriate course of action.

(2) The office has insufficient resources to provide adequate representation: The CPD, in consultation with other TCPD managers, will continuously monitor attorney and non-attorney staff resources to assess whether, prior to accepting an assignment, the PDO has sufficient resources to provide adequate representation. That assessment will take into consideration the following non-exhaustive factors:

³ Initial representation may occur at any stage of the case, including at magistration.

⁴ T.C.C.P. Art. 26.044(j)

- Whether criminal defense attorneys are able to regularly and consistently meet with their detained and out-of-custody clients on non-court dates; consult with other members of the holistic defense team; research, draft and timely file all necessary motions; and prepare sufficiently to deliver high-quality representation through disposition of every case;
- Whether attorneys advising clients as to potential immigration consequences of the criminal charges are able to regularly and consistently meet with their detained and out-of-custody clients on non-court dates; thoroughly research the applicability of immigration law to the facts and circumstances surrounding a particular case; and consult with other members of the holistic defense team;
- Whether investigators have the time and resources to execute standard investigative tasks such as interviewing witnesses, visiting scenes, and completing other assignments necessary for a thorough investigation of the allegations;
- Whether social workers have the time and resources necessary to build substantive relationships with clients and develop mitigation and/or render other support services appropriate for each client;
- Whether support staff have sufficient time and resources necessary to support the office's delivery of services;
- Whether the PDO has funding sufficient to retain all appropriate experts; and/or
- Whether accepting the case will impair any other factor in the PDO's ability to provide high quality, client-centered, holistic representation.

(3) The office is incapable of providing representation in accordance with the rules of professional conduct: Whether the office is incapable of providing representation in accordance with the rules of professional conduct will be determined on a case-by-case basis by the Chief Public Defender in consultation with other members of TCPD management. That determination shall be guided by the understanding that: (a) it is the primary duty of an attorney to provide competent, diligent, and zealous advocacy; (b) in the representation of a client, each attorney is bound by the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyers Creed and (c) throughout the representation of a client, each attorney is bound first by their obligation to the client.⁵

(4) The acceptance of the appointment would violate the Office's internal caseload standards: Consistent with the information in Section III below, the CPD along with TCPD managers shall regularly review individual as well as officewide workloads to ensure: (a) that no individual attorney is carrying a caseload "that by reason of its size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional

⁵ Where these Practice and Policies or the directives of a superior conflict with the Texas Disciplinary Rules of Professional Conduct, the attorney is bound by the standards of the ethical practice of law and should disregard the conflicting policy or directive. Whenever an individual TCPD attorney feels that they are incapable of providing representation in accordance with the rules of professional conduct, the attorney must immediately notify their supervisor.

obligations” and (b) that the overall office workload is consistent with “the effective and ethical conduct of the defense function.”⁶

(5) The office shows other good cause for refusing assignment: Whether good cause exists to refuse an assignment will be determined on a case-by-case basis by the Chief Public Defender in consultation with other members of TCPD management, taking into consideration the obligations and responsibilities of any individual TCPD employee or the office as whole to existing clients.

Internal case assignments to individual TCPD attorneys will be determined through a process approved by the Chief Public Defender and will take into consideration the experience, skills, and training of all attorneys, individual and officewide caseloads, and any other consideration relevant to an attorney’s ability to provide competent, diligent, and zealous advocacy.

2.2.3 Community Inquiries

Community members seeking TCPD representation outside of the processes established in conjunction with TCCA should be advised of the procedures in place for requesting counsel and may be provided with a copy of the Travis County Indigence Application. Any attorney who receives such a request can advise that individual about the appropriateness of answering questions by a government agent or court officer. This advice may be given regardless of whether the PDO will ultimately be assigned the case.

Attorneys should not otherwise give case-specific advice to persons who solicit information. Attorneys should not recommend, endorse, or provide opinions on the competence of attorneys in private practice.

III. CASELOAD MANAGEMENT

3.1 STANDARDS

TCPD shall use caseload standards that are consistent with the research-based weighted caseload guidelines put forth in January 2015 by the Texas Indigent Defense Commission in the Guidelines for Indigent Defense Caseloads report.⁷ TCPD shall apply the reasoning and guidance contained in that report to assess the maximum annual caseloads for individual TCPD attorneys as well as officewide caseload.⁸

⁶ See ABA, STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-1.8

⁷ See Appendix C: Guidelines for Indigent Defense Caseloads, published in January 2015 pursuant to HB 1318 of the 83rd Texas Legislature.

⁸ Generally, TCPD attorneys providing direct criminal defense representation should carry a caseload of no more than 236 units per year. Depending on the nature of the most serious charge, each case carries a specific number of units as follows:

3.2 REVIEW

The Chief Public Defender shall review office caseloads as least quarterly. The CPD may override individual or office caseload limits based on overall complexity (or simplicity) of cases, overall types of cases, attorney experience, court needs, or other factors affecting the PDO's delivery of services to clients. The CPD shall notify the TCPD Oversight Board in writing if caseloads exceptions are warranted.

Class B Misdemeanor = 1 unit
Class A Misdemeanor = 1.09 units
State Jail Felony = 1.36 units
Third Degree Felony = 1.64 units
Second Degree Felony = 2.25 units
First Degree Felony = 3.06 units

APPENDIX A



September 17, 2019

CHAIR:
The Honorable Sharon Keller
Presiding Judge
Court of Criminal Appeals

The Honorable Sarah Eckhardt
Travis County Judge
Via E-mail: Sarah.Eckhardt@traviscountytx.gov

EX OFFICIO MEMBERS:
Honorable Sharon Keller
Honorable Nathan Hecht
Honorable John Whitmire
Honorable Brandon Creighton
Honorable Nicole Collier
Honorable Andrew Murr
Honorable Sherry Radack
Honorable Vivian Torres

RE: FY2020 Statement of Grant Award – Grant Number **212-20-D07**

Dear Judge Eckhardt:

MEMBERS APPOINTED BY GOVERNOR:
Mr. Alex Bunin
Honorable Valerie Covey
Honorable Richard Evans
Honorable Missy Medary
Mr. Gonzalo Rios

I am pleased to inform you that the Texas Indigent Defense Commission has awarded Travis County a **FY2020 Multi-Year Improvement Grant** in the amount of **\$868,402** for the **Public Defender Office and MAC Enhancements**. Your Statement of Grant Award for fiscal year 2020 is attached. Please sign, scan, and return via e-mail the Statement of Grant Award to Edwin Colfax at ecolfax@tidc.texas.gov on or before **October 1, 2019**. You do not need to mail a copy.

EXECUTIVE DIRECTOR:
Geoffrey Burkhardt

Congratulations to Travis County on taking the lead in Texas by developing this new indigent defense program. If you have any questions or need clarification of the information contained in this letter or the attached Statement of Grant Award, please contact Edwin Colfax, the Commission's Grant Manager, at (512) 463-2508.

Sincerely,

Sharon Keller
Chair, Texas Indigent Defense Commission
Presiding Judge, Court of Criminal Appeals

Cc: Patti Smith, Travis County Auditor: patti.smith@traviscountytx.gov
Roger Jefferies, Roger.Jefferies@traviscountytx.gov

Texas Indigent Defense Commission
209 West 14th Street, Room 202 · Austin, Texas 78701
512.936.6994
www.tidc.texas.gov



**Statement of Grant Award
FY2020 Improvement Grant**

Grant Number: 212-20-D07
 Grantee Name: Travis County
 Program Title: Public Defender Office + MAC
 Grant Period: Improvements 4/1/2020-9/30/2020
 Grant Award: **\$868,402**

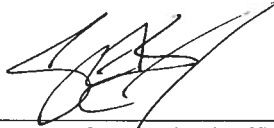
The Texas Indigent Defense Commission (herein, the Commission) has awarded the above-referenced grant to Travis County (herein, the County) for indigent defense services. The authorized official named on the grant application must sign this Statement of Grant Award and return it to the Commission by October 1, 2019. The grantee will not receive any grant funds until this notice is executed and returned to the Commission. Funding is provided as listed in the categories in the table below:

Direct Costs:	
1) Personnel (FTEs: 2.5)	\$279,931
2) Fringe Benefits	\$96,293
3) Travel and Training	\$8,130
4) Equipment	\$46,116
5) Supplies	\$3,363
6) Contract Services	\$1,302,971
7) Indirect Costs	0
Total Proposed Costs	\$1,736,804
Less Cash from Other Sources- County Match	\$868,402
Total Amount Funded by Commission	\$868,402

Standard Grant Conditions:

- The authorized official for the grantee accepts the grant award.
- The authorized official, financial officer, and program director, referred to below as grant officials, must comply with the terms of the grant as written in the Request for Applications issued in January 2019, including the rules and documents adopted by reference in the Commission’s Grant Rules in Title 1, Part 8, Chapter 173, Texas Administrative Code.
- The grant officials understand that a violation of any term of the grant may result in the Commission placing a temporary hold on grant funds, permanently de-obligating all or part of the grant funds, requiring reimbursement for funds already spent, or barring the organization from receiving future grants.
- Disbursement of funds is always subject to the availability of funds.
- The grant officials agree to follow the grant terms contained in the “Terms and Conditions” detailed in Attachment A and which includes the final grant application as amended.
- Any indigent defense plan documents submitted to the Commission must continue to meet all grant eligibility requirements.
- The judges hearing criminal and juvenile matters must amend the Indigent Defense Plan for their respective courts as needed to include the program funded under this award and submit it to the Commission by November 1, 2019.

The authorized official for this grant program has read the preceding and indicates agreement by signing the Statement of Grant Award included below.



Signature of Authorized Official

SARAH ECKHARDT
COUNTY JUDGE

Name & Title (print or type)

OCT 01 2019

Date

Attachment A

Terms and Conditions

In addition to the program requirements stated in the Request for Applications (RFA), these specific program requirements apply to this funded program.

- The budget in the Statement of Grant Award is based on a 12-month period. The approved funding plan provides the county four years (48 months) of funding at 50% of eligible expenses detailed in the approved program budget. If the county has a delayed start in the first year, it may necessitate an adjustment in future years to allow the county to fully expend grant funds.
- The County will operate directly a Public Defender's Office as defined in Article 26.044 of the Texas Code of Criminal Procedure.
- The County must maintain a Public Defender Oversight Board in accordance with Texas Code of Criminal Procedure Article 26.045 to supervise the operation of this program. The County must submit with the first quarterly progress report a written policy detailing how the members are selected and the duties and procedures of the board. The board must meet at least quarterly.
- The Public Defender Oversight Board is responsible for recommending to the commissioners court the selection or approval of the Chief Public Defender. The Chief Public Defender will be responsible for the implementation of the public defender program and will hire staff sufficient to operate the department. Staffing with attorneys and support personnel must be supported by sufficient caseloads.
- A Public Defender Office Case Representation Policies and Procedures Manual must be developed and provided to the Commission with the 4th quarterly progress report. The Public Defender Office should consider relevant professional standards of representation such as the Texas State Bar Performance Guidelines for Non-Capital Criminal Defense Representation when developing the manual. Any revised versions of the Policies and Procedures Manual must be submitted with regular quarterly progress reports.
- The County must develop a written policy that includes caseload standards for the public defender office as required in Texas Code of Criminal Procedure Articles 26.044 and that is consistent with research-based weighted caseload guidelines published by TIDC. The caseload policy must require the Chief Public Defender to review caseloads at least quarterly. The Chief Public Defender must notify the program's Oversight Board in writing if caseloads exceed the adopted standards.
- The Public Defender's Office must record attorney and support staff work time in a manner that allows for accurate completion of the Indigent Defense Expenditure Report and Public Defender Addendum. Records must contain sufficient detail to allocate time and salary across categories of offenses (capital, non-capital felony, misdemeanor, juvenile, felony appeals, misdemeanor appeals, and juvenile appeals) and to document the number of cases disposed by attorney for each court.
- The County must amend the MAC plan of operation required by Article 26.047 of the Code of Criminal Procedure to incorporate the changes in policies and procedures described in the grant application as amended, including phase-in of annualized caseload limits based on TIDC's weighted caseload guidelines and other changes described therein, and provide a draft to TIDC with the second quarterly progress report. Any future amendments to the MAC plan of operation must be provided to TIDC with subsequent quarterly progress reports.
- Contracts with third parties for core services under this grant must be provided to TIDC and approved prior to execution.
- Grantees that use grant funds to contract for services must develop and include in the contract provisions to monitor each contract that is for more than \$10,000 per year. These provisions must include specific actions to be taken if the grantee discovers that the contractor's performance does not meet the operational or performance terms of the contract.

- This grant requires quarterly progress reports to document the work performed and impact of the program. The TIDC grants administrator will construct an on-line progress report that reflects the work performed in this program and is consistent with the grant application listed below. The County may request modifications to the on-line report. See the Timeline for Reporting and Fund Distribution at the end of this document for dates.
- Grant funds are disbursed on a reimbursement basis according to the funded percentage in the award. The County must submit expenditure reports to obtain reimbursement of expended funds based on actual expenditures. The reimbursements will be proportional to the county's required match. See the Timeline for Reporting and Fund Distribution at the end of this document for dates.
- The County must provide to the Commission staff the minimum job requirements and full job descriptions of the staff positions specified under this project before positions are publicly posted.
- The County will develop a data collection plan in consultation with the TIDC grant program manager to be submitted with the 4th progress report. The data collection plan will include a list of data elements that the program will track to accurately document the work performed under this program as well as the data necessary to evaluate the impact of the program.

Original Grant Application and Amendments Follow

2020 Travis County Discretionary Grant Application Narrative

(Multi-Year Grant)

The County is not bound to the various dates and provisions appearing in the original application included herein that are superseded by the approved amendments to the application beginning on page 18 below.

a. Application Form

Counties Represented: **Travis**

Fiscal Year: **2020**

State Payee Identification Number: **740000192**

Division To Administer Grant: **Travis County Justice Planning**

Program Title: **Travis New Public Defender Office and CAPDS Enhancement**

Requested Grant Amount: **\$4,135,443.00**

Financial Officer: **Patti Smith**

Program Director: **Roger Jefferies**

Mailing Address: **P.O. Box 1748; Austin, TX 78767**

b. Introduction (Executive Summary)

Travis County seeks to establish a comprehensive public defender office ("PDO") and improve its managed assigned counsel ("MAC") program -- the Capital Area Private Defender Service ("CAPDS") -- to provide individuals with defense in accordance with nationally recognized best practices. The PDO will (1) promote a client-centered culture that values and respects client dignity; (2) serve as a strong, independent, institutional voice for public defense; (3) provide a training ground that produces excellent defenders; (4) raise the quality of criminal representation for all people charged with crimes in Travis County who cannot afford an attorney and (5) be resourceful and responsive to the evolving needs of the community. CAPDS will improve its in-house support and expand its holistic team

c. Problem Statement

With the help of the Texas Indigent Defense Commission (TIDC), Travis County established a mental health public defender in 2006 and the MAC program in 2014. However, between the case volume and the paucity of resources available for public defense, further progress is needed. All agree that the current level of funding for low-income criminal defense must be increased. Virtually every major urban jurisdiction of similar size, in Texas and nationally, has a hybrid public defense system comprised of a public defender office and private appointed counsel, which the

American Bar Association considers a best practice. Travis County now seeks to create an institutional defender office that will provide excellent representation to its clients; conduct a needs assessment and add strategic resources to CAPDS; and, have the two entities share training and resources to improve the quality of defense across the county.

An essential improvement for indigent defense in Travis County is additional resources for our currently understaffed and underfunded MAC. For example, the CAPDS holistic defense team of one immigration attorney and two social workers struggles to meet the needs of the clients involved in the 20,000+ cases CAPDS currently handles each year. CAPDS has focused social work resources on clients with mental health conditions and those facing the most serious charges, but, that targeting results in far too few clients being assisted. Further, CAPDS' single immigration attorney is stretched too thin to provide the constitutionally mandated advice that is required by *Padilla v. Kentucky*, with consultation wait times up to four weeks for in-custody clients and a six-plus-weeks for out-of-custody clients.

Travis County needs additional funds and a robust public defender office in order to achieve public defense systems that value equity, fairness, and respect; adheres to the American Bar Association's Ten Principles of a Public Defense Delivery System; and, employs best practices in every person's case. Creation of a public defender office should be accompanied by raising the level of resources available to assigned counsel, so that all clients receive an adequate defense, regardless of whether they are assigned to the PDO or to an attorney assigned by CAPDS. A planning study completed by TIDC staff last fall outlined a plan that forms the basis for the PDO component of this proposal.

d. Objectives

Travis County seeks to establish a PDO to provide robust and client-centered representation to a significant portion of people charged with crimes in Travis County who cannot afford an attorney, and improve the quality of all public defense representation countywide. This project includes the following objectives:

- Create a scalable, comprehensive PDO that would provide holistic defense representation and other support to low-income people accused of criminal offenses in Travis County, in coordination with CAPDS.
- ~~Provide 24-hour representation and bond advocacy during magistration for all arrested persons at the Travis County Central Booking facility.~~
- Provide high-quality trial representation, including robust investigation and mitigation support, for low-income people in misdemeanor and felony courts in Travis County.
- Through legal representation and advocacy, as well as policy-making, work to limit unnecessary incarceration and excessive punishment of poor people in Travis County.
- Develop and provide comprehensive, client-centered, training, continuing legal education, and mentorship to public defenders.
- Act as a resource and support to private appointed counsel representing low-income individuals in Travis County.
- Develop reasonable and robust standards for evaluation of the quality of public defender representation and appointed counsel representation, and regularly evaluate the system and make necessary adjustments and improvements to ensure clients' needs are being met.
- Develop reasonable and robust standards for the evaluation and oversight of individual attorneys employed by the PDO.
- Act as an institutional representative on behalf of the accused in county groups and other forums and participate in systemic policy development and decision making.
- Pursue funding from other sources, including the City of Austin and other governmental and nongovernmental sources, internships and fellowships, and sponsored programs and research.

Travis County also seeks to expand direct client services provided by CAPDS to increase capacity and expand areas of service to achieve better outcomes for clients needing those services, reduce incarceration, and increase engagement in community services. Further, Travis County seeks to improve the MAC program by designing and implementing an improved model of compensation, transparency, and accountability for criminal cases to eventually end flat-fee compensation and provide structural improvements. Lastly, Travis County seeks to improve the supervisory role within the MAC. This project includes the following objectives:

- Improve outcomes, increase attorney efficiency, and reduce recidivism by expanding the support of alternative dispositions specialists.
- Improve outcomes, reduce failures to appear, increase attorney efficiency, and increase engagement of community resources by expanding case management services.
- Provide constitutionally required Padilla advice and complementary advocacy promptly to all clients.
- Increase monitoring of attorney performance to ensure all clients are provided high-quality representation.
- Improve supervision and monitoring of MAC by increasing capacity to receive and respond to clients, and provide appropriate community feedback.
- Design and implement a pilot program to increase supervision and monitoring of managed assigned counsel performance through the use of mandatory time reporting and hourly billing.

e. Activities

Upon receiving notice that Travis County has been awarded the grant, the Travis County Commissioners Court may delegate its oversight of the Public Defender Office to an Oversight Board as permitted by Article 26 of the Texas Code of Criminal Procedure. The board will have an odd number of no less than seven members who have demonstrated conflict resolution skills and the duties described in Article 26.045(c)(l) through (3). The membership of the Oversight Committee will include representation from at least the following categories:

1. Community advocates who are, who are family members of, or who work with individuals directly impacted by the criminal justice system;
2. Criminal defense attorneys; and
3. Jurists retired from the criminal justice system.

The Commissioners Court will appoint a nonpartisan board with a mix of voting and non-voting seats to balance the requirements of Texas Law with the American Bar Association's Ten Principles of a Public Defense Delivery System, placing significant emphasis on the first two principles:

1. That public defense be independent from political influence; and
2. That the public defense delivery system consists of both a defender office and the active participation of the private bar.

The hiring committee for the Chief PD may use the National Association for Public Defense (NAPD) Systems Builders Committee, which comprises current and retired defender leaders, to assist with the Chief Public Defender search or may also use any other National Search service that might assist in the search for the office's chief public defender. The hiring committee will begin the search for a chief public defender within 45 days of notification of the grant award and will conduct interviews of candidates and make recommendations to the Commissioners Court. ~~Travis County will make every effort to hire a Chief Public Defender by November 15, 2019.~~

The selected Chief Public Defender will oversee the hiring of staff consistent with the goals of:

- ~~1. Providing 24-hour representation and bond advocacy during magistration at the Central Booking facility for all arrested persons, and~~
2. Taking on 15% of Travis County misdemeanor (A and B) and felony cases by the end of the first grant year. Staffing will include at least one deputy to the Chief Public Defender, a training director, attorneys at varying levels of practice consistent with taking misdemeanor to first degree felony cases, and other staff. Staffing levels and staff

positions will be determined by the Travis County Planning and Budget Office based on those necessary personnel to accommodate the percentage of cases handled.

Travis County anticipates that the PDO will handle 30% of felony and misdemeanor cases in the county and district courts by the end of the second grant year and remain at that level through the rest of the grant term. Staffing will increase in grant year two to accommodate a full appointment capacity.

The PDO and CAPDS will seek to develop contractual relationships with entities and partnerships to provide advocacy in collateral proceedings, including school suspension hearings, administrative license revocation hearings, and immigration proceedings where the proceeding is impacted by or has an impact on the underlying criminal matter. These services will be approved and funded by Commissioners Court.

The selected Chief Public Defender will oversee the procurement of necessary office equipment and furniture, as well as give input on the office location options should office space procurement still be in process. The Travis County Fair Defense Act plan will be adjusted for the addition of an adult public defender office. The PDO will be included in the random, automated appointment system, and will be weighted proportionately as to be available for appointment at the percentage levels contained in this proposal. The Chief Public Defender or the deputy will have access to the appointment system such that they can enter the PDO's availability. In doing so, the chief/deputy will have the autonomy to govern the office's workload.

The PDO will begin accepting appointments in the county and district courts ~~no later than February 1, 2020.~~

~~The PDO will begin representation and bond advocacy at magistration no later than February 1, 2020.~~

The PDO will begin entering cases into a case management system by ~~February 1, 2020.~~

The PDO will develop the ability to track all complaints relating to the PDO and their staff. The system must allow for tracking, classifying, and reporting on complaints, and tracking the numbers of complaints, client satisfaction surveys conducted, consultations with attorneys on performance, and responses to complaints among other metrics.

The PDO will begin reporting to Commissioners Court ~~after the first quarter on April 1, 2020.~~

The PDO, with participation and approval of the oversight development committee, will produce and present, in an open community forum, an annual report that includes, at a minimum, activities and evaluation.

The Chief Public Defender or deputy will periodically attend judges' meetings or meetings with other stakeholders to facilitate improvement to any system problem areas in the continuity of client-centered representation.

The Chief Public Defender or designee will attend Travis County jail population meetings.

The Chief Public Defender shall review the caseload status at least quarterly. The Chief Public Defender may override individual or office caseload limits based on overall complexity of cases, overall types of cases, attorney experience, support staff experience, court needs, or other factors affecting the delivery of services. The Chief Public Defender must notify the oversight development committee in writing if exceptions to the caseload standards are warranted.

The training director will provide relevant training for public defenders including remedial training as needed, which will also be available to assigned counsel. The training director will conduct at least one CLE per month on best practices, including trial trainings, skills workshops, holistic defense representation and legal specializations, for both the PDO and managed assigned counsel attorneys. The training director will maintain training materials for the PDO and managed assigned counsel bar, and act as a resource for both.

The PDO will have dedicated space for use by assigned counsel, partner with CAPDS, Justice Planning, and the Law Library to provide to appointed private counsel and pro se defendants adequate resources for legal research and appropriately private spaces including computer stations with Lexis Nexis or Westlaw access and access to a private room for client meetings.

The PDO, along with the oversight development committee, will have ongoing discussions regarding the feasibility of merging one or more of the existing specialized Travis County Public Defender offices into the general PDO in grant year four. If such a merger is desired by each agency and the PDO, and has the approval of Commissioners Court, then the merger will occur at a future point agreeable to each agency.

For the MAC program:

CAPDS will immediately expand staffing for holistic defense resources in the form of hiring two alternative disposition specialists (one supervisory), two 1 case managers, and two immigration attorneys.

CAPDS will develop job descriptions for these positions and post for applicants ~~no later than October 15, 2019~~, for its expansion and will hire new staff with appropriate experience and qualifications ~~no later than November 30, 2019~~.

CAPDS will begin to accept referrals for new and expanded services ~~no later than December 31, 2019~~, and will train assigned counsel on the use of expanded services.

CAPDS will expand its administrative capacity by hiring two supervisory attorneys and two client advocates. These positions will allow CAPDS to more effectively oversee contract attorneys and respond to client concerns. A financial analyst will also be added to assist with budgeting. CAPDS will develop job descriptions and responsibilities for these positions.

CAPDS will develop, with Criminal Court Administration, the ability to track all complaints in the Indigent Defense Application software, allowing for better tracking, classifying, and reporting of complaints, and, to track the number of complaints, client satisfaction surveys conducted, consultations with attorneys on performance, and decisions by the review committee to remove attorneys from the panel, among other metrics.

CAPDS will develop objective criteria, to be adopted by the CAPDS review committee, to review attorney performance, including caseloads, number and quality of complaints, utilization of holistic defense resources, and case outcomes to determine which attorneys are qualified to remain on the appointment list.

CAPDS will develop written policies and procedures for deviation from the flat fee payment on misdemeanor cases. Additionally, CAPDS will develop written policies and procedures for proactive monitoring of attorney performance and evaluation, including expanded ability to collect and utilize client feedback. These policies will be readily available to assigned counsel.

Time Reporting and Hourly Billing Pilot Program for "A, B and C Panel" Cases: In addition to the program-wide activities designed to improve attorney monitoring and performance described above, CAPDS will develop and implement a pilot program for enhanced reporting and accountability. The pilot program will require attorneys to report their time and submit hourly billing for their work on all cases assigned.

CAPDS will develop draft guidelines and procedures for the pilot program that will be designed to support improvements to CAPDS' attorney monitoring and evaluation functions, as well as to eliminate the County's current flat-fee compensation structure. The pilot program will begin in grant year 1 with the implementation of hourly billing for all A panel cases; year 2 will include hourly billing for all B panel cases; year 3 will include hourly billing for all C panel cases. CAPDS will finalize guidelines and procedures for the pilot program in consultation with stakeholders,

including panel attorneys and the CAPDS oversight committee. At a minimum, guidelines and procedures for the pilot program will include:

1. Mandatory participation by all panel attorneys;
2. Mandatory time reporting by panel attorneys using time categories that are consistent with those used to develop the TIDC caseload guidelines and that protect attorney-client and attorney work product privileges;
3. Payment of all cases in the pilot program on an hourly, and not fixed-fee, basis;
4. Requirements for attorney certification of time reports;
5. Audit procedures for time reports;
6. Evaluation metrics for attorney performance in cases in the pilot program that are consistent with; and, permit comparison with, attorney performance metrics; and
7. Evaluation metrics for the pilot program as a whole. CAPDS also will work with stakeholders to develop a phase-in timeline for the pilot program. CAPDS will finalize the guidelines, procedures, and phase-in timeline for the pilot program no later than January 1, 2020.

In preparation for phase-in of the pilot program, CAPDS will develop, with Criminal Court Administration, the ability to effectively accept and review electronically through the AMP and IDA software systems detailed vouchers that include time reporting within the categories included in the pilot program within the first year of the grant. The Travis County criminal judges will modify the Travis County fee schedule to provide for hourly compensation, at a rate no less than \$100-\$125 per hour, for all felony panel assignments. CAPDS will train panel attorneys on time reporting procedures, pilot program audit and attorney evaluation procedures, and, the electronic voucher system.

Phase-in of the pilot program for A panel cases will begin February 1, 2020.

The hiring committee for the Chief PD may use the National Association for Public Defense (NAPD) Systems Builders Committee, which comprises current and retired defender leaders, to assist with the Chief Public Defender search or may also use any other National Search service that might assist in the search for the office's chief public defender. The hiring committee will begin the search for a chief public defender within 45 days of notification of the grant award and will conduct interviews of candidates and make recommendations to the Commissioners Court. Travis County will make every effort to hire a Chief Public Defender by November 15, 2019.

The selected Chief Public Defender will oversee the hiring of staff consistent with the goals of:

1. Providing 24 hour representation and bond advocacy during magistration at the Central Booking facility for all arrested persons; and
2. Taking on 15% of Travis County misdemeanor (A and B) and felony cases by the end of the first grant year. Staffing will include at least one deputy to the Chief Public Defender, a training director, attorneys at varying levels of practice consistent with taking misdemeanor to first degree felony cases, and other staff. Staffing levels and staff positions will be determined by Travis County based on those necessary personnel to accommodate the percentage of cases handled.

Travis County anticipates that the PDO will handle 30% of felony and misdemeanor cases in the county and district courts by the end of the second grant year and remain at that level through the rest of the grant term. Staffing will increase in grant year two to accommodate a full appointment capacity.

The PDO and CAPDS will seek to develop contractual relationships with entities and partnerships to provide advocacy in collateral proceedings, including school suspension hearings, administrative license revocation hearings, and immigration proceedings where the proceeding is impacted by or has an impact on the underlying criminal matter. These services will be approved and funded by Commissioners Court.

The selected Chief Public Defender will oversee the procurement of necessary office equipment and furniture, as well as give input on the office location options should office space procurement still be in process. The Travis County Fair Defense Act plan will be adjusted for the addition of an adult public defender office. The PDO will be included in the random, automated appointment system, and will be weighted proportionately as to be available for appointment at the percentage levels contained in this proposal. The Chief Public Defender or the deputy will have access to the appointment system such that they can enter the PDO's availability. In doing so, the chief/deputy will have the autonomy to govern the office's workload.

The PDO will begin accepting appointments in the county and district courts ~~no later than February 1, 2020.~~

~~The PDO will begin representation and bond advocacy at magistration no later than February 1, 2020.~~

The PDO will begin entering cases into a case management system ~~by February 1, 2020.~~

The PDO will develop the ability to track all complaints relating to the PDO and their staff. The system must allow for tracking, classifying, and reporting on complaints, and tracking the numbers of complaints, client satisfaction surveys conducted, consultations with attorneys on performance, and responses to complaints among other metrics.

The PDO will begin reporting to Commissioners Court after the first quarter on April 1, 2020.

The PDO, with participation and approval of the oversight development committee, will produce and present, in an open community forum, an annual report that includes, at a minimum, activities and evaluation.

The Chief Public Defender or deputy will periodically attend judges' meetings or meetings with other stakeholders to facilitate improvement to any system problem areas in the continuity of client-centered representation.

The Chief Public Defender or designee will attend Travis County jail population meetings.

The Chief Public Defender shall review the caseload status at least quarterly. The Chief Public Defender may override individual or office caseload limits based on overall complexity of cases, overall types of cases, attorney experience, support staff experience, court needs, or other factors affecting the delivery of services. The Chief Public Defender must notify the oversight development committee in writing if exceptions to the caseload standards are warranted.

The training director will provide relevant training for public defenders including remedial training as needed, which will also be available to assigned counsel. The training director will conduct at least one CLE per month on best practices, including trial trainings, skills workshops, holistic defense representation and legal specializations, for both the PDO and managed assigned counsel attorneys. The training director will maintain training materials for the PDO and managed assigned counsel bar, and act as a resource for both.

The PDO will have dedicated space for use by assigned counsel, partner with CAPDS, Justice Planning, and the Law Library to provide to appointed private counsel and pro se defendants adequate resources for legal research and appropriately private spaces including computer stations with Lexis Nexis or Westlaw access and access to a private room for client meetings.

The PDO, along with the oversight development committee, will have ongoing discussions regarding the feasibility of merging one or more of the existing specialized Travis County Public Defender offices into

the general PDO in grant year four. If such a merger is desired by each agency and the PDO, and has the approval of Commissioners Court, then the merger will occur at a future point agreeable to each agency.

For the MAC program:

CAPDS will ~~immediately~~ expand staffing for holistic defense resources in the form of hiring two alternative disposition specialists (one supervisory), two case managers, and two immigration attorneys.

CAPDS will develop job descriptions for these positions and post for applicants ~~no later than October 15, 2019~~, for its expansion and will hire new staff with appropriate experience and qualifications ~~no later than November 30, 2019~~.

CAPDS will begin to accept referrals for new and expanded services ~~no later than December 31, 2019~~, and will train assigned counsel on the use of expanded services.

CAPDS will expand its administrative capacity by hiring two supervisory attorneys and two client advocates. These positions will allow CAPDS to more effectively oversee contract attorneys and respond to client concerns. A financial analyst will also be added to assist with budgeting. CAPDS will develop job descriptions and responsibilities for these positions.

CAPDS will develop, with Criminal Court Administration, the ability to track all complaints in the Indigent Defense Application software, allowing for better tracking, classifying, and reporting of complaints, and, to track the number of complaints, client satisfaction surveys conducted, consultations with attorneys on performance, and decisions by the review committee to remove attorneys from the panel, among other metrics.

CAPDS will develop objective criteria, to be adopted by the CAPDS review committee, to review attorney performance, including caseloads, number and quality of complaints, utilization of holistic defense resources, and case outcomes to determine which attorneys are qualified to remain on the appointment list.

CAPDS will develop written policies and procedures for deviation from the flat fee payment on misdemeanor cases. Additionally, CAPDS will develop written policies and procedures for proactive monitoring of attorney performance and evaluation, including expanded ability to collect and utilize client feedback. These policies will be readily available to assigned counsel.

Time Reporting and Hourly Billing Pilot Program for "A, B and C Panel" Cases: In addition to the program-wide activities designed to improve attorney monitoring and performance described above, CAPDS will develop and implement a pilot program for enhanced reporting and accountability. The pilot program will require attorneys to report their time and submit hourly billing for their work on all cases assigned.

CAPDS will develop draft guidelines and procedures for the pilot program that will be designed to support improvements to CAPDS' attorney monitoring and evaluation functions, as well as to eliminate the County's current flat-fee compensation structure. The pilot program will begin in grant year 1 with the implementation of hourly billing for all A panel cases; year 2 will include hourly billing for all B panel cases; year 3 will include hourly billing for all C panel cases. CAPDS will finalize guidelines and procedures for the pilot program in consultation with stakeholders, including panel attorneys and the CAPDS oversight committee. At a minimum, guidelines and procedures for the pilot program will include:

1. Mandatory participation by all panel attorneys;
2. Mandatory time reporting by panel attorneys using time categories that are consistent with those used to develop the TIDC caseload guidelines and that protect attorney-client and attorney work product privileges;

3. Payment of all cases in the pilot program on an hourly, and not fixed- fee, basis;
4. Requirements for attorney certification of time reports;
5. Audit procedures for time reports;
6. Evaluation metrics for attorney performance in cases in the pilot program that are consistent with; and, permit comparison with, attorney performance metrics; and
7. Evaluation metrics for the pilot program as a whole. CAPDS also will work with stakeholders to develop a phase-in timeline for the pilot program. CAPDS will finalize the guidelines, procedures, and phase- in timeline for the pilot program ~~no later than January 1, 2020.~~

In preparation for phase-in of the pilot program, CAPDS will develop, with Criminal Court Administration, the ability to effectively accept and review electronically through the AMP and IDA software systems detailed vouchers that include time reporting within the categories included in the pilot program within the first year of the grant. The Travis County criminal judges will modify the Travis County fee schedule to provide for hourly compensation, at a rate no less than \$ 100-~~\$125~~ per hour, for all felony panel assignments. CAPDS will train panel attorneys on time reporting procedures, pilot program audit and attorney evaluation procedures, and, the electronic voucher system.

Phase-in of the pilot program for A panel cases will begin ~~February 1, 2020.~~

f. Evaluation

Travis County will evaluate annually the effectiveness, efficiency, and fairness of public defense services, including services provided by both public defenders and assigned counsel. For purposes of providing a fair comparison of the outcomes of the managed assigned counsel program and the public defender office, cases will be assigned randomly with use of the wheel system. Travis County will obtain assistance from the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania, the Public Policy Research Institute (PPRI) at Texas A&M University, the Sixth Amendment Center, or, comparable nationally-recognized researchers to assist in designing the evaluation and evaluation metrics. Travis County will use a case management system capable of tracking case data and outcomes. Evaluation will be both quantitative and qualitative and will include client satisfaction surveys. Nationally-accepted best practice evaluation measures will be adopted, including those from organizations such as the National Legal Aid & Defender Association and the Indigent Defense Research Association. Such measures will include, but are not limited to:

- Number of people represented
- Number of new cases and cases disposed
- Average time from appointment to initial person contact
- Average time from appointment to in-person interview
- Number of interactions with clients - whether in person, emails or telephone correspondence
- Percentage of clients in jail pretrial
- Average number of days in jail pretrial
- Percentage of clients released on personal bond
- Percentage of clients released on bond
- Use of investigators
- Use of immigration attorneys
- Use of alternative disposition specialists
- Use of defense experts
- Use of discovery
- Number of motions filed
- Case outcomes (dismissal, acquittal, reductions and conviction)
- Sentence length

- Caseloads of attorneys and non-attorney advocates
- Income of attorneys and non-attorney advocates
- Oversight and client complaint resolution
- Advocacy in collateral proceedings

Clients will be surveyed on their satisfaction with:

- Amount of time spent with attorney
- Advice and case information given by attorney
- Trust in attorney
- Whether client felt empowered in their representation
- Belief that attorney was fighting for them
- Attorney preparation
- Outcome in case

In addition to the general evaluation measures used above, attorneys participating in the time reporting and hourly billing pilot program will be evaluated on how the overall amount of time they dedicate to cases in the program, and the time they dedicate to different time categories, compares to relevant data used to develop the TIDC caseload guidelines. To the extent practicable given the nature of available pre-implementation data, A, B, and C Panel attorneys' performance pre- and post-implementation of the pilot program will also be reviewed. Evaluation of the pilot program as a whole will consider CAPDS' differential ability to monitor attorney performance in program and non-program cases, any identifiable changes in A, B, and C Panel attorney performance pre- and post-implementation, and differences in attorney performance outcomes compared to attorney performance in other CAPDS cases and in cases handled by the PDO.

In grant year 3, Travis County will evaluate the overall effectiveness of its public defense system, including by considering client outcomes, cost efficiency, and impact of representation on class and racial disparities, to determine the appropriate proportion between public defender and assigned counsel cases and structure of the indigent defense system. The County will consider expanding public defender representation, expansion of time reporting and hourly billing to all case types, greater funding to the managed assigned counsel system, and/or other improvements to public defense.

g. Future Funding

All Travis County funding is considered on an annual basis. Travis County intends to fund a shared cost of the program each year as required by the discretionary grant program contract that will be negotiated between the County and TIDC. The County will make a good faith effort to continue funding the program after the grant period expires.

Travis County and CAPDS will pursue alternative funding and resources, including internships with college and university students, and funding and fellowships from private foundations and/or governmental agencies available for public defense programs.

Please see Attachment A for a table outlining future budget/funding requested in the application.

h. Budget Narrative and Budget Form

In order to ensure that the entire Travis County public defense system receives equitable representation, both the PDO and CAPDS management and staff salaries must be commensurate with the prosecutorial offices, e.g. the District and County Attorney offices. Factors that should be considered in determining salaries include percentage of cases handled, tenure in office, and experience levels. This information should be determined based on the review, assessment, and recommendation of the Planning and Budget Office. The number of staff requested for the PDO and CAPDS should be reflective of the needs based on the types of cases handled, and the overall percentage of cases that each entity represents.

Travis County estimates that based on projected caseload levels, an adult public defender office taking 30% of cases and providing representation and bond advocacy at magistration will ultimately need up to 40 trial attorneys. Appropriate staffing to ensure the effective implementation of a holistic defense model, including management positions, specialized attorneys, support staff, social workers, paralegals, investigators, and analysts will require additional personnel. The funding needed to staff the office depends upon caseload levels and percentage of cases represented. Public defender and CAPDS personnel should have pay parity with county and district attorneys' staff of similar experience and rank, providing for a 3% annual increase for anticipated compensation and benefit cost increases.

Travis County will determine any staffing projections and annual ongoing expenses that will be incurred by both offices. These expenses include continuing legal and other education and associated travel and lodging, mileage for regular travel, phone bill allowances, office supplies, subscription services, licenses and maintenance for case management software and professional memberships. Estimated annualized ongoing court costs at \$144,000 for expert witnesses and lab tests are also included within that ongoing expense total; this number is an estimate and not a cap on these costs. If needed, PDO will seek additional funding from the Commissioners Court. Additionally, approximately \$800,000 in one-time start-up costs is projected by Travis County for capital equipment. Outside of the proposed grant funding, the County will provide office space, human resources, Information Technology services and other support.

This proposal also seeks funding to help improve the pay and incentive structure for private attorneys that are assigned counsel through CAPDS. A program expanding hourly pay for "A Panel" counsel assigned clients facing 1st degree felony cases will be implemented in year 1. Based on projected caseloads in fiscal year 2020, CAPDS projects an additional \$1,091,030 will be needed to provide hourly pay for the remaining 1st degree felony cases at \$125/hour; and, an additional \$2,744,493 to provide hourly pay for the remaining 2nd and 3rd degree cases at \$100/hour in year 2; and, an additional \$777,120 for the remaining state jail felony offenses at \$100/hour in year 3.

In addition, based on a needs assessment by CAPDS leadership, funding is requested for personnel to provide more holistic support to clients with managed assigned counsel and to better supervise private attorneys and their use of these additional resources. Specifically, funding is requested for additional social workers, case managers, immigration attorneys, additional support staff, a financial analyst, and supervising attorneys are included within this proposal. Additional ongoing expenses to support the new CAPDS employees are also requested. CAPDS employees are contracted with Travis County; costs (including salaries and fringe benefits) are reflected under contracted services.

Funding is requested for new CAPDS employee office furniture and equipment, as well as for software development to support improved private attorney management, specifically, payment and complaint tracking (\$80,000).

Travis County is proposing an alternate grant match schedule at 50% for each of the grant's four years, with the State contributing 50% of grant funds, ~~in addition to an annual 2% indirect cost allocation.~~

Please see Attachment B for staffing charts.

Please see Attachment C for the proposed grant match schedule from FY2020 to FY2023.

ATTACHMENT A

Original proposed budget is superseded by TIDC Approved Final Grant Budget that follows on page 31 below.

TIDC PD Office and CAPDS Improvements Grant Application Budget						
Year	FY 2020 (Year 1)	FY 2021 (Year 2)	FY 2022 (Year 3)	FY 2023 (Year 4)	Total (Grant Term)	FY 2024 Cost
PD Personnel	\$4,162,906	\$8,597,354	\$8,855,274	\$9,120,933	\$30,736,467	\$9,394,561
PD Ongoing Operating	239,867	501,194	501,194	501,194	1,743,449	501,194
PD Start Up costs	805,862	0	0	0	805,862	0
Case Management System	500,000	100,000	100,000	100,000	800,000	100,000
Total PD	\$5,708,635	\$9,198,548	\$9,456,468	\$9,722,127	\$34,085,778	\$9,995,755
CAPDS Personnel	948,437	1,172,268	1,207,436	1,243,659	4,571,799	1,280,969
CAPDS Ongoing Operating	122,050	122,050	122,050	122,050	488,200	122,050
Holistic Defense Parity w PD	23,290	8,408	8,987	9,256	49,941	9,534
MAC Parity w PD	115,286	24,523	25,259	26,017	191,084	26,797
CAPDS/PD Evaluation (OT)	0	0	200,000	0	200,000	0
CAPDS One time operating	149,922	0	0	0	149,922	0
Hourly Pilot	1,091,030	3,835,523	4,612,643	4,612,643	14,151,839	4,612,643
Total CAPDS	\$2,450,015	\$5,162,772	\$6,176,374	\$6,013,625	\$19,802,785	\$6,015,662
Estimated Program Budget	\$8,158,650	\$14,361,320	\$15,632,843	\$15,735,751	\$53,888,564	\$16,011,416
Indirect Cost from State	56,118	104,258	107,202	110,231	377,809	0
Total Grant Application Budget	\$8,214,768	\$14,465,578	\$15,740,045	\$15,845,982	\$54,266,373	\$16,011,416

ATTACHMENT B

PDO Staffing Chart

Position	FTE
Chief Public Defender	1.00
Deputy Chief	1.00
Division Director	2.00
Training Director	1.00
Attorney VI	10.00
Attorney V	5.00
Attorney IV	9.00
Attorney III	10.00
Attorney II	5.00
Attorney I	5.00
Investigator Lt	1.00
Investigator	5.00
Social Worker	4.00
Office Manager Sr	1.00
Legal Secretary	7.00
Paralegal	4.00
Business Analyst	1.00
Financial Analyst Sr	1.00
Total	73.00

These figures are modified by the grant application amendment that follows on page 23 below.

Revised total 67 - see amendments on page 23 below.

**CAPDS Additional Staffing Chart
(Contracted)**

Position	FTE
Supervising Attorney	2.00
Immigration Attorney	2.00
Alternative Disposition Specialist (MSW) Supervisor	1.00
Alternative Disposition Specialist (MSW)	1.00
Case Manager	2.00
Legal Secretary	2.00
Financial Analyst, Sr.	1.00
Total	11.00

These figures are modified by the grant application amendment that follows on page 24 below.

Revised total 9, per amendment on page 24 below.



OFFICE OF TRAVIS COUNTY JUDGE SARAH ECKHARDT

July 31, 2019

Dear Mr. Burkhart,

On May 9, 2019, Travis County submitted an FY2020 Multi-Year Discretionary Grant, (confirmation number D202022720190509) to the Texas Indigent Defense Commission to help fund the establishment of a public defender's office. In response to your request for additional and clarifying information, please see the following:

1. The extent to which the total budget for the grant project will be impacted by SB2.

Please see the attached memo from the Planning and Budget Office and Justice Planning that outlines the changes that were made to the original grant application budget in response to the potential impact of revenue caps on county budgets.

2. Adjustments to the 30% target for cases assigned to the PD in order to implement PD counsel at the proposed 24/7 magistration hearings.

As noted in the PBO/Justice Planning memo, the share of cases to be taken by the public defender office remained at 30% to be achieved by the end of the grant period.

3. As part of the CAPDS improvements, address caseloads and shift from a carrying caseload to annualized caseload maximums.

Please see attached agenda item backup from Criminal Courts Administration.

4. How data will be used on an ongoing basis to provide enhanced supervision for CAPDS attorneys.

Please see attached agenda item backup from Criminal Courts Administration.

5. The basis of cost for the case management system budget item.

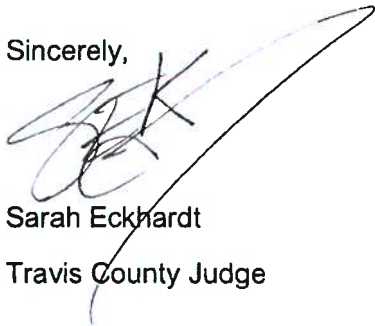
The Planning and Budget Office has worked with our ITS Department to refine the estimate for the public defender office case management system. The amount reflected in the revised budget is the latest estimate.

6. Information on the proposed oversight structure.

- Academic (Andrea Marsh)
- Private Attorney (Gerry Morris)
- Public Defender (Alex Bunin)
- Justice Involved Individual (Darwin Hamilton)
- Community Advocate (Ofelia Zapata)
- Commissioners Court Representative (Roger Jefferies)
- Community Advocate (Pastor Joe Parker)
- Judicial Representative (TBD)
- Justice Involved/Community Advocate (TBD)

Thank you for your consideration of this revised grant application. Please contact us if you have further questions. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'SE', is written over a large, light blue diagonal line that spans across the signature area.

Sarah Eckhardt

Travis County Judge



Travis County Commissioners Court Voting Session Agenda Request

Meeting Date: July 30, 2019

Agenda Language:

Consider and take appropriate action on the grant application to the Texas Indigent Defense Commission for a public defender office in Travis County.

Prepared By/Phone Number: Roger Jefferies, 512-854-4759

Elected/Appointed Official or Department Head: Roger Jefferies, County Executive, JPS

Commissioners Court Sponsor(s): Sarah Eckhardt, County Judge

Press Inquiries: Hector Nieto, PIO@traviscountytexas.gov or (512) 854-8740

Background/Summary of Request and Attachments:

On May 7, 2019, the Commissioners Court submitted an application to the Texas Indigent Defense Commission (TIDC) to fund a public defender office in Travis County. TIDC has requested some further information to help them in their analysis of our request. The additional information includes:

1. The extent to which the total budget for the grant project will be impacted by SB2 (if at all).
2. Adjustments to the 30% target for cases assigned to the PD in order to implement PD counsel at the proposed 24X7 magistration hearings.
3. As part of the CAPDS improvements, the application should address caseloads and shift from a carrying caseload to annualized caseload maximums.
4. While the application identifies a number of metrics to be used in the evaluation, more information should be included regarding how data will be used on an ongoing basis to provide enhanced supervision for CAPDS attorneys.
5. We'd like to see the basis of cost for the case management system budget item.
6. Information on the proposed oversight structure.

On July 16th, the Commissioners Court approved the category composition and charge for the oversight structure. On July 23rd, the Commissioners Court a revised budget that considered the impact of tax revenue caps recently enacted by the Texas legislature (SB2).

The original proposal approved on May 7, 2019 had a projected FY 2024 cost of \$16,011,416. This cost did not include the 24/7 magistration, space related costs and civil attorney fee increases to mirror the proposed criminal hourly fee schedule. If these additional costs had been included, the annual cost by FY 2024 would have been an estimated \$21.6 million a year. PBO would not have been able to support the

original application with the added costs due to forthcoming revenue caps. The Commissioners Court directed PBO and JPS to develop a revised proposal that was more affordable but still met the goals of the original program.

In the July 23rd discussion it was recommended by staff that 24/7 magistration not be included in the grant proposal due to funding limitations and programmatic unknowns that still need to be researched. The cost in FY 2025 for the revised program without 24/7 magistration is \$14.8 million (including civil indigent attorney fee hourly rate changes that cannot be included in the grant application). In the discussion, the Commissioners Court directed staff to add back in an Investigator position that had been removed in the revised budget. Also, at the request of former members of the Indigent Legal Services work group, the grant proposal was edited to allow for the three leadership staff who would be hired in the first year to take at least some cases in the first year if able. The previous revised budget assumed that no cases would be taken in the first year.

Criminal Courts Administration will also be providing an overview of a plan to enhance the quality of representation through data collection and utilization of the performance indicators to measure the CAPDS attorneys.

Staff Recommendations:

Staff recommends approval of the revised budget as proposed and the approval of the performance indicators as presented.

Issues and Opportunities:

N/A

Fiscal Impact and Source of Funding:

Please see July 19 memo attached describing the revised financial implications of the grant application.

Required Authorizations:

Sarah Eckhardt, County Judge
Roger Jefferies, County Executive, JPS
Jessica Rio, County Executive, PBO



PLANNING AND BUDGET OFFICE

TRAVIS COUNTY, TEXAS

700 Lavaca, Ste 1560
P.O. Box 1748
Austin, Texas 78767

July 24, 2019

MEMO REVISED TO REFLECT FEEDBACK FROM JULY 23 2019 COMMISSIONERS COURT MEETING

NOTE: Revised budget includes one additional Investigator position for PD Office, also does not limit PD Office from taking cases the first year, if able.

To: Commissioners Court

From: Roger Jefferies, County Executive for Justice and Public Safety & Travis Gatlin, PBO Budget Director

Re: TIDC Public Defender and CAPDS Improvement Grant Application Update

Travis County currently spends \$23.8 million per year for indigent defense costs, of which \$1.3 million is reimbursed by the State. The County has been exploring ways to improve outcomes of indigent defense within a cost model that is sustainable given revenue caps (SB2) will be in place beginning in FY 2021. The Commissioners Court requested that the Planning and Budget Office and Justice Planning look at revising the grant application to the Texas Indigent Defense Commission (TIDC) to create a general criminal Public Defender's Office in Travis County and make improvements to the Capital Area Private Defenders Service (CAPDS). The original proposal was approved on May 7, 2019 with an annual cost to the County of \$16 million once the grant ends in FY 2024. As noted by the Planning and Budget at that time, the \$16 million did not include the cost for indigent representation at magistration on a 24/7 basis or prosecution and other stakeholder costs including civil indigent attorney fees. These costs are estimated at \$5.6 million. The combined annual amount for FY 2024 with these costs is estimated \$21.6 million.

The revised application maintains that the Public Defender's Office would still handle 30% of eligible cases but does not include representation at magistration on a 24/7 basis. Representation at magistration will continued to be analyzed and discussed during future budget processes. The Planning and Budget Office and Justice Planning recommends a revised application over a five-year term rather than four-year term with an estimated annual cost of \$13.5 million for FY 2024 for grant expenses (County and state) plus \$1.5 million for civil indigent attorney fees that are not eligible to be included in the grant but will be required to match the criminal indigent attorney hourly rate pilot in the revised application. The combined total is \$15 million for FY 2024 and the County must fully fund these costs starting in FY 2025.

The Planning and Budget Office believes the funding requirements for revised grant application and associated non-grant eligible related costs can be more realistically accommodated over the next five years compared to the originally proposed four years with the provision of indigent representation at magistration on a 24/7 basis. The table on the next page highlights the original application with \$16.0 million budget in FY 2024 with the added \$5.6 million for the estimated costs associated with representation at magistration and civil indigent

attorney fees for with the revised application. Details highlighting the changes within the recommended revised application by fiscal year will also be highlighted in the remainder of the memo.

Comparison of FY 2024 Cost for Original Application vs. Revised Application			
Category	Full Cost of Original Application	Revised Application	Difference
Grant Eligible Expenses	\$16 Million (84 FTEs PD + CAPDS)	\$13.5 Million (76 FTEs PD+CAPDS)	\$2.5 Million (8 FTEs)
Representation at Magistration + Civil Attorney Fees	\$5.6 Million (35 FTEs)	\$1.5 Million (0 FTEs)	\$4.1 Million (35 FTEs)
Total	\$21.6 Million (119 FTEs)	\$15.0 Million (76 FTEs)	\$6.6 Million (43 FTEs)

Revised TIDC Grant Application

The revised TIDC grant application as recommended by PBO and Justice Planning includes the following:

- Revised Oversight Committee (discussed with Commissioners Court July 16, 2019)
- Revised cost considerations:
 - Extends grant period from four years to five years **Note TIDC approved 4-year funding plan.**
 - Reduces management and support staffing in PD Office proposal by six positions (73 FTE to 67 FTE)
 - Reduces CAPDS personnel from 11 new staff to 9 new staff
 - Gradually increases hourly pilot
 - Removes lease costs in CAPDS budget
 - Includes a more refined case management system costs for the Public Defender’s Office
 - Has an improved space plan for staff
 - Reduces annual personnel cost growth 3% to 2.5%

Public Defender Office

It would be expected that this new public defender’s office would still take 30% of the cases with the workload gradually increasing over a five year period. The attorney staffing ratios per case per year remained the same (138 felony cases for felony defenders and 239 cases per misdemeanor defender); however, some support staff were removed from the budget. The grant proposal includes the following for the Public Defender Office:

- No change to the percentage of cases (30% of felony and misdemeanor cases)
- Maintains Attorney-to-Case ratio as recommended by TIDC
- Refines case management system cost
- Removes deputy chief position
- Removes one Padilla immigration attorney and one research attorney (Revised proposal includes two Padilla immigration attorneys for the PD and two new immigration attorneys for CAPDS)
- Removes one investigators (Revised proposal includes one Investigator Lt and four Investigators)
- Removes two support staff (Paralegal and Legal Secretary)
- Total FTE count reduced by 6, from 73 FTEs to 67 FTEs. (Original report from TIDC proposed 66 FTEs.)
- Indigent representation at magistration on a 24/7 basis is not included
- Includes one-time costs to move to USB Building

CAPDS

The CAPDS proposal still includes increased assistance to the CAPDS attorneys for better overall representation and provide for improved equity in the pay structure between a PD Office, County Attorney & District Attorney and CAPDS personnel. The following is included for the CAPDS portion of the application:

- Maintains two supervising attorneys and two Padilla immigration attorneys
- Maintains Financial Analyst position due to increased number of hourly vouchers
- Reduces two support staff (Case Manager and Legal Secretary)
- Total new staff reduced by two, from 11 to 9 full-time positions
- Removes lease cost for CAPD using County space
- Includes one-time costs to move to Rusk Building

Staffing Schedule

It is expected that the new Public Defender would be hired within six months of the final approval of this grant by Commissioners Court. The new Chief Public Defender will then start hiring Division Directors and support staff. It is not expected that the Office would take cases in the first year. In the second year, staff attorneys would begin to be hired and the Office can increase the percentage of cases they can take. Attorney staffing levels in this proposal maintain the cases-per-attorney ratio as recommended by TIDC. CAPDS, since it is already an established program, will hire all new staff within a two year period to continue to handle the majority of cases. The chart below outlines the staffing and case schedule:

Timeline for PD Office, CAPDS Improvement Schedule					
	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024
Public Defender FTE	2.50	23.00	40.00	56.00	67.00
CAPDS FTE	5.00	9.00	9.00	9.00	9.00
Total FTE	7.50	32.00	49.00	65.00	76.00
PD Percentage of Eligible Cases Taken	<1%	7.5%	15%	22.5%	30%
CAPDS Percentage of Eligible Cases Taken	>99%	92.5%	85%	77.5%	70%

Indigent Defense Hourly Pilot

The criminal indigent attorney fee hourly pilot portion of the grant was updated to cap hourly rate for highest charges at \$100 rather \$125 hour for felony A cases and other incremental changes in an effort to promote cost sustainability over the grant term. The revised hourly pilot by year is below.

Revised Criminal Hourly Rate Pilot (Grant Eligible)					
Highest Charge	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024
1 st Degree Felony	\$100	\$100	\$100	\$100	\$100
2 nd Degree Felony	\$0	\$80	\$85	\$90	\$90
3 rd Degree Felony	\$0	\$0	\$85	\$90	\$90
State Jail Felony	\$0	\$0	\$0	\$85	\$85
Misdemeanors	N/A	N/A	N/A	N/A	N/A

Note: TIDC approved 4-year funding plan with no indirect costs. See TIDC Approved Final Grant Budget at the end of this document.

Incorporating the changes listed above the following is the proposed grant budget for the revised application:

Revised TIDC Grant Match Costs						
Cost	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024	Total
PD Personnel & Operating (66 FTE)	\$406,931	\$3,089,982	\$5,108,785	\$7,235,201	\$8,774,807	\$24,615,705
Court Costs	\$-	\$35,931	\$71,862	\$107,793	\$143,724	\$359,310
Space Costs	\$125,000	\$-	\$-	\$-	\$-	\$125,000
Case Mgmt System	\$102,000	\$18,400	\$32,000	\$44,800	\$53,600	\$250,800
Total PD	\$633,931	\$3,144,313	\$5,212,647	\$7,387,794	\$8,972,131	\$25,350,815
CAPDS Personnel & Operating (9 new)	\$712,815	\$1,092,544	\$1,093,473	\$1,119,842	\$1,050,752	\$5,069,426
Current CAPDS personnel Parity w PD	\$138,576	\$142,040	\$144,174	\$149,231	\$152,962	\$726,984
PD/CAPDS Evaluation (OT)	\$-	\$-	\$200,000	\$-	\$-	\$200,000
CAPDS Space Costs	\$50,000	\$-	\$-	\$-	\$-	\$50,000
CAPDS Software	\$80,000	\$80,000	\$80,000	\$80,000	\$80,000	\$400,000
Hourly Rate for MAC Cases	\$1,412,576	\$2,802,951	\$3,945,635	\$4,174,845	\$3,191,963	\$15,527,970
Total CAPDS	\$2,393,967	\$4,117,535	\$5,463,282	\$5,523,918	\$4,475,677	\$21,974,380
Estimated Program Budget	\$3,027,898	\$7,261,848	\$10,675,929	\$12,911,713	\$13,447,808	\$47,325,195
2% Indirect Cost	\$57,058	\$145,237	\$209,519	\$258,234	\$268,956	\$939,004
Total Grant Application Budget	\$3,084,956	\$7,407,085	\$10,885,447	\$13,169,947	\$13,716,764	\$48,264,199

On May 7, 2019 PBO recommended a grant match schedule that allowed TIDC and the County to split the grant costs 50/50, rather than the traditional 20/40/60/80% grant match schedule used for many TIDC grant programs. The revised application includes the proposed 50/50 match. The 50/50 model will allow for a larger state contribution. The following table shows the proposed grant match schedule by year:

50/50 Grant Match Model						
	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024	Total
State Grant Funds	\$1,571,007	\$3,776,161	\$5,547,183	\$6,714,091	\$6,992,860	\$24,601,601
County Cash Match	\$1,513,949	\$3,630,924	\$5,337,964	\$6,455,856	\$6,723,904	\$23,662,597
Total	\$3,084,956	\$7,407,085	\$10,885,447	\$13,169,947	\$13,716,764	\$48,264,199

Costs not included in the Grant proposal

Space Plan for Counseling and Education Services’ Intake Unit, Office of Child Representation and Office of Parent Representation and Mental Health Public Defender

PBO, Justice Planning and Facilities Management worked on a proposal to accommodate the Public Defender’s Office and consolidate CAPDS personnel into one office. FMD proposes moving the Public Defender Office into the University Savings Bank (USB) Building and move all of CAPDS from their current locations in the Brizendine House and USB in to the Rusk Building. To accommodate those moves, the Office of Child Representation, Office of Parent Representation and Counseling and Education Services’ Intake Division will need to leave the USB and relocate to the 2nd floor of the Granger building, which was recently vacated by the District Attorney’s Office. The Mental Health Public Defender is proposed to move to Post Road, with an eventual move back to the downtown area once the Civil and Family Courthouse is completed. FMD estimates that this move and related office renovations will cost \$975,000, of which the renovations related to USB and Rusk of \$175,000 can be reimbursed by the grant. The County will need to pay for the remaining \$800,000 in renovations costs in FY 2020. The expected completion date of all the changes summer 2020.

Civil Indigent Attorney’s fees

By statute Civil Indigent Attorney’s Fees can match but not exceed the criminal indigent attorney fees schedule as determined by the Criminal Judges. Since the grant is adding an hourly criminal indigent attorney fee pilot, the civil attorney fees will need additional resources based on anticipated civil fee changes from the Civil District Judges. The Civil District Judges submitted an hourly rate budget request to mirror the rates included for criminal cases in the original grant proposal. With the revised criminal rate structure, the Civil Courts propose raising the fees from \$75 to \$90-\$100 over a five year period. Below is the proposed five year rate schedule:

Revised Civil Hourly Rate Schedule (Not Grant Eligible)					
Attorney Qualifications	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024
Certifications/ Multi-lingual	\$100	\$100	\$100	\$100	\$100
Other	\$75 (no change)	\$80	\$85	\$90	\$90

The total five year cost to Travis County is below for the grant contribution plus non grant eligible space costs and increases for civil indigent attorney’s fees:

Total County Funding Contribution for Indigent Defense Improvements						
	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024	Annual Cost After Grant
County Cash Match	\$1,513,949	\$3,630,924	\$5,337,964	\$6,455,856	\$6,723,904	\$13,447,808
Space	\$800,000	\$-	\$-	\$-	\$-	\$-
Civil Indigent Attorney’s Fees	\$371,886	\$713,943	\$1,064,204	\$1,421,444	\$1,481,873	\$1,481,873
Total County Contribution	\$2,685,835	\$4,344,867	\$6,402,168	\$7,877,300	\$8,205,777	\$14,929,681

*excludes proposed state’s 2% indirect cost allocation.

As noted on the previous page the final year of the grant plus civil indigent attorney fees is \$15 million, which is \$6.6 million less than the \$21.6 million full cost of May 7 application. The County must carefully plan over the next five years so that resources to fully fund the program in FY 2025 are available. The revised proposal provides resources for the Public Defender's Office to take 30% of criminal cases as originally envisioned and significantly increasing support for indigent defense within CAPDS and indigent attorney budget for the Criminal and Civil Courts. Justice Planning and PBO recommend Commissioners Court approval of these changes to the application. TIDC will make a final determination on the County's application on August 29, 2019.

The FY 2020 Preliminary Budget includes a grant match of \$4,079,325 budgeted in Justice Planning based on the original May 7, 2019 application. The revised proposal includes a FY 2020 grant match of \$1,513,949 with an additional requirement of \$1,171,886 for non-grant eligible space costs and civil indigent attorney fees resulting in a total County requirement for FY 2020 of \$2,685,835. The amount for FY 2021 is \$4,344,867, which will increase to \$6,402,168 for FY 2022, \$7,877,300 in FY 2023, \$8,205,777 in FY 2024 with the full cost of approximately \$15 million in FY 2025 once the grant ends. The Planning and Budget Office will be making forthcoming recommendations on how to best plan for the contributions for each fiscal year.

CC: Kimberly Pierce, Cathy McLaugherty, Valerie Hollier, David Shelton, Keith Goertz, Efrain Davila, Justice Planning
Hon. Brenda Kennedy, Hon Elisabeth Earle, Debra Hale, Margaret Ledyard, Joseph Kertz, Criminal Courts
Hon. Lora Livingston, Peg Liedtke, Amanda Michael, Civil Courts
Jessica Rio, County Executive for Planning & Budget
Katie Gipson, Aerin Pfaffenberger, PBO
ILS Work Group

July 30, 2019 Commissioners Court

Additional Backup for Item #6

Caseload and Additional Monitoring Information for CAPDS Related Enhancements to Indigent Defense in the Application to TIDC

Update for TIDC Grant

Caseload Limits for TIDC Grant

To improve quality and ensure attorneys have adequate time to represent assigned clients, Travis County will move from caseload limits based on a carrying caseload to an annualized caseload based on the TIDC Weighted Caseload Study. Travis County will phase in caseload controls during this grant, to be fully implemented by the end of the grant, ensuring attorneys' yearly caseloads do not exceed the TIDC guidelines by more than 10%, unless demand on a specific panel requires an exception. For example, if there are too few attorneys active on the Felony MH wheel, CAPDS may assign an attorney qualified to represent a Felony Mental Health defendant who has reached their caseload limits for the time period specified. CAPDS will also work with the attorneys and the court's data scientist to determine limits for those who take cases other than Travis County appointed cases. During the phase in, any case that is part of the hourly pilot program will count at 100% toward the caseload limit for the attorney. Cases not subject to the pilot, such as flat fees, may be counted at a reduced rate in order to maintain the viability of all panels during the phase-in process.

Travis County and CAPDS will create a dynamic caseload monitoring program to effectively manage an annualized caseload limit while ensuring the viability of all panels. CAPDS will provide the details of implementation and its caseload monitoring plan no later than October 15, 2019. Caseload monitoring will be further developed and monitored by CAPDS staff during the implementation of the pilot. CAPDS will work with Travis County to create automated caseload controls through the Indigent Defense Application (IDA) after a period of manual monitoring resolves any challenges or concerns with the operation of the dynamic caseload controls.

Enhanced Oversight of Attorneys Receiving an Hourly Rate

One key to improving representation in Travis County for indigent defendants is to improve the quality provided by Managed Assigned Counsel (MAC) attorneys through the CAPDS. This grant will aid in two key ways: through increased CAPDS staff for case support and attorney monitoring, and through a new fee structure that does not disincentivize quality representation. Currently, attorneys are compensated by a flat-fee system, creating a perverse incentive for attorneys in which compensation decreases the harder and longer an attorney works. By moving to an hourly payment system, the attorney's incentives are more closely aligned with those of the client, leading to improved representation. In addition to aligning the incentives between clients and attorneys, the move to an hourly-payment system will lead to improved data collection and allow for more detailed monitoring of the attorneys and the time that they spend on activities related to representation. Attorneys will be required to categorize their

activities in a manner consistent with the TIDC timekeeping study enabling the consolidation of all activities into TIDC main categories: Client communications, negotiation and meetings, discovery, attorney investigation, legal research and trial preparation, court time, social work and case management, and case specific office support. By monitoring the time spent on key activities, CAPDS can identify the areas where individual attorneys or groups of attorneys do not align with best practices. CAPDS can target interventions both individually and collectively to these areas in order to improve performance. This increased data collection and additional staff for support and supervision creates a new vision into representations and new opportunities to evaluate attorney performance. Detailed voucher submission provides CAPDS with a more robust tool than previously available.

Currently, CAPDS and Travis County closely monitor attorney outcomes. But outcomes do not tell the whole story. With the detailed and structured data submission that will be required of attorneys paid an hourly amount, CAPDS and Travis County will be able to better pinpoint where attorneys are not spending sufficient time on activities. Using categories from the TIDC time sufficiency study, CAPDS can identify where an attorney's practice differs from guidelines and target its limited resources at appropriate remediation.

For example, one area that has a large effect on a client's perception of their representation is the amount of time spent communicating with the client and family members. It is not possible, however, to directly evaluate the frequency or quality of those communications using outcomes. Increasing the amount of information that attorneys report will permit better monitoring of the frequency of communication an attorney has with the client and provide contextual clues into the quality and appropriateness of the amount of communication. Currently, CAPDS only is able to track the dates of first client contact and first face-to-face meeting with a client, but not the duration of these interactions or any subsequent meetings. With hourly timekeeping, attorneys will record their meetings and CAPDS supervisory staff will be able to compare the frequency and duration against TIDC standards and Travis County averages to spot attorneys that are deficient in their client communication. This will allow CAPDS to work with attorneys to improve their interactions and ultimately adopt additional standards to guide attorneys and provide new benchmarks for evaluation. Communication is just one example of how improved data collection through attorney time tracking will allow CAPDS to better monitor attorneys and improve the services available to clients. Other areas that CAPDS will monitor to better understand and evaluate the work that attorneys are performing are investigation by the attorney, legal research, social work performed by the attorney, and increased understanding of hearings and motion practice. Understanding how attorneys are spending their time provides CAPDS with new tools and opportunities to improve quality.

In addition to time tracking, this grant will permit the development a complaint tracking system tied to Indigent Defense Application ("IDA"). Currently CAPDS receives client complaints and acts on them when appropriate; however, its resources and current case tracking system does not permit comprehensive review, coding, and tracking of complaints and responses. By moving complaint and response tracking into IDA, CAPDS will better be able to see patterns of behavior and cross-reference assignments, clients, and cases. By developing a view into total attorney performance, CAPDS can consolidate complaints, responses, observations, and data metrics to create a more comprehensive view of attorney performance. With the addition of two supervising attorneys, CAPDS will increase its capacity to proactively monitor performance and responding to client concerns, improving the services that clients receive.

CAPDS is committed to increased monitoring and supervision of its attorneys utilizing the new resources of this grant. CAPDS already uses a large amount of data to track case outcomes, bonding work, and jail visits. However, this information only scratches the surface of what can be learned from data about the quality of services being provided to clients. By moving to hourly billing, not only do we better align the incentives between clients and attorneys, we also increase the amount of visibility that CAPDS has into the activities taken by the attorneys. By better understanding where attorneys are spending their time in representing clients, CAPDS can target trainings and mentoring to those areas where deficiencies are observed. This increase in data availability and new staff will help CAPDS to improve representation of the clients they are charged with representing.

TIDC-Approved Final Grant Budget

TIDC Grant Match Costs										
Fiscal Year	FY 2020		FY 2021		FY 2022		FY 2023		FY 2024	
	Year 1 April 1 start	Year 2	Year 3	Year 4	Year 5 April 1 end	Total				
Cost										
PD Personnel & Operating (67 FTE)	\$ 406,931	\$ 3,089,982	\$ 5,108,785	\$ 7,235,201	\$ 4,435,461	\$ 20,276,360				
Court Cost	\$ -	\$ 35,931	\$ 71,862	\$ 107,793	\$ 71,862	\$ 287,448				
Space Costs	\$ -	\$ -	\$ 750,000	\$ -	\$ -	\$ 750,000				
Case Mgmt System	\$ 102,000	\$ 18,400	\$ 32,000	\$ 44,800	\$ 53,600	\$ 250,800				
Total PD	\$ 508,931	\$ 3,144,313	\$ 5,962,647	\$ 7,387,794	\$ 4,560,923	\$ 21,564,608				
CAPDS Personnel & Operating (9 new)	\$ 372,298	\$ 1,092,544	\$ 1,093,473	\$ 1,119,842	\$ 525,376	\$ 4,203,532				
Current CAPDS personnel Parity w PD	\$ 69,288	\$ 142,040	\$ 145,591	\$ 149,231	\$ 76,481	\$ 582,632				
PD/CAPDS Evaluation (OT)	\$ -	\$ -	\$ 200,000	\$ -	\$ -	\$ 200,000				
CAPDS Space Costs	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				
CAPDS Software	\$ 80,000	\$ 80,000	\$ 80,000	\$ 80,000	\$ 80,000	\$ 400,000				
Hourly Rate for MAC Cases	\$ 706,288	\$ 2,802,951	\$ 3,945,635	\$ 4,174,845	\$ 1,595,982	\$ 13,225,700				
Total CAPDS	\$ 1,227,873	\$ 4,117,535	\$ 5,464,699	\$ 5,523,918	\$ 2,277,839	\$ 18,611,865				
Estimated Program Budget	\$ 1,736,804	\$ 7,261,848	\$ 11,427,346	\$ 12,911,713	\$ 6,838,762	\$ 40,176,472				
(Proposed Indirect Removed)										
Total Grant Application Budget	\$ 1,736,804	\$ 7,261,848	\$ 11,427,346	\$ 12,911,713	\$ 6,838,762	\$ 40,176,472				

50/50 Model						
	Year 1: FY 2020	Year 2: FY 2021	Year 3: FY 2022	Year 4: FY 2023	Year 5: FY 2024	Total
State Grant Funds	\$ 868,402	\$ 3,630,924	\$ 5,713,673	\$ 6,455,856	\$ 3,419,381	\$ 20,088,236
County Cash Match	\$ 868,402	\$ 3,630,924	\$ 5,713,673	\$ 6,455,856	\$ 3,419,381	\$ 20,088,236
Total	\$ 1,736,804	\$ 7,261,848	\$ 11,427,346	\$ 12,911,713	\$ 6,838,762	\$ 40,176,472

Timeline for Reporting and Fund Distribution

Reports will be submitted on-line at tidc.tamu.edu.

Reporting Period	Type Report Due	Date Report Due	Fund Distribution Date
October 2019 through December 2019	Grant Expenditure Report Progress report	January 15, 2020	February 2020
January 2020 through March 2020	Grant Expenditure Report Progress report	April 15, 2020	May 2020
April 2020 through June 2020	Grant Expenditure Report Progress report	July 15, 2020	August 2020
July 2020 through September 2020	Grant Expenditure Report Progress Report	November 16, 2020	December 2020

APPENDIX B



STATE BAR *of* TEXAS

PERFORMANCE GUIDELINES
for
NON-CAPITAL CRIMINAL DEFENSE
REPRESENTATION



*Standing Committee on Legal Services to the Poor in Criminal Matters
Adopted by the State Bar Board of Directors
January 28, 2011*

THE NEW PERFORMANCE GUIDELINES IN CRIMINAL CASES: A STEP FORWARD FOR TEXAS CRIMINAL JUSTICE

BY JEFF BLACKBURN AND ANDREA MARSH

The right to counsel is the most basic guarantee of our criminal justice system. Without a good lawyer, innocent citizens may be convicted of crimes they did not commit, defendants may be overcharged for inadequate legal representation, and people who need another chance may never get one.

The State of Criminal Practice

Criminal defense lawyers face unique challenges. Criminal law and procedure are complex areas of practice with high stakes for clients. Every case presents legal and factual problems that can only be solved through time, effort, and expense. Many, if not most, cases involve indigent clients whose legal fees are paid for by the county at rates far below what they should be. Unlike prosecutors, court-appointed defense attorneys have no easy access to investigators, experts, or witnesses. In many cases, they are not given enough time or money to do a good job. Many court-appointed lawyers feel pressured to back off from aggressively representing their clients out of fear that their efforts will go unpaid or that they will be removed from the list of attorneys doing such cases.

The Future of Criminal Practice

These problems will get worse in the next few years. State grant funding to counties for indigent defense will decrease by \$8.6 million in the next biennium under the budget that was passed during the regular legislative session.¹ If counties cannot, or will not, replace that funding with local revenue, criminal defense lawyers will be asked to handle even more cases at even lower rates. Texas is headed into a county-by-county funding crisis in indigent defense.

Performance Guidelines

The State Bar Board of Directors adopted the *Performance Guidelines for Non-Capital Criminal Defense Representation* (the Guidelines) in January 2011. The Guidelines were drafted by the State Bar Committee on Legal Service to the Poor in Criminal Matters to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of citizens accused of crime. They represent an effort to “hold the line” for criminal defense practitioners against a host of financial and political pressures.

The Guidelines are a step-by-step guide to what lawyers should do in criminal cases. They remind attorneys that certain actions, like investigating facts before trial, should be considered in every case regardless of funding issues or local practice. At the same time, they remind judges and county officials that lawyers have work to do and steps to take that have to be paid for no matter how constrained counties feel about their budgets.

The Guidelines’ Structure

The Guidelines provide a road map of potential courses of action and best practices for every stage of a state criminal proceeding from arrest through direct appeal.

The Guidelines are detailed, but they are not an exercise in micromanagement. They allow defense lawyers great flexibility

to exercise their best professional judgment. While the Guidelines use the words “shall” or “must” on a few occasions when a particular action is essential to providing quality representation, in most instances the use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “when appropriate.”

The Guidelines are not disciplinary rules nor are they black-and-white standards for the judicial evaluation of ineffective assistance. They are, instead, a set of tools to be used by criminal defense lawyers, judges, and county officials to improve our criminal justice system.

Development of the Guidelines

The Committee on Legal Services to the Poor in Criminal Matters began the drafting process by reviewing similar guidelines developed by national organizations and other states. Guidelines published by the American Bar Association² and the National Legal Aid and Defender Association³ were analyzed, as were state-level guidelines adopted in Georgia,⁴ Louisiana,⁵ Massachusetts,⁶ Montana,⁷ Nevada,⁸ New Mexico,⁹ New York,¹⁰ North Carolina,¹¹ North Dakota,¹² Oregon,¹³ and Virginia.¹⁴ The Committee carefully evaluated how such guidelines have been applied in those jurisdictions.

The Committee borrowed language from these sources, edited it to reflect specific elements of Texas procedure, and drafted new guidelines to address new issues (e.g., the representation of defendants with mental health issues and post-trial representation).

A draft version of the Guidelines was circulated to criminal justice stakeholders across the state in Spring 2010. The committee received hundreds of comments from lawyers, judges, and legal organizations and made every effort to listen to and learn from the many people who took time to contribute to the process. The Committee spent the next six months evaluating this input and editing the draft and presented a final version to the State Bar Board of Directors that was adopted early this year.

These new Guidelines for non-capital cases are a companion to the Guidelines and Standards for Texas Capital Counsel adopted by the Board of Directors in April 2006.

Potential Application of the Guidelines

The Guidelines can be applied in many ways by both defense lawyers and county officials who want to improve indigent defense in their jurisdiction.

Here are some examples of how defense attorneys can use the Guidelines:

- As a personal checklist that is useful for attorneys at every level of experience. Although some of the items on the checklist will seem very basic to experienced criminal defense lawyers, they can help lawyers revisit practice routines as well as alert lawyers to necessary actions when they accept a type of case they do not normally handle. Checklists of basic process steps have been shown to improve outcomes in other fields,¹⁵ and criminal law is no exception;
- As a tool to assist in the training of new criminal defense attorneys. This is particularly important because defense

lawyers frequently begin their careers as sole practitioners and have less access to formal training and mentoring than do lawyers who start their careers in association with more experienced attorneys;

- As a tool for self-evaluation, both as an individual attorney and, where applicable, as a public defender's office or other group of defense lawyers;
- As an objective tool for the internal evaluation of attorneys in a public defender's office or managed assigned counsel system;
- As a tool for advocating for additional resources for criminal defendants and/or defender offices (e.g., greater access to investigative services). Lawyers have used the previously adopted capital guidelines for this purpose in death penalty cases;¹⁶ and
- As persuasive authority for arguing that a client did not receive effective assistance of counsel at an earlier stage of the proceedings. Although the Guidelines do not create standards that the courts must enforce when evaluating ineffective assistance claims, courts may find that the Guidelines are persuasive in certain cases and may cite them in the same manner as other non-binding authority, such as law review articles. The U.S. Supreme Court has cited similar American Bar Association performance guidelines in support of findings of ineffective assistance in death penalty cases.¹⁷

Here are some examples of how judges and local officials can use the Guidelines:

- To supplement the experience-based attorney qualifications in county indigent defense plans. The Fair Defense Act (FDA) requires counties to adopt objective qualifications that attorneys must meet in order to be eligible to receive court appointments.¹⁸ All counties have adopted qualifications that focus on attorneys' prior experience, e.g., number of years in criminal law practice and number of jury trials.¹⁹

The FDA recognizes that these experience-based qualifications alone are insufficient to guarantee high-quality representation, and specifies that attorneys who meet the qualifications also must be approved by a majority of the judges in their jurisdiction.²⁰ This judicial approval requirement protects defendants by enabling judges to keep experienced attorneys off the appointment list if their current performance on behalf of their clients is inadequate. However, the subjective nature of this approval has left it vulnerable to claims of retaliation.²¹ The Guidelines can assist local jurisdictions by providing objective and transparent benchmarks for attorney performance that can be used in the FDA process for attorney review.

- As a tool for improving attorney performance, by requiring attorneys to be familiar with and follow the Guidelines as a condition for receiving court appointments. In addition to general concerns about the quality of counsel provided with public funds, defense attorneys' failure to perform certain actions can have a direct impact on the county budget. For example, attorneys' failure to meet promptly with their clients or to file motions for bond reductions in appropriate cases can contribute to county jail overcrowding. Counties can encourage these actions, which are addressed in the Guidelines, by requiring attorneys on the appointment wheel to use the Guidelines in their practice.

Adherence to the Bar's capital guidelines already is required to get on the appointment list for death penalty cases in parts of the state.²²

- As a reference for setting compensation levels for indigent defense cases. Counties are required to pay lawyers who represent indigent defendants "a reasonable attorney's fee ... based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel."²³ By detailing the many actions required of criminal defense counsel, the Guidelines can provide an important resource as counties review whether their current fee schedules adequately compensate appointed counsel for all of the "labor required" to represent criminal defendants.

Conclusion

The Performance Guidelines for Non-Capital Criminal Defense Representation are a move ahead for the Texas criminal justice system and the legal profession. Their use will help ensure that people accused of crimes will receive not just a lawyer, but a lawyer who is ready and able to do the job they should do under the law. ✪

Notes

1. Act of May 31, 2011, 82nd Leg., R.S., ch. __, § __, 2011 Tex. Gen. Laws __. The budget bill, House Bill 1, had not been signed by Gov. Rick Perry at the time of publication. Furthermore, the House and Senate each included \$7.6 million in additional funds for indigent defense in their respective versions of Senate Bill 2 during the first called special session. The Senate had not considered the House amendments to Senate Bill 2 at the time of publication.
2. American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function (3rd ed., 1993), available at americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html.
3. National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation (1997), available at www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.
4. Georgia Public Defender Standards Council, State of Georgia Performance Standards for Criminal Defense Representation in Indigent Criminal Cases (2004), available at www.gpdsc.com/docs/cpdsystem-standards-%20performance%20_5-21-04_.pdf.
5. Louisiana Public Defender Board, Trial Court Performance Standards (2010), available at lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/LPDB%20Trial%20Court%20Performance%20Standards.pdf.
6. Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual, Ch. 4 Performance Standards Governing the Representation of Indigent Persons in Criminal cases (2004), available at http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_4_full.pdf.
7. Montana Office of the State Public Defender, Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act (2010), available at publicdefender.mt.gov/forms/pdf/Standards.pdf.
8. New Mexico Public Defender Department, Performance Guidelines for Criminal Defense Representation (1998), available at pdd.state.nm.us/aboutus/guidelinesforcriminaldefense.pdf.
9. New York State Bar Association, Standards for Providing Mandated Representation (2005), available at nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726; New York State Defenders Association, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), available at nysda.org/04_NYSDAStandards_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf.
10. North Carolina Commission on Indigent Defense Services, Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level (2004), available at www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf.

12. North Dakota Commission on Legal Counsel for Indigents, Minimum Attorney Performance Standards, Criminal Matters, *available at* nd.gov/indigents/docs/performanceStandardsCriminal.pdf.
13. Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases (1996), *available at* [nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa7914dae4947ae3537e4852566d6000dae23/\\$FILE/Oregon.pdf](http://nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa7914dae4947ae3537e4852566d6000dae23/$FILE/Oregon.pdf)
14. The Virginia Indigent Defense Commission, Standards of Practice for Indigent Defense Counsel (2006), *available at* indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice.pdf.
15. See Atul Gawande, *The Checklist*, *The New Yorker*, Dec. 10, 2007.
16. Cf. *Ex parte Van Alstyne*, 239 S.W.3rd 815, 822 n.22 (Tex. Crim. App. 2007) (citing Texas capital guidelines as authority for defense counsel's need for mental health expert to supplement counsel's own observations of client's mental state).
17. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (citing American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as benchmark for what constitutes reasonable performance of counsel in a death penalty case, and finding counsel ineffective for failing to discover all reasonably available mitigating evidence as required by the ABA guidelines).
18. Tex. Code Crim. Proc. art. 26.04(e).
19. See, e.g., Bexar County Criminal District Courts Plan: Standards and Procedures Related to Appointment of Counsel for Indigent Defendants 5.22 (2009), *available at* tfid.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=26 (creating five attorney appointment lists based on the seriousness of the offense and stage of the proceedings and specifying experience requirements for each list; e.g., attorneys must have at least one year prior experience in criminal litigation and prior experience as lead or co-counsel in at least three criminal jury trials to be included on the state jail felony list).
20. Tex. Code Crim. Proc. art. 26.04(d).
21. See, e.g., *Davis v. Tarrant County*, 565 F.3d 214, 217–18 (2009) (suit by crimi-

nal defense attorney alleging his application for inclusion on felony court appointment wheel was denied because he did not have good personal relationships with judges; dismissed on immunity grounds).

22. See, e.g., Standards for the Qualification of Attorneys for Appointment to Death Penalty Cases in the Eighth Administrative Judicial Region of Texas Pursuant to Article 26.052 of the Texas Code of Criminal Procedure (2006), *available at* tfid.tamu.edu/CountyDocuments/Region8/Standards%20for%20the%20Qualification%20of%20Attorneys%20for%20Appointment%20to%20Death%20Penalty%20Cases.pdf.
23. Tex. Code Crim. Proc. art. 26.05(a).

JEFF BLACKBURN

is chair of the State Bar Committee on Legal Services to the Poor in Criminal Matters. He is a criminal defense and civil rights lawyer and founder and chief counsel to the Innocence Project of Texas.

ANDREA MARSH

chairs the State Bar Legal Services to the Poor in Criminal Matters subcommittee that drafted the Performance Guidelines for Non-Capital Criminal Defense Representation. She is executive director of the Texas Fair Defense Project.



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PURPOSE AND SCOPE OF THE PERFORMANCE GUIDELINES

The Guidelines are intended to serve several purposes. The foremost purposes are to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of indigent defendants.

The Guidelines are intended to alert defense counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist counsel in deciding upon the particular actions that must be taken in each case to provide the client the best representation possible. The Guidelines also are intended to provide a measure by which the performance of individual attorneys may be evaluated and to assist in training and supervising attorneys.

The language of the Guidelines is general, implying flexibility of action appropriate to the particular situation at issue. Use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “when appropriate.” When a particular course of action is appropriate in most circumstances, the Guidelines use the word “should.” When a particular action is absolutely essential to providing quality representation, the Guidelines use the words “shall” or “must.” Even when the Guidelines use the words

“should” or “shall,” or “must,” in certain situations the lawyer’s best informed professional judgment and discretion may indicate otherwise. Variations from the Guidelines also may be appropriate to accommodate local court procedures; however, counsel should protect a client’s rights and, when necessary, preserve error when local practices conflict with the client’s rights under state and federal law or counsel’s ethical obligations to the client.

The Guidelines are not criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. The Guidelines may or may not be relevant to such a judicial determination, depending upon all of the circumstances of the individual case.

The Guidelines specifically apply to practice in Texas state court from the time of initial representation in trial-level proceedings to the exhaustion of direct review before the Court of Criminal Appeals. In any particular case, the Guidelines begin to apply at the time an attorney-client relationship is formed. The Guidelines require counsel to advise clients of their right to seek federal review in appropriate circumstances but do not extend to representation of defendants in federal court.

Guideline 1.1 Role of Defense Counsel

- A. The primary and most fundamental obligation of defense counsel is to provide zealous and effective representation for the client at all stages of the criminal process. Counsel’s role in the criminal justice system is to fully protect and advance the client’s interests and rights. If personal matters make it impossible for counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the client. Counsel’s personal opinion of the client’s guilt is totally irrelevant. The client’s financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney.
- B. Counsel also has an obligation to uphold the ethical standards of the State Bar of Texas and to act in accordance with the rules of the court.

Guideline 1.2 Education, Training and Experience of Defense Counsel

- A. To provide competent, quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction, including changes and developments in the law. Counsel must maintain research capabilities necessary for presentation of relevant issues to the court. Counsel should participate in skills training and education programs in order to maintain and enhance skills.

- B. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept more serious and complex criminal cases only after having had experience or training in less complex criminal matters. When appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.
- C. If representing a client with mental illness or a developmental disability, counsel should become familiar with the symptoms of the client’s mental impairment and those symptoms’ potential impact on the client’s culpability in the case and potential use as a mitigating factor during sentencing. Counsel also should be familiar with the side effects of any medication the client may be taking to treat the client’s mental impairment and the impact those side effects may have on the client’s culpability in the case or use as a mitigating factor during sentencing.
- D. Attorneys who represent individuals who are charged with capital offenses in which the prosecution is seeking death must adhere to the *Guidelines and Standards for Texas Capital Counsel* adopted by the State Bar Board of Directors in 2006.

Guideline 1.3 General Duties of Defense Counsel

- A. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to confirm that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.
- B. Counsel has the obligation to maintain regular contact with the client and keep the client informed of the progress of the case, when it is possible to do so. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.
- C. Counsel should adequately inform the client of the client's legal obligations related to the case, such as conditions of release or sentencing terms, and have the client verbally restate the obligations in order to ascertain the client's understanding of those obligations.
- D. If appointed to represent an indigent client, counsel shall make every reasonable effort to contact the client not later than the end of the first working day after the date on which counsel is appointed, in compliance with Code of Criminal Procedure 26.04(j). In making this contact, counsel should provide the client with an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with counsel.
- E. Counsel should appear timely for all scheduled court appearances in a client's case.
- F. Counsel should spend appropriate time on each case regardless of whether counsel is appointed or retained. Counsel shall not suggest to an appointed client that counsel would provide preferential treatment if counsel were retained or otherwise compensated beyond the fee paid by the court for their work on a case.
- G. Counsel must be alert to all potential and actual conflicts of interest.
- H. If a conflict develops during the course of representation, counsel has a duty to notify the client and, generally, the court. Notice must be provided to the court without disclosing any confidential information.
- I. If counsel's caseload is so large that counsel is unable to satisfactorily meet these performance guidelines, counsel shall inform the court or courts before whom counsel's cases are pending.
- J. If appointed to represent an indigent client, pursuant to Code of Criminal Procedure 26.04(j), counsel shall continue to represent the client until charges are dismissed, the client is acquitted, appeals are exhausted, or counsel is relieved of counsel's duties by the court or replaced by other counsel after a finding of good cause is entered on the record.
- K. If counsel withdraws from representation, counsel has an obligation to deliver all contents of the client's file, including notes by counsel, to new counsel if requested. Counsel shall timely respond to any reasonable request by new counsel regarding the case.

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

When appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

Guideline 2.2 Initial Interview

- A. Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. When necessary, counsel may arrange for a designee to conduct the initial interview. If the initial interview is completed by a designee, counsel shall interview the client personally at the earliest reasonable opportunity.
- B. *Preparation:*
After being assigned to a case and prior to conducting the initial interview, counsel should, when possible, do the following:
 1. Be familiar with the elements of the offense and the potential punishment range, if the charges against the client are already known;
 2. Obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial services agencies concerning pretrial release, and law enforcement reports; and
 3. If representing client with mental illness, obtain reports from jail staff on the client's mental health status at the time of booking into the jail and the client's current mental health status.In addition, if the Client is incarcerated, counsel should:
 4. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting pretrial release conditions;
 5. Be familiar with the different types of pretrial release conditions the court may set, any written pretrial release policies of the judicial district, and whether any pretrial service or other agency is available to act as a custodian for the client's release;
 6. Be familiar with any procedures available for reviewing the trial judge's setting of bail; and
 7. Be familiar with Code of Criminal Procedure 17.032, which sets forth the procedure by which certain mentally ill defendants may be released on personal bond.
- C. *The Interview:*
 1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release if the client is incarcerated, and also to provide the client with information concerning the case. At this and all successive interviews and proceedings, counsel should make every effort to overcome barriers to communication, such as differences in language or literacy, disability, or different cultural backgrounds. When appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.
 2. In addition, counsel should obtain from the client all release forms necessary to obtain the client's medical,

psychological, education, military, prison, and other records as may be pertinent.

3. In some jurisdictions, videoconferencing or teleconferencing is available for meeting with the client from a remote location, rather than traveling to the jail. Videoconferencing or teleconferencing is not preferred for the initial interview. Videoconferencing or teleconferencing is never recommended for contact with mentally ill clients or clients who have a developmental disability.
4. While obtaining the information specified in item 5 below during the initial interview is important to preparation of the defense of the client's case, if working with a mentally ill or developmentally disabled client, counsel should be aware of symptoms of the client's mental impairment that may make it difficult to obtain some of the information. Counsel may need to make a few visits to the client to obtain the specified information or obtain the information from multiple sources, depending on the client's state of mind and ability to provide counsel with information.
5. Information that should be acquired includes, but is not limited to:
 - a. The client's ties to the community, including the length of time the client has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);
 - b. The client's physical and mental health, educational, employment, social security/disability, and armed services records;
 - c. The client's immediate medical needs;
 - d. The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether the client is on probation or parole and the client's past or present performance under supervision;
 - e. The ability of the client to meet any conditions of release, including financial conditions;
 - f. The names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;
 - g. Any necessary information waivers or releases that will assist in the client's defense, including preparation for sentencing; the written releases obtained should include a HIPAA (Health Insurance Portability and Accountability Act) compliant release in case medical records are required; and
 - h. Any other information that will assist the client's defense, including mitigation information for use in preparation for sentencing.
6. Information to be provided to the client includes, but is not limited to:
 - a. An explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - b. An explanation of the types of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that

the client should not make statements concerning the offense;

- c. An explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with counsel;
 - d. The charges and the potential penalties;
 - e. A general procedural overview of the progression of the case, when possible;
 - f. Realistic answers, when possible, to the client's most urgent questions;
 - g. What arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers;
 - h. How and when counsel can be reached; and
 - i. When counsel intends to see the client next.
- D. *Supplemental Information*
Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:
1. The facts surrounding the charges against the client;
 2. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
 3. Any possible witnesses who should be located;
 4. Any evidence that should be preserved; and
 5. When appropriate, evidence of the client's competence to stand trial or mental state at the time of the offense.

Guideline 3.1 Initial Appearance before the Magistrate and Pretrial Release Proceedings

- A. At the initial appearance on the charges before the magistrate, counsel should preserve the client's rights by seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges.
- B. Counsel should request a timely examining trial if the client is entitled to one unless there is a sound tactical reason not to do so.
- C. When appearing at a bond hearing, counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, when appropriate, to make a proposal concerning conditions of release.
- D. Counsel should adequately inform the client of the client's conditions of release after such conditions have been set.
- E. If the client is unable to fulfill the conditions of release set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.
- F. If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should inform the client of the available options and the procedures that must be followed in posting such assets. When appropriate, counsel should advise the client and others acting on the client's behalf how to properly post such assets.
- G. The decision as to whether or not the client should testify at any bond hearing shall be made after consultation

between counsel and the client. In the event that the client and counsel decide that it would be in the best interest of the client to testify regarding bond, counsel should instruct the client not to answer any questions that do not pertain strictly to the issue of bond.

- H. If the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical, psychiatric, or security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs. Counsel should follow up with the client regarding whether medications or treatments are being given in jail, and notify the court or relevant jail management personnel if any problems arise.

Guideline 3.2 Examining Trial

- A. Before conducting an examining trial, counsel should make reasonable efforts to secure and review information in the prosecution's or law enforcement authorities' possession. When necessary, counsel should pursue such efforts through formal and informal discovery unless there is a sound tactical reason for not doing so.
- B. If the client is entitled to an examining trial, counsel should take steps to see that the examining trial is conducted timely unless there are strategic reasons for not doing so.
- C. In preparing for the examining trial, counsel should become familiar with:
1. The elements of each of the offenses alleged;
 2. The law of the jurisdiction for establishing probable cause;
 3. Factual information that is available concerning probable cause;
 4. The subpoena process for obtaining compulsory attendance of witnesses at an examining trial and the necessary steps to be taken in order to obtain a proper record of the proceedings;
 5. The potential impact on the admissibility of any witness's testimony if the witness is later unavailable at trial;
 6. The tactics of calling the client as the witness; and
 7. The tactics of proceeding without discovery materials.
- D. Counsel should meet with the client prior to the examining trial. Counsel must evaluate and advise the client regarding the consequences of waiving an examining trial and the tactics of full or partial cross-examination.
- E. If counsel becomes aware that the client is the subject of a grand jury investigation, counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Texas law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

Guideline 3.3 Competency to Stand Trial

- A. The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea. Counsel is often in the best position to discern whether the client may not be competent to stand trial.
- B. Counsel should be familiar with Code of Criminal Procedure Article 46B, which governs proceedings surrounding incompetence to stand trial.
- C. During the initial interview with the client, counsel should note signs that a mentally ill or developmentally disabled client may not be competent to stand trial. Signs include, but are not limited to: inability to communicate with counsel; delusions; psychosis; intellectual inability to comprehend the proceedings; and inability to remember or articulate the circumstances of arrest.
- D. Counsel should request mental health records from the client's mental health provider and history of psychiatric treatment in the jail, if any.
- E. If counsel believes the client may be incompetent to stand trial, counsel should file a motion to have the client examined for competency. The motion to have a client examined for competency may be supported by affidavits setting out the facts on which the suggestion of incompetence is made.
- F. If counsel has determined that the client may be incompetent to stand trial, and it appears that transporting the client to and from court for routine proceedings at which the client's presence is not needed may cause disruption or undue stress for the client, counsel should consider requesting that the client not be transported to court unless or until the client's presence is necessary.
- G. If the court finds that there is some evidence that would support a finding of incompetence, the judge is required to stay all other proceedings in the case and order a competency evaluation. Counsel should facilitate setting up the competency evaluation as soon as possible. The sooner the evaluation is completed, the sooner the client can receive the mental health treatment that the client may need. Courts often have a list of professionals who have been approved to provide these evaluations.
- H. Counsel should investigate competency restoration treatment options including outpatient or community competency restoration.
- I. If client is in custody while awaiting competency restoration, counsel should communicate with the Sheriff's office regarding when the client will be transported to the hospital or treatment program.
- J. To the extent it is possible to communicate with the client, counsel should keep the client informed of when the client will be going to the hospital.
- K. Counsel should provide contact information to the social workers at the hospital and stay in touch with the social workers regarding the client's status.
- L. When the client is returned from the hospital after competency restoration treatment, counsel should request that the client's case be placed back on the docket as quickly as possible to prevent the client from decompen-sating upon return to the jail, but before the case can be resolved.

Guideline 3.4 Prosecution Requests for Non-Testimonial Evidence

Counsel should be familiar with and understand the law governing the prosecution's power to require a client to provide non-testimonial evidence, such as handwriting exemplars and physical specimens, the circumstances in which a client may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

Guideline 4.1 Investigation

A. Counsel has a duty to conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. Counsel should, regardless of the client's wish to admit guilt, determine whether the charges and disposition are factually and legally correct and inform the client of potential defenses to the charges. Counsel should explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. In no case should counsel delay a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed.

B. Sources of review and investigative information may include the following:

1. *Charging documents, statutes, and case law*

The arrest warrant, accusation, complaint, and information or indictment documents, along with any supporting documents used to establish probable cause, should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

- a. The elements of the offense with which the client is charged;
- b. The defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses;
- c. Any lesser included offenses that may be available;
- d. Any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy; and
- e. The applicable punishment range for the charged offense and all potential lesser included offenses.

2. *The client*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to obtain information as described above under the performance guideline applicable to the initial interview of the client. Information relevant to sentencing also should be obtained from the client when appropriate.

3. *Potential witnesses*

Counsel should consider whether to interview potential witnesses, including any complaining witnesses, others adverse to the client, and witnesses favorable to the client. If counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt

to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.

4. *The police and prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so.

5. *The courts*

When possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel also should review the client's prior court file(s) when appropriate.

6. *Information in the possession of third parties*

When appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

7. *Physical evidence*

When appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing and counsel should examine any such physical evidence. Upon completion of the inspection of the physical evidence, counsel should determine whether independent analysis or testing of the evidence is appropriate and, if so, seek the services of a qualified expert to complete such analysis or testing.

8. *The scene*

When appropriate, counsel or an investigator should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed or retained. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense.

9. *Expert assistance*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize experts and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:

- a. The preparation of the defense;
- b. Adequate understanding of the prosecution's case;
- c. Rebut the prosecution's case or provide evidence to establish any available defense;
- d. Investigate the client's competence to proceed, mental state at the time of the offense, or capacity to make a knowing and intelligent waiver of constitutional rights; and
- e. Mitigate any punishment that may be assessed after a verdict or plea of guilty to the alleged offense.

10. *Mental Health Records*

If representing a client with mental illness or a developmental disability, counsel should seek available mental health records (e.g., records of previous court cases in which mental health issues may have been raised; mental health treatment records, whether institutional or in the community). Counsel should consider obtaining these records using a HIPAA (Health Insurance and Portability Act) release instead of a subpoena in order to maintain client confidentiality.

- C. During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel also should consider how best to respond to objections that could be raised by the prosecution.

Guideline 4.2 Formal and Informal Discovery

- A. Counsel has a duty to pursue discovery procedures provided by the rules of the jurisdiction and such informal discovery methods as may be available. Counsel should pursue formal and informal discovery as soon as practicable and to the extent reasonably necessary to zealously and effectively represent the client.
- B. Counsel should consider seeking discovery of the following items:
1. All information to which the client is entitled under Art. 39.14 of the Texas Code of Criminal Procedure;
 2. Potential exculpatory information;
 3. Potential mitigating information;
 4. Potential favorable information;
 5. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
 6. Any other information that may be used to impeach the testimony of prosecution witnesses;
 7. All oral or written statements by the client, and the details of the circumstances under which the statements were made;
 8. The prior criminal record of the client and any evidence of other misconduct that the government may intend to use against the client;
 9. Statements made by co-defendants;
 10. Statements made by other potential witnesses;
 11. All official reports by all law enforcement and other agencies involved in the case, e.g., police, arson, hospital, results of any scientific test(s);
 12. All records of evidence collected and retained by law enforcement;
 13. All video/audio recordings or photographs relevant to the case, as well as all recordings of transmissions by law enforcement officers, including radio and computer transmissions;
 14. All books, papers, documents, tangible objects, buildings or places, or copies, descriptions, or other representations or portions thereof, relevant to the case;
 15. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof; and
 16. A written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.

- C. If counsel has made formal discovery demands, counsel should seek prompt compliance and sanctions for failure to comply.

- D. Counsel should timely comply with all of the requirements governing disclosure of evidence by the client and notice of defenses and expert witnesses. Counsel should be aware of the possible sanctions for failure to comply with those requirements.

Guideline 4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case and develop strategies for advancing appropriate defenses and mitigating factors, including those related to mental health, on behalf of the client.

Guideline 5.1 Arraignment

Counsel should preserve the client's rights at arraignment by:

- A. Entering a plea of not guilty in all but the most extraordinary circumstances when a sound tactical reason exists for not doing so; and
- B. Requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury.

Guideline 5.2 The Decision to File Pretrial Motions

- A. Counsel should consider filing an appropriate pretrial motion whenever a good-faith reason exists to believe that the client is entitled to relief that the court has discretion to grant.
- B. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:
1. The pretrial custody of the client and the filing of a motion to review conditions of release;
 2. The competency of the client;
 3. The constitutionality of the relevant statute or statutes;
 4. Potential defects in the charging process;
 5. The sufficiency of the charging document;
 6. Severance of charges or defendants;
 7. The discovery obligations of the prosecution;
 8. The suppression of evidence gathered as the result of violations of the Fourth, Fifth, Sixth, or Fourteenth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions and statutes, including:
 - a. The fruits of illegal searches or seizures;
 - b. Involuntary statements or confessions;
 - c. Statements or confessions obtained involuntarily or in violation of the client's right to counsel, or privilege against self-incrimination; and
 - d. Unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification.
 9. The suppression of evidence gathered in violation of any right, duty, or privilege arising out of state or local law;
 10. Change of venue;
 11. Access to resources that or experts who may be denied to the client because of the client's indigence;

12. The client's right to a speedy trial;
 13. The client's right to a continuance in order to adequately prepare or present the client's case;
 14. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion; and
 15. Matters of trial or courtroom procedure.
- C. Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:
1. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
 2. Changes in the governing law might occur after the filing deadline that could enhance the likelihood that relief ought to be granted; and
 3. Later changes in the strategic and tactical posture of the defense case may occur that affect the significance of potential pretrial motions.
- D. Counsel should request a full evidentiary hearing on any pretrial motion to the extent necessary to preserve the issue adequately for appellate review.
- E. Counsel should consider the advisability of disqualifying or substituting the presiding judge. This consideration should include any information about the judge's history in aligning with the prosecution on bail issues or motion rulings, any routine refusals of plea bargains, the client's experience with the judge, and any specific dislike of counsel, other defense counsel, or defense counsel in general. The decision to disqualify a judge shall only be made when it is a reasoned strategy decision and in the best interest of the client. The final decision rests with counsel.
- F. Requests or agreements to continue a trial date should be discussed with the client before they are made.
- G. Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

Guideline 5.3 Filing and Arguing Pretrial Motions

- A. Motions should be filed in a timely manner in accordance with statute and local rule, should comport with the formal requirements of the court rules, and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect the filing might have upon the client's speedy trial rights.
- B. If a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
 1. Investigation, discovery, and research relevant to the claim advanced;
 2. The subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
 3. Full understanding of the burdens of proof, evidentiary principles, and trial court procedures applicable to the hearing, including the benefits and potential consequences and costs of having the client testify;

4. The assistance of an expert witness when appropriate and necessary;
 5. Familiarity with all applicable procedures for obtaining evidentiary hearings prior to trial; and
 6. Preparation and submission of a memorandum of law when appropriate.
- C. In every case, counsel should examine whether it is appropriate to file a motion to suppress evidence or statements.
- D. In every case that proceeds to trial, counsel should file timely and appropriate motions in limine to prohibit improper prosecutorial practices and to shield the jury from potentially improper evidence. Counsel should remain aware that the granting of a motion in limine alone will not preserve error on appeal.
- E. Counsel should obtain a clear ruling on any pretrial motion on the record or in writing.

Guideline 5.4 Subsequent Filing of Pretrial Motions

- A. Counsel has a continuing duty to raise any issue that was not raised before trial, because the facts supporting the motion were not reasonably available at that time. Further, counsel shall be prepared, when appropriate, to renew a pretrial motion if new supporting information is disclosed in later proceedings.
- B. When appropriate, counsel should file an interlocutory appeal from the denial of a pretrial motion.
- C. When negotiating the entry of a guilty plea, counsel should consider reserving the right to appeal the denial of a pretrial motion.

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

- A. Under no circumstances should counsel recommend to the client acceptance of a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial. The amount of appropriate investigation will vary by case.
- B. After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial, and in doing so counsel should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.
- C. Counsel should obtain the consent of the client before entering into any plea negotiation. Exploratory inquiries of the prosecution prior to obtaining client consent are permitted.
- D. Counsel should keep the client fully informed of any continued plea discussions and negotiations and promptly convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.
- E. Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel also should explain to the client the impact of the decision to enter a

guilty plea on the client's right to appeal. Although the decision to enter a guilty plea ultimately rests with the client, if counsel believes the client's decisions are not in the client's best interest, counsel should attempt to persuade the client to change the client's position.

- F. The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.
- G. Counsel should confirm that all conditions and promises comprising a plea agreement between the prosecution and defense are included in writing or in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

A. In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular jurisdiction, judge, and prosecution that may impact the content and likely results of a negotiated plea agreement.

B. In order to develop an overall negotiation plan, counsel should be fully aware of, and make the client fully aware of:

1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;
2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;
3. If a plea involving community supervision or deferred adjudication community supervision is under consideration, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;
4. If a plea involving deferred adjudication community supervision is under consideration, special considerations regarding such a plea including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;
5. If a plea of no contest is under consideration, differences between a no contest plea and a guilty plea including the potential collateral uses of such a plea in subsequent judicial proceedings;
6. Any registration requirements including sex offender registration and job-specific notification requirements;
7. The availability of appropriate diversion and rehabilitation programs;
8. The possible and likely place and manner of confinement;
9. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
10. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
11. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence on a parole status;

12. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

13. Deportation and other possible immigration consequences that may result from the plea;

14. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions;

15. The effect on appellate rights; and

16. That plea bargains are not binding on the court.

C. In developing a negotiation strategy, counsel should be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

- a. Not to proceed to trial on the merits of the charges;
- b. To decline from asserting or litigating any particular pretrial motions;
- c. An agreement to fulfill specified restitution conditions or to participate in community work or service programs, or in rehabilitation or other programs;
- d. Providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;
- e. Admitting identity and waiving challenges to proof or validity of a prior conviction record;
- f. Foregoing appellate remedies; and
- g. Asset forfeiture.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

- a. That the prosecution will not oppose the client's release on bail pending sentencing or appeal;
- b. That the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
- c. To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
- d. That the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
- e. That the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
- f. That the prosecution will take, or refrain from taking, at the time of sentencing or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;
- g. That the prosecution will not present, at the time of sentencing or in communications with the preparer of the official presentence report, certain information; and
- h. That the client will receive, or the prosecution will recommend, specific benefits concerning the client's

place or manner of confinement or release on parole and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from incarceration.

- D. In developing a negotiation strategy, counsel should be familiar with the position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:
1. Consider whether interviewing the alleged victim or victims is appropriate and, if so, who is the best person to do so and under what circumstances;
 2. Consider to what extent the alleged victim or victims might be involved in the plea negotiations;
 3. Be familiar with any rights afforded the alleged victim or victims under the Victim's Rights Act or other applicable law; and
 4. Be familiar with the practice of the prosecutor or victim-witness advocate working with the prosecutor and to what extent, if any, the prosecution defers to the wishes of the alleged victim.
- E. In conducting plea negotiations, counsel should be familiar with:
1. The various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, and a plea in which the client is not required to personally acknowledge guilt;
 2. The advantages and disadvantages of each available plea according to the circumstances of the case, including whether or not the client is mentally, physically, and financially capable of fulfilling requirements of the plea negotiated;
 3. Whether the plea agreement is binding on the court and prison and parole authorities;
 4. Possibilities of pretrial diversion; and
 5. Any recent changes in the applicable statutes or court rules and the effective dates of those changes.

Guideline 6.3 The Decision to Enter a Plea of Guilty

- A. Counsel shall make it clear to the client that the client must make the ultimate decision whether to plead guilty. Counsel should investigate and explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses (if known), relevant concessions and benefits subject to negotiation, and possible consequences of a conviction after trial. Counsel should not base a recommendation of a plea of guilty solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- B. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential direct and collateral consequences of the agreement. Counsel shall advise the client if the agreement carries a risk that the client will be deported.
- C. The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision. If counsel reasonably believes that rejection of a plea offer is in the best interest of the client,

counsel should advise the client of the benefits and risks of that course of action. Similarly, if counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.

- D. A negotiated plea should be committed to writing whenever possible.
- E. Counsel should, whenever possible, obtain a written plea offer from the prosecution. If the prosecution does not provide counsel with a written plea offer, counsel should document in writing all the terms of the plea agreement offered to and accepted by the client.
- F. When the client verbally rejects a fully explained and detailed plea offer, counsel may ask the client to sign a written rejection of plea offer statement.

Guideline 6.4 Entry of the Plea before the Court

- A. Prior to the entry of the plea, counsel should:
1. Make certain that the client understands the rights the client will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
 2. Provide the client a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea, including whether the plea agreement is binding on the court and whether the court, having accepted the guilty plea, can impose a sentence greater than that agreed upon;
 3. Explain to the client the nature of the plea hearing and prepare the client for the role the client will play in the hearing, including answering questions of the judge and providing a statement concerning the offense; and
 4. If the plea is a non-negotiated plea, inform the client that once the plea has been accepted by the court, it may not be withdrawn after the sentence has been pronounced by the court.
- B. Counsel should investigate and inform the client of the consequences of a plea or a finding of guilty in state court for any current or future federal prosecution.
- C. When entering the plea, counsel should confirm that the full content and conditions of the plea agreement are placed on the record before the court.
- D. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. If the client has been released pending trial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. If the client is in custody prior to the entry of the plea, counsel should, when practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.
- E. Subsequent to the acceptance of the plea, counsel should make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Guideline 7.1 General Trial Preparation

- A. Throughout preparation and trial, counsel should consider the theory of the defense and make decisions and act in a manner consistent with that theory.

- B. The decision to seek to proceed with or without a jury during both the guilt and punishment phases of the trial rests solely with the client after consultation with counsel. Counsel should discuss the strategic considerations relevant to this decision with the client, including the availability of different sentencing options depending on whether sentence is assessed by a judge or jury and the need to obtain the prosecution's consent to proceed without a jury on guilt. Counsel should maintain a record of the advice provided to the client, as well as the client's decision concerning trial. Counsel has an obligation to advise the court of the client's decision in a timely manner.
- C. Counsel should complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
1. Subpoenaing and interviewing all potentially helpful witnesses;
 2. Subpoenaing all potentially helpful physical or documentary evidence;
 3. Obtaining funds and arranging for defense experts to consult or testify on evidentiary issues that are potentially helpful (e.g., testing of physical evidence, opinion testimony, etc.);
 4. Obtaining and reading transcripts of prior proceedings in the case or related proceedings;
 5. Obtaining photographs and preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may assist the fact finder in understanding the defense; and
 6. Obtaining and reviewing the court file of any co-defendant(s) and contacting co-defendant's counsel to obtain information about the co-defendant's case and ascertain, to the extent possible, what the co-defendant's strategy was or will be, and whether the outcome of the client's case will be affected thereby.
- D. When appropriate, counsel should have the following materials available at the time of trial:
1. Copies of all relevant documents filed in the case;
 2. Relevant documents prepared by investigators;
 3. Relevant documents provided by the prosecution;
 4. Reports, test results, and other materials subject to disclosure;
 5. Voir dire topics, plans, or questions;
 6. An outline or draft of counsel's opening statement;
 7. Cross-examination plans for all possible prosecution witnesses;
 8. Direct examination plans for all prospective defense witnesses;
 9. Copies of defense subpoenas and defense subpoena returns;
 10. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
 11. Prior statements of all defense witnesses;
 12. Reports from defense experts;
 13. A list of all defense exhibits, and the witnesses through whom they will be introduced;
 14. Originals and copies of all documentary exhibits;
 15. Proposed jury instructions, with supporting case citations if available;
 16. A list of the evidence necessary to support defense requests for jury instructions;
 17. Copies of all relevant statutes and cases; and
 18. An outline or draft of counsel's closing argument.
- E. If counsel or the prosecution will seek to introduce an audio or video tape or a DVD of a police interview or any other event, counsel should consider whether a transcript of the recording should be prepared and how the relevant portions of the recording will be reflected in the appellate record, when necessary, by stipulating those matters with the prosecution.
- F. Counsel should be familiar with the rules of evidence, the law relating to all stages of the trial process, and legal and evidentiary issues that can be reasonably anticipated to arise at trial.
- G. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, when appropriate, counsel should prepare motions and memoranda for such advance rulings.
- H. Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. Counsel must be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and make a record sufficient to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. As part of this effort, counsel should request, whenever necessary, that all trial proceedings, including voir dire, be recorded.
- I. If appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing. When necessary, counsel should file pretrial motions seeking appropriate clothing for the client and that court personnel follow appropriate procedures so as not to reveal to jurors that the client is incarcerated. Counsel should attempt to prevent the client from being seen by the jury in any form of physical restraint.
- J. Counsel should plan with the client the most convenient system for conferring throughout the trial. When necessary, counsel should seek a court order to have the client available for conferences.
- K. If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions should be discussed with the client before they are made.
- L. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Guideline 7.2 Voir Dire and Jury Selection

A. Preparation

1. Counsel should be familiar with the procedures by which both petit and grand jury venires are selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venires.
2. Counsel should be familiar with local practices and the

individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to those procedures.

3. Prior to jury selection, counsel should seek to obtain a prospective juror list and the standard jury questionnaire if feasible, and counsel should seek access to and retain the juror questionnaires that have been completed by potential jurors. Counsel should also consider requesting use of a separate questionnaire that is tailored to the client's case and should determine the court's method for tracking juror seating and selection.
 4. Counsel should tailor voir dire questions to the specific case. If appropriate, counsel should develop and file in advance of trial written voir dire questions that counsel would like the court to ask jurors. Among the purposes voir dire questions should be designed to serve are the following:
 - a. To elicit information about the attitudes of individual jurors, which will inform counsel and client about peremptory strikes and challenges for cause;
 - b. To determine jurors' attitudes toward legal principles that are critical to the defense, including, when appropriate, the client's decision not to testify;
 - c. To preview the case for the jurors so as to lessen the impact of damaging information that is likely to come to their attention during the trial;
 - d. To present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecution; and
 - e. To establish a relationship with the jury, when the voir dire is conducted by counsel.
 5. Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
 6. Counsel should be familiar with the law concerning challenges for cause, peremptory strikes, and requests for additional strikes. Counsel also should be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause that have been denied.
 7. When appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
 8. Counsel should consider seeking assistance from a colleague or a defense team member to record venire panel responses and to observe venire panel reactions. Counsel also should communicate with the client regarding the client's venire panel preferences.
- B. Examining the Prospective Jurors**
1. Counsel should take all steps necessary to protect the voir dire record for appeal, including, when appropriate, filing a copy of proposed voir dire questions not allowed by the court or reading such proposed questions into the record.
 2. If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors.
 3. In a group voir dire, counsel should avoid asking questions that may elicit responses that are likely to preju-

dice other prospective jurors or be prepared to examine such prejudices with the panel and address them appropriately.

4. Counsel should be familiar with case law regarding the client's right to be present during individual voir dire. Counsel should fully discuss the risks and benefits of asserting this right with the client.

C. Challenges

1. Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.
2. If challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
6. Counsel should object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecution.
7. Counsel should make every effort to preserve error in voir dire by urging proper objection or instruction.

Guideline 7.3 Opening Statement

- A. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- B. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
- C. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case. Counsel's opening statement also may incorporate these objectives:
 1. To provide an overview of the defense case;
 2. To identify the weaknesses of the prosecution's case;
 3. To identify and emphasize the prosecution's burden of proof;
 4. To summarize the testimony of witnesses, and the role of each witness in relationship to the entire case;
 5. To describe the exhibits that will be introduced and the role of each exhibit in relationship to the entire case;
 6. To clarify the jurors' responsibilities;
 7. To establish counsel's credibility with the jury;
 8. To prepare the jury for the client's testimony or failure to testify; and
 9. To state the ultimate inferences that counsel wishes the jury to draw.
- D. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecution makes to the jury during its opening statement.
- E. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should consider object-

ing, requesting a mistrial, or seeking a cautionary instruction, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

1. The significance of the prosecution's error;
2. The possibility that an objection might enhance the significance of the information in the jury's mind; and
3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Guideline 7.4 Confronting the Prosecution's Case

- A. Counsel should research and be fully familiar with all of the elements of each charged offense and should attempt to anticipate weaknesses in the prosecution's case.
- B. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for a directed verdict.
- C. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- D. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements that they may have made or adopted, and should consider doing so outside the presence of the jury.
- E. In preparing for cross-examination, counsel should:
 1. Consider the need to integrate cross-examination, the theory of the defense, and closing argument;
 2. Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking unnecessary questions or questions that may hurt the defense case;
 3. File a motion requesting the names and addresses of witnesses the prosecution might call in its case-in-chief or in rebuttal;
 4. Consider a cross-examination plan for each of the anticipated witnesses;
 5. Be alert to inconsistencies or variations in a witness's testimony;
 6. Be alert to possible variations between different witnesses' testimony;
 7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 8. When appropriate, obtain and review laboratory credentials and protocols and other similar documents for possible use in cross-examining expert witnesses;
 9. When appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
 10. Have prepared a transcript of all audio or video tape-recorded statements made by witnesses;
 11. Be alert to issues relating to witness credibility, including bias and motive for testifying; and
 12. Have prepared, for introduction into evidence, all documents that counsel intends to use during cross-examination, including certified copies of records such as prior convictions of witnesses and prior sworn testimony of witnesses.

- F. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecution may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.
- G. Prior to trial, counsel should ascertain whether the prosecution has provided copies of all prior statements of the witnesses it intends to call at trial. If disclosure is not timely made after the witness has testified, counsel should prepare and argue (a) motion(s) for:
 1. A cautionary instruction;
 2. Adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess when necessary;
 3. Exclusion of the witness's testimony and all evidence affected by that testimony;
 4. A mistrial;
 5. Dismissal of the case; and
 6. Any other sanctions counsel believes would remedy the violation.
- H. If appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, if necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Guideline 7.5 Presenting the Defense Case

- A. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- B. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel also should be familiar with the ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify. If the client does not follow counsel's advice, counsel should consider having the client acknowledge in writing the advice provided by counsel.
- C. The decision to testify rests solely with the client, and counsel should not attempt to unduly influence that decision. When counsel reasonably believes that testifying is in the best interest of the client, counsel should advise the client of the benefits and risks of that course of action. Similarly, when counsel reasonably believes that not testifying is in the best interest of the client, counsel should advise the client of the benefits and consequences of that course of action.
- D. Counsel should be aware of the elements and tactical considerations of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

- E. In preparing for presentation of a defense case, counsel should, when appropriate, do the following:
1. Consider all potential evidence that could corroborate the defense case, and the import of any evidence that is missing;
 2. After discussion with the client, make the decision whether to call any witnesses;
 3. Develop a plan for direct examination of each potential defense witness;
 4. Determine the implications that the order of witnesses may have on the defense case;
 5. Consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
 6. Consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
 7. Determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
 8. Consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
 9. Review all documentary evidence that may be presented;
 10. Review all tangible evidence that may be presented; and
 11. Be fully familiar with statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.
- F. In developing and presenting the defense case, counsel should consider the implications the defense case may have for a rebuttal by the prosecution.
- G. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel shall advise all witnesses about the sequestration of witnesses, the purpose of that rule and the consequences of disregarding it. When appropriate, counsel also should advise witnesses of suitable courtroom dress and demeanor.
- H. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- I. Counsel should conduct redirect examination as appropriate.
- J. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and make an offer of proof.
- K. Counsel should guard against improper cross-examination by the prosecution.
- L. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.
- M. Counsel should keep a record of all exhibits identified or admitted.

Guideline 7.6 Closing Argument

- A. Before argument, counsel should file and seek to obtain rulings on all requests for jury instructions in order to tailor or restrict the argument properly in compliance with the court's rulings.
- B. Counsel should be familiar with the substantive limits on both prosecution and defense summation.

- C. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- D. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, when appropriate, should consider:
 1. Highlighting weaknesses in the prosecution's case;
 2. Describing favorable inferences to be drawn from the evidence;
 3. Incorporating into the argument:
 - a. The theory and the theme(s) of the case;
 - b. Helpful testimony from direct and cross-examination;
 - c. Verbatim instructions drawn from the jury charge;
 - d. Responses to anticipated prosecution arguments; and
 - e. Visual aids and exhibits; and
 4. The effects of the defense argument on the prosecution's rebuttal argument.
- E. Counsel should consider incorporating into counsel's closing argument summation of the promises of proof the prosecution made to the jury during its opening.
- F. Whenever the prosecution exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking a cautionary instruction unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 1. Whether counsel believes that the case will result in a favorable verdict for the client;
 2. The need to preserve the objection for appellate review; and
 3. The possibility that an objection might enhance the significance of the information in the jury's mind.

Guideline 7.7 Jury Instructions

- A. Counsel should file proposed or requested jury instructions before closing argument.
- B. Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.
- C. Counsel always should submit proposed jury instructions in writing.
- D. When appropriate, counsel should submit modifications to the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, counsel should provide case law in support of the proposed instructions.
- E. When appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- F. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, when appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.
- G. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, when necessary, request additional or curative instructions.

- H. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.
- I. Counsel should reserve the right to make exceptions to the jury instructions above and beyond any specific objections that were made during the trial.
- J. Counsel should move to discuss any jury notes or responses to jury notes regarding substantive matters in open court and on the record, and to include the actual notes and responses in the record for appellate purposes.

Guideline 8.1 Obligations of Counsel in Sentencing

Among counsel's obligations in the sentencing process are:

- A. When a client chooses not to proceed to trial, to negotiate the plea agreement with consideration of the sentencing, correctional, financial, and collateral implications;
- B. To object and preserve error so that the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
- C. To seek and present to the court all reasonably available mitigating and favorable information that is likely to benefit the client;
- D. To seek the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
- E. To object to all information presented to the court that may harm the client and that is not shown to be accurate and truthful or is otherwise improper, and to seek to strike such information from the text of the presentence investigation report before distribution of the report;
- F. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted; and
- G. To identify and preserve legal and constitutional issues for appeal.

Guideline 8.2 Sentencing Options, Consequences and Procedures

- A. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
 - 1. The minimum and maximum term of imprisonment and fine or restitution that may be ordered, any mandatory punishment, and the possibility of forfeiture of assets;
 - 2. The potential for recidivist sentencing, including habitual offender statutes and sentencing enhancements, and all other applicable sentencing statutes or case law;
 - 3. If a sentence involving community supervision or deferred adjudication community supervision is possible, the permissible conditions of community supervision with which the client must comply in order to avoid revocation or adjudication;
 - 4. If a sentence involving deferred adjudication community supervision is possible, special considerations

- regarding such a sentence including sentencing alternatives in the event a motion to adjudicate is granted and the unavailability of a pardon;
- 5. The availability of appropriate diversion and rehabilitation programs; and
- 6. Applicable court costs.
- B. Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
 - 1. The possible and likely place and manner of confinement;
 - 2. The effects of good-time or earned-time credits on the sentence of the client, the period that must be served according to statute before the client becomes eligible for parole, and the general range of sentences for similar offenses committed by defendants with similar backgrounds;
 - 3. Whether the sentence will run concurrently or consecutively to any past or current sentence and, if known, to any future sentence;
 - 4. Any registration requirements, including sex offender registration and job-specific notification requirements;
 - 5. Possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if the client is serving a prior sentence;
 - 6. The possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;
 - 7. Deportation and other possible immigration consequences that may result from the plea; and
 - 8. Other consequences of conviction including, but not limited to, ineligibility for professional licensure and various government programs; prohibition from possessing a firearm; suspension of a motor vehicle operator's license; civil monetary penalties; loss of civil rights; and potential federal prosecutions.
- C. Counsel should be familiar with the sentencing procedures, including:
 - 1. The effect that plea negotiations may have upon the sentencing discretion of the court;
 - 2. The procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;
 - 3. The practices of those who prepare the sentencing services plan or presentence report, and the client's rights in that process;
 - 4. Access to the sentencing services plan or presentence report by counsel and the client;
 - 5. The defense sentencing presentation and sentencing memorandum;
 - 6. The opportunity to challenge information presented to the court for sentencing purposes;
 - 7. The availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and
 - 8. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

In preparing for sentencing, counsel should consider the need to:

- A. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

- B. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
- C. Obtain from the client and other sources relevant information concerning such subjects as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;
- D. Inform the client of the client's right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial, or trial on other offenses;
- E. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
- F. Prepare the client to be interviewed by the official preparing the presentence report and seek adequate time for the client to examine the presentence report, if one is utilized by the court;
- G. Inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of the client's right to speak personally for a particular sentence or sentences; and
- H. Collect documents and affidavits to support the defense position and, when relevant, prepare witnesses to testify at the sentencing hearing; when necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence and use subpoenas to secure relevant documents and witnesses.

Guideline 8.4 The Official Presentence Report

Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

- A. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; if preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
- B. Provide to the official preparing the report relevant information favorable to the client, including, when appropriate, the client's version of the offense, and supporting evidence;
- C. Attend any interview of the client by an agency presentence investigator, if there is a significant risk that information damaging to the client will be obtained unless counsel intervenes;
- D. Review the completed report;
- E. Take appropriate steps to preserve and protect the client's interests, including requesting that a new report be prepared with the challenged or unproved information deleted before the report is distributed to correctional and parole officials, when the defense challenges information in the presentence report as being erroneous or misleading and:

1. The court refuses to hold a hearing on a disputed allegation adverse to the client;
 2. The prosecution fails to prove an allegation; or
 3. The court finds an allegation not proved; and
- F. When appropriate counsel should request permission to see copies of the report to be distributed in order to verify that challenged information actually has been removed from the report.

Guideline 8.5 The Prosecution's Sentencing Position

- A. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.
- B. If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
- C. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the memorandum by the court and to prevent distribution of the memorandum to parole and correctional officials.

Guideline 8.6 The Defense Sentencing Memorandum

Counsel should prepare and present to the court a defense sentencing memorandum when there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

- A. Challenges to incorrect or incomplete information in the official presentence report or any prosecution sentencing memorandum;
- B. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report or any prosecution sentencing memorandum;
- C. Information contrary to that before the court and that is supported by affidavits, letters, and public records;
- D. Information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;
- E. Information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;
- F. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; and
- G. Presentation of a sentencing proposal.

Guideline 8.7 The Sentencing Process

- A. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- B. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

- C. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. If a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the client.
- D. When information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- E. If the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, and against deportation/exclusion of the client.
- F. When appropriate, counsel should prepare the client to personally address the court.

Guideline 8.8 Self-Surrender

If a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

Guideline 8.9 Expungement of Record

After final disposition of the case, counsel should inform the client of any procedures available for requesting that the client's records in the case be expunged and, if such procedures may be available in the client's case, when and under what conditions the client may pursue an expunction.

Guideline 9.1 Duties of Defense Counsel in Post-Trial Proceedings

- A. A client's right to counsel, and counsel's responsibilities to the client, do not terminate upon conviction, imposition of sentence, or order of deferred adjudication community supervision.
- B. Regardless of whether appointed or retained, and irrespective of the terms of any contract or legal services agreement, counsel must continue representation of the client until counsel has been formally granted permission to withdraw as counsel of record. Counsel shall continue to represent the client until appeals are exhausted, including in motion for new trial proceedings.
- C. If the client wishes to pursue post-trial remedies, counsel should do the following prior to seeking to withdraw as counsel for post-trial proceedings:
 1. Notify the trial court in advance if the client will submit an affidavit of indigency and may require immediate appointment of post-trial counsel; and
 2. If arrangements have not been made for new counsel by the day of the verdict, assist the client in filing a written notice of appeal and in requesting prompt appointment of post-trial counsel.

Guideline 9.2 Education, Training and Experience of Defense Counsel in Post-Trial Proceedings

To provide competent, quality representation in post-trial proceedings, counsel must possess the education, training, and experience specified in Guideline 1.2 and in addition be familiar with the Rules of Appellate Procedure and any local rules of the courts of appeal.

Guideline 9.3 Motion for a New Trial

- A. Counsel should be familiar with the procedures applicable to a motion requesting a new trial including:
 1. The time period for filing such a motion;
 2. The effect it has upon the time to file a notice of appeal;
 3. The grounds that can be raised;
 4. The evidentiary rules applicable to hearings on motions for new trial, including the requirement that factual allegations in the motion, or affidavits in support of such factual allegations, must be sworn to;
 5. The requirement that a motion for new trial be timely "presented" to the trial court in conformance with Rule of Appellate Procedure 21.6 in order to obtain a specific hearing date and preserve for appeal a claim that a request for a hearing was erroneously denied;
 6. The time period for receiving a ruling on a motion for new trial, after which the motion is overruled by operation of law; and
 7. The requirement that a trial court make written findings if a motion for new trial is granted.
- B. If a judgment of guilty has been entered against the client after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
 1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;
 2. The effect that such a motion might have upon the client's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion because of the opportunity to establish facts not in the trial record;
 3. The effect filing a motion for new trial will have on the time period for perfecting an appeal;
 4. Whether, after explaining to the client the client's rights to submit a motion for new trial, the client desires that such a motion be filed; and
 5. The effect filing a motion for new trial may have on the availability of other post-trial remedies.
- C. The decision to file a motion for new trial should be made after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a motion for new trial are:
 1. Denial of the client's right to counsel or right to be present during trial;
 2. A fundamentally defective jury charge;
 3. Jury misconduct;
 4. Intentional suppression of witness testimony or other evidence tending to show the client's innocence, preventing its production at trial;
 5. Denial of a continuance based upon a critical missing witness;

- 6. Sufficiency of the evidence; and
 - 7. Any claim that would require a new trial in the interest of justice.
- D. In the event that a motion for new trial is granted, counsel should be prepared to draft and timely file a reply brief in opposition to any appeal of that decision filed by the prosecution.

Guideline 9.4 Protecting the Right to Appeal

- A. Following trial, counsel shall inform the client of the client's right to appeal the judgment of the court and the action that must be taken to perfect an appeal. Counsel's advice to the client should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court.
- B. If the client wants to file an appeal and trial counsel will not be handling the appeal, counsel shall formally withdraw from the client's case in conformance with Guideline 9.1, but only after taking all steps necessary to preserve the right to appeal. These steps include:
- 1. Assisting the client in filing written notice of appeal in accordance with the rules of the court;
 - 2. Assisting in the preparation and filing of a motion for new trial, if any; and
 - 3. If the client is indigent, assisting the client in requesting prompt appointment of appellate counsel.
- C. If the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court. If an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

Guideline 9.5 Direct Appeal

- A. Counsel representing a client on direct appeal should be familiar with the procedures applicable to an appeal, including the rules specifying the time period for filing an appeal and the requirements for submission of the clerk's and reporter's records.
- B. Counsel should, upon being contacted by the court or client concerning representation for an appeal, immediately consult with the trial court to ascertain relevant information concerning the perfection of the appeal and relevant filing deadlines, in order to confirm that counsel's acceptance of the case permits the maximum opportunity for proper representation.
- C. When a client indicates a desire to appeal the judgment or sentence of the court, counsel should inform the client of any opportunity that may exist to be released on bail pending the disposition of the appeal and, if the client desires to pursue release pending appeal, file a motion requesting same including affidavits supporting such motion, and seek a hearing before the trial court.
- D. Counsel should immediately contact trial counsel to obtain background information on the client, information on the nature of the issues presented, and to determine whether filing a motion for new trial, if available, is necessary to, or will assist in, preserving the client's right to raise on appeal the issues that might be raised in the new trial motion.
- E. Retained counsel should, upon acceptance of appellate representation, immediately inform the court and the

prosecution of the representation by filing the appropriate designation of counsel with the court, and all counsel, both retained and appointed, must submit the proper designations of the clerk's and reporter's records as mandated by the Rules of Appellate Procedure.

- F. Counsel must review the clerk's and reporter's records to determine whether they are true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial or appellate courts in order to obtain corrections or hearings necessary to protect the reliability of the record.
- G. Counsel should fully review the appellate record for all reviewable errors, prepare a well researched and drafted appellate brief, file the brief in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure and any local rules, and notify the court of counsel's desire to present oral argument in the case, when appropriate.
- H. Counsel should consider preparing and filing a reply brief or a motion for rehearing if, under the circumstances, such is needed or required, particularly in order to make the court of appeals aware of legal or factual matters that may have been overlooked or mischaracterized or that may have newly developed.

Guideline 9.6 Right to File a Petition for Discretionary Review

In the event that the intermediate appellate court's decision is unfavorable to the client, counsel must advise the client in writing by certified mail of the client's right to file a petition for discretionary review and the action that must be taken to properly file such a petition. In advising the client of the right to file a petition for discretionary review, counsel should explain that:

- A. Review by the Court of Criminal Appeals is discretionary and not a matter of right, and that the Court of Criminal Appeals may refuse to review the client's case without providing any reason for doing so;
- B. If the client is indigent, the client does not have the right to appointed counsel for the purpose of filing a petition for discretionary review but that, upon request, counsel may be appointed for this purpose; and
- C. If the client is indigent and if the petition for discretionary review is granted, the client does have the right to court-appointed counsel for further proceedings on the merits before the Court of Criminal Appeals.

Guideline 9.7 Petition for Discretionary Review

- A. Counsel representing a client on a petition for discretionary review should be familiar with the procedures applicable to such a petition, including the rules specifying the time period for filing a petition; the organization of a petition; the page limits for a petition and the procedure for requesting an expansion of the petition for good cause; and appendices and copies required for filing a petition.
- B. If an intermediate appellate court has issued a decision unfavorable to the client, counsel should consider whether it is appropriate to file a petition for discretionary review with the Court of Criminal Appeals.
- C. The decision to file a petition for discretionary review should be made after considering the applicable law in light of the circumstances of each case and the reasons for

granting review specified in the Rules of Appellate Procedure. Reasons for review that counsel should consider presenting in a petition for discretionary review include:

1. Whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;
 2. Whether a court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals;
 3. Whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the United States Supreme Court;
 4. Whether a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued a statute, rule, regulation, or ordinance;
 5. Whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and
 6. Whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.
- D. In preparing a petition for discretionary review, counsel should fully review the appellate opinion for all reviewable errors, prepare a well researched and drafted petition, file the petition in a timely manner and in accordance with all other requirements in the Rules of Appellate Procedure, and notify the court of counsel's desire to present oral argument in the case, when appropriate.
- E. Should the Court of Criminal Appeals grant review on one or more issues presented in the petition, counsel should notify the client and prepare and timely file a brief on the merits in support of the grant of review.
- F. Counsel should be prepared to draft and timely file a reply brief in opposition to any brief filed by the prosecution.
- G. Counsel should be prepared to draft and timely file a motion for rehearing should the Court of Criminal Appeals deny relief after granting a petition for discretionary review and reviewing the case on the merits. Counsel should be prepared to timely defend against the prosecution's motion for rehearing should the court reverse the conviction.
- H. If the Court of Criminal Appeals summarily denies a petition for discretionary review, counsel should be prepared to draft and timely file a motion for rehearing if, in conformance with Rule of Appellate Procedure 79.2, there are substantial intervening circumstances justifying further review.

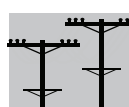
Guideline 9.8 Right to File a Petition for Certiorari to the United States Supreme Court

- A. In the event that the Court of Criminal Appeals either summarily denies a petition for discretionary review or denies relief after reviewing the client's case on the merits, counsel should advise the client in writing by certified mail of the client's right to file a petition for certiorari before the United States Supreme Court and the action that must be taken to properly file such a petition. In

advising the client of the right to file a petition for certiorari, counsel should explain that:

1. Review by the United States Supreme Court is discretionary and not a matter of right, and that the United States Supreme Court may refuse to review the client's case without providing any reason for doing so;
 2. If the client is indigent, client does not have the right to court-appointed counsel for the purpose of filing a petition for certiorari; and
 3. If the client is indigent and if the petition for certiorari is granted, the client may request the appointment of counsel for further proceedings on the merits before the United States Supreme Court.
- B. Considerations relevant to filing a petition for certiorari may include but are not limited to:
1. The Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decision of another state court of last resort or federal court of appeals; or
 2. The Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, or has decided an important federal question in a way that conflicts with decision of the United States Supreme Court. ❖

SAVE THE DATE!



STATE BAR OF TEXAS

Public Utility Law Section Annual Meeting and Seminar Friday, August 12, 2011

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The Public Utility Law Section's annual seminar is the premiere utility law conference in the state. This year's seminar will cover the latest developments from the 2011 sunset review of the Texas PUC and ERCOT; a discussion on the "lessons learned" from the February 2nd energy emergency event in ERCOT; a discussion on the various entities reviewing the February 2nd event; a discussion of developments in the SPP; a review of eminent domain issues for utility transmission lines and pipelines; an update on telecommunications and water utility issues; and more. Confirmed speakers include PUC Commissioners Donna Nelson and Kenneth Anderson. CLE credit will be provided and a post-seminar reception is included. Do not miss it!

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APPENDIX C



LIBERAL ARTS
TEXAS A&M UNIVERSITY



Public Policy Research Institute

Texas Indigent Defense Commission

January 2015

Office of Court Administration

Guidelines for Indigent Defense Caseloads

**A Report to the
Texas Indigent Defense Commission**

Pursuant to House Bill 1318
83rd Texas Legislature



Guidelines for Indigent Defense Caseloads

AUTHORS

Dottie Carmichael, Ph.D.
Research Scientist

Austin Clemens, Ph.D.
Assistant Research Scientist

Heather Caspers, M.A.
Research Assistant

Miner P. Marchbanks, III, Ph. D.
Associate Research Scientist

Steve Wood, Ph.D.
Senior Research Associate

Public Policy Research Institute
Texas A&M University
College Station, Tx. 77843-4476
979.845.8800

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Preface

The problems in providing criminal defense representation for the indigent in state courts across America are well documented. Due to lack of funding, there are inadequate investigative, expert, and other support services; poor compensation for public defenders and private lawyers; insufficient lawyer training; and poor oversight and supervision of defense providers. But of all the difficulties, none has proven more vexing than outrageously high caseloads of public defenders and even sometimes private lawyers. Although performance standards for defense lawyers, rules of professional conduct, and court decisions warn against accepting too much work, defense service providers have struggled to convince judges and those who fund defense representation of the numbers and types of cases that constitute a reasonable criminal caseload.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (hereafter “National Advisory Commission”), organized and funded by the federal government, recommended national annual maximum caseload numbers for indigent defense programs, which included on average not more than 150 felony cases per annum per lawyer and not more than 400 misdemeanor cases per annum per lawyer, excluding traffic offenses. Over the past 40 years, these numbers, referred to as the “NAC standards,” have been repeatedly cited by defense programs, bar associations, and even courts as “national caseload guidelines.” But these standards were not the result of any kind of work performed by the National Advisory Commission. Instead, as the commentary to the National Advisory Commission’s report conceded the caseload numbers were proposed by a defender committee of the National Legal and Defender Association and simply “accepted” by the National Advisory Commission. Moreover, I know from personal knowledge that the NLADA committee arrived at its caseload numbers during a conversation, not as the result of empirical study of any sort. Further, in accepting NLADA’s numbers, the National Advisory Commission repeated NLADA’s acknowledgement of “the dangers of proposing any national [caseload] guidelines.”

Despite the age of the NAC standards, as well as the myriad of changes in the defense of criminal cases during the past four decades, the standards are still frequently cited as if the recommended numbers are a meaningful measure of maximum defense caseloads that an individual lawyer should be able to represent over the course of a year. In 1973, however, defense lawyers handling criminal cases did not need to worry about collateral consequences of convictions, be familiar with a wide range of forensic evidence, or be called upon to represent defendants in sexually violent offender proceedings. In other words, as noted in the 2009 report, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, since the NAC standards were published “legal developments and procedural changes have

made indigent defense much more difficult, placing on defense lawyers far greater time demands and requiring a higher level of expertise.”

We are witnessing today a concerted emphasis to determine appropriate caseload limits for lawyers representing defendants in criminal cases. The means of achieving this is through the use of weighted caseload studies applicable either to a state or local jurisdiction. Although such studies have been performed in the past, the ones now being implemented, including this Texas study, are more rigorous in their methodology than those previously undertaken. Other criminal defense weighted caseload studies are currently underway in several other states.

This Texas study – the first ever mandated by a state legislature – is similar in its methodology to “The Missouri Project” published in 2014 by the public accounting firm of RubinBrown on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID). The Missouri Project was the first of this new breed of defense workload studies in which, as in this study, my colleague, Steve Hanlon, played a major advisory role. The Missouri Project focused on the caseloads of the Missouri State Public Defender program, which furnishes the vast majority of indigent defense representation in that state. Much like this study, the Missouri Project used a well-designed Delphi methodology. Thus, in Missouri the expertise of both full-time public defense providers and experienced private defense practitioners was used to determine how much time lawyers should devote to providing effective and competent representation of indigent clients charged in various kinds of cases. And, again much like this Texas study, the Missouri Project compared the amount of time that should be devoted to representation of different kinds of cases against the amount of time actually being spent, utilizing recent time records maintained by defense providers.

Because of reporting and offense classification differences between the Missouri Project and this Texas study, it is difficult to make precise comparisons between the recommended caseload standards of the two studies. However, both studies concluded that many fewer felony and misdemeanor cases should be handled by defense lawyers than were suggested as appropriate by the 1973 NAC standards. The significance of this cannot be overstated. In fact, when the Missouri Project report was released in 2014, James Silkenat, then President of the American Bar Association, commented about the study’s implications: “It can now be more reliably demonstrated than ever before that for decades the American legal profession has been rendering an enormous disservice to indigent clients and to the criminal justice system in a way that can no longer be tolerated.”

In several respects, this Texas study conducted by the Public Policy Research Institute at Texas A&M University improved upon the methodology used in the Missouri Project. For example, this study included in its calculations “non-controllable case tasks,” which were excluded as part of The Missouri Project’s methodology. In addition, unlike the Missouri Project, this study

analyzed separately the time required to be spent on cases resulting in guilty pleas and cases that should proceed to trial. Further, this study utilized a time sufficiency study among a broad cross-section of private lawyers and compared the results against the Delphi panel's recommendations, which as stated in the report, "reached a striking level of agreement" between "two completely independent samples of attorneys...." No such comparison among Delphi panel members and another group of lawyers was part of the Missouri Project's methodology.

The challenge of this Texas report and similar such workload studies are to translate empirical findings into adequate financial support and thus achieve lower caseloads among indigent defense providers. In the past, caseload reductions have proven difficult to achieve, as suggested at the beginning of this Preface. But in the past such efforts to reduce caseloads were not fortified with the kind of evidence contained in this Texas study. It remains to be seen whether the impressive data presented in this study will lead to enhanced financial support for Texas indigent defense and quality of justice improvements in its criminal courts.

Norman Lefstein

Professor of Law and Dean Emeritus

Indiana University Robert H. McKinney School of Law

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The Public Policy Research Institute would like to thank the many individuals who made this research possible. We are grateful to everyone who assisted, and specifically acknowledge the following individuals and organizations.

The sponsors of House Bill 1318, passed in the 83rd Texas Legislature, are credited with creating the statutory mandate for the study. The caseload guidelines envisioned by the Honorable Senators Rodney Ellis, Sylvia Garcia, and John Whitmire as well as the Honorable Representatives Sylvester Turner and Armano Walle will serve as a cornerstone for the improvement of indigent defense in Texas.

The Honorable Sharon Keller, Chair of the Texas Indigent Defense Commission (TIDC), as well as Commissioners the Honorable Linda Rodriguez and Don Hase served on the project's Advisory Panel. Commission staff also provided extensive guidance and support over the course of the study. Executive Director, James Bethke and his team including Edwin Colfax, Wesley Shackelford, and Joel Lieurance have been an invaluable resource from conceptualization through completion of the project. We also appreciate the assistance of Brittany Long and Allison Cunningham with preparation of the final report.

We thank the Regional Presiding Judges of Texas' nine Administrative Judicial Regions. They helped researchers identify and recruit a geographically representative sample of highly qualified defense attorneys to serve on the Delphi Panel responsible for final caseload recommendations.

We appreciate the tireless and superlative guidance provided by two national caseload scholars, Norman Lefstein, Dean Emeritus and Professor of Law at Indiana University Robert H. McKinney School of Law, and Steve Hanlon, public interest attorney and Adjunct Professor of Law at St. Louis University School of Law. Professor Lefstein's 2011 book, *Achieving Reasonable Caseloads*, is a modern classic among academics, policymakers, and advocates seeking to improve indigent defense. Professor Hanlon's experience, creativity, and leadership in pioneering new, more rigorous methods to determine caseload guidelines in Missouri inspired many aspects of the research approach used here. The participation of these valued contributors elevated the quality of the study.

The project also greatly benefitted from the support and assistance of two of the state's most prominent leaders in indigent defense. President of the State Bar of Texas, Mr. Buck Files and President of the Texas Criminal Defense Lawyers Association, Mr. Bobby Mims each delivered the full support of their respective organizations. With the backing of Mr. Files and Mr. Mims, these organizations disseminated information to members through announcements at trainings and leadership meetings, in publications, and through social media. These contributions were key to the study's success engaging over 500 attorneys to provide the necessary data.

We thank the individuals who contributed expertise and information through their service on the project Advisory Panel. Acknowledged in Appendix A, these state and national indigent defense stakeholders shared feedback and ideas for improving the study from many varied perspectives. Their input helped provide direction for the research team while strengthening the relevance and usefulness of the results.

The private and public defender attorneys who voluntarily tracked their time on criminal cases are recognized in Appendix B. These professionals sustained timekeeping over a 12-week period. We thank each of these study participants not only for their personal assistance with data collection, but also for their clear commitment to improving indigent defense policy and practices. An additional 319 attorneys responded to the Time Sufficiency Survey. Though they are not identified by name, their input regarding the time required for effective representation was an important element of the research.

In Appendix G we acknowledge the 18 attorneys who made significant contributions to the study through their service on the Delphi Panel. Their considerable criminal defense expertise, and their conscientious adherence to the prescribed research protocol, was instrumental for developing the final caseload recommendations set forth in this report. Criminal defense attorney Don Hase represented the Texas Indigent Defense Commission on the panel. Without their participation the research would not have been possible.

The authors would like to thank Kellie Bailey, Patricia Cummings, Bradley Hargis, and Jeanette Kinard for their assistance during the planning stages of the study. These attorneys shared their extensive expertise concerning criminal defense to help the research team develop offense and timekeeping categories appropriate for Texas.

Carl and Keith Richey of JusticeWorks, LLC created the custom timekeeping software used by attorneys to track their time on criminal cases. The online system was user-friendly for attorneys which increased reporting compliance, and it was accessible to the research team in real time making it feasible to monitor data collection. The staff of JusticeWorks were reliable partners whose conscientious attention to the study improved the timekeeping data.

Many individuals at PPRI helped with specific aspects of the project. Terry Williams provided extensive assistance with meeting set-up, travel arrangements, and incentive gift cards. Stacy Rhodes oversaw assembly of the master database of appointed counsel from which attorneys were sampled for the study. The staff of PPRI's Survey Research Laboratory, supervised by Alicia Novoa and Andrea Sesock, recruited study participants. Aaron Williams developed the weighted caseload study website and assisted with cover art. Laura Hugill and Emily Naiser helped program the Time Sufficiency Survey. David Cabrera contributed to earlier drafts of this report. We appreciate these many valued contributions.

Executive Summary

Executive Summary

House Bill (HB) 1318, passed by the 83rd Texas Legislature, instructed the Texas Indigent Defense Commission (TIDC) to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.”¹ In response to this directive, TIDC determined to conduct a weighted caseload study. This methodology accounts for variation in the amount of attorney time required to defend different types of cases. Unlike other weighted caseload studies, this was the first to include time spent by private assigned counsel. It sought to answer two important questions:

1. How much time “is” currently being spent on the defense of court-appointed criminal cases?
2. How much time “should” be spent to achieve reasonably effective representation?

The Importance of Attorney Caseloads in Effective Representation

The Sixth Amendment of the U.S. Constitution guarantees the right to assistance of counsel for defendants in criminal matters. In 1963, the Supreme Court decision *Gideon v. Wainwright*² affirmed that this right extends to individuals unable to afford an attorney in state felony prosecutions. Today, in Texas and other states, the right to counsel for the indigent is broadly recognized in misdemeanor cases as well.

In 1984, the Supreme Court set forth rules for the reversal of criminal convictions based on ineffective assistance of counsel in *Strickland v. Washington*³ and *United States v. Cronin*.⁴ In the *Cronin* decision, the Court has emphasized that beyond not harming a client through deficient representation, defense lawyers must be proactive, providing zealous and meaningful opposition to the prosecutor’s case. Excessive caseloads erode the right to competent and effective counsel by inhibiting attorneys’ ability to devote the time and attention required for “meaningful adversarial testing” of the charges.⁵

¹ Tex. H.B. 1318, 83rd Leg., R.S. (2013).

² 372 U.S. 335 (1963).

³ 466 U.S. 668 (1984).

⁴ 466 U.S. 648 (1984).

⁵ *Id.*

In addition, professional conduct rules address the duties of lawyers in all of the cases in which they provide legal representation. The *Texas Rules of Professional Conduct*⁶ and the *Performance Guidelines for Non-Capital Criminal Defense Representation* of the State Bar of Texas⁷ require of lawyers sufficient knowledge, skill, preparation, time and resources for adequate representation. Furthermore, when attorneys cannot provide such representation, professional conduct rules and standards dictate that they should decline or withdraw from the case.⁸

Despite these professional obligations, it is not difficult to find examples of defense lawyers who are overwhelmed by too many cases to defend. In Texas, new reporting requirements under HB 1318⁹ reveal some attorneys were paid for 500 to 1,400 court-appointed cases in FY 2014. For some this was only a portion of the clients they represented during the fiscal year. Precise criteria defining excessive caseloads are elusive because of the many different factors that influence the time required for competent and effective representation. Nonetheless, objective research methods integrating time measurement with expert opinion from experienced attorneys can yield meaningful guidelines. This is the purpose of the research reported here.

Weighted Caseload Study

Texas' weighted caseload study began with input from an Advisory Panel of indigent defense stakeholders convened in late 2013. These included national caseload experts, national indigent defense practitioners, Texas Indigent Defense Commissioners, criminal defense attorneys, legislators, state agency representatives, and other stakeholder constituencies with an interest in indigent defense. Their expertise helped research staff integrate diverse perspectives and clarify direction for the Texas study.

Three complementary data collection approaches were used for the study. These included a Timekeeping Study, a Time Sufficiency Survey, and final recommendations generated using the Delphi Method. Investigation was limited to adult-trial level cases, ranging from Class B misdemeanors through first degree felonies. Eight different task categories were used to describe attorneys' use of time. These included communication with clients or their families, interaction with the court, discovery or investigation by the attorney, time spent by a private or

⁶ Tex. Disciplinary Rules of Prof'l Conduct R. 1.01.

⁷ STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION 2 (2011) [hereinafter PERFORMANCE GUIDELINES], available at <https://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/PerformanceGuidelinesforNon-CapitalCriminalDefenseRepresentationJanuary2011.pdf>.

⁸ Tex. Disciplinary Rules of Prof'l Conduct R. 1.15.

⁹ Tex. Code Crim. Proc. Ann. art. 26.04(j)(4), amended by Tex. H.B. 1318, 83rd Leg., R.S. (2013).

public defender investigator, legal research and trial preparation, negotiations or meetings related to litigation issues, social work assistance for clients, and case-specific office support.¹⁰

Timekeeping Study

Timekeeping data was provided by 196 private and public defender attorneys who tracked their time on criminal defense cases over a 12-week period. Results show that in current practice Class B and Class A misdemeanors are being disposed in 4.7 and 7.6 hours, respectively. Low-level state jail and third degree felonies are resolved in 10.8 and 12.9 hours, respectively. Second degree felonies take 15.2 hours to dispose, and the highest-level first degree felonies are resolved with 22.3 hours of attorney time. However, individuals and public defender offices with the highest caseloads may have been disinclined to participate in the study. Timekeeping data may therefore overestimate actual average time spent.

At present, according to the Timekeeping Study, nearly half of all defense-related time is spent in court. The next most time-intensive categories, legal research/trial preparation and communication with clients account for 15 to 20 percent of case time each. The time dedicated to these tasks is as high as 30 percent for high-level felonies. Notably, investigators are rarely used among attorneys, accounting for less than two percent of case time at every offense level. Most investigation is conducted by the lawyers themselves.

Time Sufficiency Survey

To ascertain peer perspectives on how much time “should” be spent on criminal cases, 319 survey respondents reviewed and recommended revisions to Timekeeping Study findings. Respondents were able to adjust either the frequency with which tasks were performed or the time spent when the tasks were done.

To ensure effective representation, a 66 percent increase in time was recommended at every offense level. By far, the greatest proportional increase by task was for investigation. Lawyers surveyed advised that non-attorney investigator’s time should increase by a factor of 13 times for misdemeanors, and 10 times for high-level felonies. This guidance is consistent with direction provided by the State Bar of Texas.¹¹ Involvement of a third party investigator

¹⁰ Discovery and investigation by the attorney were treated as a combined category during the Timekeeping Study and the Time Sufficiency Survey. These categories were treated separately during the Delphi deliberations.

¹¹ PERFORMANCE GUIDELINES, (stating in Guideline 4.1 that “[i]f counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.”).

provides the defense with a witness who can testify at trial in the event that a witness contradicts what was told to a defense investigator during a prior interview.

A five-fold increase was suggested for time spent in negotiations or meetings with judges, prosecutors, pre-trial services, and other offices that impact case processing. Attorneys also concluded that time spent on client communication and on case management should more than double to enable clients to receive necessary benefits and services.

Delphi Panel

To arrive at final caseload guidelines for Texas, a panel of 18 highly experienced criminal defense practitioners was selected to take part in a Delphi process. The Delphi method offers a rational and structured means to integrate opinions of highly informed professionals to solve problems.¹² Members averaging more than 25 years of experience were selected to represent each of the state's nine Administrative Judicial Regions. Over a two-month period, Delphi Panel members completed a three-round sequence of activities designed to integrate independent judgment and collaborative decision-making to arrive at recommended case weights.

In a departure from workload studies in other states, the Texas Delphi Panel chose to produce separate time recommendations for cases disposed by trial and those disposed in other ways (e.g., plea, dismissal, diversion). Using the Delphi-recommended trial rate, time guidelines generated by the panel are strikingly similar to those suggested by peer attorneys responding to the Time Sufficiency Survey. The high degree of convergence – within a range of just one misdemeanor per week or one felony per month – lends credence to the validity of overall study findings.

Also like their colleagues responding to the Time Sufficiency Survey, Delphi members agreed the greatest time increment is needed the area of investigation. Delphi members supported at least a five-fold increase in attorney discovery and investigation and a twenty-fold increase in non-attorney investigator's time. As much as forty times more external investigation was recommended for misdemeanors in particular. Delphi members also agreed with survey respondents that about six times more time should be spent in negotiation or meetings with officials such as prosecutors and judges that can impact case outcomes, and that time spent communicating with clients should increase by more than two-thirds on average.

¹² See generally, Section II (discussing the Delphi method).

Final Recommended Caseload Guidelines

Whether the Delphi Panel’s ideal trial rates or actual trial rates are applied makes a difference in the final caseload recommendations. The Delphi Panel’s higher assumed trial rate translates to 28% fewer misdemeanors and 20% fewer felonies defended per year than if actual trial rates are used. Clearly, the smaller number of annual cases derived from the panel’s recommendation would allow more time for a competent and diligent defense. For now, however, the “ideal” rate is not aligned with reality. Just 1.1 percent of misdemeanors are tried – not the 14 to 20 percent favored by the panel. Similarly, just 2.5 percent of felony cases are disposed by trial rather than the 11 to 20 percent urged by the panel.

For this reason, final recommended caseload guidelines for Texas are based on actual FY2014 trial rates. Importantly, annual data is available on the proportion of felony and misdemeanor cases resolved by trial or by other means. It is therefore not only possible, but recommended that proactive measures be taken to align Delphi-recommended and actual trial rates as an element of efforts to create standards of reasonably effective counsel.¹³ Until that occurs, however, it is most accurate and efficient to base current caseload guidelines on actual trial practice.

The results indicate for the delivery of reasonably competent and effective representation attorneys should carry an annual full-time equivalent caseload of no more than the following:

- 236 Class B Misdemeanors
- 216 Class A Misdemeanors
- 174 State Jail Felonies
- 144 Third Degree Felonies
- 105 Second Degree Felonies
- 77 First Degree Felonies

Conclusion

According to national standards, defense attorneys “should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to

¹³ OFFICE OF COURT ADMIN., OFFICE OF COURT ADMINISTRATION ANNUAL STATISTICAL REPORTS FOR FY 2014 1, *available at* <http://www.txcourts.gov/statistics/annual-statistical-reports/2013.aspx>. See Activity Detail from September 1, 2013 to August 31, 2014 for Constitutional County Courts and For Statutory County Courts.

the breach of professional obligations.”¹⁴ With the development of caseload guidelines for the state of Texas, a valuable new tool will be available to help define the point at which caseloads become excessive. This tool can be used in important ways to protect the Constitutional right to counsel and the equitable administration of justice.

With evidence-based caseload parameters, appointing authorities and attorneys taking appointments can be held accountable for managing workloads, information is available to set fair compensation rates, and jurisdictions adhering to reasonable caseload limits are less exposed to potential litigation. Caseload guidelines alone may not guarantee the provision of reasonably effective counsel, but they are certainly a necessary component, essential to securing the Sixth Amendment right to counsel for the indigent accused.

¹⁴ ABA, PROVIDING DEFENSE SERVICES, Standard 5-5.3, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html. See also ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 18 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

Guidelines for Indigent Defense Caseloads

I. Introduction

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1318 relating to the appointment of counsel for indigent defendants. Among other things, the Bill instructed the Texas Indigent Defense Commission (TIDC) to conduct a study to generate caseload recommendations that enable the state's criminal defense attorneys "to give each indigent defendant the time and effort necessary to ensure effective representation."

The Public Policy Research Institute at Texas A&M University (PPRI) assisted with research design and implementation. The State Bar of Texas and the Texas Criminal Defense Lawyers Association partnered to inform attorneys and to engage them in this important undertaking. A 27-member Advisory Panel brought state and national expertise to bear and 17 additional invited observers represented diverse stakeholder constituencies. More than 500 individual attorneys contributed data over the course of the study including 18 highly qualified criminal defense lawyers who served on the Delphi Panel responsible for making final caseload recommendations.

Results from Texas's first defense attorney caseload assessment are presented herein. Following this introduction, Section II offers an overview of the major issues related to excessive caseloads and the importance of the study. Section III provides background information about the Indigent Defense Commission's role in implementing HB 1318 and the scope of the bill with regard to indigent defense caseload assessment.

Attention is then focused on the research. Section IV offers an overview of the tasks and timeline associated with the weighted caseload study. In Section V, results of the Timekeeping Study are presented. This section discloses the amount of time currently being spent on court-appointed cases. Next, practicing attorneys were asked to review and provide feedback on the time measurements taken. Their recommended changes in attorney time necessary for effective representation are presented in Section VI. Section VII describes the Delphi Method used to determine the time that "should" be spent on indigent defense to attain effective representation, then shares the time recommendations emerging from that process. Section VIII concludes the report, presenting the criminal defense caseloads recommended by this study. Potential uses of the caseload guidelines are considered in Section IX, followed by conclusions in Section X.

II. Why Defense Caseloads Matter

The Sixth Amendment of the U.S. Constitution guarantees defendants the right to have the assistance of counsel in criminal matters. It was not until the decision in *Gideon v. Wainwright*¹, however, that this constitutional protection was significantly expanded for indigent defendants. For the first time, *Gideon* established that in state court felony cases if the accused was unable to afford an attorney, the state is obliged to provide one.² As accused individuals have gained greater access to legal counsel, the number of cases receiving appointed representation has increased proportionately. In the United States today, approximately 80% of defendants rely on court-appointed counsel.³

Defining Effective Counsel

Foundational court decisions have created an expectation that attorneys should do more than just be present at court proceedings. They have an obligation to provide indigent defendants with “effective assistance of counsel” in accord with the Sixth Amendment.⁴ In 1984, in *Strickland v. Washington*, the US Supreme Court set forth a two-prong test for finding ineffective assistance of counsel: 1) the defendant must show that the attorney’s performance was deficient and 2) that the deficient performance prejudiced the defendant.⁵ In *United States v. Cronin*, a companion case decided the same day as *Strickland*, the Court emphasized that defense lawyers must provide zealous and meaningful opposition to the prosecutor’s case. According to the Court, “[T]he adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’⁶ The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”⁷

¹ 372 U.S. 335 (1963).

² In *Powell v. Alabama*, 287 U.S. 45 (1932), the United States Supreme Court held that the Sixth Amendment requires that indigent defendants in state court capital cases must be provided the right to counsel. Supreme Court decisions after *Gideon* afforded representation to indigent defendants in other types of cases including misdemeanor cases resulting in imprisonment and juvenile delinquency proceedings. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967). In Texas, the Court of Criminal Appeals has long recognized the right to counsel in misdemeanor cases where imprisonment is possible absent a valid waiver of the right to counsel. See, e.g., *Lewis v. State*, 501 S.W.2d 88 (Tex. Crim. App. 1973).

³ Widney Sainvil, *The State of Public Defenders and Gideon’s Army*, PLAIN ERROR: THE OFFICIAL BLOG OF THE INNOCENCE PROJECT OF FLORIDA (Feb. 28, 2013), <http://floridainnocence.org/content/?p=8565>.

⁴ See *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69–70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

⁵ 466 U.S. 668 (1984).

⁶ *Anders v. California*, 386 U.S. 738 (1967).

⁷ 466 U.S. 648 (1984).

Professional Performance Criteria

In addition to decisions of the Supreme Court, national and local bar associations impose duties upon lawyers in all cases in which they provide legal representation. Nationally, the American Bar Association's (ABA) *Model Rules of Professional Conduct* requires that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁸ In Texas, Rule 1.01 of the *Texas Rules of Professional Conduct* requires that lawyers provide competent and diligent representation.⁹

Additionally, the State Bar of Texas's *Performance Guidelines for Non-Capital Criminal Defense Representation* requires that counsel before taking a case, confirm that they have "sufficient time, resources, knowledge and experience to offer quality representation...."¹⁰ Components of "competent" and "quality" representation include adequate communication with clients,¹¹ prompt investigation,¹² and appropriate investigation and study of the case facts prior to acceptance of a plea arrangement.¹³

When attorneys cannot provide quality representation, professional standards dictate that they should decline or withdraw from the case. According to commentary for Rule 1.15 of the *Texas Rules of Professional Conduct*, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest."¹⁴ ABA Criminal Justice Standard, Providing Defense Services 5-5.3 (b) is even more explicit:

⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009). *See also*, ABA, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009).

⁹ Tex. Disciplinary Rules of Prof'l Conduct R. 1.01.

¹⁰ STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION 2 (2011) [hereinafter PERFORMANCE GUIDELINES], *available at* <https://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/PerformanceGuidelinesforNon-CapitalCriminalDefenseRepresentationJanuary2011.pdf>.

¹¹ Tex. Disciplinary Rules of Prof'l Conduct R. 1.03.

¹² PERFORMANCE GUIDELINES, *supra* note 10, at 9–11.

¹³ *Id.* at 16. Under *Strickland's* two-pronged test, a claim of "ineffective assistance of counsel" requires a the defendant to show there is a reasonable probability the attorney's failure to investigate prior to accepting a plea could have changed the outcome of the case (i.e., a finding of prejudice). This standard was attained in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), where a plea was rejected on the basis of deficient legal advice, and in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), where a plea agreement lapsed because the defendant was never informed of the offer. However, prejudice is an inquiry only after conviction and is extremely difficult to establish. When caseload standards are available, it is possible to avoid *Strickland's* prejudice prong by demonstrating "deficient representation" due to excessive caseloads during the critical stage between arraignment and trial. *See* Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 1, 24–33 (2011).

¹⁴ Tex. Disciplinary Rules of Prof'l Conduct R. 1.15.

Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments...¹⁵

Consequences of Excessive Caseloads

There is little dispute that excessive caseloads are incompatible with ensuring effective defense representation, as well as competent and diligent legal services. Yet, it is not difficult to find examples of defense lawyers who are overwhelmed with far too many cases to defend.¹⁶ Two defense lawyers in Washington State told the New York Times they handled approximately 1,000 cases each in a year.¹⁷ In Florida, a non-capital felony attorney had 971 cases in a single year, of which nearly 80 percent were felonies.¹⁸ In testimony solicited by the American Bar Association, witnesses from Rhode Island, Pennsylvania, Maryland, Nebraska, and New York affirmed that excessive indigent defense caseloads are endemic nationally. They cited instances of annual misdemeanor caseloads in excess of 1,000 cases, as well as active felony caseloads of more than 100 pending cases.¹⁹

¹⁵ ABA, PROVIDING DEFENSE SERVICES, Standard 5-5.3, *available at*

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

¹⁶ See AM. COUNCIL OF CHIEF DEFENDERS, NAT'L LEGAL AID & DEFENDER ASS'N, AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS (2007), *available at*

<http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDSELOADSTATEMENTsept6.pdf>.

¹⁷ Jesse Wegman, *The Right to an Attorney Who Actually Does His Job*, N.Y. TIMES, Dec. 9, 2013, *available at* takingnote.blogs.nytimes.com/2013/12/09/the-right-to-an-attorney-who-actually-does-his-job/?_php=true&_type=blogs&_r=0.

¹⁸ PARKER D. THOMSON & JULIE E. NEVINS, PUBLIC DEFENDER EXCESSIVE CASELOAD LITIGATION IN MIAMI-DADE COUNTY, *available at* www.nij.gov/topics/courts/indigent-defense/documents/thompson.pdf.

¹⁹ ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 18 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

In Texas, new reporting requirements under HB 1318²⁰ reveal a number of attorneys were paid for 500 to 1,400 court-appointed cases in FY 2014. Moreover, for some, this was just a portion of their total caseload. At least 14 individuals representing more than 600 indigent defendants claimed those clients comprised just 40 to 70 percent of their total cases.

High caseloads contribute to a “meet and plead” system²¹ that can result in serious incidents of attorney error. As one example, a Florida public defender with 13 serious felony cases set for trial in a single day found herself unable to respond in a timely manner to a prosecutor’s plea offer.²² The mistake increased the client’s jail term from one to five years. As another example, the Georgia Court of Appeals ruled that a convicted defendant facing 15 years in prison could withdraw his guilty plea as a result of attorney neglect.²³ Explaining his failure to interview key witnesses, the defense attorney said “he had so many cases on his load that if he looked into every nook and cranny there was to this case, that he would never get anything done.”²⁴ While it is impossible to precisely quantify the frequency or consequences of mistakes made by overburdened defense lawyers,²⁵ these examples provide some insight into the ways excessive caseloads distort and threaten individuals’ right to counsel.

Efforts to Address the Caseload Problem

While court decisions, statute, rules of professional conduct, and performance guidelines are in agreement that defense attorneys must limit the number of their cases, determining caseload standards for use in a particular jurisdiction presents certain challenges. Three main approaches have been used to date to derive uniform time recommendations. These include empirical workload studies, professional judgments, and most recently, the Delphi Method.

Attorney Workload Studies

Over the last two decades, workload studies have been widely used by states to develop objective caseload guidelines. Using this methodology, defense attorneys track the time being

²⁰ Data is available upon request from the Texas Indigent Defense Commission. See *infra* Section III, “Reporting Requirements” for more information about attorney reporting under HB 1318.

²¹ See Memorandum of Decision, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2013 WL 6275319 (W.D. Wash. Dec. 4, 2013), available at http://www.opd.wa.gov/documents/0181-2013_WilburDecision.pdf.

²² NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 60–62 (2011) [hereinafter SECURING REASONABLE CASELOADS], available at http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_securing_reasonable_caseloads_authcheckdam.pdf.

²³ See *Heath v. State*, 601 S.E.2d 758 (2004).

²⁴ Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1172, 1172 (2003).

²⁵ JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 20–21 (2011), available at www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

spent to represent cases in their daily work. Recommended time allowances are then based on the actual time used for different types of cases in a jurisdiction. Workload assessments have been conducted in at least 16 states with results being used to help public defender offices determine staffing needs to adequately represent their case volume.²⁶

A limitation of relying solely on workload data, however, is that resulting recommendations assume that adequate time is already being spent. If the work of attorneys contributing time records is constrained by high case volume, the results measure “what is” rather than what “should be” in order to achieve quality representation.

Professional Judgments

An alternative means of determining the time required for effective counsel is to assemble the opinions of experts. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) adopted the annual maximum caseloads proposed by the National Legal Aid and Defender Association (NLADA). The standards recommend attorneys in a public defender office should take no more than 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 appeals per person on average in a year.²⁷ Though they were never intended to serve as national guidelines, public defense programs often reference these numbers as the accepted benchmark for an attorney’s caseload.

Today, forty years since their inception, there are serious concerns about the adequacy of these NAC Standards.²⁸ For one thing, the recommendations are entirely based on the opinions of NLADA committee members rather than evidence of the time required for attorneys to do their job well. In addition, critics point out that the standards weigh all felony and misdemeanor cases the same regardless of seriousness, and do not account for changes in defense-related policies and practices that have emerged since 1973. These include the advent of forensic DNA evidence, growth in linguistic diversity, and the rise in collateral consequences stemming from

²⁶ See, e.g., OFFICE OF THE COLO. STATE PUB. DEFENDER, FY 2013-14 STRATEGIC PLAN & PROGRAM EVALUATION, *available at* [http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/bd961d1a895c4dd387257af7007cd76e/\\$FILE/13JtJud0118AttachQ.pdf](http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/bd961d1a895c4dd387257af7007cd76e/$FILE/13JtJud0118AttachQ.pdf); NAT’L CTR. FOR STATE COURTS, MD. ATTORNEY AND STAFF WORKLOAD ASSESSMENT (2005), *available at* www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Workload%20Assessment/ResWorkLdMDAttyStaffWkLdAs05.ashx; ABA, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014) [hereinafter THE MISSOURI PROJECT], *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf; ELIZABETH NEELY, UNIV. OF NEB. PUB. POLICY CTR., LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT (2008), *available at* lancaster.ne.gov/pdefen/workloadas.pdf.

²⁷ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973) [hereinafter NAC STANDARDS].

²⁸ For a summary of limitations of the NAC standards, see Lefstein, SECURING REASONABLE CASELOADS, *supra* note 22, at 43–45.

criminal cases to name a few.²⁹ Some attorneys also consider the NAC time recommendations to be insufficient to achieve quality representation.³⁰

It is rarely noted, however, that the NAC caseload standards are accompanied by several important caveats. The NLADA explicitly acknowledged the “dangers of proposing any national guidelines”³¹ because of local differences in a range of factors that could impact time needed to represent similar cases in different jurisdictions. These included possible variations in definitions of a “case,” ways workload is measured, and differences in geographical factors that would impact travel time.³² These concerns were affirmed in the experience of prosecutors who have attempted but abandoned efforts to develop national caseload standards, a task they deemed to be “impossible.”³³

The Delphi Method

The Delphi method has been recommended by legal experts³⁴ as a substantially more rigorous means than professional judgment alone to quantify professional opinion about attorney caseload size. Recently, this approach was used in Missouri to help quantify reasonable caseloads for indigent defense attorneys.³⁵ The Delphi method involves an iterative decision-making process to integrate and rationalize the diverse opinions of highly knowledgeable experts. First, experts provide individual, anonymous responses to a given topic. Next, experts are given aggregated results showing group means, medians, and ranges. At this time, panel members may then choose to adjust their initial answers based on feedback from the group. By

²⁹ Donald J. Farole & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 88 (2010); N.Y. STATE DEFENDERS ASS’N PUB. DEF. BACKUP CTR., RECOMMENDATIONS REGARDING THE CHIEF ADMINISTRATOR’S IMPLEMENTATION OF CASELOAD STANDARDS FOR NEW YORK CITY (2010), available at <http://www.nysda.org/docs/PDFs/2010-2012/CaseloadNYCStdsfinal.pdf>. See also, *infra* Section VIII for discussion of factors in Texas contributing to the need for more attorney time than allowed in the NAC standards.

³⁰ Hannah Levintova, Jaeah Lee & Brett Brownwell, *Charts: Why You’re in Deep Trouble if You Can’t Afford a Lawyer*, MOTHER JONES (May 6, 2013, 5:00 AM), www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts.

³¹ NAC STANDARDS, *supra* note 27, at 277.

³² *Id.*

³³ AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT (2002), available at www.ndaa.org/pdf/How%20Many%20Cases.pdf.

³⁴ SECURING REASONABLE CASELOADS, *supra* note 22, at 142–146. Steve Hanlon, *Needed: A Cultural Revolution*, ABA HUMAN RIGHTS MAGAZINE, April 2013, available at http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/needed_a_cultural_revolution.html; NAT’L LEGAL AID & DEFENDER ASS’N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK 13–14 (2014), available at www.nlada100years.org/sites/default/files/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf.

³⁵ THE MISSOURI PROJECT, *supra* note 26.

alternating participants' independent assessments with group feedback, expert opinion can be converted into objective data. The mean or median resulting from the final iteration may be accepted as the group's opinion.

The Delphi method has been widely used across several research disciplines³⁶ to help obtain consensus on matters that defy precise measurement. Literature on the advantages of the Delphi method over other types of decision-making procedures generally find that the Delphi method results in estimates that are more accurate than those derived from unstructured interacting groups and statisticized groups.³⁷

Conclusion

Professional standards of the American Bar Association and the State Bar of Texas agree that criminal defense attorneys must avoid excessive workloads and refuse cases that would adversely affect their ability to deliver quality legal representation to all clients. While excessive caseloads have been challenged in the courts, precise standards remain elusive because of the many different factors that influence the time required for robust representation. Nonetheless, objective research methods integrating time measurement with expert opinion from informed and experienced attorneys can yield meaningful guidelines.

III. Recent Texas Indigent Defense Caseload Legislation

Since 2002, the Texas Indigent Defense Commission (TIDC) has been responsible for the oversight and improvement of indigent defense.³⁸ The Commission promotes quality and consistency by setting policies and standards and by providing technical support. In 2015, TIDC will administer \$34 million in formula and discretionary grant funds to offset costs and spur innovation in the state's 254 counties.

³⁶ See e.g., Rym Boukdedid et al., *Using and Reporting the Delphi Method for Selecting Healthcare Quality Indicators: A Systematic Review*, 6 PLoS ONE (2011), available at <http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0020476&representation=PDF>; Vanessa Campos-Climent, Andreea Apetrei & Rafael Chaves-Ávila, *Delphi Method Applied to Horticultural Cooperatives*, 50 MGMT. DECISION 1161, 1266–1284 (2012).

³⁷ See Gene Rowe & George Wright, *The Delphi Technique As a Forecasting Tool: Issues and Analysis*, 15 INT'L J. OF FORECASTING 351, 353–375 (1999).

³⁸ See e.g., TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.texas.gov/>.

For many years, various organizations and persons have voiced concerns about the effects of excessive caseloads on the quality of criminal defense representation.³⁹ In Texas, a recent study found that the top 10% of private attorneys taking appointments in a single jurisdiction averaged 632 indigent cases in 2012, and one attorney received appointments to 952 cases.⁴⁰ In 2013, policymakers took action to gather the data needed to better understand the scope of the problem.

Reporting Requirements

House Bill (HB) 1318, passed by the 83rd Texas Legislature, requires the TIDC to add new reporting requirements related to indigent defense caseloads.⁴¹ Beginning October 15, 2014, attorneys taking court-appointed cases in the preceding fiscal year must report the percentage of their practice time dedicated to those cases. At the same time, starting November 1, 2014, counties must report the number of cases assigned and the total amount paid to every attorney taking appointments in each court. This newly required information will provide unprecedented insight into the total case volume of indigent defense attorneys and their compensation. It also will make it possible to assess whether some attorneys are receiving a disproportionate share of overall appointments.

Weighted Caseload Study

HB 1318 also instructed TIDC to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.”⁴² A weighted caseload study methodology was chosen to account for variation in the amount of attorney time required to defend different types of cases.

³⁹ ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 18 (2004); NAT’L RIGHT TO COUNSEL COMM., *CONSTITUTION PROJECT, JUSTICE DENIED* (2009); NAT’L LEGAL AID & DEFENDER ASS’N, *MINOR CRIMES, MASSIVE WASTE* 17 (2009); *Editorial: Public Defender’s Office Deserves Public Support*, HOUS. CHRONICLE, May 11, 2012, available at <http://www.rodneyellis.com/2012/05/11/editorial-public-defenders-office-deserves-public-support/>; *THE SPANGENBERG GROUP, U.S. DEPT. OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE* (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>; Hanlon, *supra* note 34; NAT’L ASSN. OF CRIM. DEF. LAWYERS, *GIDEON AT 50: A THREE PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA* (2013); COMMONWEALTH OF KY. DEPT. OF PUB. ADVOCACY, *JUSTICE JEOPARDIZED* (2005), available at <http://apps.dpa.ky.gov/news/JusticeJeopardizedFINALREPORT.pdf>.

⁴⁰ TONY FABELO, CARL REYNOLDS & JESSICA TYLER, COUNCIL OF STATE GOV’TS JUSTICE CTR., *IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER* (2013), available at <http://www.courts.state.tx.us/tidc/pdf/JCHCPDFinalReport.pdf>.

⁴¹ Tex. H.B. 1318, 83rd Leg., R.S. (2013).

⁴² *Id.*

A number of states have previously applied the weighted caseload methodology in combination with other data sources to develop evidence-based caseload parameters for public defender offices.⁴³ Texas is the first to also account for time spent by private assigned counsel. By providing the data needed to set professional practice guidelines in specific jurisdictions, weighted caseload studies represent an important step in an effort to ensure that effective and competent legal representation is available for all accused persons. Specifically, caseload guidelines enable policymakers to make data-driven decisions about indigent defense. They can be used to set limits for appointing authorities responsible for indigent case allocations, help policymakers determine resource levels necessary to provide effective and competent representation, and position criminal defense attorneys to provide higher quality services for their court-appointed clients. These many positive outcomes serve to increase efficiency and advance justice for those without the ability to hire effective legal counsel.

IV. Project Design

The Texas Indigent Defense Commission approved the weighted caseload study on August 23, 2013. As a first step, a panel of county, state, and national advisers was assembled to finalize the research approach. The final methodology was designed to address two fundamentally important research questions:

- 1) How much time “is” currently being spent on the defense of court-appointed criminal cases?
- 2) How much time “should” be spent to achieve reasonably effective representation?

The following paragraphs provide an overview of the study approach.

⁴³ See Lefstein, *supra* note 22, at 140 (noting that caseload studies have been completed in Nevada, Washington, Nebraska and others mentioned in NAT’L RIGHT TO COUNSEL COMM., *supra* note 39, including Colorado and Arizona); see also ABA, *supra* note 26; MD. OFFICE OF THE PUB. DEFENDER, MARYLAND ATTORNEY STAFF WORKLOAD ASSESSMENT (2005), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Workload%20Assessment/ResWorkLdMDAttyStaffWkLdAs05.ashx>; N.M. SENTENCING COMM’N & NAT’L CTR. FOR STATE COURTS, A WORKLOAD ASSESSMENT STUDY FOR THE NEW MEXICO TRIAL COURT JUDICIARY, NEW MEXICO DISTRICT ATTORNEYS’ OFFICES, AND THE NEW MEXICO PUBLIC DEFENDER DEPARTMENT (2007), available at <http://nmsc.unm.edu/reports/2007/b.%20NMSC%202006-07%20Workload%20Final%20Report.pdf>; NAT’L CTR. FOR STATE COURTS, VIRGINIA INDIGENT DEFENSE COMMISSION ATTORNEY AND SUPPORT STAFF WORKLOAD ASSESSMENT: FINAL REPORT (2010), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/189>; OFFICE OF RESEARCH, STATE OF TENN. COMPTROLLER OF THE TREASURY, FY2005-2006 TENNESSEE WEIGHTED CASELOAD STUDY UPDATE: DISTRICT PUBLIC DEFENDERS (2007), available at <http://www.comptroller.tn.gov/Repository/RE/PD2006.pdf>.

Weighted Caseload Study Advisory Panel

A panel of indigent defense stakeholders convened in Austin on October 18, 2013 for a full-day meeting. There were two main objectives of the day. The first was to gather input and feedback on study objectives from caseload experts and key stakeholders. The second was to engage and inform legislators, agency officials, county officials, and others that would potentially have a role in making or implementing policy emanating from the study findings. A complete list of Advisory Panel members is provided in Appendix A. They included five main contingents.

Texas Indigent Defense Commission Members

The Honorable Judge Sharon Keller, Chair of the Texas Indigent Defense Commission, along with Commission members, the Honorable Judge Linda Rodriguez and criminal defense attorney Don Hase advised the study. These individuals and the other ten members of the Commission are responsible for indigent defense policy and standards in Texas.

National Caseload Experts

Two national caseload scholars present were Norman Lefstein, Dean Emeritus and Professor of Law at Indiana University Robert H. McKinney School of Law and Steve Hanlon, public interest attorney and Adjunct Professor of Law at St. Louis University School of Law. These thought leaders named excessive caseloads as a threat to “meaningful adversarial testing”⁴⁴ that endangers the Sixth Amendment right to counsel. They reviewed professional and legal standards available to guide the conduct of attorneys and set the tone for the study.⁴⁵

National Indigent Defense Practitioners

Colorado’s State Public Defender Doug Wilson; Public Defender Dennis Keefe from Lancaster County, Nebraska; and Peter Sterling, General Counsel of the Missouri State Public Defender System shared lessons from their experiences with caseload studies in their respective jurisdictions including how the resulting standards and policies have been applied to improve policy and practice.

Texas Criminal Defense Attorneys

Experienced defense attorneys with thorough knowledge of current practice in Texas also provided input at the meeting. Bobby Mims, President of the Texas Criminal Defense Lawyers Association and private practice attorney David Gonzalez attended, as did public defenders in three of the state’s six largest counties. These included William Cox, Deputy Public Defender in the El Paso County Public Defender’s Office; Jeanette Kinard, Director of the Travis County

⁴⁴ United States v. Cronin, 466 U.S. 648 (1984).

⁴⁵ See generally, *supra* Section II.

Mental Health Public Defender’s Office; and Lynn Richardson, Chief of the Dallas County Public Defender’s Office.

Key Stakeholder Constituencies

Other Advisory Panel members attended on behalf of constituencies with a significant stake in the issue of indigent defense. These included the Conference of Urban Counties, County Judges and Commissioners Association of Texas, Texas Association of Counties, the State Bar of Texas, the Texas Defender Service, the Innocence Project of Texas, and the Texas Fair Defense Project. The National Association of Criminal Defense Lawyers and the Council of State Governments Justice Center were represented as well.

Invited Policymakers

Selected policymakers were invited to hear discussion regarding how the weighted caseload study could potentially be used to impact policy and practice in Texas. Attendees represented each of the legislative sponsors of HB 1318 that called for the study. These were the Honorable Senators Rodney Ellis, Sylvia Garcia, and John Whitmire as well as the Honorable Representatives Sylvester Turner and Armano Walle. Indigent Defense Commissioners, the Honorable Senator Royce West and the Honorable Representatives Roberto Alonzo and Abel Herrero were invited. Others attended on behalf of the Office of the Attorney General, the Texas Legislative Council, and the criminal courts of Harris and Travis Counties.

The combined expertise of the group served to integrate diverse perspectives, refine methods and objectives, and lay a solid foundation for the Texas study.

Methodologies

Three complementary data collection approaches were used to triangulate information about time currently being spent on indigent defense, and to determine adjustments necessary to ensure effective representation. Additional detail on each of these methods, along with accompanying results, is presented in subsequent sections.

Attorney Timekeeping Study

A total of 196 attorneys took part in a Timekeeping Study. These individuals answered a key research question by recording for a period of twelve weeks the actual time that “is” being spent on trial-level court-appointed cases. This timekeeping data was a useful baseline against which to assess the increment of change required for reasonably effective representation.

Time Sufficiency Survey

Results of the Timekeeping Study were shared through a survey with defense attorneys in public and private practice statewide. The survey gathered opinion about the time needed to

deliver effective representation from a broad cross-section of 319 public and private sector criminal defense practitioners.

The Delphi Process

A panel of highly experienced criminal defense attorneys from across the state was convened to determine the time that “should” be spent to achieve reasonably effective counsel. The group used the highly structured Delphi method⁴⁶ involving the expression of independent opinions, feedback from peers, and facilitated discussion to reach consensus.

Case Definition

Throughout the study, time measures were taken at the “case” level. Because the case definition used can impact interpretation of study findings,⁴⁷ it is necessary to be clear about the meaning applied here. The definition of a “case” adopted for this study is taken from the Office of

**Texas Office of Court Administration
Definition of Criminal Cases**

[I]f an indictment or information contains more than one count (Section 21.24, CCP), report this as **one case** under the category for the **most serious offense alleged**. If all counts are of the same degree, report the case under the category for the first offense alleged. [Emphasis in the original.]

Court Administration’s (OCA) instructions to reporting courts.⁴⁸ By this standard, one or more charges under a single indictment or information are considered to be a single case. Time for each case was attributed to the highest level offense charged.

Case Types

Investigation was limited in focus to adult criminal trial-level cases. Other types of cases such as juvenile cases and appeals were excluded from analysis because of time constraints.

Offense Types

In all phases of the study, attorneys were asked to consider six separate levels of cases ranging from Class B misdemeanors through first degree felonies. Offense categories defined in the state’s criminal statutes and associated punishment ranges are summarized in Table 4-1.

⁴⁶ See generally, *supra* Section II & *infra* Section VII (discussing the Delphi method).

⁴⁷ See SPANGENBERG GROUP, *supra* note 39, at 4.

⁴⁸ OFFICE OF COURT ADMIN. TEX. JUDICIAL COUNCIL, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 1 (2013), available at http://www.txcourts.gov/media/513947/District-Report-Instructions-9_1_13.pdf.

Table 4-1. Offense Levels and Punishment Range

OFFENSE LEVEL	PUNISHMENT
Class B Misdemeanor	Punishable by up to 180 days in jail, a fine of up to \$2,000, or both. (See Tex. Penal Code Ann. § 12.22)
Class A Misdemeanor	Punishable by up to one year in jail, a fine of up to \$4,000, or both. (See Tex. Penal Code Ann. § 12.21)
State Jail Felony	Punishable by 180 days to two years in state jail and a fine of up to \$10,000. (See Tex. Penal Code Ann. §§ 12.04, 12.35)
Third Degree Felony	Punishable by two to ten years’ imprisonment and a fine of up to \$10,000. (Tex. Penal Code Ann. § 12.34)
Second Degree Felony	Punishable by two to 20 years in prison and a fine of up to \$10,000. (Tex. Penal Code Ann. § 12.33)
First Degree Felony	Punishable by life imprisonment or five to 99 years’ imprisonment, as well as a fine of up to \$10,000. (Tex. Penal Code Ann. § 12.32)

Time Categories

During the Timekeeping Study and the Time Sufficiency Survey, attorneys were asked to consider time spent on eight task categories. Two categories – Discovery and Attorney Investigation – that were combined in these initial phases were considered separately during the Delphi deliberations. As a result, there were nine time categories for the Delphi phase only.⁴⁹ In all cases, recommendations for external “Investigator’s Time” was recorded in an independent category.⁵⁰ The full set of categories, defined in Table 4-2, included communication with clients or their families, interaction with the court, discovery, investigation conducted by the attorney, time spent by a private or public defender investigator, legal research and trial preparation, negotiations or meetings related to litigation issues, social work assistance for clients, and case-specific office support.

⁴⁹ Detailed reporting of time in each category is available for the Timekeeping Study in Appendix D, for the Time Sufficiency Survey in Appendix F, and for the Delphi Panel in Appendix I.

⁵⁰ In the Timekeeping Study, because it was not possible to extract auditors’ payment records in all the participating counties, non-attorney Investigators’ time was ordinarily reported by attorneys rather than being taken from official records. For the four public defender offices that provided electronic records to the study, non-attorney investigation was electronically recoded into the “Investigators Time” category. These offices include Bee County, El Paso County, Harris County, and Willacy County (see Appendix C, Table C-1).

Table 4-2. Time Categories and Definitions

Client Communication
<ul style="list-style-type: none"> • Meetings, letters, emails, texting, phone, discussions at court with client and/or family members • Jail visits, wait time, time locating client • Arranging for interpreter
Negotiation/ Meetings
<ul style="list-style-type: none"> • Negotiation with officials (e.g., judges, DA, probation department, pretrial services) regarding plea bargaining, discovery, trial preparation, motions, client supervision or bond status, sentencing or other litigation issues.
Discovery
<ul style="list-style-type: none"> • Discovery requests • Review of discovery materials or state’s evidence • Listening to jail calls to family and friends
Attorney Investigation
<ul style="list-style-type: none"> • Investigation of the facts conducted by the attorney (Record external private practice or public defender investigation under IN) • Depositions and statements from witnesses/family/friends • Visits to the crime scene • Consulting with external investigator • (See State Bar Defense Guideline 4.1b3 regarding counsel’s responsibilities in the investigation of potential witnesses adverse to the client)⁵¹
Investigator’s Time
<ul style="list-style-type: none"> • Investigation of the facts conducted by private practice or public defender investigators. • If investigation is conducted by office support staff, record the time as OS
Legal Research/Trial Preparation
<ul style="list-style-type: none"> • Consulting with experts (e.g., immigration attorney, social workers, forensics specialists) • Drafting case-specific motions and pleadings • Developing theory of the case • Preparing/coordinating with witnesses, jury instruction • Sentencing materials, alternative sentencing research
Court Time
<ul style="list-style-type: none"> • Filing documents (including standardized motions) • Calls, emails, internet usage to schedule court time or check court dates • Calls to court clerk regarding a specific case • Court appearances, hearing and trials, time waiting in court
Social Work/Case Management
<ul style="list-style-type: none"> • Assistance to help clients to get benefits and services needed for better defense outcomes. Examples include mental health treatment, medical care, public benefits, housing, etc. • Other forms of direct client assistance to improve their wellbeing and case outcomes.
Case-Specific Office Support
<ul style="list-style-type: none"> • Time spent by attorneys or their staff (paralegals, clerical, or administrative support staff) helping to prepare the defense of a specific client. • Includes administrative work such as file creation and management, invoicing, and calendaring. • May include fact-finding, social work, or other case-specific functions performed by a non-attorney assistant.

⁵¹ The reference to State Bar Defense Guideline 4.1b3 was provided in the Delphi Panel instructions only. It was not provided to attorneys participating in the Timekeeping Study or the Time Sufficiency Survey.

V. Time Currently Being Spent on Court-Appointed Cases

The first phase of the research involved measurement of current indigent defense practice. This data provided a “real world” starting point for describing defense-related services provided in different types of cases. It also offered a baseline for assessing the amount of additional time, if any, that may be required to provide reasonably effective representation. However, the task of measuring actual indigent defense practice time in Texas presents significant challenges, and the limitations of the descriptive data presented below should be noted.

Because the state has a decentralized, county-based indigent defense system, there is substantial variation across jurisdictions in terms of local systems and practices used to deliver indigent defense. As a result, a statewide perspective on actual time spent on court-appointed cases is difficult to gain with precision. In part, this problem was addressed by recruiting a sample of attorneys balanced against population in all nine regions of the state. In addition, recruitment was focused in the 39 counties with populations in excess of 100,000. These 15 percent of all counties contain approximately 80 percent of Texas’ population, ensuring that the available practice data was from attorneys representing the large majority of indigent defense cases. Over 95 percent of attorneys who kept time records were from these most populous counties.

While previous caseload studies in other states relied on public defender data (which could be required through office policy), the vast majority of indigent defense cases in Texas are handled by private attorneys, most of whom do not routinely track their time. Likewise, public defender offices are administered at the county level, and could choose whether to take part in the study. Consequently, timekeeping data collection was dependent upon volunteer public defender offices and private attorneys who were willing to track and submit their time records.

Individuals that volunteered may differ in important ways from those who did not. Most notably, it is likely that both individual attorneys and public defender offices with the highest caseloads chose not to participate. While these limitations should be noted, the resulting descriptive data is nonetheless useful for providing context for normative recommendations that follow, as well as for providing a baseline against which to assess practice changes over time.

Between November 2013 and January 2014, an “awareness campaign” was conducted to inform Texas defenders about the weighted caseload study and to enroll volunteers through the study website. The Texas Criminal Defense Lawyers’ Association and the State Bar of Texas disseminated information about the project through multiple channels including trainings, leadership meetings, publications, and social media. At the same time, the research team implemented a direct telephone recruitment campaign.

Timekeeping took place over a 12-week period between February 3 and April 25, 2014. Attorneys tracked their time on criminal cases through a customized online data entry system developed specifically for the study. At the end of the study period, 196 participating lawyers made over 25,000 time entries representing 8,151 defendants. Attorneys contributing time records had 14.7 years of experience on average.

During analysis, findings from cases in the 12-week time sample were extrapolated to estimate average time currently being spent on eight defense-related tasks at each of the six offense levels. Attorneys who contributed time records to the study are acknowledged in Appendix B. Additional detail regarding the Timekeeping Study research methods is provided in Appendix C.

Timekeeping Study Results

Figure 5-1 shows the average hours the Timekeeping Study found Texas attorneys actually spend per case at each offense level. Class B and Class A misdemeanors are being disposed in 4.7 and 7.6 hours, respectively. Low-level state jail and third degree felonies are resolved in 10.8 and 12.9 hours, respectively. Second degree felonies take 15.2 hours to dispose, and the highest-level first degree felonies are resolved with 22.3 hours of attorney time.

Figure 5-1. Average Hours Currently Spent on Indigent Defense Cases

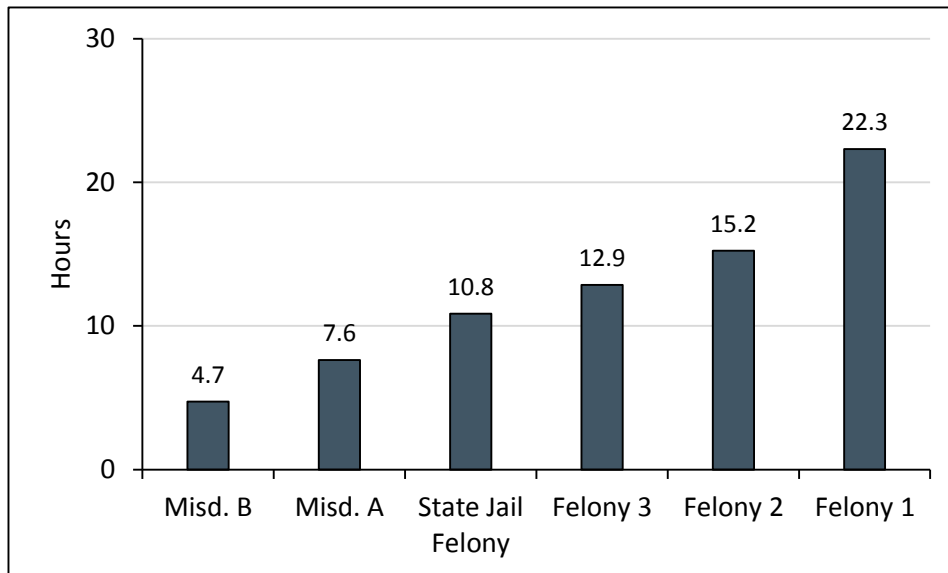
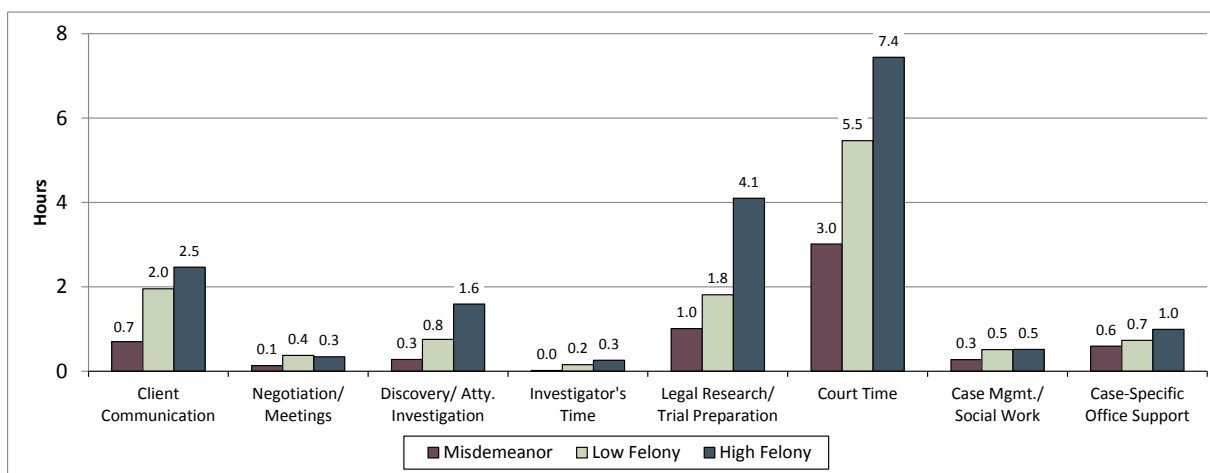


Figure 5-2 provides a more detailed picture of how attorneys are utilizing their time on specific tasks. To reduce complexity, the six offense levels were consolidated into three.⁵² A fully detailed breakdown of Timekeeping Study results by offense level and task is available in Appendix D. Average misdemeanors are being disposed in 6.0 hours, low-level felonies in 11.8 hours, and high-level felonies in 17.7 hours.

Nearly half of all time on indigent defense cases is being expended in Court Time. The next most time-intensive task categories, Legal Research/Trial Preparation and Client Communication account for about 15 to 20 percent of case time each. A larger proportion of case time (as much as 30 percent) is devoted to Legal Research/Trial Preparation in high-level felony cases.

Figure 5-2. Average Hours Currently Spent on Indigent Defense Cases by Task



Notably, investigators are rarely used among attorneys in the study. In fact, non-attorney investigation accounts for less than two percent of all case time at every offense level. Most investigation seems to be done by the lawyers themselves, with approximately 5 to 10 percent of case time expended on Discovery/Attorney Investigation.

Not surprisingly, less time is devoted to misdemeanors than felonies. However, it is striking that criminal defendants who have been charged with a misdemeanor receive no more than an hour of attorney time in nearly every time category except Court Time.

While these data establish a baseline in current practice, the weighted caseload study does not assume that the time that “is” being spent on criminal defense necessarily reflects the time that

⁵² Misdemeanors include Class A and Class B offenses, low-level felonies include state jail and third degree felonies, and high-level felonies include second and first degree felonies. Aggregated results at each level were based on a weighted average of the proportion of cases in each of the two categories being combined.

“should” be spent to deliver effective representation. The next phases of the study moved from a focus on current practice toward normative assessments of the adequacy of measured time.

VI. Time Sufficiency Survey

Upon completion of the timekeeping study, practicing criminal defense attorneys statewide were invited to review results in a Time Sufficiency Survey. They were asked to indicate if, “in your professional judgment, the measured amounts should be increased or decreased to ensure effective assistance of counsel.”⁵³ “No change” was also a response option.

The Time Sufficiency Survey gathered input, as noted earlier, from a diverse body of 319 public and private legal practitioners. Respondents averaged 18.4 years in the criminal defense profession and reported having a slightly larger proportion of retained clients on average (46 percent) than their colleagues in the Timekeeping Study (33 percent). Results provided context for assessing the adequacy of timekeeping findings from the perspective of professional criminal defense peers. The survey is presented in Appendix E.

To make responding to the survey more manageable, the original six offense levels were aggregated into three categories for presentation to respondents.⁵⁴ Within each offense level, attorneys could adjust either the frequency with which tasks were performed or the time spent when the tasks were done. Time and frequency adjustments were multiplied and aggregated by offense level to get revised time estimates.

Time Sufficiency Survey Results

The Time Sufficiency Survey reveals agreement among a cross-section of practicing criminal defense lawyers that more time “should” be spent on indigent defense than currently “is” the case. Increases were recommended for virtually every indigent defense-related task and at every offense level (Figure 6-1). Full survey results are reported in Appendix F.

⁵³ “Effective assistance of counsel” was defined in the survey as “competent legal representation without errors that would result in the denial of a fair trial.”

⁵⁴ See *supra* note 52.

Figure 6-1. Adjustments to Current Practice Recommended by Time Sufficiency Survey Respondents

Figure 6-1a. Misdemeanor “Time Sufficiency Survey” Time Adjustments

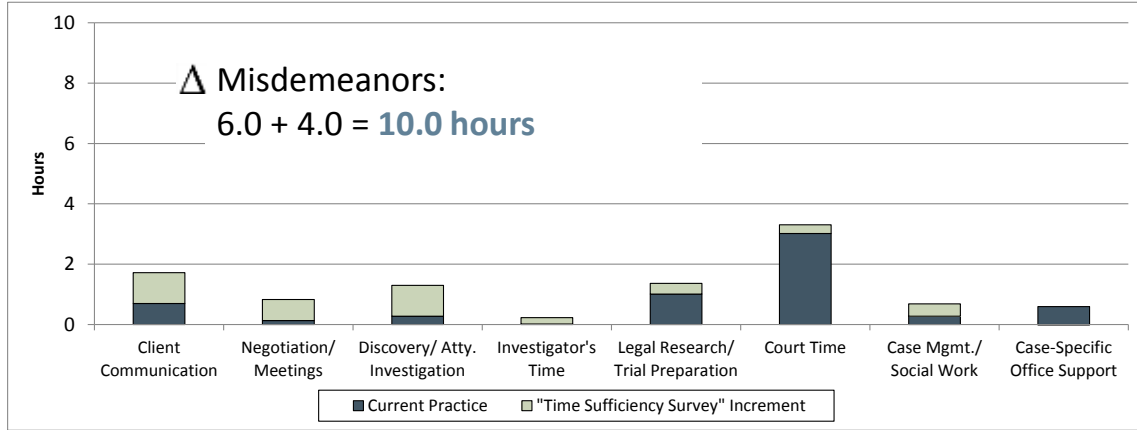


Figure 6-1b. Low-Level Felony “Time Sufficiency Survey” Time Adjustments

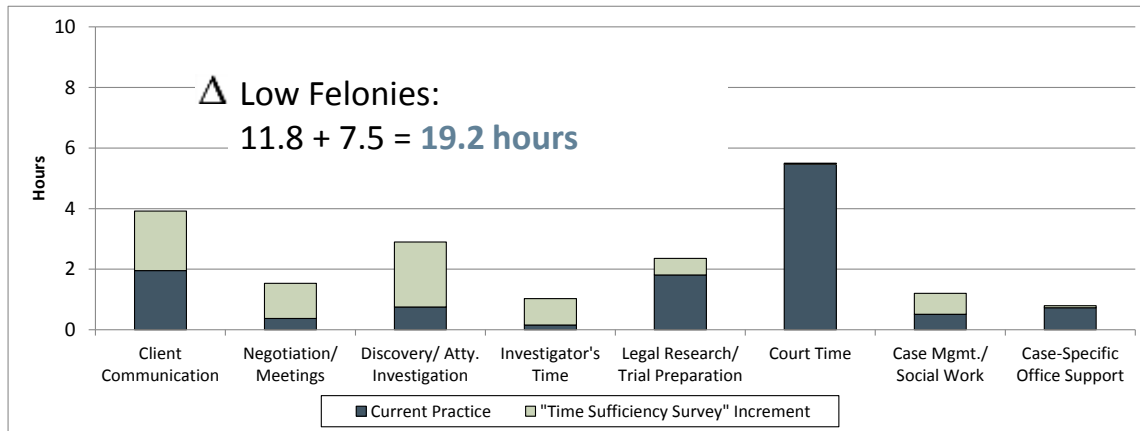
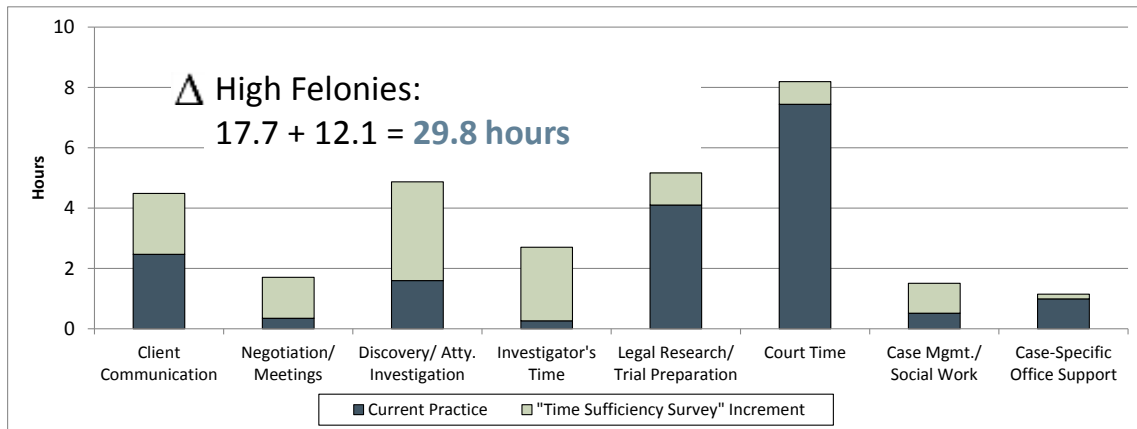


Figure 6-1c. High-Level Felony “Time Sufficiency Survey” Time Adjustments



For both misdemeanors and felonies, survey respondents advised increasing actual time by about two-thirds above that currently being spent. By far, the greatest proportional increase was recommended for investigation. According to respondents, four times more attorney time should be dedicated to Discovery/Attorney Investigation. However, the largest proportional increases were in time spent by external investigators. Lawyers surveyed advised that non-attorney Investigator's Time should increase by a factor of 13 times for misdemeanors, and 10 times for high-level felonies. This advice is consistent with direction provided by the State Bar of Texas.⁵⁵ Involvement of a third party investigator provides the defense with a witness who can testify at trial in the event that a witness contradicts what was told to a defense investigator during a prior interview.

Substantial time increases were also suggested in the area of Negotiations/Meetings. Surveyed lawyers recommend five times as much time should be spent in meetings with judges, prosecutors, pre-trial services, and other offices that impact case processing. Overall time spent on Client Communication and on Case Management/Social Work should more than double.

The smallest increases were suggested for Court Time and Case-Specific Office Support. It should be noted, however, that attorneys called for increases in time spent in every category. In just one instance – Case-Specific Office Support for misdemeanor cases – did they believe measured time is already sufficient for reasonably effective representation.

While the Sufficiency of Time Survey is useful for demonstrating the general opinions of a broad cross-section of attorneys, a greater degree of precision is required to produce formal guidelines for policy and practice. For this, the research team turned to highly knowledgeable experts who were well versed in criminal case practice in Texas.

VII. The Delphi Method for Determining Caseloads

A central purpose of the case weighting study was to generate more exacting guidelines for the number of cases attorneys can responsibly carry. However, there is no objective way to measure the point at which caseload size interferes with the delivery of reasonably effective counsel. For this determination, qualitative assessments are unavoidable. The research team

⁵⁵ PERFORMANCE GUIDELINES, *supra* note 10 (stating in Guideline 4.1 that “[i]f counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.”).

therefore needed a rigorous method of extracting judgmental data from authorities to arrive at valid attorney time recommendations.

The Delphi method offers a rational and structured means to integrate opinions of highly informed professionals to solve problems.⁵⁶ Group processes are systematized in order to minimize bias while extracting and reconciling knowledge from capable experts.⁵⁷ Because of its relative objectivity, the Delphi method is endorsed by national indigent defense scholars⁵⁸ as an alternative to facilitated focus groups to determine the time attorneys “should” spend on different types of cases. The Delphi process is designed to remove sources of bias that can compromise the validity of group decision-making.

Qualifications of the Attorney Panel

The Texas Delphi Panel was comprised of 18 highly experienced criminal defense practitioners selected to represent each of the state’s nine Administrative Judicial Regions. Participants averaged 25.3 years practicing criminal law. Thirteen were solo private practitioners or partners. Three chief public defenders and two managed assigned counsel attorneys were also represented. Panel members included people specializing in both felony and misdemeanor cases, as well as individuals on appointment lists for foreign language clients and mental health cases. A complete list of members is presented in Appendix G.

Panel members were able to offer a well-informed perspective on the elements of effective counsel based on their familiarity with different types of cases in a variety of contexts over many years. As a result of their depth of experience, these attorneys could think holistically about the overall impact on case time of complex and overlapping case attributes such as charge enhancements, sentencing practices, and client characteristics like detention status, immigrant status, or mental illness. Because of the qualifications of the decision-makers and

⁵⁶ See generally, Section II (discussing the Delphi method).

⁵⁷ See M. ADLER & E. ZIGLIO, *GAZING INTO THE ORACLE: THE DELPHI METHOD AND ITS APPLICATION TO SOCIAL POLICY AND PUBLIC HEALTH* (Kingsley Publishers 1996). The technique was piloted by the RAND Corporation in the mid-1960’s as a means to forecast new inventions and technologies. Since its inception, the Delphi process has been used in industry, government, and academics, particularly in the areas of public health and education. See also, EDWARD CORNISH, *FUTURING: THE EXPLORATION OF THE FUTURE* (World Future Society 2004).

⁵⁸ In most weighted caseload studies conducted during the past decade [see *supra* note 43] focus groups of attorneys reviewed time sample and Time Sufficiency Survey results in order to determine “quality adjustments” needed to arrive at caseload standards. See Lefstein, *supra* note 22, at 142–146 (arguing that “in making quality adjustments to preliminary case weights derived from the time-based study, some type of a Delphi method is essential to assess individual lawyer guesses about amounts of additional time needed to perform various tasks, such as preparing for pretrial release hearings, trials, sentencing, etc. Through analysis and discussion, the most experienced lawyers in the defense program along with senior management should be able to assess the estimates of individual lawyers respecting additional amounts of time that are needed.”); see also Hanlon, *supra* note 34; NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 34, at 13–14.

the rigorous processes used, time estimates generated through the Delphi process offer the most comprehensive and carefully constructed attorney time recommendations currently available for Texas jurisdictions.

The Delphi Decision-Making Process

Panel members were convened for in-person meetings on two occasions. The first meeting, held on August 26, 2014, was to review the group's charge and to train participants on the procedure. Then, over the next seven weeks, Delphi Panel members completed a highly specified iterative process involving a three-round sequence of activities designed to integrate their cumulative expertise and arrive at recommended case weights. At the final meeting held on October 17, 2014, members reached consensus on final caseload guidelines.

Two members of the project Advisory Panel, Norman Lefstein and Steve Hanlon⁵⁹ collaborated in the implementation of both the initial and the final Delphi Panel meetings. They brought an external perspective informed by their work supporting the implementation of caseload standards in other jurisdictions. Their role in the Texas study was to advise the research team on methodological considerations regarding the Delphi process and to orient member attorneys to professional norms and standards of practice that should guide their thinking when developing time recommendations.⁶⁰

ROUND 1: Independent Analysis

Throughout the Delphi process, attorney time estimates were made de novo without reference to earlier results from either the Timekeeping Study or the Time Sufficiency Survey findings. During the first phase of Delphi group decision-making, panel members were required to complete a survey regarding their personal recommendations for frequency and duration of tasks at each offense level (see Appendix H). Data collection was adapted to accommodate panel members' request to develop separate time estimates for cases resolved by trial and for those resolved by other means such as plea, dismissal, or diversion.

Separation from others in the group was intended to give each member equal influence as more prominent or charismatic individuals were unable to disproportionately affect the decision process. In addition to recording their recommended time values, respondents could also record open-ended comments expressing their rationale to be shared anonymously with peers in the next survey round. Comments helped to inform group thinking without

⁵⁹ See *supra* Section IV (referencing Lefstein and Hanlon's credentials).

⁶⁰ See *generally, supra* Section II.

significantly impacting group dynamics. Round One time assessments were aggregated and de-identified so that individual responses remained confidential.

ROUND 2: Iterative Adjustments of Opinion

The second Delphi round involved another survey, this time to review and respond to summary recommendations from the first round (see Appendix H). Anonymized results expressed as aggregated medians and ranges, as well as open-ended comments submitted during Round One, were shared with members. Again, the purpose was to encourage frank and thoughtful responses while removing the possibility of undue influence by individual participants.

After reviewing the summary feedback from peers, attorneys were given the opportunity to adjust their original time recommendations. Results from Round Two were then aggregated and summarized by the research team in preparation for the consensus phase.

ROUND 3: Consensus

In the third and final stage of the Delphi process, panel members met to reconcile remaining differences in time estimates. The data generated in Round Two was projected on a large screen for the group to see as a starting point for facilitated discussion. A first review iteration was to reach agreement on how frequently each of nine tasks⁶¹ should be performed at every offense level. A second iteration was to reach agreement on the amount of time that should be spent when each activity occurred.

In contrast to earlier rounds, in Round Three anonymity was not a concern. As each of 108 task time or frequency values was considered,⁶² participants were encouraged to publicly state a rationale and advocate for their views based on their best professional judgment. Following discussion, a vote was held with a two-thirds majority required to change the frequency or time estimate being considered. Further discussion ensued until at least two-thirds of participants indicated no further adjustments were needed. Time recommendations remaining after completing this process were aggregated to produce totals by offense level.

Delphi Results

Trial and Non-Trial Time Estimates

In a departure from previous workload studies,⁶³ the Texas Delphi Panel chose to produce separate time recommendations for cases disposed by trial and for cases disposed by pleas,

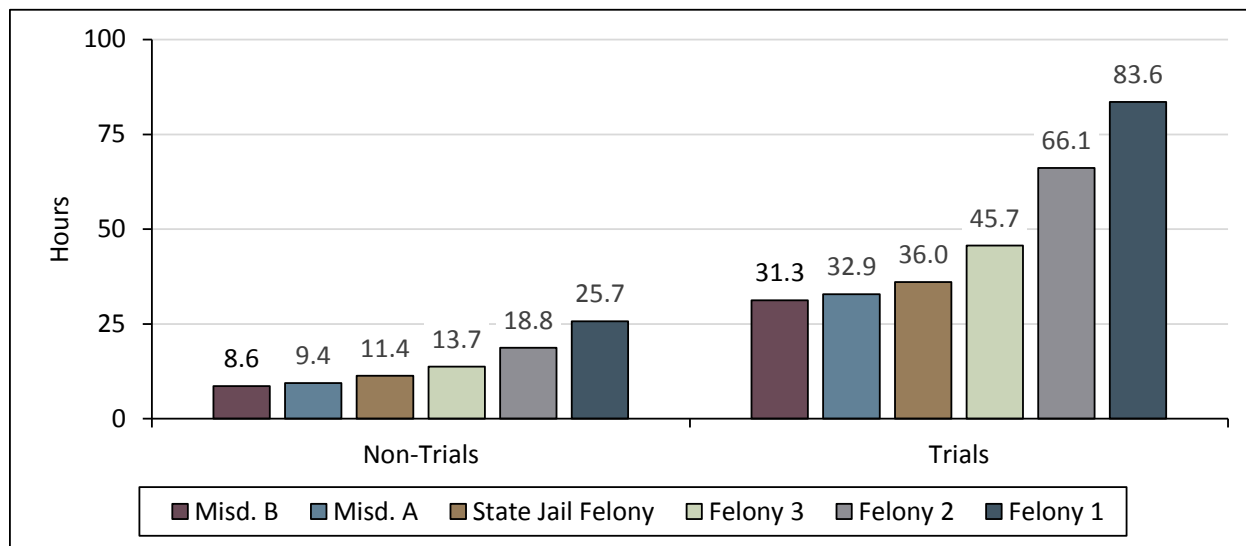
⁶¹ The “Discovery/Attorney Investigation” category, combined for the Timekeeping Study and the Time Sufficiency Survey, was divided into two separate components for consideration by the Delphi Panel. *See supra* Section II (discussing the Delphi method) & Section IV, “Time Categories.”

⁶² Nine task categories x Six offense levels x Two dimensions (frequency and duration) = 108 categories reviewed.

⁶³ *Supra* note 43.

dismissals, diversion, or other non-trial means. Figure 7-2 illustrates the final estimates for each scenario. A detailed description of findings is in Appendix I. In general, panel members expect trials to require about 3.5 times as much time as non-trials at each offense level.

Figure 7-2. Hours Recommended by Delphi Panel for Reasonably Effective Counsel



In order to deliver effective and competent representation, the Delphi Panel also determined that considerably more cases should be resolved by trial than is currently the case (Table 7-1). Although just 1.1 percent of all misdemeanors in Texas went to trial in FY 2014,⁶⁴ Delphi members recommended a trial rate of 14 percent for Class B misdemeanors and 20 percent for Class A violations. Similarly, though 2.5 percent of actual felonies were disposed in trials,⁶⁵ Delphi members concluded that higher trial rates ranging from 11 percent for state jail felonies up to 20 percent for first degree felonies are required to achieve reasonably effective and competent representation. On the whole, the panel held that at least 15 times as many misdemeanors and roughly 5 times as many felonies should be tried than are in practice.

⁶⁴ OFFICE OF COURT ADMIN., OFFICE OF COURT ADMINISTRATION ANNUAL STATISTICAL REPORTS FOR FY 2014 1, *available at* <http://www.txcourts.gov/statistics/annual-statistical-reports/2013.aspx>. See Activity Detail from September 1, 2013 to August 31, 2014 for Constitutional County Courts and For Statutory County Courts.

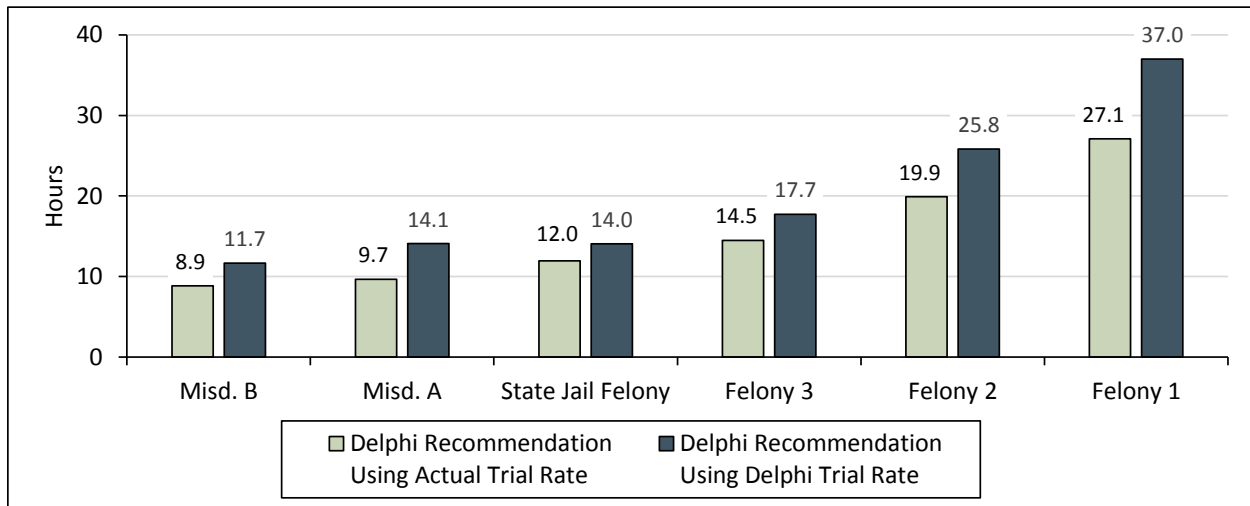
⁶⁵ *Id.* at 2. See Activity Detail for District Courts.

Table 7-1. Delphi-Recommended and FY 2014 Actual Trial Rates

	FY 2014 Observed Percent of Cases Resolved by Trial	Delphi-Recommended Percent of Cases Resolved by Trial
Misdemeanor B	1.1%	14%
Misdemeanor A		20%
State Jail Felony	2.5%	11%
Felony 3		13%
Felony 2		15%
Felony 1		20%

The trial rate that is used makes a substantial difference in overall time recommendations. A weighted average of Delphi time estimates based on actual trial rates (1.1 percent for misdemeanors, 2.5 percent for felonies) yields lower estimated hours per case than if weighted averages are based on the higher 11 to 20 percent trial rate recommended by the Delphi Panel. Figure 7-3 illustrates the differences resulting from each weighting scheme. Overall, adopting the Delphi Panel’s higher trial rate increases time guidelines by 39 percent for misdemeanors and 26 percent for felonies.⁶⁶ Higher Delphi-recommended trial rates would require more attorney time per case.

Figure 7-3. Hours per Offense Level Using Actual and Delphi-Recommended Trial Rates



⁶⁶ Percentages are based on a weighted average accounting for differences in the proportion of felony cases at each level, see *supra* note 52.

Delphi Adjustments to Current Practice by Task

The specific task areas where the Delphi Panel advised increases in defense time are illustrated in Appendix J. Like their colleagues responding to the Time Sufficiency Survey, Delphi members agreed that the greatest increases are needed in the area of investigation. Delphi members articulated at least a five-fold increase in Discovery/Attorney Investigation overall (nine times more for misdemeanors). Showing deference to the State Bar of Texas’s non-capital defense performance guidelines,⁶⁷ they also called for a near twenty-fold increase in non-attorney Investigator’s Time. As much as forty times more external investigation was recommended for misdemeanors in particular.

State Bar of Texas Non-Capital Defense Performance Guidelines

Guideline 4.1: If counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.

Delphi members agreed that about six times more time should be spent in Negotiations/ Meetings, and that Client Communication should increase by more than two-thirds on average. Like surveyed attorneys, Delphi participants concluded increases in Court Time are needed for the lowest- and highest-level cases. However, while surveyed attorneys suggested a 10 percent increase, Delphi members recommended a greater increment for both misdemeanor (46 percent increase) and high-level felony cases (35 percent increase). This greater emphasis on Court Time is consistent with the Delphi Panel’s assessment that more cases should be resolved through trials.

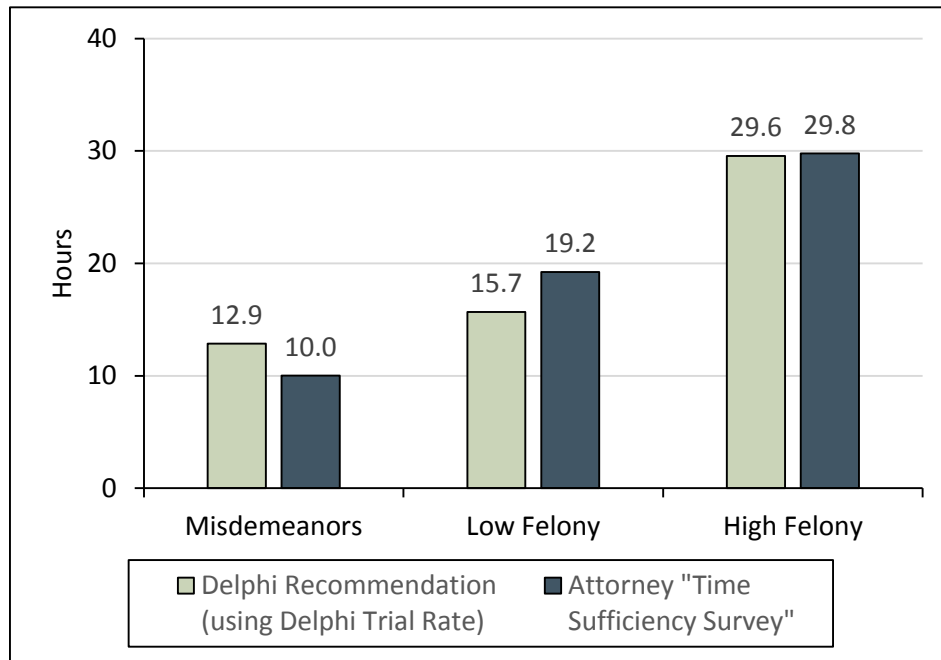
VIII. Texas Caseload Guidelines

With the conclusion of Texas’ weighted caseload study, new and important sources of information are now available to guide policymakers’ thinking about criminal defense caseloads. For the first time, data is available to describe how practicing attorneys spend their time on court-appointed cases. In addition, an attorney survey and the Delphi Panel assessment, measure professional norms regarding how indigent defense “should” be provided. This section of the report compares and integrates guidance offered by these data sources, culminating in a recommendation for caseload parameters.

⁶⁷ See generally, *supra* Section VI, “Time Sufficiency Survey Results.”

To begin, it is noteworthy that two completely independent samples of attorneys reached a striking level of agreement regarding the time that “should” be spent on criminal defense cases. If all of the Delphi Panel’s recommendations are fully accepted, including the assumption that reasonably effective counsel requires that more cases go to trial (see Table 7-1), the resulting caseload estimates are in close accord with those of attorneys responding to the Time Sufficiency Survey.

Figure 8-1. Hours per Case Recommended by Delphi Panel Compared to Time Sufficiency Survey Respondents



Remarkably, the two unconnected attorney cohorts are in perfect agreement that a high-level felony requires 30 hours to defend, on average (see Figure 8.1). Their recommendations are just three hours apart for other case categories. It is reasonable to believe that if the surveyed attorneys had had the benefit of the Delphi process to structure their decision-making, full consensus would likely have been attained between the two groups. This finding increases confidence in the reasonableness of time estimates emerging from the study.

Delphi Recommended Cases per Year

The time attorneys say “should” be spent in different types of cases serves as the basis for calculating maximum caseload guidelines. To convert time estimates into annual caseloads, it

was assumed that attorneys work 2,087 hours per year⁶⁸ and that all of this time is spent defending clients. The resulting calculation is straightforward:

$$(2,087 \text{ Hours/Work-Year}) / (\# \text{ Hours/Case}) = \text{Annual Full-Time Caseload}$$

Calculated separately at each offense level, the resulting guidelines represent the maximum number of clients a single attorney should represent in a year if they handle only a single type of case.

Figure 8-2. Case Limits per Year Comparing Different Trial Rate Assumptions

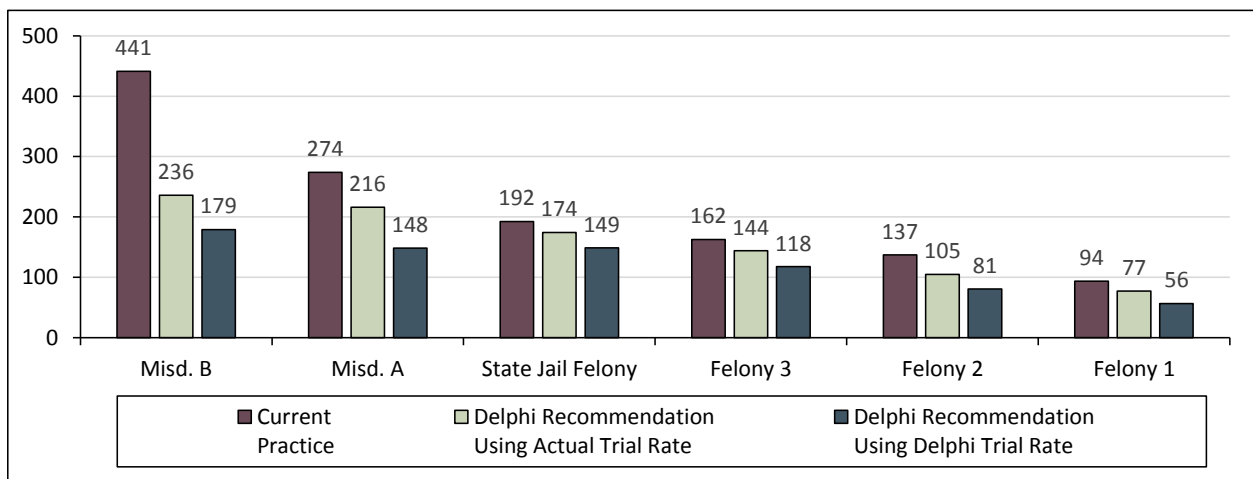


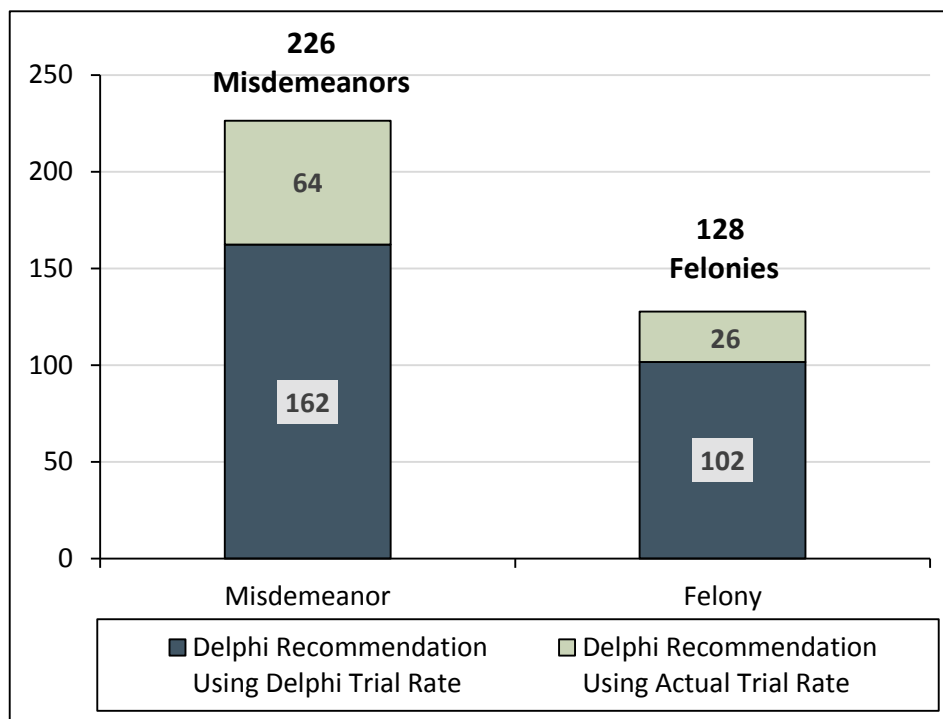
Figure 8-2 shows caseloads computed based on actual current practice time (see Figure 5-1) compared to two different ways of calculating the Delphi Panels’ ideal caseload maximums. The first set of caseload parameters accepts the Delphi time estimates but substitutes actual FY 2014 trial rates for the higher trial rates advised by members. The second set of caseloads parameters also accepts the Delphi Panel’s time estimates, but applies the Delphi-recommended trial rate as well.

When the Delphi’s recommended trial rate is used, the maximum number of cases per year ranges from 56 to 149 for different levels of felonies and from 148 to 179 for misdemeanors. When actual trial rates are substituted for the Delphi Panel’s “ideals,” more non-trial

⁶⁸ The 2,087-hour work week is taken from the US Government’s Federal civilian employee full-time pay computation, available online at: <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/factsheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/>.

dispositions are assumed, leaving attorneys with time to defend about 64 additional misdemeanors or 26 additional felonies in a year (see Figure 8-3). Importantly, either calculation method yields case recommendations that are well below those observed in current practice.

Figure 8-3. Change in Caseload Guidelines after Applying Actual Trial Rates to Delphi Panel Recommendations



Caseload Recommendations Compared to NAC Standards and Current Practice

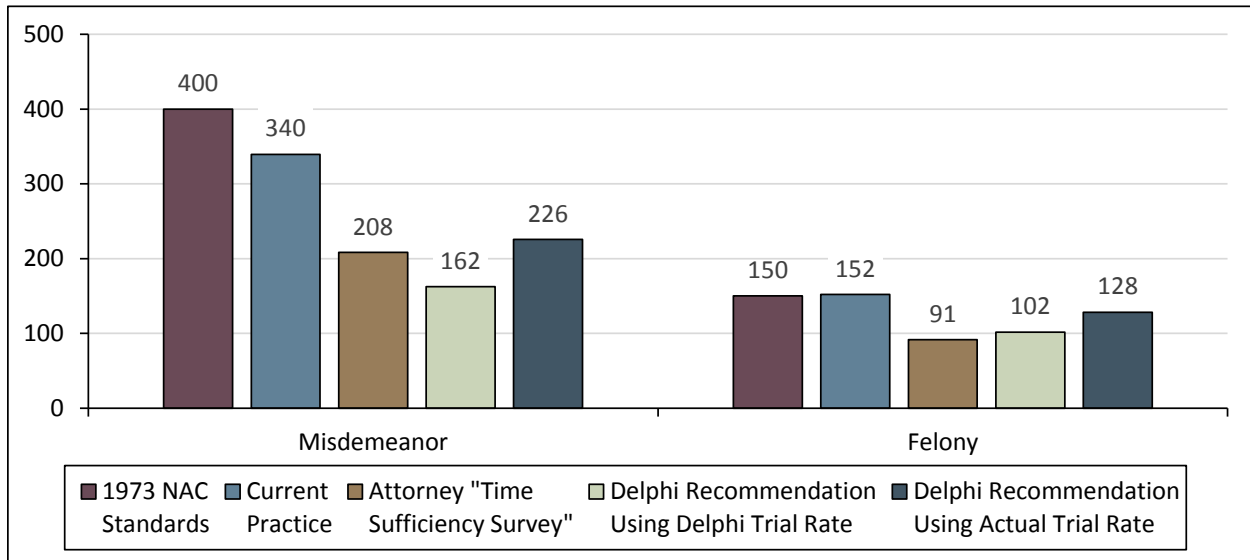
For over 40 years, caseload guidelines set forth by the National Advisory Commission have been widely cited parameters for public defender attorneys. As noted elsewhere in this report,⁶⁹ serious concerns have been expressed about the validity of the NAC standards for contemporary criminal defense representation. Guidelines emerging from the Texas study are considerably lower, affirming that today’s defense attorneys need substantially more time to ensure the delivery of adequate defense services.

A public defender caseload should not exceed 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 Mental Health Act cases, or 25 appeals cases per year.

National Advisory Commission (1973)

⁶⁹ See generally, *supra* Section II, “Efforts to Address the Caseload Problem—Professional Judgments.”

Figure 8-4. Comparison of Annual Caseload Recommendations from All Sources Available to the Study



Current Practice vs. NAC Standards

Texas lawyers taking part in the Timekeeping Study have full-time equivalent capacity for 340 misdemeanors or 152 felonies each year.⁷⁰ Figure 8-4 shows current felony caseloads are similar to the NAC guidelines and misdemeanors are lower. These findings suggest existing agreement among attorneys that the 400 annual misdemeanor cases recommended by NAC in 1973 are not sufficient for quality counsel in today’s practice environment. Public defenders in particular, responsible for two-thirds of the study cases, may be subject to formal office policies constraining misdemeanor caseloads at or below the NAC parameters.

Current Practice vs. Delphi Recommendation.

Second, Figure 8-4 shows that still further reductions are needed in order to ensure reasonably effective representation. The full opinion of the Delphi Panel, using both their time estimates and their recommended trial rate, is that attorneys should take at least 178 fewer misdemeanors or 50 fewer felonies each year. This equates to a 52 percent reduction in misdemeanors and a 33 percent reduction in felonies compared to current practice.

Delphi vs. Surveyed Attorney Recommendations

Third, Figure 8-4 illustrates that caseload recommendations emanating from Delphi Panel members and surveyed attorneys are substantially similar, affirming their general validity. For instance, the Delphi Panel’s misdemeanor case limit (162 cases/year) and the recommendation

⁷⁰ Current attorney caseloads are calculated based on Timekeeping Study findings presented in Figure 5-1 and using the Annual Caseload Formula presented earlier in this section.

of attorneys in the Time Sufficiency Survey (208 cases/year) differs by just 46 cases per year, or less than one misdemeanor case per week over the course of a year. Similarly, for felonies the full Delphi recommendation of 102 cases per year is just 11 more cases than the number suggested by surveyed attorneys (91 cases/year). This difference is less than one felony per month over the course of a year. The high degree of convergence – within a range of just one misdemeanor per week or one felony per month – lends credence to the validity of overall study findings.

Factors Contributing to Increased Attorney Time Requirements

The striking discrepancy between the caseload standards emerging from this study and the NAC standards of 1973 are readily understood based upon a review of the literature and interviews with Texas attorneys.⁷¹ Lower current caseload recommendations reflect a criminal law practice that has changed dramatically over the past 40-plus years. Factors driving higher attorney time include:

- Increased criminalization of minor offenses requires legal counsel for cases that once were simply deemed undesirable behavior or punished by fine;⁷²
- Tougher sentencing policies make some categories of cases more costly and time-consuming to defend (e.g., DWI, drug, and domestic violence charges);⁷³
- De-institutionalization of people with mental illness increase both case volume and time commitments required to defend complex cases;⁷⁴
- Growing prevalence of specialty courts create new dockets for public defenders to cover with cases that endure over a longer period of time;⁷⁵
- Use of forensics and experts increases responsibility of defense attorneys to understand and integrate technical and scientific considerations into the defense;⁷⁶

⁷¹ See *supra* text accompanying note 28.

⁷² NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 39, 27–28.

⁷³ Personal conversation on October 4, 2013 with criminal defense lawyers Kellie Bailey, Austin Criminal Defense Lawyers Association (ACDLA) Board Member; Patricia Cummings, Adjunct Professor teaching the Criminal Defense Clinic at the University of Texas School of Law; Bradley Hargis, President of the ACDLA; and Jeanette Kinard, Director of the Travis County Mental Health Public Defender Office. See also, ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* (Metropolitan Books 2010).

⁷⁴ See, e.g., THE SENTENCING PROJECT, *MENTALLY ILL OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM: AN ANALYSIS AND PRESCRIPTION* (2002), available at http://www.sentencingproject.org/doc/publications/sl_mentallyilloffenders.pdf. Andrew E. Taslitz, *Mental Health and Criminal Justice: An Overview*, 22 *CRIM. JUST.* 1, 4–7 (2007).

⁷⁵ See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 *GEO. J. LEGAL ETHICS* 401, 401–458 (2001); Tamar M. Meekins, *Risky Business: Criminal Specialty Court and the Ethical Obligations of the Zealous Criminal Defender*, 12 *BERKELEY J. CRIM. L.* 75 (2007).

⁷⁶ See, e.g., THE JUSTICE PROJECT, *IMPROVING THE PRACTICE AND USE OF FORENSIC SCIENCE* (2008), available at http://ag.ca.gov/meetings/tf/pdf/Justice_Project_Report.pdf; Brandon L. Garrett & Peter J. Neufeld, *Invalid*

- Collateral consequences of conviction raise the stakes for defendants⁷⁷ – especially in a state with a large immigrant population, many of whom may be undocumented.⁷⁸

The magnitude of the transformation demonstrates that criminal defense must evolve to stay current. Not only must attorneys meet current practice requirements, but policymakers must constantly monitor caseload guidelines and related resource requirements for the provision of effective indigent defense.

Final Recommended Caseload Guidelines

This report demonstrates that establishing indigent defense caseload parameters is necessarily a qualitative determination. However, the research approach used here has relied upon methods to introduce order and logic into the decision-making process. Methods have followed a rigorous process incorporating:

- Independent judgments made by highly qualified professionals,
- Collaborative consideration of factors impacting time required for effective counsel,
- A rational decision-making protocol to promote valid results,
- Use of evidence from multiple convergent data sources, and
- Consideration of actual trial rate.

Upon its conclusion, the study must offer guidance to policymakers and appointing authorities regarding the number of cases that can be effectively defended. In this instance, the task is complicated by the Delphi Panel’s decision to recommend a larger number of cases be disposed by trial than is currently the case in practice. In fact, members advised more than a five-fold increase in the actual FY 2014 trial rate for felonies, along with a fifteen-fold increase in misdemeanor trials.

Whether the Delphi Panel’s ideal trial rates or actual trial rates are applied makes a difference in the final caseload recommendations. Figures 8-2, 8-3, and 8-4 quantify this difference. The Delphi Panel’s higher assumed trial rate translates to 28% fewer misdemeanors and 20% fewer felonies defended per year than if actual trial rates are used. Clearly, the smaller number of annual cases derived from the Delphi Panel’s recommended trial rate would allow more time for a competent and diligent defense. Indeed, if attorneys had additional time to defend each client, it is likely the number of trials would rise, perhaps to ideal levels. For now, however, the

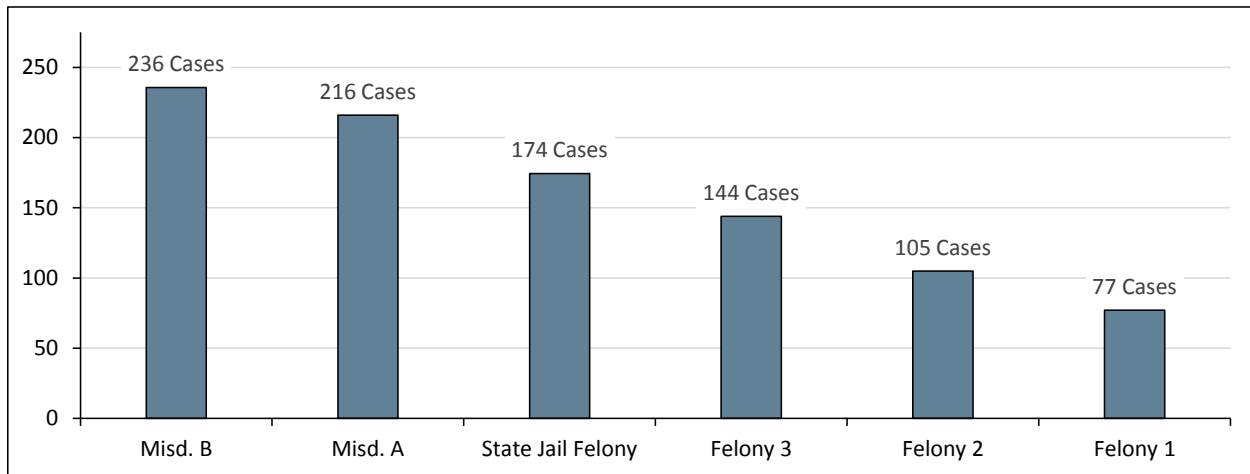
Forensic Science Testimony and Wrongful Convictions, 95 VA. L. REV. 1, 1–97 (2009).

⁷⁷ NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 39, at 12–13.

⁷⁸ *Supra* note 72; *see also*, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *available at* <http://www.abacollateralconsequences.org/>.

“ideal” rate is not aligned with reality. Just 1.1 percent of misdemeanors are tried – not the 14 to 20 percent favored by the panel. Similarly, just 2.5 percent of felony cases are disposed by trial rather than the 11 to 20 percent the panel supports (see Table 7-1).

Figure 8-5. Final Recommended Caseload Guidelines for Texas
(Based on Delphi Time Estimates and FY 2014 Trial Rates)



For this reason, final recommended caseload guidelines for Texas presented in Figure 8-5 are computed based on actual FY2014 trial rates. The results indicate, for the delivery of reasonably effective representation attorneys should carry an annual full-time equivalent caseload of no more than the following:

- 236 Class B Misdemeanors
- 216 Class A Misdemeanors
- 174 State Jail Felonies
- 144 Third Degree Felonies
- 105 Second Degree Felonies
- 77 First Degree Felonies

Importantly, annual data is available on the proportion of felony and misdemeanor cases resolved by trial or by other means. It is therefore not only possible, but recommended that proactive measures be taken to align Delphi-recommended and actual trial rates as an element of efforts to achieve standards of reasonably effective counsel. Annual data is available to

monitor actual changes in the occurrence of trials⁷⁹ and caseload guidelines should be reviewed and adjusted to reflect changes over time. Until that occurs, however, it is most accurate and efficient to base current caseload guidelines on actual trial practice.

IX. Uses of Texas Caseload Guidelines

According to national standards, defense attorneys “should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.”⁸⁰ With the development of caseload guidelines for the state of Texas, a valuable new tool will be available to define the point at which caseloads become excessive. This tool can be used in important ways to protect the Constitutional right to counsel and the equitable administration of justice.

Attorney Accountability Standards

The problem of excessive caseloads is a concern for public defender offices and private assigned attorneys alike.⁸¹ Caseload guidelines give jurisdictions the information needed to hold all court-appointed attorneys accountable for spending sufficient time on each case. Attorneys, likewise, have a tool with which to self-assess their own performance. If cases are being disposed more quickly than allowed under the caseload recommendations, a self-review might reveal more time should be spent on one or more of the tasks required for reasonably effective representation.

Attorney Compensation Standards

If attorneys are to provide the level of defense services required for “meaningful adversarial testing” prescribed by the Supreme Court in *United States v. Cronin*,⁸² besides revised caseload criteria there should also be reasonable compensation for both public defenders and private lawyers. At current average compensation rates of \$608 per non-capital felony and \$198 per misdemeanor,⁸³ court-appointed private attorneys spending the time recommended by this

⁷⁹ See OFFICE OF COURT ADMIN., *supra* note 64 & 65 (citing misdemeanor and felony trial rates).

⁸⁰ See ABA, PROVIDING DEFENSE SERVICES, Standard 5-5.3, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html. See also ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 19, at 17.

⁸¹ Lefstein, *supra* note 22, at 14; SPANBERG GROUP, *supra* note 39, at 14.

⁸² 466 U.S. 648.

⁸³ Based on indigent case and expense data in the FY 2014 TIDC Indigent Defense Expenditure Report. Personal

study would earn \$37 and \$20 per hour, respectively. Justice is put at risk not only when caseloads are excessive, but when lawyers are not paid fairly for their work.⁸⁴ This is why parity between defense counsel and prosecutors has long been advocated by the American Bar Association.⁸⁵

State-Level Indigent Defense Budgeting

Likewise, caseload guidelines can enable state policymakers to determine indigent defense appropriation levels required to ensure that every defendant has consistent quality representation irrespective of the county involved. A professionally competitive compensation rate establishes a goal for statewide defense funding, thereby strengthening an indigent defendants' constitutionally guaranteed right to counsel.⁸⁶

Preemption of Litigation

Adherence to caseload guidelines may help protect jurisdictions against the threat of litigation. Professor Hanlon, advisor to this study, observes that the next generation of indigent defense litigation "will rely heavily on the admonition... that the evidence-based professional judgment of a public defender with respect to excessive caseloads is entitled to substantial deference by the courts."⁸⁷ Texas' new caseload recommendations will provide just such an evidence base upon which legal claims can be grounded. Conversely, jurisdictions following evidence-based court-appointed caseload guidelines would be unlikely targets of complaints.

X. Conclusion

In order to set appropriate caseload guidelines, policymakers need to know the amount of time needed to provide reasonably effective counsel. A central purpose of this research has been to collect data needed to establish these caseload levels given contemporary requirements of

communication on Dec. 22, 2014 with TIDC policy monitor Joel Lieurance.

⁸⁴ NAT'L RIGHT TO COUNSEL COMM., *supra* note 39, at 7; Lefstein, *supra* note 22, at 20.

⁸⁵ ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ABA TEN PRINCIPLES, Principle Eight, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf; ABA, PROVIDING DEFENSE SERVICES, Standard 5-2.4, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

⁸⁶ NAT'L RIGHT TO COUNSEL COMM., *supra* note 39, at 11.

⁸⁷ *See* Hanon, *supra* note 34; *see also*, LAURENCE A. BENNER, AMERICAN CONSTITUTION SOCIETY, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE (2011), *available at* http://www.acslaw.org/sites/default/files/bennerib_excessivepd_workloads.pdf.

criminal defense within the state of Texas. Rigorous research methods were employed, first to assess current time being spent on different levels of cases, then to get normative judgments from a wide spectrum of attorneys regarding the adequacy of time to meet professional obligations.

Results, presented in Figure 8-5 show the final evidence-based caseload recommendations. The guidelines should prove to be a valuable tool for policymakers and practitioners alike. With evidence-based caseload parameters, appointing authorities and attorneys taking appointments can be held accountable for managing workloads, information is available to set fair compensation rates, and jurisdictions adhering to reasonable caseload limits are less exposed to potential litigation. Caseload guidelines alone do not guarantee the provision of reasonably effective counsel, but they are an essential component in securing the promise of the Sixth Amendment right to counsel for the indigent accused.

APPENDIX A

Weighted Caseload Study Advisory Panel Members

Advisory Panel Members

Name	Title	Organization
Jeff Blackburn	Founder and Chief Counsel Attorney at Law	Innocence Project of Texas Blackburn & Moseley, L.L.P.
Robert Boruchowitz	Professor Director	Seattle University School of Law The Defender Initiative
Alexander Bunin	Chief Public Defender	Harris County Public Defender's Office
William Cox	Deputy Public Defender	El Paso County Public Defender's Office
John Dahill	General Counsel	Texas Conference of Urban Counties
Dr. Tony Fabelo	Director, Research Division	Justice Center, Council of State Governments
Buck Files	President Attorney at Law	State Bar of Texas Bain, Files, Jarrett, Bain, and Harrison, P.C.
Laura Garcia	Deputy Legislative Director	Texas Association of Counties
David Gonzalez	Attorney at Law	Sumpter and Gonzalez, L.L.P.
John Gross	Indigent Defense Counsel	National Association of Criminal Defense Lawyers
Steve Hanlon	Adjunct Professor of Law	St. Louis University School of Law
Don Hase	Commissioner Attorney at Law	Texas Indigent Defense Commission Ball & Hase, P.C.
Dennis Keefe	Elected Public Defender	Lancaster County, Nebraska Public Defender
The Honorable Sharon Keller	Chair Presiding Judge	Texas Indigent Defense Commission Texas Court of Criminal Appeals
Jeanette Kinard	Director	Travis County Mental Health Public Defender's Office
Norman Lefstein	Professor of Law and Dean Emeritus	Indiana University Robert H. McKinney School of Law
Andrea Marsh	Founder and Senior Counsel	Texas Fair Defense Project
Joseph Martinez	Executive Director	Texas Criminal Defense Lawyers Association
Bobby Mims	President Attorney at Law	Texas Criminal Defense Lawyers Association Law Offices of Bobby D. Mims, P.C.

Name	Title	Organization
Norman Reimer	Executive Director	National Assoc. of Criminal Defense Lawyers
Lynn Richardson	Chief Public Defender	Dallas County Public Defender's Office
Carl Richey	Founder and President	JusticeWorks, LLC
The Honorable Linda Rodriguez	Commissioner Judge, Hays County, Texas	Texas Indigent Defense Commission County Court At Law
Peter Sterling	Director and General Counsel	Missouri State Public Defender System
Jessica Tyler	Research Manager	Justice Center, Council of State Governments
Jana Williams	General Counsel Attorney at Law	Texas County Judges and Commissioners Association Allison, Bass & Associates, L.L.P
Doug Wilson	Colorado State Public Defender	Colorado State Public Defender System

APPENDIX B

Attorneys Contributing Timekeeping Data

Attorneys Participating in the Timekeeping Study*

Name	Firm
Acosta, Mary	Harris County Public Defender's Office
Alexander, Robert	Law Office of Robert F. Alexander
Anderson, Henisha	Payne & Payne & Associates
Austin, Amanda	Travis County Juvenile Public Defender's Office
Ballard, Cherie	Ballard & Mallowney, PC
Barton, Curtis	Harris County Public Defender's Office
Bass, David	David Bass, Attorney at Law
Benefield, Michael	Albritton Law Firm
Botello, Lori	Law Office of Lori A. Botello
Brese-LeBron, Lacinda	Law Office of Lacinda Brese-LeBron
Bryan, Cole	Law Office of Cole Bryan
Burnett, Abner	Texas Rio Grande Legal Aid
Burnett, Kriste	Law Office of Kriste Burnett
Carpenter, Jacquelyn	Harris County Public Defender's Office
Carreras, Kara	Goza & Carreras, Attorneys at Law, PC
Cartwright, Don	Law Office of Don Cartwright
Chacona, Krista	Law Office of Krista A. Chacona
Cleveland, Walt	Walt A. Cleveland, Attorney at Law
Craven, Elsie	West Avenue Law Practice
Crow, Jerald	Darden, Fowler & Creighton LLP
Cummings, Eric	Cummings & Cummings
Curl, Matthew	M. Fox Curl & Associates, PC
Davalos, Rebecca	Webb County Public Defender's Office
Davidson, Clint	Law Office of Clint Davidson
Dixon, Woodrow	Dixon Law Office
Doggett, Kasey	Kasey Doggett, Attorney at Law
Donley, Roger	Harris County Public Defender's Office
Donohue, Katie	Texas Rio Grande Legal Aid
Dowden, Ralph	Ralph Dowden, Attorney at Law
Downing, Amanda	Harris County Public Defender's Office
Downing, Jeffrey	Harris County Public Defender's Office
El Paso County PDO Staff	El Paso County Public Defender's Office
Farkas, Andrew	Andrew L. Farkas, PC
Flores, Eric	Law Office of Eric Flores
Frale, Frank	Frank J Fraley and Associates
Franklin, Tracy	Behr Law Firm
Freed, Gregory	Travis County Juvenile Public Defender's Office

Name	Firm
Galmour, Dustin	Galmour Stovall, PLLC
Galvan, Marcelo	Webb County Public Defender's Office
Garcia, Melissa	Webb County Public Defender's Office
Glass, Roderick	Fort Bend Mental Health Public Defender
Gonzalez, Manuel	Albin, Yates, Balius, Roach
Gonzales, Monica	Harris County Public Defender's Office
Gonzalez, Richard	Richard Gonzalez, Attorney at Law
Graham, Coretta	Graham Legal Services
Gravois, Jackie	Harris County Public Defender's Office
Griffin, Michael	Griffin and Cain, Attorney at Law
Gutierrez, Amador	Gutierrez & Hunter, Attorneys at Law
Hajek, Anton	Law Office of Anton Paul Hajek III
Hansen, Barrett	Law Office of Barrett Hansen
Heller, Uri	Heller and Associates Law Office, PLLC
Hill, Terry	Law Office of Terry Bentley Hill
Huggler, James	Law Office of James Huggler
Hughes, Chad	Griffith & Associates
Hunt, Russell	Law Office of Russ Hunt Jr
Jackson, Jeff	Law Office of Jeff T. Jackson
Jessup, Clifford	Jose Sanchez Law Firm, PC
Johnson, Sarah	Law Office of Sarah Johnson
Jones, Birdie	Law Office of Birdie Jones
Jones, Jeredith	Griffin and Cain, Attorney at Law
Keates, Robert	Law Office of Robert Keates
Kline, Richard	Richard C. Kline Attorney
Lagway, Denise	Law Office of Denise Lagway
Leggett, Kenneth	Gravley & Leggett, PLLC
Leon, Celina Lopez	Law Office of Scott M. Ellison, PLLC
Lewis, Michael	Law Office of Michael Lewis
Mabry, Bob	Bob Mabry, Attorney at Law, PLLC
Mabry, Richard	Law Office of Richard Mabry
Macey, John	John E. Macey, Attorney at Law, PLLC
Madrid, Carlos	Law Office of Carlos Madrid
Mais, Jr., Charles	Mais, Boucher and Associates
Martin, Randy	Harris County Public Defender's Office
Martinez, Dolores	Webb County Public Defender's Office
Martinez, Gilbert	Law Office of Gilbert Martinez
McLauchlan, John	Law Office of John D. McLauchlan
McShan, Elizabeth	Withers & Withers, PC
Meador, Miranda	Harris County Public Defender's Office

Name	Firm
Minter, Jim	Law Office of Jim Minter
Mulanax, Maurita	Stockard, Johnston & Brown PC
Mullowney, Lacey	Ballard & Mullowney, PC
Murray, Crystal	Law Office of Joshua P. Murray
Ochoa, Michelle	Texas Rio Grande Legal Aid
Olvera, Diana	Harris County Public Defender's Office
Ortiz, Laura	Webb County Public Defender's Office
Parmer, Elizabeth	The Parmer Law Firm PC
Parr, Michael	Law Office of Michael Parr
Perez-Jaramillo, Maggie	Law Office of Maggie Perez-Jaramillo
Pope, Scott	Harris County Public Defender's Office
Postell, Kristin	Kristin Postell Law Office
Press, Dionne	Dionne S Press, PC
Pullan, Tracy	Maginnis Pullan & Young
Raesz, Chris	Law Office of Chris Raesz, P.C.
Rew-Hunter, Jason	Jason Rew-Hunter, Attorney at Law
Richmond, Jeannette	Richmond Law Office
Riskind, Miriam	Isenberg & Riskind
Ruder, Cliff	Cliff Ruder Law
Salinas, Omar	Webb County Public Defender's Office
Sauer, Larry	Law Office of Larry Sauer
Scanlon, Mary	Law Office of Mary Scanlon
Sera, Gene	Gene Sera, Attorney at Law
Shaffer, Robert	Law Office of Robert L. Shaffer, PC
Shearer, Melissa	Travis County Juvenile Public Defender's Office
Shinn, Erin	Law Office of Erin Shinn
Shipp, Jeremy	Wagstaff LLP
Silva, Ambrosio	Travis County Juvenile Public Defender's Office
Simer, Michel	Simer, Tetens, & Fanning
Skinner, Charles	Law Office of Charles Wesley Skinner
Still, Craig	Harris County Public Defender's Office
Sullivan, Robert	Law Office of Trey Poage, PC
Summers, Deborah	Deborah Summers, PC
Swain, Thomas	Law Office of Thomas Swain
Temple, Bradley	Travis County Juvenile Public Defender's Office
Terry, Tami	Law Office of TK Terry
Terry, Tanya	Harris County Public Defender's Office
Trevino, Fred	Webb County Public Defender's Office
Tuthill, Robert	Harris County Public Defender's Office
Waddell, Valerie	Bastine & Associates

Name	Firm
Warner, Michael	The Warner Law Firm
Warren, Rosalind	Law Office of Rosalind Warren
Watson, Tom	Mehaffey and Watson
Wharton, Jonathan	Snow E. Bush, Jr., PC
Williams, Lashawn	L.A. Williams Law Firm, PC
Wilson, Joe Marr	Law Office of Joe Marr Wilson
Wilson, Reginald	Law Office of Reginald Wilson
Wise, Charles	Webb County Public Defender's Office
Wood, Jackie	Law Office of Jackie Wood

*Additional attorneys participating in the study did not give consent to be recognized.

APPENDIX C

Timekeeping Research Methods

Timekeeping Study Research Methods

The Timekeeping Study took place between September 2013 and June 2014. The following paragraphs review key aspects of the study methodology: participant recruitment, data collection, and analysis methods used to extrapolate from the twelve-week time sample to reach annual caseload estimates. A study timeline is presented in Figure C-2.

Attorney Recruitment

Systems for assigning counsel to represent indigent defendants vary widely in Texas. Each of the state's 254 counties determines independently how they will meet statutory and regulatory guidelines for making court appointments. In the absence of a centralized appointing authority, eligible criminal defense attorneys for the study had to be identified and recruited at the county level. A broad-based media campaign was combined with targeted participant recruitment to enroll study participants.

Media Campaign

From October through December 2013, a large-scale recruitment initiative was launched to inform criminal defense attorneys statewide about the weighted caseload study. The Texas Criminal Defense Lawyers' Association and the State Bar of Texas disseminated information to members through announcements at trainings and leadership meetings, in publications, and through social media. Articles about the study appeared in the state's major professional print journals including TCDLA's "Voice for the Defense,"¹ "Texas Lawyer"² and the "Texas Bar Journal."³ Other information about the purpose and scope of the project featuring TIDC staff and national experts was made available in videos posted on the "State Bar TV" Youtube internet channel.⁴ In addition, email messaging was directed toward local bar presidents and to TCDLA members.

¹ Bobby Mims, *A Landmark Study in Indigent Defense and a Professional Opportunity!*, VOICE FOR THE DEFENSE (Oct. 2013).

² Miriam Rozen, *Represent Indigents? A&M Study Will Help Determine Maximum Caseload*, TEXAS LAWYER, Oct. 21, 2013, at 7.

³ *News From Around the Bar*, TEXAS BAR JOURNAL, Nov. 2013, at 1025.

⁴ See State Bar of Texas, *Weighted Case Load Study*, TEXAS BAR TV (Nov. 4, 2014), <https://www.youtube.com/watch?v=RkLxocMpGhg>.

Figure C-1. Summary of Tasks and Timeline

	2013				2014												
	9	10	11	12	1	2	3	4	5	6	7	8	9	10	11	12	
Task 1: Advisory Panel Planning																	
<i>1a. Prepare for Advisory Panel Meeting</i>	■																
<i>1b. Conduct Advisory Panel Meeting</i>		■															
Task 2: Attorney Timekeeping Study																	
<i>2a. Publicize the Study</i>	■	■	■														
<i>2b. Recruit Attorneys</i>	■	■	■	■													
<i>2c. Select and Customize Timekeeping Software</i>	■	■	■	■													
<i>2d. Collect Attorney Time Data</i>						■	■	■	■								
<i>2e. Analyze Attorney Time Data</i>									■	■							
Task 3: Sufficiency of Time Survey										■	■						
Task 4: Adjust Case Weights thru Delphi Process																	
<i>4a. Prepare for Delphi Process Meeting</i>									■	■	■						
<i>4b. Conduct Delphi Process Meeting</i>												■	■	■			
Task 5: Prepare Final Report															■	■	■

A website was also created to manage attorney registration and to serve as an information portal over the course of the study. Posted resources included legislative guidance, reports outlining the purpose and objectives of the Texas project, similar studies from other states, and resources for participating attorneys. Through these channels, a large number of criminal defense attorneys were made aware of the study and its objectives. The overall information campaign was foundational for attorney enrollment.

Attorney Enrollment

While attorneys had the option to sign up through the study website, in order to meet enrollment objectives, direct recruitment was also necessary. Different recruitment approaches were used for public defender and court appointed attorneys in private practice.

Table C-1. Participating Adult Trial-Level Public Defender Offices

	Case Types Contributed	Automated Timekeeping Records?
Bee County PDO	Misdemeanor, Felony	Yes
El Paso County PDO	Misdemeanor, Felony	Yes
Harris County PDO	Misdemeanor Mental Health, Felony	Yes
Travis County PDO	Misdemeanor Mental Health, Felony Mental Health	No
Webb County PDO	Misdemeanor, Felony	No
Willacy County PDO	Misdemeanor, Felony	Yes
Collin County MAC	Misdemeanor Mental Health, Felony Mental Health	No
Lubbock County MAC	Misdemeanor, Felony	No
Montgomery County MAC	Misdemeanor Mental Health, Felony Mental Health	No

Public Defender Recruitment

Fourteen Texas counties use public defenders for at least some adult trial cases. To explore whether office-wide timekeeping would be feasible, chief public defenders were contacted directly by the research team. Six of the state’s 14 such offices agreed to contribute time records, and four were able to provide complete time data for all attorneys through records extracted from automated information systems (Table C-1). None of the state’s three Managed Assigned Counsel offices had time records in a form that could be used by the study. Therefore, lawyers in those offices were recruited in the same manner as other private practice attorneys.

Private Assigned Counsel Recruitment

By far the largest proportion of counties in Texas rely exclusively on private assigned counsel systems for adult trial-level cases. Considerable effort was therefore directed toward recruiting individual private practice attorneys for the study. While all Texas lawyers taking court appointments were encouraged to volunteer, telephone recruitment was limited to the state's 39 counties with population exceeding 100,000.⁵

Importantly, these 15 percent of all counties contain 82 percent of Texas's population. The targeted recruitment strategy was therefore designed to focus on defense practices in the counties serving the largest majority of indigent defendants. Of the 129 private practice attorneys who ultimately kept time records, 95 percent were from the largest counties. Furthermore, 31 of the 39 largest counties (80 percent) had at least one attorney in the study.

Incentives

To reward busy lawyers agreeing to take part in the study, and to encourage sustained commitment over the entire 12 weeks of timekeeping, several incentives were offered. Continuing Legal Education credit was awarded for completion of the required 1.75 hour webinar-style study training. Everyone who contributed at least four weeks of timekeeping data received a guaranteed \$50 gift card. In addition, to reward complete reporting, weekly prize drawings were held for people who updated their time records each week. Prizes ranged from \$10 coffee gift cards to a single \$600 prize in the final week of the study.

Description of the Study Sample

To help recruit a balanced sample representing private practice attorneys statewide, a sampling frame was used to structure recruitment. To create the frame, lawyers were categorized by county population, Administrative Judicial Region, and case qualifications. Individuals were randomly selected from each cell of the frame to be invited to take part in timekeeping. As enrollment goals were met for each cell, calls were directed to people in unfilled cells. As a result the final sample that was reasonably balanced in terms of key attributes including geographic distribution, offense type, and attorney type.⁶

⁵ PPRI requested the list of individuals qualified to take court-appointed cases in each of the state's 39 counties with population exceeding 100,000. Twenty-three of 39 counties responded, providing the research team with information needed to contact 1,733 attorneys. Attorneys in the remaining large counties were identified from TCDLA membership lists.

⁶ Other undetected sources of sample bias may also have been present. These could have had the effect of either inflating or suppressing time estimates in the sample relative to the population.

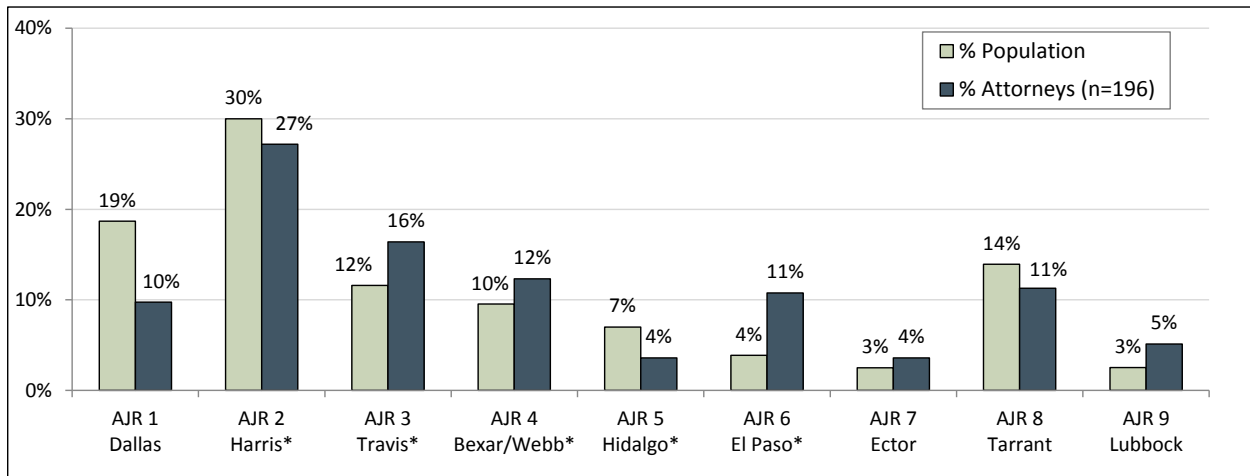
Practice Characteristics

A total of 196 attorneys participated in the Timekeeping Study. Individuals agreeing to be recognized are acknowledged in Appendix B. They had 14.7 years in criminal defense practice on average. Nine percent of those tracking time were on a special appointment list or represent foreign language clients, and 11 percent qualified for mental health case appointments. Individuals keeping time reported they work an average of 43 hours per week.

Geography

To achieve a geographically representative sample, people were recruited in proportion to the population in each of Texas’s nine Administrative Judicial Regions. Figure C-2 shows the relative distributions. Attorneys in the study are proportionally under-represented in Region One, in part because Dallas County public defenders did not take part. Conversely study lawyers are over-represented in Region Six due to the full participation of the public defender office in El Paso County. Aside from these exceptions, the geographic distribution of the study sample is approximately proportional to the population distribution across the remaining judicial regions statewide.

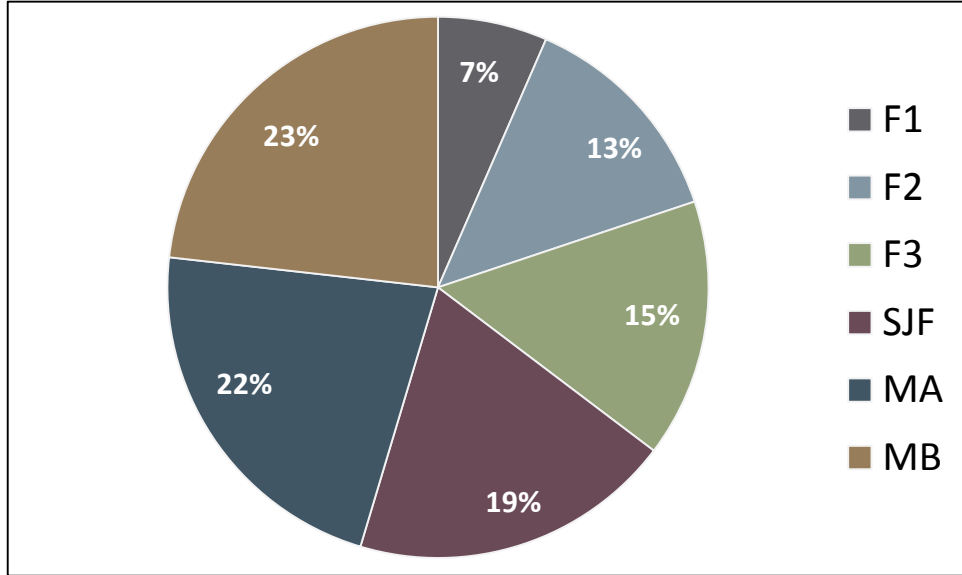
Figure C-2. Attorney Representation by Administrative Judicial Region



Offense Type

Figure C-3 shows the composition of cases in the final study. Misdemeanors (45 percent) and felonies (55 percent) are about evenly represented. Because there are more misdemeanor attorneys, and a larger number of misdemeanor cases are disposed each week, felony-qualified attorneys were intentionally over-sampled to achieve this balance. By controlling and adjusting the recruitment process, there are enough cases to assess the time being spent on both low- and high-level offenses.

Figure C-3. % of Cases by Offense Type (n=8,151)



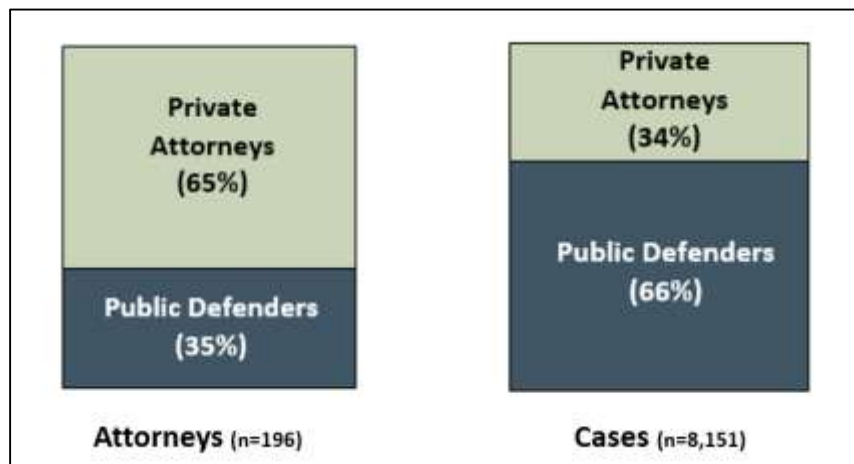
Attorney Type

The research team faced greater challenges achieving balance between cases represented by public defender and private practice attorneys (Figure C-4). While just one-third of the lawyers contributing to the study (35 percent) were public defenders, these same attorneys provided two-thirds of all cases (66 percent). For context, just 14 percent of trial-level felony and misdemeanor indigent defense cases statewide were represented by public defenders in FY 2013.⁷ Several factors explain this outcome.

First, private appointed attorneys represent fewer indigent defendants. Those in the study said court appointments average just 66 percent of their practice, while public defenders carry a near 100% indigent caseload. In addition, two of the state’s largest public defender offices contributed complete time records for all cases active in the study period. Due to these two factors, public defender cases, particularly those from Harris and El Paso Counties, over-represented in the study sample.

⁷ TEXAS INDIGENT DEFENSE COMMISSION, FY 2013 COMBINED STATEWIDE INDIGENT DEFENSE EXPENDITURE REPORT, *available at* <http://tidc.tamu.edu/public.net/Reports/StateFinancialReport.aspx?fy=2013>.

Figure C-4. Proportions of Attorneys and Cases by Type of Counsel



Timekeeping Data Collection

To prepare for data collection, enrolled attorneys were required to complete a 1.75 hour webinar training held on January 28, 2014.⁸ Information was provided about the potential uses and benefits of time tracking in criminal defense, and participants were instructed on the use of an online reporting system developed for the project.

Timekeeping Software

JusticeWorks, a professional developer of attorney timekeeping software, was contracted to create the customized reporting system necessary for the study. The password-protected web-based system allowed attorneys to view confidential information such as client names and case numbers. However, a randomly generated case number was substituted to anonymize records before sharing with the research team. Study information was entered through three screens:

- Registration Screen (Figure C-5a): The set-up page where attorneys created a base account and provided some information about their practice.
- Case Information Screen (Figure C-5b): Provided fields to document the characteristics of cases being tracked in the study.⁹ Variables recorded included date of the offense, date of court appointment, and date of case disposition (if available); charges; custody status; and indicators of case complexity such as probation, mental health, immigration or language concerns, and the use of experts or forensics by the prosecution or the defense.

⁸ A recorded version of the training was posted on the website people who were unable to attend the initial training, or who wished to review components of the training.

⁹ In order to protect confidentiality, client name was visible to attorneys but was not made available to the research team.

- Time Entry Screen (Figure C-5c): Provided a search box for case retrieval where the amount and purpose of time spent could be entered using the standardized time categories.

Attorneys and office staff could choose to record timekeeping data on personal cellphones or office computers. Hard copy timekeeping forms were also available for individuals who preferred to take written notes in the field for later online entry. Because the entire current database was available for download by the research team at any time, it was possible to implement regular data quality checks. Attorneys with lapses in data entry were identified each week and attorneys were contacted both individually and as a group to encourage continued participation and accurate reporting.

Figure C-5a. Registration Screen

The screenshot shows a web browser window with the following content:

- Practice Type (check all that apply):**
 - Public Defender
 - Private Attorney
 - Managed Assigned Counsel
 - Contract Attorney
 - Investigator
 - Social Worker
- Court-appointed case types you are qualified to represent in at least one county (check all that apply):**
 - Juvenile
 - Misdemeanor
 - State Jail Felony
 - Felony 3
 - Felony 2
 - Felony 1
 - Capital Felony
- Are you on a specialized appointment list for (check all that apply):**
 - Foreign Language Clients
 - Mental Health Cases
 - Immigration Law
- Years practicing:**
- Estimated % of total caseload that is court-appointed:** %
- About how many hours do you work in a typical week?:**
- Do you wish to have your participation in the study publicly acknowledged in the final report?:** Yes No

Figure C-5b. Case Information Screen

Case Information Joseph Anderson

Client
 First: Joseph
 Middle:
 Last: Anderson

Case
 Attorney: Kelt Richey
 Appointed: Retained: 01/21/2014
 County: Fort Bend

Usual County Payment
 Method: Flat Fee per case
 Amount \$ 100.00

Check all that apply

- Specialty Court
- Probation Concerns
- In Custody
- Co-Counsel
- Parole Concerns
- Mental Health Concerns
- Experts/Forensics Ever Used
- Immigration Concerns
- Language Concerns

Most Serious Charge Filed
 Cause/Case Number: 123CAUSE
 Offense Date: mm/dd/yyyy
 Level/Charge: F1 31.160(x)(6) - ORGANIZED RETAIL THEFT => \$100K
 Total # of Charges Filed:
 Prior Felony Convictions:

Closing Details
 Disposition: mm/dd/yyyy
 Trial/Disposition:
 Sentence:

Case Time Keith Richey

Figure C-5c. Time Entry Screen

Timesheet

Recent Entries Select Dates

Date	Type	h:mm	Time Entry User	Case	Comment
01/20/2014	CT	01:15	Richey, Keith	Jackson, Jerry (Open Case)	
01/20/2014	OS	00:30	Richey, Keith	Graham, Joe (Open Case)	
01/20/2014	CC	01:30	Richey, Keith	Anderson, Joseph (Open Case)	
01/20/2014	CH			Anderson, Joseph (Open Case)	
01/20/2014	CT			Anderson, Joseph (Open Case)	
01/20/2014	D/I			Anderson, Joseph (Open Case)	
01/20/2014	LR/TP			Anderson, Joseph (Open Case)	
01/20/2014	N/H			Anderson, Joseph (Open Case)	
01/20/2014	NC			Anderson, Joseph (Open Case)	
01/20/2014	OS			Anderson, Joseph (Open Case)	
01/20/2014			Richey, Keith		

Total hours: 07:20

Timekeeping Data Analysis

At the end of the 12-week study period, time records were available for a total of 8,151 defendant-level cases. Although people were encouraged to record time spent with both public appointed and private retained clients, at the end of the study sufficient data was only available to include court-appointed cases in the analyses.

Attorneys were instructed to provide offense information for the most serious charge filed in each information or complaint, as well as a total count of all charges. Time was attributed to the highest named charge category. Table C-2 provides shows the average number of charges by offense level for cases in the study.

Table C-2. Average Number of Charges per Defendant/Case by Offense Level

	Average Number of Charges per Case
Misdemeanor B	1.1
Misdemeanor A	1.2
State Jail Felony	1.2
Felony 3	1.3
Felony 2	1.2
Felony 1	1.4

The challenge for the research team was to extrapolate individual case time records to time estimates for cases at all offense levels. Just 16 percent of cases were started and disposed within the study period providing full information about time spent. The remaining cases either began (23 percent), ended (27 percent), or both began and ended (34 percent) outside the data collection window. Yet, conclusions based only on complete cases would inaccurately represent time estimates for more complex, longer-duration case types such as high-level felonies. To correct for this limitation, estimation was based on three case categories as shown in Figure C-6.

Group 1: Known Duration, Known Time Spent

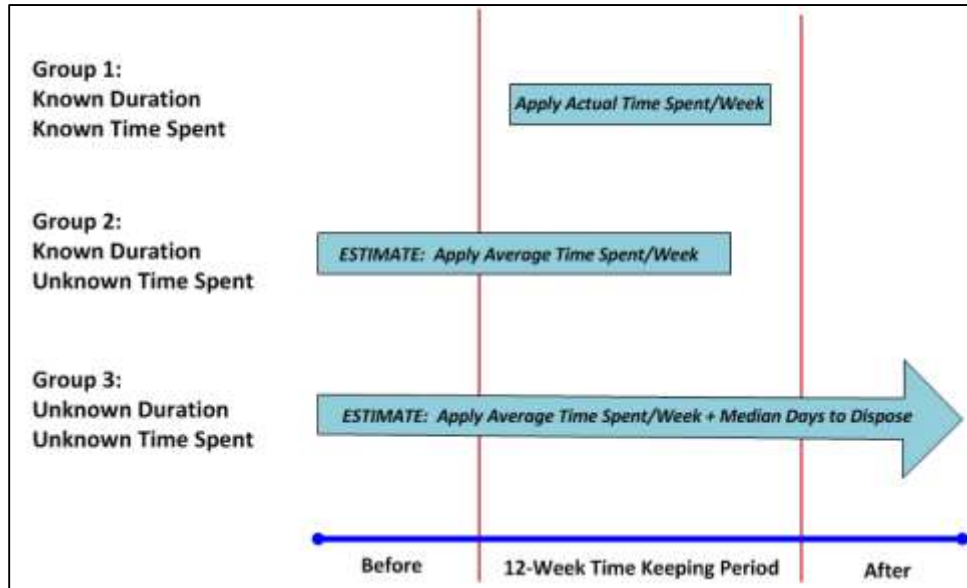
Full information about time spent on defense was available for the first group of cases because they were initiated and disposed during the data collection interval. Average actual weekly time requirements for each case were directly calculable and no estimation was required.

Group 2: Known Duration, Unknown Time Spent

The second group of cases began before the study but were disposed during the 12-week data collection interval. The duration of these cases was measured as the difference between attorney appointment and disposition dates. Time per week could also be measured for the portion of the case that fell within the study. To complete the estimation for the entire case,

average observed time spent per week for all cases of the same type was applied for the weeks preceding the study interval.

Figure C-6. Estimation Procedure Used to Extrapolate from 12-Week Time Sample



Group 3: Unknown Duration, Unknown Time Spent

The least information was available for the final group of cases that began before and ended after the data collection interval. The most extensive inferences were therefore required for this case set. As with Group 2, average observed time per week for cases of the same type was applied to weeks outside the study period. However, with the case ending date unknown, additional estimation of the number of weeks to disposition was also required. The median observed number of days to completion for disposed cases of the same type was therefore assigned to all cases in Group 3.¹⁰

¹⁰ Median was used instead of the mean because it is less susceptible to influence by extreme values. The median is more stable and more likely to reflect time spent on most cases.

Final Computation of Case Time Values

Upon completion of the estimation process, weekly time and duration values were available for all cases in the study. Actual average time expended for cases at each offense level could then be computed according to the following formula:

$$\text{Average (Time/Week x Number of Weeks) = Actual Time per Offense Level}$$

This calculation, done separately for every offense level, produced the final actual time estimates shown in Section V and Figure 5-1 of the main report.

APPENDIX D

Detailed Timekeeping Results

Average Minutes Currently Spent In Indigent Defense Cases by Offense and Task

	Misdemeanors		Low-Level Felony		High-Level Felony	
	Class B	Class A	State Jail	F 3	F 2	F 1
Client Communication	30 (10.4%)	58 (12.6%)	109 (16.7%)	128 16.6%	134 (14.7%)	175 (13.0%)
Negotiation/Meetings	7 (2.3%)	10 (2.1%)	20 (3.0%)	26 (3.3%)	18 (2.0%)	26 (1.9%)
Discovery/Atty. Investigation	13 (4.5%)	22 (4.9%)	42 (6.5%)	48 (6.2%)	73 (8.0%)	137 (10.2%)
Investigator's Time	1 (0.3%)	1 (0.3%)	5 (0.8%)	13 (1.7%)	19 (2.1%)	7 (0.5%)
Legal Research/Trial Preparation	44 (15.6%)	81 (17.7%)	90 (13.9%)	134 (17.3%)	162 (17.8%)	408 (30.5%)
Court Time	150 (52.7%)	217 (47.5%)	315 (48.4%)	343 (44.4%)	417 (45.7%)	498 (37.2%)
Case Management/Social Work	11 (3.9%)	24 (5.2%)	31 (4.8%)	29 (3.8%)	31 (3.4%)	30 (2.3%)
Case-Specific Office Support	29 (10.3%)	44 (9.7%)	38 (5.9%)	51 (6.6%)	59 (6.5%)	59 (4.4%)
TOTAL MINUTES	284 (100%)	457 (100%)	651 (100%)	771 (100%)	914 (100%)	1,338 (100%)

APPENDIX E

Time Sufficiency Survey

Time Sufficiency Survey

PRACTICE DESCRIPTION

1) How many years have you been licensed to practice criminal law?

2) What type of practice do you have?

- Solo practice
- Partnership/LLC
- Office share agreement
- Public Defender
- Managed Assigned Counsel
- Contract Attorney
- Other

3) About how many new clients do you accept in a typical month in each of the following categories:

Misdemeanors

- Appointed /month
- Retained /month
- Do not currently represent misdemeanors

Felonies

- Appointed /month
- Retained /month
- Do not currently represent felonies

Juvenile Cases

- Appointed /month
- Retained /month
- Do not currently represent juvenile cases

Civil Cases

- /month
- Do not represent civil cases

4) How many clients do you usually have on your active caseload at any given time?

active clients

5) Are you on a specialized appointment list for:

- Foreign language clients
- Mental health cases
- Immigration law
- Other

6) About how many hours do you work in a typical week?

hours

7) On average, about how much time per day do you spend...

On case-related work (i.e., working on behalf of clients)?

hours/day on case-related work

On non-case-related work such as staff meetings, administrative tasks, supervising law clerks, business travel, etc.? (Do not include personal time such lunch and vacation.)

hours/day on non-case-related work

SURVEY INSTRUCTIONS

The following survey shows the amount of time Texas defense attorneys participating in the Weighted Caseload Study tell us they are spending on court-appointed juvenile delinquency or trial-level criminal cases.

Two questions are addressed:

- In what percentage of cases are key tasks being performed?
- When those tasks are performed how much time is being spent?

You will be asked to review results, then indicate if, in your professional judgment, the measured amounts should be increased or decreased to ensure Effective Assistance of Counsel.

- **Effective Assistance of Counsel:** Competent legal representation without errors that would result in the denial of a fair trial.

Attorney time is reported in eight time categories. Definitions of each category can be viewed by hovering the mouse cursor over each category name.

Trial Level MISDEMEANORS

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

Effective Assistance of Counsel: Competent legal representation without errors that would result in the denial of a fair trial.

Time Categories <i>(Hover for definitions)</i>	Hours per Case When Task is Performed			Percent of Cases Where Task Should Be Performed		
	Attorney Responses	Your Opinion	No Adjustment Needed	Attorney Responses	Your Opinion	No Adjustment Needed
Client Communication	1.7		<input type="checkbox"/>	46 %	%	<input type="checkbox"/>
Negotiation/Meetings	1.0		<input type="checkbox"/>	20 %	%	<input type="checkbox"/>
Discovery/Investigation	1.3		<input type="checkbox"/>	22 %	%	<input type="checkbox"/>
Legal Research/Trial Preparation	3.5		<input type="checkbox"/>	11 %	%	<input type="checkbox"/>
Court Time	3.9		<input type="checkbox"/>	68 %	%	<input type="checkbox"/>
Case Management	2.7		<input type="checkbox"/>	11 %	%	<input type="checkbox"/>
Investigator's Time	2.5		<input type="checkbox"/>	0.3 %	%	<input type="checkbox"/>
Case-Specific Office Support	1.7		<input type="checkbox"/>	17 %	%	<input type="checkbox"/>

Trial Level STATE JAIL FELONY - FELONY 3

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

Effective Assistance of Counsel: Competent legal representation without errors that would result in the denial of a fair trial.

Time Categories (Hover for definitions)	Hours per Case When Task is Performed			Percent of Cases Where Task Should Be Performed		
	Attorney Responses	Your Opinion	No Adjustment Needed	Attorney Responses	Your Opinion	No Adjustment Needed
Client Communication	4.6	<input type="text"/>	<input type="checkbox"/>	50 %	<input type="text"/> %	<input type="checkbox"/>
Negotiation/Meetings	2.5	<input type="text"/>	<input type="checkbox"/>	24 %	<input type="text"/> %	<input type="checkbox"/>
Discovery/Investigation	4.4	<input type="text"/>	<input type="checkbox"/>	25 %	<input type="text"/> %	<input type="checkbox"/>
Legal Research/Trial Preparation	6.3	<input type="text"/>	<input type="checkbox"/>	15 %	<input type="text"/> %	<input type="checkbox"/>
Court Time	7.3	<input type="text"/>	<input type="checkbox"/>	62 %	<input type="text"/> %	<input type="checkbox"/>
Case Management	4.1	<input type="text"/>	<input type="checkbox"/>	17 %	<input type="text"/> %	<input type="checkbox"/>
Investigator's Time	8.3	<input type="text"/>	<input type="checkbox"/>	1 %	<input type="text"/> %	<input type="checkbox"/>
Case-Specific Office Support	2.4	<input type="text"/>	<input type="checkbox"/>	17 %	<input type="text"/> %	<input type="checkbox"/>

Trial Level FELONY 2 - FELONY 1

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

Effective Assistance of Counsel: Competent legal representation without errors that would result in the denial of a fair trial.

Time Categories (Hover for definitions)	Hours per Case When Task is Performed			Percent of Cases Where Task Should Be Performed		
	Attorney Responses	Your Opinion	No Adjustment Needed	Attorney Responses	Your Opinion	No Adjustment Needed
Client Communication	5.2	<input type="text"/>	<input type="checkbox"/>	51 %	<input type="text"/> %	<input type="checkbox"/>
Negotiation/Meetings	2.2	<input type="text"/>	<input type="checkbox"/>	24 %	<input type="text"/> %	<input type="checkbox"/>
Discovery/Investigation	6.9	<input type="text"/>	<input type="checkbox"/>	31 %	<input type="text"/> %	<input type="checkbox"/>
Legal Research/Trial Preparation	10.9	<input type="text"/>	<input type="checkbox"/>	23 %	<input type="text"/> %	<input type="checkbox"/>
Court Time	9.8	<input type="text"/>	<input type="checkbox"/>	63 %	<input type="text"/> %	<input type="checkbox"/>
Case Management	5.0	<input type="text"/>	<input type="checkbox"/>	17 %	<input type="text"/> %	<input type="checkbox"/>
Investigator's Time	14.1	<input type="text"/>	<input type="checkbox"/>	1 %	<input type="text"/> %	<input type="checkbox"/>
Case-Specific Office Support	3.2	<input type="text"/>	<input type="checkbox"/>	20 %	<input type="text"/> %	<input type="checkbox"/>

APPENDIX F

Detailed Time Sufficiency Results

Average Minutes Recommended by Time Sufficiency Survey Respondents

	Misdemeanors	Low-Level Felony	High-Level Felony
Client Communication	103 (17.2%)	235 (20.4%)	269 (15.1%)
Negotiation/Meetings	50 (8.3%)	92 (8.0%)	102 (5.7%)
Discovery/Atty. Investigation	78 (13.0%)	174 (15.1%)	292 (16.4%)
Investigator's Time	14 (2.3%)	62 (5.4%)	162 (9.1%)
Legal Research/Trial Preparation	82 (13.6%)	141 (12.2%)	310 (17.4%)
Court Time	198 (33.0%)	330 (28.6%)	492 (27.5%)
Case Management/Social Work	41 (6.9%)	72 (6.3%)	90 (5.1%)
Case-Specific Office Support	35 (5.8%)	48 (4.1%)	69 (3.9%)
TOTAL MINUTES	601 (100%)	1,154 (100%)	1,786 (100%)

APPENDIX G

Delphi Panel Members

Delphi Panel Members

Name	Title	Organization	AJR/City
Buck Files	President Attorney at Law	State Bar of Texas Bain, Files, Jarrett, Bain, and Harrison, P.C.	AJR: 1 Tyler
Knox Fitzpatrick	Attorney at Law	Fitzpatrick Hagood Smith & Uhl, LLP	AJR: 1 Dallas
Alexander Bunin	Chief Public Defender	Harris County Public Defender's Office	AJR:2 Houston
Allen Isbell	Attorney at Law	Law Office of Allen Isbell	AJR: 2 Houston
Bruce Fox	Attorney at Law	Law Office of Bruce Fox	AJR: 3 Austin
David Gonzalez	Attorney at Law	Sumpter and Gonzalez, L.L.P.	AJR: 3 Austin
Russell Hunt, Jr.	Attorney at Law	Law Office of Russell Hunt, Jr.	AJR: 3 Georgetown
Kameron Johnson	Chief Juvenile Public Defender	Travis County Juvenile Public Defender's Office	AJR: 3 Austin
Jeanette Kinard	Director	Travis County Mental Health Public Defender's Office	AJR: 3 Austin
Stephanie Boyd	Attorney at Law	Law Office of Stephanie Boyd	AJR: 4 San Antonio
Joseph Esparza	Attorney at Law	Gross & Esparza, P.L.L.C.	AJR: 4 San Antonio
Reynaldo Garza III	Attorney at Law	Law Office of Reynaldo Garza III	AJR: 5 Brownsville
Mary Stillinger	Attorney at Law	Law Office of Mary Stillinger	AJR: 6 El Paso
Mark Dettman	Attorney at Law	Law Office of Mark Dettman	AJR: 7 Midland
Don Hase	Commissioner Attorney at Law	Texas Indigent Defense Commission Ball & Hase, P.C.	AJR: 8 Arlington
Stephanie Patten	Attorney at Law	Law Office of Stephanie Patten	AJR: 8 Fort Worth
Laurie Key	Attorney at Law	Law Office of Laurie Key	AJR: 9 Lubbock
Philip Wischkaemper	Professional Dev. Director	Lubbock Private Defender Office	AJR: 9 Lubbock

APPENDIX H

Delphi Survey Response Forms

Example Delphi Panel Round One Response Form

Trial Level MISDEMEANOR A

INSTRUCTIONS: Consider cases that go to trial, and those that are resolved by a plea.
 For each group please provide separate estimates of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

	% of CASES SHOULD GO TO TRIAL		% of CASES SHOULD BE RESOLVED BY PLEA												
	Minutes per Case when Task Is Performed	Percent of Cases where Task Should Be Performed	Minutes per Case when Task Is Performed	Percent of Cases where Task Should Be Performed	Explanation (optional)										
Client Communication	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %	<table border="1" style="width: 100%; height: 100%; border-collapse: collapse;"> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> </table>										
Negotiation/Meetings	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Discovery	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Attorney Investigation	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Investigator's Time	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Legal Research/Case Preparation	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Court Time	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Social Work	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Case-Specific Office Support	<input type="text"/> mins.	<input type="text"/> %	<input type="text"/> mins.	<input type="text"/> %											
Total Case Time:	<input type="text"/> hour(s) total case time in Trials		<input type="text"/> hour(s) total case time in Pleas												

	TOTAL CASE TIME	
	Minutes per Case when	Percent of Cases
Client Communication	<input type="text"/> mins.	<input type="text"/> %
Negotiation/Meetings	<input type="text"/> mins.	<input type="text"/> %
Discovery	<input type="text"/> mins.	<input type="text"/> %
Attorney Investigation	<input type="text"/> mins.	<input type="text"/> %
Investigator's Time	<input type="text"/> mins.	<input type="text"/> %
Legal Research/Case Preparation	<input type="text"/> mins.	<input type="text"/> %
Court Time	<input type="text"/> mins.	<input type="text"/> %
Social Work	<input type="text"/> mins.	<input type="text"/> %
Case-Specific Office Support	<input type="text"/> mins.	<input type="text"/> %
Total Case Time:	<input type="text"/> hour(s) total case time in Trials	

Example Delphi Panel Round Two Response Form

Trial Level MISDEMEANOR A

INSTRUCTIONS: Consider cases that go to trial, and those that are resolved by a plea.
 For each group please provide separate estimates of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

		% of CASES SHOULD GO TO TRIAL						% of CASES SHOULD BE RESOLVED BY PLEA or other non-trial resolutions (e.g., dismissal or diversion)					
		14 % PEERS Median						86 % PEERS Median					
		10-25 % PEERS Range						75-90 % PEERS Range					
	Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed			Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed			Explanation (optional)
	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	
Client Communication	mins.	240	120-330		100	100-100%	mins.	60	45-120		100	100-100%	
Negotiation/Meetings	mins.	60	50-120		100	100-100%	mins.	45	30-60		100	100-100%	
Discovery	mins.	120	90-120		100	100-100%	mins.	60	30-60		100	100-100%	
Attorney Investigation	mins.	180	60-180		100	90-100%	mins.	45	30-120		100	20-100%	
Investigator's Time	mins.	120	60-180		55	25-90%	mins.	45	30-90		23	5-25%	
Legal Research/Trial Preparation	mins.	120	90-240		100	100-100%	mins.	45	30-60		85	35-100%	
Court Time	mins.	840	480-1560		100	85-100%	mins.	90	50-240		100	95-100%	
Social Work	mins.	60	30-90		50	25-75%	mins.	30	5-60		25	20-50%	
Case-Specific Office Support	mins.	60	60-120		100	100-100%	mins.	30	30-60		100	75-100%	
Total Case Time:	<input type="text" value="0.0"/> hour(s) total case time in Trials						<input type="text" value="0.0"/> hour(s) total case time in Pleas						

* The range shown is for the middle 50% of answers (i.e., 25th and 75th percentile) * The range shown is for the middle 50% of answers (i.e., 25th and 75th percentile)

TOTAL CASE TIME												
	Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed			Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed		
	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*
Client Communication	0 mins.	99	55-156	0 %	100	100-100%	0 mins.	99	55-156	0 %	100	100-100%
Negotiation/Meetings	0 mins.	49	32-120	0 %	100	100-100%	0 mins.	49	32-120	0 %	100	100-100%
Discovery	0 mins.	60	39-78	0 %	100	100-100%	0 mins.	60	39-78	0 %	100	100-100%
Attorney Investigation	0 mins.	66	35-130	0 %	100	35-100%	0 mins.	66	35-130	0 %	100	35-100%
Investigator's Time	0 mins.	56	38-96	0 %	26	6-35%	0 mins.	56	38-96	0 %	26	6-35%
Legal Research/Trial Preparation	0 mins.	53	45-90	0 %	87	39-100%	0 mins.	53	45-90	0 %	87	39-100%
Court Time	0 mins.	162	98-489	0 %	100	93-100%	0 mins.	162	98-489	0 %	100	93-100%
Social Work	0 mins.	32	9-60	0 %	29	20-50%	0 mins.	32	9-60	0 %	29	20-50%
Case-Specific Office Support	0 mins.	39	32-66	0 %	100	75-100%	0 mins.	39	32-66	0 %	100	75-100%
Total Case Time:	<input type="text" value="0.0"/> hour(s) total case time											

* The range shown is for the middle 50% of answers (i.e., 25th and 75th percentile)

APPENDIX I

Detailed Delphi Panel Results

**Average Minutes Recommended by Delphi Panel for
Non-Trial Case Resolutions**

NON-TRIAL RESOLUTION	Misdemeanors		Low-Level Felony		High-Level Felony	
	Class B	Class A	State Jail	F3	F 2	F 1
Client Communication	75 (14.5%)	75 (13.3%)	108 (15.8%)	117 (14.2%)	210 (18.7%)	240 (15.6%)
Negotiation/Meetings	60 (11.6%)	60 (10.6%)	75 (11.0%)	94 (11.4%)	106 (9.4%)	126 (8.2%)
Discovery	60 (11.6%)	60 (10.6%)	70 (10.2%)	93 (11.2%)	150 (13.3%)	210 (13.6%)
Attorney Investigation	60 (11.6%)	90 (15.9%)	90 (13.2%)	120 (14.6%)	120 (10.7%)	161 (10.4%)
Investigator's Time	25 (4.9%)	32 (5.6%)	41 (5.9%)	60 (7.3%)	83 (7.3%)	157 (10.2%)
Legal Research/Trial Preparation	60 (11.6%)	60 (10.6%)	64 (9.4%)	98 (11.8%)	111 (9.9%)	240 (15.6%)
Court Time	128 (24.8%)	132 (23.4%)	165 (24.2%)	164 (19.9%)	246 (21.9%)	291 (18.9%)
Case Management/Social Work	9 (1.7%)	11 (2.0%)	19 (2.8%)	23 (2.8%)	26 (2.3%)	33 (2.1%)
Case-Specific Office Support	40 (7.7%)	45 (8.0%)	51 (7.4%)	56 (6.8%)	73 (6.5%)	86 (5.6%)
TOTAL MINUTES	517 (100%)	565 (100%)	682 (100%)	823 (100%)	1,125 (100%)	1,543 (100%)

Average Minutes Recommended by Delphi Panel for Trial Case Resolutions

TRIAL RESOLUTION	Misdemeanors		Low-Level Felony		High-Level Felony	
	Class B	Class A	State Jail	F3	F 2	F 1
Client Communication	168 (8.9%)	225 (11.4%)	240 (11.1%)	240 (8.8%)	350 (8.8%)	433 (8.6%)
Negotiation/Meetings	80 (4.3%)	80 (4.1%)	106 (4.9%)	142 (5.2%)	156 (3.9%)	185 (3.7%)
Discovery	81 (4.3%)	104 (5.3%)	119 (5.5%)	133 (4.9%)	186 (4.7%)	294 (5.9%)
Attorney Investigation	115 (6.1%)	126 (6.4%)	130 (6.0%)	150 (5.5%)	208 (5.3%)	258 (5.2%)
Investigator's Time	150 (8.0%)	150 (7.6%)	154 (7.1%)	180 (6.6%)	250 (6.3%)	369 (7.4%)
Legal Research/Trial Preparation	240 (12.8%)	270 (13.7%)	270 (12.5%)	300 (11.0%)	480 (12.1%)	600 (12.0%)
Court Time	939 (50.1%)	898 (45.6%)	1,020 (47.2%)	1,440 (52.6%)	2,160 (54.5%)	2,640 (52.6%)
Case Management/Social Work	23 (1.2%)	24 (1.2%)	31 (1.4%)	42 (1.5%)	42 (1.1%)	45 (0.9%)
Case-Specific Office Support	78 (4.2%)	93 (4.7%)	92 (4.3%)	112 (4.1%)	133 (3.4%)	190 (3.8%)
TOTAL MINUTES	1,875 (100%)	1,971 (100%)	2,162 (100%)	2,739 (100%)	3,966 (100%)	5,015 (100%)

APPENDIX J

Delphi Time Increments by Task

Adjustments to Current Practice Recommended by Delphi Panel Members
(Using Delphi-Recommended Trial Rates)

Figure J-1. Misdemeanor Delphi-Recommended Time Adjustments

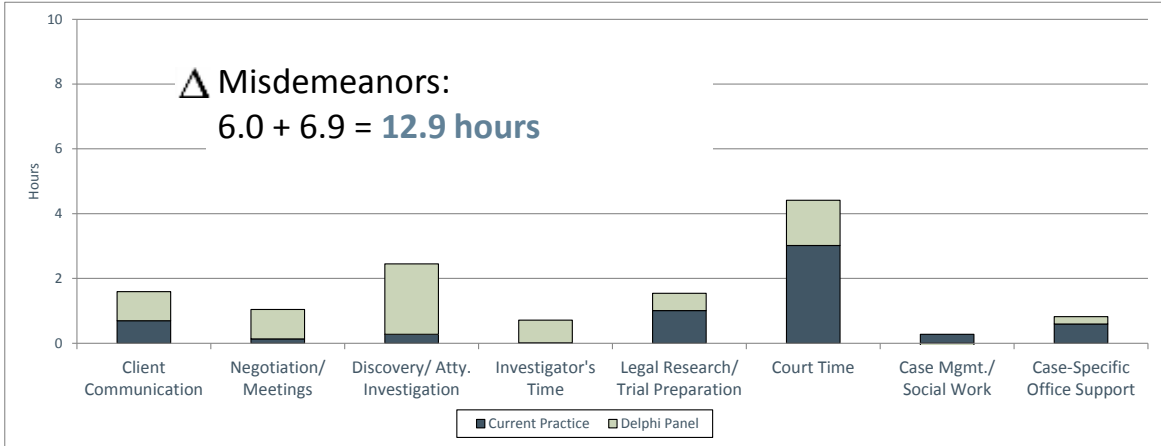


Figure J-2. Low-Level Felony Delphi-Recommended Time Adjustments

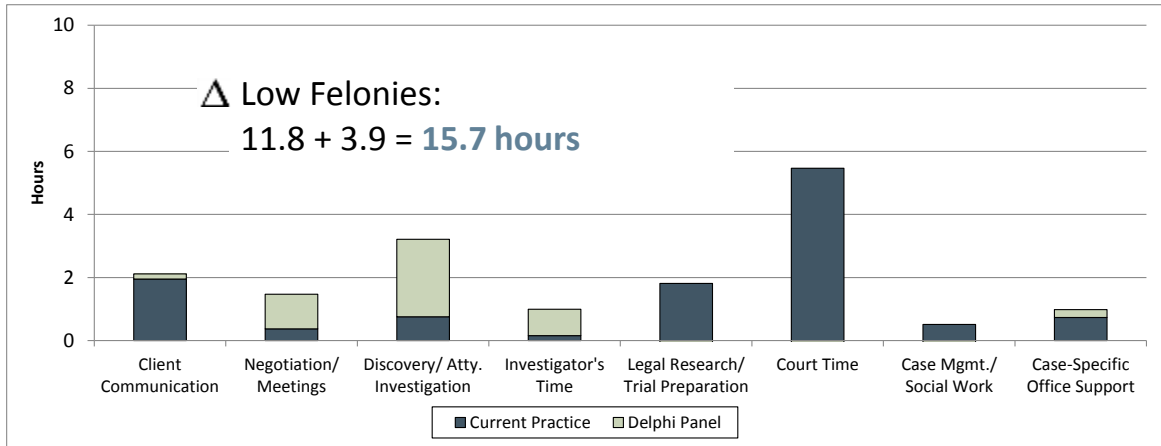
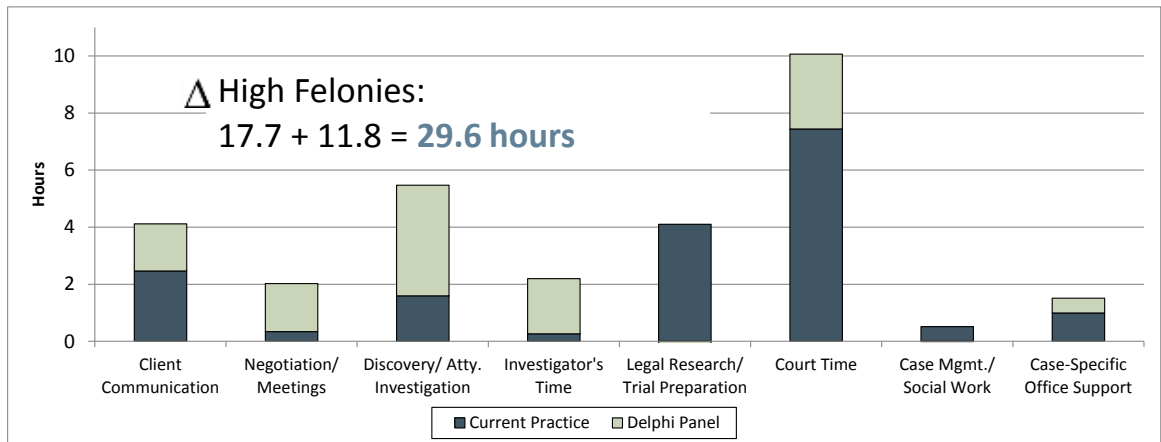


Figure J-3. High-Level Felony Delphi-Recommended Time Adjustments



APPENDIX K

Final Recommended Caseload Guidelines by Task

Average Minutes Recommended in Final Caseload Guidelines (Using Actual Trial Rates)

	Misdemeanors		Low-Level Felony		High-Level Felony	
	Class B	Class A	State Jail	F 3	F 2	F 1
Client Communication	76 (14.3%)	77 (13.2%)	111 (15.4%)	120 (13.7%)	214 (17.9%)	245 (15.0%)
Negotiation/Meetings	60 (11.3%)	60 (10.3%)	76 (10.6%)	95 (10.9%)	107 (9.0%)	127 (7.8%)
Discovery	60 (11.3%)	60 (10.4%)	71 (9.9%)	94 (10.7%)	151 (12.6%)	212 (13.0%)
Atty. Investigation	61 (11.5%)	90 (15.6%)	91 (12.7%)	121 (13.9%)	122 (10.2%)	163 (10.0%)
Investigator's Time	26 (4.9%)	32 (5.6%)	42 (5.9%)	62 (7.2%)	86 (7.2%)	161 (9.9%)
Legal Research/Trial Preparation	62 (11.7%)	62 (10.7%)	69 (9.7%)	103 (11.8%)	120 (10.1%)	249 (15.3%)
Court Time	137 (25.9%)	141 (24.3%)	187 (26.0%)	195 (22.4%)	294 (24.6%)	348 (21.4%)
Case Management/Social Work	9 (1.6%)	11 (2.0%)	19 (2.7%)	24 (2.7%)	26 (2.2%)	33 (2.0%)
Case-Specific Office Support	40 (7.6%)	46 (7.8%)	52 (7.2%)	58 (6.6%)	75 (6.3%)	89 (5.4%)
TOTAL MINUTES	531 (100%)	580 (100%)	718 (100%)	870 (100%)	1,195 (100%)	1,627 (100%)



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