



National
Legal Aid &
Defender
Association

National Survey of Indigent Defense Systems

Prepared for United States Department of Justice,
Bureau of Justice Statistics, Washington, DC

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In 1986, the Bureau of Justice Services published the *National Criminal Defense Systems Study*, the first comprehensive statistical analysis of how legal representation is provided to indigent defendants in states and counties throughout the nation. That study analyzed data compiled through 1982. BJS has now undertaken a new nationwide study of indigent defense systems. The study will collect, organize and analyze data from defender organizations, government agencies and other participants in criminal justice systems around the country. Its goal is to paint an accurate picture of how we deliver legal services to indigent defendants, and how those defender services fit within the larger criminal justice system including the courts, police and prosecution offices.

As a precursor to the new study, this report has two purposes. First, it reviews the existing research and literature on the delivery of legal services to indigent defendants in criminal cases. Second, it analyzes many of the recent changes in the administration of criminal justice that the new survey will have to address. It summarizes the findings and recommendations of a Working Group convened by the Bureau of Justice Statistics to provide guidance for the first comprehensive new study of indigent defense services since 1986.

Systemic collection and analysis of indigent defense systems is a difficult task because there are hundreds of different, unrelated defender organizations throughout the nation, and enormous diversity in their structure, organization and approach to indigent representation. Moreover, there is little uniformity of meaning in the language most defender offices use to measure the quantity and quality of their work. Terms such as "case," "client," "representation," "support services," and "caseload" have very different meanings from agency to agency.

In addition to definitional problems, there is little uniformity in how defender organizations keep records of their output. Some agencies keep meticulous records, some keep none, and most fall somewhere in between. There are also great differences in the kinds of data defender offices choose to keep, and the kinds of reports available from such agencies. Some only keep records of how many cases are tried, how many plead guilty and how many are dismissed. Others record far more detail, including the nature of the charges, the race of

the defendant and the use of support services. Finally, there may be serious problems with the accuracy of records kept by some defender agencies that do not have professional data processing services and rely on sporadic and voluntary data collection by staff attorneys and clerical personnel.

In 1982, the Bureau of Justice Statistics undertook a comprehensive review of the manner in which legal services are delivered to indigent defendants. A report was published in 1986, entitled *National Criminal Defense Systems Study*. In 1988, BJS published a bulletin, entitled *Criminal Defense for the Poor, 1986*, updating the information from the 1982 study with information gathered through 1986. BJS is now embarking on a new study, to update the two previous reports.

In March, 1997, to begin the process of producing the new study, BJS convened a Working Group which met and discussed ways of making the survey most productive, both for BJS and for public defender offices around the country. The group included representatives of public defender offices, federal, state, county and local governments, and other organizations and agencies that participate in the delivery of defender services.

After the meeting of the Working Group, BJS retained Robert Spangenberg, who led the 1986 survey, and the Spangenberg Group, to do the new study. The data collection process is presently underway.

INTRODUCTION

Few areas of government have attracted as much attention in recent years as the criminal justice system. Public announcements of "wars" on crime, drugs, and violence have often been accompanied by changes in the funding, organization, and

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function of the agencies that make up the criminal justice systems. Sometimes these changes have been mandated by the legislature or the courts. Sometimes they were adopted by the agencies themselves, in order to keep up with the rapidly shifting demands of the system. But invariably, they have drastically changed the way indigent defendants are represented, at the federal, state and local level.

One participant in the BJS Working Group analogized the criminal justice system to a "three-legged stool," supported by the courts, the prosecution and defender agencies. Many believe that if this analogy is correct, then the weakest and most neglected "leg" is the defense side. Often, new anti-crime initiatives include funding for court and prosecution services, but leave defender offices to their own devices in trying to satisfy the demands of new justice initiatives.

Unfortunately, there has been little systematic collection of data over the past fifteen years that would clarify the manner in which defender agencies have adapted to changes in the criminal justice system. Consequently, there has also been little informed analysis of whether there are in fact inequalities in the treatment of the three "legs" of the criminal justice "stool," and if so, which of the strategies chosen by various defender organizations have been most successful in maintaining high quality, competitive defense services.

Despite any perceived inequality, however, there is still a constitutional mandate that indigent defendants be provided with free lawyers in criminal cases. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that the Sixth Amendment right to counsel required that all felony defendants be afforded a lawyer. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the guarantees of *Gideon* were extended to misdemeanor cases in which indigent defendants faced a potential prison sentence.

Constitutional guarantees to indigent defendants extend beyond the provision of a lawyer. The Supreme Court, in cases such as *Ake v. Oklahoma*, 470 U.S. 68 (1985), also ruled that poor people are entitled to necessary expert and investigative services – all of which place additional obligations on the defender offices required to provide those services.

The work now being undertaken by the Spangenberg Group and BJS should provide an accurate picture of how indigent defense services are currently provided within the context of the larger criminal defense systems of the 90's. It should help defender offices throughout the nation achieve a better understanding of how they can maximize the quality of legal services they provide to their clients. It should also assist courts and legislators to understand and satisfy the needs of defender agencies seeking to fulfill their constitutional mandate within the criminal justice system.

PREVIOUS STUDIES OF INDIGENT DEFENSE SERVICES

A. Studies Prior to the 1986 Report

Before the 1986 Report, there was only one systemic attempt to complete a national survey of defender services. In

1973, the National Legal Aid and Defender Association published *The Other Face of Justice*, written by L. Benner and B. Lynch-Neary. That study was based on responses to questionnaires sent to participants in the criminal justice system in all 3110 counties in the nation, and field studies conducted in twenty jurisdictions, selected at random. Its goal was to provide a comprehensive view of the manner in which all jurisdictions provide indigent defense services.

While *The Other Face of Justice* provided a significant glimpse of how indigent defendants were being afforded counsel, it was hampered by several problems. First, the study was done shortly after the Supreme Court's decision in *Argersinger*, so it is possible that *Argersinger* caused immediate changes in the indigent defense system that rendered the 1973 survey obsolete at birth. Second, only 25% of the survey instruments were returned. This casts doubt on the statistical validity of the survey as a national study.

Between 1973 and 1982, several limited studies were done, collecting and analyzing data about particular aspects of defender organizations, but not attempting anything nearly as comprehensive as the earlier survey. The 1978 *Defender Office Survey*, published by the National Legal Aid and Defender Association, collected information directly from public defender offices, concerning the scope of their representation, their procedures for appointment of counsel, and other aspects of providing defense services. An earlier unpublished NLADA study, *Indigent Defense Systems Analysis*, collected data on plea bargaining and the timing of defense counsel's entry into a case. The bibliography appended to this Report contains citations to many other articles and surveys done prior to 1986, most of which focused narrowly on individual programs, or particular aspects of criminal defense systems, and did not attempt a survey of national scope.

B. The 1986 Report

The most recent comprehensive national study of indigent defense services was the *National Criminal Defense Systems Study*, published by BJS in 1986. The study was based upon data collected and interpreted as of 1982 by Robert Spangenberg, Beverly Lee, Michael Battaglia, Patricia Smith and A. David Davis, of Abt Associates.

The 1986 Report collected data from 777 defender programs, covering 718 counties in all 50 states. The survey was done by mail, with telephone follow-up, and resulted in a response rate of about 97 percent. The Report recognized that in many offices, very little data is collected in any organized fashion, and that in some of these offices, the data may not be accurate. Nonetheless, the 1986 Report is far more comprehensive and reliable than any national study done before or since.

The 1986 Report organized the collected data into three broad categories:

- (1) The Types and Characteristics of Indigent Defense Systems.
- (2) Indigent Defense Expenditures and Caseload.
- (3) Variations in Case Processing and System Changes.

B(1). The Types and Characteristics of Indigent Defense Systems.

In 1982, thirteen states had public defender systems organized on a purely statewide basis, in which one state office coordinated and administered indigent defense services for the entire state. These systems typically had a central administrative office that oversaw the workings of the agency, while client representation was provided by salaried staff attorneys, usually working in regional offices. Some state defenders also administered private assigned counsel and contract programs.

In most jurisdictions, however, defense systems were organized on a county level, with each county having its own system or agency, independent of other defenders in the state. Most counties used an assigned private counsel system. About one-third used a public defender system, in which full or part-time salaried lawyers represented indigent defendants.

The 1982 Study also noted that a relatively new phenomenon, contract defenders, had taken hold in a few counties. These contracts took one of three basic forms: fixed price contracts where a lawyer or group of lawyers agreed to handle a set number of cases for a fixed cost-per-case fee; block grant contracts, where attorneys agreed to represent all indigent defendants in the jurisdiction for a fixed amount; and cost-plus-fixed-fee contracts, where the contracting attorney represented defendants on an estimated cost-per-case basis until the contract was out of money, at which time it might be renegotiated.

The salient characteristic of all contract systems is that the lawyers were not working on a salaried basis, and were not employed by an established public defender office. Rather, they were independent contractors, whose workload was based up on a formula pre-determined in the contract.

The 1982 Report also noted that many states used a hybrid of these forms of representation. For example, Massachusetts had a statewide public defender that represented defendants in felony cases, while misdemeanor defendants were represented by private lawyers from plans administered by county bar associations. In Florida, representation was organized by multi-county judicial districts.

Within those states that used county-based systems, there was a significant difference between the models chosen by small counties and those selected by large counties. Small and rural counties preferred assigned counsel systems. More populous urban counties tended towards salaried public defender offices.

There were also major differences between the structure and administration of public defender systems and that of assigned counsel systems. Most public defender programs were part of county government. Some were established as part of the judiciary, while others were an arm of an executive agency. Only about 8 percent of all public defenders were independent, not-for-profit organizations.

The chief public defender in most jurisdictions was usually a full-time employee, and was paid a salary significantly less than the salary of the chief prosecutor in the same jurisdiction. Most public defender programs had a small staff of lawyers, with only 16 of 321 programs reporting more than fifty

attorneys. A majority of offices relied upon full-time staff lawyers, although some used part-time attorneys.

A significant weakness of most public defender offices was that they rarely had any support staff other than secretaries and investigators. Most public defenders did not employ social workers, paralegals, fiscal administrators or training directors. The few agencies that did have such a staff tended to be located in larger counties and more populous urban areas.

In contrast to public defender offices, assigned counsel systems fell within two broad categories. The majority were ad hoc systems, where individual judges assigned individual private attorneys to individual cases. About a quarter of the assigned counsel systems were coordinated offices, which employed an administrator and staff that tried to establish a set of standards and procedures for assigning counsel and maintaining quality of representation.

Most counties maintained a list of lawyers willing to accept assignments. These lists usually consisted of lawyers who had volunteered to be included. The lists were often not organized by attorney specialty, but sometimes categorized the attorneys by experience, with the more experienced lawyers eligible to handle the more serious cases, and the less experienced lawyers available to represent clients in less serious matters.

In most counties, assigned counsel were paid on an hourly basis, with separate rates established for in-court and out-of-court work. Often the hourly rates were less in misdemeanor and juvenile cases than in felony cases. In some jurisdictions, fees were set by statute, while in others the assigning judge or administrator had the discretion to set different fees for different cases.

On average, the fees ranged from \$10 to \$65 per hour. Some systems, however, set fixed fees for a particular type of court appearance, such as \$50 for an arraignment, \$100 for a guilty plea and \$150 per day for a trial. Others took an even more radical approach to fees, paying a flat fee for the case, regardless of how serious the case was, or how much work was involved.

In addition to hourly rates, many jurisdictions set caps on total compensation allowed for assigned counsel on any case. Often these caps were so low as to render the hourly rate virtually meaningless. In Arkansas, for example, the hourly rate for in-court felony representation was a relatively high \$50 per hour. Total compensation was capped, however, at \$350 per case, so any work done beyond seven hours per case was uncompensated. Systems that imposed caps usually set the maximum for felonies at somewhere between \$500 and \$1000. The range for misdemeanors was about \$200 to \$500.

The 1986 Report also noted that in the few jurisdictions using a contract system, a majority of the contracts were awarded to private practitioners. Law firms also received a significant amount of the contract work, while other groups, such as bar associations and not-for-profits received very little. About a quarter of the jurisdictions employing contracts used them to supplement a public defender or assigned counsel system. In these places the contracts provided representation in cases where the other defender system had a conflict of

interest, or could not accept the case for some other reason.

Many defenders have expressed serious concerns with the quality of service provided by contract systems. Questions have arisen as to who will monitor performance of the services contracted for, and what standards will be adopted for measuring performance. This is particularly important where there are fixed price or block grant contracts, because the attorney's compensation does not increase as he or she devotes more time to a case, creating a financial incentive to cut corners or do less work. The 1982 Report found that in more than half of the contract jurisdictions, there was either no monitoring, or the only monitoring was done by the agency that made the initial award.

B(2). Indigent Defense Expenditures and Caseloads

The 1986 Report found that funding for indigent defense was provided exclusively by state government in 18 states, by county government in 21 states and by a combination of state and county money in the remaining 11. Per capita spending on indigent defense was highest in the most populous counties and urban areas, and significantly less in smaller, rural counties. In raw sums, \$625 million was spent on indigent defense in 1982. This was far greater than had been estimated in a 1980 study entitled *Criminal Defense Services for the Poor*, written by Norman Lefstein and published by the American Bar Association in 1982. This amount also does not include indigent defense spending in the federal court system.

Although the sum of \$625 million may seem large, the 1982 Report found that it was quite small compared to other aspects of the criminal justice system. In 1982, the Bureau of Justice Statistics *Sourcebook* noted that public defense received 1.5 percent of state and local criminal justice funding, while prosecution services were allocated 5.9 percent, the judiciary 13.1 percent, corrections 24.7 percent and police 53.2 percent.

An important factor in evaluating spending on public defense is the indigency rate in a given jurisdiction. Nationally there are about fourteen indigent defendants per one thousand people in the population. There are, however, wide regional and local swings in these statistics. For example, at the high end, there are 29.92 indigent cases per thousand of population in the District of Columbia. At the low end, there are only 5.30 per thousand in Rhode Island.

The 1986 Report discovered several factors which contributed to the disparities in indigency rates. First, there was a strong correlation between the indigency rate and the overall crime rate in any given county. Places with the highest crime rates also had highest indigency rates in criminal cases. Second, there was a positive correlation between the indigency rate and the percentage of a county's population living in urban areas. Indeed, the highest indigency rates occurred in the fifty most populous counties in the nation.

Nationally, there were approximately 3.2 million indigent defense cases in 1982. Unfortunately, the 1986 Report was unable to document precisely how this figure could be broken down among the various kinds of criminal cases, because too many of the survey respondents did not keep the neces-

sary information. Nonetheless, the reliable data in the 1986 Report is a valuable starting point in comparing costs per case across states and counties.

B(3). Variations in Case Processing and Systems Changes

The 1986 Report also analyzed the manner in which defender systems administratively processed and arranged representation for individual clients. Aspects of case processing addressed included the way defenders decide which potential clients are indigent; whether clients are required to contribute to the cost of their representation; at what stage of the case attorneys are first assigned; how conflicts of interest and multiple defendant cases are handled; and whether the defender system provides any formal training to defenders.

Most states claimed to have established written criteria for determining whether a possible client is indigent. There are, however wide differences between the standards used by various jurisdictions. Some consider gross income to be a determining factor, while others consider net income. Some consider all of a defendant's assets in determining ability to pay, while others exempt certain essentials, such as a house and car, from consideration. Some only consider liquid assets. Moreover, there is no uniformity on the question of where to draw the line between eligibility and ineligibility. Some jurisdictions use the Bureau of Labor Statistics' definition of the poverty level, while others attempt to measure a defendant's resources against the estimated cost of retaining counsel. The disparities between jurisdictions are so great that in some places there are lists of criteria that make a defendant presumptively ineligible (such as not being on welfare, or being able to post bond), while in other places there is at least a *de facto* assumption that all defendants are eligible.

As of 1982, several jurisdictions were trying to reduce defender costs by employing indigency screeners, who gathered financial information about defendants who applied for free defender services. This was most frequently done in large public defender offices in the northeast part of the country.

Some places also adopted recoupment policies, requiring indigent defendants to pay some amount of money towards defraying their legal expenses. These policies took many forms, ranging from imposing judgment liens after conviction, to imposing repayment as a condition of probation.

Although three quarters of all counties reported having recoupment policies, most admitted that the policies were ineffectual. Of the counties with recoupment plans, one quarter admitted to recovering no funds. Another 45 percent said that they were reimbursed in 10 percent or less of all indigent cases. Only 17 percent claimed to have a recovery rate of 25 percent or higher. There were no statistics about whether the money recovered even matched the amount spent to implement the recoupment programs.

It has long been known that the point at which a defendant is afforded counsel in a criminal case has a significant effect on the defendant's chances of success. A lawyer who is appointed immediately after the arrest can do a prompt investigation before witnesses have disappeared. He or she can also

advise the client against making incriminating statements or engaging in other destructive behavior that will injure his chances at trial. If the client wishes, plea bargains and cooperation agreements can be entered into early enough for them to be worth concessions from the prosecution. At the very least, defense counsel has significantly more time to prepare for trial.

The 1986 Report discovered that early representation was most common in jurisdictions that had public defender systems. 39 percent of public defender counties reported providing lawyers within 24 hours of arrest, and another 44 percent began representation within three days of arrest. The statistics for counties with assigned counsel systems were somewhat less than public defender counties, with 33 percent of cases being assigned within 24 hours. Contract defenders lagged far behind other systems, with only 12 percent supplying a lawyer within 24 hours of arrest.

A problem that has long bedeviled indigent defense systems involves the way a program deals with conflicts of interest and multiple defendant cases. In cases where more than one person has been charged with participating in a single crime, it is common for the defendants to have different, and possibly conflicting defenses. For example, if two people are accused of assaulting someone, the first defendant may claim that he was home watching TV during the assault, and was a victim of mistaken identity. The second defendant, however, may insist that he was merely an innocent bystander, while the first man was guilty. Obviously, a single lawyer cannot represent both clients and effectively argue the inconsistent defenses. Equally problematic, one of the defendants may be offered a deal, in which he receives a favorable plea bargain, or even a dismissal, if he will testify against the other. Again, a single lawyer representing both defendants cannot negotiate an agreement that benefits one at the expense of the other.

These problems are particularly acute in jurisdictions with public defender systems, because all lawyers employed by the public defender are considered to be members of the same firm. Thus, where a conflict of interest occurs, a private attorney must be appointed to represent at least one of the defendants, while the public defender continues to represent the other. The 1986 Report reviewed the circumstances under which separate counsel are actually appointed for co-defendants.

About one third of all counties reported appointing separate counsel in all cases involving co-defendants. Half of the respondents said that they appointed separate lawyers when the original defender requested relief. Many counties also said that individual counsel was assigned when requested by the defendant, or at the court's discretion. Only one percent of the respondents reported never assigning separate lawyers to co-defendants.

A final subject addressed in the 1986 Report concerned the provision of legal training for the lawyers who represent indigent defendants. The Report noted that because the salaries for public defenders and the compensation rate for assigned counsel are so low, and the availability of support services is so limited, it is essential to provide good legal training to the

lawyers who are representing indigent clients. The Report discovered that in 55 percent of all counties, there are no opportunities for legal training. This statistic was qualified, however, by several significant trends discovered by the Report. First, counties with public defender systems were far more likely to provide legal training to their lawyer than counties with other systems. Eighty-one percent of public defenders reported making training available to their lawyers, while only 21 percent of assigned counsel programs and 37 percent of contract programs did so.

There were also significant local and regional disparities in the availability of training. 90 percent of all counties with a population over 500,000 provided legal training, while a far lower percentage applied in smaller counties. Moreover, training was more available in the northeast and western parts of the country, where most statewide public defender systems were located.

C. Studies Since the 1986 Report

In 1988, the Bureau of Justice Statistics published a Bulletin entitled *Criminal Defense for the Poor, 1986*, which updated some of the information contained in the 1986 Report. The 1988 Report was prepared by Robert L. Spangenberg, Judy Kapuscinski and Patricia A. Smith of the Spangenberg Group.

The 1988 Report noted that indigent defense had become significantly more frequent and expensive since 1982. In 1986, there were approximately 4.4 million cases nationwide in which counsel was assigned to an indigent defendant. This was a 40 percent increase from the 3.2 million cases reported just four years earlier.

Approximately \$991 million was spent on indigent defense services in 1986. This was a large increase from the \$625 million reported four years previously. The average cost for each case also increased, from \$196 in 1982 to \$223 in 1986.

Twenty states funded their indigent defense systems with state money; ten states were county funded, while the remaining thirty states used a combination of state and county financing.

A majority of counties still use assigned counsel systems, but that figure dropped from 60 to 52 percent. The use of public defender programs and contract systems increased, with the largest growth coming in the area of contracting. Not all was well in contract defense, though, as several of the quality control problems anticipated in the 1986 Report proved prescient. At least one county in Arizona adopted a program in which the indigent defense system was awarded to the lowest bidder. In *Smith v. State*, 140 Ariz. 355, 681 P.2d 1374 (1984), the Arizona Supreme Court found the system violated the Fifth and Sixth Amendment rights of indigent defendants for four reasons: (1) it did not take into account the time the attorney spent in representing his assigned clients; (2) it did not provide for support costs, such as investigators; (3) it did not consider the competence or experience level of the attorneys bidding on contracts; and (4) it did not consider the complexity or seriousness of the cases being bid on. Since 1988, there have been no comprehensive national studies of indigent defense services. The bibliography appended to this report lists

several articles and studies of more limited scope that provide some information about developments during the past decade.

THE PURPOSE OF THE NEW SURVEY

In the fifteen years since the last comprehensive national survey of indigent defense systems, the criminal justice system has changed in ways that have rendered much of that study obsolete. Some of these changes have occurred within the public defender community itself. For example:

1. More states have adopted a state public defender system.
2. State offices have expanded in some jurisdictions that use a hybrid of state and local defender services.
3. The use of contract defenders has increased in many parts of the country. This has included a wide variety of contracting scenarios, ranging from traditional low-bid for service contracts, to funding of "specialty" defenders to deal with a narrow problem peculiar to a jurisdiction.
4. Defender services are expanding to address the broader needs of clients, including concepts of client-centered representation and incorporation of civil and administrative matters related to a client's criminal case.
5. Experiments in community-based defender offices, as opposed to traditional city, county or state agencies.
6. The emergence of defender "performance guidelines" (such as those developed by the National Legal Aid and Defender Association) that describe the tasks of representation more clearly than ever before.
7. The increased use of technology by public defenders to share information and research, and to keep case data.

Other changes have taken place in the legislative, judicial, prosecutorial, correctional and administrative wings of the criminal justice system, including:

1. Increases in the length of prison sentences, and the number of crimes carrying mandatory prison terms.
2. Determinate sentencing through sentencing guidelines.
3. Lowering of the age for prosecuting juveniles as adults, and increases in the number of such prosecutions.
4. Dramatic increases in the number of persons arrested and prosecuted for non-felony and "quality of life" crimes.
5. New, and often severe, collateral consequences of criminal convictions through civil matters, such as immigration status, housing, licensing, fines and benefits entitlement.
6. The growth of forfeiture, both civil and criminal.
7. Increasing federalization of state crimes, resulting in broader concurrent exposure to prosecution in parallel criminal justice systems.
8. Legislative elimination or reduction of parole and probation.
9. Legislative creation of many new "predator" and repeat-offender statutes.
10. Legislative expansions of the death penalty, increased capital prosecutions, and the accelerated pace of executions.
11. The establishment and subsequent defunding of capital resource centers, and other offices that previously provided defenders with assistance in death penalty cases.
12. Reduced availability of habeas corpus and other post-

conviction remedies.

13. Imposition of restrictive time limits for filing of appeals, habeas corpus and post-conviction petitions.

14. Increased funding for prosecutors and police, with a concurrent increase in the number of specialized prosecution units defenders must contend with, such as domestic violence, sexual assault and narcotics task forces.

15. Development of new fields of scientific and other areas of expertise used in criminal prosecution and defense.

16. Development of new specialized courts, often designed as "adjudication partnerships," such as drug courts, juvenile gun courts, or domestic violence courts.

17. The emergence of alternative justice-system models, such as community justice and restorative justice

These system changes have had a profound effect on the agencies that provide indigent defense services. The purposes of the new Survey will include:

1. Determining how changes in the criminal justice system have affected the delivery of defender services.
2. Examining how institutional defenders have responded to these changes, e.g., in terms of structure, funding and method of client representation.
3. Determining which of these responses have been successful, and which need improvement or change.
4. Supplying the information needed to evaluate and compare the effectiveness of services offered by various forms of defender offices.
5. Providing a basis for determining what resources defender offices will need to respond to these changes in the future.

On March 13, 1997, a meeting was held in Washington, D.C. of a Working Group assembled by the Bureau of Justice Statistics to discuss ways of making the Survey most productive, both for BJS and for public defender offices around the country. A list of the members of the Working Group is appended to this report. The following sections reflect the views and recommendations of the Working Group.

DATA ORGANIZATION ISSUES

The Survey should be more than just a "snapshot" of the present status of indigent defense. The future of the public defender community will be determined by its ability to successfully meet the challenges posed by the criminal justice system as a whole, including all other system participants. It is therefore essential that the Survey provide a basis for comparing the structure, resources, performance and needs of public defender offices to those of the prosecutors, police and courts which control defenders' caseload inputs. Members of the Working Group referred to this as an "ecosystem," or "three-legged stool" approach to the survey. Defender services must be evaluated not in a vacuum, but in the context of the criminal justice systems in which they operate. Changes in one part of the system should be examined for their impact on defender services in the same jurisdiction.

The "ecosystem" approach requires that the Survey must

go beyond counting the raw number of cases processed by an office and measuring the cost per case. "Workload" is a more useful measurement than "caseload," because even where the number of cases has remained constant, the number and variety of services provided to each client will have increased in a variety of ways as a result of changes in the criminal justice system beyond the control of defender agencies. For example, a jurisdiction may have lowered the age for adult prosecution of juveniles, mandated lengthy state prison terms and established collateral consequences affecting the families of defendants who receive welfare or public housing. A defender agency that represents a juvenile in this jurisdiction may still represent only one client in one case, but must do dozens of hours more work, in order to deal with the more severe penalties and civil consequences. In similar fashion, a defender office may represent an adult accused of assaulting his spouse. In the past, this would have been considered a simple assault case, and would have been handled as one case in a single criminal court, or may have been a candidate for diversion out of the criminal justice system. Now, however, many jurisdictions have created special prosecution and police units for bringing these cases, special courts for adjudicating them, mandatory arrest policies, or mandatory mediation procedures and collateral civil actions for addressing the family implications of the case. From a statistical perspective this may still be considered just a single client, but the amount of work the defender must do has increased exponentially.

As a result of these changes, the frequency with which defender offices must now use the services of non-lawyer specialists has also increased dramatically. Social workers, welfare, immigration and benefits specialists may be essential to successfully representing a client in many kinds of criminal cases. The value of representation in a criminal case is significantly undermined if a "successful" conclusion nevertheless results in the client's deportation, homelessness, or inability to provide for his family, including an increased risk of the client's children entering a similar cycle of legal troubles.

In death penalty cases in particular, the importance of non-lawyer specialists is crucial. The presence of an experienced mitigation expert frequently is the difference between a life sentence and capital punishment.

The Survey should document these changes, as well as the ways they have affected defender workload and expenditures. Also, if the Survey is to be a useful tool for determining what resources are necessary for defenders to properly represent their clients, it must compare the changes in defender resources to changes in the funding of other criminal justice agencies including prosecution, police and courts. It should develop a model for evaluating the effectiveness of public defender services, to guide the gathering of data. Simple cost-per-case measurements are not reflective of the quality of work done by defenders. Among the criteria suggested for evaluating quality of services were the following considerations:

1. Nature of representation (misdemeanor v. felony; frequency and nature of collateral proceedings; jury trial v. bench trial; trial v. appeal; representation in related civil proceedings).

2. Pre-trial incarceration rate.
3. Plea v. trial v. dismissal rate.
4. Frequency of filing and litigating pretrial motions.
5. Use of investigators.
6. Availability and use of diversion programs.
7. Use of social workers and other non-lawyer specialists.
8. Use of mitigation experts in capital cases.
9. Use of experts.
10. Typical length of trials.
11. Post-trial incarceration rate.
12. Frequency of post-conviction litigation.
13. Level of skill and experience of attorneys and supervisors.
14. Salary and benefits afforded attorneys and supervisors.
15. Type and amount of supervision and case review afforded attorneys.
16. Type and amount of training afforded attorneys.
17. Availability of support staff and word processing facilities.
18. Level of skill and experience of support staff (secretarial, clerical, social work, paralegal and investigative).
19. Salary and benefits afforded attorneys and supervisors.
20. Library and computerized research facilities.
21. Availability and use of interns, law clerks and law student clinical programs.

The quality measurement model should be used not just to evaluate individual defenders, but to compare the quality of services delivered by different forms of defender offices. For example, in jurisdictions which are serviced by both a state public defender and contract defenders, it would be useful to examine not just which office is more expensive, but which office is providing better representation, and how they are doing it. In this respect, the Study should include not just data about the rates of trials, pleas, dismissals, acquittals and convictions. It should also consider the extent to which each form of defender office has been able and willing to utilize non-lawyer personnel, such as paralegals, social workers and mitigation specialists to achieve the optimum results for their clients.

The Survey should include data about the office structure adopted by defender agencies. At the most basic level, this would address issues such as the manner in which a chief defender is selected; whether he or she is hired for a specific term of years; who has the authority to fire a chief defender; and what the criteria are for making hiring and firing decisions. Particular attention should be paid to determining whether the authority to make these decisions is structured in such a way as to keep the representational aspects of the defender office independent of potentially hostile political agencies. Similar data should be collected about the authority of the chief defender to hire managers, supervisors and staff lawyers, and the way that authority is exercised. In jurisdictions where defender services are obtained on a contract basis, the Survey should determine who the contractors are; what standards are used to qualify, select and evaluate them; what services they are required to provide; what mechanisms are used

to maintain standards of quality; and what training and support services are available to the lawyers. The method of payment (hourly, fee per case, fee per year, or other formula billing) and the amount of payment should also be noted. All of this data should be used to compare the practices of various types of defender office, and should be correlated with the criteria used to measure quality of representation.

Information should also be gathered about the structure defender offices have chosen for client representation. At the most basic level, this would entail whether an office has opted for vertical representation, horizontal representation, or some hybrid plan. The creation and effectiveness of specialized units, such as domestic violence, juvenile, sex offense and narcotics defense teams should also be covered. It should be noted whether a defender service provides appellate and/or post-conviction representation, and if so, how those branches of the office are organized, and how the office resolves conflict of interest problems.

Along with information about office structure, the Survey should take account of whether, and how, a defender agency provides supervision and training to its staff attorneys. Where services are provided by contract defenders or assigned private counsel, the Survey should also determine whether there is any formal training or supervision given to the lawyers who handle the casework.

DATA COLLECTION ISSUES

Members of the Working Group expressed concern over the amount, nature and accuracy of relevant information presently being collected by public defender offices. It was suggested that state public defender systems are probably doing the best job of collecting accurate information, if only because they are centralized, and have access to material from all areas of the state. The Minnesota State Public Defender System was recognized as having an excellent data collection system, but even that agency has only been gathering information for a few years.

The Survey should also recognize that many defender agencies use multiple data systems within one agency. For example, Massachusetts uses separate data systems for public defenders and for assigned and appointed counsel. Moreover, in jurisdictions such as New York City, where there are two or more independent defender agencies, each office is likely to maintain a database that differs both substantively and stylistically from the systems employed by the other offices.

It is also important to gather information about smaller defender agencies, such as contract defenders and county offices, which are frequently ignored by national studies. Some of this information can be obtained from the National Association of Counties. Equally important, the Survey must gather information about the other branches of the criminal justice system, in order to make meaningful comparisons with developments in public defender offices. Information about other criminal justice agencies, such as courts, prosecutors and police can be obtained from the relevant government offices. The Bureau of Justice Statistics has done several studies which

will be helpful in this respect.

The Working Group expressed concern about the wide differences in the kind of data collected by various defender services. For example, some jurisdictions keep records on indigency rates, while others do not. Other categories in which information should be collected include:

1. Race/gender/age/prior record of the defendant.
 2. Type of case, including crime, potential sentence, felony/misdemeanor/juvenile distinctions.
 3. Percentage of trials v. plea bargains v. pretrial dismissals.
 4. Outcomes of cases. The Minnesota data collection system provides for 26 potential outcomes. Other jurisdictions may have others to add.
 5. Cases per attorney (mean, median and range within an office).
 6. Expenditures, along with an explanation of how each office collecting the data defines expenditures, and how those expenditures fit within the overall financial structure of the system.
 7. An explanation of how each jurisdiction measures caseload and/or workload per attorney.
 8. Sentencing, and how it relates to the crime charged, the crime for which the defendant was convicted, whether the case was tried or plea bargained, and how the jurisdiction's overall sentencing laws are structured (guidelines/mandatory sentencing/availability of probation or parole/permissibility and limits on plea bargaining/range of judicial discretion).
 9. In death penalty states, the frequency with which capital crimes are charged as opposed to non-capital homicide, the conditions relevant to that decision (personal characteristics of the victim, the defendant, etc.), the frequency with which a guilty verdict results in a death sentence, the resources devoted by the public defender to various stages of capital cases).
- The Survey should also accommodate regional differences in court structure and terminology (whether substantive or semantic) which a reader must understand in order to use the data properly. For example, some jurisdictions use preliminary hearings as a means of screening less serious cases out of the system, while others treat the hearing as a mere formality, and leave the screening process to another stage of prosecution. The ability to reflect such distinctions will affect the accuracy of comparisons among felony/misdemeanor statistics, as well as trial/plea bargain/dismissal figures.

APPENDIX A MEMBERS OF THE WORKING GROUP, MARCH 18, 1997

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Jordan Leiter, National Institute of Justice

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Steve Smith, Bureau of Justice Statistics

APPENDIX B LIST OF AVAILABLE LITERATURE

The following is a partial list of past surveys, studies, questionnaires, articles, books and other materials that provide useful background for the undertaking of this Survey. The reader should be aware, however, that because of the many changes in the criminal justice system over the past decade, some of the details discussed in these materials have become outdated.

National Criminal Defense Systems Study [Analyzing 1982 Survey] (U.S. Dept. of Justice, Bureau of Justice Statistics, 1986).

Spangenberg, R.L., Lee, B., Battaglia, M., Smith, P., Davis, A.D., *National Criminal Defense Systems Study, Final Report* (U.S. Dept. of Justice, Bureau of Justice Statistics, 1984).

Criminal Defense for the Poor, 1986 (U.S. Dept. of Justice, Bureau of Justice Statistics, 1988).

Steven K Smith and Carol J. DeFrances, *Indigent Defense*, (U.S. Dept. of Justice, Bureau of Justice Statistics, 1996).

Bureau of Justice Statistics Fiscal Year 1996: At a Glance. (U.S. Dept. of Justice, Bureau of Justice Statistics, 1996).

Bezruki, D., Allsen, D., Barkelar, C., Bensch, H. I., Coulthart, T., Feher, Z., Herta, D., *Evaluation of Office of the Wisconsin State Public Defender* (Wisconsin Legislative Audit Bureau, Madison, WI).

Directory of Legal Aid and Defender Offices in the United States and Territories, 1995/96. (National Legal Aid and Defender Association).

Murphy, T. R., *Indigent Defense and the U.S. War on Drugs: The Public Defender's Losing Battle*, Criminal Justice, Vol. 6, #3 (Fall 1991), 14-20.

Murphy, T., *System Balance: Indigent Defense and the War on Drugs*. (National Center for State Courts, Williamsburg, VA 1990).

Twenty-First Annual Report State of Maryland Office of the Public Defender Fiscal Year, 1993, (Maryland Office of the Public Defender Baltimore, MD).

America's Children at Risk: A National Agenda for Legal Action, 27 Family Law Quarterly, 433 (#3 Fall 1993).

Bright, Steven B., *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 Yale Law Journal 1835 (May 1994).

Worden, A.P., *Counsel for the Poor: An Evaluation of Contracting for Indigent Criminal Defense*, 10 Justice Quarterly 613 (#4 December 1993).

Juvenile Courts: Access to Justice, (U.S. Senate Subcommittee on Juvenile Justice of the Committee on the Judiciary, March 4, 1992).

Schulhofer, S.J., Friedman, D.D., *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for all Criminal Defendants*, 31 American Criminal Law Review, 73 (Fall 1993).

Zorza, R., *Bringing Criminal Justice Agencies On-Line: The Neighborhood Defender Service Experience*, 8 Criminal Justice 2 (Fall 1993).

Klein, R., Spangenberg, R., *Indigent Defense Crisis* (American Bar Association Criminal Justice Section, 1993).

Mecham, L.R., *Federal Defender Services: A Status Report* (Administrative Office of the United States Courts, 1993).

Gershman, Bennett, *Defending the Poor* 29 Trial 47 (#3 March 1993).

Office of the Defender General 16th Annual Report, Fiscal Year 1992 (Vermont Office of the Defender General, 1992).

Uphoff, R.J., *Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?* 28 Criminal Law Bulletin 419 (September-October 1992).

Murphy, T.R., *War on Drugs: Dollars for Law Enforcement, Pennies for Indigent Defense*, 30 Judges' Journal 28 (Fall 1991).

Spears, L.D., *Contract Counsel: A Different Way to Defend the Poor*, 6 Criminal Justice 24 (Spring 1991).

Spangenberg, R.L., Rose, W.J., Menton, J.T., *Appellate Indigent Defense System Review* (Washington State Office of the Administrator for the Courts, 1989).

Briefing Book: The Justice System and the Private Sector: Traditional Practice and Emerging Trends in the Private Delivery of Police, Court and Corrections Services, U.S. Department of Justice, National Institute of Justice, Office of Communication and Research Utilization (1987).

Bailey, A., *Legal Services, Poor Clients, and the "War on Drugs"* 24 Clearinghouse Review 504 (special issue, 1990).

Indigent Defense in Washington State: 1990 Report of the Indigent Defense Task Force (Washington State Office of the Administrator for the Courts, 1990).

Wasserman, D.T., *Sword for the Convicted: Representing Indigent Defendants on Appeal* (1990).

Margulies, J., *Resource Deprivation and the Right to Counsel*, 80 Journal of Criminal Law and Criminology, 673 (Fall 1989).

Fiscal Accountability and Quality of Performance in Assigned Counsel Programs: Materials and Examples of Computer Records, Vouchers and Statistics Used in Attorney Monitoring, Materials from a seminar of the Sixty-Sixth annual conference of the

National Legal Aid and Defender

Association, held November 16-19, 1988, in San Diego, Calif.

Potential Impact of Prosecutorial and Court Practices and Procedures on Indigent Defense Costs in Oregon: A Preliminary Assessment (US Department of Justice Bureau of Justice Assistance, 1989).

Lippman, M., Wineberg, R., *In Their Own Defense: A Profile of Denver Public Defenders and Their Work* (From Ethics in Criminal Justice, P 8-41, 1990, Frank Schmallegger, ed.).

Kura, J., *Prove You Need the Money*, 4 Criminal Justice 21 (Spring 1989).

Crawford, M., *Death Penalty* 2 Advocate 14 (February 1989).

Spangenberg, R.L., Kapuscinski, J., Smith, P.A., *Criminal Defense for the Poor, 1986* (US Department of Justice Bureau of Justice Statistics, 1988).

Pennypacker, P.H., *If You're Defending the Poor.. What's a Reasonable Fee?* 3 Criminal Justice, 15 (Summer 1988).

McIntyre, L.J., *Public Defender: The Practice of Law in the Shadows of Repute* (1987).

Houlden, P., Balkin, S., *Performance Evaluation for Systems of Assigned Service Providers - A Demonstration Assessing Systems of Indigent Defense* 9 Evaluation Review 547 (October 1985).

Jacoby, J.E., *Case Weighting Systems for the Public Defender - A Handbook for Budget Preparation* (National Legal Aid and Defender Association, 1985).

Lind, F.G., *Public Defender Program in North Carolina* 49 Popular Government 5 (Fall 1983).

Kendrick, V.R., *Uncompensated Appointments of Attorneys for Indigent Criminal Defense - The Need for Supreme Court Standards*, 14 Southwestern University Law Review 389 (1984).

Lefstein, *Criminal Defense Services for the Poor* (American Bar Association, 1992).