

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator



JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

**Indigent Defense Commission (IDC)
VIDEOCONFERENCE**

Date and Time of Meeting: Wednesday, January 17, 2018 @ 1:30 p.m.

Place of Meeting:

Carson City	Las Vegas	Washoe	Ely	Elko
Supreme Court Library Room 107 201 S. Carson Street Carson City, Nevada	Nevada Supreme Court Building Conference Room A/B 408 E. Clark Avenue Las Vegas, NV	Second Judicial District Court Room 214 75 Court Street Reno, NV	White Pine County District Court 801 Clark Street Ely, NV	Elko County District Court 571 Idaho Street, Elko, NV
Teleconference Access: Dial-In # 1-877-336-1829 Access Code 2469586				

****All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.***

AGENDA

- I. Call to Order
 - a. Call of Roll
 - b. Determination of a Quorum
- II. Public Comment

Because of time considerations, the period for public comment by each speaker may be limited. Speakers are urged to avoid repetition of comments already made by previous speakers.
- III. Review and Approval of the October 23, 2017 Meeting Summary*
- IV. Update on Nevada Right to Counsel Commission – *Mr. John McCormick*
- V. Update on Caseload Standards - *Mr. Hans Jessup*
- VI. Status Update on ACLU of Nevada – *Ms. Amy Rose*
- VII. Status Update on Indigent Defense Clark County - *Mr. Phil Kohn, Mr. Drew Christensen*

Supreme Court Building ♦ 201 South Carson Street, Suite 250 ♦ Carson City, Nevada 89701 ♦ (775) 684-1700 • Fax (775) 684-1723

Supreme Court Building ♦ 408 East Clark Avenue ♦ Las Vegas, Nevada 89101

- VIII. Status Update on Indigent Defense in Washoe County - *Mr. Jeremy Bosler, Mr. Marc Picker, Mr. Bob Bell*
- IX. Status Update from State Public Defender's Office - *Ms. Karin Kreizenbeck*
- X. Status Update on the Federal Public Defender's office – *Ms. Megan Hoffman*
- XI. Update on Eighth Judicial District Court Homicide Case Pilot Project – *Mr. Chris Lalli*
- XII. Other Business
- XIII. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited to five minutes per person at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030 (4)(a))
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations:** Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: 408 East Clark Avenue.

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Indigent Defense Commission

Summary Prepared by Sarah Stenger and Jamie Gradick
October 23, 2017
1:30p.m.

<u>Attendees Present</u> Chief Justice Michael A. Cherry, Chair Judge Tom Armstrong Judge Gary Fairman Judge Mason Simons Judge Kimberly Wanker Judge Nathan Tod Young Bob Bell Jeremy Bosler Drew Christensen Joni Eastley Franny Forsman Chris Hicks Kriston Hill	Philip J. Kohn Karin Kreizenbeck Chris Lalli John Lambrose Mark Picker Amy Rose Dagny Stapleton Jeff Wells <u>AOC Staff</u> Jamie Gradick Ben Graham John McCormick
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- I. Call to Order
 - Call of Roll and Determination of a Quorum
 - Ms. Jamie Gradick called roll; a quorum was present.
- II. Public Comment
 - Carson City
 - My name is Al Castaneda. I'm from the new civil rights organization the American Federation for Civil Rights, formerly I was with the Mexican American Political Association of Nevada. The AFRCR, a new organization not unlike the ACLU. We find out that it's, you know, heavy levels of criminality going on in Nevada, it's almost impossible to get anything done or hear on anything including on issues of indigent defense. In the past I have called in and I, I try to be on the record to let you guys know some of the things that you may not be able to see, from the perspective of what you discuss. I'm on the trenches and I even have been a victim of violation of, of constitutional rights of indigent people. There's, there's a concerted, ring of

criminality going on, with the public defenders in which they don't actually do anything to defend, a defendant, they're only interested in making the easy money by presenting, by standing next to the defendant and saying, entering, guilty pleas or plea bargains. But, when they are, when a defendant says, "I want to go to trial, I'm innocent." They basically get upset and they say, "Damn it, you know, if you want to take this to trial, they're going to throw the book at you, etc. etc.," and they basically force the person to take the deal. Either plead guilty or take a plea bargain. Also when, when they fail to appear in court, they pass, they send someone else to represent, they send another attorney to, to appear, make appearance in court, but they're not appearing for the purpose of, representing the defendant, they're only appearing for the purpose of protecting their contract, so that their contract can now be, you know, renewed because they failed to appear so they send someone to make an appearance and this allows the case to go forward in, in court. But the new, the replacement attorney knows nothing about the case, so basically it turns out to be a detrimental move on, on the part of the defendant. You know, the outcome of the hearing moving forward, with no actual representation because the replacement attorney knows nothing about the case, they just show up for the purpose of the, protecting their, their contract as public defenders. And obviously the defendant, defendants are the ones that always take the loss. Another, another issue that I, I want to talk about is the right to, to counsel when it, when it comes to uh, on civil matters, and a person who is held in contempt on, on criminal activity on part of attorneys abusing pro se litigants who actually make false accusations and claims against people, criminalize them, wrongfully prosecute them, and criminalize them and have them thrown in jail on issues of contempt, but, in a, in civil cases, you know, a person does not have a right to counsel, however the United States Constitution says that any case in which there can be an issue of incarceration, a person is entitled to legal defense. I know in states, state laws says that any case, more than six months is entitled to counsel, but not less than six months. So I want to say that the maximum in law is the United States Constitution, not the State Constitution, or the local ordinances. So therefore any, anything that is in violation of the United States Constitution is automatically null and void, because the United States Constitution is the maximum in law. So that, that issue needs to be addressed that an indigent person making, being a pro se litigant for example in civil cases, such as family court, and people being prosecuted wrongfully accused and prosecuted and even incarcerated, those people have no right to legal counsel and, and thus they're abused, criminalized, and thrown in jail for the purpose of oppression when they're fighting over an issue of children and this is my personal case. That there's heavy levels of criminality on the part of attorneys who take advantage of the ignorance of the law, of pro se litigants where they file motions without ever serving the opposition, in this case the pro se litigants, the motion goes forward granted in, when someone tries to face, speak about it, later on, a pro se litigant only finds out that he's got an order never knowing that such actions took place. The lawyers actually lie and

they, they file, they file a certificate of service when, in fact, they never did, so that is a Class D felony and perjury because, for example, even in my case, the attorney was asked in open court after I notified the, the clerk that this was a false move, I was never, I was never notified, I was never served, in the, the clerk, I apparently made me out to be the liar and gave them full credit when I said I have not been served, I have no idea what the case is about, I cannot even respond to the, to the motion because I have never been served. And because I haven't been served, I don't, I don't have to appear, but even if I have been served in what's to make a telephonic appearance for example, well I have an obligation to file a response, and how can I file a response when I never got any documentation, I was never served, so what can I respond to?

- Chief Justice Cherry thanked Mr. Castaneda for his comments and informed Mr. Castaneda the State Bar, local DA's Office, or Judicial Discipline Commission would be more appropriate venues to report the issues he raised.
- Chief Justice Cherry assured Mr. Canstenda that the Commission would document his comments

III. Review and Approval of the September 5, 2017 Meeting Summary

- Attendees approved the summary of the September 5, 2017 meeting.

IV. Update on Nevada Right to Counsel Commission

- Chief Justice Cherry asked for an update on the Nevada Right to Counsel Commission.
 - Mr. John McCormick informed attendees that he has not been able to connect with Ms. Reynolds at the Governor's Office.
 - Attendees discussed the LCB's opinion indicating that lawyers with potential financial interests are not allowed to participate on the Commission; discussion was held regarding institutional defenders and the LCB's opinion that their participation is allowable.
 - Mr. McCormick informed attendees that he has received a scope of work from a potential vendor and the consultant role is currently under review. Since the Court received the appropriation, the consultant contract will go to Chief Justice Cherry as soon as Mr. McCormick is able to "vet it fully".
- Chief Justice Cherry asked Mr. McCormick to send an email to the IDC membership if/when he receives an update on membership from the Governor's Office.
- Further discussion was held regarding the timeline for the new Commission's work.

V. Rural Counsel Contract Discussion

- Ms. Franny Forsman commented that there seems to be a misunderstanding of the definition of "flat fee" and whether "extraordinary fees" include attorney's fees or only expert/investigator fees.
- Ms. Forsman commented that it's important to know how often and under what circumstances attorneys are asking for fees.

- Ms. Forsman commented that there is an issue regarding how best to enforce the fee requirement.
- Attendees discussed a possible confusion between “fees” and “services” and whether these fall under the definition of extraordinary fees.
- Ms. Forsman commented that the “big problem” is whether or not the attorney fees are limited by salaries contained in the contract and whether or not there is the ability to modify that in the contract language.
- Judge Young commented that it is incumbent on the attorneys to ask for extra fees, it is not the responsibility of the court to “tell them to ask”.
- Judge Fairman explained that the contract counsel in his district have never indicated any confusion and seem to be aware that they can ask for these fees on a case-by-case basis as needed.
 - Discussion was held regarding district variances in caseloads and how this affects the number of attorneys asking for fees across the state. In some counties, the workload is small enough to allow for adequate time/resources.
 - Ms. Forsman commented that she has not seen the data on the workload and cases per attorney; Judge Fairman will provide her with what he has.

VI. Update on Caseload Standards (*See meeting materials for handout*)

- Mr. McCormick presented on Hans Jessup’s behalf.
 - Data from a few counties is still missing thus far.
 - Mr. McCormick stated that the data they have is from the courts and reflects total appointments.
 - Discussion was held regarding the need for a summary of the caseloads of each contract attorney and the public defender’s offices; Chief Justice Cherry asked that a summary be prepared for the next meeting so the group can ascertain where it is at in terms of caseload standards.

VII. Status Update on Indigent Defense in Clark County

- Mr. Phil Kohn gave a report in regards to the hiring process they are currently going through.
 - The Clark County PD office now has someone on staff for immigration matters.
- Discussion was held regarding the Special Public Defender’s Office and the current status of the hiring process/candidates.

VIII. Status Update on Indigent Defense in Washoe County

- Jeremy Bosler provided an update on indigent defense in Washoe County.
 - The Public Defender’s Office, Alternative Public Defender’s Office, Bob Bell attorneys, and some district attorney’s offices are still working with the district court as there are some calendar issues. This impacts the attorney’s ability to attend court appearances.

- The APD has declared “overflow unavailability” on some family court cases. The district court has been advised that Washoe County is going to reassign family court deputies to criminal court to help with the calendaring issue.
- Washoe County is recruiting a replacement for the Alternate Public Defender. The application selection process has been a struggle, three applicants to forward to the county commission would be ideal.
- Bob Bell touched on the overflow from the APD.
 - They are expecting an increase in the family law cases
 - Advertising is being done for the additional family court attorneys, particularly for 432B cases.
- Chief Justice Cherry inquired about the caseload standards in Washoe County.
 - Bob Bell informed Chief Justice Cherry that, occasionally, they get an attorney that picks up a number of cases.
 - Mr. Bell advised Chief Justice Cherry that one of the attorneys that does some of the post-conviction cases has been a little overwhelmed, the attorney will not be assigned cases for a while. It’s managed on a case-by-case basis.
 - Mr. Bosler currently has two capital cases, the third case is currently with the Feds.
- Chief Justice Cherry asked how many attorneys Washoe County uses for their murder cases.
 - Chris Hicks stated that it depends on the case; however, with typical murder cases there isn’t necessarily two on the murder cases, but with capital murder cases he cannot remember not having two attorneys on the murder cases.
 - Chris Hicks informed attendees that Washoe County is currently working on sentencing for one case dating back to the 1980s.
 - As for the remainder of the cases, the Attorney General’s office has appealed.

IX. Status Update from State Public Defender’s Office

- Ms. Karin Kreizenbeck provided an update on the State Public Defender’s Office; everything is status quo. There isn’t anything new to report, they are fully staffed and covering both counties fairly well at the moment.

X. Status Update on the Federal Public Defender’s Office

- No report was given.

XI. Status Update of the 8th Homicide Case Pilot Project

- Judge Herndon and Chris Lalli provided and updates on the Eighth Judicial District’s Homicide Case Pilot Project.
 - Four departments in the 8th Judicial District are dedicated to help with the project and is currently working on the pending murder cases; Judge Herndon is essentially the “gatekeeper” who handled preliminary matters.
 - Judge Herndon does initial monitoring then sends the case to one of the four departments, this can include his own department.
 - The idea of this program is to have more aggressive and judicial monitoring on these cases.

- From July 1st, 2017 to mid-October, approximately forty cases have been resolved.
- Discussion was held regarding the comparison between Milwaukie and Clark County and a recent site-visit to Milwaukie to observe its program.
- Mr. Kohn commented that Nevada has the death penalty, this slows the process down.
- Chief Justice Cherry asked how these cases are working out as far as the public defenders, special public defenders, and the conflict attorneys are concerned.
 - Discussion was held regarding concerns about people who feel they have been rushed to trial or with people who have needed a continuance.
 - Attendees discussed the importance of communication so no one is rushed to trial.
- Attendees discussed the discovery “checklist,” the role law enforcement plays in discovery, and the obligations of the lawyers.
 - Concern was expressed regarding discovery and rushing the process; does this process enhance “open file” mentality?
 - Attendees discussed the possibility that many of these issues will only be solved by litigation or by Legislative action.

XII. Other Business

- Status Update on the ACLU
 - Ms. Amy Rose said that they are trying figure out the status on the contracts. They are still concerned about the rural counties, the contract attorney fees, investigators and expert witness fees, and how well attorneys are representing their clients.
 - Chief Justice Cherry commented on the need for attorneys to come forward.
 - Further discussion was held regarding the conflicts and concerns with attorney fees; the concern seems to be that the attorneys simply aren’t asking for fees.
- Chief Justice Cherry and Ms. Gradick will choose a date for the next meeting.

XIII. Adjournment

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

MEMORANDUM

TO: Indigent Defense Commission

FROM: Hans Jessup, Lead Court Research Analyst

COPY: John McCormick, Assistant State Court Administrator
Jamie Gradick, Rural Courts Coordinator

DATE: December 19, 2017

SUBJECT: Caseload Standards Report

In the Indigent Defense Commission (IDC) meeting on October 23, 2017, a report on caseload standards was requested. Accordingly, the Administrative Office of the Courts, Research and Statistics Unit (AOC) researched the caseload standards for indigent defense attorneys in other states. Attached is a table that summarizes some of the caseload standards discovered during this review process.

In 1973, the National Advisory Commission (NAC) introduced national caseload standards for indigent defense attorneys. Since that time, several states also implemented caseload standards that closely followed the NAC standards. In 2001, The U.S. Department of Justice (DOJ) published *Keeping Defender Workloads Manageable*, a article that discussed approaches and strategies for managing caseloads. The article includes a table that reports the caseload standards of States across the country and is included in the attached materials.

Since the 2001 DOJ article, many States have reviewed and updated caseload standards. Most recently, Texas and Colorado have conducted empirical-based research to determine their standards should be. The study papers issued on their research have been attached.

Finally, the AOC looked at States regionally similar to Nevada. Oregon and Washington also have updated their caseload standards since 2001. These states were included in the attached table for reference and comparison.

HJ

Attachment

State/ Organization	Felony	Misdemeanor	Juvenile	Mental Health	Other	Notes:
Texas (Jan 2015)	175 State Jail 144 3rd Degree 105 2nd Degree 77 1st Degree	236 Class B 216 Class A				
Washington (June 2012)	Death Penalty Case -1 Felony - 150	300	Juv. Offender - 250 Juv. Depend. - 80	250	36 Appeal	1. Washington Standard included a provision in the Rules which stated "The contract or other employment agreement or government budget shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle."
Colorado (Aug. 2017)	Fel 1 - 3 Fel 2 - 15 Violence Fel 3 or 4 - 64 NonViolence Fel 3 or 4 - 142 Fel 5 or 6 - 199 Drug Fel 1, 2, 3, or 4 - 241 Sexl Aslt Fel 2, 3, 4, 5, or 6 - 30 DUI Fel 4 - 115	Misd. 1 - 310 Misd. 2 or 3 - 411 Misd. DUI - 234 Misd. Traffic/Other - 672 Misd. Sex Offense - 125	Juv. Fel - 200 Juv. Misd. - 351 Juv. Sex Offense - 53			It is unclear if these are adopted standards. This was a study completed by RubinBrown and the ABA. Previous Standards were based upon the Spangenberg Group (1996)
Oregon	Fel. Lvl. 11 - 6 Fel Lvl. 10 - 40 Fel Lvl. 9 - 40 Fel Lvl. 8 - 150 Fel Lvl. 7 - 240 Fel Lvl. 6 - 240 Fel Lvl.s 1-5 - 300	400	Delinq. Lvl (11-100) - 100 Delinq. Lvl (8-10) - 80 Delinq. Lvl (1-7) - 480 Juv Misd - 800 Adult TPR - 10 Child TPR - 20 Adult Depend. - 80 Child Depend. - 120	600	Fugitive - 600 Felony Prob. Viol. - 600 Msd Prob. Viol. - 600	
1973 National Advisory Comm.	150	400	200	200	25 Appeal	See Standard 13.12



KEEPING DEFENDER WORKLOADS MANAGEABLE

January 2001

NCJ 185632

Prepared by The Spangenberg Group

**Table 2: Maximum Public Defender Workload Standards
in Selected States**

State	Felony	Misdemeanor	Juvenile	Appeals	Authority
Arizona	150	300	200	25	<i>State of Arizona v. Joe U. Smith</i> , 681 P. 2d 1374 (1984).
Colorado*	80–241 ¹	310–598 ²	305–310 ³	–	The Spangenberg Group. <i>Weighted-Caseload Study for the Colorado State Public Defender</i> . November 1996.
Florida*	200	400	250	50	Florida Public Defender Association. <i>Comparison of Caseload Standards</i> . July 1986.
Georgia	150	400	200	25	Georgia Indigent Defense Council. <i>Guidelines of the Georgia Indigent Defense Council for the Operation of Local Indigent Defense Programs</i> . October 1989.
Indiana	200	400	250	25	Indiana Public Defender Commission. <i>Standards for Indigent Defense Services in Non-Capital Cases: With Commentary</i> . January 1995.
Louisiana	200	450	250	50	Louisiana Indigent Defense Board. <i>Louisiana Standards on Indigent Defense</i> . 1995.
Massachusetts	200	400	300	–	Committee for Public Counsel Services. <i>Manual for Counsel Assigned Through the Committee for Public Counsel Services: Policies and Procedures</i> . June 1995.
Minnesota*	100–120 ⁴	250–400 ⁵	175	–	Minnesota State Public Defender. <i>Caseload Standards for District Public Defenders in Minnesota</i> . October 1991.
Missouri	40–180 ⁶	450	280	28	Missouri State Public Defender System. <i>Caseload Committee Report</i> . September 1992.
Nebraska	50 ⁷	–	–	40	Nebraska Commission on Public Advocacy. <i>Standards for Indigent Defense Services in Capital and Non-Capital Cases</i> . May 1996.

**Table 2: Maximum Public Defender Workload Standards
in Selected States (continued)**

State	Felony	Misdemeanor	Juvenile	Appeals	Authority
New York* (City)	150	400	–	25	Indigent Defense Organization Oversight Committee. <i>General Requirements for All Organized Providers of Defense Services to Indigent Defendants</i> . July 1996.
Oregon	240	400	480	–	Oregon State Bar. <i>Indigent Defense Task Force Report</i> . September 1996.
Tennessee	55–302 ⁸	500	273	–	The Spangenberg Group. <i>Tennessee Public Defender Case-Weighting Study</i> . May 1999.
Vermont	150	400	200	25	Office of the Defender General. <i>Policy of the Defender General Concerning Excessive Workloads for Public Defenders</i> . October 1987.
Washington	150	300	250	25	Washington Defender Association. <i>Standards for Public Defender Services</i> . October 1989.

* Jurisdictions in which caseload standards have been developed through case-weighting studies.

¹ Colorado's felony caseload standards establish thresholds based on the severity of the charge and whether defenders are in urban or rural offices. For Felony 2 and 3 cases, the standard is 80 cases per year. For Felony 4, 5, and 6 cases, the standard in rural areas is 191 cases and in urban areas is 241 cases.

² Colorado's misdemeanor caseload standards establish thresholds based on the severity of the charge and whether defenders are in urban or rural offices. The standards for misdemeanors in urban areas are 259 traffic and 310 nontraffic cases per year. The standards for misdemeanors in rural jurisdictions are 285 traffic and 598 nontraffic cases per year.

³ Colorado's juvenile delinquency caseload standards establish thresholds based on whether defenders are in urban or rural offices. For juvenile delinquency cases in urban areas, the standard is 310 cases per year. In rural jurisdictions, the standard is 305 cases.

⁴ Minnesota's caseload standards establish a range of cases a public defender may handle according to local practices throughout the state. Additionally, Minnesota has established a caseload standard (3 cases per year) specifically for homicide cases.

⁵ Minnesota's misdemeanor caseload standards establish a threshold based on the severity of the charge. For gross misdemeanors, a public defender should not handle more than 250 to 300 cases per year, depending on local practices. For all other misdemeanors, the standard is 400 cases per year.

⁶ Missouri's caseload standards establish thresholds based on the severity of the felony charge. For Felony A and B cases, the standard is 40 cases per year. For Felony C and D cases, the standard is 180 cases.

⁷ The Nebraska Commission on Public Advocacy has established a felony caseload standard for only the most serious category of felonies. The standard represents the number of violent crime cases (rape, manslaughter, 2-degree murder, sexual assault) that a single attorney could handle during a year if those cases were the only type of cases handled during the year.

⁸ Tennessee's felony caseload standards establish thresholds based on the severity of the charge. The standard is 55 per year for Felony A cases; 148 for Felony B cases; and 302 for Felony C, D, and E cases.



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

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APPENDICES

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APPENDIX B: Attorneys Contributing Timekeeping Data

APPENDIX C: Timekeeping Research Methods

APPENDIX D: Detailed Timekeeping Results

APPENDIX E: Time Sufficiency Survey

APPENDIX F: Detailed Time Sufficiency Results

APPENDIX G: Delphi Panel Members

APPENDIX H: Delphi Survey Response Forms

APPENDIX I: Detailed Delphi Panel Results

APPENDIX J: Delphi Time Increments by Task

APPENDIX K: Final Recommended Caseload Guidelines by Task

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.

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Acknowledgements

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/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.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/ls_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/lisclaid_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/CaseloadNYCStdfinal.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://nmssc.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

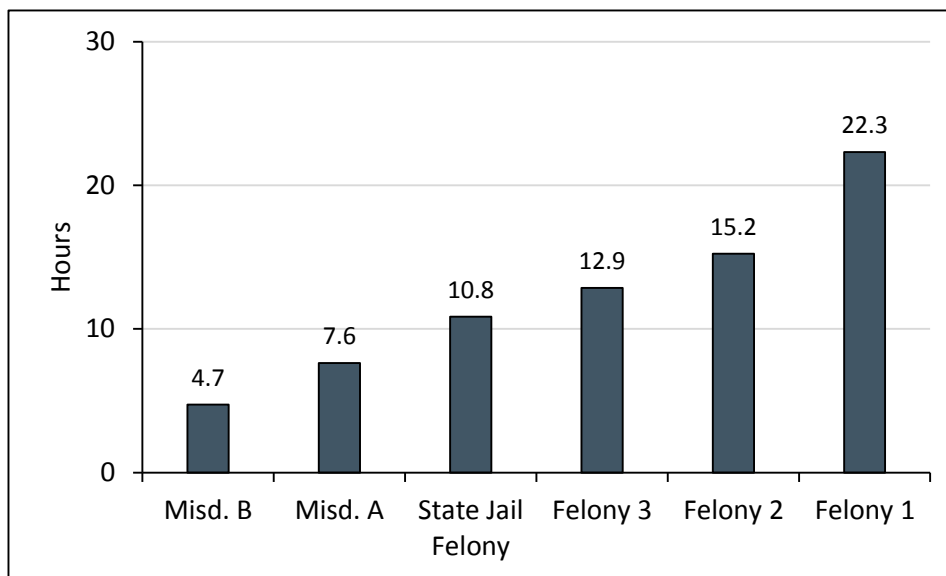
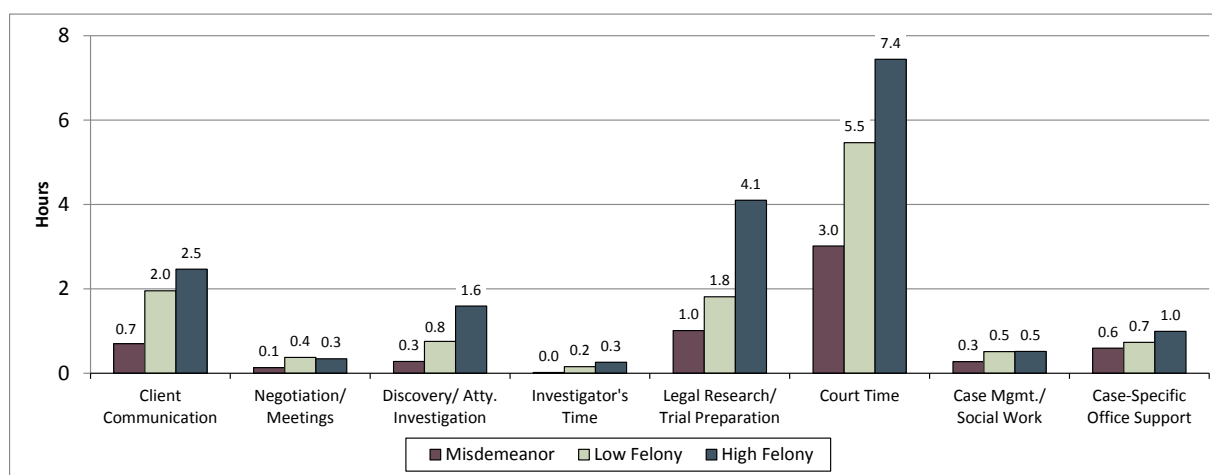


Figure 5-2 provides a more detailed picture of how attorneys are utilizing their time on specific tasks. To reduce complexity, the six offense levels were consolidated into three.⁵² A fully detailed breakdown of Timekeeping Study results by offense level and task is available in Appendix D. Average misdemeanors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

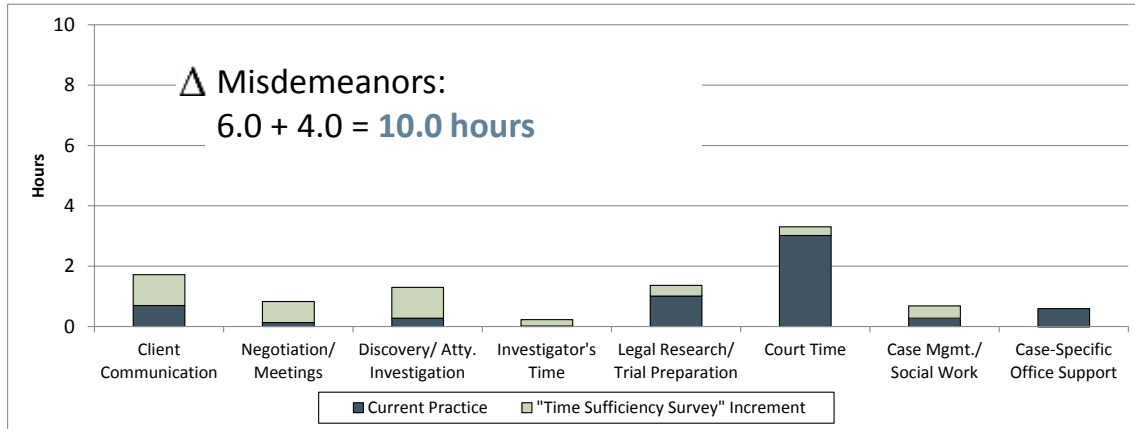


Figure 6-1b. Low-Level Felony “Time Sufficiency Survey” Time Adjustments

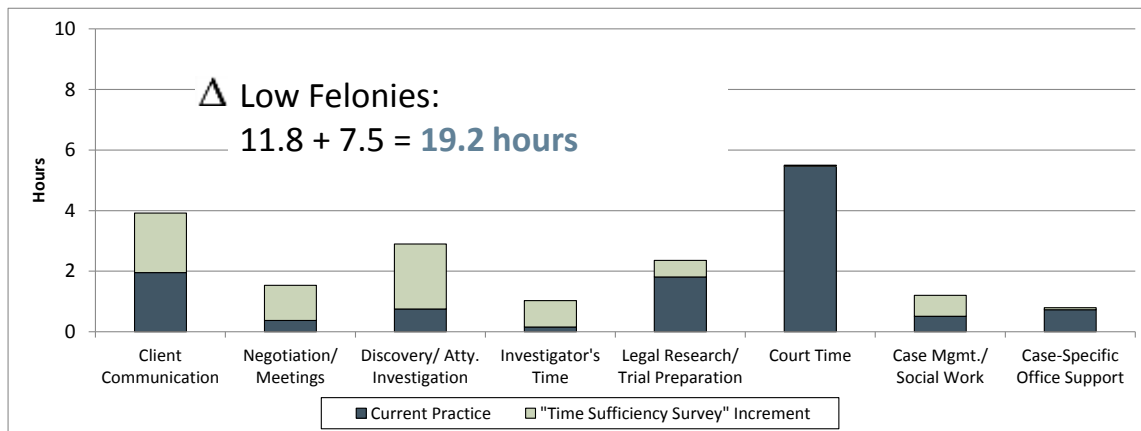
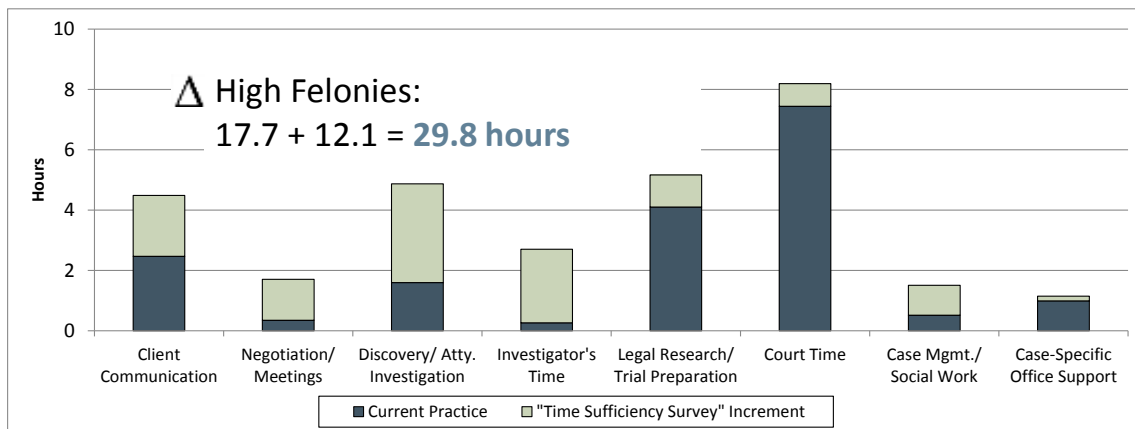


Figure 6-1c. High-Level Felony “Time Sufficiency Survey” Time Adjustments



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,

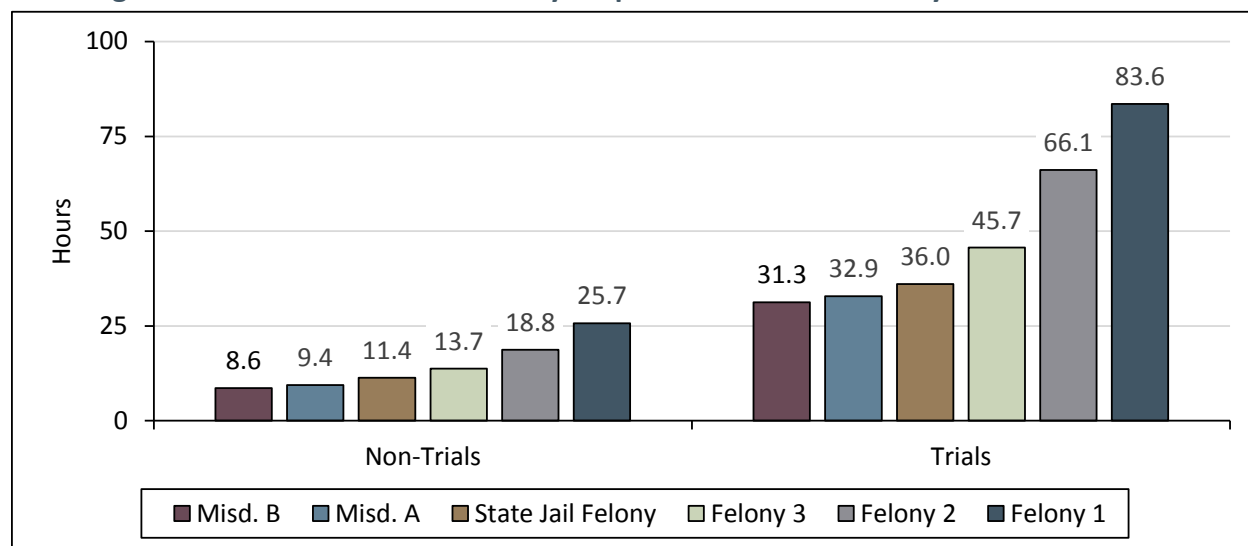
⁶¹ The “Discovery/Attorney Investigation” category, combined for the Timekeeping Study and the Time Sufficiency Survey, was divided into two separate components for consideration by the Delphi Panel. *See supra* Section II (discussing the Delphi method) & Section IV, “Time Categories.”

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.

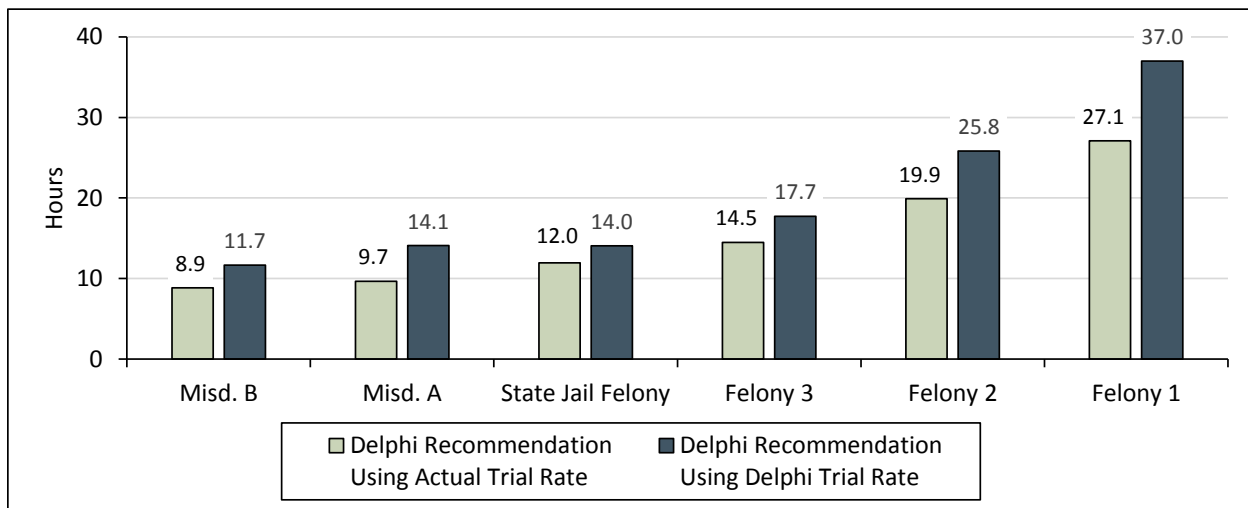
⁶⁵ *Id.* at 2. See Activity Detail for District Courts.

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.

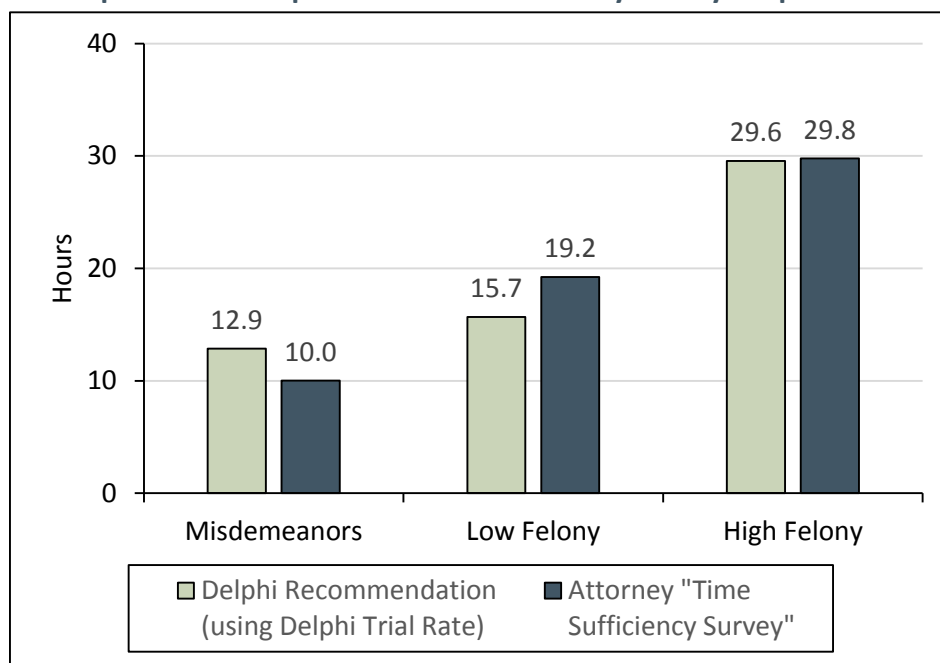
VIII. Texas Caseload Guidelines

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

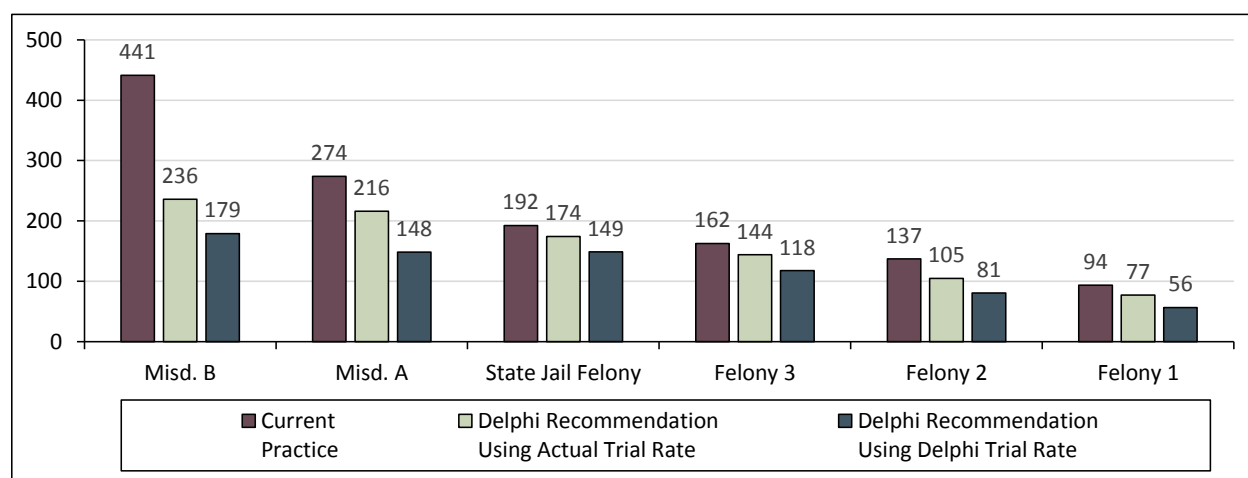


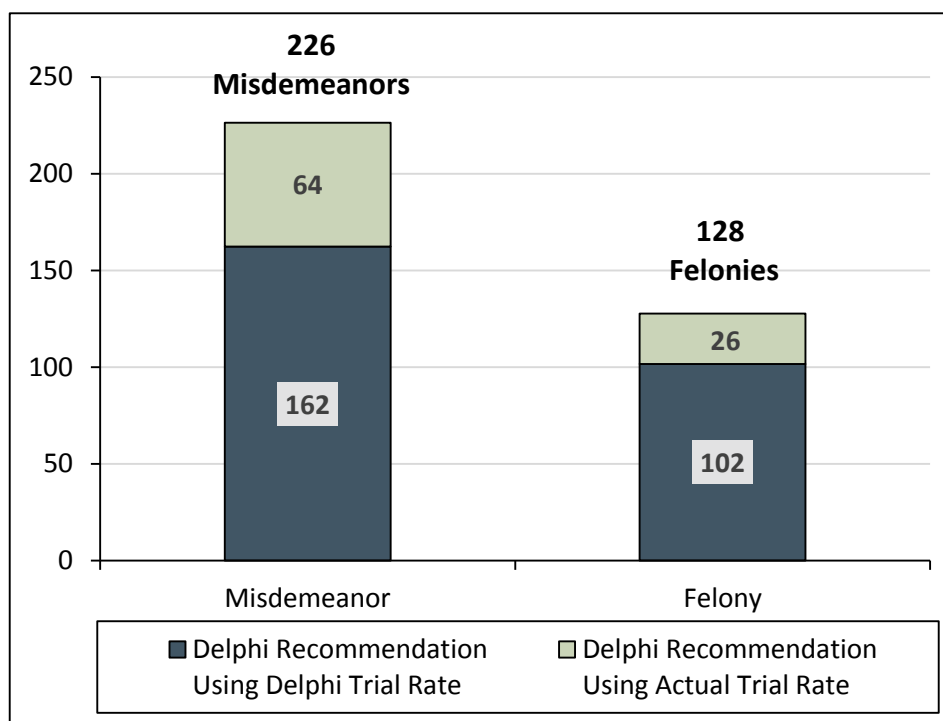
Figure 8-2 shows caseloads computed based on actual current practice time (see Figure 5-1) compared to two different ways of calculating the Delphi Panels’ ideal caseload maximums. The first set of caseload parameters accepts the Delphi time estimates but substitutes actual FY 2014 trial rates for the 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/fact-sheets/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

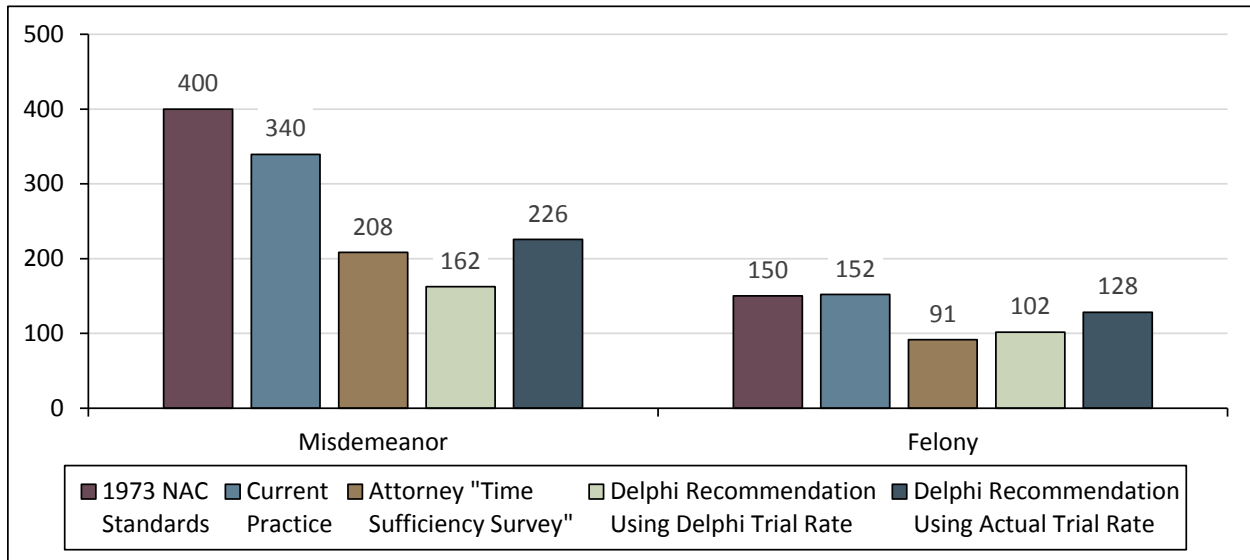
For over 40 years, caseload guidelines set forth by the National Advisory Commission have been widely cited parameters for public defender attorneys. As noted elsewhere in this report,⁶⁹ serious concerns have been expressed about the validity of the NAC standards for contemporary criminal defense representation. 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

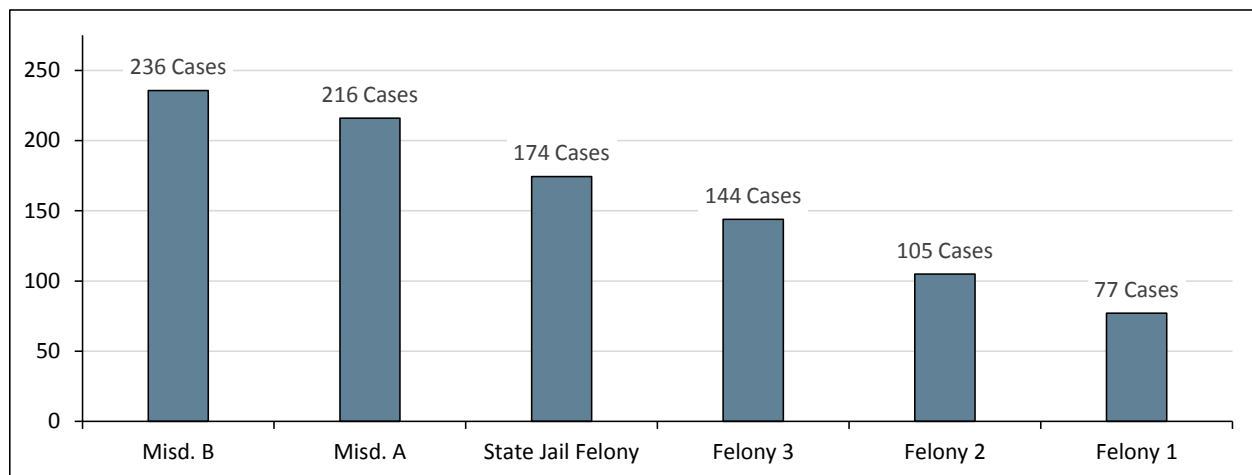
Forensic Science Testimony and Wrongful Convictions, 95 VA. L. REV. 1, 1–97 (2009).

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; SPANGEBERG 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.

The Colorado Project

A Study of the Colorado Public Defender System
and Attorney Workload Standards



Modeled on the *National Blueprint for Future Workload Studies*
from *The Missouri Project*
www.indigentdefense.org

The Colorado Project:
A Study of the Colorado Public Defender System
and
Attorney Workload Standards

August 2017

Conducted by:



and

The American Bar Association's
Standing Committee on Legal Aid and Indigent Defendants



This publication has been produced by RubinBrown and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. The views expressed herein, unless otherwise noted, have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Douglas K. Wilson
Colorado State Public Defender
Office of the State Public Defender
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Dear Mr. Wilson,

RubinBrown and the American Bar Association (“ABA”) Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”) were engaged by the Colorado Office of the State Public Defender (“OSPD”) to provide assistance in assessing and calculating workload standards for the Colorado state public defender system. This report presents the results of the engagement. RubinBrown’s services were performed in accordance with the Statements on Standards for Consulting Services as prescribed by the American Institute of Certified Public Accountants.

RubinBrown LLP

RubinBrown LLP

Lora J. Livingston

Hon. Lora J. Livingston, Chair
American Bar Association Standing Committee on Legal Aid and Indigent Defendants

Preface

The Colorado Project is a public defense workload study performed as a collaborative research effort conducted by RubinBrown¹ and the American Bar Association (“ABA”).² RubinBrown and the ABA were engaged by the Colorado Office of the State Public Defender (“OSPD”) to provide consulting services and assist in assessing and calculating workload standards for the Colorado state public defender system. This report presents the results of the engagement.

The Colorado Project was led by Michael T. Lewis (Partner-In-Charge of the Business Advisory Services group at RubinBrown) and Stephen F. Hanlon,³ Project Leader for the ABA.

On behalf of RubinBrown, the research team consisted of Jason Mannello, Josh Leesmann, and Jessica Holmes.

On behalf of the ABA, Mr. Hanlon was supported by Geoffrey Burkhart and Malia N. Brink (ABA SCLAID former Staff Attorney and Assistant Counsel for Public Defense, respectively), as well as Dean Norman Lefstein (Professor of Law and Dean Emeritus, Indiana University Robert H. McKinney School of Law and Special Advisor to SCLAID).

We would also like to thank the OSPD for their cooperation through this project, specifically Douglas K. Wilson (State Public Defender) and Janene McCabe (Director of Technical Litigation) who provided guidance and insight into the OSPD’s practices and technical systems.

We would like to thank the Colorado Public Defender Commission for guiding the selection of attorneys in the field of Colorado criminal defense representation to participate in the workload study. We would also like to thank the group of private bar attorneys and public defender experts asked to participate in numerous surveys and meetings. Finally, we would like to thank members of the OSPD staff for their contributions and support of this effort. The project would not be possible without their input and efforts.

¹ Founded in 1952, RubinBrown (www.RubinBrown.com) is one of the nation’s leading accounting and professional consulting firms. RubinBrown helps its clients build and protect value, while at all times honoring the responsibility to serve the public interest. RubinBrown’s vision statement is: One firm, highly respected and nationally prominent with a solid foundation of core values, inspired team members and totally satisfied clients.

² The ABA (www.AmericanBar.org) is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.

Since its founding, the ABA has actively worked in the fields of legal ethics and indigent defense. In 1908, the ABA adopted its first Canons of Professional Ethics (now the Model Rules of Professional Conduct) (“ABA Model Rules”). In 1913, the ABA created the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”). The ABA Ethics Committee publishes formal ethics opinions on professional and judicial conduct, provides informal responses to ethics inquiries, and, upon request, assists courts in their development, modification, and interpretation of ethical standards such as the ABA Model Rules and the ABA Model Code of Judicial Conduct. The work of the ABA on The Colorado Project was performed under the auspices of the ABA Standing Committee on Legal Aid and Indigent Defendants (“ABA SCLAID”).

³ Mr. Hanlon previously served as the Project Leader for the ABA on The Missouri Project and The Louisiana Project. In 1989, he founded the Community Services Team at Holland & Knight and for the next 23 years he served as the Partner in Charge of the CST. Since leaving Holland & Knight at the end of 2012, Mr. Hanlon has confined his practice to assisting and representing public defenders with excessive caseloads. He now serves as General Counsel to the National Association for Public Defense in Washington, D.C. and is a Professor of Practice at Saint Louis University School of Law. Mr. Hanlon was lead counsel for the Missouri Public Defender in State ex rel. Mo. Public Defender Commission, 370 S.W.3d 592 (Mo. 2012), which was the first state supreme court case to uphold the right of a public defender organization to refuse additional cases when confronted with excessive caseloads.

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Executive Summary

This report lays out the methodology, analysis, and results of the joint efforts of the ABA, RubinBrown, and the OSPD to calculate data-driven workload standards that can assist the OSPD in assessing staffing requirements and provide empirical support to determine workloads.

The Colorado Project consisted of four main phases: (1) an analysis of the Colorado OSPD's historic caseloads and staffing; (2) an analysis of the actual time spent by public defenders on recent cases; (3) the application of the Delphi Method to identify how much time an attorney *should* spend, on average, in providing representation in certain types of criminal cases⁴; (4) finally, to maintain continuity with prior workload studies performed by the Spangenberg Group for the OSPD, we have been asked to recreate the workload standards calculations advanced by the Spangenberg Group in those studies (See Appendix 1).

Historical caseload and staffing data were obtained from OSPD. Additionally, for a period of 6 months (beginning January of 2016 and ending June of 2016), daily time entry was a mandatory function for all OSPD line defenders. This study utilized OSPD time data for a 16-week period beginning March 6, 2016 and ending June 30, 2016 for the analysis of recent caseloads.⁵ The data was used to identify Case Types common to Colorado that should be examined by the Delphi Panel, as well as the Case Tasks frequently preformed in each Case Type.

The Delphi Method's structured and reliable technique integrates input and feedback of experienced professionals to develop consensus opinions. The Delphi Panel, consisting of Colorado private defense practitioners and OSPD line attorneys, provided professional consensus opinions regarding the estimated amount of time an attorney *should* spend, on average, on the case types identified to provide reasonably effective assistance of counsel pursuant to prevailing professional norms in the State of Colorado.⁶

The Delphi estimates shown in this study are not the end of the process. Stakeholders throughout the criminal justice system recognize that the study and calculation of workload and related workload standards is a continuous process. The results of this study can serve as a guidepost and be used by OSPD management to provide operational insight, identify training opportunities, and assess future system needs. The analysis and resulting standards should be revisited periodically to account for potential changes in technology and technology usage, indigent defendant demographics and crime patterns, the Colorado criminal code, and the staffing and organizational structure within the OSPD and the larger criminal justice system.

⁴ Specifically, how much time an attorney should spend to provide reasonably effective assistance of counsel pursuant to prevailing professional norms and standards in the State of Colorado.

⁵ The first 8 weeks of the time study were used as training to monitor time tracking participation and consistency. As a result, the study period began March 6, 2016.

⁶ Because RubinBrown's leadership team for this project are neither lawyers nor experts in providing criminal defense representation, RubinBrown expresses no opinion on the consensus expert opinions reached by the panel of experienced Colorado criminal defense experts who participated in this study.

Introduction

The relevant legal rules and standards pertaining to effective assistance of counsel are critical components for understanding both attorney workloads and our analysis thereof in this study. The duty of the State of Colorado to provide defendants representation in criminal cases for those unable to afford counsel derives from the Sixth Amendment to the United States Constitution, as interpreted by the United States Supreme Court, and Article II, Section 16 of the Constitution of the State of Colorado.

In 1963, the United States Supreme Court held in the *Gideon* case that defendants charged with a felony in state criminal court were entitled to a lawyer at state expense if they were unable to afford counsel.⁷ In response to the *Gideon* case, Colorado passed the public defender statute in 1970. The OSPD's enabling legislation CRS 21-1-101 states:⁸

- (1) The office of state public defender is hereby created and established as an agency of the judicial department of state government. The general assembly hereby declares that the state public defender at all times shall serve his clients independently of any political considerations or private interests, provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association standards relating to the administration of criminal justice, the defense function.

Thus, this legislation requires public defenders to:

- Provide legal services to indigent persons commensurate to nonindigents,
- Conduct the office in accordance with the Colorado rules of professional conduct; and,
- Conduct the office in accordance with the American Bar Association standards.

In 1972, the United States Supreme Court extended the right to counsel to misdemeanor cases resulting in a defendant's loss of liberty.⁹ In 1984, the United States Supreme Court held that the Sixth Amendment's requirement of counsel means the right to "reasonably effective assistance of counsel pursuant to prevailing professional norms of practice."¹⁰ In 2010, the Supreme Court noted in *Padilla v. Kentucky* that: "We have long recognized that 'prevailing norms' of practice as reflected in American Bar Association Standards...are guides to determining what is reasonable...although they are 'only guides'...and not 'inexorable commands'...these standards may be valuable measures of the prevailing professional norms of effective representation...."¹¹

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸ C.R.S.A § 21-1-1.

⁹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹¹ *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010), citing, inter alia, American Bar Association Standards for Criminal Justice related to Defense Function.

In short, both Supreme Court precedent on the right to counsel and Colorado law direct practitioners to the ABA practice standards and the ABA and Colorado Rules of Professional Conduct to determine what is required of a public defender.

ABA Criminal Justice Standards

The ABA Standards for Criminal Justice are the result of a lengthy process that began in 1964, and most recently culminated with the fourth edition of these standards approved and published by the ABA in 2015. These ABA Standards “are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process.”¹² Within the ABA Standards for Criminal Justice, the Defense Function Standards address every aspect of criminal defense practice.

Early Entry of Counsel

In 2008, the Supreme Court further established that the Sixth Amendment right to counsel attaches at a criminal defendant's initial appearance before a judicial officer, because that is when “the accused ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law’.”¹³ The ABA Defense Function Standards similarly require a public defender to act with “diligence and promptness” (Standard 4-1.3) and “as soon as practicable” interview the client (Standard 4-3.2).

Adequate Preparation

The ABA Defense Function standards guide defense counsel to investigate the facts (Standard 4-4.1); research the law (Standard 4-4.6); communicate with clients (Standards 4-3.1, 4-3.3, 4-3.9, 4-5.1, 4-5.4); negotiate with prosecutors (Standards 4-6.1, 4-6.2, 4-6.3); file appropriate motions (Standards 4-3.2, 4-7.11, 4-8.1); and prepare for court (4-4.6).

Plea Bargains and Investigations before Entering a Plea of Guilty

In 2012, the United States Supreme Court in *Missouri v. Frye*, citing to the Department of Justice, Bureau of Justice Statistics, noted that “ninety-four percent of state convictions are the result of guilty pleas.”¹⁴ In that case, the United States Supreme Court quoted with approval the following statement from a Yale Law Journal article: “[P]lea bargaining...is not some adjunct to the criminal justice system; it is the criminal justice system.”¹⁵

The ABA Criminal Justice Standard related to the Defense Function, 4-6.1(b), “Duty to Explore Disposition Without Trial (Plea)”, provides as follows:

¹² Martin Marcus, The Making of the ABA Criminal Justice Standards: Forty Years of Excellence, 23 CRIM. JUST. (2009), available at www.americanbar.org/groups/criminal_justice/standards.html.

¹³ *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 213 (2008).

¹⁴ *Missouri v. Frye*, 132 S.Ct.1399, 1407 (2012).

¹⁵ *Id.* See also R. E. Scott & W. J. Stuntz, Plea Bargaining as Contract, 101 YALE L. J. 1909, 1912 (1992).

In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer (plea) unless and until appropriate investigation and study of the matter has been completed. Such study should include:

- discussion with the client,
- analysis of relevant law,
- analysis of the prosecution's evidence,
- analysis of potential dispositions, and
- analysis of relevant potential consequences.

Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest. (Emphasis added).

The criminal defense professionals (both private defense practitioners and public defenders) on the Delphi Panel were asked to consider the standards cited above in completing this study.

Workload Standards

The history of public defender workload studies is also critical to understanding the need for this workload study. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) established the first set of specific numeric caseload standards for public defense programs. The NAC recommended that annual maximum caseloads "should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."¹⁶ No other entity has ever made specific nationally applicable caseload recommendations.

The NAC Standards, in addition to being over 40 years old, were never based on empirical data.¹⁷ In contrast to the NAC standards which identified a specific maximum number of cases a defense attorney could handle, ABA Defense Function Standards provide a more comprehensive definition of appropriate workload and defense obligations to ensure competent representation. Specifically, the standards state:

Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload.

¹⁶ National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973)

¹⁷ "From the NAC Commentary, it is clear that no empirical study in support of its recommended caseload limits was ever undertaken." Norman Lefstein, Securing Reasonable Caseloads: Ethics and Law in Public Defense, 44-45, ABA (2011).

Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.¹⁸

In contrast to the NAC Standards, this study is an effort to provide empirical data to assist OSPD in assessing resource needs through the use of workload standards, taking into account the specific conditions in the State of Colorado.

Rules of Professional Conduct

All lawyers in Colorado, including public defenders, are required to abide by the Colorado Rules of Professional Conduct. The Rules not only talk about the responsibilities of lawyers in representing a particular client, but when lawyers are not permitted to represent a client or must withdraw. The Colorado Rules of Professional Conduct applicable to this study include the following:

Rule 1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.7(a) Conflict of Interest: Current Clients: Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.16(a)(2) Declining or Terminating Representation: Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law;

Rule 6.2 Accepting Appointments: A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law.

¹⁸ American Bar Association, STANDARDS FOR CRIMINAL JUSTICE RELATED TO DEFENSE FUNCTION, 4th Edition, Standard 4-1.8 Appropriate Workload (2015)

The Colorado Rules are identical to the ABA Model Rules of Professional Conduct, which have been interpreted to require public defenders to limit workloads to ensure that they can represent each client with the competence and diligence required.¹⁹ Compliance with these rules requires an understanding of when a public defender workload is excessive.

Literature Review of Delphi Method

The Delphi method was introduced in 1962 by researchers at the Rand Corporation. The method was described as a “new” research technique utilized by the Air Force in the 1950s to gather expert opinion and generate a reliable consensus.²⁰ As a methodological strategy, the Delphi method proposed that a succession of surveys be given to a group of experts, with structured feedback presented to the experts at each interval stage.²¹ The surveying practices applied by the Delphi method could be interviews or questionnaires that focus on some fundamental question of significance to the group of experts convened for feedback.

The features of this method include “anonymity, iteration, controlled feedback, and the statistical aggregation of group response.”²² At the onset of the process, participants in a Delphi group are largely anonymous from one another. The purpose of anonymity is to ensure that solicited experts are not influenced by the responses of other participants and that the ideas presented are judged on their own merit. This technique is believed to be conducive to the exercise of independent thought on the part of participating experts and to aid experts in forming well-thought-out opinions.

The reliance on expert opinion as data is built on the premise that an expert is “able to select the needed items of background information, determine the character and extent of their relevance, and apply these insights to the formulation of the required personal probability judgments.”²³ Experts typically complete a questionnaire over multiple iterations with the goal of allowing participants to change their opinions and judgments when presented with controlled feedback regarding the opinions and judgments of their fellow participants.

¹⁹ ABA Ethics Committee, Formal Ethics Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf (last visited June 1, 2017).

²⁰ NORMAN DALKEY & OLAF HELMER, RM-727, AN EXPERIMENTAL APPLICATION OF THE DELPHI METHOD TO THE USE OF EXPERTS 1 (1962), available at http://www.rand.org/content/dam/rand/pubs/research_memoranda/2009/RM727.1.pdf.

²¹ *Id.*

²² Gene Rowe & George Wright, *The Delphi Technique as a Forecasting Tool: Issues and Analysis*, 15 INT’L J. OF FORECASTING 353, 354 (1999).

²³ OLAF HELMER & NICHOLAS RESCHER, P-1513, ON THE EPISTEMOLOGY OF THE INEXACT SCIENCES 42 (1958) available at <http://www.rand.org/content/dam/rand/pubs/papers/2005/P1513.pdf>.

This controlled feedback is normally presented as a statistical summation of the group's responses, e.g., a mean or median. The structured feedback at each successive iteration consists of "available data previously requested by...the experts..., or of factors and considerations suggested as potentially relevant by one or another respondent."²⁴ The goal of the feedback at each stage is to assist in limiting mistaken beliefs an expert may have on the question at hand or to increase their awareness of other information they may not have previously considered.²⁵

At the conclusion, the mean or median response is used as the measure of the group's opinion.²⁶ In theory, the number of iterations required of the Delphi method can be unlimited until consensus among participants is achieved, however it has been found that three to four iterations is usually all that is required to reach consensus.²⁷ Rowe and Wright systematically reviewed studies that explored the effectiveness of the Delphi method. Their focus was on how well the Delphi method worked in producing a consensus of opinions and judgments and to assess how accurate those opinions and judgments were.

Overall, they found that the majority of these evaluative studies showed support for the Delphi method in reducing variances in opinion and judgment, thus indicating that greater consensus had been achieved. As for the concern over the accuracy of those opinions and judgments, Rowe and Wright again found that the majority of studies provide compelling evidence in support of the Delphi method. Compared to other methodological techniques utilized for similar purposes, the Delphi method was found to "lead to improved judgments over staticized groups and unstructured interacting groups."²⁸

Since its introduction, the Delphi method has been employed across a diverse array of industries, such as health care, education, information systems, transportation, and engineering.²⁹ The purpose of its use beyond forecasting has ranged from "program planning, needs assessment, policy determination, and resource utilization."³⁰ Within the legal system, early examples of use of the Delphi method can be traced back a couple of decades.

²⁴ DALKEY & HELMER, *supra* note 20, at 2.

²⁵ *Id.* at 2–3.

²⁶ Rowe & Wright, *supra* note 22, at 354.

²⁷ Chia-Chien Hsu & Brian A. Sandford, *The Delphi Technique: Making Sense of Consensus*, 12 PRAC. ASSESSMENT, RES. & EVALUATION 1 (2007), available at <http://pareonline.net/pdf/v12n10.pdf>.

²⁸ Rowe & Wright, *supra* note 22, at 366.

²⁹ HAROLD A. LINSTONE & MURRAY TUROFF, *THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS* 10–11 (2002); Rowe & Wright, *supra* note 22, at 355.

³⁰ Hsu & Sandford, *supra* note 27, at 1. For detailed examples of the application of the Delphi method, see LINSTONE & TUROFF, *supra* note 29.

Examples of these attempts were sponsored by both the National Association of Court Management (“NACM”) and the National Center for State Courts (“NCSC”). These efforts were principally charged with assessing judicial and court support staff needs.³¹

In the 2000’s, the NCSC started using Delphi techniques in addressing the workload and workload crisis of indigent defense in the United States. In a recent book, Lefstein comments on the use of the Delphi method, noting:

“The technique is recommended when a problem does not lend itself to precise measurement and can benefit from collective judgments. This would seem to be precisely the situation when a defense program seeks to determine how much additional time, on average, its lawyers need to spend on a whole range of activities involving different kinds of cases.”³²

The Delphi method has been recommended as a necessary complement to time-based studies that seek to determine appropriate workload for defense lawyers.³³ What the Delphi method is believed to offer is a method to calculate workloads based on time studies while avoiding the institutionalization of current practices.

Methodology & Analysis

Past workload studies³⁴ were reviewed and assessed in developing the methodology advanced in this study, which sought to quantify the amount of time a public defender should expect to spend on a particular task in a particular case type through an application of the Delphi method. As in prior studies, the Delphi methodology was used to provide an estimate of what workload standards *should be* in order for a public defender to provide reasonably effective assistance of counsel. This study focuses on both the amount of time that should be spent on a task, as well as how often a task should be completed and utilizes the input of private practice defense counsel.

³¹ See, e.g., VICTOR E. FLANGO & BRIAN J. OSTROM, NAT’L CENTER FOR STATE COURTS, ASSESSING THE NEED FOR JUDGES AND COURT SUPPORT STAFF (1996).

³² NORMAN LEFSTEIN, AMERICAN BAR ASSOCIATION, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, *supra* note 1, at 146.

³³ *Id.* at 149.

³⁴ See National Center for State Courts’ (“NCSC”) reports: MATTHEW KLEIMAN & CYNTHIA G. LEE, VIRGINIA INDIGENT DEFENSE COMMISSION ATTORNEY AND SUPPORT STAFF WORKLOAD ASSESSMENT – FINAL REPORT (2010); NATIONAL CENTER 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 – FINAL REPORT (2007); NATIONAL CENTER FOR STATE COURTS, MARYLAND ATTORNEY AND STAFF WORKLOAD ASSESSMENT (2005). See also ELIZABETH NEELEY, UNIV. NEB. PUB. POLICY CENTER, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT (2008).

To determine workload standards, a multi-step process was used that first analyzed the current, “actual” state of affairs as a starting point. After an introduction of the definitions and key terms utilized throughout this study, the methodology can best be explained as the performance of the following steps:

- A. System Analysis
- B. Case Type / Case Task Summary
- C. Time Study
- D. Delphi Process

A. System Analysis

“The mission of the Office of the State Public Defender is to defend and protect the rights, liberties, and dignity of those accused of crime who cannot afford to retain counsel.”³⁵ The system is comprised of approximately 786 employees, of which 490 (62%) are attorneys and 296 (38%) are support staff. The support staff group for the regional offices includes 151 investigators, paralegals and social worker, and 112 administrative assistants. There are 33 centralized management and support positions at the State office.

The OSPD maintains a case management system that tracks basic case information such as date opened, date closed, case type, case class, office, county, and assigned attorney. From January of 2016 through June of 2016, the OSPD required that all of its public defenders enter their time in a time log system. The first 8 weeks of the time tracking were used for training purposes to ensure accuracy and completeness of data. Therefore, the study period for this report began on March 6, 2016. This study linked the case management system with the time log system as a basis for the workload analysis. Between March 6, 2016, and June 25, 2016, time was coded to over 89,000 cases.

B. Case Type / Case Task Summary

Working with the OSPD, 18 different Case Types were identified to use in the development of new workload standards. The 18 Case Types are:

- | | |
|--|---|
| 1. Juvenile Felony | 11. Driving Under the Influence Felony 4 |
| 2. Juvenile Misdemeanor | 12. Misdemeanor 1 |
| 3. Juvenile Sex Offense | 13. Misdemeanor 2 or 3 |
| 4. Felony 1 | 14. Misdemeanor Driving Under the Influence |
| 5. Felony 2 | 15. Misdemeanor Traffic/Other |
| 6. Crime of Violence Felony 3 or 4 | 16. Misdemeanor Sex Offense |
| 7. Non-Crime of Violence Felony 3 or 4 | 17. Felony Probation Revocation |
| 8. Felony 5 or 6 | 18. Misdemeanor Probation Revocation |
| 9. Drug-related Felony 1, 2, 3 or 4 | |
| 10. Sexual Assault Felony 2, 3, 4, 5, or 6 | |

³⁵ Office of the Colorado State Public Defender, Annual Performance Report, November 01, 2016

Case Type is currently the primary way complexity is addressed in this workload study, though it is recognized that case complexity can be impacted by a variety of factors. Language barriers, mental health history, and family issues are just a few examples of factors that can impact case complexity.

All else equal, however, different Case Types generally have different degrees of average complexity. For example, without any prior case specific knowledge, it is reasonable to assume that a Felony 1 will be more complex than a misdemeanor. Since both the case management database and the time log system consistently report Case Type, this data was utilized to assess current actual time and resource utilization, which provides the foundation to draw conclusions about time and resource allocation by Case Type. The 18 Case Types form the foundation for the workload standards and are used to identify how OSPD practitioners are actually spending their time under current conditions and practice.

This study was particularly interested in the tasks that are best performed by attorneys (versus support staff), and in the tasks an attorney typically has more control over, such as trial preparation, research, interviews, etc. (“Controllable Tasks”) than the time spent on other case tasks, such as travel, court, etc. (“Non-Controllable Case Tasks”). Therefore, Case Tasks were segregated into two different categories for purposes of this study:

Delphi Studied Case Tasks (Controllable Tasks)

In Court Activities	Out of Court Activities
Juvenile Detention Hearings (Juvenile Cases Only) Pre-trial Hearings Motions Sentencing Trial	Investigation Client Related Contact Legal Research and Writing Negotiation Social Services (Juvenile Cases Only) Case Prep Consult with Experts

Non-Delphi Case Tasks (Non-Controllable Tasks)

In Court Activities	Out of Court Activities	General Work Related Activities
35(c) Hearing Supervision Waiting	Supervision Supervision Administration Justification for Costs Travel Waiting	Committee and Board Work Community Service Office Meeting Professional Development Training Administrative

Once identified, the Case Type and Case Task classifications were utilized to measure how OSPD attorneys are currently spending their time on case-related work.

C. Time Study

The Time Study combines OSPD's time entry database with its case management database to present a picture of how much time OSPD practitioners are spending on case-related work. Time data was extracted from the time entry database for a 16-week period beginning March 2016 and ending June 2016.³⁶ This data showed how much time, in total, OSPD practitioners spent on case-related tasks.

This data was combined with case count information from the OSPD case management database to calculate average time spent per Case Type, shown below.³⁷

Case Type	Average Reported Delphi Studied Case Task Hours per Case
Juvenile Felony	4.8
Juvenile Misdemeanor	2.6
Juvenile Sex Offense	20.8
Felony 1	425.7
Felony 2	77.2
COV Felony 3 or 4	18.3
Non COV Felony 3 or 4	8.4
Felony 5 or 6	5.9
Drug Felony 1, 2, 3 or 4	4.9
Sex Assault Felony 1, 2, 3, 4, 5 or 6	40.4
DUI Felony 4	10.5
Misdemeanor 1	3.9
Misdemeanor 2 or 3	2.9
Misdemeanor DUI	5.1
Misdemeanor Traffic Other	1.8
Misdemeanor Sex Offense 1, 2 or 3	9.6
Felony Probation Revocation	1.9
Misdemeanor Probation Revocation	1.2

The calculation first annualized the total case-related time incurred over the 16-week period (by dividing the total time by 16 weeks, and then multiplying the result by the 52 weeks in a year). We then estimated the average time per Case Type by using OSPD's case management database to estimate the average number of cases for which that time is incurred.

³⁶ As previously mentioned, the first 8 weeks of the time tracking were used for training purposes to ensure accuracy and completeness of data. Therefore, the study period for this report began on March 6, 2016.

³⁷ The chart summarizes current average reported time on case-related tasks by Case Type. Further, the reported average excludes travel, non-controllable in court, and administrative time. This Delphi study has focused on the Controllable Case Tasks for each of the 18 referenced case types, excluding all Non-Controllable Case Tasks (which account for a significant portion of an attorney's time), because the time required for the Non-Controllable Case Tasks is predominantly dictated by the court's schedule and the geography of the district.

Specifically, we determined the average number of open cases between January 2016 and June 2016, and then annualized that figure by dividing the open workload by the average length of case (based on case management data from January 2010 through June 2016). The resulting figure is an estimate of the number of cases per year. The annualized total time incurred divided by the estimated number of cases per year provides the average reported time per case, as shown below.

Case Type	Annual Hours		Annual Case Count		Average Reported Delphi Studied Case Task Hours per Case
Juvenile Felony	9,792	÷	2,040	=	4.8
Juvenile Misdemeanor	7,833	÷	3,035	=	2.6
Juvenile Sex Offense	6,681	÷	321	=	20.8
Felony 1	40,103	÷	94	=	425.7
Felony 2	17,804	÷	231	=	77.2
COV Felony 3 or 4	40,837	÷	2,238	=	18.3
Non COV Felony 3 or 4	60,723	÷	7,264	=	8.4
Felony 5 or 6	61,591	÷	10,396	=	5.9
Drug Felony 1, 2, 3 or 4	38,417	÷	7,814	=	4.9
Sex Assault Felony 1, 2, 3, 4, 5 or 6	52,895	÷	1,310	=	40.4
DUI Felony 4	6,811	÷	651	=	10.5
Misdemeanor 1	59,959	÷	15,322	=	3.9
Misdemeanor 2 or 3	32,461	÷	11,134	=	2.9
Misdemeanor DUI	37,470	÷	7,317	=	5.1
Misdemeanor Traffic Other	26,041	÷	14,511	=	1.8
Misdemeanor Sex Offense 1, 2 or 3	6,528	÷	683	=	9.6
Felony Probation Revocation	33,568	÷	17,565	=	1.9
Misdemeanor Probation Revocation	18,488	÷	16,018	=	1.2

The Time Study quantified how OSPD attorneys are actually spending their time. However, it does not indicate if this actual time is sufficient to provide reasonably effective assistance of counsel.

D. Delphi Process

The Delphi process used in this study leverages the expertise of both private practice and public defenders to provide a consensus estimate of the amount of time defense counsel *should* expect to spend on a particular case in order to provide reasonably effective assistance of counsel. Further, in providing estimates of the amount of time an attorney should expect to spend on a particular case, the Delphi panel was asked to consider prevailing professional norms and standards of practice. That is to say, the standards resulting from this process should reflect the prevailing professional norms and standards, such as the ABA Standards.

As a first step in this process, the time an attorney spends on a particular case can be broken out into two components, time and frequency, as follows:

1. time incurred on the performance of specific Case Tasks (“Task Time”); and
2. the actual performance (or non-performance) of certain Case Tasks (“Task Frequency”).³⁸

Then, criminal defense experts (private, as well as public defense practitioners) from across the state of Colorado were identified and asked to participate in an iterative study of the time associated with the Case Tasks and Case Types. The expert panel was asked to provide A) an estimate of in what percentage of cases a specific task should attorneys perform on average; and B) an estimate of the amount of time that *should be* spent on each Case Task for each Case Type, assuming that the task must be performed. An example of the survey instrument for this step is shown in the illustration below.

Delphi Panel Survey - Office of the State Public Defender - Round 3

CASE TYPE: Juvenile Felony - CLIENT RELATED CONTACT

All time spent communicating with client or client's family in person, on the phone, or in writing.

* 4. Client Related Contact: In what percentage of cases (0 = 0% to 100 = 100%), on average, should attorneys perform the task to provide reasonably effective representation?

* 5. Client Related Contact: Assuming the task will be performed and assuming adequate support staff, how much attorney time (MEASURED IN MINUTES), on average over the entire life of the case, is required to perform the task to provide reasonably effective representation?

The response estimates of Task Time were then summarized across the entire group of experts. The group was then provided summary statistics on the point estimate and range of time and frequency (as a percentage) from this first survey. In addition to those summary statistics, the Task Time was combined with the Task Frequency to arrive at an expected time for each Case Task. That is to say, the Task Time was multiplied by the Task Frequency (as a percentage) as follows:

$$\textit{Time Estimated per Task} = \textit{Task Time} \times \textit{Task Frequency (or Percent of cases)}$$

An example of the summary information for the **Juvenile Felony** Case Type collected from the first survey round is shown in the table below.

³⁸ For example, Task Frequency component seeks to answer: “In how many cases does an attorney speak to a client over the phone?” This is contrasted with the number of phone calls an attorney may make within a particular case, which was not in the scope of this study.

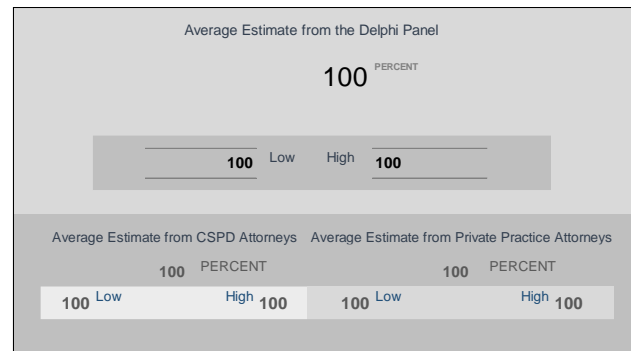
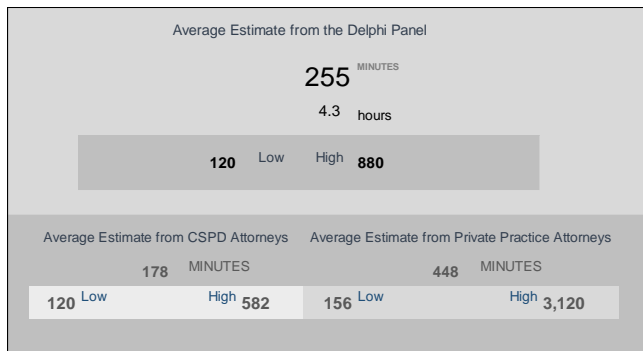
Case Type and Task	Minutes			Percentage			Minutes x Percentage	
	Lower	Average	Upper	Lower	Average	Upper	Weighted Average (Minutes)	Weighted Average (Hours)
Juvenile Felony (F2, F3, F4, F5, F6 - Including drug-related Juvenile Felonies: DF-1, DF-2, DF-3, or DF-4)								
Client Related Contact	108.00	251.43	528.00	100.00	100.00	100.00	251.43	4.19

As shown in the above example, the average Delphi response was 4.19 hours of client communication for this particular Case Type.³⁹ Using the same survey instrument as the first round, the expert panel was then asked to again provide an estimate of the Task Time and Frequency (percentage), this time taking into account the summary of responses from the first round of the process. Similar to the first iteration, the responses were summarized across all participants for this round as well. This round also presented the summarized responses of the private practice and OSPD attorney groups.

An example of the summary from this second round is shown below for the same **Juvenile Felony** Case Type and **Client Related Contact** Case Task.

Juvenile Felony (F2, F3, F4, F5, F6 -
CASE TYPE Including drug-related Juvenile
Felonies: DF-1, DF-2, DF-3, or DF-4)
ATTORNEY TASK Client Related Contact

MINUTES X PERCENT		HOURS X PERCENT	
Time Estimate	255 MINUTES	4.3	HOURS



As a final iteration, the expert panel was invited to participate in another online survey. The information in the above illustration as well as the summarized (information similar to what was provided after round one) was provided to the group. The group was reminded to keep in mind that the time estimate should:

1. assume adequate support staff (and that attorneys would only perform tasks not appropriate for support staff),
2. assume that the task must be performed,
3. apply prevailing professional norms, and
4. provide an estimate of the amount of time defenders should expect to perform the Case Task.

Given the above information, the group was asked to provide the average amount of time required to perform a specific task for a specific case type and the percentage of cases the specific task for the specific case type is performed.

³⁹ Note that the lower, upper, and average frequency percentages are all 100%. This can be interpreted as all Delphi panel experts reporting that client communication is required in all cases.

The first round results can then be compared to the next iteration to assess the change in Delphi responses for each iteration. For example, comparing the first round average Delphi response of 4.19 hours of client communication for Juvenile Felony cases to the second round average Delphi response of 4.3 hours shows that the panel slightly (less than 5 minutes) increased their time estimates after reviewing the first round of responses.

For this example, the 4.3 hours represents the expected time per task interpreted as the amount of time that a public defender *should* expect to spend on client communication for this Case Type for the typical case. Similarly, the Delphi panel's frequency weight was applied to the time estimate for all Case Type and Case Task combinations to arrive at the estimated amount of time that an attorney should reasonably expect to spend on a particular Case Type.

Attorney Workload Standard Conclusion

The following table shows the Delphi-estimated time required for Case Tasks for an attorney to provide reasonably effective defense by Case Type.⁴⁰

Case Type	Delphi Studied Case Task Hours per Case
Juvenile Felony	23.4
Juvenile Misdemeanor	13.1
Juvenile Sex Offense	42.4
Felony 1	427.3
Felony 2	134.5
Crime of Violence Felony 3 or 4	87.1
Non-Crime of Violence Felony 3 or 4	47.0
Felony 5 or 6	28.3
Drug-related Felony 1, 2, 3, or 4	28.6
Sexual Assault Felony 2, 3, 4, 5, or 6	98.9
Driving Under the Influence Felony 4	29.9
Misdemeanor 1	16.3
Misdemeanor 2 or 3	11.4
Misdemeanor Driving Under the Influence	15.5
Misdemeanor Traffic/Other	6.9
Misdemeanor Sex Offense	33.8
Felony Probation Revocation	7.4

⁴⁰ The workload standards include only case-related tasks over which an attorney has some control (i.e., exclude non-controllable in court, travel, training, and administrative time). Further, the workload standards assume adequate support staff and attorney resources are available.

Misdemeanor Probation Revocation

4.3

This study sought to quantify the amount of time a public defender *should* expect to spend on a particular type of case through an application of the Delphi method. In other words, this study sought to quantify what workload standards *should be* in order for a defender to provide reasonably effective assistance of counsel. The conclusion shown in the above chart (and attached to this report as Exhibit 1) reflects the consensus time expectations (under prevailing professional norms and standards) of a group of both private practice and public defender experts from across the state of Colorado.

The conclusions reached by the Delphi panel can be assessed in relation to the OSPD system's current reported hours (attached as Exhibit 2) to provide operational insights. For example, the Delphi conclusion for Felony 1 cases can be compared to the hours currently reported by the OSPD system to see that the current time is 1.6 (0.4%) hours less than the Delphi conclusion. Further, the Delphi conclusion for Misdemeanor 1 cases can be compared to the hours currently reported by the OSPD system to see that the current time is 12.4 (76.1%) hours less than the Delphi conclusion.

When viewed in tandem, the results would suggest that future resource allocations should focus on the lower level Misdemeanor cases.⁴¹ Therefore, the results of this study can serve as a guidepost and be used by OSPD management to provide operational insight, identify training opportunities, and assess future system needs.

The Delphi conclusions shown in this study are not the end of the process. Stakeholders throughout the criminal justice system recognize that the study and calculation of workload and related workload standards is a continuous process. These standards should be revisited periodically to account for potential changes in technology and technology usage, indigent defendant demographics and crime patterns, the Colorado criminal code, and the staffing and organizational structure within the OSPD and the larger criminal justice system.

⁴¹ To assist the OSPD in future resource analyses and maintain continuity with prior studies of the OSPD system, we have provided and update of the workload calculations performed by the Spangenberg Group (attached as Appendix 1).

Exhibit 1: Concluded Delphi Hours by Case Type

Case Type	Delphi Studied Case Task Hours per Case
Juvenile Felony	23.4
Juvenile Misdemeanor	13.1
Juvenile Sex Offense	42.4
Felony 1	427.3
Felony 2	134.5
Crime of Violence Felony 3 or 4	87.1
Non-Crime of Violence Felony 3 or 4	47.0
Felony 5 or 6	28.3
Drug-related Felony 1, 2, 3, or 4	28.6
Sexual Assault Felony 2, 3, 4, 5, or 6	98.9
Driving Under the Influence Felony 4	29.9
Misdemeanor 1	16.3
Misdemeanor 2 or 3	11.4
Misdemeanor Driving Under the Influence	15.5
Misdemeanor Traffic/Other	6.9
Misdemeanor Sex Offense	33.8
Felony Probation Revocation	7.4
Misdemeanor Probation Revocation	4.3

Exhibit 2: Current Average Reported Case-Related Hours by Case Type

Case Type	Average Reported Delphi Studied Case Task Hours per Case
Juvenile Felony	4.8
Juvenile Misdemeanor	2.6
Juvenile Sex Offense	20.8
Felony 1	425.7
Felony 2	77.2
COV Felony 3 or 4	18.3
Non COV Felony 3 or 4	8.4
Felony 5 or 6	5.9
Drug Felony 1, 2, 3 or 4	4.9
Sex Assault Felony 1, 2, 3, 4, 5 or 6	40.4
DUI Felony 4	10.5
Misdemeanor 1	3.9
Misdemeanor 2 or 3	2.9
Misdemeanor DUI	5.1
Misdemeanor Traffic Other	1.8
Misdemeanor Sex Offense 1, 2 or 3	9.6
Felony Probation Revocation	1.9
Misdemeanor Probation Revocation	1.2

Exhibit 3: Case Task Descriptions

Case Task	Task Description
Client Related Contact	All time spent communicating with client or family on the phone, in person, or in writing. Includes case consultation time.
Investigation	Time spent by the attorney, contacting witnesses, retaining an investigator, communicating with investigator about the case and following up. Also includes going to the scene and viewing evidence.
Legal Research and Writing	Time spent conducting legal research and writing for any phase of the case including motions, pre-trial issues, or sentencing arguments.
Negotiation	Time spent working with a District Attorney to reach a resolution on the case. Includes mitigation time.
Case Prep	Reviewing all case-related materials/evidence, strategic planning, trial preparation and sentence preparation.
Consult with Experts	Locating, retaining, corresponding, consulting, reviewing reports with experts. Preparing the expert to testify at trial.
Pre-trial Hearings	Any hearing that occurs prior to trial or sentencing. Includes, PH, Bond, Arraignment, pretrial conferences or dispositions.
Motions	Time spent in court, taking testimony, examinations, making arguments, and receiving rulings.
Sentencing	Time spent in court making sentencing argument.
Trial	Time spent litigating a trial in court.
Social Services (Juvenile Cases Only)	Time spent gathering social services information or discussing case with social services worker. Includes developing a safety plan and determining the appropriate housing available for a client, client's needs, and opportunities.
Juvenile Detention Hearings (Juvenile Cases Only)	First appearance for client in court and determination of whether juvi will remain in or out of custody, may include advising of rights, appointment of GAL, conditions set by court. This should not include case prep time.

Appendix 1: OSPD Updated Workload Standards

To maintain continuity with prior workload studies performed by the Spangenberg Group for the OSPD, we have been asked to recreate the workload standards calculations advanced by the Spangenberg Group in those studies.⁴² The Spangenberg Group calculated workload standards “using the total number of available work hours in one year and dividing that by the average number of hours it takes for a disposition of a particular case type”.⁴³

If attorneys work 40 hours per week⁴⁴ for 52 weeks per year, there are 2,080 available hours per attorney per year as illustrated below.

$$40 \text{ Available Hours Per Week} \times 52 \text{ Weeks per Year} = 2,080 \text{ Available Hours per Year per Attorney}$$

However, not all the 2,080 attorney hours are available for core case work for that year. To reflect the expected number of hours available for core case work per attorney per year, the Spangenberg Group adjusted for leave and general public defender time as reflected in the table below.

Leave and General Public Defender Time	Hours
General Public Defender Time*	243
All Purpose Court/Client Related Time**	285
Paid Time Off	204
Holidays	80
Total Leave and General Public Defender Time	811

* General Public Defender Time includes travel, training, professional development, alternative court activities, etc. General Public Defender Time excludes general administrative time.

** All-Purpose Court/Client Related Time includes initial advisements, bond hearings (for both OSPD clients as well as those who later proceed pro-se, have ADC, or hire private counsel), extradition, court docket work not coded to specific cases, etc.

Expected core case attorney hours are then calculated as follows:

$$2,080 \text{ Available Hours per Year} - 811 \text{ Leave and General Public Defender Time} \\ = 1,269 \text{ Available Hours for Core Case Work per Attorney per Year}$$

⁴² Cite 2008 Spangenberg Group study.

⁴³ Id. at 51

⁴⁴ An analysis of the time tracking data showed that the actual available attorney hours averaged about 45 hours per week.

Lastly, the Spangenberg Group calculated workload standards for each case type by dividing the total number of available hours for core case work per attorney per year by the average number of hours for each case type, as illustrated below:

$$\frac{\text{Available Hours for Core Case Work per Attorney per Year}}{\text{Average Hours for Each Case Type}} = \text{Calculated Current Workload}$$

The table below provides the actual concluded case hours, actual additional case hours, and the resulting calculated current workload as calculated following the Spangenberg methodology.

Case Type	Current Core Case Time	Additional Case Time*	Hours/Case	Calculated Current Workload
Juvenile Felony	4.8	1.6	6.4	200
Juvenile Misdemeanor	2.6	1.0	3.6	351
Juvenile Sex Offense	20.8	3.3	24.1	53
Felony 1	425.7	23.7	449.3	3
Felony 2	77.2	5.4	82.6	15
Crime of Violence Felony 3 or 4	18.3	1.5	19.7	64
Non-Crime of Violence Felony 3 or 4	8.4	0.5	8.9	142
Felony 5 or 6	5.9	0.4	6.4	199
Drug-related Felony 1, 2, 3, or 4	4.9	0.4	5.3	241
Sexual Assault Felony 2, 3, 4, 5, or 6	40.4	2.0	42.4	30
Driving Under the Influence Felony 4	10.5	0.6	11.1	115
Misdemeanor 1	3.9	0.2	4.1	310
Misdemeanor 2 or 3	2.9	0.2	3.1	411
Misdemeanor Driving Under the Influence	5.1	0.3	5.4	234
Misdemeanor Traffic/Other	1.8	0.1	1.9	672
Misdemeanor Sex Offense	9.6	0.6	10.1	125
Felony Probation Revocation	1.9	0.1	2.1	617
Misdemeanor Probation Revocation	1.2	0.1	1.3	1,014

*Additional Case Time includes time recorded to case-specific activities that were not studied by the Delphi panel (i.e. travel time, time waiting in court, etc.).

The above table is the result of an application of the Spangenberg Group methodology used to calculate workloads using the actual time observed over the 16 week study period.