

## THE DALLAS MORNING NEWS

THE QUALITY OF JUSTICE: Defense of indigents criticized in Texas Bush, others call appointee system sound

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Every year, hundreds of thousands of Texans are charged with crimes ranging from petty theft to capital murder - and most of them cannot afford an attorney.

Three out of four felony defendants nationwide are indigent, relying on court-appointed counsel or public defenders, according to U.S. Justice Department estimates.

In Texas, the system that appoints those attorneys has virtually no state funding or oversight, resulting in what critics call an inconsistent quality of justice that varies not only from county to county, but also from court to court. Though the system works well in some areas, providing competent representation relatively quickly, observers say it is badly crippled in others, often slowly assigning lawyers, who may be underpaid, overworked, inexperienced and sometimes just inept.

In addition, the standards of competence for attorneys in the state are strikingly low, the critics say. For example, the Texas Court of Criminal Appeals has upheld murder convictions in which defense lawyers slept during trial and when a lawyer's license had been suspended.

Across the country, the indigent-defense system is in "a chronic state of crisis," a Justice Department report says. Texas is no different, and some say it may be worse. "The Texas system is a national embarrassment," said Dr. Michael Moore, a University of Texas at Arlington professor who recently completed a study of the system for the state bar. "We are the Third World of the justice world."

W.C. Kirkendall, president of the Texas District and County Attorneys Association, disagrees.

"We're not in a crisis," said the former defense attorney. Examples cited by critics, such as attorneys dozing during death penalty cases, are "a terrible minority," he said. "In any human-designed program, there are going to be errors."

Calls for change in the system date back 20 years, but Gov. George W. Bush's Republican presidential bid has drawn a national spotlight to the state's criminal justice system, particularly its administration of the death penalty.

Linda Edwards, spokeswoman for Mr. Bush, said the governor is open to improvements, but he doesn't think that the system is in crisis.

"Governor Bush believes that Texas has a good system of indigent representation," she said.

Critics say no one, including the governor, can know how good the system is because no one knows exactly how indigent defense works in Texas. Each of the state's 254 counties runs and pays for its own system, using a mishmash of court-appointed lawyers, public defenders and some private contract systems.

"You've got states where you could use some improvements; you've got the states where there are some really serious problems," said Bill Beardall, legal director of Texas Appleseed, a nonprofit public law organization that is studying the issue of indigent defense in 23 Texas counties. "And then there's Texas, which doesn't even know the full extent of its problem."

What is known is that the Texas system falls short of national standards set by legal organizations.

For instance, if a defendant cannot afford legal counsel, which can cost several thousand dollars for even a minor offense and hundreds of thousands for capital murder, he may sit in jail for weeks or months before obtaining a court-appointed lawyer. While he waits, the pressure to plead guilty often builds because it's quicker and easier to accept a plea bargain than take a case to trial.

Once an attorney is assigned, the system offers little financial incentive to pursue an aggressive defense. Pay for court-appointed counsel, which comes from taxpayer dollars, is so low that many good lawyers avoid appointments.

The system either must be overhauled or "just take the phrase 'equal justice under the law' down off the courthouse," says Stephen Bright, director of the Southern Center for Human Rights in Atlanta. "We've got a system now where you're literally better off to be rich and guilty than to be poor and innocent."

Who foots the bill?

Texas was in the forefront of guaranteeing the right to counsel for every defendant, passing a law in 1857 - more than a century before the U.S. Supreme Court weighed in. But the state did not provide for payment of court-appointed attorneys, relying instead on the good will of local barristers.

"We have had a history in Texas, in so many areas, of lying to ourselves and talking tall but not walking the walk," said state Sen. Rodney Ellis, a Democrat from Houston who has unsuccessfully sponsored a series of reform bills in the last decade.

In 1963, the Supreme Court ruled in the case of Gideon v. Wainwright that defendants unable to pay for an attorney must be provided one. The state still made no provisions for paying appointed attorneys and provided no standards.

"There are three things you've got to have to have a decent indigent-defense system," said Mr. Bright. "You've got to have structure, and you've got to have independence and you've got to have resources. Texas doesn't have any."

Senior Judge Larry Gist of Beaumont says justice generally is well-served in the state, but "we could certainly use some objective analysis of the system and find ways to make it better."

Dr. Moore, an associate professor of political science, and Judge Allan Butcher of Fort Worth think they have that objective analysis. They have studied the system for the state bar Committee for Legal Services to the Poor in Criminal Matters for the last five years, surveying 3,000 Texas judges, defense attorneys and prosecutors.

Among their findings:

\*Texas is one of a handful of states that provide little or no state funding for indigent defense, forcing often financially strapped counties to bear a burden that threatens their fiscal stability. Many counties that struggle to pay for basic services such as paving roads strain to pay the rising cost of indigent defense, particularly when court dockets are swelling under get-tough law enforcement policies.

Because every state's system is different, it's difficult to make dollar-to-dollar comparisons on spending. However, according to a report prepared for the Legislature last year, 24 states use state funds exclusively to pay for indigent defense at trial; 15 states use a combination of state and county funds; and 11 states, including Texas, use county funds alone.

\*Texas provides no state oversight, and few minimum standards or guidelines, so how quickly a defendant gets an attorney, how competent the attorney is, and how well he's paid depends on what judge the defendant draws.

\*Just getting an appointed attorney can be difficult: In some counties, defendants routinely sit in jail for weeks or months before seeing a lawyer, for crimes ranging from misdemeanors to felonies. One man now on death row spent almost five months in jail before being appointed an attorney, according to appellate records.

\*Texas is one of the few states to rely heavily on an attorney appointment process laden with conflicts. Elected judges who make the assignments carry heavy caseloads. Under pressure to win re-election, they may funnel appointments to lawyers who are potential campaign donors. Under pressure to clear their dockets, they may appoint attorneys who mount a minimal defense.

"It's like Alice in Wonderland," says Scott Wallace, director of defender legal services for the National Legal Aid and Defenders Association. "It's the world turned on its head. The less work a lawyer does, the more he is rewarded with more cases. Word gets around that this guy is going to make your life easy as a judge."

Supporters of the system say such instances are rare.

"You can look at all these anecdotes," said senior Judge Pat McDowell of Dallas, "but if you look at the system overall in Texas, the system works."

Judges take seriously their responsibility to provide a fair trial and to provide effective attorneys, he said. "I don't think any judge would sell out his responsibility for campaign contributions."

Judge McDowell, who worked as both a prosecutor and defense attorney, said if he thought a lawyer "was only in there to turn the docket, I quit appointing him."

\*Pay for court-appointed lawyers varies from county to county but is almost always lower than the market rate. The estimated average hourly rate for a hired lawyer is \$136 an hour; for court-appointed lawyers it's \$40 an hour. Because it costs an estimated \$71 an hour to keep a law office operating, the only way many court-appointed attorneys can make money is to handle a massive number of cases.

Some lawyers refer to such colleagues as "plea mills" or "cop out" attorneys because they constantly encourage clients to plead guilty. Those who earn a good living from court appointments but rarely take a case to trial are "not providing anybody with legal representation," Mr. Bright said. "You're like somebody in McDonald's providing fast-food justice."

Because pay is low, lawyers who accept appointments may be altruistic - but many are just inexperienced or burned out. Rookies may make mistakes, such as advising clients inadequately about plea bargains, or failing to understand the law.

"It's like putting a scalpel in an intern's hand," said former state district Judge Jay Burnett of Houston, who has returned to practicing criminal defense. "What profession in the world does not have an internship or something to learn before they start practicing or operating?"

Burned-out lawyers, on the other hand, know what to do, but may expend minimal effort..

\*Even if a court-appointed lawyer wants to mount a vigorous defense, chances of success may be hampered by limited access to expert witnesses, such as DNA analysts. The cost of such experts is controlled by the judge, who often feels pressure from county officials to hold the budget down.

"We hear horror stories about judges specifying not only how much can be spent, but who you have to use as an expert," Dr. Moore said. "'You can use my cousin Billy down the street as your ballistics expert - he owns a gun shop, he can tell you what bullet came out of that gun.'"

'A tough nut to crack'

The criticisms of indigent defense are not new, but Texas has been slow to embrace change. The size and diversity of the state, which makes a one-size-fits-all solution difficult, and the political nature of the debate in Texas have discouraged a serious reform effort, Mr. Beardall says. "People have looked at it and said, 'That's such a tough nut to crack,' so they have confined their efforts to the easier states," he says. "We're in a league of our own."

Dr. Moore says state political leaders of all stripes have been reluctant to overhaul the system because providing effective legal counsel to the poor has no constituency, no political value.

"We all have these nice commitments to 'justice for all,' and all that stuff in the abstract," he said. "Then you start thinking about who it is we're actually talking about. We need, from a politician's standpoint, to raise taxes to give money to criminal defense lawyers - who rank right down there with insurance and car salesmen - to defend poor people, who don't vote in large numbers, who have been charged with a crime, who are viewed as not making any contribution to society. Who votes for that? No one."

Some people, mostly criminal defense lawyers, began lobbying for change years ago.

"The same thing was wrong with it then that is wrong today," said Dallas defense lawyer Vincent Perini, who initially led the battle. "It's just a cheap mockery of what the Constitution really contemplates. ... Texas is not unique but Texas is a very bad example." Mr. Perini quit accepting court appointments in the 1980s because the low pay ended up costing him money.

A few changes have been made - for example, two attorneys generally are now required in death penalty cases, and the lawyers are supposed to be selected from a list of "capital qualified" attorneys, with criteria determined by a local committee.

Appellate attorneys, paid for by the state, are also selected from a special list maintained by the Court of Criminal Appeals.

In practice, however, the lists receive little scrutiny. Though the law requires posting the list in each district clerk's office, some clerks say they can't find or no longer have one. And the lists sometimes include lawyers with documented discipline problems.

"Those standards are so minimal that virtually anybody can satisfy them," said David Dow, an appellate lawyer and professor at the University of Houston law school. "Many of the lawyers handling appeals especially, and some of the lawyers handling trials, might meet whatever the paper standards are, but they're still not competent lawyers."

Last year the Legislature passed a bill sponsored by Mr. Ellis that would have changed the appointment process and required that a defendant get a court-appointed attorney within 20 days of requesting one. Judges successfully lobbied Mr. Bush to veto the bill.

"That bill, while well-intentioned, was seriously flawed," said Ms. Edwards, the governor's spokeswoman, "and would not have resulted in better representation for indigent defendants."

Critics say Texas judges opposed the bill because they wanted to protect their power to appoint lawyers, which in many cases amounts to patronage.

Judge McDowell says judges were simply concerned that the bill would give the appointment power to county commissioners whose interest in cost cutting might result in even poorer appointments.

"Judges secretly feared it would end up being a system in which lawyers would get appointments by someone picked by the commissioners court, whose charge might be 'get the cheapest people you can get,'" he said. "And you're going to end up then with people doing court-appointed work who are less qualified than the people we're getting now."

A year and considerable public scrutiny later, some people sense there is a new interest in change. "There is now a growing consensus that Texas needs to do something about the indigent defense system, among attorneys, among judges, among defense lawyers," Mr. Beardall said.

He attributed the interest to a desire for fairness, a need for economic efficiency and concerns about recent bad publicity.

Judge Faith Johnson of Dallas, who chairs a judicial committee studying the issue, also said she thinks the state is ready for change.

"I think a lot of us were in the dark about what's really happening around the state," she said. "I don't think most of us got the impression this was a serious issue."

In her court, for instance, defendants typically receive an attorney within a few days. Until her committee started studying the issue statewide, "I never thought that people might have been in jail for six months."

Many county officials also are hoping for changes, said Jim Allison, general counsel for the County Judges and Commissioners Association of Texas.

Funding for indigent defense is one of the most pressing issues facing counties today, he said. In addition to economic concerns, Mr. Allison, a former prosecutor, said Texans have a sense of justice and fair play. When indigent defendants don't receive adequate representation, "that reflects badly on all of us," he said.

Mr. Ellis says he hopes the attention generated by the presidential campaign will stir interest in reform. "We certainly took the lead on incarceration," he said. "We took the lead on building prisons. Why don't we take the lead on being fair?"