

# Innovation in indigent defense makes for smart justice

BY JIM BETHKE AND SHARON KELLER, FOR THE EXPRESS-NEWS : FEBRUARY 13, 2014 : Updated: February 13, 2014 6:14pm

SAN ANTONIO — Since the landmark Gideon Supreme Court case 50 years ago, it has been the law of the land that poor

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The Texas Indigent Defense Commission helps counties protect the legal rights of the poor.



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people accused of serious crimes have access to defense representation.

In Texas, our commitment to protecting the legal rights of the indigent goes back even further. At the time that appointment of counsel first became required by Texas statute four years before the Gideon decision, it was already common practice in Texas to appoint counsel to poor people charged with serious crimes.

In 2001, Texas passed the Fair Defense Act to better ensure that constitutional rights are protected consistently across the state, to help elevate the quality of representation, and to

ensure prompt access to court-appointed counsel.

Protecting the rights of the accused is not the only reason prompt appointment of counsel is important. When appointment of counsel is not prompt, cases take longer to adjudicate and nonviolent defendants who might otherwise qualify for release remain in jail, which leads to rising costs that are shouldered entirely by county taxpayers.

While our indigent defense system is still county-based, the **Texas Indigent Defense Commission** now provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems.

With a state as big and diverse as Texas, from Harris County (population 4,279,430) to Loving County (population 82), we know that we are more likely to make improvements by recognizing this diversity and providing different options and strategies for counties.

For some counties, operating a public defender office is the most effective way to provide defense representation. For others, the assigned counsel system, in which courts appoint private attorneys to represent poor defendants, is the chosen path.

Bexar County has one of the fastest-growing populations in the country, and its elected officials have recognized the need to increase the effectiveness of the county's criminal justice system. Working with the **Council of State Governments Justice Center**, they modernized the operations of the probation department in 2010 and, most recently, engaged in a top-to-bottom review of pretrial operations and of the assessment of mentally ill defendants entering the criminal justice system.

During this process, staff with the Indigent Defense Commission met with local officials and others to review the structure of the county's indigent defense system. The **CSG Justice Center** found that, of the five major counties in Texas, Bexar has the lowest percentage of pretrial defendants in its jail. It also determined that comprehensive pre-trial assessments of arrested individuals could lead to more appropriate release conditions that would better ensure defendants' appearance in court and, at the same time, reduce the likelihood that defendants would commit new crimes while awaiting trial.

Although Bexar County relies primarily on the assigned counsel system, it does have two public defender offices — one for appeals and one for representation of mentally ill defendants. These two offices, which together have three attorneys, reside in different county departments.

The benefits that a public defender office can provide — budget predictability, economies of scale, and a single voice for the defense — are diminished by this separation. Realizing these shortcomings, Bexar County has recently adopted a plan to combine the offices, have one chief defender, and reorganize the **Public Defender Oversight Board**. The costs of these changes will be minimal, and the benefits to the criminal justice system as a whole will be substantial.

The Indigent Defense Commission continues to develop new strategies for improving our system, including testing in Comal County the concept of "client choice," a free-market approach that will allow poor defendants to select the qualified attorney of their choice, rather than having the lawyer selected by judges or court administrators.

The theory behind the client choice model is that attorneys will have stronger incentives to provide effective service to defendants in order to build and maintain a reputation for quality service. That kind of reputation will help them earn future appointments, and attorneys who do a good job will get more appointments than those who do not.

Additionally, clients will have some voice in a decision that is critically important to them. The project will test the effectiveness of bringing the accountability of the marketplace to the provision of indigent defense.

We recognize the need to understand the impact of these different approaches, their advantages and disadvantages. We conduct research and program evaluations to help us learn what is effective. It will be essential moving forward to capture and analyze more data in order to make better decisions.

Last year, the [Texas Legislature](#) implemented new reporting requirements to provide a more detailed picture of the operation of indigent defense in local jurisdictions. The Legislature also directed our commission to conduct a criminal defense caseload study, which will provide a better understanding of time requirements for various types of defense representation.

These legislative actions responded to serious questions about the adequacy of defense representation provided by attorneys with caseloads well in excess of existing professional standards. These measures will shine additional sunlight — the best of disinfectants — on this area.

While it is important for counties to have options in indigent defense, it is also important to recognize that Texas's 254 counties have different resources and different problems. The traditional assigned counsel system is still the primary system in Texas, but this method of providing constitutionally required services has no clear mechanism for managing workload or supervising attorney performance.

Questions have been raised, for example, about whether existing oversight is adequate to prevent attorneys from taking on excessive caseloads. If an attorney accepts too many cases, corners may be cut and defendants may be urged to plead guilty with inadequate inquiry into the evidence or into the consequences of that plea.

Today, the state provides only pennies on the dollar for indigent defense — county governments fund the overwhelming majority of these expenses. Although it amounts to just a small portion of the costs, the state investment in indigent defense comes with more accountability.

Existing state investment has succeeded in increasing transparency and providing incentives to implement quality standards that improve the system. When state investment amounts to only 13 percent of total indigent defense costs, however, we run into the limits of our ability to continue building upon our improvements.

Last session, our commission asked the Legislature to provide funding that would allow the state to share the costs of indigent defense more equally with local governments. Sharing more equally the funding responsibility for these constitutionally required legal services would provide the best opportunity for Texas to build upon its many successes in this field.

We look forward to working with the Legislature as we continue our efforts to make Texas a national leader in the area of indigent defense.

*Jim Bethke is the executive director of the Texas Indigent Defense Commission. Sharon Keller is presiding judge on the Texas Court of Criminal Appeals and chairs the commission.*