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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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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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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 and Professor of Law Emeritus 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 Cronic*.[4] In the *Cronic* 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]

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[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 Texas[7] 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 1318[9] reveal some attorneys were paid for 500 to 1,000 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

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[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

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[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.

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[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
- 175 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.

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[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. Cronic*, 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]

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[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:

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[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]

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[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 1318[20] 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" system[21] 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

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[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

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[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; NAT'L CTR. FOR STATE COURTS, MD. ATTORNEY AND STAFF WORKLOAD ASSESSMENT (2005), *available at* www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Workload%20Assessment/ResWorkLdMDAttyStaffWkLdAs05.ashx; ABA, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014) [hereinafter THE MISSOURI PROJECT], *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf; ELIZABETH NEELY, UNIV. OF NEB. PUB. POLICY CTR., LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT (2008), *available at* lancaster.ne.gov/pdefen/workloadas.pdf.

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

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

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

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

The Delphi Method

The Delphi method has been recommended by legal experts[34] 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

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

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

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

[32] *Id.*

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

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

[35] THE MISSOURI PROJECT, *supra* note 26.

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

The Delphi method has been widely used across several research disciplines[36] 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.

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[36] *See e.g.*, Rym Boulkedid 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.

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[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.

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

Weighted Caseload Study Advisory Panel

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

Texas Indigent Defense Commission Members

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

National Caseload Experts

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

National Indigent Defense Practitioners

Colorado's State Public Defender Doug Wilson; former 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

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[44] United States v. Cronic, 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 method[46] 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 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.

> **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.]

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.

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[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
• 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
• 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
• Discovery requests • Review of discovery materials or state's evidence • Listening to jail calls to family and friends
Attorney Investigation
• 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
• 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
• 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
• 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
• 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
• 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 facto-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

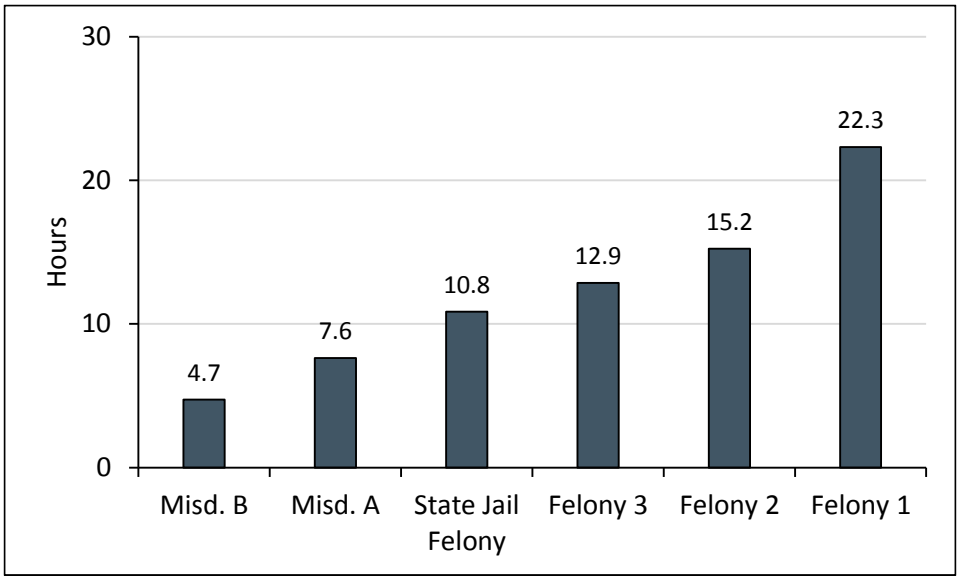
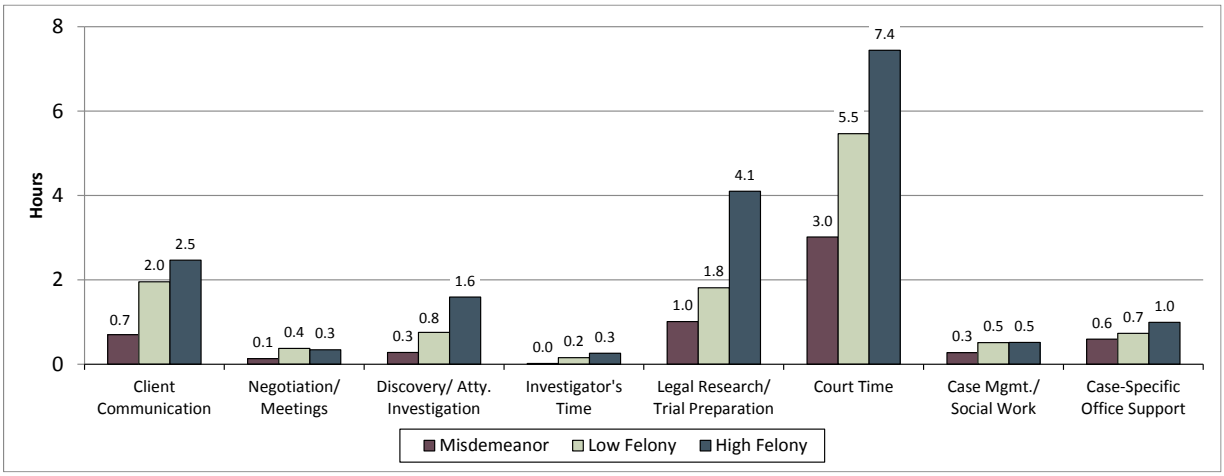


Figure 5-2 provides a more detailed picture of how attorneys are utilizing their time on specific tasks. To reduce complexity, the six offense levels were consolidated into three.[52] A fully detailed breakdown of Timekeeping Study results by offense level and task is available in Appendix D. Average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

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[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

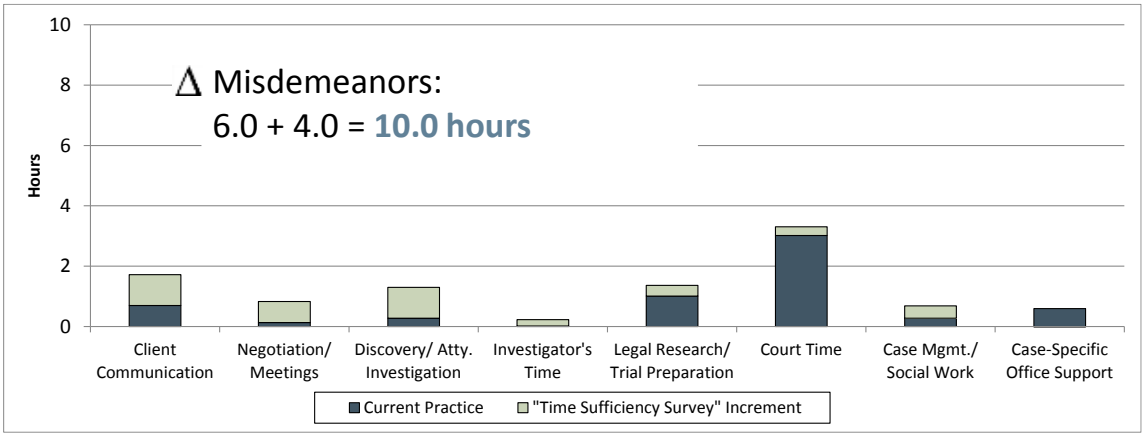


Figure 6-1b. Low-Level Felony "Time Sufficiency Survey" Time Adjustments

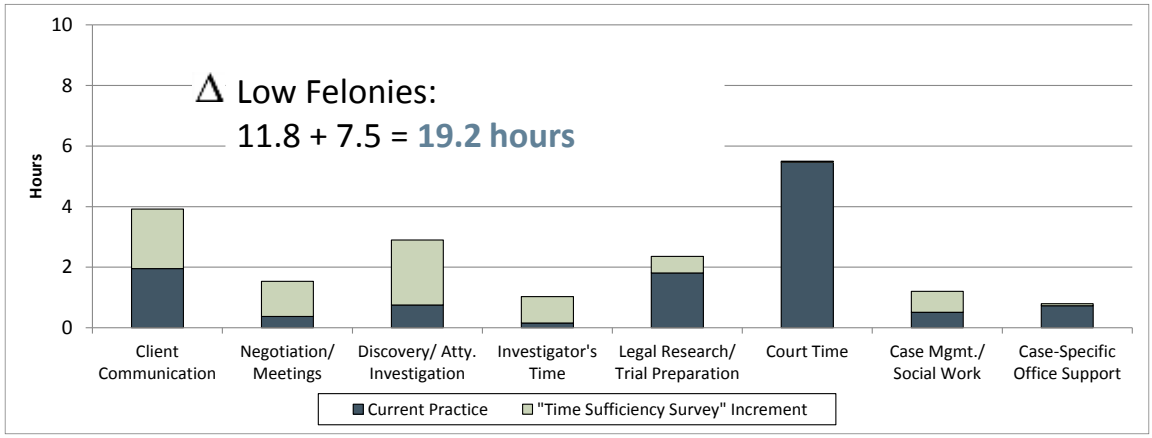
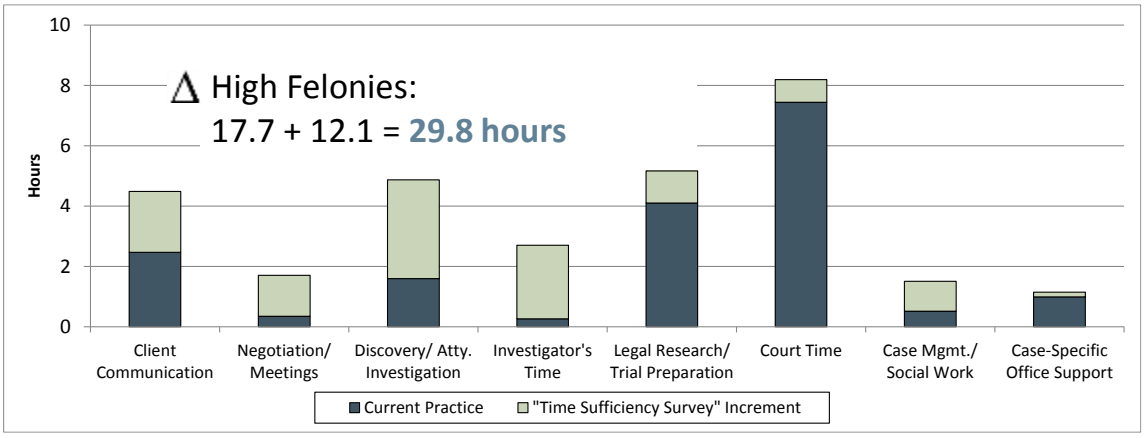


Figure 6-1c. High-Level Felony "Time Sufficiency Survey" Time Adjustments



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

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[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 scholars[58] 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

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[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 Hanlon[59] 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

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[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 tasks[61] 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,

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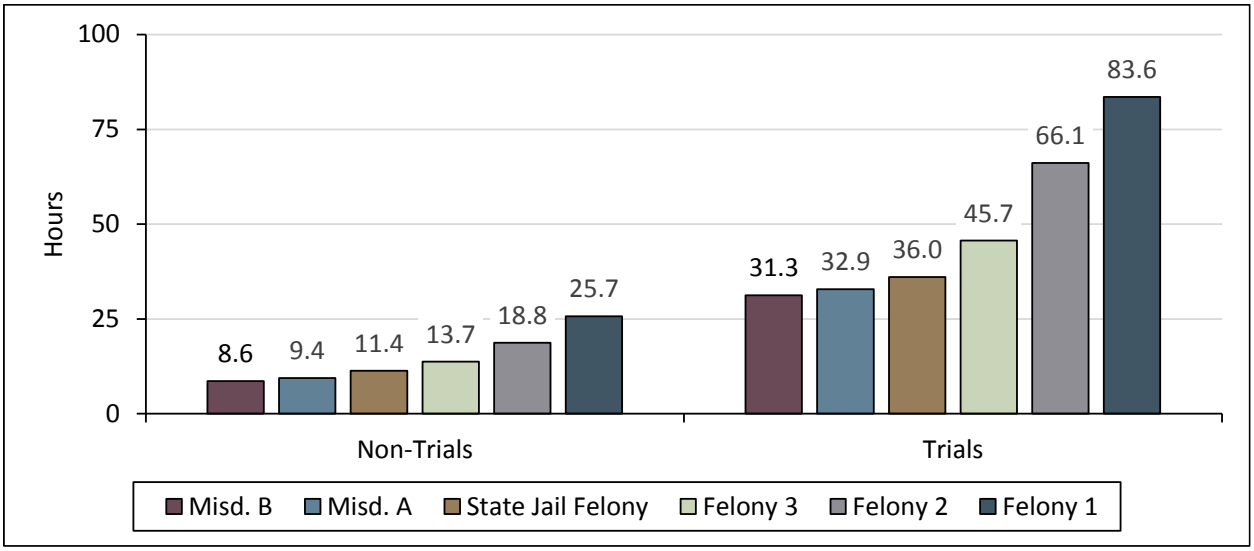
[61] The "Discovery/Attorney Investigation" category, combined for the Timekeeping Study and the Time Sufficiency Survey, was divided into two separate components for consideration by the Delphi Panel. *See supra* Section II (discussing the Delphi method) & Section IV, "Time Categories."

[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.

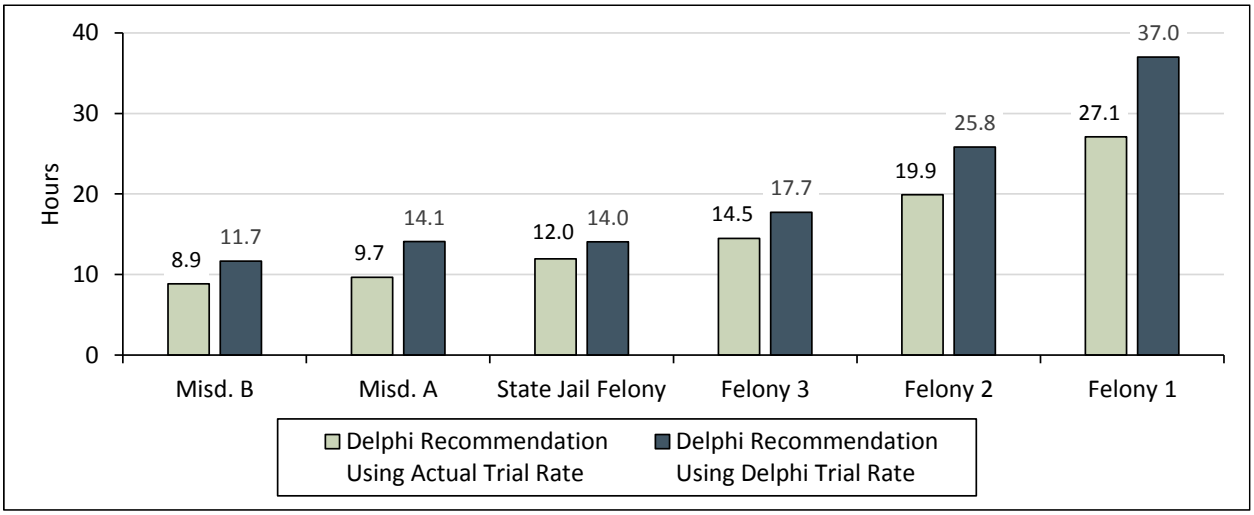
[64] OFFICE OF COURT ADMIN., OFFICE OF COURT ADMINISTRATION ANNUAL STATISTICAL REPORTS FOR FY 2014 1, *available at* http://www.txcourts.gov/statistics/annual-statistical-reports/2013.aspx. See Activity Detail from September 1, 2013 to August 31, 2014 for Constitutional County Courts and For Statutory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

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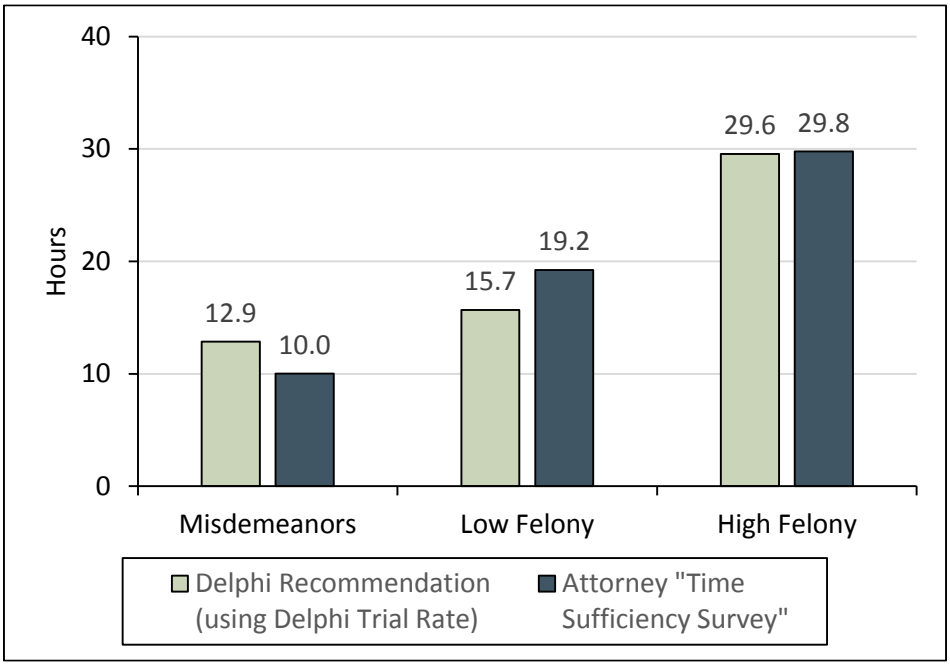
[67] *See generally, supra* Section VI, "Time Sufficiency Survey Results."

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 year[68] and that all of this time is spent defending clients. The resulting calculation is straightforward:

(2,087 Hours/Work-Year) / (# Hours/Case) =

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

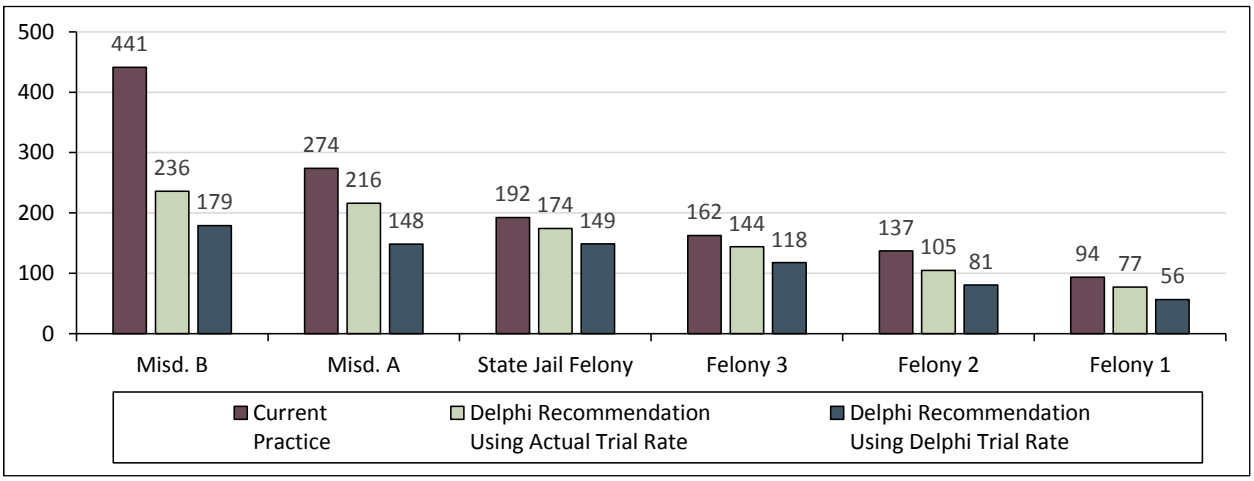


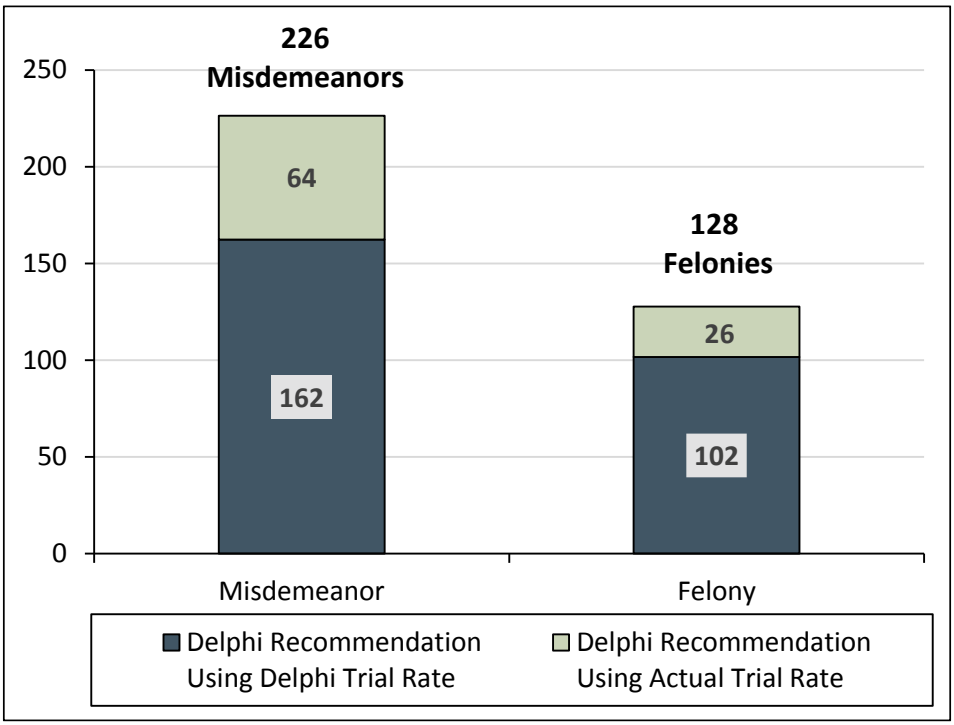
Figure 8-2 shows caseloads computed based on actual current practice time (see Figure 5-1) compared to two different ways of calculating the Delphi Panels' ideal caseload maximums. The first set of caseload parameters accepts the Delphi time estimates but substitutes actual FY 2014 trial rates for the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



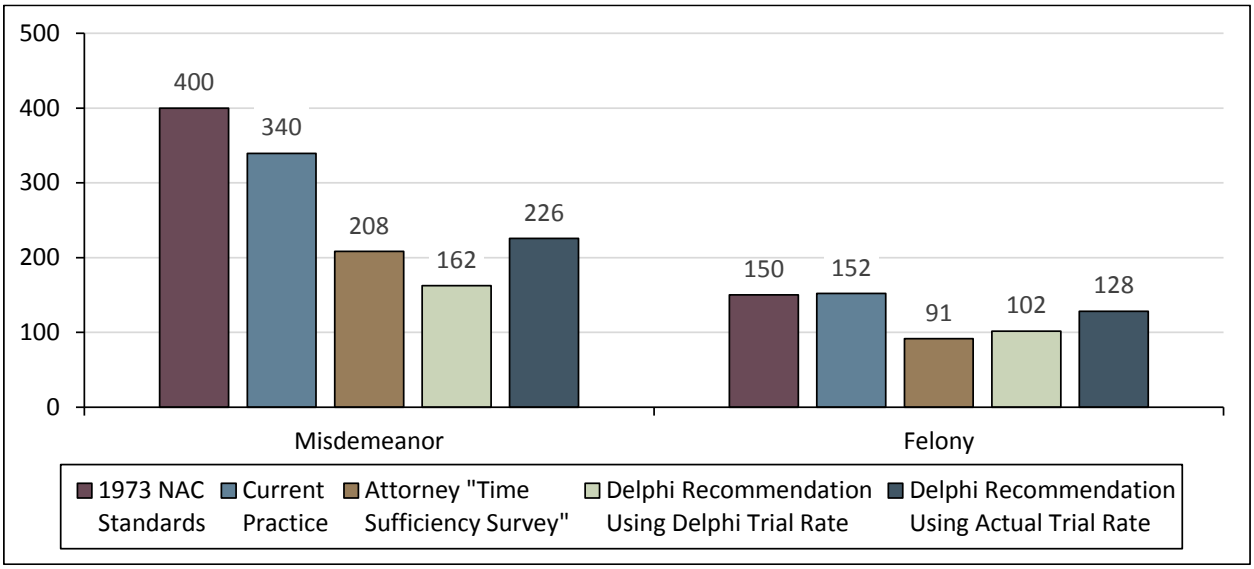
Caseload Recommendations Compared to NAC Standards and Current Practice

> 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)*

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.

[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]

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[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 defendants[77] – 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

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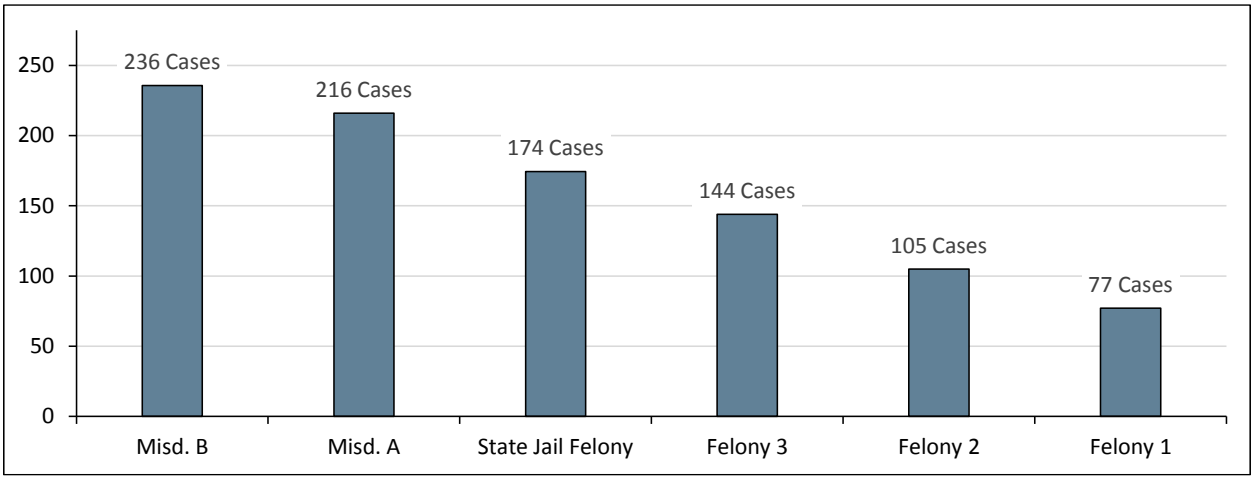
Forensic Science Testimony and Wrongful Convictions, 95 VA. L. REV. 1, 1–97 (2009).

[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
- 175 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 trials[79] 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. Cronic*,[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

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[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

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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_tenprinciplesbooklet.authcheckdam.pdf; ABA, PROVIDING DEFENSE SERVICES, Standard 5-2.4, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

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

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

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

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

APPENDIX A

Weighted Caseload Study Advisory Panel Members

Advisory Panel Members

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

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

APPENDIX B

Attorneys Contributing Timekeeping Data

Attorneys Participating in the Timekeeping Study*

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

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

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

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

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

APPENDIX C

Timekeeping Research Methods

Timekeeping Study Research Methods

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

Attorney Recruitment

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

Media Campaign

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

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[1] Bobby Mims, *A Landmark Study in Indigent Defense and a Professional Opportunity!*, VOICE FOR THE DEFENSE (Oct. 2013).
[2] Miriam Rozen, *Represent Indigents? A&M Study Will Help Determine Maximum Caseload*, TEXAS LAWYER, Oct. 21, 2013, at 7.
[3] *News From Around the Bar*, TEXAS BAR JOURNAL, Nov. 2013, at 1025.
[4] *See* State Bar of Texas, *Weighted Case Load Study*, TEXAS BAR TV (Nov. 4, 2014), https://www.youtube.com/watch?v=RkLxocMpGhg.

Figure C-1. Summary of Tasks and Timeline

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

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

Attorney Enrollment

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

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

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

Public Defender Recruitment

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

Private Assigned Counsel Recruitment

By far the largest proportion of counties in Texas rely exclusively on private assigned counsel systems for adult trial-level cases. Considerable effort was therefore directed toward recruiting individual private practice attorneys for the study. While all Texas lawyers taking court appointments were encouraged to volunteer, telephone recruitment was limited to the state's 39 counties with population exceeding 100,000.[5]

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

Incentives

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

Description of the Study Sample

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

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

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

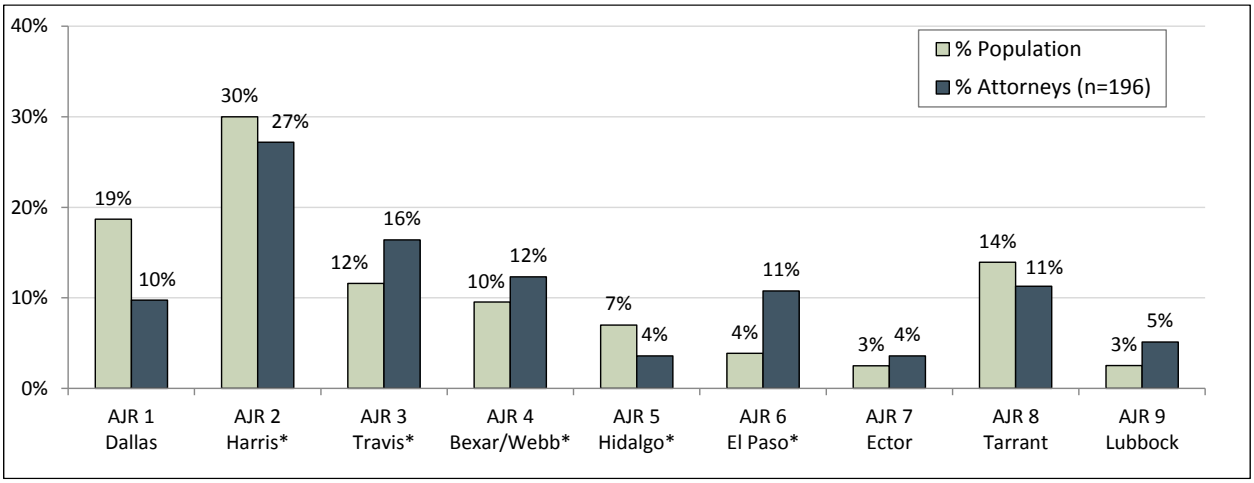
Practice Characteristics

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

Geography

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

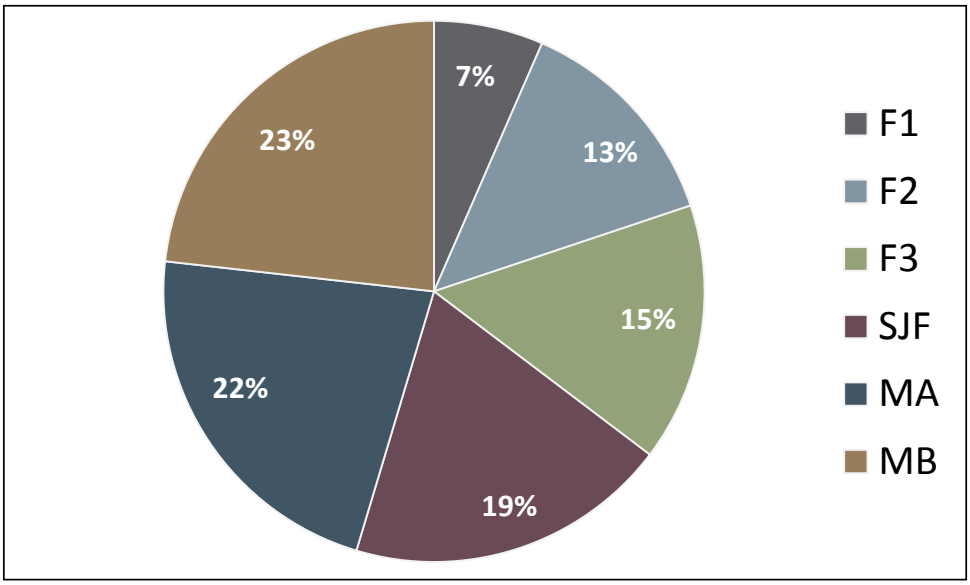
Figure C-2. Attorney Representation by Administrative Judicial Region



Offense Type

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

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



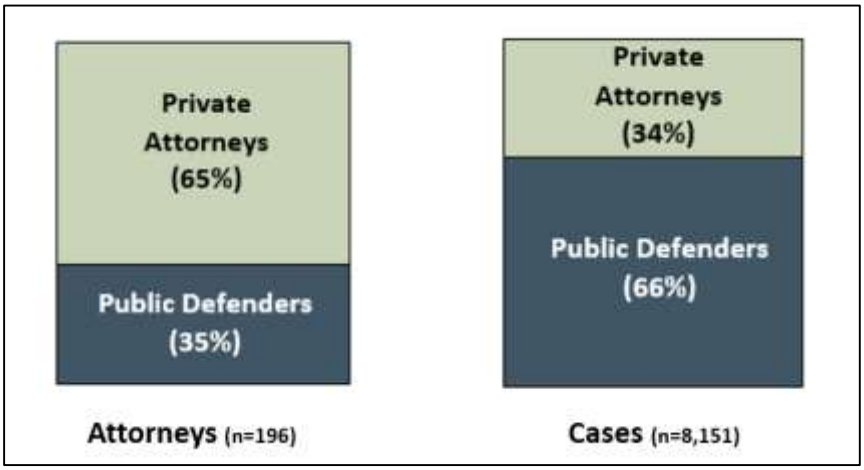
Attorney Type

The research team faced greater challenges achieving balance between cases represented by public defender and private practice attorneys (Figure C-4). While just one-third of the lawyers contributing to the study (35 percent) were public defenders, these same attorneys provided two-thirds of all cases (66 percent). For context, just 14 percent of trial-level felony and misdemeanor indigent defense cases statewide were represented by public defenders in FY 2013.[7] Several factors explain this outcome.

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

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

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



Timekeeping Data Collection

To prepare for data collection, enrolled attorneys were required to complete a 1.75 hour webinar training held on January 28, 2014.[8] Information was provided about the potential uses and benefits of time tracking in criminal defense, and participants were instructed on the use of an online reporting system developed for the project.

Timekeeping Software

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

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

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

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

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

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

Figure C-5a. Registration Screen

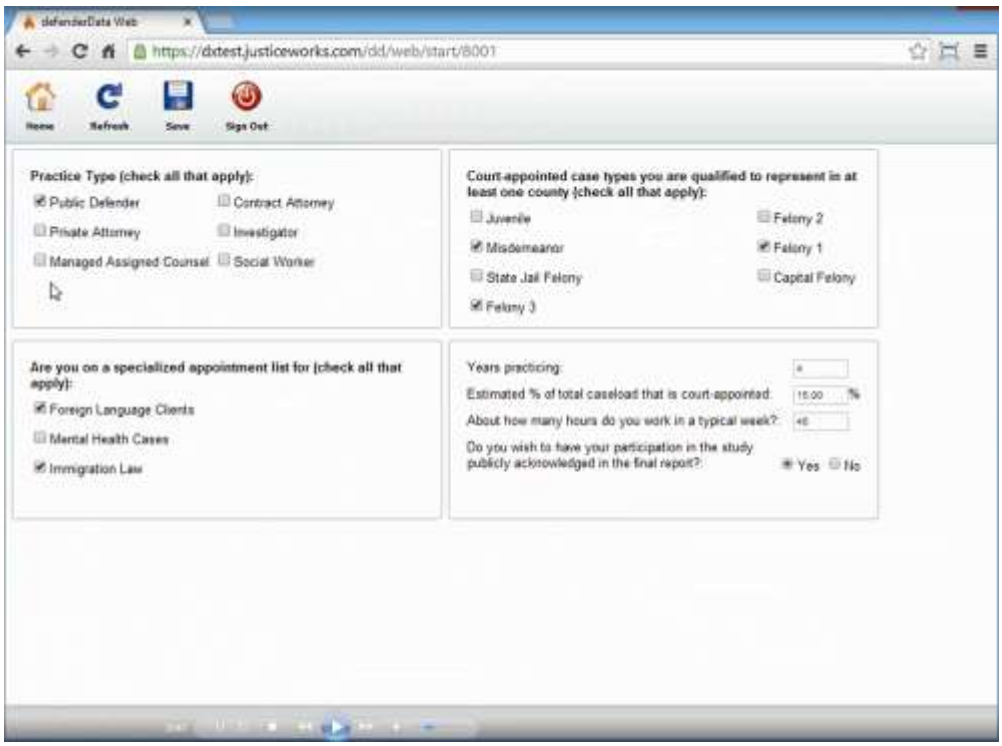


Figure C-5b. Case Information Screen

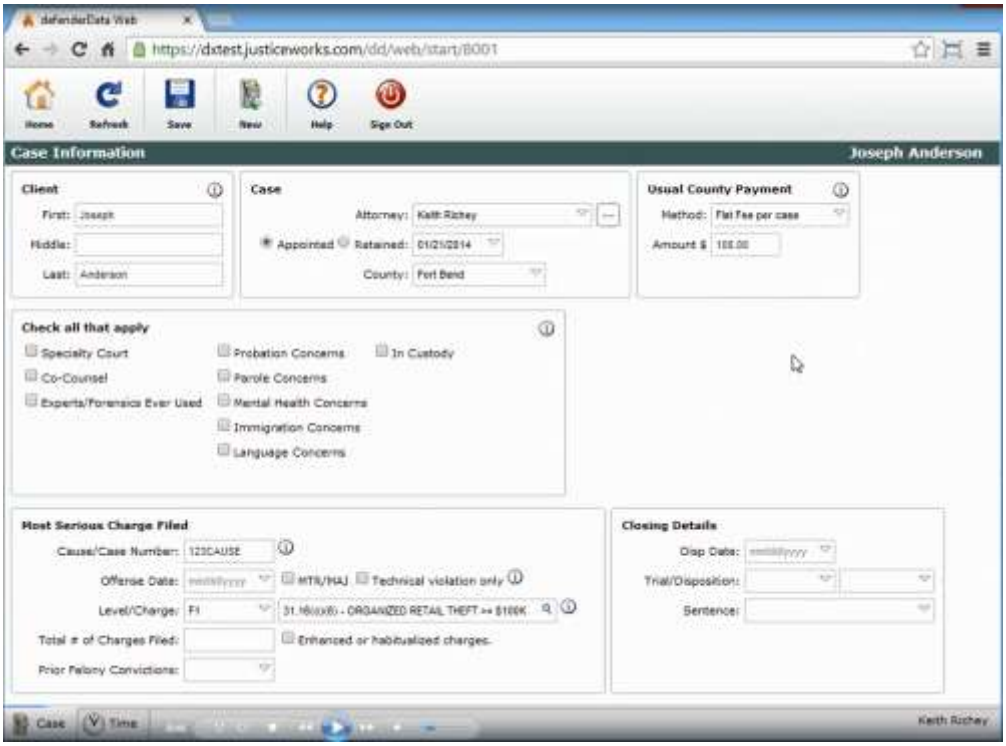
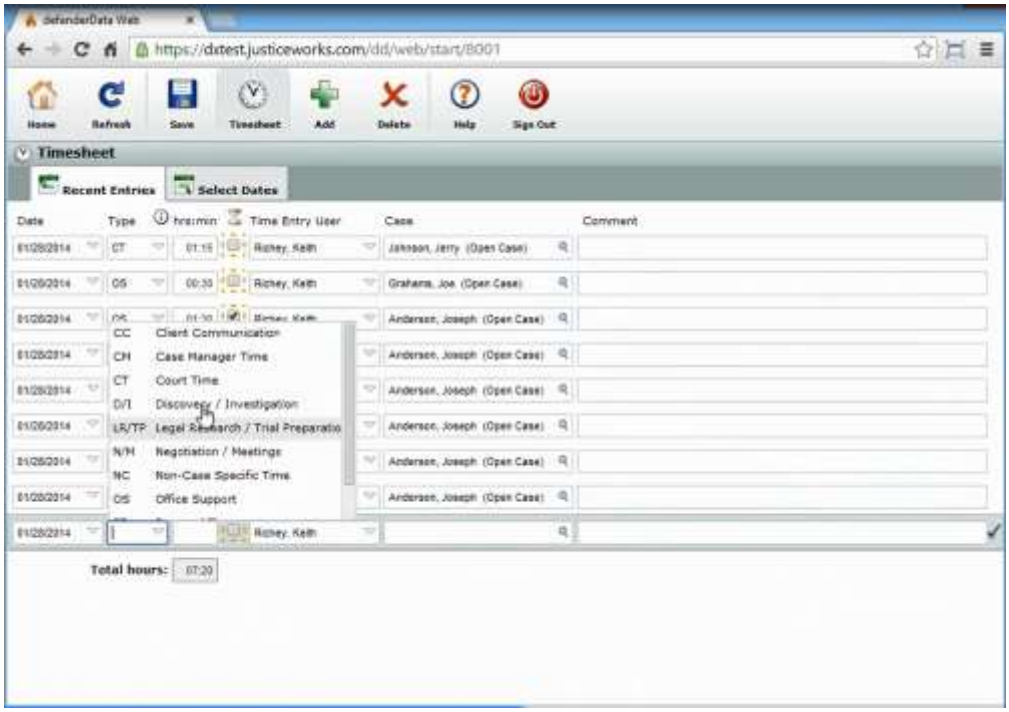


Figure C-5c. Time Entry Screen



Timekeeping Data Analysis

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

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

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

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

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

Group 1: Known Duration, Known Time Spent

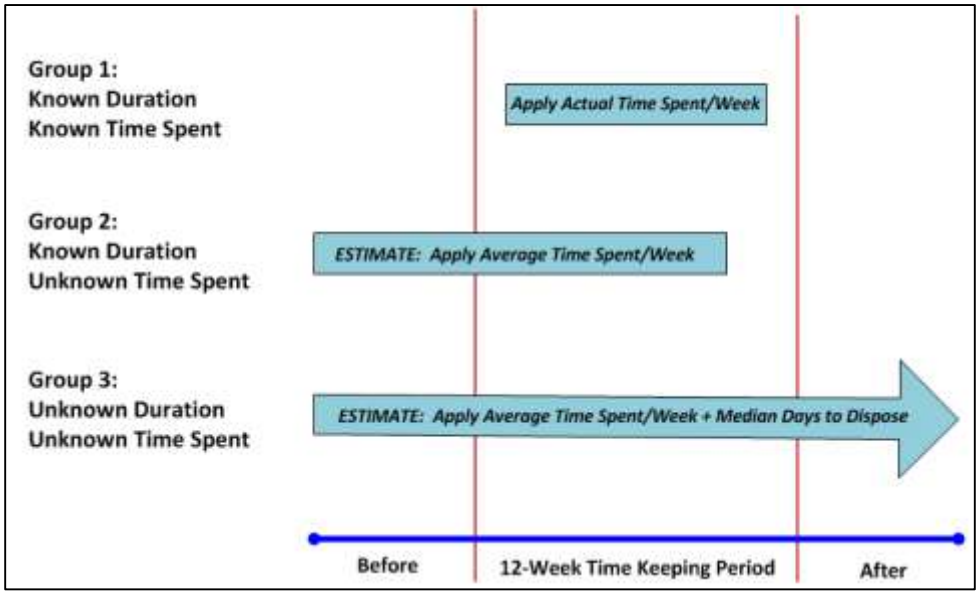
Full information about time spent on defense was available for the first group of cases because they were initiated and disposed during the data collection interval. Average actual weekly time requirements for each case were directly calculable and no estimation was required.

Group 2: Known Duration, Unknown Time Spent

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

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

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



Group 3: Unknown Duration, Unknown Time Spent

The least information was available for the final group of cases that began before and ended after the data collection interval. The most extensive inferences were therefore required for this case set. As with Group 2, average observed time per week for cases of the same type was applied to weeks outside the study period. However, with the case ending date unknown, additional estimation of the number of weeks to disposition was also required. The median observed number of days to completion for disposed cases of the same type was therefore assigned to all cases in Group 3.[10]

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

Final Computation of Case Time Values

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

Average (Time/Week x Number of Weeks) =

Actual Time per Offense Level

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

APPENDIX D

Detailed Timekeeping Results

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

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

APPENDIX E

Time Sufficiency Survey

Time Sufficiency Survey

PRACTICE DESCRIPTION

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

☐

2) What type of practice do you have?

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

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

Misdemeanors

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

Felonies

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

Juvenile Cases

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

Civil Cases

- ☐ ☐ /month
- ☐ Do not represent civil cases

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

☐
active clients

5) Are you on a specialized appointment list for:

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

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

_____ hours

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

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

_____ hours/day on case-related work

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

_____ hours/day on non-case-related work

SURVEY INSTRUCTIONS

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

Two questions are addressed:

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

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

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

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

Trial Level MISDEMEANORS

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

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

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

Trial Level STATE JAIL FELONY - FELONY 3

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

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

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

Trial Level FELONY 2 - FELONY 1

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

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

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

APPENDIX F

Detailed Time Sufficiency Results

Average Minutes Recommended by Time Sufficiency Survey Respondents

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

APPENDIX G

Delphi Panel Members

Delphi Panel Members

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

APPENDIX H

Delphi Survey Response Forms

Example Delphi Panel Round One Response Form

Trial Level MISDEMEANOR A

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

	% of CASES SHOULD GO TO TRIAL		% of CASES SHOULD BE RESOLVED BY PLEA		
	Minutes per Case when Task Is Performed	Percent of Cases where Task Should Be Performed	Minutes per Case when Task Is Performed	Percent of Cases where Task Should Be Performed	Explanation (optional)
Client Communication	mins.	%	mins.	%	
Negotiation/Meetings	mins.	%	mins.	%	
Discovery	mins.	%	mins.	%	
Attorney Investigation	mins.	%	mins.	%	
Investigator's Time	mins.	%	mins.	%	
Legal Research/Case Preparation	mins.	%	mins.	%	
Court Time	mins.	%	mins.	%	
Social Work	mins.	%	mins.	%	
Case-Specific Office Support	mins.	%	mins.	%	
Total Case Time:	0 hour(s) total case time in Trials		0 hour(s) total case time in Pleas		

	TOTAL CASE TIME	
	Minutes per Case when	Percent of Cases
Client Communication	0 mins.	0 %
Negotiation/Meetings	0 mins.	0 %
Discovery	0 mins.	0 %
Attorney Investigation	0 mins.	0 %
Investigator's Time	0 mins.	0 %
Legal Research/Case Preparation	0 mins.	0 %
Court Time	0 mins.	0 %
Social Work	0 mins.	0 %
Case-Specific Office Support	0 mins.	0 %
Total Case Time:	0 hour(s) total case time in Trials	

Example Delphi Panel Round Two Response Form

Trial Level MISDEMEANOR A

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

	% of CASES SHOULD GO TO TRIAL	% of CASES SHOULD BE RESOLVED BY PLEA or other non-trial resolutions (e.g., dismissal or diversion)
% PEERS Median	14	86
% PEERS Range	10-25	75-90

	Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed			Minutes per Case when Task Is Performed			Percent of Cases where Task Should Be Performed			Explanation (optional)
	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	YOUR ANSWERS	PEERS Median	PEERS Range*	
Client Communication	mins.	240	120-330	%	100	100-100%	mins.	60	45-120	%	100	100-100%	
Negotiation/Meetings	mins.	60	50-120	%	100	100-100%	mins.	45	30-60	%	100	100-100%	
Discovery	mins.	120	90-120	%	100	100-100%	mins.	60	30-60	%	100	100-100%	
Attorney Investigation	mins.	180	60-180	%	100	90-100%	mins.	45	30-120	%	100	20-100%	
Investigator's Time	mins.	120	60-180	%	55	25-90%	mins.	45	30-90	%	23	5-25%	
Legal Research/Trial Preparation	mins.	120	90-240	%	100	100-100%	mins.	45	30-60	%	85	35-100%	
Court Time	mins.	840	480-1560	%	100	85-100%	mins.	90	50-240	%	100	95-100%	
Social Work	mins.	60	30-90	%	50	25-75%	mins.	30	5-60	%	25	20-50%	
Case-Specific Office Support	mins.	60	60-120	%	100	100-100%	mins.	30	30-60	%	100	75-100%	
Total Case Time:	0.0 hour(s) total case time in Trials						0.0 hour(s) total case time in Pleas						

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

TOTAL CASE TIME

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

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

APPENDIX I

Detailed Delphi Panel Results

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

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

Average Minutes Recommended by Delphi Panel for
Trial Case Resolutions

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

APPENDIX J

Delphi Time Increments by Task

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

Figure J-1. Misdemeanor Delphi-Recommended Time Adjustments

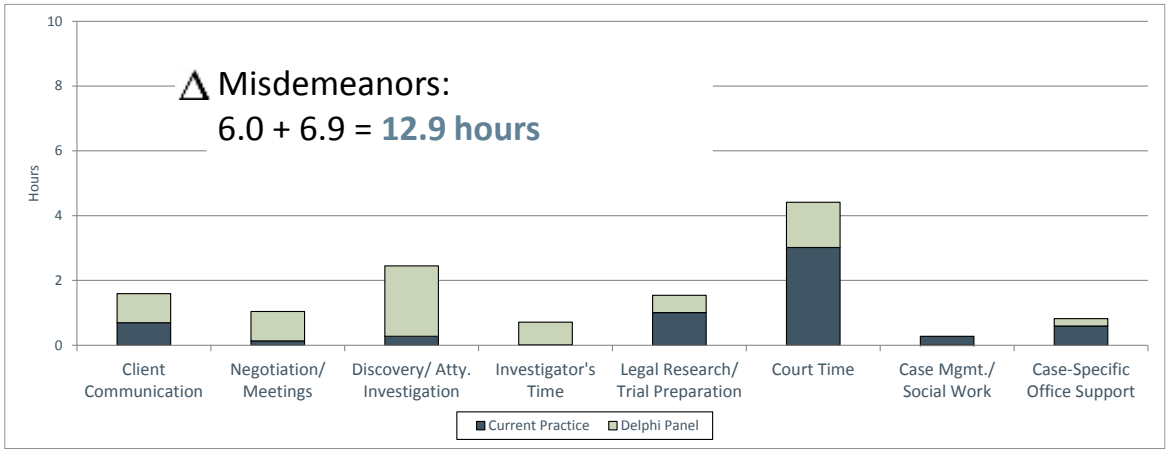


Figure J-2. Low-Level Felony Delphi-Recommended Time Adjustments

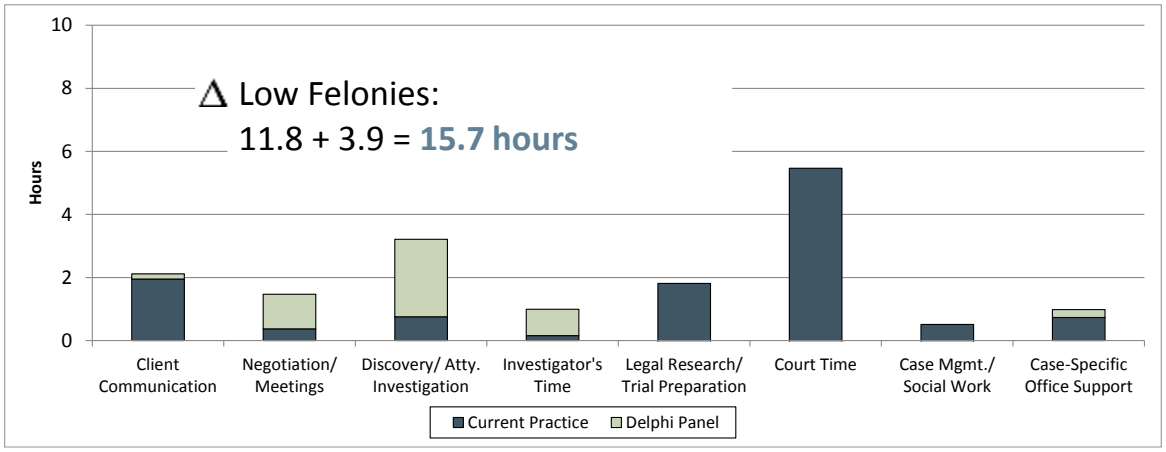
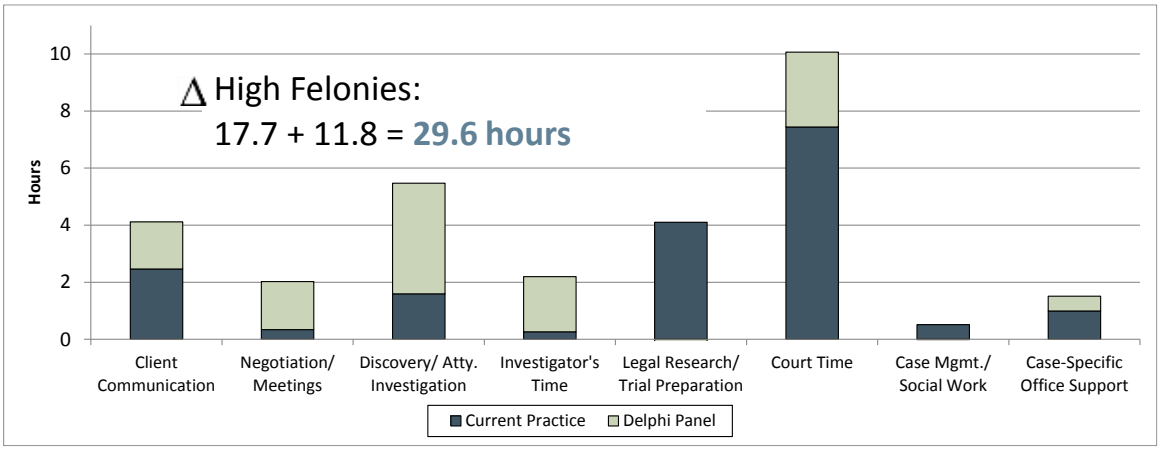



Figure J-3. High-Level Felony Delphi-Recommended Time Adjustments