

CRIMINALLAW

Rich or Poor: The Right to a Fair Trial Requires a Good Lawyer

BY JAMES D. BETHKE



Suppose a friend or family member calls asking for advice. He faces burglary charges but cannot afford a lawyer. What do you tell him? You could start with reassurances that the Sixth Amendment guarantees “the assistance of counsel for his defense” in “all criminal prosecutions,”¹ and that the Texas Constitution provides that “[i]n all criminal prosecutions the accused ... shall have the right of being heard by himself or counsel. ...”² But what do these guarantees really mean in a practical sense?

Before the Supreme Court’s decision in *Gideon v. Wainwright*,³ the right to a lawyer meant merely that those defendants who could afford lawyers were allowed to hire them. Texas, like most other states, provided free lawyers only under limited circumstances — when the court deemed such appointment necessary “in the interest of justice.” This all changed in 1963, when the court declared in *Gideon* that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴

For 39 years, Texas’ efforts to comply with *Gideon*’s mandate took place on a local level, with each of the 254 counties responsible for managing its own appointment procedures, budget, and funding. As a result, Texas lacked consistency and, to an extent, accountability in its protection of the Sixth Amendment rights of indigent defendants. The timing of appointment of counsel varied from days to months, depending on the county. Local funding varied significantly. There were no state-administered requirements that a lawyer even know anything about criminal law to receive an appointment.⁵ By 1999, Texas was one of only nine states providing no state funding or state oversight of indigent defense services.⁶

The movement by Texas lawmakers to reform the delivery of legal services to indigent criminal defendants began in the late 1990s. Sen. Rodney Ellis of Houston led the effort, facilitating nearly two years of bipartisan collaboration among legislators, the State Bar, district judges, prosecutors, defense attorneys, and reform groups. These efforts culminated in the passage of the Fair Defense Act in 2001.⁷

The Fair Defense Act focused on four critical improvements: ensuring timely counsel appointment; guaranteeing fair and neutral procedures for attorney selection; establishing minimum competency standards for court appointed attorneys; and requiring counties to publicly report data on indigent representation services and expenditures in the form of “plans.” The legislation also created the Task Force on Indigent Defense, headed by Presiding Judge Sharon Keller of the Court of Criminal Appeals, to recommend further improvements and direct funding to assist counties in meeting the requirements imposed by the Fair Defense Act.⁸ The legislation ensures that all ultimate decision making remains with judges and counties but provides necessary state input and oversight.

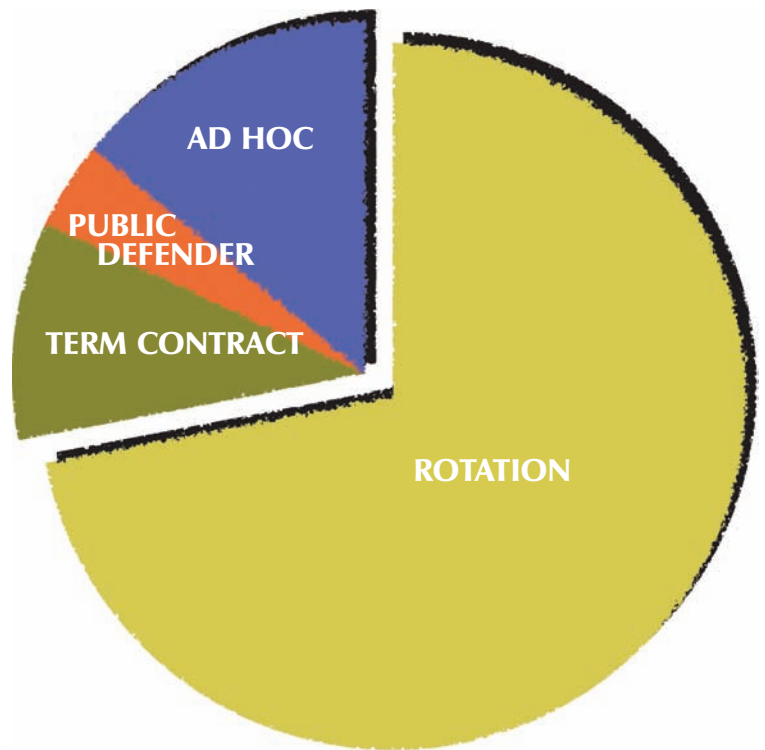
Any person facing criminal charges, including the hypothetical friend or family member, can now find out online whether he or she qualifies for a lawyer and, if so, how (and how quickly) a lawyer will be selected. Under the current system, a defendant can have greater confidence that his or her lawyer was selected in a fair and neutral way from a pool of competent attorneys. To learn how your county appoints attorneys to indigent individuals, visit www.courts.state.tx.us/tfid. Each county's indigent defense plan, covering both adult defendants and juvenile respondents, and every county's indigent defense expenditures are available to anyone with access to the Internet.

Despite some initial resistance, every court in Texas has now adopted and published a local indigent defense plan detailing its compliance with the standards outlined in the Fair Defense Act. These plans cover timing of appointments, minimum attorney qualifications, attorney fee schedules, indigency standards, and methods of attorney selection. For descriptions of the different methods of counsel selection that counties have developed since the passage of the Fair Defense Act, see Figure 1.

Counties most commonly use a rotation, or "wheel," system for selecting appointed counsel. Under this system, attorneys receive appointments in rotating order from one or more countywide lists created by the county's judges. Under the Fair Defense Act, this is the default method; in order to use any other appointment method, such as a public defender or an alternative system, county officials must take extra steps.

Far less common are "ad hoc" assigned counsel programs, in which individual judges appoint attorneys based on who the judge determines is the most appropriate for a particular case. Ad hoc systems have no specified objective selection methodology, although some plans in this category specify relevant factors for judges to consider in making their selections. This process is most popular in rural areas with low populations and few, if any, criminal defense lawyers.

The next most common method of selecting court appointed counsel is through a contract defender system, under which



the court employs private attorneys who act as independent contractors. Contract defenders receive public funds in exchange for agreeing to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts. The Policies and Standards Committee of the Task Force is currently developing standards for providing indigent defense services under a contract defender program. Counties that use some type of a contract defender program include Austin, Burnet, Dallam, Dawson, Gaines, Garza, Lynn, Hartley, Moore, Fayette, Sherman, Waller, and Willacy.

In Texas, the least common method of providing court-appointed counsel is through a public defender office.⁹ A public defender office can operate as either a county-created entity or a nonprofit corporation operating under a written agreement with the county. Together, judges and commissioners decide the duties of the public defender and what criteria will be used to select him or her. Counties with public defender offices also have at least one alternative way of assigning counsel, for cases that present conflicts of interest or in order to ensure a balanced workload.

Prior to the passage of the Fair Defense Act, only seven

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FIGURE 1 2004 ATTORNEY SELECTION METHOD

ROTATION SYSTEM

Attorneys are selected based on the order that their names appear on lists of qualified attorneys. **184 (72 percent) district or county courts use this method.**

TERM CONTRACT

Attorney or group of attorneys in private practice enters into a contract with a county for a specified period of time to provide representation to defendants. **25 (10 percent) district or county courts use this method.**

PUBLIC DEFENDER

Governmental entity or nonprofit corporation employs attorneys to represent indigent defendants. **10 (4 percent) district or county courts use this method.**

AD HOC SYSTEM

A judge appoints an attorney in a case based on who the judge determines is most appropriate for a case without specifying an objective system of selection. Some plans in this category specify factors judges should use in assigning attorneys to cases. **35 (14 percent) district or county courts use this method.**

counties had a public defender office: Cameron, Colorado, Dallas, El Paso, Travis, Webb, and Wichita. Last year, Bexar and Hidalgo counties established public defender offices with grants from the task force. Val Verde County was awarded a grant by the task force earlier this year to establish the first regional public defender office in the state.

The increased funding and attention that have come to indigent criminal defense since the passage of the Fair Defense Act has resulted in improved legal representation for poor criminal defendants. A key ingredient for this success is attributable to a six-fold increase in funding for continuing legal education (CLE) and technical assistance for lawyers who regularly represent indigent criminal defendants.¹⁰ The primary recipient of this increased funding is the Texas Criminal Defense Lawyers Association (TCDLA), headed by Joseph Martinez.

TCDLA has expanded its programming to include such events as free CLE programs for public defenders and those who regularly accept court appointments. Also included are programs with a nominal registration fee like the Prairie Dog Lawyers Advanced Criminal Law Seminar, hosted by the Lubbock Criminal Defense Lawyers Association and TCDLA earlier this year. With more than 200 live participants, many believe

Q&A TED POE



After eight years as a Harris County prosecutor and 22 years as a criminal court judge, **Ted Poe's** public service continued with his election to the U.S. House of Representatives in November 2004.

What has been the most unexpected or surprising aspect of your transition from state judge to congressman?

As a judge, things were on my terms, I had the only vote. As a congressman, I am one of many and have to play well with others.

What do you consider to be your greatest professional accomplishment?

My greatest professional accomplishment is that in the eight years I served the Harris County District Attorney's office, I never lost a single jury trial.

Which of your "creative sentences" do you believe was most effective?

Of the many punishments handed down, having thieves carry signs outside the establishments they stole from was the most effective. The recidivism rate was very low and it served as a very good deterrent for any would-be-thieves entering that business.

Why did you choose a career in criminal law?

I believe that the criminal court is the center of the most important issue each of us has, freedom and liberty. I chose criminal law because every trial deals with that very issue.

What does "tough on crime" mean to you?

"Tough on crime" means more than just punishment, it is a message to those offenders that society is not tolerant of their conduct and there are serious and unpleasant consequences for their actions.

What is the biggest issue facing the criminal justice system?

Over the course of recent years, the quality of lawyering, on both the prosecution and defense, has diminished. Some of the new lawyers in the profession lack a passion for the law and the Constitution.

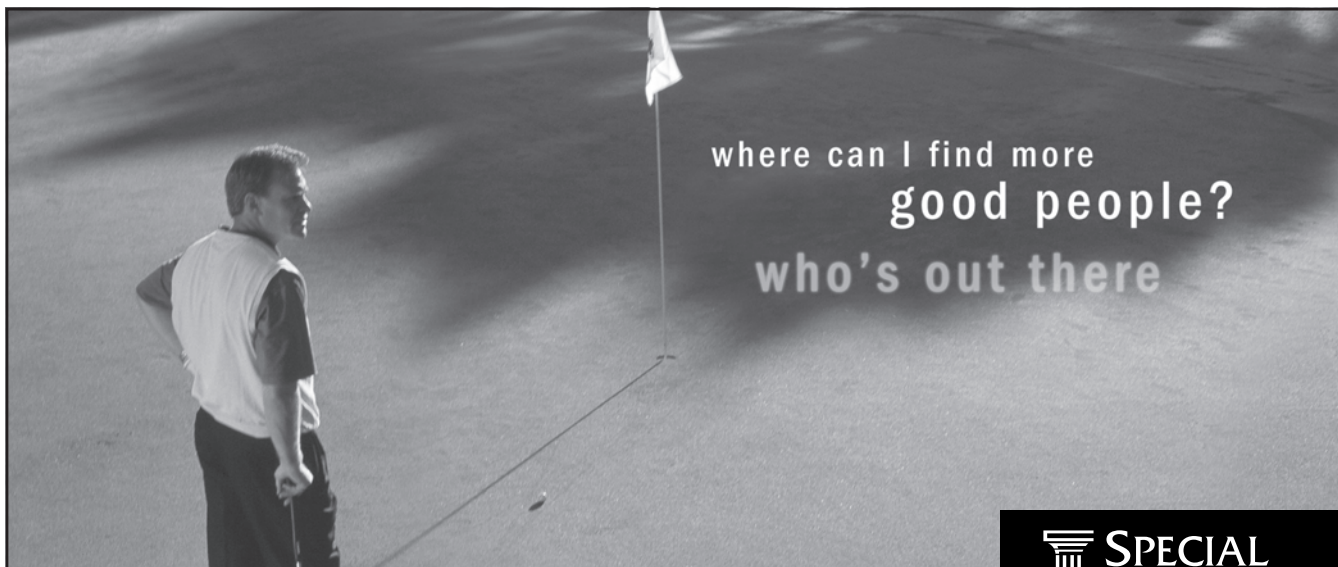
the seminar had the largest attendance at any Lubbock County legal seminar in history. According to Patrick Metzger, president of the Lubbock Criminal Defense Lawyers Association, a program of this caliber and quality could not have been offered at a discounted price without the grant TCDLA received from the Court of Criminal Appeals. Proceeds from the seminar's registration fee went to the Texas Tech Criminal Justice Clinic, which gives students practical training and experience in criminal defense work. TCDLA's satellite office in Lubbock, run by Philip Wischkaemper, has also been able to improve the quality of training and resources it provides practicing criminal defense lawyers working on both capital and non-capital cases.¹¹

For the past three decades, the State Bar of Texas has offered an excellent Advanced Criminal Law Seminar. Moreover, the State Bar also promotes the quality of criminal defense services through its Criminal Justice Section and its Legal Services to the Poor in Criminal Matters Committee. The Center for American and International Law in Plano also offers high quality continuing legal education for those practicing criminal law. Local criminal defense lawyers in most counties have also

formed local associations of criminal defense lawyers to promote the professionalism of its members.

As a result of state funding, improved local practices, and enhanced CLE opportunities, the future of our hypothetical friend or family member looks promising. Consider a recent "real" case of an indigent juvenile accused of aggravated robbery in Houston. The defendant received a well-trained court appointed lawyer by the name of Bill Connolly. Connolly had access to increased funding and used it to hire a private investigator necessary to clear the boy's name by locating the true culprit. It was a case of mistaken identification. Without adequate assistance of counsel, without adequate funding for a proper investigation, without a criminal defense lawyer willing to take this case to trial, it is quite possible that this juvenile might have been convicted of a crime that he did not commit — a result no one wants.

Texas and its criminal defense lawyers are making progress in meeting the constitutional demand for effective representation of indigent defendants. It is up to all of us to continue to strive to make sure that we do not leave the poorest of us behind.




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Notes

1. U.S. Const. amend. VI.
2. Tex. Const. art. I, §10.
3. 372 U.S. 335 (1963).
4. *Id.* at 344.
5. See generally Tex. Applesseed Found., Fair Defense Report: Analysis of Fair Defense Practices in Texas (2000), available at <http://www.equaljusticecenter.org/Fair%20Defense%20Reference%20Report.pdf>.
6. Bureau of Justice Statistics, U.S. Dept. of Justice, State-Funded Indigent Defense Services, 1999 at 2 n.3 (1999). Beginning in 2002 the Texas Legislature began providing state money for indigent defense services. In 2002/2003 it appropriated \$19.7 million; 2004/2005 it appropriated \$23.9 million; and in 2006/2007 it appropriated \$27.2 million.
7. Leading the efforts on the House side were five sponsors: Rep. Hinojosa, Rep. Keel, Rep. Goodman, Rep. Shields, and Rep. Thompson.
8. Members of the Task Force include: Hon. Sharon Keller, presiding judge of the Court of Criminal Appeals; Hon. Wallace Jefferson, chief justice of the Texas Supreme Court; Sen. Chris Harris (Arlington); Rep. Todd Smith (Euleess); Hon. Sharry Radack, chief justice of the First Court of Appeals (Houston); Hon. Orlanda Naranjo, Travis County Court at Law No. 2, Austin; Sen. John Whitmire (Houston); Rep. Terry Keel; Hon. Olen Underwood, presiding judge, Second Administrative Judicial Region; Hon. Jon Burrows, county judge, Bell County, Belton; Mr. Knox Fitzpatrick, Fitzpatrick, Hagood, Smith & Uhl, L.L.P.; Mr. Anthony Odiorne, first assistant public defender, Wichita County Public Defenders Office; Hon. Benny Glen Whitley, Tarrant County Commissioner for Precinct 3, Hurst. Tex. Gov't Code Ann. §§71.052-53.
9. By contrast, public defender systems are the most common on a national level. Among the nation's most populous 100 counties, 73 percent of funding went to public defender programs, 21 percent went to assigned counsel programs, and 6 percent went to contract defender programs. Bureau of Justice Statistics, U.S. Dept. of Justice, indigent defense statistics (1999) available at <http://www.ojp.usdoj.gov/bjs/id.htm>.
10. S.B. 1 (General Appropriations Act), 77th Leg. Reg. Sess. (Tex. 2001). The legislature increased the appropriation from \$200,000 to \$1,250,000 to the Court of Criminal Appeals to contract with a statewide association of criminal defense lawyers for the purpose of providing continuing legal education for criminal defense lawyers who regularly represent indigent criminal defendants.
11. To learn more about the resources and services available through this office, please contact: Philip Wischkaemper at pwisch@tccla.com.

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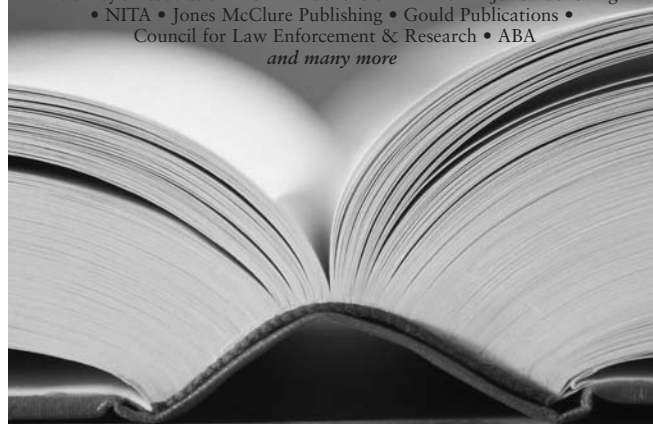


is director of the State Task Force on Indigent Defense, which is charged with implementing a statewide system of standards, financing, and other resources for criminal defendants unable to hire attorneys. He is a U.S. Army veteran from the 101st Airborne Division and a graduate of the University of Texas at Tyler and Texas Tech University School of Law. He joined the Office of Court Administration in 1998.

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