

The Need for Limiting Court-Appointed Caseloads in Harris County

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.” That study is now complete and available on the TIDC website at <http://www.tidc.texas.gov/>.

The study makes clear that dozens of private attorneys in Harris County are appointed to far more cases than they can competently handle. Combined with the fact that little investigation is done, some defendants receive counsel that is little better than if they had represented themselves. The effect is that more defendants are convicted, more receive custody sentences, more receive longer terms, and fewer cases are dismissed or receive alternative dispositions. This makes the criminal justice system more costly and less fair.

Aside from being unfair to defendants, it is also unfair to lawyers. Harris County does not lack attorneys. A small cadre of lawyers who receive the bulk of the appointments means that others are excluded. There is no evidence that the disproportionate appointment system is based upon merit. Few of the attorneys with highest appointed caseloads ever go to trial.

The Study

Over a twelve-week period 196 lawyers across Texas (private attorneys and public defenders) kept track of their time in a computer software program. The entries were categorized by task (e.g., investigation, legal research, court appearance, etc.) and by level of offense (First Degree Felony through Class B Misdemeanor). The collection and compilation was overseen by the Public Policy Research Institute of Texas A&M University (PPRI). The result was an accurate sample of the amount of time lawyers currently spend on their cases.

The next step was to send those results out to 319 attorneys to review. The respondents were asked to change the entries for each task to establish how much time attorneys *should* work to assure that clients receive effective assistance of counsel. In all instances, the respondents found the actual time spent was insufficient, particularly with regard to investigation.

Finally, 18 criminal defense lawyers, averaging 25 years' experience each, from different parts of Texas, became the “Delphi” panel. The panel took the results of the previous steps and individually submitted changes to assure enough time per task for effective representation. After two rounds of averaging and resubmitting those recommendations to the panel members, the panel met with facilitators from PPRI for a day together in Austin to resolve differences. As in the prior step, the panel found the actual time spent on tasks was less than necessary for effective assistance of counsel. The final results were reviewed by PPRI and TIDC to assure they represented a complete and accurate image of the ideal caseload standards.

The study found that, on average, attorneys would be able to competently represent

defendants based upon the following caseloads:

236 Class B Misdemeanors
216 Class A Misdemeanors
174 State Jail Felonies
144 Third Degree Felonies
105 Second Degree Felonies
77 First Degree Felonies

Each category is independent of the others. An attorney can handle cases of different case levels, but the total may not proportionally exceed any single category. For example, 50 Second Degree Felonies and 120 Class B Misdemeanors would not exceed the recommended total. Two hundred State Jail Felonies and 200 Class A Misdemeanors in one year would exceed the standards.

These are ideal caseloads and even the participants in the study understand they are aspirational. However, there comes a point when caseloads reach levels that no person familiar with the requirements of representing criminal defendants can accept as valid.

For many years, the standard was set by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), organized and funded by the federal government, which in 1973 recommended national annual maximum caseload numbers for indigent defense programs. They 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. Those are higher than the Texas report recommended. However, they were not based upon a controlled study of actual cases within a single jurisdiction. The Texas report is consistent with other recent empirical studies, such as one done in Missouri.

While the Texas study found that on average that most Texas counties were close to the NAC standards – but above the Texas recommendations – at least a couple of large urban counties are outliers. Harris County is the most egregious case.

Harris County

The disparity between the recommended caseloads and that of many lawyers in Harris County is great. There are lawyers that have hundreds of cases above the suggested maximums in either the Texas study or the NAC. See <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>.

Take for example, the lawyer with the most adult criminal appointments in Harris County during Fiscal Year 2014 (September 30, 2013 to October 1, 2014). This attorney closed 969 cases (441 felonies and 528 misdemeanors).¹ Even assuming these were only State Jail Felonies and Class B Misdemeanors, that is still two and one-half times the recommended amount for *each* category,

¹ Jeanie L. Dickey, SBA #24044749.

or about five times the total recommended caseload. Even more absurd, this same lawyer self-reported to the TIDC that court appointments were *only* 65% of her practice.

During that same fiscal year, 23 attorneys each closed more than 300 adult felonies. That is twice the NAC standard and significantly higher than any of the felony caseloads recommended by the Texas study. Of those, six had 400 or more, and two had 553, which is apparently the cut-off for getting paid. Many of these lawyers reported to the TIDC that this was not even their entire legal practice. Each of the two lawyers with 553 felonies claimed it was only 40% of their whole practice.²

This is not being done without the knowledge of judges. Although Harris County has 22 judges with adult felony jurisdiction and 15 judges with adult jurisdiction for Class A and B misdemeanors, many of the high-volume lawyers concentrate in just a few courts. In one felony court, three lawyers split 1346 cases for an average of 448 each.³ In one misdemeanor court, three lawyers had a total of 2158 cases or about 719 each for the year.⁴

Although most of the previous scrutiny of Harris County appointments has been about the amount of money received by lawyers, the lawyers are actually underpaid. In fact, the high-volume system promotes inadequate payment to lawyers. The two lawyers with 553 felony cases apiece averaged about \$174 per case. At that rate, the lawyers have no incentive to provide competent representation. Not even a brand new lawyer with no other source of income would charge a retained client \$174 for a felony.

There are many lawyers in Harris County whose appointed adult and juvenile cases total far above either the NAC or Texas Study recommendations. These are not even close calls. The most overworked lawyers are also often the least likely to go to trial. Prosecutors know they have nothing to fear from lawyers who cannot credibly threaten to test the state's version of the facts. Those defendants will get nothing better than the standard offer, despite potential legal arguments, defenses or mitigation, that the stressed-out lawyer has no time or inclination to explore.

This is not mere hyperbole. There really *are* only so many hours to work on cases. In his seminal work, *SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE* (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2011), Professor Norman Lefstein wrote:

Typically, there are between 255–258 workdays per year, after deducting for holidays that fall on weekdays. If the higher of the two numbers is used and 10 days are subtracted for vacations and another 5 days for sick leave, the average number of

² Gerald W. Guerinot SBA #8571500; John Arthur Clark SBA #4286800.

³ 208th Criminal District Court.

⁴ County Criminal Court at Law, No. 2.

weekdays available for work is 243. If multiplied by 7 hours, which excludes an hour for lunch, the available work hours for client representation are 1701 hours per year. Although this does not include time for other work-related functions, such as continuing legal education, staff meetings, and bar activities, 1701 hours for direct representation of clients is a justifiable number. Nevertheless, for the sake of argument, assume that the defenders work nights, weekends, and holidays and that they push themselves hard, much like many lawyers in the private practice of law and, for that matter, much like most defenders. So assume that the defenders work on their clients' cases at least 1850 hours per year.

Thus, using that assumption of 1850 hours per year, the lawyer with 553 felonies can give each client about 3 hours and 20 minutes for their case. At best, that would allow a lawyer to meet the client in the hold-over cell at the initial setting, read the offense report, discuss the case in court with the prosecutor, relay a guilty plea offer to the client, reset the case for a plea, and prepare the client for guilty plea and sentencing in court at the next setting. Any of the following – visits to the client in jail, investigation, seeking and reviewing discovery, legal research, visiting the scene, meeting with witnesses or the defendant's family – will put the case beyond the allotted time of less than three and a half hours. A case that goes to trial will eat up that much time just waiting for proceedings to start.

The time available for misdemeanors is even less. The most prolific misdemeanor appointed attorney in Harris County closed 873 cases.⁵ Based on 1850 working hours, he could provide slightly over two hours to each client. That is just enough time to plead someone guilty at their initial appearance, which is what seems to have occurred in most of his cases. He was paid only about \$80 for each case. Thirty-one lawyers had over 500 misdemeanor appointments each that same year.

However, total cases, across different courts, is what shows the breadth of the high-volume appointed caseloads in Harris County. More than 100 lawyers exceeded the recommended caseload standards, with a combination of adult felony, adult misdemeanor and juvenile cases.

The Texas caseload study is not the only recent evaluation that highlights the disparities in Harris County's indigent defense system. In 2013, Council of State Governments Justice Center issued IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER. The report found the Public Defender's Office (PDO) got better results for clients for two main reasons. First, the PDO strictly adhered to the NAC standards for maximum caseloads. Second, the PDO made extensive use of investigators in its cases. Alternatively, the report found that 45 percent of felonies were appointed to private assigned counsel in excess of the NAC standard and only about \$13 per case was spent on investigation (\$.22 in misdemeanors).

The answer to improving private assigned counsel in Harris County is twofold: (1) establish reasonable caseload maximums, and (2) encourage a culture of investigating and researching cases.

⁵ Abel Izaguirre, SBA #2405381.