STATE OF MAINE
114TH LEGISLATURE
FIRST REGULAR SESSION

JOINT STANDING COMMITTEE ON JUDICIARY STUDY OF THE FINANCIAL FEASIBILITY OF A PUBLIC DEFENDER PROGRAM, AND ISSUES IN IMPLEMENTING A COST EFFECTIVE PROGRAM

NOVEMBER 1988

MEMBERS:
Sen. Joseph C. Brannigan, Chair
Sen. N. Paul Gauvreau
Sen. Henry W. Black *

Rep. Patrick E. Paradis,* Chair
Rep. Dan E. Warren **
Rep. Harry L. Vose
Rep. Constance D. Cote *
Rep. Gerard P. Conley, Jr.
Rep. Dale F. Thistle
Rep. Mary H. MacBride *
Rep. Jeanne F. Begley
Rep. Dana C. Hanley
Rep. Francis C. Marsano

** Denotes Subcommittee Chair
* Denotes Subcommittee Members

Staff: Gilbert Brewer, Legislative Analyst

Office of Policy and Legal Analysis
Room 101, State House--Sta. 13
Augusta, Maine 04333
(207) 289-1670

TABLE OF CONTENTS

PAGE

PREFACE

The Joint Standing Committee on Judiciary of the 113th Legislature undertook this study upon approval by the Legislative Council. The stated purpose of the study was to determine the financial feasibility of replacing Maine's current court-assignment system of providing legal representation to indigent criminal defendants with a statewide public defender program. Due to time and resource constraints, the subcommittee of the Judiciary Committee that performed this study has carefully limited its study to the stated purpose. It did not attempt to consider the possibility of implementing any one of the various methods (other than a traditional public defender system) that the several states have developed to meet the constitutional requirement of providing adequate legal representation to criminal defendants who cannot afford to provide their own counsel. The lack of recommendations in this regard should not be read as a finding that these delivery systems do not have merit or are not suited to use in this state; the subcommittee simply did not have the time nor resources to comprehensively examine the potential utility of various service delivery systems, particularly as these methods might be suited to use in a limited geographical region or regions of the state.

Similarly, although the subcommittee reviewed the court-assignment system currently in use in Maine as a basis of comparison with the proposed public defender system, the study does not focus on the present efficacy of the court-assignment system or how it may be improved. Several excellent studies of Maine's court-assignment system have been conducted, the most recent being a very complete and accomplished study by the Maine State Bar Association in 1986. Similarly, the subcommittee did not examine the use of the court-assignment system to provide legal representation in child protection cases, but examined its use only in criminal proceedings. We do make minor recommendations and comments regarding the current system but the primary focus of this study was to determine the financial feasibility of implementing a statewide public defender system in Maine. Again, this should not be read as a blanket endorsement of the present system and its current implementation but is simply a reflection of the study's narrow scope.

Finally, the study subcommittee would like to thank those persons who testified before the subcommittee and those persons who provided data or other information to the subcommittee. The Subcommittee would particularly like to thank those members of the Judiciary and the Maine Bar who found time in their schedules to help the subcommittee throughout the study.

INTRODUCTION

A subcommittee of the Joint Standing Committee on Judiciary undertook this study to determine the financial feasibility of creating a public defender system for the State of Maine. The study was suggested as a result of recent bills submitted in each of the past two regular sessions of the Legislature that would have created such a system. Due to the complexity of the issues raised by that legislation, the Judiciary Committee requested authorization from the Legislative Council to pursue this study. The Legislative Council granted that request and this report is the result of the study.

The subcommittee began its work on June 28, 1988. It held three public hearings at which testimony was heard and other information accepted by the subcommittee. At its first meeting, the subcommittee heard from representatives of the Judiciary as well as attorneys who participated in or had knowledge of the current court-assignment system. At the second meeting, the subcommittee heard testimony from district attorneys, a representative of the Maine Bar Association and from the executive director of the New Hampshire Public Defender Program. The third meeting was devoted to hearing from the Attorney General's office, a private investigator and Pine Tree Legal Assistance. Various other relevant comments and information was acquired by the subcommittee staff and distributed to the subcommittee throughout the period of the study. The fourth and final subcommittee meeting was held to deliberate over recommendations and the content of this report, after which the full Joint Standing Committee on Judiciary reviewed and accepted the subcommittee's report.

This report begins by briefly describing the constitutional requirement that states provide adequate legal representation to indigent criminal defendants and recounting the testimony and information received by the subcommittee relating to the current court-assignment system. This information served as the basis of the subcommittee's comparison with the proposed public defender system. The report then discusses the testimony and information received by the subcommittee regarding the operation of a statewide public defender system in Maine. This provides the model which is compared to Maine's current court-assignment system. The third section of the report discusses the issues considered by the subcommittee in comparing the proposed public defender system with the current system. Finally, the report concludes with the subcommittee's conclusions and recommendations.

I. MAINE'S CURRENT COURT-ASSIGNMENT SYSTEM

The general right of an indigent criminal defendant to have counsel provided at the state's expense to aid in the presentation of his defense is of relatively recent origin. Its roots lie in the Sixth Amendment to the United States Constitution, "In all criminal prosecutions the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."[1] That express right has been applied to state prosecutions by the United States Supreme Court through application of the 14th Amendment since 1932.[2] At that time, the right was interpreted as extending to only cases in which a capital offense was charged. In the celebrated case of *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Supreme Court extended the right to non-capital cases. Later cases have further clarified the right to the point where it may be fairly stated that, if he desires, any indigent person who is charged with an offense for which imprisonment of any duration is a possible sentence must be provided an attorney at the expense of the state.

The relatively rapid expansion of the right to counsel forced a similarly rapid expansion in the money expended by states to provide counsel to indigent defendants and the means through which such counsel was provided. The traditional means of providing counsel for indigent criminal defendants was on an *ad hoc* appointment basis. Maine was no different in this regard and as the right to counsel was recognized and expanded, Maine developed a court-assignment system to provide attorneys to represent defendants who were financially unable to secure their own counsel.

The general framework of the court-assignment system is very simple. Rule 44 of the Maine Rules of Criminal Procedure governs the appointment of counsel under Maine's court-assignment system. The presiding judge generally makes a determination of indigency and entitlement to counsel when the defendant initially appears before the court (his arraignment). If the judge finds that court-assigned counsel is required, the judge then appoints an attorney to the case. This appointment is sometimes made immediately at the arraignment and in some cases is delayed until an attorney can be located. Appointments are generally made from a list of attorneys who perform criminal defense work as part of their practice and who have expressed a willingness to the court to accept indigent criminal defense cases. An appointed attorney is then compensated by the State for his representation of the indigent defendant.

The subcommittee received testimony from both active members of the Judiciary as well as participating members of the criminal defense bar. The principal subjects of discussion concerning the present system involved three areas: (1) which

attorneys get and accept appointments from the court; (2) the amount of compensation paid to attorneys who perform court-appointed work; and (3) the level of support services, such as private investigators and expert witnesses, available to attorneys in an indigent criminal defense case.

1. Which attorneys participate in the present system?

Much of the testimony presented before the subcommittee dealt with the subject of which attorneys participate in the present court-assignment system. The subcommittee was particularly interested in how well the present system attracted and retained qualified attorneys and how equitably the system spread the workload of providing indigent criminal defense representation.

Testimony on the first issue was slightly mixed, but the general tenor was that the present system attracts sufficient qualified attorneys to carry its workload. Both judicial officers who spoke with the subcommittee agreed that a serious problem with attracting attorneys had existed in the court-assignment system as recently as last year. This problem was confined almost exclusively to the rural areas of the state, with Piscataquis County, Franklin County, and particularly Washington County, being the areas most frequently identified. The Justices and attorneys agreed that the recent increase in appropriations for indigent expense, which permit approximately an 100% increase in hourly compensation for attorneys, appears to have resolved that problem. Most witnesses further agreed that there has been very little difficulty experienced in attracting attorneys to accept indigent defense cases in the major urban areas of the state. The subcommittee did however, hear testimony indicating that some problems do exist with the number of attorneys participating in the current system. One attorney disputed the assertions that no problem existed in the state's urban areas, declaring that a severe shortage of participating attorneys existed in the Augusta area. Although the Justices testified that they very rarely were forced to "pressure" an attorney to accept an appointment, the subcommittee also received the results of a survey performed in 1986 as part of the Maine State Bar Association's study of the indigent defense system that concluded that most judges do not attempt to assign cases to attorneys who are likely to refuse the appointment.[3]

Most witnesses agreed that the quality of appointed counsel did not differ appreciably from the quality of representation provided in cases where a defendant retained his own counsel. As one Justice put it, there are only so many attorneys in the state who do criminal work at all, and generally the same attorneys who do retained criminal work also accept court-appointed cases. Testimony disputing this finding was also received by the subcommittee. Some witnesses testified

that particularly in the larger urban areas of the state, a large portion of the indigent defenses cases were assigned to attorneys "just out of law school," the implication being that these attorneys lack the necessary knowledge and experience to provide the same quality representation as more seasoned attorneys. The judicial representatives, as well as several of the attorneys present, suggested that this situation was not as severe a problem as might be expected, since judges routinely search for more experienced attorneys to handle cases where the indigent defendant is charged with a more serious crime, particularly in murder cases. Testimony was unanimous that, regardless of their inherent abilities, appointed attorneys represented their clients in assigned cases just as zealously as they served their retained clients.

Data from the Attorney General's office provided further evidence that attorneys who participate in the present system are satisfactorily representing their indigent clients. The Attorney General provided the subcommittee with data indicating that in petitions for post-conviction review which had been closed over the past three years, petitioners received relief in only eight cases. Six of those cases involved missed filing deadlines due to a particularly confusing court appellate rule which was recently corrected, leaving only two cases in which the attorney of record failed to present a constitutionally-adequate defense. This data included petitions filed by both indigent and non-indigent defendants. In light of the fact that the State has prosecuted roughly 30,000 indigent individuals during that time, it is readily apparent that indigent criminal defendants in Maine are receiving an adequate defense. This conclusion is further buttressed by the small number of grievances filed with the Board of Bar Overseers concerning criminal defense representation. For dispositions in 1987, the Board reported only eight cases in which any action was taken against criminal defense attorneys. These statistics were also not limited to cases where the defendant was indigent but included data for all criminal cases.

The subcommittee also investigated the distribution of the indigent defense workload among attorneys. According to some witnesses, although the lack of sufficient participating attorneys was apparently not so severe as to cripple the present system, it was severe enough to cause dissatisfaction among those attorneys who do participate. A frequently-heard criticism was that, particularly in rural areas of the state, a few participating attorneys end up carrying the indigent defense workload for the non-participating attorneys. This testimony is supported by data from the Maine State Bar Association study which shows that in several rural areas of the state, the system is precariously subject to the continued participation of a very few attorneys who bear the brunt of the court-appointed workload for those areas. This situation is aggravated by the fact that very few new attorneys, the type of attorney willing to accept court appointments in order to establish his or her practice, are moving to these areas. As

some witnesses testified, this inequitable distribution of the court-appointed workload meant that participating attorneys worked several hours at $40 an hour while their non-participating counterparts were working at higher rates and earning more money. An apparently even more aggravating aspect of this dichotomy was that the participating attorneys not only earned less money per hour, but also, because they accepted court-assigned cases, they had to pass up more lucrative private work which went by default to their competitors. In essence, participating attorneys could possibly be losing clients because of their goodwill toward the state system and sense of ethical responsibility to help provide representation for indigent defendants.

2. The amount of compensation paid to attorneys who perform court-appointed work.

The rates and amounts of compensation paid to attorneys who accept court-assigned cases was a frequent topic of testimony presented to the subcommittee. Both the judiciary and members of the bar agreed that the system had for several years severely under-compensated participating attorneys. Until the recent appropriations increase, the maximum hourly fee paid to participating attorneys was $20 per hour. All witnesses agreed that this amount did not even approach the average hourly overhead of almost all practicing attorneys. The result was that the cost of providing indigent criminal defense, an activity constitutionally imposed upon the State, was in effect being subsidized by private attorneys. In other words, participating attorneys were "paying" a large portion of the costs more appropriately charged to the State.

The system managed to continue operating at relatively low cost (to the State) in this manner for several years while the Legislature declined to increase the program's appropriation, despite repeated attempts by the Judiciary and bar to encourage additional appropriations. Additional appropriations were only made after several attorneys located in rural areas of the state announced that they would no longer accept indigent criminal defense appointments unless additional compensation was forthcoming.

As a result of the recent increase in the system's appropriation, the maximum hourly rate has been increased to $40 per hour, placing Maine's rate of compensation slightly above the level suggested by an American Bar Association consultant in 1986.[4] Even at this rate, many attorneys who accept court appointment will not make money on such cases. As one attorney stated, before the increase, he lost $20 an hour on indigent cases just to pay his overhead; now he will just about break even. Several attorneys however, particularly those who are just beginning their practice and some rural attorneys, will be able to actually show a slight profit on court-appointed cases now.

Several attorneys who accept court-appointed cases now expressed dissatisfaction with the method and amount of payment under the current system. Delay in receiving compensation was a common complaint among these lawyers. Others complained of the variation in fees approved by different judges as well as the lack of variation in some courts, where a standard fee for attorneys' services is paid (e.g. $100 for an OUI defense case) regardless of the different amounts of work expended by the attorneys in those cases. Finally, the Law Court's maximum fee of $500 for a criminal appeal was termed "insulting" by one attorney.

3. The level of support services.

The third area in which the subcommittee received testimony involved the availability of support services for the representation of indigent criminal defendants. Such support services often required for an adequate criminal defense include the use of private investigators and expert witnesses to aid in the preparation and presentation of an accused's defense. As the constitutional right to counsel has been developed, the courts have consistently recognized the need for adequate support services if an accused is to receive adequate legal representation. *See Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

The testimony in this area was generally critical of the extent to which support services are available to indigent criminal defendants under the present system. The participating attorneys who appeared before the subcommittee generally agreed that their clients in court-appointed cases do not receive the benefit of support services to the same extent as their retained clients. The primary objection was not that judges were unwilling to provide funds for such services in appropriate instances, but that the amount provided was too little to adequately pay for the necessary work. One private investigator who testified before the subcommittee estimated that the average fee ceiling in court-appointed cases ranged from $175 to $250, with a great deal of variation among the various state court judges. He further stated that, "when the amount approved by the judge runs out, I stop working." He did say that he might continue working on a case (with no compensation) if the lawyer provided him with other business or in exceptional cases.

II. THE PROPOSED PUBLIC DEFENDER SYSTEM

There are several different methods employed by the various states to satisfy their obligation to provide legal representation to indigent criminal defendants. As stated earlier, the oldest such program is a court-assignment system similar to Maine's current system. One possible variation on

such a system is to provide a central administrative entity to oversee the assignment of participating attorneys and their compensation, relieving the judges from these administrative burdens. Another common alternative is for the state to contract with state bar associations, law firms or individual lawyers who agree to provide a certain amount of legal representation for a set fee. This method was in use in 18 states as of 1986. The subcommittee did not focus its attention on these alternatives as we understood that we were directed to study only the feasibility of creating a statewide public defender system in its traditional sense.

A "traditional" public defender program involves an independent entity which employs one or more lawyers and necessary support staff to provide legal representation for indigent criminal defendants. Areas which have adopted public defender systems still tend to retain a court-assignment or contract system as well, since the public defenders' office may not be able to handle cases with multiple defendants due to a potential conflict of interest. The popularity of public defender programs has increased dramatically since the inception of the first program in Los Angeles in 1913.[5] As of 1986, 37% of all counties in the United States employed a public defender system while another 11% employed some form of contract system.[6] In fact, Maine and North Dakota are the only two states in the United States which do not have some form of public defender office in operation, and Maine is the only state that relies upon assigned counsel as its sole means of providing indigent criminal defense.[7] The clear trend over the past years has been a movement toward increased use of public defender offices and contract systems, particularly in the larger urban communities.[8]

The subcommittee focused its inquiry regarding the proposed public defender system upon three factors: (1) The potential cost of establishing and maintaining such a system; (2) The quality of legal services provided to indigent criminal defendants under a public defender system; and (3) Other potential effects caused by the creation of a public defender system.

1. The potential cost of establishing and maintaining a public defender system.

Any estimate of the potential costs involved in creating and maintaining a public defender system in Maine must rely in part on guesswork. It is very difficult to simply compare the costs that other states have incurred under their programs since so many factors can affect such a comparison, such as the number of cases, the types of cases, the number of cases with multiple defendants, and geographic and demographic factors among several others. Similarly, it is not valid to simply calculate the expense of all prosecutorial offices in the state

and assume that a public defender system will essentially mirror those expenses since not all criminal defendants are indigent. Additionally, a public defenders' office would require independent investigators, unlike the prosecutorial offices which can rely upon the efforts of law enforcement personnel.

With these cautions in mind, the subcommittee attempted to estimate the cost of creating a public defender system in Maine by comparison with cost figures supplied by the New Hampshire Public Defender Program and the Maine Prosecutors' Association. The cost of operating New Hampshire's Public Defender Program in the last fiscal year, as provided by its executive director, was approximately $2,800,000. Since New Hampshire does not rely exclusively upon its public defender offices to provide indigent criminal representation, but also employs both contract and court-assigned attorneys, its total annual expenses for providing indigent criminal defense are higher, approximately $4,300,000. This figure represents the costs of providing legal representation for approximately 11,000 indigent criminal defendants; by way of comparison, Maine has an indigent criminal caseload of approximately 10,000 persons. The Maine Prosecutors' Association provided the subcommittee with the financial figures relating to the cost of prosecuting criminal defendants in Maine. Including the costs of each prosecutorial district, and adding to that the cost of the criminal division of the Attorney General's Office, that total comes to $4,636,567. The Prosecutors' Association also estimated the cost of providing comparable office space for public defender offices at approximately $500,000, bringing the total necessary to replicate the state's prosecutorial services to $5,136,567.

2. The quality of legal services provided to indigent criminal defendants under a public defender system.

The second major focus of the subcommittee's inquiry was the quality of legal representation provided to indigent criminal defendants under a public defender system. The subcommittee received testimony on this issue from several witnesses, most of whom agreed that, with certain exceptions, a public defender system would probably result in more effective representation in most cases.

Testimony was unanimous that attorneys employed by a public defenders' office gain some measure of expertise in criminal defense for the same reasons that district attorneys become experts in prosecuting cases. By handling many cases within the same general area of law, a public defender gains extensive knowledge of the criminal law, and by working side-by-side with other criminal defense specialists, the public defender gains knowledge from the experience of his fellow public defenders. In addition to a knowledge of the law, a public defender also

gains familiarity with the criminal justice system. In this manner a public defender will have better knowledge of the judges, prosecutors and law enforcement personnel with whom he must deal on a regular basis. Presumably, this makes it easier to gauge when to attempt to plea bargain a case and what result you are likely to obtain. A public defenders' office may also streamline the defense of cases by creating standardized pleadings or trial tactics. The presence of staff investigators could be a further benefit of a public defenders' office, providing quality investigative support for indigent criminal defense.

Some witnesses also discussed ways in which a public defenders' office could reduce the quality of legal representation provided to indigent criminal defendants. For instance, in a small number of cases, indigent defendants may actually receive better representation under the present system where they are represented by a very experienced and outstanding private attorney. That defendant may well be represented by a less-talented attorney under a public defender system.

3. Other potential aspects of a public defender system.

Several witnesses discussed other potential effects caused by the creation of a public defender system in Maine. The judicial representatives who spoke with the subcommittee suggested that a public defender system would ease the court's present administrative burden of operating the court-assignment system, freeing up judicial resources for other tasks. At the same time, one judicial representative also suggested that a public defender system could in time become a powerful institutional force. Noting that only 5% of all criminal cases go to trial under the present system, the representative suggested that a public defenders' office could conceivably take all cases to trial, threatening to overload the criminal justice system. As the office gained institutional power, it could also use this power as a tool to influence plea bargains, resulting in more lenient sentences for their clients. Similarly, since public defenders are not responsible for their time in the same manner as private attorneys, they may file more unnecessary motions and further clog the court system. The director of the New Hampshire Public Defender Program noted that these fears had been expressed in that state before their program was instituted, but had proven to be false. He further testified that, in fact, the court system now operated even more smoothly than previously since the public defenders were more familiar with the process, and that the state's judges had become enthusistic supporters of the program. He also added that an additional advantage of a public defender program was that it provided a central source of data regarding a state's indigent criminal defense system, making it easier to evaluate the state's expenses in this area.

Witnesses also made note of the fact that in some states, the public defenders' office had gone down one of two extreme paths. They had either become large, inefficient bureaucracies or they were understaffed and severely overworked. In the first example, any cost-savings potentially achieved through economies of scale had been lost, and in the second, indigent criminal defendants received low-quality representation and the office had difficulty retaining qualified staff due to a high "burn-out" rate.

III. DISCUSSION OF ISSUES

The purpose of this study, as approved by the Legislative Council, was to determine the financial feasibility of a statewide public defender system for the State of Maine. The subcommittee understood this purpose to require the subcommittee to determine whether a public defender system would be a wise and cost-effective method for the State to fulfill its constitutional obligation to provide legal representation for indigent criminal defendants. The subcommittee undertook this determination by investigating three basic issues: (1) How much would a statewide public defender system cost?; (2) Would a public defender system resolve the problems experienced under the present system?; and (3) What additional benefits would the State receive in return for its investment in a public defender system?

1. How much would a state-wide public defender system cost?

The basis upon which the subcommittee could evaluate the financial feasibility of a public defender system for Maine must obviously be the cost of creating such a system. Unfortunately, it is this very area where the least hard data is available. The subcommittee attempted to use the cost data obtained from the New Hampshire Public Defenders Program and the Maine Prosecutors' Association to make a reasonable estimate of potential costs.

As previously discussed, several factors prevented the subcommittee from simply assuming that a public defenders program would require the same amount of funding as the prosecutors' offices. The Maine Prosecutors Association attempted to take these various factors into account, and came to the conclusion that a conservative estimate of the cost would be approximately 75% of the prosecutorial costs, or roughly $3,850,000. This figure compares favorably with the New Hampshire figure of $2,800,000 to operate its public defender program, since one would expect Maine's costs to be higher given the different geographic and demographic factors, such as the larger geographic area to be covered in Maine and the lower population density of those areas.

The costs of creating a public defender program alone, however, does not tell the whole story. Even if the State were to adopt a public defender program, it would still have to pay for legal representation provided by private attorneys for cases where the public defenders' office could not represent an indigent criminal defendant, such as where multiple defendants were involved. It is very difficult to estimate the amount of these costs, since no data is available to determine how many instances occur where criminal charges arising out of the same incident are brought against multiple indigent defendants. If we assume that Maine would experience a "spillover" similar to New Hampshire (which has only a very slightly higher number of indigent criminal defendants), we can use New Hampshire's extraneous costs as a guide. New Hampshire spent approximately $1,500,000 in their last fiscal year to pay for legal representation in these "spillover" cases. The subcommittee believes that the total cost of providing legal representation for indigent criminal defendants if Maine was to institute a public defender system would be in the neighborhood of $5,350,000. This is an increase of almost 50% over Maine's expected expenses for indigent criminal defense in the current fiscal year. This year's total appropriation for indigent defense is $4,478,291. If previous years' experience continues, approximately 80% of this figure will be used to provide legal representation for indigent criminal defendants (the remainder will be used to provide court-appointed counsel in child-protective cases).[9] Assuming this to be true, Maine will expend approximately $3,600,000 to provide legal representation for indigent criminal defendants in the current fiscal year, approximately $1,750,000 less than the projected expense of a public defender system.

2. Would a public defender system resolve the problems experienced under the present system?

The second primary factor to be considered in determining the feasibility of creating a public defender system for the State is whether such a system effectively addresses the problems experienced under the present court-assignment system.

The most evident problem under the existing system is the lack of sufficient participating attorneys in the rural areas of the state. Unfortunately, a public defender system is not well-suited to provide legal services for indigent defendants in these areas. A public defender system works best in areas that generate a large number of cases within a relatively small geographic area. In such an instance, a centralized office of staff attorneys can easily represent a large percentage of the total indigent caseload. While a public defender system may well be the most cost-effective means of providing legal representation to indigent criminal defendants in larger urban areas, it is not easily adapted to handle cases in the rural parts of the state. It is difficult to provide legal services

from a central office to clients who may live literally hundreds of miles apart. You cannot simply add more offices to make the services more accessible since the caseload in these areas is much smaller and would not justify the retention of the additional attorneys who would be needed to staff those offices. In addition, the creation of more offices would raise overhead expenses further reducing any cost advantage that might otherwise be achieved. Most states that utilize a public defender system also retain a contract or court-assignment system to cover the more rural areas of the state for these very reasons.

A public defender system would, to some extent, ease a second problem existing in the current system in that it would ease the burden upon those members of the bar who bear the brunt of court-assigned cases under the present system. Of course, it accomplishes this not by spreading the burden among more private attorneys but by retaining a large percentage of cases which would currently be handled by private attorneys. In doing so, it bears the risk of overburdening the staff of the public defenders' office, a situation which is not uncommon in other states. In much the same manner, but without a correlative risk, a public defender system would reduce the administrative burden upon the court system which must now find and appoint attorneys to individual cases.

A public defender system would probably have little effect upon a third area of concern under the present system, the lack of support services. At first glance, it might seem that a public defender system would provide better investigative support services than the present system as one might assume that the offices would have their own investigators as part of their staff. But the current problem in obtaining these support services is not the unavailability of private investigators, but the lack of funds with which to compensate them for their work. There is no reason to believe that if the State were to adopt a public defender system, the money necessary for adequate support services would automatically follow.

3. What additional benefits would the State receive in return for its investment in a public defender system?

The major advantage likely to accrue to the State under a public defender system would be an increase in the general quality of legal representation provided to indigent criminal defendants. There is no question that a public defender program would create a source of skilled, experienced criminal law practitioners available to indigent defendants. The public defenders would benefit greatly from the tight focus of their work, the vast experience which they would quickly amass, and the cooperation and assistance of other skilled public defenders. While we certainly do not denigrate the work

performed by attorneys under our present system, a public defenders' office would probably be able to bring a greater level of expertise to many cases while being free of the personal financial pressures which might influence a private attorney in the same instance. While certain indigent defendants would lose the benefit of having an outstanding private attorney represent them, many others would benefit from representation by generally more skilled public defenders.

One major caveat to the increased quality of legal services provided by a public defender program must, however, be recognized. If a public defender system is implemented but is underfunded to the same extent as the court-assignment system until very recently, this advantage would rapidly disappear under a smothering caseload and inadequate resources. Ultimately, the quality of legal representation provided to indigent criminal defendants is more a function of a state's willingness to support its chosen method of providing legal services, than the nature of the system which it selects. The nature of this necessary support is more than just financial, but also includes the institutional support necessary to make the system work.

Assuming this to be true, and noting some of the inherent advantages achieved under a public defender system, would a public defender system receive the support necessary for it to function efficiently in Maine? The subcommittee was surprised at the apparent lack of support for a public defender system among those parties involved with the current court-assignment system. While the courts and prosecutors chose to adopt a publicly neutral stance before the committee, it appeared that they perceived no urgent need to depart radically from the present structure. Very few attorneys who spoke with the subcommittee endorsed a public defender system, and those who did speak in its favor often did so guardedly. As a whole, while several parties commented on the need for adjustments to the present system, very few were ready to make a wholesale change to a public defender system.

While no strong desire for a change appears to exist in the state, the subcommittee was interested in the fact that Maine is one of only two states that have not adopted some form of public defender system in at least part of the state. Further, the clear trend has been toward the use of public defender systems. This trend appears to have been primarily driven by one aspect of a public defender system; in large urban areas, it provides a means of satisfying the state's obligation to provide legal representation to indigent criminal defendants in a very cost-effective way. The subcommittee examined whether the financial aspects of a public defender system alone might eventually commend its adoption in Maine.

Previous studies of Maine's court-assignment system have always praised it as being very cost-effective, finding that it compared very favorably with the costs of other state indigent defense systems. The Maine State Bar Association study cited figures showing that Maine ranked 47th among the 50 states and the District of Columbia in per capita expenditures for indigent defense in 1982.[10] By 1986, Maine had risen to 42nd.[11] Although these statistics have frequently been cited as evidence of the current system's economical operation, the per capita basis is not the best method of comparing the costs of the various states' indigent defense systems. Per capita expenditure figures tend to raise the system costs for states which have higher crime rates as compared to the apparent costs in states with low crime rates. A more accurate picture can be drawn by comparing the states' average costs per case. Cost per case figures must also be looked at with some skepticism though, since several factors can influence them as well. For example, states which experience a higher percentage of serious crimes will show a higher cost per case not necessarily due to the method by which they provide court-assigned counsel. It is also very difficult to obtain accurate data for the precise number of indigent criminal cases in each state. Although recognizing the limitations of the statistical methodology, the subcommittee found it significant that Maine's rank rose to 31st among the 50 states and the District of Columbia under the cost per case standard.[12] But even under the cost-per-case standard, it appeared that Maine was still meeting its constitutional obligation to provide counsel to indigent criminal defendants at a relatively bargain rate.

But as was suggested by the testimony described earlier, this bargain rate was achieved largely through the private subsidies received from participating attorneys through the artificially low rates of compensation. The State's appropriation for indigent criminal defense roughly doubled when the State finally recognized the need to pay its fair share of the system's costs in the past year. Although data is not yet available to compare Maine's present system costs (after the appropriations increase) with the costs for other states, a very rough approximation can be achieved by simply doubling Maine's costs in the 1986 comparisons. Such a comparison is not invalid since the appropriations increase was an extraordinary action by the State and not the result of a simple increase to offset inflation or an increased caseload. Of course, we do not have any data that indicates whether other states have experienced the need for similar extraordinary increases in their indigent defense system appropriations, so the comparison remains at best a very rough approximation of the effects of the recent appropriations increase. When this adjustment is made, Maine's system cost ranking takes a dramatic leap upward. On a per capita basis, Maine's rank changes from 42nd to 25th, but on a cost-per-case basis, Maine jumps from 31st to 6th in the nation.

Assuming more recent data, when it becomes available, bears out the apparent dramatic increase in Maine's indigent defense cost ranking, it alone may not be cause for concern. It may simply be an indication that Maine has appropriately taken greater steps to adequately support its indigent defense program whereas other states continue to underfund their own programs. It might also, however, indicate that Maine's court-assignment system is not functioning as efficiently as other states' systems. It is impossible at this point to determine which of these two scenarios is correct, if indeed either is.

IV. CONCLUSIONS & RECOMMENDATIONS

1. The State should not implement a state-wide public defender program.

The committee finds that a statewide public defender system is not justified by the facts now available. By most accounts, the current court-assignment system is adequately meeting its responsibilities. Although the system has experienced difficulty in locating enough participating attorneys in the more rural areas of the state, most witnesses agreed that the recent increase in compensation for attorneys should ease this problem. Even if that problem should persist, a public defender system is not well-suited for use in such rural areas. It functions most efficiently in areas of high population density and would not be the best alternative for the State to turn to if the problems in rural areas persist.

Although the committee believes that a public defender system certainly has some inherent advantages, these advantages alone do not justify the substantial increase in appropriations necessary to finance such a system. The primary benefit of a public defender system would be the better quality legal services that it would provide to indigent criminal defendants. All available evidence indicates that this is not a substantial problem under the current court-assignment system. Although indigent defendants may not receive the best quality representation in all cases, they certainly are receiving adequate representation.

Finally, and perhaps most importantly, the committee finds that very little support exists for the creation of a public defender system among current participants in the criminal justice system. Without this support, any attempt to implement and sustain a public defender system is not likely to succeed. We cannot recommend that the State expend the substantial amount of money needed to establish such a program without a greater showing of support from those participants.

2. The State should continue to review expenditures and performance under the current court-assignment system and should consider modifications and alternative systems in the future if warranted.

While we do not recommend that the State immediately initiate a public defender program statewide, we do recommend that the current system continue to be closely monitored and suitable options considered if future conditions warrant it.

The Committee recommends that the Judiciary continue to monitor Maine's indigent defense expenditures and their relationship to other states' expenditures. If, when the data is available, it appears that Maine's system is not operating in as cost-effective a manner as it has appeared to do in the past, the Judiciary should consider the desirability of creating public defender offices of limited jurisdiction in the larger urban areas of the State as a cost-reducing option. Such a proposal would involve different considerations than examined by this Committee and would require more detailed examination of the indigent defense caseload in those limited areas than the Committee's limited resources would allow.

We also recommend that the Judiciary continue to monitor the ability of the current system to satisfactorily serve the State's indigent population in the more rural areas of the state. Although most witnesses agreed that the additional compensation recently approved will ease, if not eliminate, one principal impediment for attorneys to participate in the system, other problems, such as the impact on the participating attorneys' private practices, persist. If difficulty is encountered in obtaining sufficient attorney participation in these areas, the Judiciary should consider the utility of a contract arrangement in rural areas. Again, this type of system involves different considerations than examined by this Committee and would require more detailed examination of the indigent defense caseload in those limited areas, and attorney availability and attitudes, than the Committee's limited resources would allow.

3. The Judiciary should attempt to encourage greater attorney participation in the current court-assigned system.

Particularly in rural areas, the Judiciary must attempt to draw more attorneys into the system and must continue its recent efforts to ease the practical difficulties and impact upon the practice of participating attorneys. The present system works well now largely through the good will and sacrifices made by private attorneys in supporting the system. If participation in the system continues to carry with it deleterious effects upon a participating attorney's private practice, we risk alienating these attorneys and exhausting the bank of good will and ethical responsibility upon which the

system has for too long heavily drawn. We also urge the Maine State Bar Association to encourage greater participation by qualified attorneys in an effort to spread the burden of providing representation for indigent criminal defendants.

4. The Judiciary should attempt to ensure that adequate support services are available to indigent criminal defendants.

The Judiciary should be more willing to grant reasonable requests for the assistance of private investigators and expert witnesses. While many attorneys have participated in the system in the past for little or no compensation out of a sense of ethical responsibility, the expert witnesses and private investigators necessary to provide a complete defense may not feel similarly compelled. The Judiciary must, however, be supported in this effort by the Legislature. Judges do not artificially limit the amount of funds provided for individual cases out of parsimony or spite, but are simply trying to divide an already inadequate financial "pie" in the most efficient manner. In the future, the Legislature must be more sensitive to the need for these support services when appropriating funds for the system.

5. The State should continue to fund adequately its indigent criminal defense program, in whatever form it takes, in order to avoid future "crises" in the system.

The most recent "crisis" in the court-assignment system did not come as a surprise to many observers. The system had for many years been underfunded and was dependent upon the goodwill and cooperation of private attorneys to keep the system operational at artificially low expense. The recent increase in appropriations was a long-overdue adjustment which unfortunately required a "crisis" to achieve. The Legislature must continue to adequately fund its indigent legal defense system regardless of whatever form it may eventually take. The constitutional obligation to provide indigent criminal defendants with effective legal counsel rests upon the State, not the private bar. The State must be willing to ensure that this burden is met in the future.

6. The State should continue and expand the pilot program that provides greater screening of criminal defendants who claim to be indigent, assuming the final data supports the early indications presented to the subcommittee.

Although final data is not yet available, the Committee was very impressed with the early indications obtained under the pilot indigency screening program in effect in Cumberland County. In that program, the court employs a full-time investigator to determine whether criminal defendants who claim to be indigent are able to afford their own attorney or not.

According to a court spokesman, this program has reduced the number of criminal defendants who are found to be indigent by 25%. By providing sufficient resources to enable the courts to more searchingly evaluate a criminal defendant's claim of indigency, the system may actually reduce its costs by screening out defendants who have sufficient income to hire a private attorney. If the final results continue to reflect the results obtained to this point, the Committee recommends that this program be expanded throughout the state.

FOOTNOTES

[1] United States Constitution, Sixth Amendment.

[2] *Powell v. Alabama*, 287 U.S. 45 (1932).

[3] Report of the Maine State Bar Association's Commission to Evaluate Maine's Court Appointment System (1986), Table 28, p. 82.

[4] Spangenberg, Robert L. & Smith, Patricia A., An Introduction to Indigent Defense Systems (1986), p. 26.

[5] *Ibid*, p. 11.

[6] Bureau of Justice Statistics, Bulletin, Criminal Defense for the Poor, 1986 (1988), p. 3.

[7] *Ibid*.

[8] *Ibid*.

[9] Figures obtained from the Maine Administrative Office of the Courts for fiscal year 1987.

[10] Report of the Maine State Bar Association's Commission to Evaluate Maine's Court Appointment System (1986), p. 1.

[11] Bureau of Justice Statistics, Bulletin, Criminal Defense for the Poor, 1986 (1988), p. 5.

[12] *Ibid*.

6538m/GB

APPENDIX A

This Appendix is provided as an addendum to the full committee report by Representative Daniel Warren, who served as chairman of the Public Defender Study Subcommittee.

ADDENDUM TO THE REPORT OF THE PUBLIC DEFENDER SUBCOMMITTEE

The subcommittee studying the public defender issue has voted unanimously to refrain from recommending at this time to the full Legislature that a public defender system be established in the State of Maine. Some enlightening information that came to the attention of the Committee the summer and fall of 1988, however, and some unfortunate lack of information on certain points, causes the committee to use considerable caution in making its recommendation against a public defender system.

The hearings and work sessions held during the summer and fall of 1988 provide grounds for the following additional statements, to be taken as an appendix to the full report by the Committee.

(1) Testimony from defense lawyers, district attorneys, and court personnel made it clear that the practice of criminal law is becoming increasingly complex in the State of Maine and nationwide. At one time, cases involving arson, rape, and any other charge involving evidence of hair, blood, semen or fingerprints might have been considered easy, or at least straightforward, cases. That is no longer fact. There have been great technological advances made in the past decade in the area of criminal defense. The scientific community and the legal community have combined to provide courts with greater ability to determine such things as the cause of a fire, the source of a sample of semen, and the source of a blood sample or hair sample. In fact, nationwide seminars are regularly held throughout the country on these highly technological topics. The thrust of the seminars, which are attended both by private practice lawyers who practice criminal defense and by prosecutors, is that issues affecting a person's liberty, or loss of liberty, will be decided according to whatever evidence is produced by expert witnesses at trial on these scientific and technical points. Therefore, it has become clear to intelligent and reasonable observers of the criminal law process in Maine, that to ensure that criminal defendants, and indigent criminals, receive a vigorous and fair defense, the lawyers handling the criminal defense work must be knowledgable and skilled in these technical areas.

Many members of the Committee received the impression during hearings over the summer and summer of 1988 that criminal defense work was not particularly lucrative for most

lawyers in Maine. It certainly could not be called lucrative for those handling court appointed cases. With this in mind, it is probably difficult for lawyers in the criminal defense area, especially court appointed lawyers, to attend seminars that deal on these scientific topics. The reasons are the time and expense involved.

Occasionally, members of the State's prosecutorial staffs and members of the staff of the Maine Attorney General in Augusta attend some of these specialized seminars. There is no doubt the taxpayers are well served by the expenditure of public funds so that these public prosecutors may gain greater knowledge in important areas affecting criminal cases. Certainly the quality of criminal defense work in the State of Maine would be increased if more lawyers had access to these seminars. It is reasonable to believe that if a Public Defender's Office was established and could set aside funds for attendance at such seminars, the level of representation would increase. Also, to the extent that lawyers in a Public Defender's Office would be handling many of the same types of cases over and over, the level of quality in representation would increase because lawyers would become more familiar with the issues that were going to be involved in criminal defense cases. For many reasons, the Committee during the summer and fall of 1988 heard no testimony about severe errors by Maine criminal defense lawyers harming clients in criminal cases. Statistics indicate that, by in large, the defense provided to criminal in its defendents is "constitutionally adequate." The level of quality in representation would certainly increase from that constitutional minimum standard to a higher standard should Maine criminal defense lawyers be better schooled in highly technical areas that district attorneys are schooling themselves in.

The Committee suffered from an unfortunate lack of information concerning support services and private investigative services that might be available in an organized, statewide public defender system. Private investigator William O'Rourke from South Portland indicated that private investigator services can often be crucial to the successful defense of an indigent criminal defendant. He outlined for the committee some of the standard functions he performs in privately retained cases and in court-appointed cases. He admitted that he occasionally is not allowed to do all of the work he feels is necessary in a criminal case if the defendent is indigent and must rely on court permission for private investigative funds. He said that courts routinely limit the amount of funds available. There was also no indication from him that investigative equipment is provided to indigent defendants, such as video tape equipment, 35mm cameras, tape recorders, or other devices that are sometimes used by private investigators in criminal and civil court cases. The Judiciary Committee could benefit from additional testimony in this area to learn whether such private investigator services and

equipment costs could be reduced or streamlined by the establishment of a statewide Public Defender System that could have such equipment for use throughout the several counties.

(2) Although the Judiciary Committee's Public Defender Study Subcommittee has unanimously recommended against the establishment of a Public Defender System, the major reason did not turn out to be financial. Going into the initiation of the study in the summer of 1988, many committee members possessed only that sketchy financial information about the establishment of a Public Defender System that they had received informally during the 1987 and 1988 sessions of the Maine Legislature. During both of those sessions, there were bills before the Judiciary Committee to establish a Public Defender Office. Perhaps the most publicized cost estimate of setting up a Public Defender System throughout Maine with the estimate of 14 million dollars.

On September 29, 1988, Debbie Olken of the Administrative Office of the Courts in Portland testified before the Public Defender Subcommittee. She estimated that in fiscal year 1991 the costs of providing indigent criminal defense in the State of Maine would approximate 6 million dollars. She said that the cost of the program, for paying attorneys and other costs, in 1987 was 2.5 million dollars. She said the projected increase had to do with the recent increase passed by the Legislature's Appropriations Committee, along with other increased cost portions of the program, including $400,000 in private investigator and expert witness fees. These were some of the fees mentioned above in this Appendix.

The subcommittee received no indication from the Administrative Office of Courts about how costs could be reduced or streamlined. The courts are, however, actively pursuing the screening program of criminal defendants to determine if they are in fact indigent.

During legislative hearings in front of the Judiciary Committee in 1987 and 1988, proponents of a Public Defender System thought that the 16 county district attorney offices and Pine Tree Legal offices statewide could provide a model concerning how public defender offices could be set up throughout the State of Maine. Proponents have acknowledged that there would be similarities and also differences among these various systems. With this in mind, the Public Defender Study Committee received testimony from Aroostook County District Attorney John McElwee at its August 11, 1988, work session that the budget for all prosecutorial offices statewide and the Criminal Division of the Attorney General's Office was approximately 5 million dollars. He said that approximately 1.9 million dollars was for salaries and benefits and that an additional approximately 1.9 million was budgeted for other costs. There was also a substantial cost for lease payments for office space statewide. This number was surprising to the members of the Public Defender Study Committee who had received

information in 1987 and 1988 that the cost of the prosecutorial system statewide was far higher. Earlier estimates had been that the prosecutorial system was between 8 million and 10 million dollars.

The Public Defender Study Subcommittee also took a close look at the New Hampshire Public Defender System. On August 11, 1988, the committee heard from David Garfunkle of the New Hampshire Public Defender Program. He had many comments to make about the operation of the system, the purposes of the system, and costs. Most significantly, he testified that the cost of the public defender system in New Hampshire had been approximately 8.4 million dollars for the 1986 and 1987 years in New Hampshire. That two year figure was far below earlier estimates received by the Judiciary Committee. He has forwarded financial figures and detailed information to the subcommittee for review by its members.

The financial figures provided by Maine prosecutors and by the New Hampshire Public Defender Program were refreshing in that they will now allow legislators on both sides of the public defender question to debate the topic with a better grasp on financial figures, and with perhaps more focus on the merits of the program. Some committee members earlier on had been skeptical of the proposal for a public defender system on the grounds that the costs would be exorbitant, perhaps 14 million dollars per year or greater. Finally, Pine Tree Legal Assistance provided budget figures to the committee during the summer/fall of 1988. Pine Tree Director Pam Anderson informed the committee on September 29, 1988, that the annual Pine Tree budget was approximately 2 million dollars. Comparisons between the proposed public defender system and the criminal justice system in Maine and the Pine Tree Legal System are difficult, however, because Pine Tree handles only civil matters, which often involve only a telephone inquiry. A public defender system, of course, would be handling criminal matters and the involvement of attorneys and personnel in the public defender office would be far more substantial than mere telephone contact.

The Committee had hoped to obtain a clearer view on current public defender systems in other states and also of the court appointed and private defense bars in the State of Maine. Scheduling problems prevented numerous lawyers from testifying before the subCommittee in the summer and fall of 1988, however, therefore depriving the committee of much needed information.

(3) Prior to the initiation of the Public Defender Study during the summer of 1988, there was much discussion about whether the recent appropriation increase provided by the Legislature to the court appointed attorney system would solve the problem of a lack of sufficient number of lawyers to handle the caseload in the system. The general consensus seemed to be that the increased appropriation would solve the problem.

Although the committee received some testimony from court appointed lawyers who depend on the court appointed system for their livelihood and who welcomed the fee increase, the Maine Supreme Court on July 26, 1988, issued an administrative order concerning fee schedules for court appointed counsel. This order from Chief Justice Vincent McKusick set what amount to flat rates on certain types of cases taken by court appointed lawyers in the system. This will have the effect, among other things, of reducing the hourly rate at which a lawyer is paid on a case in which the lawyer works an excessive amount of hours. A copy of the multi-page order from Justice McKusick is attached to this Appendix. The subcommittee members did not have the opportunity to receive and discuss this order prior to the conclusion of subcommittee deliberations in the fall of 1988. This Appendix includes the order because the figures are relevant to the subject matter the committee studied during the summer and fall of 1988. Also, there is no suggestion that increased fees will improve services on such topics as those mentioned at the outset of this Appendix, namely, the skills of a lawyer handling a court appointed case in the field of arson or in any case involving blood, hair, or semen samples.

(4) Perhaps the most unfortunate lack of information concerning the Public Defender Subcommittee Study during the summer and fall of 1988 was the lack of input from the consumers in the system - the indigent criminal defendants. For a variety of reasons, many of them scheduling and many of them short-term of the study, no indigent criminal defendants who had gone through the system appeared before the subcommittee as witnesses. Since the object of the study, at least in part, was to examine whether these individuals are well served or adequately served, it obviously would have been relevant to have some of these individuals appear before the committee. Hopefully, if the Legislature takes a look at this topic again in the future, such individuals can be consulted. The Administrative Office of the Courts could certainly share with the committee public records from court houses indicating names and addresses of individuals who have been served by court appointed attorneys. Perhaps a substantial and random sampling of these individuals would be helpful to the committee in gaining a view from a human perspective about whether the system works. Unfortunately, the majority of the testimony about the current system working in Maine came from court appointed attorneys whose livelihoods depends on the system continuing, and who oppose a public defender system that would deprive them of this work and income. The committee acknowledged that the attorneys appearing before it were experienced, hard working individuals with the goal of seeing that justice is done. The committee notes, however, that these individuals would have a financial conflict of interest in appearing before the committee to advocate Public Defender System in that they would in some instances be advocating a system that would take money out of their pockets.