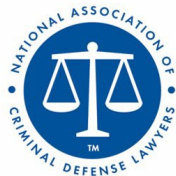




Strengthening the Sixth Amendment in Texas: Supporting the Right to Present a Defense Through Defense Investigations

**Preliminary Report & Recommendations to the Texas Indigent
Defense Commission**



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1. Background

"Even when his counsel is competent and diligent, a defendant may be deprived of the promise of Gideon due to a lack of investigative and expert services. A lawyer, even a very skilled and highly competent lawyer, is no longer enough."

The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After Gideon v. Wainwright (2013).

According to the Texas Indigent Defense Commission (TIDC) 2020 Annual Report, 138 of the 254 counties (54%) in Texas reported no expenditures for defense investigation.¹ The majority of jurisdictions reporting zero or minimal expenditures were small and rural communities. Concerned that investigators were being underutilized in Texas, the TIDC applied to the Bureau of Justice Assistance (BJA) for Training and Technical Assistance (TTA) in February 2021 to examine the use of investigators in court-appointed cases.²

1.1 TTA Request and Process

A team was assembled to provide the requested TTA. The team consisted of two main groups, those from the Justice For All: Sixth Amendment TTA grant project (JFA team) and those working and practicing in the state of Texas (Texas team). The JFA team included representatives from all four of the JFA grant principles: the Association of Prosecuting Attorneys, the National Center for State Courts (NCSC), the National Association of Criminal Defense Lawyers (NACDL), and RTI International. The Texas team included members of TIDC as well as an advisory group of a broad range of legal system stakeholders.³

At the project's kickoff meeting on May 13, 2021, attending members of the Texas team discussed some of the challenges and strengths of the Texas public defense

¹ Texas Indigent Defense Commission (TIDC). (2020). *Annual report for fiscal year 2020 (September 2019–August 2020)*.

http://www.tidc.texas.gov/media/8d92f48d6bbd826/tidc_annual_report_fy20.pdf. See also Carmichael et al. (2015). *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* ("TIDC Caseload Study"). Public Policy Research Institute, Texas A&M University. ("investigators are rarely used among attorneys in the study." The report also indicated that many defense attorneys felt that investigators should be used more frequently and reported that investigators are especially useful in finding and interviewing witnesses.)

² Assistance in this project was provided under BJA's Justice For All: Strengthening the Sixth Amendment grant (Grant Number: 2019-YA-BX-K001). This grant is part of the Justice for All Act of 2004. More information on this grant can be found at: <https://strengthenthesixth.org/Focus/Justice-for-All-Strengthening-the-Sixth-Amendment>.

³ See Appendix 1 for a full list of Advisory Group and TIDC Staff members.

system and the attorneys who provide public defense representation.⁴ From this robust group, a smaller working group was formed, meeting monthly to provide input and feedback on the project's progress and proposals.⁵

One of the initial steps in the process was for the JFA team to survey Texas investigators to understand their perspectives on how they were being utilized and what barriers, if any, existed in serving as defense investigators in court-appointed cases. Additional information, such as years of experience, level of education, and prior training in law enforcement, were also collected in the survey. The investigator survey was followed by a similar survey for defense attorneys.⁸

In completing the survey, both defense lawyers and investigators were asked to identify the primary jurisdiction in which they worked and up to six secondary jurisdictions. Regarding the geographic representation of the survey respondents, the investigators reported working in 133 of the 254 counties, while attorneys reported working in 205 counties. Forty-one counties had no responses from either an attorney or an investigator, although some respondents in both surveys indicated that they provided statewide coverage.

Additionally, the JFA team conducted qualitative interviews of judges, investigators, and public defense lawyers⁶ from selected jurisdictions. The analysis of those surveys and interviews, along with the associated legal, ethical, and empirical research, formed the basis for this report and recommendations.

1.2 Investigation—A Critical Component of Constitutional Representation

The importance of defense investigation is highlighted in many of the national standards of practice. Both the American Bar Association (ABA)⁷ and National Legal Aid and Defender Association (NLADA) practice standards make clear that investigation is a core obligation when providing criminal defense representation.⁸

⁴ The Texas team did not participate in the creation of the recommendations that are a part of this Report and their work as part of the initial advisory group does not serve as an endorsement of the Report's findings and recommendations.

⁵ See Appendix 1 for a full listing of members of the working group.

⁶ As used in this report, the term "public defense lawyer" refers to any lawyer appointed by the court who provides representation to an individual. This includes lawyers working for public defender offices, managed assigned counsel programs, under contracts with localities to provide representation, and individual lawyers appointed by the court.

⁷ See Appendix 2 for the American Bar Association's *Criminal Justice Standards of the Defense Function: Standard 4-4.1 Duty to Investigate and Engage Investigators*. (ABA) (2017).

https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

⁸ National Legal Aid and Defender Association (NLADA). (2006). *Performance Guidelines for Criminal Defense Representation* (Black Letter), 4th ed. ("NLADA Defense Performance Guidelines") Guideline 4.1 Investigation, (a) ("Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.").

As the ABA notes, “[d]efense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.”⁹ This duty exists even when the evidence appears overwhelming, the defendant admits guilt to his lawyer, suggests no investigation be done, or expresses a desire to plead guilty.¹⁰

According to Backus and Marcus (2006):

[A]n in-depth analysis of nine urban public defender programs found that success in the courtroom was frequently tied to the availability of investigators. Investigators, with their specialized experience and training, are often more skilled than attorneys, and invariably more efficient, at performing critical case preparation tasks such as gathering and evaluating evidence and interviewing witnesses. Without the facts ferreted out by an investigation, a defender has nothing to work with beyond what she might learn from a brief interview with the client. With such limited information regarding the strength and nature of the case, any attorney would be hard pressed to make the sensible strategic decisions necessary to adequately defend an accused or even have any leverage in plea bargaining.¹¹

Anecdotal information drawn from both investigator and defense attorney surveys reinforce that conclusion:

Investigator Prompt: What are the most rewarding or enjoyable parts of your job?

“[To] ensure that our clients [sic] rights were protected and our actions obtained a more favorable outcome for our client. It is very gratifying...proving if the law enforcement agencies did not follow the procedures against our client... It is also very satisfying in proving to prosecutor’s [sic] that they should not depend on officer’s sworn testimony alone to charge someone.”

Investigator Prompt: Can you provide an example of how your investigative services benefitted or affected the outcomes of a recent criminal case?

“Recently my services have helped move cases through the system. Courts have been backed up... The most rewarding case recently worked was a case where a high school student was falsely accused of

⁹ ABA. (2017).

¹⁰ ABA. (2017). See also, ABA. (2002). *ABA Ten principles of a public defense delivery system*. https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclai_d_def_tenprinciplesbooklet.authcheckdam.pdf Principle 8 states, (“There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.” Its Commentary states, “There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, **investigators**, and access to forensic services and experts) between prosecution and public defense.” (Emphasis added).

¹¹ Backus, M. S. & Marcus, P. (2006). The right to counsel in criminal cases, a national crisis. *Hastings Law Journal*, 57(6), 1031–1130. https://repository.uchastings.edu/hastings_law_journal/vol57/iss6/1

sexual assault of another classmate at a party. Through witness interviews and video analysis showing contradictions to the allegations, the case never went to court.”

“Too many times to note. I’ve had entire cases turn on information discovered or proven false by my investigators. They have done crime scene reenactments for me in a capital murder case that was essential in obtaining a not guilty.”

“I can recall several instances in which an investigator has been able to find witnesses to events or alleged criminal activity that have not been listed in the police report. I have used witness interviews/statements in trial and in plea negotiations to secure a better plea or dismissals for clients.”

1.3 Reasons for Underutilization of Investigators

There are several potential reasons why over half of Texas counties reported no expenditures for defense investigators¹²:

- Attorneys are doing their own investigations.¹³ There are no investigators available in or near their county.
- There are investigators, but the investigators choose to not accept cases in a county because other counties pay more, or the process for payment is easier and faster in other counties.
- The process for requesting investigators is too difficult or takes too long, so attorneys choose to not request investigators.¹⁴
- Judges are denying defense requests for investigators or only approving investigators for certain case types or cases likely to go to trial.
- There is investigator use in the county, but the county is not tracking investigator expenses separately from appointed attorney expenditures, or the county auditor is not reporting investigator expenditures separately from appointed attorney expenditures.

¹² It is also possible that no investigation is being conducted at all (i.e., the attorney is not doing any investigation in the case). This possibility is largely outside the scope of this report and thus is not included in this list of possibilities.

¹³ Carmichael et al. (2015). (“TIDC Caseload Study”).

¹⁴ “[A]ccording to judges in Armstrong and Potter counties, court-appointed lawyers “never” use investigators in misdemeanor cases and rarely do so in felony cases. One lawyer who has been on the court-appointed counsel list for 10 years says he has used an investigator in only four cases. A different lawyer says she has “never” used an investigator in her 10 years on the Potter County list.” Some of the reasons the attorneys provided for this included that it was difficult to find competent investigators in the area, fear of judicial reprisal for making requests for funds for investigative (and expert) services, that the process to seek funding was too time consuming, and, in some instances, that they ran the risk that the judge would interfere with the defense by choosing the investigator (or expert) they would be allowed to use. Sixth Amendment Center. (2019). *The right to counsel in Armstrong County and Potter County, Texas: evaluation of adult trial level indigent defense representation*, p. 138. https://sixthamendment.org/6AC/6AC_tx_armstrongpotterreport_2019.pdf

Nationally, several other reasons are frequently advanced as to why public defense lawyers might not be using investigators:

- **Lack of knowledge.** Attorneys have limited understanding or training on obtaining and using investigators.
- **Lack of time.** When attorneys have excessive caseloads, they do not have the time to identify whether a case needs investigative assistance.
- **Culture.** In some legal communities, there is no “culture” of defense lawyers utilizing investigators. A variety of reasons can create this culture, from frequent denials by the court to a practice of lawyer-conducted investigation. Sometimes prosecution practices, including early, time-limited plea offers, can prevent investigations from regularly occurring.
- **Court practices.** In some places the process for seeking funds for an investigator themselves serves as a barrier to attorneys utilizing them. This can include practices which require the attorneys to disclose a high degree of information and/or case strategy in order to justify the funding request. Other concerns can be judicial retaliation towards those attorneys making the request or towards the client if the investigation fails to produce favorable information.

2. Findings

2.1 Judicial Involvement in the Approval Process a Barrier to the Use of Investigators

Reports indicate the courts in some jurisdictions may be a critical barrier to the use of investigators in court-appointed cases. For example, a 2019 Tarrant County monitoring report indicated the total amount of funds for investigative services in misdemeanor cases for the fiscal year was less than one-half of 1% of the overall court-appointed expenditures.¹⁵ Felony expenditures did not fare much better, with the total defense investigator expenditures for the county representing just over 3% of the total felony expenses.¹⁶

When asked what might explain the low expenditures, some attorneys indicated that judges discouraged use of defense investigators by frequently refusing to approve funds and cutting vouchers for work that was completed.¹⁷

During JFA interviews with judges in counties with zero investigator expenditures, only one judge mentioned reducing investigator invoices, explaining that they only reduce invoices when the investigator double-charges, such as charging for both mileage and travel time to interview a witness.

In court-appointed cases, judges make decisions to authorize funds to hire an investigator, the amount of funding, and the amount ultimately to be paid to the investigator after the work has been completed.

Interviews with investigators as well as survey responses revealed that judges in some jurisdictions are slow to approve requests for investigator funding. There were consistent reports that courts routinely cap the amount of funds to be authorized for an investigation at \$500 (which, in many jurisdictions, amounts to a total of 10 hours of work). Allowing time for travel and to review discovery, little money may be left to use to locate and interview witnesses, follow up on leads, and identify and recover other evidence.

Several investigators reported courts reducing investigator invoices, even when the total amount billed is at or below the cap, based on after the fact judicial decisions about whether particular efforts by the investigator were necessary:

¹⁵ Data reflects spending was 0.38% of the total misdemeanor public defense expense budget for the county. Supplement to Tarrant County Monitoring Report (2020): Additional Observations on Attorney Qualifications.

¹⁶ *Id.*

¹⁷ *Id.* at p. 4. See also, "[His Clients Weren't Complaining. But the Judge Said This Lawyer Worked Too Hard.](#)" By Richard Oppel, Jr., New York Times, March 29, 2018.

Investigator prompt: The most challenging or frustrating part of my job is:

“Obtaining adequate and timely financial authorizations from the courts on appointed cases ... Obtaining full expense recover[sic] and compensation from the Courts in a timely manner at the conclusion of investigative services. Appointed Investigator Vouchers are currently being parsed and expense recovery is being arbitrarily cut by the Courts simply because ... a Judge does not believe a particular line item expense was warranted or the investigative service it represents was necessary to the defense.”

The high degree of *post hoc* assessments as to the “necessity” of an investigation is explained by several county indigent defense plans that require defense attorneys to provide a specific, detailed description of how the investigation will “lead to admissible evidence.” This requirement disincentivizes obtaining funding by creating an additional hurdle to obtaining an investigator and can place defense lawyers in the untenable position of having to reveal confidential or sensitive information to the person who will ultimately be deciding the case.

The JFA team received responses from 16 judges in 6 of the 10 counties identified as having very low or no reported expenditures.¹⁸ The interviews asked judges about the process of requesting investigators, tracking costs and payments for investigators, the judges’ opinions about the process and use of investigators, and general court information.

In one county with zero reported expenditures, two judges reported that they receive and approve requests for investigators daily. Both judges stated that they routinely approve these requests if they are submitted with the correct information (e.g., name of investigator or firm, type of case, and what the investigator will perform for the amount requested).

In another county with zero expenditures, a judge reported via email, “The only thing I do is approve their requests when made. Which in my experience has been very seldom. I can only really remember one time in the past 5 years that I’ve gotten a request for an investigator from them....”

When asked about the costs of investigators, one judge described that a judge’s role is to “balance the need to be a good steward of the county’s funds with the

¹⁸ The JFA team received either emailed responses or conducted interviews with 12 judges in 6 of the 10 counties identified by TIDC as having low or zero expenditures. An additional 4 judges responded that the court did not handle criminal cases, and so did not receive investigator requests. The 6 Texas counties included Cameron, Colorado, Ector, Howard, Liberty, and Gregg.

need to provide a robust defense.” A second judge stated that judges must be mindful of taxpayer funds, and not to waste those funds¹⁹:

“I just don’t hand out court-appointed lawyers, nor do I appoint investigators or expert witnesses like a bag of lollipops because once again, I’m conscious of who has to pay for these. But if the need is there, absolutely. And certainly an indigent person is entitled to representation, and we don’t quibble about that. But I do look hard at appointing investigators. I just don’t want a lawyer to say, ‘Well, I’m just going to sit in my office, and I’m going to have the taxpayers pay for an investigator to go out and talk to witnesses,’ when it’s their damn job to do so. That aggravates me.”

2.2 Availability and Reported Qualifications of Investigators

To learn more about where the investigators are located, NACDL made a public records request to the Texas Department of Public Safety. In response, a list of every person with a current Texas private investigator’s license was provided.²⁰

2.2.1 Licensed Investigators

According to the Department of Public Safety, there are 33,734 persons with active private investigator licenses in Texas. These individuals work for one or more of the 2,436 licensed investigator agencies (of which 2,280 have a physical address in Texas). One-third of these agencies have physical addresses in one of five major cities: Austin (103), Dallas (159), Fort Worth (80), Houston (301), and San Antonio (128).²¹

The investigator survey asked respondents to report whether they held a current license. Fifty-six percent of the responding investigators reported that they were currently licensed. However, only 16% of investigators employed by public defender offices reported being licensed, while 86% of investigators working for other attorneys (e.g., contract counsel, appointed attorneys, MAC, or privately retained) reported having a current license.

2.2.2 Geographic Coverage

The investigator survey asked investigators to identify the county in which they primarily provided defense investigation services and allowed them to identify up to 6 more counties for a maximum total of 7 counties. In terms of investigator

¹⁹ See also ABA. (2002). Principle 1: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.” The Commentary to Principle 1 makes clear “[t]he public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”

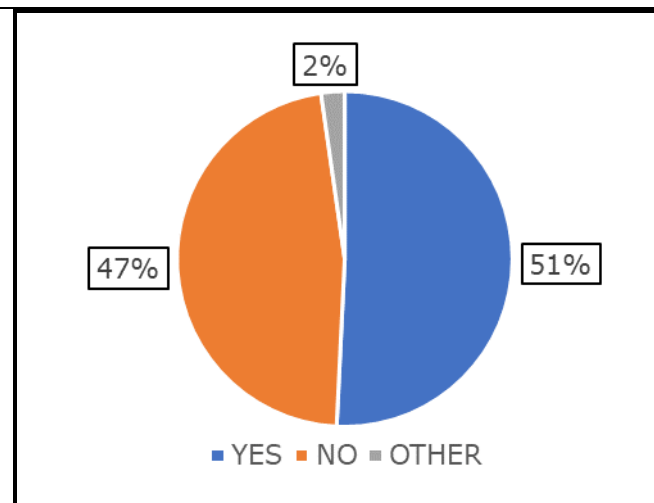
²⁰ *Note:* Licensure is *not* required of investigators working for public defender agencies.

²¹ This likely grossly undercounts the agencies in these five regions, as these numbers only reflect agencies whose physical address is within the listed city. It does not include offices that may be located in areas immediately adjacent to those locations.

coverage in Texas counties, about 40% of responding investigators reported that they worked in only one county, with Dallas (16), Harris (14), and El Paso (7) counties being the most commonly reported primary service counties. About 18% of investigators reported that they provided investigation services in at least seven counties. Investigators employed by public defender offices reported working in fewer counties. Although 40% of all investigators reported working in only one county, 71% of investigators employed by public defenders reported working in one county. Only 5% of privately retained investigators reported working in one county, while 34% of privately retained investigators reported working in 7 counties.

The investigators were asked to report their years of experience as an investigator, any previous law enforcement agency experience, opinions about working with defense attorneys, satisfaction with training, and the tasks where they felt they had the most skill. Roughly half of all (51%) responding investigators had previous law enforcement experience (**Figure 1**). About 2% of investigators responded that they had federal agency experience or worked as a parole officer. Of the respondents with former law enforcement experience, roughly 70% worked in Texas in the area in which they continue to work.

Figure 1. Previous LEO Experience



In terms of years of experience, 38% responded that they had served as a defense investigator for less than 5 years, 26% served as a defense investigator for 6 to 10 years, 15% served as a defense investigator for 11 to 15 years, and 22% served as a defense investigator for 16 or more years.

2.2.3 Feeling Valued

In terms of working with defense attorneys, 55% strongly agreed and 36% agreed that they felt like a valued member of the defense team (**Table 1**). About 4% of investigators disagreed or strongly disagreed with that statement. Furthermore, 53% of investigators strongly agreed that they were able to share opinions about the case with the defense team, and 50% strongly agreed that the defense team valued their assessments of the cases.

Table 1. Investigator Opinions about Defense Team, (N=121)

Statement	Strongly Agree (%)	Agree (%)	Neutral (%)	Disagree (%)	Strongly Disagree (%)
I am a valued member of the defense team	55	36	6	1	3
I am able to share my opinions and assessments of case information with the defense lawyer	53	36	8	2	2
My opinions and assessments of case information are valued	50	36	9	4	1

Note: Percents may not sum to 100 due to rounding.

2.2.4 Training and Mentorship

Investigators were asked whether they agreed that there is adequate training and adequate mentorship for criminal investigators in Texas. **Table 2** summarizes their responses. Overall, more than half of all investigators disagreed or strongly disagreed that there is adequate training for defense investigators (52%) or adequate mentoring for defense investigators (54%) in Texas.

Table 2. Investigator Opinions about Adequate Training and Mentorship for Criminal Investigators in Texas, (N=121)

Statement	Strongly Agree (%)	Agree (%)	Neutral (%)	Disagree (%)	Strongly Disagree (%)
There is adequate training for criminal defense investigators in Texas	3	19	26	29	23
There is adequate mentorship for criminal defense investigators in Texas	0	15	30	28	26

Note: Percents may not sum to 100 due to rounding.

2.2.5 Top Skill Sets

Investigators were given a list of tasks and asked to identify up to 3 tasks that they felt they had the most skill or expertise in completing.²² 90% of investigators responded that locating and interviewing witnesses was their best skill, followed by 63% building relationships with clients and their loved ones, and 45% examining and assessing evidence collected by police.

²² See Appendix 3 for a full list of tasks.

2.3 Investigator Compensation

Several concerns were raised relating to investigator compensation. Chief among them were those associated with the rate of compensation (including the amount paid, the lack of variation in the rate relative to experience, and the disparities between rates offered in different counties) and with the payment process (including the method for compensation, the timing of payments relative to when the work was completed, and judicial reductions of investigator invoices).

The investigator survey asked respondents if they found compensation rates in their counties to be fair. Twenty-two percent responded that they strongly disagreed that the compensation was fair, while only 2% strongly agreed the compensation was fair.

Investigator Prompt: What are the most challenging or frustrating parts of your job?

"The most frustrating part of my job is the court-appointed state attorneys asking me to assist on a case but they are unable to get adequate funding for my services and I am unable to help the Defendant [sic]."

1. Compensation Rates

Rates vary widely across jurisdictions, with each county able to set its own rates and its own process and timeline for reimbursement. This creates a high degree of unevenness, with wide swings happening between neighboring counties. For example, Travis County pays \$45/hour for investigator services while neighboring Williamson County pays \$80.

One experienced investigator firm in Harris County shared:

"Back in the 90's the rate was cut from \$55 per hour to \$40 per hour and the cap moved from \$750 to \$600. All rates were cut to include attorneys and mitigators. Early in 2000, these rates were adjusted for the attorneys and mitigators, but no one was there pitching for the investigators. Our rate stayed the same. Who can investigate a complicated aggravated assault case for \$600.00? That is the reason your court-appointed investigator universe is so small."

2. Process for payment of investigators

A review of county indigent defense plans as well as interviews with attorneys and investigators have revealed the process for payment varies across the state, with some of those processes creating additional barriers for investigators willing to accept court-appointed cases.

Investigator prompt: What are the most challenging or frustrating parts of your job?

“[C]ash flow-waiting sometimes 6 months to a year for a judge to sign an order for payment even though they signed the initial order appointing us; low paying counties that won’t even pay us half of what our regular billable hourly wage is [sic].”

In some counties investigators submit their bills directly to the court and receive their payment from the court. In others, investigators submit their invoices to the attorney who is responsible for filing the invoice with the court, with the court then directly paying the investigator. In a handful of counties, investigators submit their invoices to the attorney and also receive payment from the attorney (who received the payment from the court).²³

Investigators reported wide variations in how long they may wait to get paid. In some jurisdictions, invoicing and payment could be submitted when the investigator’s work concluded, while in others it could not occur until the case was concluded (irrespective of when the investigator completed their work).²⁴

Investigator prompt: What are the most challenging or frustrating parts of your job?

“Getting paid when case investigation has been completed. Having to wait up to or sometimes over a year until court disposition is finalized.”

Many reported payments happening within 2 weeks of submitting their invoice, while others reported waiting 6 months or more. When combined with the delays some faced because they had to wait until the case concluded, investigators might wait 18 months or longer to receive payment.

2.4 Access to and Effective Use of Investigators in All Case Types

The need for regular access to and use of investigators is not limited to institutional public defense offices. MAC programs, contract lawyers, and private assigned counsel all need to be able to easily access and utilize investigator services to meet their constitutional and ethical obligations.²⁵ “The lack of adequate investigation is the most frequent reason that courts find ineffective assistance of counsel.”²⁶

²³ See Appendix 5 for examples of county plans for investigator payment.

²⁴ See Appendix 4 for additional information.

²⁵ ABA. (n.d.). *Model rules of professional conduct*. American Bar Association Rules 1.2 (Scope of Representation and Allocation of Authority between Client & Lawyer), 1.4 (Communications), and 2.1 (Advisor).

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

²⁶ Lefstein, N. (2011). *Securing reasonable caseloads: ethics and law in public defense*. At 69, citing Benner, L. A. (2009). The presumption of guilt: systemic factors that contribute to ineffective assistance of counsel in California, *45 California Western Law Review*, 263.

Two of the leading national standards on defense practices, the ABA Standards of the Criminal Defense Function²⁷, and the NLADA practice standards make clear that investigation is a core obligation when providing criminal defense representation.²⁸ (“Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.”²⁹) The duty exists even when the evidence appears overwhelming, the defendant admits guilt to his lawyer, suggests no investigation be done, or expresses a desire to plead guilty.³⁰

However, a 2015 Texas caseload study³¹ indicates a significant under-utilization of investigators. Using time tracking data, 196 private and public defense lawyers in Texas collected 12 weeks of data relating to representational tasks. Overall, these data indicated infrequent use of investigators in all case types, with non-attorney investigation accounting for less than 2% of all case time.³² In addition to the time tracking study, the researchers conducted a “Time Sufficiency Survey” and a Delphi panel relating to various case tasks.³³ Among the conclusions was an across-the-board recommendation that significantly more time should be spent on case investigation by non-attorney investigators.³⁴

“By far, the greatest proportional increase was recommended for investigation. Lawyers surveyed through the Time Sufficiency Survey advised that non-attorney Investigator’s Time should increase by a factor of 13 times for misdemeanors, and 10 times for high-level felonies.” Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission

2.5 Findings from the Texas Criminal Defense Lawyer Survey

While the attorney survey did not ask about the time spent on investigations, the survey did ask how frequently defense attorneys requested investigators by different case types. **Table 3** shows the frequency of responses for case types in

²⁷ ABA. (2017). Standard 4-4.1, Duty to Investigate and Engage Investigators.

²⁸ NLADA. (2006). Guideline 4.1(a).

²⁹ ABA. (2017). Standard 4-4.1, Duty to Investigate and Engage Investigators.

³⁰ ABA. (2017). Standard 4-4.1(b). See also ABA. (2002). Principle 8 states, “There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.” Its Commentary states, “There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, **investigators**, and access to forensic services and experts) between prosecution and public defense.” (Emphasis added).

³¹ Carmichael et al. (2015). (“TIDC Caseload Study”). See Appendix 6 for additional details regarding the Task Time recommendations from the Delphi Study.

³² Note: Because attorney-conducted investigation and discovery review were grouped together as a single category, it is impossible to determine the degree to which attorneys are personally undertaking investigations, as compared to time expended on reviewing discovery.

³³ Carmichael et al. (2015). TIDC Caseload Study, pp.19-21, 27.

³⁴ Carmichael et al. (2015). TIDC Caseload Study, pp.19-21, 27.

which an investigator is “Almost Always” requested an investigator compared to case when an investigator is “Never” to better understand the culture of using investigators.

As expected, defense attorneys most frequently request investigators for more serious charges. Surprisingly, almost 10% of criminal defense attorneys never request the services of investigators for homicides, sexually based offenses, capital offenses or aggravated assault, and 20% of defense attorneys reported never requesting investigators for intimate partner violence cases.

Table 3. Frequency of Defense Attorney Requests for an Investigator for the Following Case Types (N=368)

Type of Case	Almost Always (%)	Never (%)
Homicide/murder	49	8
Sexually based offenses	32	8
Capital offenses	26	9
Aggravated or felony assault	47	9
Intimate partner violence	13	20
Probation violations	<1	45
Appeals	2	40
Driving under the Influence (DUI)	2	35
Theft	2	29
Other misdemeanor offenses	2	29

Note: Percents may not sum to 100 due to rounding. Top five case types for Almost Always request an investigator, and top five case types for Never request an investigator.

Consistent with the findings of the TIDC Caseload Study, most defense attorneys strongly agreed (35%) or agreed (29%) that defense attorneys should use the services of investigators more frequently. When asked why they may not request the services of an investigator, 44% of defense attorneys Strongly Agreed or Agreed that they typically do their own investigations. Notably, very few attorneys (roughly 12%) identified fear of reprisal from the court as a reason to not request investigators.

Of criminal defense attorneys surveyed, 58% strongly agreed with the statement that investigators are a valued member of the defense team, and 53% strongly agreed that they value investigator opinions and assessments.

Furthermore, the use of investigators varied by whether attorneys had investigators on staff; 21% of attorneys (n=76) reported they have an investigator on staff.

Table 4 shows the type of case and reported use of investigator, by whether there is an investigator on staff.

Table 4. Use of Investigator, by Type of Case and Whether the Attorney has an Investigator on Staff

	Investigator on Staff		Investigator Not on Staff	
	Used investigator (%)	Did not use investigator (%)	Used investigator (%)	Did not use investigator (%)
Juvenile appointed case	75	25	26	74
Misdemeanor appointed case	78	22	44	56
Felony appointed case	100	0	87	13

Note: Percents may not sum to 100 due to rounding.

Criminal defense attorneys who reported having an investigator on staff also reported increased frequency of using investigators for a wider range of case types. For example, only 26% of juvenile appointed cases involved the use of an investigator, while 75% attorneys with investigators on staff reporting using investigators in juvenile appointed cases.

Relatedly, investigator interviews revealed that in many jurisdictions, when a defense lawyer makes a motion for funds for an expert, they are expected to identify a specific investigator by name that they plan to use for their case. These investigators revealed they frequently work with the same cadre of attorneys and when they connect with a new lawyer, it is typically through a referral from a lawyer the investigator frequently works with. This can make it difficult for newer attorneys or those who do not typically use investigators, to pursue funds for one, as they must first identify an investigator and build a rapport with them before proceeding to secure available dates and times for the court proceedings.

Last, having an investigator on staff is likely related to the attorney's conducting their own investigations. Overall, 35% of all defense attorneys agreed or strongly agreed that they typically conduct their own investigations. Of attorneys with an investigator on staff, 18% agreed or strongly agreed that they do their own investigations, compared to 39% of attorneys without investigators on staff.

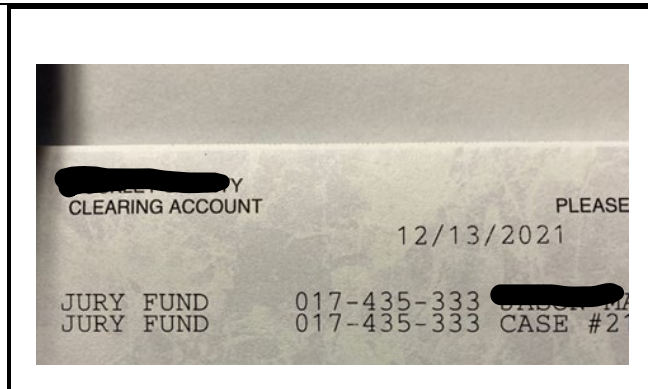
2.6 Data Collection

Although robust in many ways, the currently available Texas indigent defense data have some significant gaps that make it difficult to fully assess and understand the nature and extent of the issues surrounding attorney use of investigators.

Notably, although a number of jurisdictions were identified as regularly expending zero or negligible funds for investigators, in several counties the information reported appears to be erroneous. One glaring example of this was found on an investigator's payment records from a county where their services were recorded as being from the "Jury Fund." The investigator does appointed work in this particular jurisdiction, but the TIDC data for this county identifies it as a jurisdiction with zero investigator expenditures.

The extent to which similar instances may be occurring in other counties is unknown. Additionally, judicial interviews in zero and low expenditure counties indicated requests for investigator funds were being made and granted, reinforcing concerns about whether there are accounting errors at play in some of the counties.

Figure 2. Investigator Payment Record



3. Recommendations

Recommendation 1: Remove or minimize the role of the judiciary in approving requests for investigators and reviewing and approving payments to investigators.

A potential model to follow may be a regional or localized version of the Wayne County, Michigan, Indigent Defense Services program, which has a defense experts and investigators administrator on staff to consult with defense lawyers to identify case needs, facilitate connections with appropriate investigators, and process invoices and payments.

Recommendation 2: Take actions that promote early access to investigator services and increase investigator usage in misdemeanor and juvenile cases.

Providing methods for non-judicially controlled access to investigators, such as those seen in public defender offices and MAC programs, correlates with an increased use of investigators, and a marked uptick in usage in misdemeanor and juvenile cases. Given the significant, life-long impact both of these case types can have, it is important to take steps that raise investigator usage, most notably by removing the court as the access point to investigator services. Of similar import, removing this from court control may also increase earlier access to investigators. Some jurisdictions reported that investigators are only provided if a case is set for trial. This practice can minimize the efficacy of investigator services, as in many instances leads have grown stale, witnesses are harder to locate and have less reliable memories, and transient evidence like physical injuries, social media posts, and video recordings are no longer available.

Creating a resource pool of investigators and their areas of expertise and/or specialized skill can also minimize another barrier to access of investigator services—locating and identifying investigators who have the right skill and experience to handle a particular case type or case need, making it easier for attorneys to seek and use investigators.

Recommendation 3: Additional research is needed to determine where there may be "investigator deserts"—areas which are not served by any defense investigators.

Licensure is an insufficient method to determine who is available and willing to take court appointments for defense investigations. Not all licensed investigators perform criminal defense investigations, and not all those doing defense investigations are willing to accept court-appointed cases. As a result, more research is needed to determine whether there are parts of Texas that are lacking access to defense investigators in court-appointed matters.

Recommendation 4: Pursue practices that provide for timely, meaningful compensation to investigators.

Timely and fair compensation is critical to being able to both recruit and retain quality investigators and, more importantly, to best ensure the full breadth of relevant information is gathered and available for the defense. The U.S. criminal legal system is grounded in the principle that adversarial testing is the best way to achieve accurate and just outcomes.

Without an independent defense investigation, the adversarial system would fail in its most foundational premise—the ability of both sides to marshal and present their evidence to the judge or jury deciding the case.³⁵ “Because that [adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies ... ‘counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’”³⁶

Low and stagnant compensation rates and extended delays in payments undermine the premise that every defendant, regardless of their resources, be provided the “basic tools of an adequate defense.”³⁷

Promoting practices that facilitate timely payments directly to investigators when work is completed rather than when cases conclude will help recruit and retain qualified investigators. Additional efforts must be made to ensure compensation rates for investigators, like those for attorneys and other defense professionals, are adequate and are regularly reviewed and adjusted for inflation and cost of living increases. Additional considerations should be given to providing tiered compensation based on experience, expertise, and case complexity.

Recommendation 5: Provide education and training to improve the use and efficacy of defense investigators.

Training and educational resources should be made available to defense lawyers and investigators that include:

- Legal, constitutional, and ethical foundations for defense investigation.
- Effective communication and collaboration between defense counsel and investigators, including the array of skills, tools, and services investigators

³⁵ “[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

³⁶ *Kimmelman v. Morrison*, *supra* at 384, quoting *Strickland*, 466 U.S. at 691.

³⁷ *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). See also, ABA. (2002). Principle 8 (“There is parity between defense counsel and the prosecution with respect to resources”) and the associated Commentary, which specifically identifies the need for parity of “other resources” including investigators, between the prosecution and defense.

can provide, as well as training relating to substantive areas of practice. Special attention should be paid to the role of investigation in misdemeanor and juvenile cases.

- Training for judges on the role and import of defense investigation, as well as the legal, constitutional, and ethical underpinnings for the provision of defense investigation services. Special attention should be paid to the role of investigation in misdemeanor and juvenile cases.

Recommendation 6: *Improve data collection to provide a better understanding of investigator usage in Texas.*

Other areas of data collection that should be addressed include the need to identify the number of cases in which investigator funds are provided. Current reporting information only requires a report of the aggregate expenditure for the prior year. This prevents any determination of whether a county is expending a lot of money on a handful of large, serious, complex cases; a minimal amount but doing so in virtually every case; or some combination thereof.

To better understand the rate at which criminal defense attorneys requests for investigators are being made, granted, and denied, it will be crucial to collect data on all three of these points. Similar information relating to the cutting of investigator invoices and the reasons for such reductions will also be valuable in better understanding the nature and scope of that issue.

Other data recommendations include making indigent defense plan information more accessible and sortable. Although every county's indigent defense plan is available online, the current format makes it extremely challenging to examine the information for statewide trends and practices. By creating a searchable, filterable database, communities and counties can identify practices from other jurisdictions that they may aspire to incorporate or can facilitate identification of outlier jurisdictions.

Finally, it is important to continue to collect data on investigator usage by public defender offices and MAC programs to fully understand the nature and breadth of investigator usage in the state. Collecting information on investigator requests, frequency of investigator usage by case type and task, and the impact that investigative services have on case outcomes can help improve case outcomes for all those facing criminal accusations.

Appendix 1: Technical Assistance Advisory Group

Texas Team

- Mark Atkinson, CEO, Texas Center for the Judiciary (*invited*)
- Charles Chatman, Exonerree
- Kelli Childress, Chief Public Defender, El Paso PDO
- Rachel Ethridge, Attorney & Mitigation Specialist, Regional PDO for Capital Cases
- Nate Fennell, Attorney and Equal Justice Works Fellow, Texas Fair Defense Project
- Genesis Draper, Judge, Harris County Criminal Court at Law No. 12
- Michelle Moore, Chief PD, Burnet County PDO
- Rick Wardroup, Curriculum Director/Staff Attorney, TCDLA
- Eldon Whitworth, Fact Investigator, Lubbock Private Defenders Office
- David Williams, Investigator, Harris County PDO
- Phil Wischkaemper, Chief Defender, Lubbock Private Defenders Office
- Ben Wolff, Director, Office of Capital and Forensic Writs

Texas Indigent Defense Commission Staff:

- Geoff Burkhart, Executive Director
- Kathleen Casey Gamez, Senior Policy Analyst
- Scott Ehlers, Director, Public Defense Improvement
- Joel Lieurance, Senior Policy Analyst

JFA Team

- | | |
|-------------------------|-----------------------|
| ▪ Venita Embry, RTI | ▪ Nikki Parisi, APA |
| ▪ Bonnie Hoffman, NACDL | ▪ Suzanne Strong, RTI |
| ▪ Monica Milton, NACDL | ▪ Chris Wu, NCSC |

Working Group members:

- | | |
|------------------------|-------------------|
| ▪ Kathleen Casey-Gamez | ▪ Joel Lieurance |
| ▪ Kelli Childress | ▪ Eldon Whitworth |
| ▪ Scott Ehlers | ▪ Ben Wolff |
| ▪ Rachel Ethridge | |

Appendix 2: National Standards

American Bar Association (ABA). (2017). *Criminal Justice Standards of the Defense Function: Standard 4-4.1 Duty to Investigate and Engage Investigators*

- (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
- (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
- (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.
- (d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting, or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.
- (e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

National Legal Aid and Defender Association (NLADA). (2006).

Performance Guidelines for Criminal Defense Representation, 4th ed.

Guideline 4.1(a) "Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible."

Appendix 4: Investigator Survey Question

28. In thinking about the various tasks an investigator may be asked to do, which tasks do you feel you have the most expertise or skill in completing? (Select up to 3)

- | | |
|--|--|
| <input type="checkbox"/> Assess police officer actions | <input type="checkbox"/> Examine and document cellphone content (non-forensic) |
| <input type="checkbox"/> Build relationships with clients and their loved ones | <input type="checkbox"/> Examine and extract cellphone and other digital data (forensic) |
| <input type="checkbox"/> Conduct Research (including social media research) on jurors | <input type="checkbox"/> Locate and interview witnesses |
| <input type="checkbox"/> Conduct research (including social media research) on witnesses | <input type="checkbox"/> Locate and preserve video and other surveillance footage |
| <input type="checkbox"/> Create diagrams and trial exhibits | <input type="checkbox"/> Locate and preserve other physical or documentary evidence |
| <input type="checkbox"/> Develop mitigation and sentencing evidence | <input type="checkbox"/> Locate and review police officer records |
| <input type="checkbox"/> Examine and assess crime scene | <input type="checkbox"/> Photograph potential evidence and event locations |
| <input type="checkbox"/> Examine and assess evidence collected by police | <input type="checkbox"/> Review case-specific body worn camera or other video footage |
| <input type="checkbox"/> Examine physical evidence collected by the police | <input type="checkbox"/> Testify in court |
| <input type="checkbox"/> Other (please describe) | |

Appendix 5: Sample Indigent Defense Plan Payment Practices

Bell County

"Attorneys shall submit original invoices for investigator and expert witness fees at the time they submit their attorney fee voucher for payment. Payments for expert and investigator fees shall be paid to the attorney at the time their attorney fee voucher is paid. Attorneys shall remit fees received on their voucher to the appropriate expert and investigators within 14 days of recipient of such fees."³⁸

Bee County:

"Requests for payments for investigator and expert expenses prior to the disposition of the case are allowed with court approval."³⁹

Galveston County

"The signed claim form for Investigator and Experts shall be submitted by the Provider on the form titled CLAIM FOR INVESTIGATION OR EXPERT WITNESS FEES (#GC-12) provided by the County. Investigators/Experts should submit a claim directly to the Indigent Defense Coordinator. Judges shall not approve and the County shall not reimburse such expenses to the attorney or other third party. The County shall make all payments only to the Provider of the services."⁴⁰

³⁸ [Bell County District and County Courts Indigent Defense Plan](#), Effective Nov.1, 2021

³⁹ [Bee County District and County Court Indigent Defense Plan](#), Apr. 18, 2022.

⁴⁰ [Galveston County District and County Court Indigent Defense Plan](#), Oct. 6, 2021.

Appendix 6: Attorney Workload Study Findings and Recommendations

Using time tracking data, 196 private and public defense lawyers in Texas collected 12 weeks of data relating to representational tasks. They tracked both their personal engagement in case investigation as well as the time non-attorney investigators expended. Overall, this data indicated infrequent use of investigators in all case types, with non-attorney investigation accounting for less than 2% of all case time.⁴¹ In addition to the time tracking study, the report utilized the Delphi method to consider whether the current time expended was sufficient.⁴² Among their findings, was an across-the-board recommendation that more time should be spent on case investigation by non-attorney investigators.⁴³ The Delphi panel came to similar conclusions, calling not only for an increase in the time attorneys are currently spending on self-led investigations, but a nearly 20-fold increase in non-attorney (i.e., professional) investigator time.⁴⁴

Based on the results of their workload study, they recommended the following as the average amount of time that both lawyers and investigators should be spending on investigative work:⁴⁵

**Average Minutes Recommended in Final Caseload Guidelines
(Using Actual Trial Rates)**

	Misdemeanors		Low-Level Felony		High-Level Felony	
	Class B	Class A	State Jail	F 3	F 2	F 1
Client Communication	76 (14.3%)	77 (13.2%)	111 (15.4%)	120 (13.7%)	214 (17.9%)	245 (15.0%)
Negotiation/Meetings	60 (11.3%)	60 (10.3%)	76 (10.6%)	95 (10.9%)	107 (9.0%)	127 (7.8%)
Discovery	60 (11.3%)	60 (10.4%)	71 (9.9%)	94 (10.7%)	151 (12.6%)	212 (13.0%)
Atty. Investigation	61 (11.5%)	90 (15.6%)	91 (12.7%)	121 (13.9%)	122 (10.2%)	163 (10.0%)
Investigator's Time	26 (4.9%)	32 (5.6%)	42 (5.9%)	62 (7.2%)	86 (7.2%)	161 (9.9%)
Legal Research/Trial Preparation	62 (11.7%)	62 (10.7%)	69 (9.7%)	103 (11.8%)	120 (10.1%)	249 (15.3%)
Court Time	137 (25.9%)	141 (24.3%)	187 (26.0%)	195 (22.4%)	294 (24.6%)	348 (21.4%)
Case Management/Social Work	9 (1.6%)	11 (2.0%)	19 (2.7%)	24 (2.7%)	26 (2.2%)	33 (2.0%)
Case-Specific Office Support	40 (7.6%)	46 (7.8%)	52 (7.2%)	58 (6.6%)	75 (6.3%)	89 (5.4%)
TOTAL MINUTES	531 (100%)	580 (100%)	718 (100%)	870 (100%)	1,195 (100%)	1,627 (100%)

⁴¹ Note: because attorney conducted investigation and discovery review were grouped together as a single category, it is impossible to determine the degree to which attorneys are personally undertaking investigations as compared to time expended on reviewing discovery.

⁴² Carmichael et al. (2015). *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission*, pp. 19–21, 27. ("TIDC Caseload Study"). Public Policy Research Institute, Texas A&M University.

⁴³ Carmichael et al. (2015), pp. 19–21.

⁴⁴ Carmichael et al. (2015), p. 27.

⁴⁵ Carmichael et al. (2015).