



Photo by Cliff Haac, Research Triangle Institute

# Public Defender System The Verdict Is Out

by Stan Swofford

**E**arly this year, N.C. Supreme Court Chief Justice Joseph Branch, seeming frustrated and somewhat piqued over the irate letters he was receiving from court-appointed attorneys dissatisfied with their fees, said "it might be time to look

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*Stan Swofford, a reporter for the Greensboro Daily News, broke the story of the court-appointed system's fiscal crisis earlier this year. Swofford has won awards for legal reporting from the N.C. Press Association, the North Carolina State Bar, and the Sidney Hillman Foundation.*

into the possibility of a statewide public defender system." His predecessor, former Chief Justice Susie Sharp, said the same thing in a speech to the state bar three years ago, and reiterated it in a recent interview — more than 10 years after the state initiated a "pilot" public defender system which has grown to encompass only five judicial districts. And Gov. Jim Hunt this year has indicated strongly in a public statement that he would prefer a vastly expanded public defender system.

Their reasons have to do mainly with money. The fund set aside by the Administrative Office of the Courts (AOC) to pay court-appointed lawyers ran out in March, almost three months before the end of the fiscal year. The AOC was forced to request — and fortunate to receive — \$1.7 million from the state budget office to cover the deficit.

Every available study shows that a public defender office, consisting of a full-time staff of lawyers employed by the state to represent indigents in criminal cases, is less costly than the court-appointed or assigned counsel system. For the fiscal year ending last June 30, the state paid almost \$4.6 million for court-appointed lawyers in 28,998 cases — an average of \$157.55 per case. At the same time in the five public defender offices (Guilford, Cumberland-Hoke, Mecklenburg, Gaston and Buncombe), the cost to the state to represent 10,972 cases was \$1,149,780 or \$104.79 per case.

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#### **N.C. Chief Justice Joseph Branch**

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Although money may be the catalyst, it is not the only reason officials are looking toward the possible expansion of the public defender system. Another is fairness, equality of representation for all indigent defendants. Chief Justice Branch believes that “generally speaking, the public defender with his experience will be better.” And, says John Haworth of High Point, president of the North Carolina Bar Association, “The public defender system has made available to a class of people who badly need it good, very good representation. The public defender is able to gain a level of expertise in criminal law that private practitioners might not be able to acquire.”

Mary Ann Tally has been the chief public defender in Fayetteville for four years and has been with the office since 1974. She says that fairness and equal treatment of indigent defendants should be the main issue. A court-appointed lawyer must file a motion before a judge in order to obtain an investigator at the state’s expense, but each public defender office has at least one professional investigator on staff. Tally’s office has two. The Guilford County office has three. “The big thing, however, in the public defender’s office is expertise,” Tally says. “We practice criminal law and that’s it.”

**T**he limited public defender system in North Carolina had its origin in a flurry of U.S. Supreme Court decisions during the 1960s that broadened the rights of indigent defendants. Prior to 1963, indigent persons were entitled to counsel only in capital cases. Compensation to the court-appointed lawyer was made by the county. That year, however, the U.S. Supreme Court held in *Gideon v. Wainwright* that a state had to furnish counsel to any indigent defendant

charged with a felony. The North Carolina General Assembly was in session at that time and enacted a bill providing counsel as a matter of right for indigents charged with a felony and awaiting trial in Superior Court.

In 1967, responding to other decisions of the Supreme Court, the General Assembly extended the right of indigents to counsel in preliminary hearings in felony cases and for juveniles charged with an act which would constitute delinquency. Later in the case of *Argersinger v. Hamlin* the U.S. Supreme Court ruled that no indigent, unless he waived his right, could be imprisoned for any offense unless he was represented by counsel.

Then, in 1970, North Carolina began public defender programs in Guilford and Cumberland Counties. Former state Representatives Sneed High of Fayetteville, and Marcus Short of Greensboro, among others, helped establish these pilot programs.

**T**he question before North Carolina now is how to supply such counsel by the fairest and most economical means possible. The state has at least three options. First, it can continue with a court appointed system and find ways to supplement the current budget. Secondly, the state, in cooperation with local bar associations, can take the legislative and administrative steps necessary to expand the existing public defender programs into a statewide system. Finally, the state bar association, in conjunction with the General Assembly, could fund a private, non-profit organization to oversee the public defender function. Or some combination of these options could be attempted.



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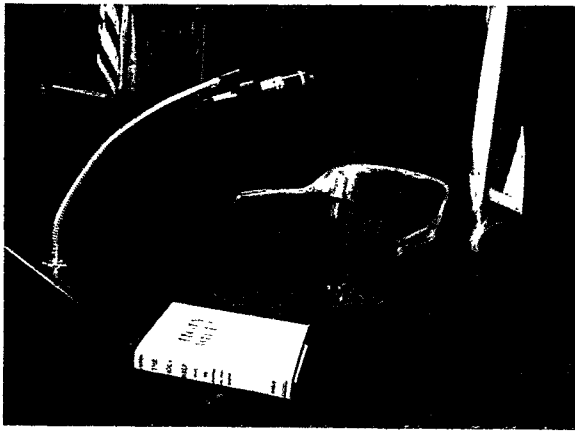


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Almost every state and national authority concerned with the problem believes the answer lies with a vastly expanded statewide public defender system. Ten states have statewide public defender offices supported by state funds, according to Howard Eisenberg, director of the National Legal Aid and Defender Association. Six more, including North Carolina, Eisenberg says, have some type of statewide indigent representation system supported by state funds. The other states have haphazard systems on a county-by-county basis, supported by county tax dollars.

"I think we've got to go to an expanded public defender system," former Chief Justice Sharp has said. "But as undesirable as the present situation is, I would hate to see the socialization of the practice of criminal law. I think the private bar must continue to play an important part in the defense of indigent defendants."

Many state and federal experts share an enthusiasm for an expanded public defender system, so long as it remains closely aligned with the private bar. In the past, local bar associations have decided whether to establish public defender offices in their districts. Some local bars, according to N.C. Bar Association President Haworth, apparently have felt that it would take money away from young lawyers just beginning practice.

"This is true," says Rep. Parks Helms of Charlotte, chairman of the North Carolina Courts Commission, established by the 1979 General Assembly to study such issues as the public defender system. "But the defendant needs to be assured of getting competent counsel." Alternatives for training young lawyers might be established to substitute for the training attorneys now get through the court appointed system, says Helms, himself an attorney.

Jim Little, who served as public defender in Fayetteville, N.C., and who now is in private practice, also believes the private bar should not be left out of a statewide indigent defender program. One reason again is economics. A statewide system probably would not work in the extremely rural areas of the

state, he says. In such areas a private attorney or several private attorneys probably could be retained to represent indigents.

Dennison Ray, director of Legal Services of North Carolina, the organization which represents indigents in civil legal proceedings, believes that a public defender office could be established in each of North Carolina's 33 judicial districts. Each should work in conjunction with the private bar, Ray says. "It should not become just another state institution."

Little and other court observers see little danger in statewide public defender offices becoming more of a "political steppingstone" for ambitious court officials than any other public office. Little, former Chief Justice Sharp, and others do feel, however, that public defenders should be chosen by some merit selection process if possible. Little also feels strongly that the system should be independent of the judiciary. That is, judges should not be given the power to determine who represents an indigent defendant, just as a judge does not decide who represents a person with money.

In recent weeks, North Carolina officials responsible for designing the criminal defense system have begun a closer review of the type of system which could best function in this state. On April 14, Governor Hunt wrote state Rep. Helms asking the N.C. Courts Commission to determine whether the state should expand the public defender system. In his letter, Hunt said he hoped the "study could be completed by the fall of this year for consideration by the 1981 General Assembly."

"The Governor has an open mind about it," says Gary Pearce, the Governor's press secretary. "In the past, he (Hunt) felt, as a lawyer, that the court-appointed system worked better," says Pearce. "But he now feels the public defender system may be better."

**John Hayworth speaking before the N.C. Courts Commission. Rep. Parks Helms, commission chairman, is seated.**



Photo by Paul Cooper

On April 18, the Courts Commission met in Raleigh, its second meeting since being established. The Commission voted to accept the request from the Governor and decided to hold a hearing on the public defender system as a step in preparing recommendations for the General Assembly.

The Wisconsin program, which the National Legal Aid and Defender Association considers a model system, combines the public defender system with the assigned counsel system. And it is entirely out of the hands of the judiciary. It is funded by the state and administered by a nine-member board, at least five of whom must be private attorneys.

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### The participation of the bar "keeps everyone honest."

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The board sets standards for indigency, and the public defender or his representative decides whether a defendant meets those standards. The board appoints a chief public defender who "puts out all the fires," according to Eisenberg of the National Legal Aid and Defender Association, and who attends to the day-to-day business of running the system. The board decides on a county-by-county basis the number of indigent defendants to be represented by assigned private counsel and the number to be represented by attorneys working for the public defender offices and establishes standards for attorneys participating in the system.

The Wisconsin judiciary is kept entirely out of the system. "If a judge has nothing to do with determining who represents a person with money," Eisenberg asks, "why should he have anything to say about who represents an indigent defendant?" When a

person who feels he cannot afford an attorney is arrested in Wisconsin, he can call a toll-free number which connects him with the nearest representative of the state public defender system. If the defendant is in an area rather far from the nearest public defender office, the central office assigns a private attorney known to be qualified in the field of law involving the charges against the indigent defendant.

All attorneys participating in Wisconsin's indigent defender program — the private lawyers and those working fulltime in the public defender offices — have at their disposal "brief banks" and other collected legal data, private investigators, and the expertise and cooperation of the central public defender office administered by the chief public defender. "I think the arrangement with and the cooperation of the private bar is absolutely essential," Eisenberg says. "Without it, the program would be too institutionalized. The state on the one hand would be trying to imprison the defendant, while on the other it would be trying to allow him to go free." The participation of the bar "keeps everyone honest." ■

**Chief Justice Joseph Branch addressing the April 18 meeting of the North Carolina Courts Commission.**



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