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DOES THE LAWYER MAKE A DIFFERENCE?

by

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Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel

BY PETER A. JOY AND
KEVIN C. MCMUNIGAL

Both the ideal of rule of law and the ideal of equal justice share a central tenet: The law and the evidence should dictate the outcome of a case rather than who the defendant, the judge, or defense counsel happens to be. A quotation attributed to Robert Frost reflects a skeptical view of how well our justice system adheres to this aspiration when it defines a jury as “twelve persons chosen to decide who has the better lawyer.” Research in recent decades, some propelled by the revelation of wrongful convictions through use of DNA evidence, provides considerable support for such skepticism by showing that bad lawyering often contributes to bad outcomes in criminal cases.

A Rand Corporation study released this past December provides further support for skeptics. That study of 3,173 murder cases in Philadelphia from 1994 to 2005 shows that the identity of the lawyer had a dramatic impact on both conviction rates and sentences. In sum, poor defendants who had a court-appointed private lawyer were more often found guilty and sentenced to more time in prison than similarly situated defendants represented by Philadelphia’s public defenders. In this column, we review the details of this study, its findings, and its ethical and constitutional implications.



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The Study

The Rand study, entitled *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes* (available at <http://tinyurl.com/6wjtux>), was conducted by James Anderson and Paul Heaton. Heaton is a lawyer who worked for a number of years in the Philadelphia public defender’s Capital Habeas Unit. The overwhelming majority of murder defendants in Philadelphia, roughly 95 percent, are indigent. The nation’s fifth largest city, Philadelphia randomly assigns one of every five indigent murder defendants to its public defender’s office for representation. The court appoints and pays private attorneys to represent the other four. The study compares outcomes in cases with public defender representation against outcomes in cases with private appointed counsel.

The Results

The study finds several significant differences in outcomes between public defender and appointed counsel cases, concluding that the data “strongly suggest that public defender representation is associated with improved case outcomes.” (*Id.* at 16.) Public defender representation reduces a murder defendant’s conviction rate by 19 percent when compared with appointed counsel. The likelihood of receiving a life sentence is reduced by 62 percent if the defendant has public defender representation rather than appointed counsel. The study further concludes that representation by a public defender results in a 24 percent decrease in expected prison terms. Anderson and Heaton conclude that “[i]t appears that public defenders are successful at both reducing the likelihood of the most extreme sanctions and reducing the severity of less extreme sentences.” (*Id.* at 18.) They describe the differences they found as “an enormous and troubling chasm.”

Possible Explanations

The study examines possible explanations for “the stark difference in outcomes” between public defender and appointed counsel cases. To gain insight into what caused the differences, the authors conducted “structured qualitative interviews” with appointed counsel, current and former public defenders, and judges. They also reviewed the records in capital cases from Philadelphia in which counsel had been found constitutionally ineffective.

Others have previously raised the institutional

factors the Rand study identifies. *The Philadelphia Inquirer*, for example, publicized many of these problems. As a Philadelphia Common Pleas judge stated, "the conclusions [of the Rand study] should not be a surprise to anybody who has been close to the system for any period of time."

The extremely low rate of compensation for appointed counsel in Philadelphia is one highly probable contributing factor. Appointed counsel there receive a flat fee for pretrial preparation—\$1,333 if the case is resolved without a trial and \$2,000 if the case goes to trial. If the case goes to trial, appointed lawyers receive \$200 for up to three hours of court time and \$400 per day for more than three hours. The Rand study concluded that court-appointed lawyers in Philadelphia effectively earn around \$2 an hour, far below current minimum wage. Such rates often fail to attract qualified lawyers, discourage adequate preparation, and create an incentive for appointed lawyers to take on many more cases than they can adequately handle. Such low payment also creates a financial incentive for the lawyer to take a case to trial when that may not be in the client's best interest. The Philadelphia public defenders against whom the court-appointed lawyers were compared, by contrast, are paid salaries and have well-managed case loads.

Lack of money for investigators, expert witnesses, and sentencing mitigation specialists also explains the difference in outcomes. As described by Mark Bookman, executive director of the Atlantic Center for Capital Representation, "[w]e have allowed a very small group of underpaid and under-resourced lawyers to handle an outrageously high number of our city's most serious cases." The Philadelphia public defenders, in contrast, have a staff of investigators and various experts, such as those who prepare mitigation evidence in capital cases.

The Rand study also spotlights the "relative isolation" of many appointed counsel. Most are sole practitioners who work on cases without input or feedback from another lawyer. This isolation increases the risk of a variety of human errors, such as overlooking a key issue in a case, overestimating the strength of a defense theory, or underestimating the strength of the prosecution's evidence. It also makes it more difficult to keep current with new strategies, current case law, and developments in scientific evidence. Again in contrast, the Philadelphia defenders work in teams, with lawyers and other staff interacting and supporting one another.

Conflict of interest also may undermine the effectiveness of appointed counsel in Philadelphia. Trial judges control the appointment of lawyers to defend murder cases, creating a risk that a lawyer's political connections or contributions rather than ability will determine an appointment. Under pressure to manage crowded dockets, "judges have incentives to appoint counsel who file fewer pre-trial motions, ask fewer questions during voir dire, raise fewer objections, and present fewer witnesses."

Ethical Implications

The Rand study's findings have significant ethical implications. First and foremost is the failure to fulfill what is perhaps the most fundamental of all ethical duties, the duty to provide competent representation, set forth in Model Rule 1.1. Lack of adequate compensation and resources also put at risk the lawyer's duty to keep a client informed about key aspects of the case as required by Model Rule 1.4. The Rand study noted that public defenders tend to spend more time communicating with clients than appointed lawyers. Taking on more cases than a lawyer can handle due to financial pressure is contrary to Comment [1] to Model Rule 1.16, stating that a lawyer "should not accept representation in a matter unless it can be performed competently, promptly, . . . and to completion."

The study also reveals a number of perverse incentives raising conflict of interest issues. Do appointed lawyers, for example, fail to conduct pretrial investigation or file pretrial motions in order to maximize their hourly income? Do they fail to prepare and present cases competently and vigorously in order to please trial judges so more appointments will be forthcoming? Do they at times advise clients against pleading guilty in order to earn the extra income a trial will bring? The Rand study notes that the clients of appointed lawyers were more likely than the clients of public defenders to reject guilty plea offers and take cases to trial.

Such incentives can undermine the effective functioning of the lawyer as an advisor in relation to key tasks such as guilty plea negotiations. They may also undermine effective functioning as a courtroom advocate. Whether privately retained, appointed counsel, or public defender, the ethics rules require that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." (Model Rule 1.3 cmt. 1.)

Constitutional Implications

The constitutional implications of the Rand study are also deeply troubling. Perhaps the most obvious constitutional right in jeopardy is the Sixth Amendment right to effective representation. But the study's findings also raise due process concerns about the underlying fairness of trials when lawyers are overworked and underprepared. Disparity in conviction and sentencing outcomes raises equal protection concerns. Finally, differences in sentencing outcomes raise the issue of whether sentences received by some defendants represented by appointed counsel in Philadelphia are disproportional to both their blameworthiness and danger, raising Eighth Amendment concerns.

Remedies

The Rand study's findings about the significance of the lawyer assigned to a murder case are disturbing for what they reveal about Philadelphia's system of providing representation to indigent defendants. As pointed out above, those revelations are neither unexpected nor isolated. Rather, they echo what researchers have found in indigent criminal representation in many parts of the United States.

The problems found with appointed counsel in Philadelphia and in many other locations around the United States are not found everywhere. The bleak picture of indigent representation in cities and counties like Philadelphia is in stark contrast to indigent representation in some states, counties, and cities that have found effective ways to address problems the Rand study finds plaguing Philadelphia murder cases. Such programs provide models for what cities such as Philadelphia can and should do.

In *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, Norman Lefstein discusses three such programs: a statewide program in Massachusetts, the District of Columbia Public Defender Service, and the Private Defender Program of San Mateo County, California. The San Mateo County program is noteworthy because it uses only private assigned counsel.

The San Mateo program for assigning counsel differs in several significant ways from the Philadelphia system. The program is independent of trial judges. In other words, trial judges are not involved in assigning cases to lawyers, removing the risk that political and personal factors rather than lawyer ability and client need control assignments. It also removes the risk that appointed

lawyers will not aggressively pursue a case to avoid antagonizing judges and ensure future case assignments. Payments to lawyers are handled by administrators, not by judges.

To overcome the problem of isolation, the program has an administrative staff that ensures training, monitors quality, and matches the seriousness of the case with the lawyer's experience level. San Mateo County has established a system of both flat and hourly fees for various stages and tasks, with no caps placed on compensation.

Conclusion

A primary concern in shaping our law of evidence is assuring the reliability of the information upon which a jury relies in rendering a verdict. We are particularly concerned about the reliability of the evidentiary input to the jury's decision-making process because there are few if any effective ways to monitor the output of the jury system. A jury's findings of fact are rarely disturbed.

The same is true for the work of lawyers in our criminal justice system. There are few effective ways to monitor and remedy poor quality legal work in a criminal case after the fact. Professional discipline of defense counsel is a relatively rare occurrence because of limited resources and the fact that the disciplinary system is reactive and few defendants, judges, or prosecutors complain to the bar about bad defense lawyers. A criminal defendant rarely succeeds in establishing civil liability through malpractice because of lack of resources and the requirement in many jurisdictions that a defendant prove factual innocence in order to succeed on a malpractice claim.

Finally, the remedy of a new trial based on a constitutional claim of ineffective assistance of counsel is difficult to attain because *Strickland v. Washington*, 466 U.S. 668 (1984), sets too high a bar for defendants. *Strickland* requires the defendant to prove both objectively unreasonable performance by the lawyer and prejudice to establish ineffective assistance of counsel. The court defines prejudice as a reasonable probability that the lawyer's inadequate performance adversely affected the outcome of the case. While the Rand study demonstrates that appointed counsel representation does have a negative effect on outcomes, it is not the type of evidence a court is likely to consider in adjudicating individual claims. As one judge painfully explained in upholding a

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death sentence in a case in which he found defense counsel's representation to be lacking: "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by 'not-legally-ineffective' lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence." (Riles v. McCotter, 799 F.2d

947, 955 (5th Cir. 1986) (Rubin, J., concurring).)

Given these serious limitations on our ability to monitor and correct bad lawyering and its consequences after the fact in criminal cases, it is crucially important that appropriate preventive measures be taken at the front end of the criminal justice process. Such measures include assuring that appointed counsel have adequate compensation, resources, and support and are insulated from conflicts of interest. ■

CRIMINAL JUSTICE MATTERS (CONTINUED FROM PAGE 56)