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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.

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/6wjtuw), 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 Philadel-
phia 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 coun-
sel there receive a flat fee for pretrial prepara-
tion—$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 con-
cluded that court-appointed lawyers in Philadel-
phia 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 appoint-
ed lawyers to take on 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 witness-
es, and sentencing mitigation specialists also ex-
plains the difference in outcomes. As described
by Mark Bookman, executive director of the Atlantic
Center for Capital Representation, “[w]e have al-
lowed a very small group of underpaid and under-
resourced lawyers to handle an outrageously high
number of our city’s most serious cases.” The Phil-
delphia 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 iso-
lation” of many appointed counsel. Most are sole
practitioners who work on cases without input or
feedback from another lawyer. This isolation in-
creases the risk of a variety of human errors, such
as overlooking a key issue in a case, overestimat-
ing the strength of a defense theory, or underestimat-
ing 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 Phi-
delphia 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 Philadel-
phia. Trial judges control the appointment of
lawyers to defend murder cases, creating a risk
that a lawyer’s political connections or contribu-
tions rather than ability will determine an ap-
pointment. 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 ob-
jections, 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 rep-
resentation, set forth in Model Rule 1.1. Lack of ade-
quorate 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 cli-
ents 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 represen-
tation in a matter unless it can be performed com-
petently, promptly, . . . and to completion.”

The study also reveals a number of perverse in-
centives raising conflict of interest issues. Do ap-
pointed lawyers, for example, fail to conduct pre-
trial investigation or file pretrial motions in order
to maximize their hourly income? Do they fail to
prepare and present cases competently and vigor-
ously in order to please trial judges so more ap-
pointments 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 defend-
ers 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 re-
tained, 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 at 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 LeStain 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 coming, 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 insuring 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 for bad lawyers 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 obtain 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
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.