THE EFFECT OF METHODS AND RATES OF COMPENSATION ON SERVICES PROVIDED BY ATTORNEYS REPRESENTING INDIGENT CRIMINAL APPELLANTS

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THE EFFECT OF METHODS AND RATES OF COMPENSATION ON SERVICES PROVIDED BY ATTORNEYS REPRESENTING INDIGENT CRIMINAL APPELLANTS

By

Richard E. Priehs

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ABSTRACT

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It is widely believed that methods and rates of compensation are directly related to the quality of criminal defense and appellate representation—that underpaid counsel perform less zealously. Studies of the impact of wages on trial counsel for the indigent are inconclusive. This is the first significant study of appointed *appellate* counsels' behavior under varying compensation systems.

Court designated appellate counsel in Michigan complete verified "Statement of Services" forms attesting to specific work performed once their representation concludes. Services are recorded in total hours and separated by categories (*e.g.*, client visitation, briefing, motions/evidentiary hearings). Types of service are consistent with Michigan's "Minimum Standards for Indigent Criminal Appellate Defense Services." Attorneys are paid by the local judicial circuits and a copy of their services form is submitted to Michigan Appellate Assigned Counsel Service (MAACS), a state agency. These forms (N=1,582) spanning two calendar years, are the basis for this research.

Since Michigan's local circuits vary markedly in their methods and rates of pay for appointed counsel, these data offer an opportunity to analyze the impact of wages on performance. Three primary methods of compensation were analyzed: hourly, hourly with maximum limitations, and fee-schedule (*i.e.*, flat rate). Services were then measured within each method by comparing varying rates of compensation (*e.g.*, high versus low hourly work

efforts). Comparisons consisted of total mean hours. Generally, high compensation rates were double lower wages, regardless of the method employed.

The primary hypothesis is that differences in rates of compensation among Michigan's judicial circuits do not result in disparate services to indigents. Rather, "role theory" suggests that existing literature too often ..er emphasizes the relationship of attorney performance and compensation, while ignoring the impact of professionalism, ethical standards, commitment, and role satisfaction.

The findings strongly suggest that the rates and methods of compensating appellate attorneys for indigent criminal defendants is not determinative of performance. Services in lower paying judicial circuits are generally consistent with those offering considerably higher remuneration. Since wages are not explanative of behavior other factors must be explored to better understand the work behavior of court appointed appellate counsel. Role theory provides a basis for further exploration of attorney performance relative to their indigent appellate clients.

DEDICATION

This work is dedicated to my wife, Nancy Lou, my daughter, Kerianne, and all the supportive faculty and staff at Saginaw Valley State University.

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CHAPTER 1
INTRODUCTION TO THE STUDY

Statement of Problem

The American criminal justice system faces difficult problems in attempting to design effective methods for providing high-quality appellate representation for indigent convicted offenders. In an effort to analyze this problem and contribute to improvements, this dissertation study will examine the quality and effort of attorneys appointed to handle criminal appeals in Michigan. Their performance will be reviewed in relation to established professional standards for appellate counsel.

The United States' legal system is adversarial. Central to this system is the advocacy model where the representatives for the state (prosecutors or district attorneys) and for the defendant (defense counsel) compete to convince the judge or jury that their perspectives on the case are the correct ones. As one commentator has observed:

> The philosophy behind the adversary system holds that the greatest number of just resolutions in all foreseeable criminal trials will occur when both sides are allowed to argue their cases effectively and vociferously before a fair and impartial jury. The system requires that advocates for both sides do their utmost, within the boundaries set by law and professional ethics, to protect and advance the interests of their clients. The advocacy model makes clear that it is not the job of the defense or the prosecution to judge the guilt of any defendant. Hence, even defense attorneys who are convinced of their client's guilt are exhorted to offer the best possible defense and to counsel their clients as effectively as possible (Schmalleger, p. 341).

In the adversarial model, it is important for the defendant as well as the state to receive high-quality representation. This representation is needed not only to protect the rights guaranteed to the defendant under the U.S. Constitution, but also to ensure that reliable

determinations of guilt limit the application of criminal punishment to those who deserve criminal sanctions. Thus, it is not only the accused who should be concerned about the quality of criminal defense representation. American society itself has an interest in ensuring zealous representation of defendants in order to avoid unjust convictions, inappropriate sentences, and misapplication of correctional resources.

It is widely recognized by criminal justice scholars that the adversarial model is an ideal which is not necessarily in accord with reality, particularly at the trial level. Packer maintains that the American system is primarily a "Crime Control Model" characterized by presumptions of guilt rather than of innocence. The system places a premium on speed and finality, evidenced by extraordinarily widespread plea-bargaining of cases rather than more tedious fact-finding processes. Packer suggests the image of an "assembly-line conveyor belt" moving an endless stream of cases quickly and efficiently (Packer, p. 42–44).

The antithesis to the Crime Control Model is the Due Process ideal which emphasizes a foremost need for reliable fact-finding processes (Packer, p. 45). This need can only be supplied by adequate representation. "Of all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one's model of the process looks like . . ." (Packer, p. 51).

At the appellate level, however, the ideal of the adversarial model is more readily seen. Unlike trial level outcomes, determined through processes of bargaining and consensus, most appellate cases actually proceed to court for disposition following preparation and presentations by the adversarial parties.

Writing for the majority in Evitts v. Lucey (1985), Justice Brennan asserted that skilled counsel was indispensable for the criminal defendant seeking to challenge his conviction:

> To prosecute the appeal, a criminal appellant must face an adversary proceeding that, like a trial, is governed by intricate rules that to a lay person would be hopelessly forbidding. An unrepresented appellant, like an

> unrepresented defendant at trial—is unable to protect the vital interests at stake. . . .[T]he promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel (Wasserman, 1984, p. 21).

The U.S. Supreme Court stated in a Fourteenth Amendment "equal protection" of the law decision:

> . . . where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . . while the indigent . . . is forced to shift for himself. The indigent, when the record is unclear or the errors are hidden, has only the right to a meaningless ritual (if unrepresented), while the rich man has a meaningful appeal (Douglas v. California, 1963, p. 359).

The roots for criminal appeals can be traced back to the twelfth century. The lineage of legal precedents is detailed in Chapter 2—Historical Antecedents. Following a succession of cases establishing trial-level rights for indigent criminal defendants, Douglas v. California (1963) mandated appointed counsel, upon request, for the offender's first appeal as a matter of right (p. 816).

All available sources suggest an estimated ninety percent of criminal defendants in the United States are classified indigent (Karfonta, 1992, p. 164). Yet, beginning with Gideon v. Wainwright (1963), when state indigents were granted rights to legal assistance, the Supreme Court has never established standards of "quality" for appointed counsel. Implementation of services, including cost and quality considerations, are left to state and local governments. Accordingly, funding systems are based on the fiscal and political considerations of the service providers (*e.g.*, the county). Rarely is there input from the service recipients (*i.e.*, defendant/appellant) or their advocates. Arguably, judges, court administrators, state and local governing bodies, bar associations, and the public all share responsibility for "quality" of representation.

Spending public funds for appellate criminal defense work is unpopular with local commissioners, judges, and taxpayers. Thus, appellate resources are more difficult to obtain than funds for indigent trial work (Levine, 1992, p. 142, 145). With the presumption of innocence removed, service providers may view the appellate process as less important—a search for legal "loopholes." Appeals are contrary to Packard's Crime Control Model which depends on "speed and finality" (p. 42). Appeals extend the criminal justice process and, if successful, typically require reconsideration at the trial level.

Purpose of the Study

This study is intended to provide insights into the role behavior of appellate counsel for indigent criminal appellants—a topic which has received little attention from scholars. It should also assist in further understanding the behavior of trial-level counsel for the indigent, where research on the quality of their performance under various compensation systems has been inconclusive (Flemming, 1989, p. 403).

Previous research has focused on comparing public with private trial counsel because of differences in compensation and caseloads. Overworked and underpaid defenders is the theme which has prompted most studies of indigents' counsels' performance. By contrast, this dissertation research is directed exclusively at comparisons of publicly appointed appellate attorneys under significantly different compensation systems, permitting the researcher to better isolate the impact of wages (Appendix A) on specific work performance (Appendix B).

Research on role behavior of appellate counsel is severely limited. Wasserman's book (1990), described in Chapter 2, is primarily an overview of appellate practices in New York City, providing insights into that system and suggestions for its improvement. He acknowledges that his work "offers only fleeting glimpses of the retained appellate bar . . . and the

individuals who face the challenges and pressures. A closer look would be useful for an integrated view of criminal appellate practice" (p. 256).

Research on roles of other key participants in the criminal justice process has been more extensive, including judicial (Gibson, 1978, 1983; Becker, 1964) and federal magistrates' behavior (Smith, 1988; Seron, 1983, 1985; Puro, 1976). In addition, trial counsel have been broadly studied (Chapter 2). The most common method of comparing attorney performance is "outcome" measurements (Cavender, Nienstedt & Everett, 1987; Stover & Eckart, 1975). Outcome-based results, however, fail to adequately measure the quality and effort of the representation. Outcomes (*e.g.*, reversal of conviction and/or sentence) of two hypothetically identical cases may be the same regardless of counsels' efforts in representation. This dissertation study will review, for the first time, key process variables (*e.g.*, time devoted to research, client contact, court motions) and permit comparisons of the specific work products under diverse appellate compensation systems. This research will also hopefully expand our knowledge and understanding of "role theory," a supposition upon which studies of professions are often grounded (Biddle, 1979b, p. 314).

A succinct definition of role is "those behaviors characteristics of one or more persons in a context" (Biddle, 1979b, p. 58). A broader explanation is offered by Levy:

> [Role is] any position differentiated in terms of a given social structure whether the position be institutionalized or not. . . . The social position [is] given to the individual. . . . These roles involve obligations, rights, and expected performances of the individuals who hold them (1952, p. 159).

Hollander writes:

> Roles are normative in that they involve some implicit shared expectancy among group members; and norms themselves, lacking visibility, may nonetheless dwell in expectancies (1958, p. 118).

Role "expectations" are the conceptual bridge spanning role behavior and social structures (Sarbin & Allen, 1968, p. 497). Expectations relative to "professions" have been the subject of

considerable research recounted in Chapter 2. Professions have been described as "occupations whose roles involve interaction with human beings (clients), whose performance is based upon long periods of training, and whose associated roles tend to be performed in private. The term 'expert,' ascribed to professionals, embodies an explicit code of conduct in the form of rules governing the role that are enforced by its members" (Biddle, 1979b, p. 314).

Role theory posits that the behavior of the individual is shaped by numerous factors: the demands and rules of others, the rewards and sanctions for the actor's behavior, and the individual's understanding of her behavioral expectations. The latter includes the individual's particular inherent expectations for herself and those of the actor's professional affiliations (Biddle, 1979a, p. 17; Callero, Howard & Piliavin, 1987).

Biddle discusses many scholars who contributed to the development of role theory. These include:

> early theorists such as Durkheim (1893)[1] writing on the division of labor; Sumner's (1906) well-known distinction between folkways versus mores and characteristics of prescriptive phenomena; James (1890), Baldwin (1897), and Cooley (1902) who advanced the theory of self; Piaget (1932) in analyzing rules and complying behavior; Dewey (1922) focused on habit and conduct; and Maine (1861) who introduced the idea of status (Biddle, 1979a, p. 4–5).

There are numerous additional contributors to the theory of role; however, the above-named scholars employed concepts which survive today or which have their modern counterparts in present-day role theory (Biddle, 1979a). Contemporary theorists also include Davis (1949) further exploring status; Homans (1950) on norms and behavior; Sarbin's (1954) work on role enactment with emphasis on self concept; and Kahn's (1964) proposals regarding role conflict within organizations.[2]

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[1]Precursors cited are found in the bibliography at the end of the text.

[2]Authors cited are found in the bibliography at the end of the text.

Role concepts are used when studying political, economic, legal, and other institutions. They have central significance for the disciplines of psychology, sociology, and anthropology, playing a more prominent role when studying the "helping professions" (Biddle, 1979b, p. 11–12), such as criminal defense and appellate work.

The role(s) of trial and appellate counsel for indigent criminal defendants are similar in many respects but significant variations exist. Both represent individuals primarily from the lower socio-economic status (*i.e.*, those determined to be indigent); their roles are adversarial to the government (*i.e.*, prosecuting/district attorneys); they have similar ethical standards of performance as guides; and they seek theoretical due process of law by zealously advocating individual rights.

However, appellate counsel primarily search to discover error in the trial court processes that may have affected the outcome (*i.e.*, conviction and/or sentence). Through the process of transcript review, legal research, factual assessments, and the submission of written briefs, appellate counsel are often viewed as paper advocates since they do not actually try the contested case. In Michigan, even oral argument before the Court of Appeals is limited to a maximum of 30 minutes; review being based primarily on submitted written briefs and matters of record, *i.e.*, trial transcripts (Michigan Rules of Court, 1994, p. 617).

Since appellate counsel are essentially gathering information, researching, and writing, they may have less client contact than trial counsel. Defendants are present at all significant phases of the trial process including arraignments, motions, and hearings; at the appellate stage, at least in Michigan, neither counsel nor appellants' presence before the Court of Appeals is even required. Their appearance <u>may</u> only be necessary for lower court motions/evidentiary hearings in order to develop or clarify issues. Investigation and/or evidentiary hearings may be essential for developing "off the record" issues. For example, attorney/client conversations preceding pleas are typically not part of the recorded transcript. Wasserman reminds us that

"trial courts tolerate a high level of coercion, deception, and bad representation in the plea-bargaining process (Blumberg, 1967, p. 240; Bordenkircher v. Haynes, 1978). Thus, appellate counsel may be adversarial to her counterpart at the trial level, particularly in "guilty plea" cases where appellant claims he received improper advice from his attorney (*i.e.*, thus, the plea was not offered "knowingly"). Attorney/client conversations preceding pleas are typically not on any recorded transcript. Plea-bargaining the outcome, which often typifies criminal trial work, is essentially non-existent on appeal. Therefore appellate counsel are looking for error which prejudiced the fairness of the trial/plea/sentencing process, while trial counsel's role includes avoiding introduction of error.

Unlike trial counsel, appellate attorneys might never have contact with the prosecutor, circuit judge, or other courthouse actors at the trial level. If they forego oral argument before the State Appellate Court it is conceivable that no personal contact will occur with any actors in the system. In addition, since appellate counsel may accept cases anywhere in the State, it is possible that they do not even know the trial level personnel. Though the functions of their daily work vary, their roles are also arguably similar—to achieve "fairness of process" for the defendant/appellant. For these reasons, many of the findings in this study may have application to publicly funded trial counsel in addition to appellate attorneys. It is believed that many criminal attorneys do both trial and appellate work. Accordingly, the results of this research may have application to both roles.

Theoretical Foundation of the Study

The commonly held belief that lawyers' desire to maximize earnings is repeatedly cited as a rationale for reduced services provided by attorneys to indigent clients (Margulies, 1989; Alscher, 1975; 1986; Blumberg, 1967; State Bar, 1990, p. 2). Indigent defendants have a parallel perspective, believing court-appointed counsel are overly eager to abbreviate time spent

on their cases, with little concern for their welfare (Daniels, 1992; Casper, 1978; Platt & Pollack, 1974). Levine refers to the concept as "fiscal self-preservation" (October 1993, p. 12).

Similarly, attorneys envision a relationship between economics and job satisfaction (Fleming, 1986). Other professions relate equitable pay to work enjoyment (Locke, 1976). A survey of Michigan's appointed trial counsel found half of the respondents focused on the pressure low fees create to spend less time and omit particular time consuming tasks (Levine, October 1992). Sixty-three percent of the lawyers surveyed believed the "quality" of representation for appointed work was lower or much lower than retained work (p. 28). Comments regarding "fee schedule" systems were exceptionally critical such as, "There is a tendency to circumvent procedure, motion practice, and investigation to maximize fees . . ." (p. 31).

However, these thoughts, beliefs, perceptions and theories have not been studied sufficiently, particularly with assigned appellate counsel. Since rates of compensation are so disparate among Michigan counties (Appendix A), and data regarding precisely how counsel expend their time are available, the concept of "shortcut justice" can be quantitatively analyzed.

Literature on "role theory" (Chapter 2), however, also suggests consideration of "non-economic" factors when assessing professional behavior. Factors such as the "independent nature" of criminal defense work may be of significance (Heinz & Laumann, 1982). Political ideologies may also affect role (Heinz & Laumann, 1982). Loyalty, commitment, and organizational attachment have been shown as predictive of work behavior (Kallenberg & Berg, 1987; Lincoln & Kallenberg, 1985, 1992; Price & Mueller, 1986). As one attorney stated, "Those of us who practice criminal defense and who have a romantic bent tend to see ourselves as the champions of civil liberty, the knights with drawn swords" (Oberg, 1992, p. 159). Mather's work on "maverick" public defenders suggests similar, non-economic, psychological

motivations for role behavior (1979, p. 130). Peer sentiments (Hall, 1988) and collegiality (Wallace, 1995) also affect organizational commitment and possibly job performance.

These studies suggest the individual professionals' concept of role encompasses personal and group (*e.g.*, peer) expectations. These may override economic considerations, particularly since counsel's role is self chosen—at least in Michigan. As one judge noted, ". . . this Court has refused to find that attorneys would shirk their professional obligations to provide competent and diligent legal representation to any client, regardless of pay" (In re Recorders' Court Bar Association, 1993, p. 127).

Prior studies attempt to compare public with private criminal defense attorneys' performance, primarily because their rates of compensation differ dramatically. Flemming cites thirty-seven such studies offering inconclusive, differing results. He notes, "when differences do emerge, patterns are uneven and seemingly serendipitous. The literature offers no clear operational criteria of performance" (1989, p. 403). By contrast, this dissertation research will quantitatively assess large samples of work-product consistent with counsel's ethical responsibilities, *i.e.*, operational criteria (Appendix B).

The central focus of this study is whether appointed appellate counsels' role (*i.e.*, work behavior) is affected by differing compensation systems. Role behavior may be derived from expectations of self, of others, and professional values. Alternatively, attorneys may view inadequate compensation as reflective of the system's expectations about their role behavior (*i.e.*, "this is all that is expected of me").

IMPORTANCE OF THE STUDY

Michigan's Appellate System

In November 1985, Michigan Appellate Assigned Counsel System (MAACS) was implemented. As a small administrative agency, it was designed to improve the quality of

representation that assigned counsel provided at the appellate level. Attorneys licensed anywhere in Michigan may request placement on the "roster" of attorneys available for appellate assignments throughout the State. The application process elicits information regarding the attorney's prior criminal appellate experience and the jurisdictions from which the attorney wishes to receive appointments. Experienced counsel are eligible for more complex appeals. MAACS then assesses their qualifications, offers limited training, provides some resource materials, and investigates attorney performance complaints. MAACS also oversees a regulated assignment process, rotating counsel throughout the various circuits (Michigan Appellate Assigned Counsel System Regulations, 1985). The circuits are required to assign counsel in sequence from these lists. Counsel can only decline a case for just "cause," (*e.g.*, a conflict of interest). If unexcused for cause, counsel revert to the end of the list. MAACS indicates that continuing successive refusals (*e.g.*, three) can result in elimination from the roster.

Although MAACS handles selection, training and attorney assignments, appellate counsel are paid by the local circuits. A cursory review of Appendix A, compiled by MAACS, illustrates not only wide variations in rates of compensation among Michigan circuits, but significant differences in methods of determining reimbursement. The characteristics of these system types are detailed in Chapter 3. Michigan's county-based system provides each jurisdiction with autonomy to implement its own system of funding services to indigents—to establish and approve actual payment. Counties then submit a detailed copy of attorneys' "Statement of Services" forms (Appendix B) to MAACS at the completion of each appeal. This form is summarized by categories of service, based on appellate standards, allowing for comparisons of work performed among circuits using varying systems. Eighty-three percent of all indigent appellate work in Michigan is managed under this MAACS coordinated system; the remaining seventeen percent is handled by the State Appellate Defender Office (SADO).

Methods of computing compensation include: hourly, hourly with limits, fee schedule, task-based, case type, and judicial discretion. Rates of compensation vary markedly within systems (*e.g.*, hourly reimbursement ranging from $25 to $65). Treatment of expenses (*e.g.*, travel, phone, photocopying), also differs, further complicating relative assessments of levels of reimbursement.

Actual compensation is determined by the trial judge in the circuit from which the case arose. Judges have arbitrarily reduced hours and expenses in an unknown number of cases (In re Attorney Fee of Jacobs; Levine, 1992). In a survey of Michigan's appointed counsel, 53.8 percent state they have had their bills reduced by the judge (State Bar of Michigan, 1990 p. 23). Several Michigan circuits do not even have an established fee structure, relying exclusively on "judicial discretion" (Appendix A). A more detailed discussion of the varying fee structures is presented in Chapter 3.

Michigan's 1991 Economics of Law Practice Survey indicates the retained rate for criminal lawyers was $90/hour. Overhead costs ranged from $30 to $45/hour (State Bar of Michigan, 1991, p. 1223). These are the fees and costs reported by private attorneys who are retained by non-indigent defendants—those who purchase their own defense services. Clearly, attorneys representing indigent appellants, even in the highest paying counties' (*i.e.*, $65/hr), earn far below the State averages for private counsel.

The disparities in the methods and rates of pay among the various Michigan circuits suggest that systemic disincentives may exist which could contribute to a reduction in appellants' due process rights. This study will examine how these varying systems impact counsels' role in serving indigents. Performance under contrasting systems will be analyzed according to the MAACS' form which uses categories of service that parallel Michigan's "Minimum Ethical Appellate Standards."

Minimum Ethical Appellate Standards

"Minimum Standards for Indigent Criminal Appellate Defense Services" for Michigan attorneys were approved by the Michigan Supreme Court, effective February 1, 1982. They were operative at the time of data collection for this study and are still in effect.

These canons advance numerous ethical considerations. Some standards do not directly impact quantifiable work-product services (*e.g.*, discouraging joint representation, making "accurate" representations). The following, however, are significant to investigating and perfecting prospective appellate issues. In addition, they have specific application to counsels' hourly "statement of services," (Appendix B) making it possible to measure performance using state-wide professional criteria.

The applicable Standards are:

3. Except in extraordinary circumstances, counsel shall interview the defendant in person on a least one occasion during the initial stages of representation.
6. Counsel shall promptly request and review all transcripts and lower court records.
7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.
8. Counsel shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by existing records which he or she believes to be meritorious.
9. Counsel should assert claims of error (*i.e.*, brief) which are supported by facts of record, which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.

10. Counsel should not hesitate to assert claims (*i.e.*, brief) which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

12. Assigned counsel shall not take steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

16. Counsel should request and appear for oral argument. In preparation for oral argument, counsel shall review the briefs of both parties, file supplemental pleadings as warranted, and update his or her legal research.

17. Counsel shall keep the defendant appraised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.

Providing these services obviously requires the attorneys' time; time may vary significantly depending on the number of prospective issues, their complexity, client demands, and counsels' skill. As attorneys and others frequently say, "Time is money." At some point any given case may become economically unfeasible for the attorney, thereby impacting expected obligations and services. When MAACS roster attorneys violate the "Minimum Standards," the Michigan Rules of Professional Conduct (MRPC) are also abridged. These may include: 1.1, Competence; 1.2, Scope of Representation; 1.3, Diligence; 1.4 Communication; and 5.4(c), Professional Independence of the Lawyer (Levine, 1992, p. 13).

Policy Implications

Gideon, and subsequent related holdings placed a heavy burden on the service providers. As criminal dockets continue to swell, fiscal strains increase, and new prisons are filled to capacity, the cost of indigent defense has become more significant. While few dispute that the

fees paid to private assigned counsel are low, many related questions generate sharp disagreement.

Do disparate fee structures affect attorney performance or the willingness of lawyers to accept assigned cases? What constitutes "reasonable compensation" and how should fees and expenses be structured? What unit of government should fund indigent appellate work? How these questions are answered may impact the quality of representation afforded indigents.

If our hypotheses are accurate, and services among systems remain consistent, the results could suggest that all service providers are performing below the "standards." This would suggest a review of all systems, not just those which appear sub-standard in terms of compensation. This study may help policy-makers determine if "justice" is better served by implementing:

1. A state-funded system, one which eliminates attorney dependence on the local judiciary
2. Certain "methods" of funding (*e.g.*, hourly plus expenses vs. a flat-fee schedule)
3. Certain "levels" of attorney compensation (*e.g.*, a minimum hourly rate)
4. County public defender offices, with funding similar to those of prosecutor's offices
5. Closely monitored "standards"
6. Increases in all levels of funding to attract experienced, quality counsel.

Economic Implications

Improved services could result in reduced expenditures for incarceration. The year 1974 was the last time the Michigan Court of Appeals published figures regarding "rates of relief" from criminal appeals. They found that 17% of all cases resulted in a benefit to the appellant, where convictions or sentences were vacated and the cases returned to the trial court. The Michigan Assigned Appellate Counsel Service (MAACS) conducted an updated study in 1993.

Their stated goal "was to identify the ultimate consequence of post conviction review and to determine how many years of prison time was saved as a result." Using a random sample of 292 cases (5.6% of the appellate population), the overall rate of relief was 13.8% (12.5% for guilty plea cases; 16.5% for trials). Of all successful appeals, 64.3% were plea-based (Unpublished letter to Chief Judge, Michigan Court of Appeals, 1993).

MAACS calculated a reduction in prison and jail sentences of 1,220 years for 1990 based on appellate corrections of error. Using an estimated cost of incarceration of $25,000 per year per inmate, MAACS suggested savings in excess of 30 million dollars annually in direct costs of incarceration. MAACS notes this amount is 15 times greater than the total expended for indigent defense in all 83 Michigan counties during fiscal year 1992–93.

This analysis of savings may, of course, be incomplete. Relief could increase recidivism, leading to higher ultimate prison costs. The system might also fill those new-found bedspaces with different individuals who might otherwise have been displaced (*i.e.*, paroled) because of overcrowding. The creation of new or stricter criminal laws, or enhanced enforcement procedures could also result in expenditures that abate perceived savings.

CHAPTER 2
REVIEW OF THE LITERATURE

INTRODUCTION

This chapter contains a review of literature on the following topics relevant to the performance of appellate counsel for the indigent: historical antecedents; service delivery systems for indigents and the trend toward privatization; system constraints including compensation, caseloads, support services, and political relationships; studies of professional "role" influences; and perceived effects of system constraints including client relationships, the work environment, burnout, and ineffective assistance of counsel. To thoroughly understand the current role of appellate counsel it is necessary to review significant historical facts and legal precedents.

HISTORICAL ANTECEDENTS

The existence of appellate rights was rarely considered at the state level prior to the "due process revolution" of the 1960s. Their presence, however, is imbedded far back in our judicial history, primarily inherited from England. The church was of primary importance in the development of law in early England. Historical documentation of law, per se, is quite fragmented; rather than appearing in legal annals, it is embodied as part of the customs and events of the era. Prior to the Norman Conquest in A.D. 1066, canon law was dominant. The bishops of the Church administered justice through the ecclesiastical courts. Jurisdiction included matters of "man's soul," encompassing crimes like adultery, fornication, incest, and

bigamy (Stuckey, 1991, p. 19–20). In the twelfth century, as kings gained power, they formulated and enforced laws through the secular or temporal courts, presided over by the kings' justices. Layman were subjected to both canon and secular laws and the jurisdictional distinctions were often unclear. Rivalry between courts developed, particularly related to appeals (Stuckey, 1991, p. 20). Appeals in the ecclesiastical courts could progress from an archdeacon to a bishop, then to an archbishop, and finally to the Pope. In the secular courts, the king was the final appellate authority. Kings were therefore jealous of the Pope's influence, particularly since the Pope's domain extended beyond national borders (Stuckey, 1991, p. 19).

In the United States, state constitutions did not provide for "access to counsel" in criminal proceedings until the late 1700s. The right of access was eventually extended to criminal defendants in all states by the U.S. Supreme Court's interpretation of the Sixth Amendment which provides that "in all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Before the Court applied the Sixth Amendment to the States, it was commonplace for criminal courts to simply deny indigents the right to counsel, thereby forcing them to rely on the prosecuting agents of the state and the leniency of the court.

It was not until 1932 that assigning counsel for indigents became a federal obligation in a small category of cases. Until then, only two states had provisions for such appointments, and these applied in capital cases only, where it was determined that the defendants were incapable of defending themselves (NLADA, 1969, p. 2). It is readily apparent that "the ability to defend oneself" is highly subjective, offering little guaranteed protection to indigents.

Eventually the U.S. Supreme Court ruled in Powell v. Alabama (1932), that all states were required to assign counsel to these defendants but only in capital cases. Six years later this practice was extended to all federal felony defendants Johnson v. Zerbst (1938). A similar effort to extend counsel to indigents at the state level was blocked in 1942 by the U.S. Supreme Court in Betts v. Brady, when the justices ruled that states were not required to provide counsel

to indigents for all felonies. Counsel was mandated only in capital cases or "when necessary to assure a fair trial," normally because of defendant's lack of intelligence or literacy.

The question of whether a "fair trial" occurred led to an abundance of appeals, particularly where complex factual issues existed. Thus, the appellate courts were forced to make ultimate subjective decisions about fairness since indigents were unrepresented. This situation was not remedied for another twenty years. In 1963, the now famous case of Gideon v. Wainwright was decided. Gideon provided for appointed counsel for all indigents accused of felonies at the state as well as the federal level.

Within several years following Gideon, this new-found right to counsel was extended on many fronts including delinquency (juvenile) proceedings In re Gault (1967); police interrogations Miranda v. Arizona (1966); post-indictment lineups U.S. v. Wade (1967); and probation and parole revocations Mempa v. Rhey (1967) and Gagnon v. Scarpelli (1937). Other holdings where the right to counsel has been affirmed include when pleading guilty Moore v. Michigan (1957); at sentencing Townsend v. Burke (1948); at preliminary hearings, Coleman v. Alabama (1970); at any line-up which is adversarial Kirby v. Illinois (1972); and during in-court identification following the initiation of a criminal complaint Moore v. Illinois (1977). Essentially, once any adversarial proceeding commences, the defendant has the right to the assistance of counsel Brewer v. Williams (1977). This right remains through defendant's first "appeal of right" Douglas v. California (1963). Under no constitutional obligation to do so, states may provide appellate counsel for defendants beyond the first appeal, (*i.e.*, by leave) Ross v. Moffitt (1974). Of course, in criminal cases defendants always have the constitutional right to proceed by representing themselves when they voluntarily and intelligently chose to do so Faretta v. California (1975).

This right to counsel has been further broadened. In Argersinger v. Hamlin (1972), the Supreme Court provided that defendants must receive appointed counsel, if indigent, in both

felony and misdemeanor cases where their liberty is threatened. The resulting fiscal impact on the states and local governments was monumental (Levine, 1992, p. 142). Then in 1979 the Supreme Court reduced the affect of Argersinger, only making counsel available to those cases when "incarceration" is imposed as punishment Scott v. Illinois (1979).

It is interesting to note that these indigents' rights accrued primarily because of judicial, rather than legislative action. This lineage of United States Supreme Court cases established threshold constitutional rights for indigent criminal defendants/appellants. Today, the extent of this "right" is subject to debate, especially with respect to questions about the quality of counsel afforded to indigent defendants and the limited applicability of the Sixth Amendment trial rights in the appellate context. States, interpreting their own constitutions, may expand appellants' federal rights.

For many years, prior to court mandates, various private organizations across the country voluntarily provided some legal assistance to poor people and some state bar associations required limited pro bono (*i.e.*, free) services from their members. The most notable private organization is the American Civil Liberties Union (ACLU). Some legal aid centers received federal funds but these were eventually curtailed by Reagan administration budget cuts (Territo, Halstead & Bromley, 1992, p. 275-276). The remains of "legal aid" systems today are generally devoted to assisting the poor in civil legal matters rather than criminal defense litigation. Disputes such as child custody and support, involving poor urban parents, would be an example. Organizations like the ACLU occasionally handle criminal appeals in situations where perceived significant legal injustices might occur. Today, although some charitable and voluntary programs still exist, the majority of indigent criminal trial level and appellate work is provided through various government sponsored systems as described below (Territo, Halstead & Bromley, 1992, p. 276).

Indigent Defense/Appellate Service Delivery Systems

Whether representation is provided at the trial or appellate level, system characteristics may impact counsel's role. Three primary systems have received extensive attention at the trial level: public defender, assigned (or appointed), and contract. These have similar application at the appellate stage but there are no detailed studies of appellate systems, until now. The methods of delivery are chosen by the specific sponsor of the service (*e.g.*, count or state). A county sponsored system, such as Michigan's, has a multitude of county governments selecting systems with widely varying characteristics.

Public Defender Systems

Defender offices are generally public agencies staffed by salaried counsel, the institutional counterpart to local prosecuting attorney staffs. Referrals are made to the defender office, rather than to a specific attorney. Twenty-three states have adopted this system state-wide, while other states use it only in some jurisdictions or counties. Local defender offices may vary in size from one attorney to several hundred (Kamisar, LaFave, & Israel, 1986).

At the trial stage, defender systems in Michigan are used in only six circuits—these are generally more populous jurisdictions (Levine, 1992, p. 2). Defender systems provide fiscal advantages to the county including a fixed yearly budget with the fiscal flexibility of being able to adjust to increases in workloads. Chief defenders are typically appointed by the chief judge of the circuit. Public defenders are criminal defense specialists with paid support staffs whose office, equipment, supplies and salaries are furnished by the government. Investigative services and expert witness resources are also generally available, similar to prosecuting attorney offices.

At the appellate level, Michigan has a State Appellate Defender Office (SADO). Similar to public defenders, SADO attorneys are full-time salaried employees with support staff. SADO,

unlike local defenders, is a centralized state office, handling appeals throughout Michigan from their base office in Lansing. SADO "specialists," however, only handle 17 percent of state-wide indigent felony appeals. Eighty-three percent are serviced by private counsel who receive their assignments from MAACS, after requesting placement on the roster of eligible attorneys (Levine, 1992, p. 3). Thus, the majority of appellate counsel in Michigan are appointed at the local (*i.e.*, county) level.

Assigned (or Appointed) Counsel Systems

The assigned counsel system is the most widely used method of indigent criminal trial defense in the United States (Territo, 1992, p. 279). It is often employed by smaller jurisdictions that cannot financially justify a full-time public defender office. It shifts the burden of defense to individual private practitioners, freeing the state or local jurisdiction from that direct responsibility. Typically, trial level appointments are made by local judges from existing lists of local attorneys who have requested placement on their roster.

This system lends itself well to smaller-size jurisdictions where a manageable number of private attorneys can handle relatively small caseloads. As volumes increase, it becomes necessary to either recruit additional attorneys or increase the load of existing counsel. When the latter occurs, critics question whether time constraints discourage or limit the attorneys' services to their indigent clients, in favor of serving those who employ them privately. Since hourly fees for private counsel are considerably higher on the average, it is believed that these clients receive priority when attorneys allocate their own time to tasks and clients.

Appellate counsel in Michigan, after placement on the state-wide roster, await assignment from MAACS, rather than a local judge. Unlike the more specialized SADO attorneys, appointed appellate counsel come from the private sector and their types of legal practices may vary markedly (*e.g.*, family law, contracts, real estate, *etc.*). Eligibility to receive appointments

requires very little experience, but attendance at a one-day MAACS sponsored appellate workshop is mandatory (Levine, October 1992). Higher levels of experience are required for more complex appeals. MAACS believes a state-wide SADO-type system would provide indigent appellants with more experienced counsel (Levine, 1992).

Assigned appellate counsel receive cases one at a time on a rotating basis under the compensation formula of the county where the case originated. Other than the prescribed compensation, appointed counsel do not receive benefits (*i.e.*, medical, vacation, retirement) like conventional government employees. Their service is akin to that of an independent contractor; they maintain financially responsible for their office, secretary, equipment, *etc.*

Contract Systems

Under contract systems, local units of government enter into written agreements with specific groups of lawyers or firms to handle all appointed representation for a specific time period (*e.g.*, one year). Similar to assigned counsel, they are private practitioners. Similar to public defenders they assume responsibility for all or a significant portion (*e.g.*, all felonies) of the criminal offenders in a jurisdiction. Essentially, defense services are privatized following a bid process.

Contract systems are a relatively recent innovation, and their presence is increasing (Worden, 1992). Although public defender and assigned counsel systems are still dominant, the contract system offers some advantages to the financial providers. Judges and local commissioners value their predictable costs and ease of administration. Unlike assigned counsel, the judge does not select the indigent's specific attorney. The defendant is automatically referred to the contract group and assignments are handled internally.

Contract systems are typically utilized because of an "efficiency assumption" regarding privatization. Studies reveal that policymakers are most likely to employ this program under

conditions of fiscal strain (Ferris, 1987; Worden & Worden, 1989). They are only more efficient, however, if competitively bid (Worden, 1991).

Currently six states use this as the most prevalent form of indigent representation (Territo, 1992, p. 281). Again, contract systems are sometimes mixed with other systems within jurisdictions. For example, conflicts of interest may arise when there are multiple defendants charged in the same criminal enterprise (Wasserman, 1990). A contract defender may be legally prohibited from representing a defendant if a co-defendant is represented by the same office. This necessitates an "assigned" backup system.

Thirty-four counties in Michigan currently use contracts for felonies at the trial level. MAACS, however, prohibits their use at the appellate level, relying exclusively on assigned counsel except for SADO's 17 percent. However, the "fiscal strain" which has prompted the growth in contracts also exists at the appellate level. Some appellate appointments (*i.e.*, fee schedules) are essentially individual contracts for services to be rendered in the future. These methods, relative to Michigan systems are detailed in Chapter 3.

The Trend Toward Privatization

As funding for defense services becomes more problematic, concerns regarding the potential for reduced services increase. Funding constraints are perceived as resulting in diminishing governmental support for vital functions, burdensome taxes, the elimination of "unnecessary" programs, and the general desire to cut costs (Donahue, 1989; Poole & Fixler, 1987). At both state and local levels, in the wake of fiscal constraints, "privatization" has become an increasingly popular means of performing public functions. Services for indigent criminal defendants and appellants, traditionally offered by ad hoc counsel and public defenders, are now often provided through service contracts with outside counsel, the most common form of privatization (Worden, 1991, p. 390).

The responsibility for defining the service and the recipient, in addition to selecting the immediate provider, remains with the government. Government provides for the service by arranging for its production, but implementation lies with the private sector (Kolderie, 1986; Morgan & England, 1988). This shift in production may be total or partial.

The percentage of publicly provided services that are externally produced (*i.e.*, contracts) has been found to increase with (1) perceived cost savings, (2) stringent fiscal conditions, and (3) the lack of powerful constituency groups (Ferris, 1986). A most important determinant of government spending for indigent defense is fiscal capacity, remembering that the majority (*i.e.*, 61%) of costs are borne by local counties (Worden & Worden, 1989; Spangenberg, 1989). Policy decisions regarding system funding alternatives are heavily influenced by political as well as economic factors. The use of private providers is seen as a promising alternative to the deficiencies of bureaucracies, namely: organizational and procedural rigidity, excessive regulation, civil service encumbrances, and diminished incentives for efficient, innovative operation (Savas, 1987; Worden, 1991).

Clearly, resources made available for indigents have fallen behind the demand (Appendix A). Decisions regarding indigent services certainly have fiscal impact. Whether policymakers establish their systems entirely from an economic perspective is unclear, but most are related to docket and cost concerns rather than quality representation (Daniels, 1992, p. 139–140).

Contract systems had been a relatively uncommon phenomenon. Only six percent of the nation's counties used contracts for trial counsel in 1982 and the majority of these were rural districts, consisting of populations less than 50,000 (Spangenberg, 1986, p. 12). Michigan provides an example of contract system growth. In 1980 only 15 of the 83 counties used contracts for indigent defense services. Within a decade the number grew to 34, including more urban jurisdictions. Seven of these have populations over 100,000 and six more exceed 50,000

(State Bar of Michigan, 1992, p. 150). The extent of contracted appellate services in other states in unknown.

A variety of studies suggest that, although there may be advantages for the service provider, contract systems can be detrimental to the best interests of indigent trial defendants. One study found that contract systems did not reduce the cost of defense, as anticipated, but did result in a reduced number of trials, de novo appeals, pre-trial motions, and requests for investigative services (Houlden & Backin, 1985b, p. 181). The same study cited lack of attorney training funds and library resources for contract attorneys (p. 181). Increased defendant dissatisfaction with attorney responsiveness and growth in numbers of guilty pleas were also noted as significant.

Once an annual contract is established, heavy workloads may result in reduced services to indigent clientele. "Attorneys could be expected to adjust their hours worked to conform to their perceptions of a fair hourly rate—thus devoting fewer hours to their contract system cases" (Houlden & Backin, 1985(b), p. 182). Perceived "reductions" are typically measured by results or outcomes. However, by merely measuring "outcomes" (*e.g.*, acquittals) the "process" is neglected. Many would argue that indigent clients are entitled to full services of counsel even if the outcome is not affected (Thibaut & Walker, 1978).

The fiscal argument for contract systems is largely bolstered by the belief that the bid process, based on competition, will result in lowered costs. In fact, contracts for criminal indigent defense frequently are not awarded in a truly competitive fashion because too few attorneys are interested in competing for the contract. Furthermore, policy makers are rarely concerned about the quality of representation provided by the low-bid attorney(s) (Spangenberg, et al., 1986; Houlden & Balkin, 1985b; Wordon & Worden, 1989). Therefore, the "cost" of contracting necessarily depends on the supply of legal labor. In addition, price-fixing, collusion among apparent competitors, and the creation of private monopolies as

unsuccessful bidders opt out of the marketplace, negate the promise of efficiency upon which contract systems originate. Once out of the market, unsuccessful bidders are less likely to be part of future bidding processes. (Morgan & England, 1988; McEntee, 1985; Kolderie, 1986).

Another major concern with these systems surrounds "accountability."

> A particular sort of market failure occurs when the purchaser of goods is unable to observe its consumption. In such cases, the purchaser cannot accurately gauge the quantity and quality of the goods delivered. The supplier may therefore provide to the consumer less than was purchased and retain the residual without fearing sanctions from the unwitting buyer (Gentry, 1986, p. 356).

Under an assigned counsel system, the court can monitor billings to review time and service. Contract systems remove the itemization of services from judicial scrutiny because individual cases are enveloped in the entire contract.

For indigent trial defendants, the services are largely unobservable and hidden by the lawyer-client privilege. This is primarily because the extensive use of plea bargaining keeps courtroom litigation to a minimum. Moreover, contracts rarely define services beyond the wide parameter of the contract (*e.g.*, to represent all felons for a specific sum during a specified time frame). Since government implementors often provide services because of court mandate their motivation to insure defense services for indigents in not necessarily inspired by an earnest commitment to the policy itself (Johnson & Canon, 1984). Efficiency may therefore be pursued at the expense of quality (Worden, 1991, p. 405).

Underbidding for indigent defense contracts is frequent. This sets off an alarming chain of events. Because of unrealistically low original bids, contract attorneys are not financially capable of allotting necessary time to all clients. When the number of cases (or time) exceeds expectations, problems compound because the attorneys are contracted to absorb the excess for the previously established fee (Mayer, 1984, p. 33). The lawyers may appeal to the county administrators for supplemental funding beyond the contract; if granted, additional funding may

defeat the economic purpose of the bid system (Nelson, 1988, p. 1148). Contract attorneys may bid as a method of paying for their overhead expenses and deliberately cut back on services to maintain profits (Nelson, 1988, p. 1148). Nelson contends many low-bid contract systems do not satisfy constitutional standards, nor do they reduce costs to the governmental entity (p. 1155).

In a study of Clark County, Washington, Lefstein concluded "that even where the county paid contract attorneys a higher rate to handle excess cases, the extra money spent did not increase the quality of representation. In fact, the overall level of representation declined" (Nelson, 1988, p. 1155). The Houlden study stated emphatically that contract attorneys spend less time and money per case than assigned counsel (Houlden & Balkin, 1985b, p. 198–199).

A Michigan study discovered that none of the existing trial-level contracts had caseload controls. This is true at the appellate level also. "No allowances were made for increases in volume caused by changes in crime rates, arrest rates or prosecution charging policies" (State Bar of Michigan, 1992, p. 152). However, the lack of "volume" controls accounts for only part of the concern. Contracts often coincide with substantial private practices which also lack caseload controls. Accordingly, each individual client becomes worth less to the "contractor" (State Bar of Michigan, 1992, p. 152).

Even the Executive Director of the Prosecuting Attorneys Association of Michigan believes criminal defendants are poorly served under contract systems. "My experience has verified for me that corner-cutting is a reality in the case of contract defenders." "When private practice is mixed with public duty there is an incentive to minimize the time allocation to public duty" (Shonkwiller, 1992, p. 174). Contract attorneys operated more efficiently than assigned counsel on a per-case basis, precisely because the former spend much less time with indigent clients (Houlden & Backin, 1985b, p. 176). Until now, the effect of contract-type constraints on appellate counsel for indigents has not been studied.

System Constraints

Private versus Public Counsel

It is widely maintained, primarily because of organizational shortcomings and constraints inherent in public indigent defense systems, that principles of justice are subverted. Specifically, low pay and large caseloads are the primary perceived system-based obstacles affecting services for indigents at trial. Since it is believed that private counsel are influenced less by these dual evils, numerous studies compare performance of public versus private retained criminal law attorneys at the trial level (Gitelman, 1971; Stover & Eckart, 1975; Wheeler & Wheeler, 1980). Others compare the same attorneys acting in both private and public capacities (Clark & Kurtz, 1983; Grier, 1971; Benjamin & Pedelski, 1969). Some studies of jurisdictions with multiple public defense systems, compare intra-system public services with those of private counsel (Flemming, 1986; Houlden & Balkin, 1985a; 1985b; Hermann, 1977; Levine, 1975; Casper 1972; Taylor, 1972).

Stover and Eckart, in a qualitative study (*i.e.*, interviews/observations) using conviction and sentencing "outcome" measures, concluded that no significant differences existed based on attorney type (*i.e.*, public versus private). In addition to outcome they examined these limited "process" variables: the norm of advocacy, factual investigation, level of interaction with court bureaucracy, and experience (1975, p. 270). Based on observations and interviews, they discovered no differences in levels of "advocacy" or "investigation." Although public attorneys had greater "experience" and "courthouse interaction," they felt outcomes (*i.e.*, sentences) were unaffected (p. 283).

Cavender, Nienstedt and Everett also compared attorney performances at the criminal sentencing disposition stage. Using the American Bar Association Standards for Criminal Justice, they concluded no significant differences (*i.e.*, sentences) existed between public and privately represented criminal defendants (1987, p. 216). This qualitative assessment was based

on observations and interviews within one local jurisdiction. It did not assess the attorneys' performance relative to the "standards"; it merely compared outcomes between the two groups. Emmelman indicates that the literature provides little insight regarding the conditions under which publicly provided counsel perform most ethically, *i.e.*, relative to standards (1993, p. 222).

Flemming cites thirty-seven studies comparing public with private counsel stating the results are inconclusive. He notes, "When differences do emerge, patterns are uneven and seemingly serendipitous. The literature offers no clear operational criteria of performance" (1989, p. 403). Nardulli studied private and public regular and nonregular attorneys in nine medium-sized communities. After identifying "regulars" by their reputations for competence and responsiveness, he was unable to discover any significant differences in case outcomes in comparison to "nonregulars" (1986, p. 379). He concluded that the regulars, public and private, establish the courthouse norms through their relationship with the courthouse community and nonregular case outcomes are then affected similarly (p. 416).

Skolnick contends there is always a smaller group of "outsider" regular attorneys, who are more combative and adversarial, unlike Blumberg's generalization that all defenders conform to system requirements and "sell out" their clients (1967, p. 60). Skolnick maintains these are often gamblers, attorneys who win big and lose big, a concept not necessarily in the clients' best interests. These studies generally seek systematic reasons for attorney performance, disregarding professional role behavior.

Caseloads

It is well documented that public trial counsel for indigents have excessive caseloads and, in most instances, are underpaid (State Bar of Michigan, 1990; NLADA, 1982). Excessive workloads are often an integral part of public service organizations and outcomes are affected

(Cherniss, 1980a). Just as the tremendous number of cases in recent years has taxed the resources of police, prosecutors, and corrections, so have defense and appellate services been strained.

Although the volume of appellate cases has increased significantly in Michigan, it is unknown whether appellate counsels' caseloads have also risen. It is well documented that the Michigan Court of Appeals is overburdened. In 1992 they received 12,000 cases with a backlog of over 4,000 active cases. The waiting period for a decision was two to three years and their caseload was increasing (For the defense, 1992, p. 10). Although studies on appellate attorneys' caseload size have not been done in Michigan (or elsewhere), MAACS believes that many appellate counsel also do indigent criminal trial work where caseloads have grown. This "belief" is based primarily on discussions with local counsel and MAACS staff.

Excessive caseloads stem from the well-documented problem of chronic underfunding of criminal defense systems (ABA, 1988). "Meaningful representation" has never been quantified in operational terms, but it is believed to diminish with increased caseload size. One research project established the ideal maximum felony trial-level caseload per attorney at thirty-five cases a year (Wice & Suwak, 1974). As far back as 1973, the National Advisory Commission on Criminal Justice Standards and Goals estimated the maximum at 150 cases per year, while public defenders' associations preferred 100. In 1975, defenders in New York averaged 922 cases each; those in Philadelphia carried between 600–800; those in Oakland 300. Tampa, Florida, which processes 175,000 indigent cases annually, averages 795 cases per year among its 220 full-time defenders (Territo, 1992, p. 281).

Excessive workloads present many impediments to performance. They offer a disincentive to time-consuming trials and are the single greatest systemic obstacle to effective representation (Margulies, 1989, p. 677). Preparation is vital to meaningful trial and appellate representation. The sheer volume of cases subjects trial attorneys to plea-bargaining pressures and the vast

majority of cases are resolved in this manner. Plea-bargaining is sometimes referred to as assembly-line justice. To conserve time, the attorney may prematurely convince the client to enter a plea or dismiss an appeal. Blumberg contends the defense attorney faces three essential tasks: to arrange for his fee; to prepare his client for the outcome; and to satisfy the court organization that he has performed adequately to avoid outside scrutiny, *i.e.*, appellate review (1967, p. 27). An outcome achieved using these criteria may not be in the clients' best interest.

Time-consuming appellate efforts can also be circumvented (Levine, October 1992, p. 12). These might include limited exploration of issues (*i.e.*, record review & legal research), reduced client contact, limited evidentiary hearings/motions in the trial court, or avoiding travel (*i.e.*, oral arguments before appellate courts). Trials present questions-of-fact, while appeals may require counsel to develop factual records (*e.g.*, an evidentiary hearing). An ancient axiom recognizes that there are two sides to every story and discovery requires time. Neglecting reasonable alternative factual explanations can have serious outcome consequences. Wasserman suggests expanding the scope (*i.e.*, discovery) of appellate review stating, "there is no reason why they (*i.e.*, appellate courts) must regard the trial court record as sacrosanct" (1984, p. 230).

Analyzing the impact of wages and caseloads on indigent services is difficult. "Outcome" measures provide limited insight. At the trial level, for example, the outcome is frequently bargained for and often routine. At the appellate stage the affirmation of appellants' guilt and/or sentence does not necessarily signify reduced attorney effort resulting from an excessive caseload or inadequate compensation. The "process" leading up to the outcome, often requires investigation to assure its veracity. If trial counsel "pressures" the client to enter a plea, that interchange is usually "off the record," necessitating fact-finding. In guilty plea appeals, appellate counsel should look for duress, misrepresentation or incompetence that would invalidate the plea (Wasserman, 1990, p. 239).

Compensation

The effect of low wages on work performance of appointed trial and appellate counsel is unknown. The commonly held belief that lawyers' desire to maximize earnings is repeatedly cited as a rationale for reduced services (Margulies, 1989; Alscher, 1975; 1986; Blumberg, 1967). Indigent defendants have a parallel perspective, believing court-appointed counsel are overly eager to abbreviate time spent on their cases, with little concern for their welfare (Daniels, 1992; Casper, 1978; Platt and Pollack, 1974). Levine refers to the concept as "fiscal self-preservation" (1992, October, p. 12). Similarly, attorneys envision a relationship between economics and job satisfaction (Fleming, 1986). Other professions relate equitable pay to work enjoyment (Locke, 1976).

County-level funding for indigents trial and appellate counsel, as practiced in Michigan's 56 judicial circuits, is the primary fiscal method employed nationwide. Local budgets, however, do not necessarily increase in proportion to rising law enforcement caseloads such as those precipitated by the relatively recent "war on drugs." State-level funding, as practiced in a minority of states, at least eliminates fiscal disparities among counties (Levine, February, 1992, p. 142). The effect of fiscal inequality on quality of service is unknown, however. In smaller venues in particular, excessive criminal activity or lengthy, complex litigation, can prematurely deplete annual circuit budgets.

A survey of Michigan's appointed counsel (*i.e.*, trial and appellate) found half of the respondents focused on the pressure low fees create to spend less time and omit particular time consuming tasks (Levine, October 1992). Over sixty-three percent of the lawyers surveyed believed the "quality" of representation for appointed work was "lower" or "much lower" than retained work. "There is a tendency to circumvent procedure, motion practice, and investigation to maximize fees . . ." (Levine, October 1992, p. 28).

When asked to specifically provide a reason regarding "how" quality is affected by fees, various responses were given in a 1990 Michigan Bar Association survey. Half of all respondents focused on the pressure low fees create to reduce the overall time commitment to cases, to increase their volume of appointments, reduce time with clients, and forego ferreting out evidence (State Bar of Michigan, 1990).

In a legal challenge to Wayne County's fixed fee schedule system, a Michigan Appellate Court fact-finding referee opined that Wayne County's system created incentives for lawyers to put in as little time as possible for the pay allowed. It was determined that essential motions were omitted and meaningful plea bargaining was discouraged because defense counsel could not afford to go to trial. The referee concluded that the system supported a group of "substandard attorneys" (In re Recorder's Court, 1993, p. 115-116). Interestingly, the Wayne County fee-schedule/contract system was created because their judges believed an hourly system created incentives for attorneys to prolong cases (p. 117).

As a result of low compensation, indigent defendants at the trial level are often represented by young or inexperienced lawyers, or by those who willingly cut corners (State Bar of Michigan, 1990, p. 27). Assigned lawyers with 3-5 years experience devote most of their workloads to assigned cases. The number of assigned attorneys drops by 50% for those with six to ten years experience (p. 27), suggesting that many attorneys stop taking assigned cases when they become less dependent on indigent work. It is argued that if higher fees were paid, more experienced counsel state they would accept indigent work and this would result in more competition among attorneys. Competition, it is reasoned, would pressure those selected to do higher quality work to insure future assignments (p. 27).

These assessments by the people who possibly know best—the attorneys—have not been empirically verified. Opinions from non-Michigan lawyers on the subject are similar. The Vice President of the Georgia Trial Lawyers Association speaks of "the mirror test" for court-

appointed counsel: "Place a mirror beneath the court-appointed lawyer's nose, and if it clouds up, that's adequate counsel." To back up this dire assessment, he cites an instance in which a court-appointed defense attorney did not recognize that the wrong defendant had been brought in for trial, obviously demonstrating the lack of prior consultation (Bright, 1990, p. 11).

It can be argued that lawyers for indigents, regardless of the compensation system, have the least desirable lot in the court system. Judges receive regular raises as do prosecutors and court reporters. Reporters' pay is even regulated and guaranteed by statute in Michigan.[3] The same cannot be said of counsel for the indigent. The NLADA study found that even counties using salaried public defenders paid them less than they paid their salaried prosecutors (p. 20–21).

Fees for court appointed counsel are generally designed to favor government fiscal priorities; in some Michigan counties attorney compensation has not risen in fifteen years (Appendix A). Actual reimbursement may be as low as $3.00 per hour depending on the requisite work and the compensation system, *i.e.*, what the judge determines as "actual" compensation (Levine, February 1992, p. 142–143). In contrast, the Federal system statutorily mandates review of indigent counsel fees every three years; those federal rates for the Eastern District of Michigan in 1993 were $75 per hour (Levine, October 1992, p. 23).

The Michigan survey further found the median hourly privately retained fee for criminal attorneys to be $90 compared with $40 for assigned counsel. The same survey noted the median hourly overhead costs of all respondents was $30 (State Bar of Michigan, 1990, p. 10). The study further indicates that hourly rates for lawyers practicing in non-criminal legal areas almost always exceed $90 per hour.

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[3]MSA 27A.2543; MCLA 600.254

Low fees have occasionally led to litigation against the government. Typically these involve jurisdictions where indigent representation is "required" (*i.e.*, mandatory pro bono). In Michigan, this work is voluntary. In Kansas, assigned trial counsel challenged the low compensation rates. The Kansas Supreme Court, debating the constitutionality of $30 per hour for assigned counsel, ruled that it was not adequate compensation. They stated:

> One who practices his profession has a property interest in that pursuit which may not be taken from or her at the whim of the government and without due process. . . . The State of Kansas has the obligation . . . to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead expenses. . . . Out of pocket expenses must be fully reimbursed (Arango, 1990, p. 29).

This ruling, however, essentially protects the attorneys' economic interests rather than the clients' right to effective legal assistance. The court's holding in Deligio v. Alaska (1987), similarly skirted the relationship between attorney compensation and defendant's need for quality representation. In Delisio, the court ruled that low compensation for assigned counsel puts an "unfair burden" on the attorney but did not require changes in the funding scheme (Curriden, 1991, p. 67).

Unfair burdens are not exclusively in the form of low compensation combined with large caseloads. In one exhaustive case, low compensation interfered with the attorney's ability to make a living. In this extraordinary example, an Alabama attorney spent several thousand hours on a capital murder case to which he was assigned. The case ended up costing him $340,000 and pushed him into bankruptcy Jewell v. Maynard (1989). The Supreme Court of Appeals of West Virginia found that requiring an attorney to spend more than 10% of a normal work year on assigned cases constitutes an unconstitutional taking of property without compensation (Arango, 1990, p. 36). The court went on to say that there is a clear link

between the Sixth Amendment right to counsel and the adequate timely payment of attorney fees and expenses.[4] In West Virginia, some pro bono work was mandatory.

The Jewell court concluded that if an attorney's overhead costs are not covered, a conflict of interest results; both the attorney and the client are unfairly burdened as the necessary services may not be performed. As a result of Jewell, the following minimum compensation schedule was established in West Virginia:

> *$45.00 per hour out of court;
> *$65.00 per hour in court;
> *$1500 cash advances if necessary to cover expenses to be approved by the judge (Arango, p. 36).

Even these suggested hourly fees are far below "retained" rates of compensation. Most Michigan counties pay less than half the privately hired hourly rates; many pay an hourly amount approximating the average criminal attorney's hourly overhead costs. For some, their actual future reimbursement is unknown. Examples include counties which pay according to "judicial discretion" and others where judges reduce fees even when their system specifies a particular rate (In Re Attorney Fee, Jacobs, et. al 1990; 1991). The unilateral reduction in fees is referred to as judicial "red-lining" by some counsel.

Support Services

Law enforcement agencies offer enormous investigative aid to the prosecutor. Essentially, they are partners in the process of presenting a case against the accused. The indigent defendant does not have similar resources. A court-appointed attorney or public defender typically has to obtain special court approval to hire a single investigator or obtain the services of an expert (Karfonta, 1992, p. 165). Recent high profile cases illustrate this dichotomy (*e.g.*, William

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[4]Appellate attorneys in Michigan, for example, regularly wait in excess of two years to be compensated for appellate work.

Kennedy Smith, O. J. Simpson). In those cases, investigators and expert witnesses consumed enormous defense resources. Those major expenditures would not be available for indigents. In the aforementioned Michigan survey, many responding attorneys expressed concern that they lacked resources to procure investigators and/or expert witnesses (State Bar of Michigan, 1990, p. 28).

While realizing the prosecution carries the burden of proof, the disparities in resources are still profound. The prosecution possesses discretion in charging which is virtually unreviewable. Using this power, the prosecutor has the ability to determine, in large part, the costs borne by the system (Oberg, 1992, p. 160). Similar discretion exists regarding which cases to "bargain" and the extent of those bargains. The prosecution is therefore allowed to use valuable resources to make social/political statements, while court-appointed attorneys are sometimes unable to obtain adequate compensation to cover their overhead at both the appellate and trial levels.

In addition to the superior investigative and support personnel, the prosecution also enjoys a better system for training and updating its attorneys. The situation in Michigan offers a comparative illustration. The Prosecution Attorneys Coordinating Council handles training, trade publications and technical support for county prosecutors. There is no statewide approach for training assigned defense counsel for trials or appeals (Karfonta, 1992, p. 166).

Assigned counsel in Michigan may receive some training from organizations funded by grants. The Criminal Defense Attorneys of Michigan was founded in 1976 as an educational and resource sharing forum. It was formed by defense attorneys and is funded by the Michigan Justice Training Commission. Their 1991 Budget was $52,024. The Legal Resources Project of the State Appellate Defender Office publishes defender trial and sentencing books and the Criminal Defense Newsletter. Its 1991 grants totaled $119,000. The Michigan Appellate Assigned Counsel System (MAACS) publishes a series of reference materials and offers a semi-

annual orientation program. Their 1991 training and orientation budget was $27,928 (Karfonta, 1992, p. 166). The total resources for training and educating all assigned counsel in 1991 in Michigan was less than $200,000. The budget for the Prosecuting Attorneys Coordinating Counsel for that same year was $1,076,735, more than five times as large. Overall, only 3% of funding for the administration of justice in the United States goes toward indigent defense (Karfonta, 1992, p. 166).

The issue with the greatest likelihood of reversal on appeal is "failure to investigate and call defense witnesses" (Levine, 1984, p. 1275). Some of the more prevalent defense deficiencies were documented in an exhaustive study by the National Legal Aid and Defender Association (NLADA). The study researched the availability of investigative support in public defender offices. Despite the crucial nature of investigating facts, NLADA found 83 percent of all offices lacked a full-time investigator and 60 percent had no investigative assistance. Twenty-five percent of those lacking support services reported there was no possibility of obtaining supplemental assistance from their court (NLADA, 1982, p. 21). Availability of resources is worse with assigned and contract systems where investigative assistance is basically non-existent. Prosecuting attorneys generally have local crime laboratories and experts at their disposal, including the services of the Federal Bureau of Investigation. Defenders, without system support, have to forego services or incur the costs themselves.

In the final analysis, the question is whether there is a denial of the defendants' ability to subject the states' case to adversarial testing pursuant to the Sixth Amendment (Margulies, 1989, p. 698). As the war on drugs continues or escalates, it is believed that existing resource imbalances may become even more pronounced; drug cases represent the bulk of increased felony rates (Murphy, 1991, p. 28; Spangenburg, 1989, p. 11).

Political Relationships

The American Bar Association requires that the defense delivery system and the lawyers serving under it "be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice" (Daniels, 1992, p. 139). Numerous examples exist of threats to terminate program funding, various pressures on counsel from the bench, and the disinclination of the judiciary to pursue reform (Keasler, 1986; Worden, 1989). In Michigan, as well as most other states, counsel for indigent defendants are paid by local judges. Not only do Michigan judges handle most trial level appointments, they often select the grantees of defense contracts and the hiring of chief public defenders. Judges may negotiate the terms of contracts or actual payments and terminate contracts at will. This suggests the possibility of co-optation since the attorney may possess divided allegiance—to the court and to the client (State Bar of Michigan, 1992, p. 152). Judges, with their own docket and fiscal concerns, can influence the disposition of cases (*e.g.*, discourage aggressive defense or appeals) when they retain power over the service provider.

Cases where judges unilaterally reduce fees to assigned counsel following case completion have occasionally led to litigation. Five cases are currently pending before the Michigan Supreme Court seeking a mandate to force trial court compliance with stated fee arrangements (Jacobs, et al.). This remedy is not practical; suing the judge strains the work relationship and possibly jeopardizes the treatment of future cases in that court. More importantly, it is believed that many attorneys, faced with this dilemma, either discontinue representing indigents in those jurisdictions or curtail their services to coincide with anticipated reimbursement (State Bar of Michigan, February 1992, p. 154–155). Thus, judicial influence can potentially affect counsels' role behavior.

Generally, the public lacks knowledge and input regarding services for the indigent. Their preferences impose no more than a very loose constraint on the decision processes; mass

political behavior has only a small effect on these policy decisions since the process is of low visibility (Worden & Worden, 1989, p. 405; Kuklinski & Stanga, 1979; Mladenka, 1977). The political culture of a jurisdiction only establishes broad parameters within which the courts must operate (Dolheare, 1967; Eisenstein & Jacob, 1977; Engel, 1984; Myers & Talarico, 1987). The courthouse actors may be permitted to play out their roles with little public interference.

In a locale stressing social control through the apprehension and conviction of lawbreakers, the political climate might not support indigent services with much conviction. The appellate process following trial might appear even less significant. Former Attorney General Robert Kennedy observed, "a poor person accused of a crime has no lobby" (Bright, 1990, p. 12). Indigents, who represent the bulk of criminal defendants/appellants, have little voice or representation. They rarely express opinions to county commissioners or judges regarding funding systems. Kessler argues that the poverty community is "unorganized, inefficacious politically, and generally quiescent," while the county elites, most notably the judges, play the prominent roles in the decision-making (1986, p. 154). Judges' opinions regarding the best means of providing indigent defense appear to have an almost determinative influence, unless financial considerations are overriding (Worden & Worden, 1989).

Local bar associations are less likely to play a significant role in influencing local funding. Generally, the majority to not practice indigent criminal work. Those with a vested economic interest are relatively few. If a contract system is utilized, only the parties to the agreement are directly affected. Appellate counsel are even fewer in number than trial counsel. In addition, local bar associations are not necessarily "political." Their focus is often social or educational. In some locales they are non-existent.

As in most states, indigents in Michigan have no choice of counsel at either the trial or appellate stage. If conflicts arise, either party may request relief (*i.e.*, motion for substitution). However, formal court action is required and just "cause" must be demonstrated before

appointed counsel can be replaced. Unlike retained counsel, the relationship cannot be dissolved simply by the desire of either party. Thus, the system establishes the initial attorney/client relationship and ultimately determines when it terminates.

Indigent program funding considerations, which fail to address "quality" of the services provided have profound ramifications relative to Gideon v. Wainwright and the defendants'/appellants' right to adequate representation. As one Legal Services Program stated their goal is "to provide access to the judicial system to those millions who for a variety of economic, social and psychological reasons have been legally alienated. . . . This is not simply related to politics; it is politics" (Kessler, 1986, p. 149). The system's influence on the role of counsel will continue to intrigue scholars and, hopefully this dissertation study will add to that body of knowledge relative to "role theory."

The Role of the Professional

An Overview

This study is an effort to contribute to the understanding and development of theory relating to appellate counsel for the indigent within organizational contexts. Although their tasks are accomplished in relative anonymity, compared with other actors in the judicial-legal community, their performance (*i.e.*, roles) may be influenced by expectations of judges, clients and peers.

Role theory provides a means for examining the influence of institutional constraints upon decision making (Gibson, 1983, p. 17). In his study of the "judicial" role, Vines discovered that the political actors' behavior depends on normative expectations of self and others (p. 464). Gibson reminds us that "institutional expectations always serve to limit choice and discretion on the part of the members of the institutions" (p. 17). "Common understandings of how jobs should be performed affect how they are performed" (Howard, 1981, p. xxii).

This dissertation study should assist in explaining and predicting the behavior of appellate counsel in their role as representatives for indigent appellants. If compensation is not determinative of performance, these research results may suggest less impact by that variable. Conversely, if compensation is of significance, it has predictive value. Accordingly, if the hypotheses are accurate, explanations of behavior (*i.e.*, role) will need to be explained in future research by factors other than compensation schemes.

Role and Appellate Counsel

Research on the role (*i.e.*, work behavior) of appellate counsel for the indigent is extremely limited. Quantitative studies scrutinizing their performance relative to specific "standards" (*i.e.*, professional ethical responsibilities) are non-existent. The vast majority of both qualitative and quantitative studies involve trial rather than appellate counsel.

Wasserman provides an extensive overview of the criminal appellate process in New York City, offering suggestions from improving quality, conserving public resources, and broadening impact (1990, p. 157-245). He provides a historical rendition of appellate resource deficiencies and offers a very limited qualitative comparison of two separate appellate defense organizations. As the only study exclusively targeting appellate counsel, its salient features are as follows:

The first study group was the Criminal Appeals Bureau (CAB). CAB attorneys were salaried, on a par with assistant district attorneys. They had a large supervisory staff, competent support services; their overhead costs were supplied by the government. The second organization consisted of "18(b)" attorneys. These were private assigned counsel who handled "conflict" cases. In situations where there were co-defendants, CAB would have a legal conflict-of-interest representing both. 18(b) counsel were then contracted from the private bar ($25 per hour, in-court time; $15 per hour, out-of-court time) to represent one of the

appellants. The maximum fee per case was $750; most of appellate counsel time was out-of-court—at the $15 rate. Further, 18(b) attorneys paid their own overhead (*e.g.*, rent and secretary) and support services (*e.g.*, investigators and expert witnesses), if they chose to acquire them (p. 44–45).

The research method consisted of eight retired appellate judges evaluating 32 paired CAB/18b briefs submitted in 1984 and 1985 for jointly tried co-defendants (p. 65). "The study found striking and consistent differences in the rated quality and significant deficiencies in 18b briefing in over a quarter of the sampled cases" (p. 69). The author further noted that the quality of the brief was largely evident on its face . . . without recourse to the trial record. They essentially judged clarity of writing, cogency of argument and appropriate use of legal authorities without any transcript review (p. 69). This subjective assessment of appellate counsels' briefs did not evaluate "outcomes" (*i.e.*, appellate relief), time devoted to specific tasks (*i.e.*, research), or adherence to recognized standards.

Wasserman's effort offers no broader theoretical explanations (*e.g.*, "role") for his findings, nor does he weight the significance of the differences in "over a quarter of the cases" (*i.e.*, eight). He concludes stating, "the research in this book has offered only fleeting glimpses of the retained appellate bar (*i.e.*, 18b counsel). A closer look would be useful for an integrated view of criminal appellate practice . . ." (p. 256). His effort does not explore counsels' behavior (*i.e.*, role) as applied to recognized professional standards or expectations. He concedes that "much of this book has been devoted to examining the challenges and pressures facing appellate defenders, but little has been said about the individuals who face them; about the lawyers who practice appellate representation" (p. 256).

Role and Public Defenders

In an exhaustive study of "burnout and job satisfaction" among public defense (*i.e.*, trial) attorneys, Hall concludes there are four contributing factors: client appreciation, peers, workload, and the work itself (1988, p. 246–252). Her findings may have some application to this research even though variations in roles exist; her attorneys were trial not appellate counsel. Hall's research group consisted of defenders in adjoining offices—in close daily contact with their immediate peers, supervisors, and the courthouse workgroup. The appellate actors in this dissertation study would appear to have greater autonomy, the equivalent of independent contractors. Compared with Hall's subjects, appellate counsel have limited contact with the courthouse workgroup unless there in another capacity. Thus, the "work itself" is distinguishable. Hall was also able to assess "workload" which is an unknown variable in this quantitative dissertation research. Hall used a recognized inventory to measure "burnout" (p. 9) and a quality of employment survey to assess "job satisfaction" (p. 11).

In another study of lawyers providing legal services to the poor, the researchers found that "those lawyers experiencing burnout are less committed to the organization; they report a lower identification with the organizations goals and less willingness to exert effort to achieve those goals" (Jackson, Turner & Brief, 1987, p. 348). Unlike these measurements, this research will focus on performance and, as noted by Locke (1976), job involvement is distinguishable from job satisfaction. Several other studies of attorneys suggest numerous individual microlevel factors as influential to role behavior including: loyalty, commitment, professionalism, collegiality, status, socio-economic origin and autonomy (Erlanger, 1990; McIntyre, 1987; Kallenberg & Berg, 1987; Price & Mueller, 1986; Heinz & Laumann, 1982).

Another examination of public defenders' roles finds they are motivated to achieve for their clients to overcome the stigma of ineptitude attached to their position (McIntyre, 1987). Emmelman noted, in her observations of defenders, that their "adversarial posture was perhaps

more importantly shaped and channeled by internal organizational conditions . . ." (1993, p. 227). She acknowledged that the defenders in her study "were already somewhat motivated to perform properly" at the time of employment (1993, p. 232).

Role and the Legal Profession—General

Measurements of social status (*i.e.*, prestige) within the legal profession are associated with role. "Professional standing is closely related to the type of client served and, concomitantly, to the field of legal specialty" (Erlanger, 1980, p. 884). While considerable variation in prestige exists, criminal defense ranks among the lowest of all legal professions (Heinz & Laumann, 1982, p. 111). The link between perceived status and performance has not been measured. Erlanger (1990, p. 884) suggests, however, that status may be enhanced through, among other things, affiliations with associations (*i.e.*, a criminal appellate/defense organization) and collegial relationships (Heinz & Laumann, 1982, p. 214). "Similarities in status, attitudes, and behavior facilitate the formation of intimate relationships among incumbents of social positions" (Heinz & Laumann, 1990, p. 216). In a study of Canadian corporate lawyers, organizational commitment was fostered in part by "collegiality" among the attorneys (Wallace, 1995). Callero states that "roles emerge in organizations or subcultures where they are accepted as authentic, but at the same time they receive little or no endorsement outside the group. Cultural reinforcement exists . . . but in a concentrated and limited sense" (1994, p. 235). Thomas & Mungham maintain the collegiate nature of lawyer groups encourage and maintain feelings of identity, colleague loyalty, and shared values (1983, p. 147).

In the detailed study of Chicago lawyers, distinct role variations were discovered among lawyers depending on their social origins, type of clientele, values, acquaintances, political affiliations and their definition of professionalism (Heinz & Laumann, 1982). Their findings suggest that criminal defense lawyers enjoy more "control" over their clients than other forms

of legal practice (p. 359). They also enjoy far more autonomy than the 27 other fields of law analyzed (p. 440); rank in the top three for having solo practitioners (p. 442); and are extremely Democratic in their political affiliations (p. 452).

Heinz and Lauman suggest that public defense attorneys' autonomy is enhanced because the clients do not control the "purse strings;" public attorneys define the needs of the consumer and the manner in which these needs are catered for (1982, p. 339). Cain concurs that the structure of the lawyer/client relationship determines "control" and autonomy (Cain, 1983, p. 129). Flemming counters that attorneys cannot freely exercise their judgement and satisfy a desire for professional autonomy until they secure their client's confidence. He claims this task is difficult because defendants distrust publicly paid counsel (1986, p. 260). To what extent the attorney/client relationship defines the role behavior of public counsel is therefore in need of further study. Similar uncertainties exist with counsel's relationship with the trial court judge. Kessler's research suggests that lawyers are "clearly cognizant of their political environment and their strategies of legal representation are influenced by it" (1986, p. 165).

Role and Judicial Behavior

In addition to lawyers, role theory has been a basis for studying other actors in the legal system. In discussing judicial behavior, Gibson maintains their decision-making is governed by three models: individual attitudes, role, and group-institution. Attitude portrays expectations of self, role designates professional obligations, and group-institution corresponds with the realities of the system (Gibson, 1983, p. 9). Role differences between counsel and the judiciary are somewhat obvious. Where counsels' role, for example, may be influenced by clients, peers, and the judiciary, judicial roles may be partially controlled by the appellate courts, the public, and supervising judges. Conversely, the desire to adhere to professional standards may be a common role influence for both.

In his work with federal magistrates, Smith states that "role theory . . . provides a framework for explaining recruitment, selection and socialization of magistrates into their judicial role" (Smith, 1988, p. 14). Smith differentiates judicial roles from those of magistrates' in the federal system. Because of their relative independence from external pressure (*i.e.*, not elected, but appointed), it is assumed that federal magistrates' roles evolve more from their social backgrounds, personal values, and professional norms. However their roles are governed to a larger extent by other's expectations, to-wit: those of their immediate supervisor—the federal district judge (Smith, 1988, p. 503). Magistrates are not typically self-recruited.

Conversely, the actors in this dissertation study essentially recruit themselves, an analogous concept where role expectations of self may explain the selection process; "non-conformists" might rarely opt for inclusion as appointed counsel for the indigent. Biddle refers to this as "self-role congruence" (1979, p. 395). The actors in this dissertation study also work indirectly for the local court which ultimately reimburses them. Although not a supervisory relationship in a management sense, judicial expectations may be known to the actor based on previous contacts with the court or word-of-mouth orientation within the appellate defense coalition.

Smith discovered the "organizational context proved less important than expected" and judicial contact did not markedly govern decision-making (p. 509). This research might suggest the possibility of judicial influence on performance (*i.e.*, hours billed) in some circuits. The extent to which judges afford autonomy in billing to assigned appellate counsel within their circuit is unknown. Lack of such autonomy can lead to role conflict and job dissatisfaction (Hall, 1988; Gross, 1958, p. 275). Accordingly, dissatisfaction may result in counsel refusing to accept indigent work.

Role and Other Service Professions

Role theory has been applied to other human services besides the legal profession. Mueller, Wallace, and Price hypothesized that loyalty and intent to stay are distinct forms of employee commitment. Their study of health care employees differentiates between work commitment and career commitment. They concluded that loyalty and both forms of commitment were predictors of quit (*i.e.*, turnover) behavior (1992, p. 211). Various other psychological studies have described organizational commitment by the degree of affective attachment of an employee to the organization (Kallenberg & Berg, 1987; Lincoln & Kallenberg, 1985, 1990; Price & Mueller, 1986).

Employees highly committed to both their profession and their organization are more effective in their work than those less committed (Aranya & Ferris, 1984). Quoting Porter, L., Steers, R., Mowday, R., and Boulian, P.V., (1974), Wallace states that theirs is the most popular definition and measure of organizational commitment, to-wit: "the relative strength of an individual's identification with and involvement in a particular organization" (1993, p. 334). When measuring commitment, "a dominant theme that runs throughout is the individual's psychological attachment to the organization" (Wallace, 1993, p. 334).

Effects of Constraints on Role Behavior

The Attorney-Client Relationship

The attorney-client relationship can affect role behavior; the relationship may be less stable when counsel is publicly sponsored. Criminal clients express deep misgivings about attorneys assigned to them by courts (Blumberg, 1967). They see publicly paid and assigned counsel as part of the "system"—overly eager to plead them guilty, disinclined to give them much time, and unconcerned for their welfare (Casper, 1972). Their mistrust may be related to the regularity of the social, racial, and economic differences between them and their counsel. Cain

asks how the appointed attorneys can effectively function as "translators" of client needs where the socio-economic gaps between attorney and client are more prevalent than when counsel is privately retained (Cain, 1979). However, defense attorneys are closer in status to criminal defendants than other lawyers are. In the "Chicago" study, the criminal defense group primarily had an urban upbringing and were more closely aligned, socio-economically, to criminal defendants than were other categories of lawyers (Heinz and Laumann, 1982). This closer proximity of social, economic, and political perspectives might better facilitate the attorney/client relationship (Cain, 1979).

Flemming interviewed 155 criminal defense attorneys to obtain their impressions of the client relationship. He concluded that attorneys "cannot freely exercise their judgment and satisfy a desire for professional autonomy until they secure their client's confidence. The attorney's craft rests on knowing how to persuade clients who have the most to lose from tactical miscues or strategic errors to listen to them" (1986, p. 260). As one attorney in the study stated, "I'm not gonna let any guy [client] tell me how to try my case . . . so I think client control is the key." Another added, "It's frustrating to have to constantly sell yourself" (1986, p. 260). Client disrespect, according to Flemming, dismays and irritates public attorneys; it sours associations, making the job less pleasant. "The etiquette of normal client-professional relations seems weaker and . . . clients or the client's family and friends freely criticize them and treat them cavalierly" (1986, p. 258).

The attorney/indigent client association generally lacks a business or social aspect, leaving the professional dimension on which to base the relationship (Kritzer, 1984). This recognition may help explain tentative findings that Black and Hispanic professionals are less prone to burnout than white professionals (Maslach, 1982), since a disproportionate number of indigent criminal defendants are of those minority groups.

Attorneys believe that deference and honesty are inherent in relations with private clients but not public ones. When retained (private), there is a certain immediate rapport, because the client is purchasing experience and judgement. Appointed cases lack trust and harmony (Flemming, 1986, p. 262). Skolnick contends "legitimation forms the basis for client control and allows attorneys to moderate their clients' demands and adjust their expectations to courthouse realities" (Skolnick, 1967, p. 65). According to Skolnick, public counsel must generate trust to establish an effective relationship.

One attorney described the dilemma as lacking an "escape hatch." "With private clients you can send them 'down the road' (to other counsel) if they don't want to follow advice" (Flemming, 1986, p. 265). In public appointed situations however, attorney and client have greater difficulty severing the legal bond. Casper found that the whole tone of the relationship is altered depending on whether the defendant (or his family) was paying for the attorney. "Clients who spurn advice or balk at suggestions . . . increase the lawyer's work and threaten his reputation for client control within the courthouse community" (Casper, 1972, p. 117-118).

Flemming defines "procedural justice"—at least from the client's perspective—as a perception of "fairness" based on a combination of style, approach, attitude, and rapport. "The most common complaint from indigents is that they don't see their attorney enough" (p. 261). Ironically, the final outcome of the case, even if favorable, may not be determinative of "fairness" from the client's vantage point. Clients rarely mention case outcome as an attribute of fairness. They voice greater concern with the "process."

The Work Environment

A related role characteristic involves appointed counsels' work environment exclusive of the client. One frequently noted aspect of the administration of criminal justice is the hectic and undignified atmosphere in which criminal proceedings are often conducted. Appellate counsel,

however, generally have limited courthouse contact. The following quotation by a court-appointed lawyer in New York City summarized his displeasure and decision regarding accepting additional indigent trial work: "I would be prepared to take more 18-B assignments (representing indigent defendants) if lawyers were not treated like cow dung by all court personnel" (McConville and Mirsky, (1985). Defense of the Poor in New York City: An Evaluation. Unpublished Draft Report.)

Additionally, anticipated compensation is not necessarily guaranteed—being subject to judicial "red-lining"; low fees may be further reduced by judges *sua sponte*. Again, these comments relate to assigned counsel rather than contract attorneys and salaried public defenders. It would be worthwhile to compare job satisfaction among public defenders, appointed counsel, and their prosecutorial counterparts relative to salary, since data suggests the prosecutors are generally higher paid (State Bar of Michigan, 1991).

Burnout

If role is defined by expectations of self, others, and the organization, estrangement from those factors may effect behavior. Burnout has been operationalized as alienation of the professional from the client, organization, co-workers and the job (Berkeley Planning Associates, 1977). Various research tools have been devised to measure job satisfaction and burnout. The most popular measure seems to be the Maslach Burnout Inventory (MBI) which primarily includes the dimensions of emotional exhaustion, personal accomplishment, and depersonalization (Maslach & Jackson, 1978).

It has long been established that organizational factors such as wages, job security, work environment and promotion have an effect on job satisfaction within all occupational groupings (Smith, Kendall & Hulin, 1969; Locke, 1976). However, individual orientations and attitudes

also contribute to role (Kahn, 1981). Mather's observations of "maverick" public defenders suggest job satisfactions are derived in part from internal role considerations (1979).

Excessive workloads are often an integral part of public service organizations, but the price they extract in terms of emotional exhaustion and other affective outcomes is a high one (Cherniss, 1980a). Hall found that "workload," among public defenders had the greatest influence on factors associated with job dissatisfaction (Hall, 1988). She concluded the effect was detrimental because it increased emotional exhaustion and decreased job satisfaction and personal accomplishment. Further, those who truly desire challenging work are affected most adversely. Kahn described the above as "role overload," a form of role conflict created because of too many tasks (Kahn, 1981; French & Kaplan, 1973). Cherniss repeatedly cites the incongruous demands of human service bureaucracies, the client community, and the employee's professional identity as influencing burnout (1980a).

Burnout has not been specifically applied in the research to appellate or contracted trial indigent attorneys. Hall's quantitative work with public defenders and Flemming's qualitative observations of assigned counsel provide some insights (Hall, 1988; Flemming, 1986). Burnout may affect the role of indigent service providers in several ways: experienced counsel may decline to accept appointments; those without experience may work primarily because they need the job; and services may be diminished because of systemic disincentives (Levine, February 1992). Varying methods and rates of pay for assigned appellate counsel in Michigan afford an opportunity to compare specific work performance, under varying conditions, against required ethical standards.

Ineffective Assistance of Counsel

A variety of factors may contribute to substandard performance by counsel. Often dubbed "malpractice," the courts and legal community use the term "ineffective assistance of counsel."

Previously discussed "system" constraints which might contribute to substandard performance include: low compensation, large caseloads, negligible support services, judicial/political relationships and contract commitments. Obviously individual attorneys working under identical systems can perform differently. Loyalty, commitment, knowledge, work environment, client relationships (*i.e.*, burnout) may contribute to work behavior.

The manner in which appellate courts analyze "ineffective assistance" distinguishes "system" from "individual attorney" deficiencies. Very few cases focus on the adequacy and integrity of the "process," with minimal emphasis on "outcomes." Relevant inquiry includes the systemic conditions under which appointed defense attorneys perform and that relationship to the fact-finding process. This minority perspective reviews inequities between prosecution and defense services/resources as a matter of basic fairness (*i.e.*, due process).

A county contract system was tested before the Arizona Supreme Court. They found that defendant's federal constitutional rights to due process and assistance of counsel were violated because of the manner in which the system was implemented State v. Smith (1984). The Court's decision was primarily influenced by two findings. First, excessive caseloads precluded attorneys from providing quality representation. Second, ABA standards for providing criminal justice services and NLADA guidelines for contracts were violated. By failing to consider the time each attorney must commit to each case and the need for investigative support costs, the Arizona Court found attorneys would essentially be forced to violate ethical responsibilities and duties (State v. Smith, p. 1381). Regardless, the Court's pronouncements were largely dicta since they cited these system inadequacies as presumptions which could be rebutted, as they were in Smith. However, precedent for "system" evaluation was established, at least in Arizona.

The majority position analyzes outcomes or results. The "process" of systematic deprivations is deemed unimportant unless the court is convinced the outcome was unreliable.

Relief is predicated on showing actual prejudice (*i.e.*, the outcome) rather than defects in the process. Relief is sought on a case-by-case basis and the "system" is essentially spared from attack—the "individual" defense attorney being the target of the ineffectiveness claim. Recent cases to come before the U.S. Supreme Court, illustrate the Court's preference of avoiding looking at "system" failures. The premier "result-oriented" case is Strickland v. Washington (1984). To prove "actual ineffectiveness," a defendant has to establish a substantial deficiency in counsel's performance, showing it fell below accepted standards for similar attorneys in the community and demonstrating the case outcome was therefore unreliable (Strickland, p. 683, 687).

The Strickland Court, however, supported its position by citing U.S. v. Morrison (1980) which held that the proper inquiry regarding defendants' right to counsel is the concept that "fundamental to our system of justice is . . . fairness (emphasis added) in the adversary criminal process" (Morrison, p. 364). Although Morrison speaks of the right to counsel as protecting the process, not merely the result, the Strickland Court failed to adequately make that distinction. This has permitted individual states to interpret "right to counsel" cases as they choose, as long as the minimal Strickland standards are met. The Michigan Supreme Court has adopted the Strickland standard, requiring both an unreasonably deficient performance by counsel and resulting prejudice which denied defendant a fair trial (People v. Pickens, 1994).

The Strickland test places the defendant in an awkward dilemma. Since the process involves many matters for which there is no official record (*e.g.*, a transcript of in-court proceedings), actual prejudice can rarely be shown, especially considering the chasm in skill levels between counsel and client. Requiring a typical non-legally trained client to show specific errors is difficult. To further establish that the result would have been different (*i.e.*, the outcome) is speculative and unlikely. "Absent some sort of presumption against systemic deficiencies, an indigent's challenge will typically be denied for want of prejudice, no matter

how glaring the attorney error or omission" (Nelson, 1988, p. 1167-1168). "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants. The flaw in any particular case can neither be identified from the record nor isolated from the larger systemic condition of which it is a product" (Margulies, 1989, p. 713). At a minimum, an evidentiary hearing is required before such appellate issues can be perfected. A poorly represented appellant faces a double dilemma. Typically he must show ineffectiveness at both the trial and appellate levels. Furthermore, in Michigan an indigent does not receive counsel after this first appeal, (*i.e.*, "by right"). Later appeals (*i.e.*, by leave), do not require court-appointed counsel.

Clearly, without clear mandates from the courts, implementors of indigent services cannot be expected to establish exemplary systems. Indeed, we would find minimal consensus regarding what constitutes adequate representation. After all, "the contracting alternative is motivated by efficiency concerns rather than by the professional standards of the bench or bar associations" (Worden, 1991, p. 414). A related concern is the expanding privatization of defense services; these tend to shift responsibility and accountability for effective representation away from the legal profession collectively and into the hands of individual, unassociated service providers.

CHAPTER 3
RESEARCH APPROACH: HYPOTHESIS AND METHODS

INTRODUCTION

Prior to the inception of this study, the researcher was somewhat familiar with disparities in funding indigent appellant defense among the Michigan circuits. Aware of the existence of MAACS, this investigator met with their Director in hopes of gaining information which might assist with the research. At that time, the existence of the data was discovered (*i.e.*, facsimile, Appendix B). Uncovering this data was fortuitous because its form and volume provided a detailed conceptual framework for studying appellate counsels' role behavior, using large samples.

The Director of MAACS explained that the "Statement of Services" form (*e.g.*, the data) was specifically designed to later analyze services rendered by appointed appellate counsel. These services were designed consistent with the previously described "Minimum Ethical Appellate Standards" (p. 12–14). Due to insufficient MAACS staff, time, and resources the data were never analyzed by MAACS; rather, the information was placed in a MAACS storage room. MAACS' involvement with this study was strictly limited to providing the data. They offered no plans or suggestions for analysis, nor did they assist with its preparation.

STUDY INSTRUMENT

In 1988 MAACS implemented a two-page form, approved by the Michigan Supreme Court, entitled, "MAACS Statement of Service and Order for Payment of Court Appointed

Counsel" (Appendix B). When appellate services are completed, the attorney uses this form in requesting payment from the trial judge. MAACS instructions ask the circuit court to forward a copy of the form to MAACS, who then retain copies of the data in their Lansing office. Following the "Instructions" section, the form is divided into three parts. This research will focus on "Services Rendered" in Part II. A brief review of the entire form is as follows:

Case Information (Part I)

This section provides the case name, county, attorney, case type, offense(s), sentence and client's prison. The dates of certain events, if applicable, are also requested. These include client visitation, trial court motion(s), stipulation to dismiss, withdrawal of counsel, motion for resentencing, evidentiary hearing(s), Court of Appeals oral argument, and the outcome.

Fee Information—Services Rendered (Part II)

This section itemizes specific services provided on an itemized hourly basis. As the primary focus of this study, the following services were considered:

1. Record review (transcript, court file, PER/SIR)
2. Client visit (including travel)
3. Other client contact
4. Motion for new trial
5. Motion to withdraw plea
6. Motion for resentencing
7. Evidentiary hearing (prepare, appear)
8. Resentencing (prepare, appear)
11. COA Brief (research, write)
12. COA Oral argument

20. Total hours

Those services not considered either have application in relatively few cases and/or add little to the study. "COA leave application" (No. 9), for example, would only result from relatively rare lower court misdemeanor cases or where the appeal of right was not timely (*i.e.*, past the deadline prescribed by Court rule). Nos. 14–17 apply to Supreme Court matters, which are also quite rare. Finally, a cursory review of the population suggests that "Other" (No. 19) is rarely utilized—possibly indicative of the all-inclusive nature of the other categories.

Fee Information—Actual Expenses (Part II)

This section first itemizes expenses for travel, copying, postage, phone, and other. The dollars and cents total is stated in No. 27. The second sub-section indicates the fee for services, expenses, and total compensation requested. The "basis of request" indicates whether the compensation was fee schedule or hourly with accompanying rates and limitations.

Order for Payment (Part III)

This final section reflects the judicial order for fees, expenses, and total services.

HYPOTHESES

The general hypothesis is that differences in rates of compensation among Michigan's judicial circuits do not result in disparate services to the indigents represented. Attorneys' financial self-interest is frequently cited in the literature as the primary motivation for quality of work. This generalization ignores the impact of professionalism, ethical standards, commitment, loyalty, political attitudes, and role satisfaction (*e.g.*, serving clients and autonomy).

The impact of compensation on the role behavior of appellate attorneys has not been studied as with trial counsel. Their roles are not identical however. The nature of appellate work is more adversarial because the concept of plea-bargaining is typically non-existent. Issues are resolved by the courts rather than the litigants. Since their work-product is scrutinized by professionals (*i.e.*, judges and opposing counsel), expectations of others, as well as self, may be critical aspects of behavior.

Since appellate counsels' "Statement of Services" (Appendix B) attests to the validity of hours worked by service category (*e.g.*, client prison visit), their efforts are measurable to the hour. Thus, from the above stated general hypothesis, the following specific hypotheses will be tested:

1. Appellate attorneys practicing in high, medium, and low hourly systems provide similar "total services" (Appendix B, II, 20).
2. Appellate attorneys practicing in high, medium, and low hourly with maximum limitation systems provide "total services" similar to counsel practicing in respective high, medium, and low hourly systems (above).
3. Appellate attorneys practicing in high and low fee-schedule systems provide similar "total services."

Total services is a compilation of the following specific potential services:

	Appendix B
• record review	II, 1
• client prison visit	II, 2
• other client contact	II, 3
• trial court motions/evidentiary hearings	II, 4–8
• brief (research/write)	II, 11
• oral argument	II, 12

Data were compiled from 1,582 "Statement of Services" forms. If our hypotheses prove incorrect, it may be useful to study variations among systems to determine where attorneys reduce time, (*i.e.*, cut corners).

METHODOLOGY

This dissertation study analyzes existing data. There are numerous potential research methods available when studying human behavior. Chief among these are: experiments, surveys, field research, and unobtrusive research (Babbie, 1992). The chief advantage of the experimental model is the isolation of the experimental variable and its impact over time. Experiments generally require few subjects and relatively little money and time. Their greatest weakness lies in their artificiality. To observe large populations (*i.e.*, attorneys) under multiple compensation systems precludes experiments as a viable method for this particular research.

"Survey research is probably the best method available to the social scientist interested in collecting original data for describing a population too large to observe directly" (Babbie, 1992, p. 262). Sub-categories of survey research typically include self-administered questionnaires, personal interviews, and telephone surveys. Advantages include the ability to make refined descriptive assertions of large samples and the flexibility to develop operational definitions from actual observations (Babbie, 1992, p. 278). Survey weaknesses typically surround validity because a survey is an artificial device which "assumes the existence of a real definition of what is being measured" (Babbie, 1992, p. 279). The survey researcher can rarely recreate a feel for the totality of respondents' thoughts. Primarily because of the "artificiality" concern, an analysis of "existing data" is believed a better method for analyzing the proffered hypotheses. Webb notes that "some researchers feel that social science and criminal justice

research have been overdependent upon the artificial elements of questionnaires, interviews, and experimental settings" (Hagen, 1982, p. 108).

Field research is another available option which includes case studies and observations. Typically yielding qualitative data and not easily reduced to numbers, the "chief strength of this method lies in the depth of understanding it may permit" (Babbie, 1992, p. 306). Using participant observation "the researcher attempts to actually experience the life conditions of the study group. Such an approach generally produces less prejudgments, are less disturbing to respondents than experiments, and are more flexible and natural than more artificial means of data gathering" (Hagen, 1982, p. 170). Field research can also be inexpensive; however, like all methods there are drawbacks. Precise descriptive statements about large populations are extremely difficult to generate because of the qualitative nature of the research. Similarly, conclusions are often regarded as preliminary, not definitive (Babbie, 1992, p. 306).

Case study methods refer to in-depth, qualitative review of limited samples which, typically offer suggestions for further inquiry, rather than more refined explanations of behavior. This method was illustrated in Wasserman's study of appellate counsel described in the literature review (p. 50). Those observations lacked depth and range of inquiry resulting in limited insight into counsels' work effort (*i.e.*, role).

"Learning about human behavior by observing what people inadvertently leave behind them" is how Babbie describes "unobtrusive measures" (p. 312). This methodology may include historical/comparative, content, and existing data analysis. Advantages include: economy of time, money, staff and equipment; the ability to correct mistakes during the process; the ability to make observations over time; and the lack of intrusions into the subjects of the study. The primary disadvantage is the examination is limited to the record (Babbie, 1992, p. 328–329).

Analysis of existing data is a method closely related to content analysis. "It is frequently possible and even necessary to undertake social science inquiry through the use of official or quasi-official statistics" and they can be the primary source (Babbie, 1992, p. 329). Weaknesses include: units of analysis, validity, and reliability. Units of analysis are of concern because most existing statistics are aggregated to describe groups. This subjects the data to possible ecological fallacy—where patterns of behavior at a group level do not reflect corresponding patterns on an individual level. Validity problems are encountered "when existing data does not cover exactly what you are interested in, and your measurements may not be altogether valid representations of the variables and concepts you want to draw conclusions about." Unlike validity, reliability refers to the quality of the statistics themselves (Babbie, 1992, p. 331-334).

In analyzing existing data, this dissertation study offers some advantages not available using other methods and alleviates some concerns often associated with this method of research. Because of the independent, state-wide nature of appellate work, role behavior is difficult to observe. Unlike trial counsel for the indigent, observing appellate attorney behavior on a large scale is almost impossible due to the singular, primarily non-courtroom nature of the work. The advantages of watching counsel interview, conduct research, and prepare briefs are not readily apparent—particularly considering counsels' would-be awareness of the study.

The data collected for this study are extensive, incorporating more appellate practitioners (*i.e.*, all) than might typically respond to survey questions and, unlike "requests" for information, analysis of existing data is unobtrusive. Hagen notes that survey results often suffer from "overreliance upon attitudinal data, or verbal descriptions by respondents about their behavior" (p. 147). This method measures what respondents actually report that they do rather than attitudes and beliefs which may be inconsistent with their performance.

The data for this study are individually based, rather than group aggregated; thus, "unit of analysis" concerns associated with assessing existing data are largely alleviated. The research aggregates individual responses into compensation methods/rates rather than relying on previous data collection clustering techniques.

The data reveal several vital categories of "effort" including: research, client contact, trial court motions, record review, and total service. These primary functions of appellate counsels' role are recorded in hours, usually to the tenth (*e.g.*, 7.2 hours). Categories of time are consistent with the "minimum ethical obligations" (*i.e.*, requirements) and the data form (Appendix B) was designed by MAACS to measure these obligations. The researcher believes the data have strong validity to the degree that it measures what it was designed to measure (*i.e.*, work performance); additionally, those measurements are more indicative of professional role behavior than previous studies. As described later in this chapter (pp. 76–78) the data contain internal checks on reliability; in addition, this dissertation research includes a survey of appellate attorneys which further corraborates the veracity of their stated work.

Data Collection

The original potential population consisted of copies of all "MAACS Statement of Service . . ." forms (Appendix B) for 1993. Beginning in January, 1994, for reasons unknown, MAACS no longer retains copies of these. The data necessitated sorting by county. Once completed, it was apparent that some circuits, which might be necessary for comparison, had relatively small populations (*i.e.*, submitted "statement of service forms"). Therefore, the researcher went back to MAACS and obtained all vouchers from 1992, thus acquiring data for the two most recent available years. In most cases this almost doubled our populations for each circuit.

In order to accurately select study counties, it was necessary to update fee structures and rates for each circuit. Last completed in 1991, the researcher requested that MAACS revise this data. MAACS contacted all fifty-six circuits. The updated fee information was completed in February 1995 (Appendix A), reflecting very few rate modifications since the 1991 survey. Accordingly, this dissertation study incorporates rates and methods in effect at the time the forms were completed.

These voucher forms, in total, represent approximately half of the estimated appointed counsel work for 1992 and 1993. According to MAACS, some of Michigan's larger counties (*e.g.*, Wayne) do not participate in sending MAACS copies of the data. It is believed they chose to either be autonomous from MAACS or not to encumber the staff/postage costs of processing the data. Although the few "missing counties" have large indigent caseloads, their methods and rates of funding are like many others in the State. Further, they would not meet the selection criteria for inclusion in our study as described below. Other vouchers may not have been forwarded to MAACS for "clerical reasons." The responsible court clerk might not have necessarily submitted the form, per "instructions," for a multitude of reasons (*e.g.*, lack of knowledge, lack of time, neglect, oversight). Inquiries of MAACS personnel provide assurance that missing data do not have characteristics different from existing data that might impact ultimate research-based conclusions. Research findings should be applicable to missing counties, and to similar systems in other states.

Discussion of System Types

A review of the compensation systems reveals many varying "rates" of compensation accompanying these numerous system types:

1. Hourly
2. Hourly with maximum limits

3. Flat fee schedules
4. Case type (*i.e.*, trial vs. plea)
5. Judicial discretion
6. Expenses (additional vs. included with fee)
7. Task based—flat rates for specific work (*i.e.*, brief, research, client visitations, oral argument, clerical functions)
8. Miscellaneous: Specific rates for "in-court" work, prison crimes, non-jury trials, and capital (life) offenses

The majority of Michigan counties pay appellate counsel on an hourly basis without stated maximum limitations. Many of these are smaller jurisdictions with fewer trials and appeals. Hourly rates range from $25 to $65, the median being $40. Five counties pay hourly for trial-based appeals, but use the "fee schedule" method for plea-based appeals. A dozen counties with hourly systems place maximum amounts on reimbursement. These maximums for plea appeals range from $400 to $750; for trials from $700 to $1,200 (Appendix A). When limiting hourly rate compensation, "maximums" take on characteristics similar to fee schedules.

Fee schedules are the second most prevalent system in Michigan. In their purest form, "schedules" consist of set amounts per type of case. Plea-based fees range from $350 to $750; trial-based from $450 to $1,500. Some variations within this method include reductions in payment for early dismissals and/or incorporating expenses into the fee.

Numerous hybrid systems exists. These typically take the form of piecemeal payment for specific tasks. Task-based structures are used in seven counties, basing compensation on type of work performed (*e.g.*, client visitation, in-court motions, brief preparation). Each task has a set fee rather than a fixed amount for the total appeal. Other systems alter payment for non-jury trials, mandatory life offense crimes and prisoner offenses. A few counties utilize the "judicial

discretion" method, where reimbursement depends exclusively on the value the judge places on the attorneys' services.

Some counties pay what appear to be identical rates but treat expenses differently. Expenses can be significant because of the long-distance nature of appellate work. Appellate attorneys can accept appointments from any and all circuits, not just where they are geographically located. Further, client visitations can be at any of the forty plus Michigan prison sites scattered throughout the State. Evidentiary hearings and motions can entail travel back to the trial court. Thus, mileage, phone, and lodging may be important economic considerations.

To meaningfully assess and compare systems, certain judgements were required to obtain appropriate research populations. As the "Fee by Circuit" chart (Appendix A) illustrates, it is not always possible to determine, with precision, if certain systems offer higher compensation than others. For example, the St. Clair County system paid $50 per hour in 1993–94, but nothing for travel time. Since travel can entail significant hours it could conceivably lower the "effective hourly rate" to well below $50 per hour. Similarly, other counties placed maximum limits on compensation with hourly systems (*e.g.*, Cass: $50/hr., $500 plea max., $1,500 trial max.). Cass, therefore, has characteristics of a fee-structure system which could conceivably diminish service incentives. Others place various limitations on reimbursements for expenses. Isabella, for example, also pays $50 per hour, with no maximum limits. However, Isabella does not pay for travel expenses such as mileage. Thus, a quick comparison of St. Clair and Isabella counties illustrates this dilemma. St. Clair pays for mileage, but not travel time; Isabella pays for travel time, but not mileage. This study aggregates "similar" systems which are not always identical; if absolute sameness were required, aggregate comparisons would be infrequent.

Plea-Based versus Trial-Based Appeals

There are far more plea-based than trial-based appeals, primarily because the vast majority of convictions result from guilty pleas. Plea appeals typically involve less time than appeals from trials. Plea-appeals usually include issue(s) like severity of sentence and/or infirmities with the process, *e.g.*, insufficient factual basis for the plea or plea not tendered "knowingly." Trials usually require much more record review (*e.g.*, transcripts/evidence) and potential issues are often more numerous and complex. Therefore, to properly analyze the hypotheses it is necessary to distinguish between plea and trial populations. This study separates these cases for comparison. It is also necessary to sever these case types because many individual systems (*i.e.*, counties) compensate each type differently, (*e.g.*, fee schedule systems for plea appeals and hourly systems for trial appeals). In separating plea from trial appeals, some studied circuits have relatively small trial populations.

Population Selection Rationale

Consistent with the research questions, (p. 67–68), circuits were selected which best represented the following systems: high, medium, and low hourly; high, medium, and low hourly with maximum limitations (*i.e.*, caps); and high and low fee-schedules.

Since our hypotheses are based on the premise that counsel know the method and rate of compensation, it was necessary to eliminate from analysis "Statements" where the attorney believed the rate or method differed from the established system. The perceived compensation is vital when comparing with effort expended (*i.e.*, performance). On page 2 of the "Statement" the attorney fills in the rate and method of payment under sections entitled "request for payment" and "basis of request" (Appendix B).

In pure "hourly" and "fee-schedule" systems, the requests were generally consistent with the systems' compensation schemes. In a few circuits attorneys requested varying rates

reflecting possible misinformation, for reasons unknown, of the applicable fee structure. One such circuit was clearly an aberration, with six different rate "requests" and sizeable populations for each. Rather than discarding this circuit from the study, it was included to provide an "intra-circuit" comparison of role behavior (*i.e.*, effort).

Assessing counsels' "perception" of hourly systems with maximum limitations was more difficult. This method has characteristics of both hourly and fee schedule systems and the "basis of request" on the "Statement of Services" did not always reflect counsel's understanding. "Statements" were therefore excluded from the study where the requested fee exceeded the maximum or where the hourly rate was inconsistent with the established rate. For inclusion in this research the data had to clearly reflect counsels' perception of the entire compensation scheme.

It was also necessary to exclude data lacking itemized and/or total hours—the performance measurements. In hourly systems, this rarely occurred. In "fee-schedule" and "hourly with maximum" systems, attorneys occasionally did not complete the itemized hourly portion of the requested information.

The "Statement" also includes "case type" and "motion to withdraw as counsel" data which impact population decisions. Since some circuits, as previously mentioned, use different methods internally for compensating trials versus pleas, analysis of those circuits had to be bifurcated (*i.e.*, case type). Data were excluded in limited cases where plea or trial could not be distinguished or where counsel withdrew from the case. Exclusion of the latter was necessary because "total" performance could not be assessed. In sum, populations were selected on the basis of systems which clearly reflected perceived anticipated compensation. "Task-based" structures, for example, are micro fee-schedules where "perception" of future income appears more complex. "Judicial discretion" methods also fail to communicate a compensation formula. Thirty-four of Michigan's fifty-six circuits are incorporated in the study, encompassing over

1,500 "Statement of Services" forms. These circuits reflected clearly understood compensation schemes (*i.e.*, hourly) and marked differences in rates (*i.e.*, high, medium, and low hourly).

Hourly Systems (Without Maximum Limits)

Hourly rates vary from $25 to $60/65. The populations at each extreme are somewhat limited. Two circuits pay $25 per hour and one pays $60/65, the higher rate for prison offenses. To make comparisons using larger populations encompassing more circuits, hourly circuits are aggregated into three groups: $35 per hour and less, $40–45 per hour, and $50 per hour and more. These circuits, reflecting low, medium, and high rates, are:

Low Hourly

Circuit	*Hourly Rate*	*Plea Population*	*Trial Population*
C 30	$25	10	9
C 31	$25	16	4
C 32	$30	N/A	8
C 33	$30	12	1
C 34	$35	260	44
C 35	$35	19	20
Totals:		317	86

Medium Hourly

Circuit	*Hourly Rate*	*Plea Population*	*Trial Population*
C 40	$40	35	7
C 41	$40	10	9
C 42	$40	31	3
C 43	$40	20	5
C 44	$40	36	9
C 45	$45	4	2
C 46	$45	26	5
C 47	$45	37	14
C 48	$45	15	11
C 49	$45	17	5
Totals:		231	70

High Hourly

Circuit	*Hourly Rate*	*Plea Population*	*Trial Population*
C 50	$50	19	0
C 51	$50	10	5
C 52	$50	27	5
C 53	$50	2	2
C 54	$50	3	3
C 55	$50	36	11
C 56	$52	54	13
C 57	$50–58	14	14
C 58	$60–65	67	13
Totals:		232	66

Hourly Systems (With Maximum Limitations)

Several circuits compensate at the hourly rates of $30, $40 and $50 per hour with maximum limitations. The $50 population is small, limiting comparisons with the other two hourly rate systems. The maximums also vary, further complicating comparisons among these circuits. However, comparisons with similar hourly systems without limitations is a primary objective. Thus, the following "hybrid" circuits will be analyzed:

Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
C 80	$30/$400	$30/$800	20	2
Totals:			20	2

Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
C 81	$40/$500	$40/$1,000	118	23
C 82	$40/$550	$40/$1,200	7	3
C 83	$40/$600	$40/$1,200	21	7
Totals:			146	33

Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
C 84	$50/$500	$50/$1,500	16	1
Totals:			182	36

Fee-schedule Systems

Although numerous counties use these systems, high-low comparisons are more problematic than with hourly comparisons. There are few high schedule systems, possibly reflective of a rationale for this system choice initially, to-wit: to control costs. Two smaller circuits with higher paying trial schedules had no data and a third used an aberrant "statement

of services" form which did not distinguish trials from pleas. Similarly, another small circuit with a high plea schedule only had one data offering.

Still, enough data exists to make meaningful comparisons, particularly with pleas. Similar to hourly disparities, higher paying schedules approximately double the compensation offered by low fee-schedule systems. Unlike hourly systems, the spectrum of compensation rates is insufficient to aggregate three groups for comparison. Trial populations are sparse and plea populations are in a low range (*i.e.*, $300–400). Thus, these low fee schedules can only be compared with the limited higher paying populations. Fee-schedule circuits include:

Low Fee-Schedules

Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
C 60	$750	$1,250	21	3
C 61	N/A	$900	N/A	28
Totals:			21	31

High Fee-Schedules

Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
C 70	$150	N/A	34	N/A
C 71	$300	N/A	67	N/A
C 72	$350	$500	46	4
C 73	$350	N/A	31	N/A
C 74	$400	N/A	18	4
C 75	$400	N/A	21	N/A
C 76	N/A	$450	N/A	3
C 77	$400	$650	14	1
Totals:			231	12

Data-Analysis Techniques

This dissertation study did not employ sampling techniques. Rather, all available and complete "Statement of Services" forms for the circuits studied were included in the analyses. Since "the purpose of hypothesis testing is to aid the clinician, researcher, or administrator in reaching a conclusion concerning a population by examining a sample from that population" (Daniel, W., p. 201), this study is not burdened with proper sampling or sample distribution procedures.

Data were analyzed by comparisons of means, the most familiar measure of central tendency. Measures of central tendency provide information regarding average values. For any given set of data, there can only be one arithmetic mean. Each value in the set of data influences the mean; extreme values can, in some cases, distort the mean. The measure of the dispersion of values from the mean is the variance, usually described as the standard deviation. Calculations of these measures of central tendency were completed using MINITAB.

The nature of the data in this dissertation study is conducive to the reasonable assumption of normal distribution. The normal distribution of data "is not a law that is adhered to by all measurable characteristics occurring in nature . . ." even though many of these characteristics are approximately normally distributed (Daniels, W., p. 107). The normal distribution can be used to model variables of interest even though, in practice, no variable is precisely normally distributed. "Using the normal distribution . . . allows us to make useful probability statements much more conveniently than would be the case if some more complicated model had to be used" (Daniel, W., p. 108). In the absence of complete knowledge of normal distribution of the random variable (*i.e.*, hours of service), it is often considered reasonable to make this assumption (Daniel, W., p. 108).

Analysis of Variance (ANOVA) is an appropriate technique when there is a normal distribution or "N" is sufficiently large (Keller, p. 335, 460). Most of the populations in this

dissertation study, particularly with plea appeals, meet both criteria. A primary purpose of ANOVA is to estimate and test hypotheses about population means (Daniels, W., p. 274). "Neither hypothesis testing nor statistical inference, in general, leads to the proof of the hypothesis; it merely indicates whether the hypothesis is supported or is not supported by the available data (Daniel, W., p. 204).

"The p value for a hypothesis test is the probability of obtaining . . . a value of the test statistic as extreme as or more extreme than the one actually computed" (Daniel, W., p. 211). The p value reflects how common or rare the computed value of the test statistic is, rather than simply concluding rejection or non-rejection of the null hypothesis. Using a 95 percent confidence interval is common in research similar to this dissertation study (Daniel, W., p. 183, 185).

To test the null hypothesis of no difference between two population means, t tests are commonly used. When the investigator is interested in comparing several population means, ANOVA is appropriate because "performing all possible separate t-tests is very likely to lead to a false conclusion" (Daniel, W., p. 276). When ANOVA provides "clearly" significant results the researcher should forego additional tests which might heighten the possibility of error. However, there are instances when additional t-tests are necessary and/or appropriate. For example, if ANOVA offers results below or near the threshold (*e.g.*, $p = .05$) paired comparisons of means can help explain the locations of more prominent variations. An additional reason for performing t-tests of pairs is when the overall range of means is limited. Such testing permits comparisons of the extremes while mitigating the influence of more closely associated means.

In terms of testing our primary hypotheses, ANOVA is only applicable to the hourly systems. This is because the range of the data permit aggregating three means for comparison

(*e.g.*, high, medium, and low). Hourly with limits and fee-schedule systems could only be categorized as high or low. Accordingly t-tests will be conducted on these later systems.

Because the hourly systems ranges of compensation (*i.e.*, $25–$60) are not extreme, t-tests will be conducted on the paired comparisons of the means. In addition, if ANOVA fails to provide clear results, the t-tests can add value to the analysis, even though the probability of error is enhanced (Daniel, W., p. 276).

Veracity of Attorneys' Reported Hours

To a large extent, conclusions drawn from this study are dependant upon the veracity of counsels' reported work product. This study assumes the integrity of the attorney's responses (*i.e.*, Statement of Services, Appendix B) for several reasons. As "officers of the court" they submit their "itemization of services" performed under a signed declaration of truth. Most of these services require written documentation beyond the itemized statement of hours expended (Appendix B, p. 1). Counsel must specify, for example, dates and locations of client visitations, lower court hearings/motions, and oral arguments before the Court of Appeals. Transcript length (*i.e.*, number of pages) is also submitted which establishes broad parameters for "record review."

To further assist in this assessment, surveys and cover letters (Appendix C) were mailed to 100 MAACS attorneys. This representative sample encompassed counsel from each of the 34 circuits in the study on a pro rate basis, *e.g.*, larger circuits received more surveys. Given those parameters, counsel were randomly selected. Ensuring anonymity, the Survey (Appendix C) explores their knowledge of possible inaccuracies in reported hours, in addition to the frequency and reasons for incorrect responses. The University Committee on Research Involving Human Subjects (UCRIHS) approved this project on April 16, 1996, (IRB# 96–265).

Of the 100 questionnaires, 96 attorneys were presumably located; four were returned with no forwarding address. A total of 45 surveys were returned—a 47 percent response rate. Table 3.1 reproduces the survey and numerically summarizes the responses. Forty-one out of 45 (91%) report that "attorneys usually provide accurate reports. . . ." Twenty-seven of those provided additional written comments under No. 4; those responses usually elaborated on their responses to Nos. 2 and 3.

The "comments" are quite extensive; reiterating them in total would be unreasonably time consuming. Of interest in question No. 2, however, are the reasons and explanations for inaccurate reports, when they occur. Nine specifically state they underreport their hours. A similar number marked "other." These comments suggest that fee-schedule or hourly limitation systems cause counsel to be less accurate because precise time accounting may not affect their compensation. Eight attributed inaccuracies to their busy routines.

Responses to question No. 3 also reflected the belief that reports to MAACS are accurate. The majority checked the latter choices indicating "occasional" misreporting. Numerous comments expressed a steadfast belief in being honest and professional. To the contrary, a significant amount of cynicism regarding low fees was also apparent. One commentary was particularly salient because it covered the essentials of this thesis:

> "Most counties that I do appellate work for also require detailed time sheets that are also submitted. These are checked by the court administrators' offices before authorizing payment. Attorneys have too much at stake to misrepresent their time. Also, those attorneys who do this work are dedicated to learning the law and are professionals willing to do this extremely hard work for very low pay. As in any profession, you will find someone who cheats, but this activity (*i.e.*, indigent representation) is not a prime candidate for finding these people."

Three of the four attorneys who claimed "no" to question No. 1 provided written comment. Two claimed hour inflation was necessary because of low compensation rates. The third stated that "caps" on compensations discourage accurate record-keeping.

TABLE 3.1 SURVEY

1. To your knowledge, do attorneys usually provide accurate reports of their hours and activities on the MAACS form?

   41 yes *4* no

2. If you know that attorneys are not always providing accurate reports, is it because:

   5 hours are inflated to gain greater compensation

   9 hours are underreported to avoid having judges view earned compensation as excessive

   8 busy attorneys give inaccurate estimates because they are not careful about recording an reporting time and activities

   9 Other. Please explain_____

3. If you know that attorneys do not always provide accurate reports to MAACS, how frequently does this occur?

   2 most attorneys frequently misreport

   2 many attorneys frequently misreport

   1 a handful of individuals frequently misreport

   4 most attorneys occasionally misreport

   2 many attorneys occasionally misreport

   6 a handful of individuals occasionally misreport

4. Please fell free to supply any additional comments concerning the accuracy of attorneys' reports on MAACS forms.

   27 written comments

CHAPTER 4
PRESENTATION OF DATA

INTRODUCTION

A total of 1,582 "Statement of Services" forms, as submitted to MAACS, were analyzed. 1,278 (80 percent) were plea-based; 304 originated from trials. The study encompasses 34 of Michigan's 56 judicial circuits. Circuits excluded, as discussed in Chapter 3, lacked clearly defined compensation parameters and were not as readily comparable.

RESULTS OF HYPOTHESES TESTING AMONG HOURLY RATE *PLEA* APPEALS

Table 4.1 summarizes those circuits analyzed for comparison of *hourly plea-based* appeals including compensation, total mean hours, and standard deviations. Circuits using hourly rates are grouped into 3 categories: low, $25–35 per hour; medium, $40–45 per hour; and high $50–65 per hour. These *hourly* circuits represent 63.5 percent of the studied samples—plea and trial data.

Table 4.1 shows relatively large balanced groupings among low, medium, and high paying circuits (N=317, 231, and 234 respectively). These clusters illustrate slight increases in the mean total hours progressing from low to high hourly compensation. Table 4.2 summarizes the three-way analysis of variance which suggests not to reject the null hypothesis ($p=0.056$).

Table 4.3 summarizes three two-way comparisons, specifically: low versus medium, median versus high, and low versus high hourly rates. The sample T-tests comparing low and medium total hours suggest not to reject the null hypothesis ($p=0.21$). A similar analysis of

medium versus high paying hourly circuits again recommends against null hypothesis rejection ($p=0.31$). The comparison of low and high hourly circuits, however, indicates a significant difference ($p=0.015$) between the mean total hours of 14.7 and 16.9 respectively.

Results of Hypotheses Testing Among Hourly Rate *Trial* Appeals

Table 4.4 summarizes the circuits analyzed in comparing *hourly trial* appeals—similar to Table 4.1 which condensed *plea* data. Although few in number, these populations of 86, 70, and 66 are again relatively balanced among the low, medium, and high clusters, respectively.

Table 4.5 illustrates the three-way analysis of variance which supports the null hypothesis ($p=0.707$). Table 4.6 then summarizes the three two-way comparisons, specifically: low versus medium, medium versus high, and low versus high total hours. All three T-test comparisons support acceptance of the null hypothesis with respective p values of 0.48, 0.96, and 0.48. The medium versus high assessment actually shows a very slight decrease in mean total hours (38 versus 37.7) when hourly compensation rises.

TABLE 4.1 HOURLY *PLEA* CIRCUITS

	Circuit	*Compensation Method/Rate*	*Plea Population*	*Mean Hours (Total)*	*Standard Deviation*
low	C30	$25/hr.	10	13.85	6.11
	C31	$25/hr.	16	20.00	7.53
	*C32	$30/hr.	N/A	—	—
	C33	$30/hr.	12	19.84	14.82
	C34	$35/hr.	260	14.17	10.98
	*C35	$35/hr.	19	15.22	7.42
			317 (Total)	14.73 (Avg.)	10.77 (Pooled)
medium	C40	$40/hr.	35	17.37	8.22
	C41	$40/hr.	10	27.99	12.47
	C42	$40/hr.	31	16.52	13.27
	C43	$40/hr.	20	21.34	17.28
	*C44	$40/hr.	36	12.09	6.77
	C45	$45/hr.	4	11.31	9.99
	C46	$45/hr.	26	14.11	7.37
	C47	$45/hr.	37	12.80	10.50
	C48	$45/hr.	15	18.86	14.54
	*C49	$45/hr.	17	14.40	5.78
			231 (Total)	15.91 (Avg.)	11.18 (Pooled)
high	C50	$50/hr.	20	15.77	9.67
	C51	$50/hr.	10	12.07	6.20
	C52	$50/hr.	27	18.30	10.45
	C53	$50/hr.	2	17.50	2.12
	C54	$50/hr.	3	16.60	5.30
	*C55	$50/hr.	36	17.56	10.02
	C56	$52/hr.	54	20.39	11.51
	C57	$50–58/hr.	15	16.63	10.70
	C58	$60–65/hr.	67	14.39	9.23
			234 (Total)	16.93 (Avg.)	10.19 (Pooled)

* same circuit compensating at various hourly rates

TABLE 4.2 RESULTS OF ANALYSIS OF VARIANCE (ANOVA), THREE-WAY INTERACTION FOR HOURLY *PLEA* APPEALS USING A 95% CONFIDENCE INTERVAL

Analysis of Variance—low/medium/high					
Circuit	*N*	*Mean*	*St Dev*		
C30–C35	317	14.73	10.77		
C40–C49	231	15.91	11.18		
C50–C58	234	16.93	10.19		
Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	2	664	332	2.89	0.056
Error	779	89588	115		
Total	781	90252			

TABLE 4.3 RESULTS OF THE TWO SAMPLE T-TESTS FOR HOURLY *PLEA* APPEALS USING A 95% CONFIDENCE INTERVAL

Low versus Medium				
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	317	14.7	10.8	0.60
C40–49	231	15.9	11.2	0.74
	T=-1.25	DF=484		p=0.21
Medium versus High				
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C40–C49	231	15.9	11.2	0.74
C50–C58	234	16.9	10.2	0.67
	T=-1.03	DF=457		p=0.31
Low versus High				
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	317	14.7	10.8	0.60
C50–C58	234	16.9	10.2	0.67
	T=-2.45	DF=516		p=0.015

TABLE 4.4 HOURLY *TRIAL* CIRCUITS

	Circuit	*Compensation Method/Rate*	*Trial Population*	*Mean Hours (Total)*	*Standard Deviation*
low	C30	$25/hr.	9	38.03	13.81
	C31	$25/hr.	4	51.90	33.1
	C32	$30/hr.	8	28.06	17.90
	C33	$30/hr.	1	36.0	—
	C34	$35/hr.	44	28.05	23.11
	C35	$35/hr.	20	32.75	32.35
			86 (Total)	35.11 (Avg.)	
medium	C40	$40/hr.	7	50.33	24.19
	C41	$40/hr.	9	56.20	32.60
	C42	$40/hr.	3	64.60	47.30
	C43	$40/hr.	5	27.61	18.28
	C44	$40/hr.	9	31.43	14.18
	C45	$45/hr.	2	42.50	0.71
	C46	$45/hr.	5	28.25	18.26
	C47	$45/hr.	14	35.40	25.92
	C48	$45/hr.	11	29.41	20.43
	C49	$45/hr.	5	27.66	16.68
			70 (Total)	37.95 (Avg.)	
high	C51	$50/hr.	5	28.55	18.09
	C52	$50/hr.	5	42.10	23.20
	C53	$50/hr.	2	69.50	26.20
	C54	$50/hr.	3	31.20	20.00
	C55	$50/hr.	11	47.96	14.81
	C56	$52/hr.	13	44.23	28.57
	C57	$50–58/hr.	14	31.30	17.55
	C58	$60–65/hr.	13	28.01	15.23
			66 (Total)	37.74 (Avg.)	

TABLE 4.5 RESULTS OF ANALYSIS OF VARIANCE (ANOVA), THREE-WAY INTERACTION FOR HOURLY *TRIAL* APPEALS USING A 95% CONFIDENCE INTERVAL

Analysis of Variance—low/medium/high

Circuit	*N*	*Mean*	*St Dev*		
C30–C35	86	35.11	24.70		
C40–C49	70	37.95	25.21		
C50–C58	66	37.74	21.45		
Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	2	398	199	.35	0.707
Error	219	125608	574		
Total	221	126006			

TABLE 4.6 RESULTS OF THE TWO SAMPLE T-TESTS FOR HOURLY *TRIAL* APPEALS USING A 95% CONFIDENCE INTERVAL

Low versus Medium

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	86	35.1	24.7	2.7
C40–49	70	38.0	25.2	3.0
	T=-0.71	DF=146		p=0.48

Medium versus High

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C40–C49	70	38.0	25.2	3.0
C50–C58	66	37.7	21.4	2.6
	T=0.05	DF=132		p=0.96

Low versus High

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	86	35.1	24.7	2.7
C50–C58	66	37.7	21.4	2.6
	T=-0.70	DF=147		p=0.48

Results of Hypotheses Testing Among Intra-circuit Hourly Rate Plea Appeals

As discussed in Chapter 3, data were rejected if the attorney failed to recognize the prevailing compensation system within a given circuit. When sorting data for computer input, it was apparent that one particular large circuit had extraordinary unexplained variations in perceived compensation rates. The initial inclination was to discard this entire circuit since there was no apparent prevailing rate. However, since the varying rates had sizeable samples, an opportunity existed for an "intra-circuit" comparison.

Table 4.7 indicates the four different hourly rates for plea appeals in this circuit, ranging from $35 to $50 per hour with "N" varying from 17 to 36. The means of total hours shows significant variation ($p=0.02$) in the four-way ANOVA interaction. However, a close look at mean total hours (Table 4.7) shows inconsistent hourly progression from low to high rates, with medium hourly compensation resulting in fewer total hours of service than low or high hourly rates. Table 4.8 illustrates the findings of the two-way test between low and high hourly pleas. The variation in total mean hours (15.22 versus 17.56) was again not sufficient to reject the null hypothesis ($p=0.33$).

Tables 4.9 and 4.10 offer similar illustrations of *trial* data within this same aberrant circuit. Similar to the plea information, mean total hours are fewer for medium hourly rates than for high and low rates. The four-way ANOVA, in spite of variations in means (*i.e.*, from 27.66 to 47.96), does not suggest these to be significant ($p=0.378$), possibly because of the smaller medium rate populations (*i.e.*, N's=9 and 5). Table 4.10 offers a two-way comparison of the low and high trial hourly rates. Although the means vary from 37.97 to 47.96 respectively, the difference is not sufficient to reject the null hypothesis ($p=0.25$).

TABLE 4.7 RESULTS OF ANALYSIS OF VARIANCE (ANOVA), FOUR-WAY INTERACTION *WITHIN ONE CIRCUIT*, FOR HOURLY *PLEA* APPEALS USING A 95% CONFIDENCE INTERVAL

Analysis of Variance					
Circuit	*Rate*	*N*	*Mean*	*St Dev*	
C36	$35/hr.	19	15.22	7.418	
C44	$40/hr.	36	12.10	6.773	
C49	$45/hr.	17	14.40	5.776	
C55	$50/hr.	36	17.56	10.02	
Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	4	735.9	184.0	3.00	0.020
Error	158	9694.7	61.4		
Total	162	10430.7			

TABLE 4.8 RESULTS OF TWO SAMPLE T-TESTS, LOW VERSUS HIGH *WITHIN ONE CIRCUIT*, FOR HOURLY *PLEA* APPEALS USING A 95% CONFIDENCE INTERVAL

Low versus High					
Circuit	*Rate*	*N*	*Mean*	*St Dev*	*SE Mean*
C36	$35/hr.	19	15.22	7.42	1.7
C55	$50/hr.	36	17.56	10.0	1.7
	T=-0.98		DF=46		p=0.33

TABLE 4.9 RESULTS OF ANALYSIS OF VARIANCE (ANOVA), FOUR-WAY INTERACTION *WITHIN ONE CIRCUIT*, FOR HOURLY *TRIAL* APPEALS USING A 95% CONFIDENCE INTERVAL

Analysis of Variance

Circuit	*Rate*	*N*	*Mean*	*St Dev*
C36	$35/hr.	20	37.97	32.35
C44	$40/hr.	9	31.43	14.18
C49	$45/hr.	5	27.66	16.68
C55	$50/hr.	11	47.90	14.81

Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	4	2565	641	1.08	0.378
Error	42	24891	593		
Total	46	27457			

TABLE 4.10 RESULTS OF TWO SAMPLE T-TESTS, LOW VERSUS HIGH *WITHIN ONE CIRCUIT*, FOR HOURLY *TRIAL* APPEALS USING A 95% CONFIDENCE INTERVAL

Low versus High

Circuit	*Rate*	*N*	*Mean*	*St Dev*	*SE Mean*
C36	$35/hr.	20	37.97	32.3	7.2
C55	$50/hr.	11	47.96	14.8	4.5
	T=-1.18		DF=28		p=0.25

Results of Hypothesis Testing of Hourly versus Hourly with Maximum Limitations Plea Appeals

Table 4.11 summarizes the circuits analyzed which utilize hourly compensation systems *but* placed maximum limitations on reimbursement. Those were compared with similar straight hourly compensating circuits previously illustrated in Table 4.1, in an effort to isolate the impact of "limitations" on compensation.

Circuits 30–35 (Table 4.1), representing straight hourly rates ranging from $25 to $35 per hour, were compared with circuit 80 (Table 4.11) which compensated at $30 per hour, with a maximum allowable fee of $400. Circuit 80 was the only one available for comparison in the $25–35 per hour range and its population somewhat limited (*i.e.*, N=20). Table 4.12 displays the mean hours expended under each system (*i.e.*, 14.7 and 14.2 respectively), and the T-test suggests that the null hypothesis not be rejected (p=0.54).

A similar analysis was conducted for circuits paying $40 per hour. These straight hourly populations are designated C40–C44 in Table 4.1. Circuits C81–C83 represent $40 hourly circuits with maximum limitations are described in Table 4.11. This comparison of means is of relatively large populations, 132 and 146 respectively, encompassing 8 different circuits. Results are depicted in Table 4.12. The respective mean hours are relatively close, 17.1 and 16.77. Accordingly, the p value of 0.76 again suggests not to reject the null hypothesis. The analysis of $50 per hour counties is more problematic because there is only one circuit with a maximum limitation and the sample is small (N=15). That circuit (C 84) is also described in Table 4.11 along with the six straight hourly circuits (C50–C55) which were illustrated in Table 4.1. Table 4.12 displays the results which show a significant decrease (p=.002) of approximately 5 hours per case when maximum limitations are imposed—from 16.81 to 11.70 hours.

TABLE 4.11 HOURLY WITH MAXIMUM LIMITATIONS *PLEA* CIRCUITS

Circuit	*Compensation Method/Rate*	*Plea Population*	*Mean Hours*	*Standard Deviation*
C80	$30 per hr./max. $400	20	14.02	10.8
C81	$40 per hr./max. $500	118	16.77	7.66
C82	$40 per hr./max. $550	7		
C83	$40 per hr./max. $600	21		
C84	$50 per hr./max. $500	15	11.70	4.53

TABLE 4.12 RESULTS OF THE TWO SAMPLE T-TEST FOR *HOURLY VERSUS HOURLY WITH LIMITS PLEA* APPEALS. (95% C.I.)

$25–$35 per Hour

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	317	14.7	10.8	0.60
C80	20	14.02	4.37	0.98

p=0.54

$40 per Hour

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C40–C44	132	17.1	12.0	1.0
C81–C83	146	16.77	7.66	0.63

p=0.76

$50 per Hour

Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C50–C55	98	16.81	9.56	0.97
C84	15	11.70	4.53	1.2

p=0.002

Results of Hypothesis Testing of Hourly versus Hourly with Maximum Limitations Trial Appeals

Because of their limited numbers, results of trial comparisons are more suspect, increasing the possibility of faulty conclusions. The entire trial population for all five circuits is only 37, encompassing three different hourly rates.

Table 4.4 illustrates the straight hourly circuits in the study, while Table 4.13 depicts circuits using comparable systems hourly with limitations. The T-test results are illustrated in Table 4.14. Under all three hourly trial systems, mean hours were fewer where limitations on compensation existed. However, the $30 and $50 (*i.e.*, low and high) comparisons did not reject the null hypothesis (p=.12, p=.57); the $40 (*i.e.*, medium) comparisons suggest otherwise (p=.006).

Table 4.13 Hourly with Maximum Limitation *Trial* Circuits

Circuit	*Compensation Method/Rate*	*Plea Population*	*Mean Hours*	*Standard Deviation*
C80	$30 per hr./max. $800	2	28.9	2.97
C81	$40 per hr./max. $1,000	23		
C82	$40 per hr./max. $1,200	3	29.76	8.88
C83	$40 per hr./max. $1,200	7		
C84	$50 per hr./max. $1,500	2	40.55	0.071

TABLE 4.14 RESULTS OF THE TWO SAMPLE T-TEST FOR *HOURLY VERSUS HOURLY WITH LIMITS TRIAL* APPEALS. (95% C.I.)

		$30 per Hour		
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C30–C35	86	35.1	24.7	2.7
C80	2	28.9	2.97	2.1
		p=0.12		
		$40 per Hour		
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C40–C44	33	44.6	28.0	4.9
C81–C83	33	29.76	8.88	1.5
		p=0.006		
		$50 per Hour		
Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C51–C55	26	42.8	20.3	4.0
C84	2	40.55	.071	0.05
		p=0.57		

RESULTS OF HYPOTHESIS TESTING OF HIGH VERSUS LOW PLEA FEE SCHEDULE

Table 4.15 illustrates the circuits which utilize fee schedules as their method of paying court appointed counsel. For plea appeals, the majority pay in the $300–450 range. One circuit, C60, compensates at $750, almost double the average of the other circuits. Unfortunately, the population of C60 is only 21.

Table 4.16 provides the results of the comparison of total hour means, suggesting rejection of the null hypothesis (p=.01). The mean hours (22.4) for high paying C60 is considerably greater than the comparative low fee-schedule circuits (14.83).

TABLE 4.15 FEE-SCHEDULE CIRCUITS

	Circuit	*Plea*	*Trial*	*Plea Population*	*Trial Population*
high	60	$750	$1,250	21	3
	61	N/A	$900	N/A	28
	Totals			21	31
low	70	$150	N/A	34	N/A
	71	$300	N/A	67	N/A
	72	$350	$500	46	4
	73	$350	N/A	31	N/A
	74	$400	$700	18	4
	75	$400	N/A	29	N/A
	76	N/A	$450	N/A	3
	77	$400	$650	14	1
	78	$450	$450	55	2
	Totals			294	14

TABLE 4.16 RESULTS OF THE TWO SAMPLE T-TESTS FOR HIGH VERSUS LOW FEE-SCHEDULE *PLEA AND TRIAL* APPEALS.

Plea Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C60	21	22.4	12.1	2.6
C70–C75, C77	294	14.83	9.35	0.55
		p=0.010		
Trial Circuit	*N*	*Mean*	*St Dev*	*SE Mean*
C60–C61	31	33.6	18.7	3.4
C72, C74, C76–C78	14	27.3	13.4	3.6
		p=0.21		

Trial comparisons also indicate a reduction in the mean hours going from high to low fee-schedules, *i.e.*, 33.6 to 27.3 hours. However, this difference is not deemed significant ($p=0.21$)—again, possibly because of the relatively few sample comparisons, 31 and 14.

Results of Comparisons of all Three Systems—Hourly, Hourly with Limitations, and Fee-Schedules

As a final analysis, all circuits within each of the three studies systems were aggregated. Then the mean total hours for each system was calculated and ANOVA employed. The results of this analysis, for both plea and trial appeals, appear in Table 14.17. The means for each system are quite close, 15.74, 16.30, and 15.34 for pleas respectively. Fee-schedule systems generate somewhat less time, *e.g.*, 15.34 hours. Hourly with limitation schemes actually generate more time, *e.g.*, 16.30 hours, than straight hourly systems, *e.g.*, 15.74. This ANOVA analysis suggests no significant variations ($p=.613$).

Trial analysis also indicate that variations among these systems are not significant ($p=.131$). Straight hourly schemes generate the highest hourly return, *e.g.*, 36.79, while fee-schedules are the lowest at 30.38 hours. Hourly systems with limitations are somewhat higher, *e.g.*, 31.64 hours than fee schedules, but less than hourly.

Table 4.18 provides a summary of all the above described findings in this chapter.

TABLE 4.17 RESULTS OF ANALYSIS OF VARIANCE (ANOVA), THREE-WAY INTERACTION FOR HOURLY, HOURLY WITH LIMITATIONS, AND FEE SCHEDULES FOR ALL *PLEA AND TRIAL* CIRCUITS COMBINED.

Analysis of Variance—Plea

Circuit	*N*	*Mean*	*St Dev*
C30–C58	782	15.74	10.75
C80–C84	161	16.30	7.56
C60–C78	315	15.34	9.72

Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	2	101	50	.49	.613
Error	1255	129086	103		
Total	1257	129187			

Analysis of Variance—Trial

Circuit	*N*	*Mean*	*St Dev*
C30–C58	222	36.79	23.88
C80–C84	35	30.38	8.98
C60–C78	45	31.64	17.31

Source	*DF*	*SS*	*MS*	*F*	*P*
Factor	2	1942	971	2.05	.131
Error	299	141928	475		
Total	301	143870			

TABLE 4.18 SUMMARY OF RESULTS

Hourly				
System	*Comparison*	*Test*	*P-value*	*Y/N Reject H_0*
Hourly—Plea	low/medium/high	ANOVA	0.056	No
Hourly—Plea	low/medium	T-test	0.21	No
Hourly—Plea	medium/high	T-test	0.31	No
Hourly—Plea	low/high	T-test	0.015	Yes
Hourly—Trial	low/medium/high	ANOVA	0.707	No
Hourly—Trial	low/medium	T-test	0.48	No
Hourly—Trial	medium/high	T-test	0.96	No
Hourly—Trial	low/high	T-test	0.48	No
Intra-Circuit Hourly—Plea	$35/$40/$45/$50	ANOVA	0.020	Yes
Intra-Circuit Hourly—Plea	$35/$50	T-test	0.33	No
Intra-Circuit Hourly—Trial	$35/$40/$45/$50	ANOVA	0.378	No
Intra-Circuit Hourly—Trial	$35/$50	T-test	0.25	No

Hourly with Limits				
	Comparison	*Test*	*p-value*	*Y/N Reject H_0*
Plea	low hourly/low hourly with limits	T-test	0.54	No
Plea	med. hourly/med. hourly with limits	T-test	0.76	No
Plea	high hourly/high hourly with limits	T-test	0.002	Yes
Trial	low hourly/low hourly with limits	T-test	0.12	No
Trial	med. hourly/med. hourly with limits	T-test	0.006	Yes
Trial	high hourly/high hourly with limits	T-test	0.57	No

TABLE 4.18 (CONT'D)

	Comparison	Test	p-value	Y/N Reject H_0
		Fee Schedules		
Plea	high/low	T-test	0.010	Yes
Trial	high/low	T-test	0.21	No
		All Systems		
Plea	hourly/hourly with limits/fee schedule	ANOVA	.613	No
Trial	hourly/hourly with limits/fee schedule	ANOVA	.131	No

CHAPTER 5
ANALYSIS OF DATA

INTRODUCTION

Our general hypothesis stated that differences in rates of compensation among Michigan's judicial circuits do not result in disparate services to the indigents represented. Essentially the available data provided an extraordinary opportunity to test the premise that attorneys' financial self interest is reflected in their quality of work. Time was equated with quality to the extent that clients' cases which received greater time commitments were presumably offered more extensive services.

The methods and rates of compensation permitted analysis of three different systems: 1. hourly, 2. hourly with maximum limits, and 3. fee-schedules.

HOURLY SYSTEMS

From counsels' perspective, hourly systems are the only ones which place no limit on total compensation. Unlike the other two methods, payment for services relies exclusively on time rendered on behalf of the client. The more time devoted to the case, the greater the expected reimbursement.

In Chapter 4 we compared the mean total hours of low, medium, and high hourly systems—for both plea and trial appeals. As Table 5.1 illustrates, there is considerable commonality. Regardless of compensation the range of mean hours for pleas is 14.727 to 16.931, for trials 35.11 to 37.95. Of the eight analysis of means calculated under "hourly"

systems, only one suggests that we reject the null hypothesis. That exception was for low versus high hourly plea appeals—where the difference in mean hours is 2.204. This of course is an important exception because these hourly circuits represent about one-third of all total samples. Recall from the "Data Analysis Techniques" (Chapter 3) that once ANOVA showed insignificant differences in means, further analysis could have been suspended. However, since the p-value ($p=.056$) was close to our confidence interval and our range of means relatively close, t-tests were appropriate. Accordingly, these t-tests suggest a significant difference between the high/low hour plea means the probability of error is greater than ANOVA by itself (Daniel, W., p. 276).

This result is also inconsistent with other findings. For example, although lesser in size than pleas, hourly trial comparisons provide contrary results. As described in Chapter 4, the analyses of variances shows no significant differences among the populations tested. Hourly rates range from 35.11 to 37.95. Conversely, medium hourly trial services slightly surpass those of high hourly (37.95 versus 37.74).

The two hour variation is not explained by analysis of the component variables either, *i.e.*, briefs, visitations, *etc*. This modest increase in mean hours does suggest that perceived compensation may affect services but not markedly. Although significant, a two hour variation is not remarkable. Scrutinizing Table 5.1, it is noteworthy that all plea systems, with one exception, have hourly means in the 14–16 range. That exception is somewhat apparent in that it is a single circuit with a very low population ($N=21$); the other clusters have average populations of 251.

One could argue that low hourly counsel work more hours in order to generate more income. That rationale is circular however, since medium and high hourly attorneys have the same option. Again, Table 5.1 demonstrates that low fee-schedule (plea) counsel, with fixed compensation ranging from $150 to $450 (Table 4.15), actually work slightly more (14.829

versus 14.727) than low hourly counsel. Those low fee-schedule counsel represent a large sample (N=294) with sufficient opportunity to abbreviate services since their compensation is fixed. This measurement belies the axiom that counsels' financial self-interest is paramount, since they could opt to curtail indigent services and apply their time elsewhere.

TABLE 5.1 PLEA CIRCUITS—A SUMMARY

	N	*Mean*	*St Dev*	*SE Mean*
Low hourly	317	14.72	10.77	0.605
Medium hourly	231	15.91	11.17	0.735
High hourly	234	16.93	10.18	0.666
High Fee Schedule	21	22.43	12.08	2.64
Low Fee Schedule	294	14.82	9.35	0.546
Hourly with Maximum Limitations	181	16.04	7.30	0.543

TABLE 5.2 TRIAL CIRCUITS—A SUMMARY

	N	*Mean*	*St Dev*	*SE Mean*
Low hourly	86	35.11	24.70	2.66
Medium hourly	70	37.95	25.21	3.01
High hourly	66	37.74	21.45	2.64
High Fee Schedule	31	33.61	18.68	3.35
Low Fee Schedule	14	27.28	13.38	3.58
Hourly with Maximum Limitations	37	30.30	8.75	1.44

Hourly Systems—Intra-Circuit

There is another important reason for discounting the significance of the high/low total hours service difference—the aberrant intra-circuit comparisons. Tables 4.1 and 4.4, which list the individual hourly plea and trial circuits respectively, illustrate many variations in mean hours among circuits which pay similarly. These individual circuit deviations suggest the presence of variables not controlled for in this study. Data from the aberrant circuit described in Tables 4.7-4.10 offer potential insight into intra-circuit role behavior since it eliminates hidden inter-circuit variables. The ANOVA noted significant variations, but for inverse reasons. Middle range ($40–$45) hourly means of 12.10 and 14.40 respectively, were less than the low hourly mean of 15.22. A further analysis of low versus high hourly means (Table 4.8) indicated no significant variation.

Trial findings within this circuit were markedly similar. Performance, as measured in hours, was again less for mid-range than low hourly compensation (Table 4.9). A further analysis of low versus high showed no significant deviation. It is noted that these trial populations are relatively small. However, this circuit is quite representative of the aggregated hourly circuits; that is, their mean total hours for both plea and trial appeals is consistent with the data in Tables 5.1 and 5.2. Thus, this circuit appears typical, in terms of total service, but services rendered do not increase with rates of compensation for either plea or trial appeals (Table 4.8, 4.10).

Hourly Systems with Maximum Limitations

These systems have characteristics of both hourly and fee-schedule methods. "Schedules" ultimately limit reimbursement regardless of the hours of service supplied. The applicable hypothesis implies that counsel will offer services comparable to straight hourly—as if the "limitations" were non-existent.

As discussed in Chapter 3, analysis in this area is more difficult because the populations are much smaller; trial appeals in some circuits using this system are almost non-existent. The largest populations are for low and median plea appeals (Table 4.12) and their means total hours, respectively, are extremely close. Low "limitation" plea circuits average 14.02 total hours, while their straight-hourly counterparts are only slightly higher, *i.e.*, 14.7 hours. Medium "limitation" circuits average 16.77 hours while their comparative population averages 17.1 hours. Neither analysis offers significant variations. The high hourly comparison does indicate that the "with limitations," population, at 11.70 mean hours, is significantly less than the same unencumbered hourly mean of 16.81. This difference is suspect for several reasons. C84 (Table 4.12) represents only one circuit and its population is only 15. The 11.70 average total hours is also considerably less than other low and medium reimbursement schemes—by far the lowest mean of any rate of compensation, suggesting unknown reasons particular to that singular circuit.

Trial level comparisons are more problematic. Table 4.14 indicates that both low and high comparisons are beset with a lack of data. Each of the circuits "with limitations" only have two samples. Analysis of the medium hourly category ($40) cannot necessarily be discarded because of sample size. Certainly this comparison (N=33, N=33) is considerably less than any of the available plea data; however the analysis of the variance of almost 15 hours is significant. This difference is partially explained when looking at the 44.6 mean for the straight hourly circuits. This was obviously higher than the norm, as previously discussed in Table 5.2. The 44.6 mean represents only circuits paying $40 per hour, whereas the medium hourly discussed in the previous section incorporated both $40 and $45 per hour circuits. For this analysis only $40 per hour circuits were used because there were no $45 circuits with maximum limitations. Thus, Table 4.4 illustrates that $40 per hour circuits have a higher aggregate mean than $45 circuits. Three of those $40 circuits, providing sixteen of the

thirty-three samples, had average means ranging from 50 to 64 hours. Besides lending credence to the earlier discussion on higher hourly rates not impacting service, this result further illustrates considerable variations in role behavior among circuits with similar compensation systems.

A summarization of this area suggests there is limited evidence to support the premise that "limitations" on hourly compensation curtail services. Only when comparisons of small populations occur does the main hypothesis, that role behavior is unaffected by compensation, appear suspect.

Fee-Schedules

This is an area where it would be particularly helpful to have larger populations to work with because these systems portray, up front, what the attorney will earn, regardless of effort. In other words, these methods possibly present a clearer barometer of professional effort than other systems. As Table 4.15 illustrates, there is only one county that can be characterized as having a high fee schedule—possibly because the intent of these systems is generally to limit or reduce attorney fees. Thus, fee-schedules are typically "low" compensators.

Table 4.16 shows a significant variation in means (22.4 versus 14.83) between high and low systems. It would be misleading however, particularly in lieu of all the previously discussed findings, to conclude that high fee-schedules result in high hours. First, this 22.4 hour high schedule mean represents only one circuit, again with a limited sample (N=21). Second, it deviates markedly from the norm as illustrated in Table 5.1. All other plea systems have total mean hours ranging closely from 14.727 to 16.931. The other populations are also sizeable, from 181 to 317 cases. Third, this phenomena is not apparent at the trial level for high fee schedules where the mean of 33.6 hours is consistent with other trial means (Table 5.2).

On the contrary, Table 5.1 lends further support for the professional role of these "fee-schedule" counsel. Faced with low fixed rates ($150–$450), they (N=294) still offered an average of 14.83 hours of service which approximates the plea averages from other systems. Similar arguments can be offered for trial appeals where analysis of variance displayed no significant differences between high and low schedules even though reimbursement varied from $800 to $1500 (Table 4.13). Essentially, payment is almost halved for counsel representing clients from low fee-schedule trial circuits.

An Aggregate Comparison of All Three Major Systems

This perspective is separate from our hypotheses because each of our primary studied systems contain high and low rates of compensation. Thus, a given system as a whole (*e.g.*, all hourly), does not necessarily convey a clear perspective of anticipated compensation. However, analysis of the means of these systems may offer additional insights regarding the impact on services of the various methods of providing indigent appellate services. Table 4.17 illustrates the analysis. Regardless of the system, no significant differences in mean total hours are noted for either plea or trial appeals. Mean plea hours are extremely close—15.74, 16.30, and 15.34. Trial means are somewhat more varied with hourly systems seemingly generating somewhat higher hours. However, analysis of variance suggests no significant differences; again, hourly limitation and fee-schedule trial systems are hampered somewhat by limited populations.

This aggregate analysis arguably lends credence to previously stated positions; namely, the type of systems employed has little, if any, impact on services. As the literature review suggests, systems are often devised to limit compensation. However. Table 4.17 clearly portrays, for example, that hourly systems with limits generate greater hours (16.30) than straight hourly systems as a whole (15.74)—a critical observation.

CHAPTER 6
IMPLICATIONS OF THE STUDY

COMPENSATION AND PERFORMANCE

States fund their indigent criminal support services in a variety of ways. County-level funding as practiced in Michigan is the primary method utilized nationwide (Levine, February 1992). It is believed that fiscal disparities among counties affect services to indigents (*Ibid.*). A survey of Michigan's appointed counsel found the majority of respondents felt low fees created pressure to spend less time per case and omit particular tasks (Levine, October 1992). Blumberg suggested that appointed counsel typically conserve time, doing just enough to satisfy the court organization that they have provided adequate service (1967, p. 27). The desire to maximize earnings is repeatedly cited as a rationale for reduced services (Margulies, 1989; Alscher, 1975, 1986). Levine refers to this concept as "fiscal self-preservation," where attorneys circumvent time consuming efforts (October 1992, p. 12).

This dissertation study, however, counters those premises. Although confirming the disparate funding among circuits (Appendix A), remarkable variations in services (*i.e.*, total hours) do not exist, regardless of the rates or methods of compensation. At least within the parameters of this study, there are no consistent patterns associating counsels' service with the remuneration method/rate employed. Of the three "methods" of funding examined, two place limits on earnings regardless of effort: (1) hourly with maximum limitations and (2) fee-schedules. These two methods afford ample opportunities for counsel to "short-cut" justice. As the analyses illustrate, however, performance under these methods parallels hourly efforts at

both plea and trial levels (Tables 5.1 and 5.2). Low fee-schedule counsel are a notable example since, arguably, they represent the least compensated group; however, at the plea level where the sample is large (N=294), they work slightly more than their low hourly counterparts.

These fee-schedule systems are similar to contract methods discussed in the Review of the Literature (Chapter 2). Contract systems have been the subject of considerable study relating to indigent trial defense and this study should add to existing research. Typically, contract systems involve a governmental entity (*e.g.*, county) purchasing the services of a group of attorneys to represent the entirety of the county's indigent defense work for a specified time (*e.g.*, one year) at a predetermined cost. The fee-schedules in this dissertation study pertain to *appellate* counsel, but the common thread is that attorneys' compensation is predetermined—regardless of effort. Because of MAACS's rotating system for appointing counsel from around the state to specific county cases, contracts per se are not allowed. However, numerous counties use the fee-schedule method of payment, based on contract principles of fixed costs.

The Houlden study stated emphatically that contract attorneys spend less time per case than assigned counsel (Houlden & Balkin, 1985b, p. 198–199). Shonkwiller similarly stated, "My experience verified for me that corner-cutting is a reality in the case of contract defenders" (1992, p. 174). This dissertation's findings are not consistent with the above observations; rather, this study suggests role behavior (*i.e.*, work) of appellate counsel is consistent—regardless of the compensation system.

Lefstein's study of contract attorneys partially supports this dissertation's findings. He observed that where a county paid contract attorneys extra money to handle excess unanticipated cases, the quality of representation actually declined (Nelson, 1988, p. 1155). This lessening of services could have partially been a function of excess work, however.

One possible explanation for the consistency of services, regardless of the method/rate (Table 4.17), is that attorneys who do appellate work intuitively know *the entire system* is

underfunded and adjust their services accordingly. There may be a "balancing effect" occurring. Since many attorneys work in numerous circuits, specific compensation schemes may be irrelevant to their performance. Their efforts may remain constant among circuits because, ultimately, compensation averages out to an acceptable level. Further research could analyze specific counsel's work under different compensation schemes.

Compensation and Caseloads

At the trial stage, low pay and large caseloads are the dual system-based obstacles believed to affect services to indigents. Since private retained counsel are perceived as being less constrained by these constraints, comparisons between private and public counsel abound (Benjamin & Pedolski, 1969; Gitelman, 1971; Grier, 1971; Casper, 1972; Taylor, 1972; Stoker & Eckart, 1975; Levine, 1975; Clark & Kurtz, 1983; Houlden & Balkin, 1985a, 1985b; Cavender, Nienstadt & Everett, 1987). Flemming reviewed thirty-seven studies comparing public and private counsel, stating the results are inconclusive. He specifically notes that "the literature offers no clear operational criteria of performance" (1989, p. 403). This comment is based on the fact that "private vs. public" studies to date have been qualitative (*i.e.*, interviews/observations) or based on "outcome" measures (*i.e.*, convictions/sentences). Emmelman recently indicated that the literature provides little insight regarding the conditions (*e.g.*, compensation and caseload) under which publicly provided counsel perform ethically, *i.e.*, relative to standards (1993, p. 222).

This dissertation lends support to those studies which show no significant differences in services because of perceived disparity in compensation. This research involved large populations of cases and performance was measured using established ethical criteria for appellate counsel. Time spent performing vital functions (*i.e.*, client consultation, research/briefs, and court appearances) were considered more reliable indicators of "due

process" than final outcomes. Most important, these categories of attorney behavior are believed more definitive of counsels' *role* than case outcomes.

This dissertation study does not account for counsel's entire workload. Although it is well documented that public trial attorneys for criminal indigents have excessive caseloads, the workload of their counterpart appellate counselors has not been measured (State Bar of Michigan, 1990; NLADA, 1982). Since both types of practice obviously encompass similar criminal law concepts, it is believed many appellate counsel also do criminal trial work. Margulies found that excessive workloads are the single greatest systemic obstacle to effective representation and present a disincentive to time-consuming trials (1983, p. 673–725). Arguably, caseload size could impact the findings of this dissertation study. However, over 1,500 cases were analyzed and it is equally plausible that caseload size varied consistently among counsel in the thirty–four circuits studied. Levine believes large caseloads, in combination with poor compensation affect appellate rights, but her theory has not been fully tested (October 1992). It might prove helpful if future research explored the total workload of appellate counsel including the extent to which they were also doing public criminal trial work. However, it appears unlikely that the findings of this dissertation study would be affected unless higher paid counsel were found to reduce services because they had larger workloads than lower paid counsel.

Policy Implications

Methods of Funding

This dissertation study does not suggest that any particular method of funding or level of compensation will result in enhanced services to indigent criminal appellants. Although the ultimate responsibility for indigent defense remains with the government, privatizing of services has become increasingly popular in the wake of fiscal strain (Worden & Worden, 1989; Ferris,

1987). Court appointment and contractual agreement are the primary systems implemented; public defender systems are rarely used in Michigan at either trial or appellate (*i.e.*, SADO) levels. Further study is required to determine if the services of public defenders in Michigan differ from those of appointed or contract counsel. Given the inconclusive results of similar research, it is unlikely that marked differences would be identified (Flemming, 1989, p. 403).

State versus Local Control

It has been stated that state-level funding, as practiced in a minority of states, eliminates fiscal disparities among counties (Levine, February, 1992, p. 142). State established financing could be provided directly to the local circuits or centralized in a State agency such as SADO. However, this dissertation study does not confirm an accompanying change in services would occur, since performance are already quite consistent among differently funded circuits. Central agency responsibility for all appellate work, using salaried counsel, would conceivably reduce concerns of co-optation by the local judiciary (State Bar of Michigan, 1992, p. 152). Local appellate defender offices might similarly be free of judicial constraints if the fiscal responsibility is state-based.

Need for Quality Representation

Policy-makers are cautioned not to interpret the results of this study as rationale for continuing, or reducing, existing programs for indigent criminal services. Clearly, funding criminal defense is often unpopular with political decision-makers and appellate resources are more difficult to obtain than funding for trial representation (Levine, 1992, p. 142, 145). A quick review of Appendix A illustrates that compensation for appellate work has remained unchanged in many circuits for years. Appellate counsel earn far less than other criminal lawyers (State Bar of Michigan, 1991, p. 1223) and increases in pay lag behind other

government actors in the criminal justice process, *i.e.*, judges and prosecutors. Generally, investigative and expert witness resources are also not available to appellate counsel without direct cost to them (State Bar of Michigan, 1990, p. 28). These resources are more readily available to prosecutors (Oberg, 1992, p. 160).

It is possible that the appellate bar, in general lack experience. At the trial level, counsel who accept indigent appointments are believed to be young or inexperienced (State Bar of Michigan, 1990, p. 27). Those with greater experience indicate they would be more willing to accept appointments if the compensation were increased (p. 27). Experienced counsel may be capable of performing the same services in less time. Arguably, inexperienced counsel are less adept at spotting and developing meritorious issues. Recognizing viable legal questions is a learned skill. Issues are not necessarily matters of record; they often require evidentiary hearings/motions to establish their merit.

Quality representation is not necessarily measured by adherence to "minimum ethical standards." A criminal appellant has the right to "effective assistance of counsel," not simply representation. Evitts v. Lucey (1985). It is abundantly clear, however, that an appellant seeking to challenge his plight based on an "ineffective assistance of counsel" claim carries a difficult burden. Strickland v. Washington (1984). "System" failures such as large caseloads and low compensation are not "legal" considerations when assessing inferior attorney performance. However, they may be "real" considerations which contribute to inadequate work. Under-representation may be tantamount to no representation, making the appeal a "meaningless ritual" and a denial of equal protection of the law (Douglas v. California, 1963, p. 359).

Service providers for indigents must be cognizant of these dilemmas and perspectives, thus providing adequate funding in an effort to attract experienced, as well as dedicated, counsel. It is possible the entire Michigan criminal appellate population is "under-represented." This is

academic, however, since "adequate" representation has not been defined. Rather, "ineffective assistance of counsel" is legally determined on a case-by-case basis. Regardless, the multitude of studies cited previously by Flemming fail to indicate conclusive differences between private and public counsel (1989, p. 403). It is, therefore, unlikely that increased compensation (*i.e.*, like private retained counsel) will result in notable increases in hours of service, but quality could improve. The extent to which meritorious issues are not developed is unknown.

In the Michigan survey of criminal law attorneys, 71.2 percent stated they would be more willing to accept assigned cases if the fees were increased (State Bar of Michigan, January 1990, p. 22–25). This suggests that many capable attorneys forego public work because of low compensation. It does not mean however, that they would offer higher quality representation than those who currently chose to accept appointments. Still, policy-makers should not ignore the fact that over 70 percent of counsel surveyed in 1990, expressed an interest in indigent criminal work, except for the low compensation. Recall the referee in Wayne County who concluded their system supported a group of substandard attorneys (In Re Recorder's Court, 1993, p. 115–116).

Role Theory

Introduction

Although compensation may not be entirely discounted as a performance variable, clearly other variables significantly impact court appointed counsels' work. Other than Wasserman's observations, appellate counsel have never been the subject of social science research (1990). Wasserman provided limited insights regarding behavior, and never attempted to offer theoretical explanations.

Role theory posits that individual professional behavior is shaped by factors including: the demands and rules of others, behavioral rewards and sanctions, individual expectations of self

and affiliated organizations (Biddle, 1979b, p. 314). Role "expectations" are the conceptual bridge spanning role behavior and social structures (Garbin & Allen, 1968, p. 497). Expectations relative to legal and other professionals have been the subject of considerable research (Chapter 2). Role concepts often play a prominent role when studying the "helping professions" (Biddle, 1979b, p.11-12). The term expert embodies an explicit code of conduct in the form of rules, governing the role, that are enforced by the members (Biddle, 1979b, p. 314). Role concepts often play a prominent role when studying the "helping professions" (Biddle, 1979b, p. 11-12).

Applying role theory to appellate counsel, the potential factors influencing behavior include: (1) professional standards—written or unwritten codes of conduct, (2) expectations of MAACS or the court, (3) expectations of the peer group, (4) expectations of the client, (5) expectations of self.

Professional Standards

Michigan has a written code entitled "Minimum Standards for Indigent Criminal Appellate Defense Services." Counsels' expenditures of time (*i.e.*, effort) is categorized in accordance with these "Standards." Their affect on Michigan assigned appellate counsel is unknown. To measure performance, relative to these standards, would be difficult quantitatively. It is unnecessary to meet each requirement for every appellate case. Hearings, motions, research, and brief preparations may only be required where the issues merit their application. Many standards only become role expectations depending on the nature of the specific appellate case. Therefore, measuring role behavior quantitatively relative to each specific ethical standard is problematic. It is also unknown if appellate counsel are thoroughly aware of these minimum standards.

Unwritten "codes of conduct" may also influence role behavior. Nardulli observed that trial attorneys established "courthouse norms through their relationship with the courthouse community" (1986, p. 416) and Blumberg contended that defenders conformed to system requirements (1967, p. 60). Howard reminds us that "common understandings of how jobs should be performed affect how they are performed" (1981, p. xxii). These established norms may be influenced by courts, peers, professional organizations, clients, and self.

"Minimum Standards for Indigent Criminal Appellate Defense Services," as detailed in Chapter 1 (p. 12–14), were in effect throughout the time-span covered by this dissertation study. Total services measured by time expended (*i.e.*, hours), is the summation of various categories (Appendix B) of work consistent with counsels' ethical responsibilities. It must be emphasized that each and every duty is not required, or necessary, in every appellate case. Data regarding frequency of application of the various services, can offer further insights into counsels' role behavior; however, the data cannot specifically define the adequacy of services. By quantifying their role for the first time, it is contemplated that further research will result in a more comprehensive understanding of counsels' work behavior.

Frequency of Services

Table 6.1 provides an overview of the "frequency" of services for both plea and trial appeals. A review of this data reveals several insights into counsels' role relative to their obligations. Only a few responsibilities approach being mandatory in every case, the primary one being "record review." Potential issues are generally discovered by reviewing "all transcripts and lower court records" (MAACS Regulations, p. 14). Table 6.1 indicates this requirement is met in 98.3 and 97.7 percent of the cases for pleas and trials, respectively.

Why not 100 percent application of this standard? Several possible explanations emerge. Counsel may have neglected to complete that service category on the "Statement of Services."

The appeal may have been dismissed prior to record review. Issues, or lack of issues may have been determined from a source other than the record (*e.g.*, trial counsel). Death of the client could provide another explanation. Regardless, it is apparent that attorneys review the record in an extremely high percentage of cases (*i.e.*, in excess of 97 percent).

The second highest frequency of labor is "administrative" functions (*i.e.*, 93% for plea and trial). Although not a specific standard, per se, this category reflects work (*e.g.*, filings, letters, phone calls) related to other services. Most cases obviously require some ministerial tasks; thus, this frequency rate appears reasonable.

The rate of occurrence of client visitation merits further analysis. The applicable Standard states, "Except in extraordinary circumstances, counsel shall interview the defendant in person on a least one occasion during the initial stages of representation" (MAACS Regulations, p. 14). Table 6.1 indicates this regulation is adhered to in 77.7 and 80.6 percent of cases, pleas and trials respectively. Possible explanations for the non-occurrence of in-person client interviews include unknown "extraordinary circumstances," early dismissals of cases following "other client contact," client death/health problems, or intentional non-compliance. Recall that client visitation often requires significant travel since Michigan's numerous prisons are situated throughout the state. The time commitment, because of distance, could deter some counsel from complying with this obligation.

Beyond the face-to-face interview, the data reflect "other client contact" in 58.6 and 65.5 percent of the cases respectively. Providing further perspective to this category of service is more difficult. The nature of appellate work, as previously described, often is limited to developing issues from the written record and briefing them for the appellate courts. If motions or hearings are necessary to perfect the appeal, the likelihood of "other client contact" is enhanced. Since trial appeals typically involve more issues than pleas, the frequency of contact is likely to be higher for trial appeals and these findings seemingly support that belief.

TABLE 6.1 FREQUENCY OF SERVICES—(PERCENTAGE OF TOTAL *CASES*)

Plea	
Record Review	98.3
Client Visitation	77.7
Other Client Contact	58.6
Motions/Hearings	30.5
Briefs	52.6
Oral Argument	3.4
Administrative	93.4
Trial	
Record Review	97.7
Client Visitation	80.6
Other Client Contact	65.5
Motions/Hearings	31.3
Briefs	79.9
Oral Argument	11.8
Administrative	93.4

Motions/hearings occur with similar frequency (30.5% and 31.3%) for both forms of appeal. The Regulations state that "Counsel shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review. . . ." A related Standard says, "Counsel shall investigate potential meritorious claims of error" (MAACS Regulations, p. 14). The degree to which evidentiary motions/hearings "may be required" cannot be determined by this qualitative study. However, like client visitation, hearings generally require travel—to the trial court. Since appellate counsel may be situated anywhere in the state, hearings to determine evidence may require significant time/travel commitments.

Briefs (Table 6.1) present another opportunity to observe the behavior of large groups of appellate counsel. Their frequency varies dramatically between plea and trial appeals (52.6% and 79.9% respectively). The Standards require that "Counsel shall assert claims of error which are supported by facts of record . . . and, which possess arguable legal merit." Further requirements of: "diligent legal research" and the acceptance of "complex, unique, and controversial claims" frame the briefing standard. Since all defendants have the right to seek appellate review, the exercise of that right does not necessarily coincide with issues that have merit. Appellant's thoughts or feelings (*i.e.*, about their case) may lack legal significance. These circumstances can typically result in the appeals being dismissed—therefore briefing does not occur. Seemingly, plea appeals are more likely to lack merit. If the plea was knowingly and voluntarily rendered in accordance with established legal procedures, the only remaining potential issue is typically the length of sentence. Again, if the sentence is within the sentencing guidelines, it is presumptively valid (People v. Milbourne) and without appellate merit. Trials, by their very nature, expand the potential for issues which have arguable merit. Trial appeals are, therefore, less likely to be dismissed and more likely to proceed through the entire appellate process.

A final category of services, as specified in the Regulations says, "Counsel should request and appear for oral argument" (MAACS Regulations, p. 16). Table 6.1, however, indicates counsel appear before the Court of Appeals in relatively few cases—3.4% and 11.8% for plea and trial cases respectively. Prior to August 1, 1991, oral argument was a right. From that date forward it became discretionary. Appellate counsel had to request it in writing in bold type on the brief; then it was permitted strictly by leave (*i.e.*, discretion) of the Court (Michigan Rules of the Court, 1994, p. 617-618). To what extent the above data reflect the Courts' reluctance to hear argument versus counsels' lack of request is unknown. Frequency of "requests" can only be determined from the briefs which were not part of data for this dissertation study.

Division of Services

Table 6.2 offers a different perspective of counsels' role. Rather than frequency, it illustrates the overall division of services (*i.e.*, the percentage of counsels' time devoted to the specific services). Although offering fewer insights into counsels' ethical role (*i.e.*, adherence to MAACS's Regulations), Table 6.2 assists in further defining appellate counsels' work routine. A brief review of plea statistics, for example, illustrate counsel spend the most time in client visitation and briefing, 23.8 percent and 23.8 percent, respectively. Data on trial counsel, however, reveal a greater percentage of their time is devoted to briefing and record review—35.7 percent and 25.3%, respectively. This finding corresponds with conclusions drawn from Table 6.1 data—trial counsel typically have more to review and brief.

At the other extreme, both types of appeals involve minimal allotments of time to oral argument (*e.g.*, less than 2 percent). Again, this reinforces our findings relative to Table 6.1—the Court of appeals, since 1991, hear relatively few oral arguments, deciding issues on written briefs. The remaining data in this Table needs no further elaboration at this time, but it may be helpful in future research into the role of these attorneys for the indigent.

TABLE 6.2 DIVISION OF SERVICES—(PERCENTAGE OF TOTAL *TIME*)

Plea	
Record Review	15.6
Client Visitation	23.8
Other Client Contact	5.8
Motions/Hearings	11.6
Briefs	23.8
Oral Argument	.8
Administrative	18.8
Trial	
Record Review	25.3
Client Visitation	12.4
Other Client Contact	4.6
Motions/Hearings	8.1
Briefs	35.7
Oral Argument	2.0
Administrative	11.9

Political Influences

Court appointed appellate counsel receive their compensation from the specific circuit following approval by that circuit court. Ultimately the judge determines compensation. This suggests the possibility of co-optation since the attorney may possess allegiance to both his client and the court (State Bar of Michigan, 1992, p. 152). How "political influence" might affect appointed appellate counsel's role is unknown (Daniels, 1992, p. 139). It is possible that the judiciary discourages "aggressive" appeals in circuits with unlimited compensation schemes (*e.g.*, hourly), for example. As discussed in Chapter 2, Michigan has numerous trial-based lawsuits where counsel have sued the court for reducing their compensation (Jacobs, et al.). Some contend that attorneys, faced with this dilemma, either forego indigent representation altogether or curtail services to coincide with anticipated compensation (Sate Bar of Michigan, February 1992, p. 154–155).

Kessler maintains appointed counsel are "clearly cognizant of their political environment and their strategies of legal representation, *i.e.*, role, are influenced by it" (1986, p. 165). Appointed appellate counsel in this dissertation study however, are most likely to practice in numerous circuits; therefore, their "political" relationships are thought to be less intimate than their trial counterparts. However, the extent of appellate counsels' knowledge of varying judicial expectations is unknown. Certainly their role behavior may be influenced by personal experience or information obtained from others, *i.e.*, peers, and this knowledge would vary among counsel. Further qualitative research (*i.e.*, surveys) of appellate counsel could unveil the degree to which judicial expectations impact performance. Particularly because of variations in services (*i.e.*, Tables 4.1, 4.4) among similar systems, the influence of the judiciary is suspect.

Peer and Organizational Expectations

The nature of appellate work lessens the probability of regular daily interaction with other appellate counsel; yet organizational commitment and peer influence may still be important factors in counsels' role behavior. MAACS sponsors training programs for appellate counsel and the Criminal Law Section of the State Bar Association also provides forums for peer interaction, *e.g.*, conferences and seminars. Thomas and Mungham found that shared values, feelings of identity, and colleague loyalty are enhanced through lawyer groups (1983, p. 147). Callero reminds us that "roles emerge in organizations or subcultures" and attorney collegiality is an important aspect influencing professional behavior (1994, p. 235). Similar observations were made by Erlanger (1990, p. 884) and Heinz & Lauman (1982, p. 214). The extent of shared appellate/defense ideology could further assist in understanding their role.

Role Congruence

Since the subjects of this dissertation study are not mandated to perform indigent appellate services, this type of practice may attract those committed to the due process characteristics inherent in criminal defense work. In her study of defenders, Emmelman acknowledged that they were motivated to perform properly at the time of employment (1993, p. 232). Smith states that "role theory . . . provides a framework for explaining recruitment, selection, and socialization of magistrates" in our federal system (1988, p. 14). This concept has been referred to as "self-role congruence" (Biddle, p. 395).

A related concept, organizational commitment, is popularly defined as "the relative strength of an individual's identification with and involvement in a particular organization" (Wallace, 1993, p. 334). In contrast, lawyers who identify less with organizational goals are more likely to experience burnout (Jackson, Turner & Brief, 1987, p. 348; Hall, 1988, p. 246–252), suggesting that appellate counsel for the indigent might consist of "survivors."

Commitment to Client

Role theory, is partially defined by expectations of others, including the client. Beyond the aspects of commitment described above, McIntyre found that public defenders were motivated to achieve for their clients to overcome the "stigma of ineptitude" associated with criminal defense work (1987). Additionally, the criminal defense bar, in a Chicago study, were found to be more closely aligned socio-economically to criminal defendants than were other categories of lawyers (Heinz & Laumann, 1982). Contrary to comments that publicly provided counsel have little concern for their clients' welfare (Casper, 1972), the relationship might facilitated by closer identification with clients' social, economic, and political perspectives (Cain. 1979). Thus, another area for future research could involve appellate counsels' commitment to the client and related due process principles.

Self Interests

The extent to which rates or methods, of compensation influence counsels' choice of jurisdictions from which to receive appointments is unknown. MAACS indicates that "geography" is the principle determinant, where counsel elect to receive appointments close to home. Volume of work desired is the second prominent factor. Attorneys desirous of additional work typically expand their radius of jurisdictions from their home base. Inquiries regarding "fees" at the application stage are atypical. Conversely, MAACS states that the more experienced roster attorneys, who have received appointments for extended periods, are more likely to inquire about fees. Of course, counsel always have the ability to determine compensation by directly contacting individual circuits or obtaining information from other counsel.

MAACS occasionally is faced with a shortage of experienced counsel in some lower compensating jurisdictions. Most of this dilemma is reflective of the overall shortage of

experienced attorneys who can handle more complex litigation. It is possible that new roster attorneys are willing to represent indigent appellants regardless of variations in compensation. After becoming better established financially they may become more selective or decline further appointments altogether. This aspect of role requires additional research. Attorneys, for example, may also be concerned with maintaining their professional reputations or meeting other unknown self-imposed standards.

Counsels' expectations of self may be a combination of professional ethical standards, unwritten norms, perceived court expectations, peer and organizational influences, client welfare, and matters of self-interest. Self-interest may include the desire to continue receiving court appointments, possibly for financial reasons. This need may result in "under-reporting" services which several Survey respondents claimed (Appendix C).

CHAPTER 7
LIMITATIONS OF THE STUDY AND DIRECTIONS FOR FURTHER RESEARCH

Range of Compensation

It is possible that the measured "ranges" were insufficient to adequately measure the effects of compensation on performance. If differences were more pronounced (*e.g.*, $40/hour versus $100/hour) it is conceivable that more significant variations in services would be observed. Limited t-testing, following the hourly plea ANOVA results, suggests this possibility.

Methods of Analysis

When several population means are compared, ANOVA is an appropriate method. Reliance on ANOVA exclusively for multiple comparisons might strengthen our hypotheses, because performing separate t-tests is more likely to result in false conclusions (Daniel, W., p. 276). However, when the ANOVA result fails to "strongly" support the hypothesis, t-tests are invited to compare the relative strength a separate pairs. This occurred with the hourly plea results discussed in Chapter 5, suggesting a significant difference between high and low compensation.

Completeness of Data

As discussed under "Population Selection Rationale" (pp. 68–69), certain data were excluded from this research. Twenty-two circuits were not considered because suitable "comparisons" could not be accomplished. Other data were "incomplete," not permitting

necessary research assumptions. Although it is certainly possible that a complete analysis of all data could yield different conclusions, this researcher believes it highly unlikely. The 34 studied circuits represented the broadest possible range of compensations and the most commonly utilized methods of payment.

Of the studied populations, some variables could not be controlled for, such as different travel reimbursement schemes within similar paying circuits. Separating populations on the basis of all potential variables would have precluded the aggregation necessary to achieve suitable numbers for comparison.

Choices and Options

These research findings beg for follow-up qualitative study. Information regarding "why" counsel chose indigent appellate work would add markedly to our knowledge of "role." Of equal importance would be an understanding of reasons why attorneys leave the roster. For example, in addition to perceived low compensation, counsel are typically not paid until the case is concluded—a wait which may exceed two years.

The extent to which counsel might "avoid" receiving assignments from certain circuits is also unclear. MAACS indicate occasional difficulties in providing counsel when higher levels of expertise (*i.e.*, more complex appeals) are required. Otherwise, counsel do not appear to bypass lower paying jurisdictions. There are also disincentives for declining assignments; unless counsel can show good cause, they are rotated to the end of the list when rejecting cases.

The Balancing Effect

It would be unsound to reason that low fees, in all circuits, would result in similar performance at reduced costs to the service providers. Further research might indicate that significant numbers of appellate counsel remain on the roster because, in some jurisdictions,

they receive higher pay. Negating that incentive could prompt counsel to pursue other employment. Accordingly, this could reduce the number of experienced counsel and further promote an entire system of sub-standard appellate attorneys such as occurred with trial counsel in Wayne County (In Re Recorder's Court Bar Association).

Judicial Constraints

What other constraints might be influencing attorney performance? Unknown judicial expectations may be curtailing services. The Survey (Appendix C) suggests some services are "under reported." This could be the result of specific judicial red-lining or the expectation that judges might reduce payment. The extent of these influences on services could temper the results of this dissertation study (*e.g.*, higher paying circuits may influence hours reported). Attorneys might forego services due to the prospect of court coercion. We know that lawsuits against the judiciary for reducing payment are pending. In addition, substantial variations in services exist among similarly paying circuits suggesting different judicial "payment philosophies."

The Experience Factor

Comments by MAACS concerning the occasional lack of experienced counsel for more challenging appeals suggest their "roster" is populated with "newer" attorneys. If true, it would be beneficial to determine the extent and reasons for leaving the roster. Compensation may be a determining factor here, contrary to its apparent lack of impact on the services of those who remain. As cited previously in the literature, appointed trial counsel for the indigent typically have less than five years experience. Surveys and/or interviews with appellate counsel, past and present, can further define role in terms of experience.

Conclusion

The research marks a beginning in our understanding of the role of appellate counsel for the indigent. Because it embarks upon new ground, the study's conclusions invite more questions than they answer. Counsels' quantitative role is hopefully more clearly defined (*i.e.*, Tables 6.1 and 6.2). However, the factors influencing that role behavior need further study and "role theory" provides the basis for further research. Ultimately it is hoped that greater knowledge of appellate counsel and the system under which they labor will result in more competent representations for indigent appellants.

The human and constitutional implications prompted by reductions in services to indigent appellants are immense. The U.S. Supreme Court stated in a Fourteenth Amendment "equal protection" of the law decision:

> . . . where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . . while the indigent . . . is forced to shift for himself. The indigent, when the record is unclear or the errors are hidden, has only the right to a meaningless ritual (if unrepresented), while the rich man has a meaningful appeal (Douglas v. California, 1963, p. 359).

As Justice Brennan stated in Evitts v. Lucey (1985), skilled counsel is indispensable for the criminal defendant seeking to challenge his conviction. "[T]he promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel" (Wasserman, 1984, p. 21).

APPENDICES

APPENDIX A

APPENDIX A

APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
JANUARY 1995

Circuit	*Basis*	*Fee Set*	*Rate*	*Expenses*	*Comments*
1st Hillsdale	Schedule	1990	Plea: $400 Trial: $600 COA Argu.: $125	Add'l.	$40/hr. when extraordinary fees granted
2nd Berrien	Hourly	1989	$40/hr. Travel: $10/hr.	Add'l.	Plea: $600 max. Trial: $1200 max.
3rd Wayne	Schedule	1984	See Recorder's Ct. description below		
4th Jackson	Hourly	1979	Office: $25/hr. Court: $35/hr. Clerical: $15/hr.	Add'l.	Plea: $500 max. Non-Cap. Trial: $1000 max. Cap. Trial: $1200 max. Travel to prisons at set rates per location, otherwise 29¢/mile and no hourly pay for travel time
5th Barry	Schedule	1991	Plea: $350 Trial: $500	Inclu.	Extraord. fees by motion
6th Oakland	Hourly	1993	$40/hr.	Inclu.	Plea: $720 max. Trial: $1200 max. Extraord. fees by motion to three-judge panel
7th Genesee	Schedule Hourly	1992	Plea: No brief – $350; w/brief – $450; Oral Arg. if ordered – $150 Trials: $40 × 1 hr./100 transc. pages × 5; Oral Arg. – $150; $2000 max.	Trav. inclu.; other expenses add'l.	

8th Ionia Montcalm	Hourly	1989	$65/hr. (in-prison offenses) $60/hr. (non-prison offenses)	Add'l.	
9th Kalamazoo	Hourly	1990	$30/hr. Travel: $10/hr.	Add'l. +21¢/mi.	Plea: $400 max. Trial: $800 max.
10th Saginaw	Schedule Hourly	1985	Plea: $350+$100/ visit Trial: $35/hr.	Inclu.	
11th Alger Kyce Schoolcraft	Hourly	1987	$40/hr.	Add'l.	Mileage varies by county
12th Baraga Houghton Keweenaw	Hourly	1990	$45/hr.	Add'l.	
13th Antrim Gr. Traverse Leelanau	Schedule Hourly	1992	Plea: No brief – $350; w/brief – $450; Oral Arg. if ordered – $150 Trials: $50 × 1 hr./100 transc. pages × 5; $2500 max.; Oral Arg. if ordered – $150	Trav. Inclu.; other expenses add'l.	
14th Muskegon	Hourly	1989	$40/hr.	Add'l. 22¢/mi 15¢/page	Plea: $500 max. Trial: $1000 max. Extraord. fees by motion
15th Branch	Schedule	1987	Plea: $400 Trial: $700	$50 max. for trav.	
16th Macomb	Hourly	1974	$25/hr.	Inclu.	
17th Kent	Hourly	1991	$35/hr.	Add'l.	
18th Bay	Hourly	1985	Judicial discretion (Avg.: $40–$50/hr.)	Add'l.	Detailed time sheets must be submitted with voucher

19th Benzie Manistee	Hourly	1988	$50/hr.	Add'l.	
20th Ottawa	Hourly	1985	$45/hr.	Add'l.	
21st Isabella	Hourly	1986	$50/hr. Travel: $0	Add'l.	
22nd Washtenaw	Schedule	1991	Plea: $500 Trial: $1500	Inclu.	Extraord. fees at $50/hr. w/letter of explanation
23rd Iosco Oscoda	Schedule	1989	Plea: $400 Trial: $650 Visit: $50	Add'l.	Extraord. fees by motion
24th Sanilac	Hourly	1991	$50/hr.	Add'l.	
25th Marquette	Hourly	1984	$40/hr.	Add'l.	
26th Alcona Alpena Motmorency Presque Isle	Schedule	1989	TC Mot. Only: $150 Plea: $350 Trial: $500 COA Orals: $200 Jail Visit: $60 Prison Visit: $120	24¢/mi.	
27th Newaygo Oceana	Schedule Hourly	1986	Plea: $350 Trial: $30/hr.	Add'l. 29¢/mi.	Unusual or costly expenses require prior approval
28th Missaukee Wexford	Hourly	1985	$45/hr.	Add'l.	
29th Clinton Gratiot	Schedule	1990	Plea: $750 Trial: $1250	Add'l.	Extraord. fees by motion
30th Ingham	Schedule	1976	Plea: $300 Trial: $900	30¢/mi.	If case dismissed after client consultation: Plea: $150 Trial: $200 Non-mileage expenses require prior approval

31st St. Clair	Hourly	1995	$64/hr. Travel: $0	Add'l. 28¢/mi.	Mileage rate varies monthly
32nd Gogebic Ontonagon	Hourly	1989	$40/hr.	Add'l.	
33rd Charlevoix	Hourly	1990	$40/hr.	Inclu.	
34th Arenac Ogemaw Roscommon	Hourly	1990	$45/hr.	Add'l.	
35th Shiawassee	Hourly	1988	$40/hr.	Add'l.	Plea: $500 max. Trial: $1500 max.
36th Van Buren	Hourly	1994	Plea: $40/hr. Max. $570. Trial: $45/hr. Max. $1200 Mand. Life: $50/hr. Max. $2000 Trav.: $10/hr.	$100 max. $200 max. $350 max. Mileage at cty. rate	
37th Calhoun	Hourly	1990	$30/hr. out-of-court $50/hr. in-court	Prison Visit (if authorized); L.P. $150 U.P. $250 Oral Arg. (if COA directs): $200	Plea: $400 max. Trial: $700 max. + 25¢/transcript page. Maxs. include orals & prison visits; extraordinary expenses require prior written approval.
38th Monroe	Hourly	1991	$52/hr.	Add'l.	
39th Lenawee	Schedule Hourly	1977	Plea: $400 Trial: $25/hr. Secretary: $5/hr.	Add'l. 23¢/mi. 10¢/page	$150 minimum (inclu. dismissals)
40th Lapeer	Hourly	1989	Non-Ct: $50/hr. In-Ct: Tr.: $50 COA: $60 SCt: $75	Inclu.	

41st Dickinson Iron Menominee	Hourly	1981	$40/hr.	Inclu.	
42nd Midland	Hourly	1987	$45/hr.	Add'l.	
43rd Cass	Hourly	1992	$50/hr.	Add'l. 27.5¢/mi.	Plea: $500 max. Trial: $1500 max. Extraord. fees will not be approved unless previous authorization secured by formal written notice
44th Livingston	Hourly	1993	$45/hr.	Add'l.	
45th St. Joseph	Hourly	1987	$40/hr.	Add'l.	Plea: $550 max. Bench: $900 max. Jury: $1200 max.
46th Crawford Kalkaska Otsego	Hourly	1988	$40/hr.	Add'l.	
47th Delta	Hourly	1984	$40/hr.	Add'l.	
48th Allegan	Hourly	1987	Judicial Discretion (Avg: $40–$50/hr.)	Add'l.	
49th Mecosta Osceola	Hourly	1981	$40/hr.	Add'l.	
50th Chippewa Mackinaw	Hourly	1990	$37.50/hr. (non-prison offense) $50/hr. (in-prison offense)	Add'l.	
51st Lake Mason	Hourly	1991	$40/hr.	Add'l.	Plea: $550 max. Bench: $900 max. Jury: $1200 max.
52nd Huron	Hourly	1988	$45/hr.	Add'l.	

53rd Cheboygan	Schedule	1995	Plea: $500 Trial: $650 Oral Arg: $120 Jail Visit: $70 Prison Visit: $140	26¢/mi.	Extraord. fees & expenses w/written permission of court
54th Tuscola	Schedule	1993	Non-Court: $55/hr. In-Court: $75/hr.	Add'l.	
55th Clare Gladwin	Hourly Schedule	1995	Trial: $30/hr. Plea: $350	Inclu.	All Cases: Oral Arg: $100 max. Jail Visit: $60 max. Prison Visit: $120 max.
56th Eaton	Schedule	1978	$450/case	Add'l.	Extraord. fees by motion
57th Emmet	Hourly	1995	$40/hr.	Inclu.	
Recorder's Court	Schedule	1984	Plea: Transcript — $100; Claim, Brief, All Proceedings: $350; Prison visit: Wayne County Facilities — $75, Camp Pellston & all UP Facilities — $400, All others — $200; Appeal to higher court, each ½ day in trial court: $75; Appearance at Habeas Corpus: $50. Trial: Transcript — $200/every 400 pgs.; Claim Brief, All Proceedings: $500; Prison visit: Wayne County Facilities — $75, Camp Pellston & all UP Facilities — $400, all others — $200; Non-frivolous Motion for New Trial with memorandum of Law by trial Counsel: $125; Appeal to higher court, each ½ day in trial court: $75; Appearance at Habeas Corpus: $50.		

1/27/95

APPENDIX B

APPENDIX B

Approved SCAO

Original - Court records
1st copy - MAACS (yellow)
2nd copy - Attorney (pink)

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	MAACS STATEMENT OF SERVICE AND ORDER FOR PAYMENT OF COURT APPOINTED COUNSEL (Page 1)	CASE NO.

Court address | Court telephone no.

INSTRUCTIONS

This form is designed to serve as both the voucher for fees in appellate assigned cases and the case summary attorneys are required to submit to the Michigan Appellate Assigned Counsel System under section 4(6)(c)(ii) of the regulations governing that system. The form should be completed as follows:

1. The attorney, upon completing all work within the scope of the order of appointment (whether that order was for representation in the Court of Appeals or the Supreme Court), should fill out all applicable lines of section I. Apart from basic background information, section I primarily seeks information about the case not readily available from such other sources as appellate court docket entries.

2. The attorney should fill out the fee and expense information in section II completely, then sign and date the declaration. The attorney should leave sections III and IV blank.

3. The attorney should then provide the entire form, with all copies intact, to the trial judge who signed the order of appointment. Counsel may wish to photocopy the form before filing it in case the original is lost.

4. The assigning judge should review the case summary, indicate in section III the fees and expenses actually being approved, and sign and date the form.

5. The court should keep the white copy, return the pink copy to the attorney, and forward the yellow copy to:

Michigan Appellate Assigned Counsel System
Hollister Building, Suite 365
106 W. Allegan
Lansing, MI 48913

I. CASE INFORMATION	1. Attorney name		2. Bar no.	3. Telephone no.
4. Address			5. Social Security/Tax ID no.	
6. Case name		7. Lower court no.	8. Court of Appeals no.	9. Supreme Court no.
10. Date appointed	11. County	12. Judge	13. Case type: ☐ Plea ☐ Bench ☐ Jury ☐ Prob. vol.	14. Transcript length (all transcripts) pp.
15. OFFENSE(S) (include MCL cite)			SENTENCES	
16. Client Visit: Date	Location	Client no.	17. Trial court memo/type Date	Result
18. Date of stipulation to dismiss	19. Date of motion to withdraw as counsel		20. Remand/Evidentiary hearing Date	Result
21. Court of Appeals oral argument: ☐ Not held ☐ Held	If held, date and location		22. Disposition Date	Result

CC 466 (1/98) MAACS STATEMENT OF SERVICE AND ORDER FOR PAYMENT OF COURT APPOINTED COUNSEL, Page 1

Approved, SCAO

Original - Court records
1st copy - MAACS (yellow)
2nd copy - Attorney (pink)

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	MAACS STATEMENT OF SERVICE AND ORDER FOR PAYMENT OF COURT APPOINTED COUNSEL (Page 2)	CASE NO.

Court address | Court telephone no.

II. FEE INFORMATION

SERVICES RENDERED Itemize on additional sheet if needed

	HOURS
1. Record review (transcript, court file, PSR/SIR)	
2. Client visit (including travel)	
3. Other client contact	
Trial court motions (prepare, appear):	
4. _____ new trial	
5. _____ withdraw plea	
6. _____ resentencing	
7. Evidentiary hearing (prepare, appear)	
8. Resentencing (prepare, appear)	
9. COA leave application	
10. COA motion to remand	
11. COA brief on appeal (research, write)	
12. COA oral argument (prepare, appear, travel)	
13. COA motion for rehearing	
14. Reply to prosecutor's S Ct appl.	
15. S Ct leave application	
16. S Ct brief on leave granted	
17. S Ct oral argument	
18. Administrative* _____	
_____	
19. Other _____	
_____	
20. TOTAL HOURS:	

*e.g. correspondence, filing claim, procuring records and transcripts, housekeeping motions, transmitting records to client or substituted counsel.

ACTUAL EXPENSES

21. Client visit ____ miles x ____ cents	$
22. Oral argument ____ miles x ____ cents	$
23. Photocopying ____ pages x ____ cents/page	$
24. Postage	$
25. Phone calls	$
26. Other (itemize)	$
27. TOTAL EXPENSES:	$

REQUEST FOR PAYMENT

28. Fee requested	$
29. Expenses requested	$
30. TOTAL AMOUNT REQUESTED	$

BASIS OF REQUEST

31. ☐ Fee schedule
32. ☐ Hourly
    33. Rate/hour ..... $
    34. Maximum allowed (if applicable) $
35. ☐ Motion for extraordinary fees (attach copy)

I declare that I was appointed by the court to serve as appellate counsel for the named defendant, and that above is a true statement of uncompensated services rendered and expenses incurred by me in the conduct of that appeal to the best of my information, knowledge, and belief.

Date

Attorney signature

III. ORDER FOR PAYMENT

I certify that the above attorney was appointed to represent the named defendant, and the service was rendered.

IT IS ORDERED the City/County of _____ pay the above attorney $_____ in fees and $_____ in expenses, for a total of $_____ in compensation for all time and expense in connection with this case.

Date | Judge | Bar no.

IV. COURT USE ONLY

APPENDIX C

APPENDIX C

SURVEY

1. To your knowledge, do attorneys usually provide accurate reports of their hours and activities on the MAACS form?

   ____yes ____no

2. If you know that attorneys are not always providing accurate reports, is it because:

   ____ hours are inflated to gain greater compensation

   ____ hours are underreported to avoid having judges view earned compensation as excessive

   ____ busy attorneys give inaccurate estimates because they are not careful about recording and reporting time and activities

   ____ Other. Please explain _____

3. If you know that attorneys do not always provide accurate reports to MAACS, how frequently does this occur?

   ____ most attorneys frequently misreport

   ____ many attorneys frequently misreport

   ____ a handful of individuals frequently misreport

   ____ most attorneys occasionally misreport

   ____ many attorneys occasionally misreport

   ____ a handful of individuals occasionally misreport

4. Please feel free to supply any additional comments concerning the accuracy of attorneys' reports on MAACS forms.

Saginaw Valley State University.

(517) 790-4000 • From Midland: (517) 695-5325
7400 Bay Road • University Center, MI 48710

May 15, 1996

Dear Colleague:

As a former practitioner who also did court-appointed criminal appellate work for a number of years, I am requesting a few minutes--honestly--of your valuable time.

I am currently completing a major research project--my dissertation--involving over 1,400 appellate cases state-wide, analyzing broad categories of time expenditures reported on the MAACS billing form (attached) which we are all familiar with. My study does not analyze individuals and anonymity is required and insured. The research deals strictly with averages of large populations under varying compensation systems (i.e., circuits).

My research assumes the integrity of attorneys' responses as an accurate reflection of their time because these are itemized, attested to, and significantly corroborated in part I (e.g., date/location of prison visit, length of transcripts, etc.). I randomly selected a limited number of appellate counsel, including yourself, seeking brief comment on your perception of the veracity of those responses. Again, your consent to participate is totally voluntary and responses are anonymous. Do not sign the survey.

Therefore, would you kindly respond to the attached questions and return to me in the stamped enclosed envelope. I sincerely appreciate your assistance.

Respectfully,

Richard E. Prieha, J.D.
Associate Professor
Criminal Justice Department

REP/ljw

Attachments

LIST OF REFERENCES

LIST OF REFERENCES

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