

NATIONAL REVIEW

To Reform Indigent Defense, Bring the Market In

Letting indigent defendants choose their lawyers should be adopted more widely.

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America's criminal courts are in terrible shape. New York, Indiana, Louisiana, Idaho, Missouri, and many other states are mired in litigation over their festering crises in indigent legal defense. Public defenders want to do a good job for their clients but are often stretched so thin by enormous caseloads that they feel as though they are being forced to commit malpractice, like a doctor with way too many patients.

One bright spot is Comal County, Texas, near San Antonio. For the past two years, officials have been testing a pilot program known as Client Choice, which takes the unprecedented step of letting indigent defendants choose their own lawyer, instead of having one assigned to them.

The idea is to bring market competition to indigent-defense services. Let attorneys compete for the business of indigent clients, and they will try to enhance their reputations by providing quality representation. A market for defense services already exists for wealthy and middle-class families, but the market hasn't been able to function in the indigent area because clients have had no say in the selection of their attorneys.

In 1963 the Supreme Court held that poor persons have a right to counsel, but the Court left the funding and selection procedure to local government officials. Over the past 50 years, the courts have typically assigned either public defenders or private attorneys to handle their cases. These bureaucratic models have been struggling all over the United States.

State lawmakers troubled by the indigent-defense crisis should stop looking for Band-Aid solutions and instead study the Comal pilot program. A new report from the Justice Management Institute, titled The Power of Choice, found that when market competition was introduced, the quality of legal representation improved.

Before 2015, Comal County operated an "assigned counsel" system. There was a roster of attorneys who wanted to be assigned to criminal cases involving indigent clients, and unless the case required some special skills, such as fluency in Spanish, the court would use a rotation method to appoint them. The lawyers were compensated on a per-case basis pursuant to fee

schedules established by the court. The fees, which fell below what the market would demand, varied depending upon whether the case involved a misdemeanor or a felony.

Under the Client Choice pilot program, indigent defendants can either select their lawyer from the roster of attorneys or let the court choose for them. Those who wanted to select their lawyer would be given a packet of biographical information and a form to indicate their top three choices. Lawyers on the roster retained the option to decline clients if their own caseloads became too heavy. Under the Client Choice pilot program, indigent defendants can either select their lawyer from the roster of attorneys or let the court choose for them.

JMI evaluated Client Choice and made several notable findings. First, 72 percent of defendants elected to make their own choice of lawyers. Second, the indigent clients received better service. According to the judges who were surveyed, many observed that “defense lawyers were more assertive, better prepared, and more frequently saw their clients.” Another judge noted that there were fewer demands from defendants to fire their attorney.

Beyond the observations of judges, the JMI report found better case outcomes for indigent clients who chose their own attorneys. Instead of surrendering and always urging their clients to take a plea deal, the attorneys who were freely chosen were more willing to go to trial. Better defense work means fewer mistakes, and fewer wrongful conviction lawsuits that will be borne by taxpayers.

Voluntary, freely chosen relationships are generally more cordial. That’s important in the tense circumstances of a criminal case. The JMI report found that indigent clients in the choice model had greater feelings that their “lawyers advocated zealously for them.” The lawyers, in turn, felt a greater responsibility after having been chosen by the client.

One of the benefits of our decentralized criminal-justice system is that different jurisdictions can try different policies and the results can be studied so that best practices can be identified. Policymakers say they want evidence-based research, and Client Choice is an innovative policy that has now been tested and evaluated. The bottom line is that it is successful.

Over the long term, lawmakers need to undo much of the overcriminalization of conduct that has swamped the courts and indigent defenders. In the meantime, the Comal County pilot program ought to be scaled up statewide in Texas and other states.

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