

**Review of the Operations of State Counsel for Offenders  
Report by the State Bar of Texas  
Legal Services to the Poor in Criminal Matters Committee<sup>1</sup>**

**Approved for Publication December 8, 2017**

***Disclaimer: The following report and the underlying research were completed by members of the State Bar of Texas Legal Services to the Poor in Criminal Matters Committee. The report should not be construed as representing the position of the State Bar of Texas Board of Directors, the Executive Committee, or the General Membership of the State Bar.***

## **Introduction**

State Counsel for Offenders (SCFO) provides “indigent offenders who are incarcerated in the Texas Department of Criminal Justice (TDCJ) with legal counsel or representation that is independent of the TDCJ-Correctional Institutions Division.”<sup>2</sup> SCFO is organized into four sections: Criminal Defense; Civil Defense; Appellate; and Legal Services.<sup>3</sup> SCFO is a division of TDCJ, the agency “which provides confinement, supervision, rehabilitation, and reintegration of the state’s convicted felons.”<sup>4</sup> SCFO is one of the TDCJ divisions that reports directly to the Texas Board of Criminal Justice (TBCJ), which is “responsible for hiring the executive director of the department [TDCJ] and setting rules and policies which guide the agency.”<sup>5</sup>

Attorneys in the Criminal Defense section represent indigent inmates indicted for allegedly committing felonies while incarcerated in a TDCJ facility.<sup>6</sup> Attorneys in the Civil Defense section “represent indigent offenders who are subject to court proceedings under the Sexually Violent Predator (SVP) civil commitment statute.”<sup>7</sup> The Legal Services section assists inmates in a variety of legal matters, including immigration removal proceedings; biennial reviews and petitions for release for clients under a civil

---

<sup>1</sup> The principal author of this report is Scott Ehlers. Melissa Barlow Fischer conducted the legal research on the provision of inmate legal services in other states. Other members of the 2015-2016 and 2016-2017 committee reviewed the report, provided edits, and approved the final report.

<sup>2</sup> *State Counsel for Offenders-What We Do*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.state.tx.us/divisions/scfo/sco\\_what\\_we\\_do.html](https://www.tdcj.state.tx.us/divisions/scfo/sco_what_we_do.html) (last visited July 27, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Texas Board of Criminal Justice*, TEX. DEP’T OF CRIMINAL JUSTICE, <https://www.tdcj.texas.gov/tbcj/index.html> (last visited July 27, 2016).

<sup>5</sup> *Id.*

<sup>6</sup> *State Counsel for Offenders-Criminal Defense Section*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/divisions/scfo/sco\\_criminal\\_defense\\_section.html](https://www.tdcj.texas.gov/divisions/scfo/sco_criminal_defense_section.html) (last visited July 27, 2016).

<sup>7</sup> *State Counsel for Offenders-Civil Defense Section*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/divisions/scfo/sco\\_civil\\_defense\\_section.html](https://www.tdcj.texas.gov/divisions/scfo/sco_civil_defense_section.html) (last visited July 27, 2016).

commitment order; prisoner exchange programs with foreign governments; assistance to inmates in filing Petitions for Discretionary Review (PDRs); nunc pro tunc motions to correct errors in a judgment; and other legal matters.<sup>8</sup> Finally, the Appellate Section represents inmates in civil commitment appeals; criminal appeals where an attorney in the Criminal Defense section represented the inmate; and occasionally writs of habeas corpus. The Appellate Section also has “Time Specialist” legal assistants who assist inmates with time credit issues; parole and mandatory supervision eligibility questions; and applications for shock probation or a time-cut.<sup>9</sup> SCFO “will not help offenders with civil rights issues, TDCJ policy or procedure issues, fee-generating cases, and various other legal issues depending upon the circumstances.”<sup>10</sup>

Besides the Office of Capital and Forensic Writs,<sup>11</sup> SCFO is the only other statewide public defender office in the State of Texas.<sup>12</sup>

### **Origins and Purpose of This Report**

At the December 6, 2014, Board of Directors meeting of the Texas Criminal Defense Lawyers Association (TCDLA), the organization passed a resolution calling for “TCDLA to Support an Independent State Counsel for Offenders Established Pursuant to ABA” (see Appendix B).<sup>13</sup> Scott Ehlers, a member of the State Bar’s Legal Services to the Poor in Criminal Matters Committee (LSPCM), is also a member of TCDLA’s Corrections Committee. Other members of the Corrections Committee informed Mr. Ehlers of their ongoing concern about the lack of independence of SCFO and requested that the LSPCM examine the issue as well. Mr. Ehlers brought the issue to the LSPCM at its September 25, 2015 meeting, and the committee determined that it was within the committee’s purview and warranted further examination.

The purpose of this report is to determine if there are problems in the structure and operations of SCFO and the provision of indigent defense services to inmates in Texas, and if so, make recommendations on how these problems can be addressed by the State Bar of Texas and/or the Texas Legislature.

---

<sup>8</sup> *State Counsel for Offenders-Legal Services Section*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/divisions/scfo/sco\\_legal\\_services\\_section.html](https://www.tdcj.texas.gov/divisions/scfo/sco_legal_services_section.html) (last visited July 27, 2016).

<sup>9</sup> *State Counsel for Offenders-Appellate Section*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/divisions/scfo/sco\\_appellate.html](https://www.tdcj.texas.gov/divisions/scfo/sco_appellate.html) (last visited July 27, 2016).

<sup>10</sup> TEX. DEP’T OF CRIMINAL JUSTICE, *supra* note 2.

<sup>11</sup> See OFFICE OF CAPITAL WRITS, <http://www.ocw.texas.gov> (last visited July 27, 2016).

<sup>12</sup> The Regional Public Defender for Capital Cases (RPDO) is another statewide public defender office in Texas, but it is largely funded by counties who have contracted with that office to provide capital defense. For more information on the RPDO, see: <http://rpdo.org> (last visited July 27, 2016).

<sup>13</sup> TEX. CRIMINAL DEF. LAWYERS ASSOC., *TCDLA Board of Directors Meeting Minutes*, (Dec. 6, 2014), [http://www.tcdla.com/Images/TCDLA/Minutes/TCDLA%20Board%20of%20Directors%20Minutes\\_120614\\_%20final.pdf](http://www.tcdla.com/Images/TCDLA/Minutes/TCDLA%20Board%20of%20Directors%20Minutes_120614_%20final.pdf), at 4-8.

## Methodology

The LSPCM determined that the most objective means of examining SCFO's operations was to base its assessment on the American Bar Association's (ABA) *Ten Principles of a Public Defense Delivery System* (see Appendix A).<sup>14</sup> The Ten Principles:

were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.<sup>15</sup>

The Principles combine indigent defense guidelines developed by various organizations including the ABA, the National Legal Aid and Defender Association (NLADA), the National Advisory Commission on Criminal Justice Standards and Goals (NAC), and the National Study Commission on Defense Services (NSC).<sup>16</sup> The ABA's more extensive policy statement on indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992). SCFO's *Policies and Procedures Manual* recognizes the authority of the ABA Standards for Criminal Justice when it notes that "SCFO attorneys shall look to the ABA Standards for Criminal Justice when issues regarding the acceptable range of performance are in question."<sup>17</sup>

This report is largely based on an online survey of current and former employees of SCFO and criminal defense attorneys familiar with SCFO's work, that was available from March 7-18, 2016. The survey questions were based on the ABA's *Ten Principles of a Public Defense Delivery System*. Survey respondents were given standardized responses from which to choose, as well as an opportunity to provide open-ended feedback after each question. Survey participants were given the choice of whether their answers would be anonymous (to protect persons who feared potential retribution) or to have their answers attributed to the respondent. Additional questions were asked of SCFO

---

<sup>14</sup> STANDING COMMITTEE ON LEGAL AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, *Ten Principles of a Public Defense Delivery System* (Feb. 2002), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [hereinafter ABA, *Ten Principles*].

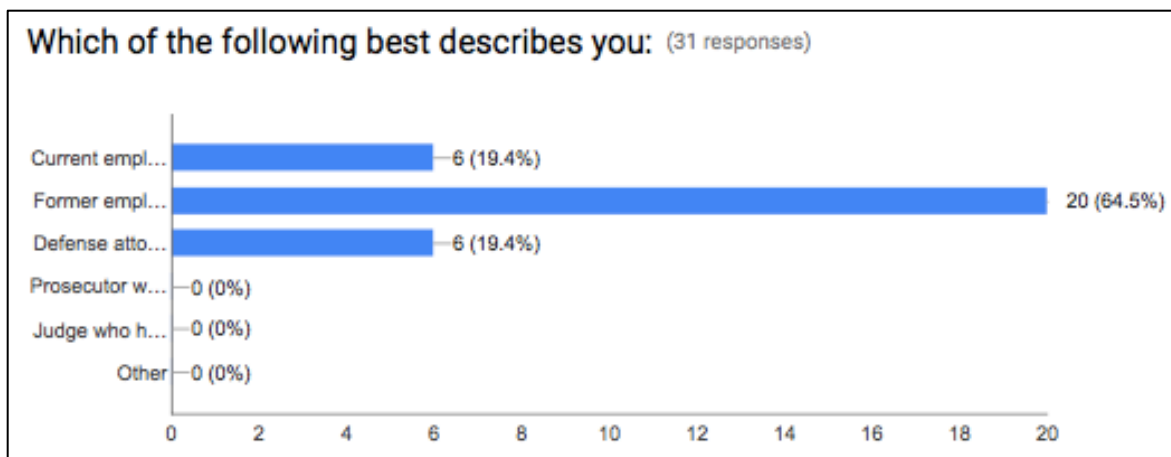
<sup>15</sup> *Id.*, at Introduction.

<sup>16</sup> *Id.*, at Notes, at 4-5.

<sup>17</sup> STATE COUNSEL FOR OFFENDERS, *Employee Manual, Policies and Procedures Manual*, Ch. 1-Section 6 (Jan. 2016).

through an information request that was submitted through Senator Rodney Ellis's office. The LSPCM also conducted research on how other states provide legal services to inmates to determine how Texas compares to those other states.

At the LSPCM's July 29, 2016, meeting, some members expressed concern that no prosecutors had responded to the survey. LSPCM members expressed a desire for the report to include the perspective of some prosecutors from the Special Prosecution Unit (SPU), who work with SCFO attorneys on a regular basis. As a result, two former and two current SPU attorneys were interviewed over the phone to get their perspective on some key aspects of SCFO operations.



**FIGURE 1**

### Characteristics of Survey Participants

Overall, 31 people responded to the survey. Of those, 13 (42%) respondents said that the committee could attribute their comments to them by name, and 18 (58%) said that they would prefer that their comments not be attributed to them individually.

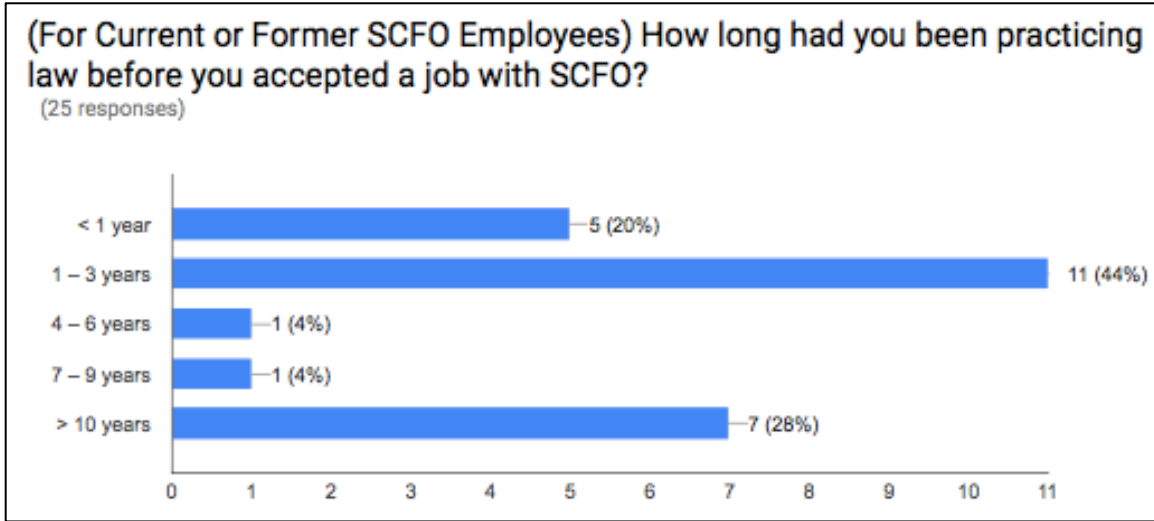
Most respondents described themselves as being former employees (64.5%), with 19.4% (6) being current employees and the same amount being defense attorneys who are familiar with the work of SCFO:

As a point of comparison, as of January 31, 2016, SCFO reported employing 23 attorneys, including the Director.<sup>18</sup> So this survey represents 26 percent of the attorney employees of SCFO.

Current and former SCFO employees were asked specific questions pertaining to their experience before joining SCFO, what their initial position was, and how much experience they had in the various sections.

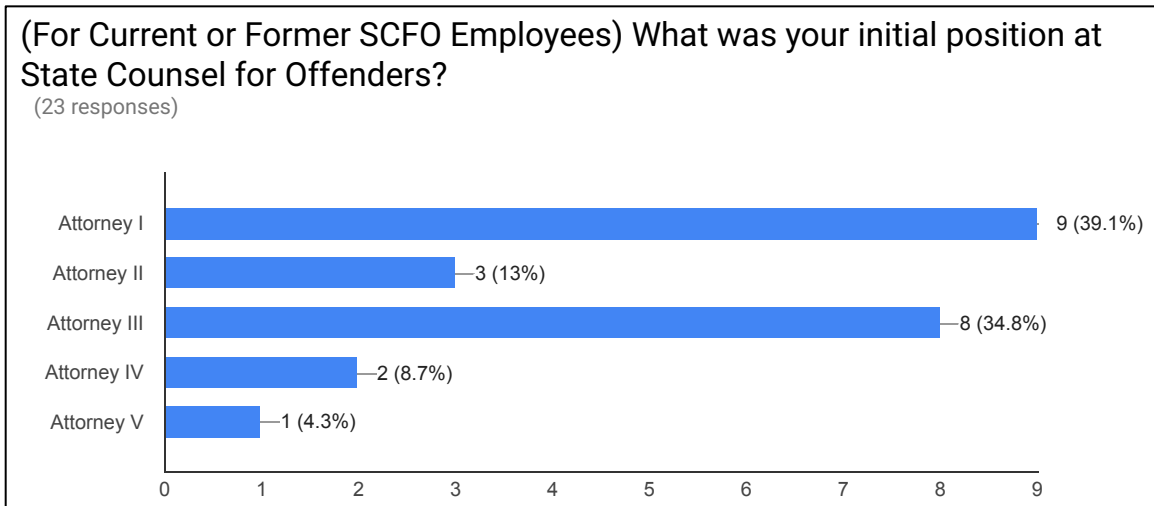
<sup>18</sup> *Information Request on State Counsel for Offenders (SCFO)*, provided to the Office of Sen. Rodney Ellis by email (March 7, 2016), at 1 [hereinafter *Information Request on SCFO*].

Most respondents had one to three years of experience before joining SCFO. A significant number had over ten years of experience before joining the office.



**FIGURE 2**

Most former or current employees initially started at the Attorney I or Attorney III position. Most respondents are currently or were an Attorney III when they left.



**FIGURE 3**

(For Current or Former SCFO Employees) What is your current or last position at SCFO?  
(25 responses)

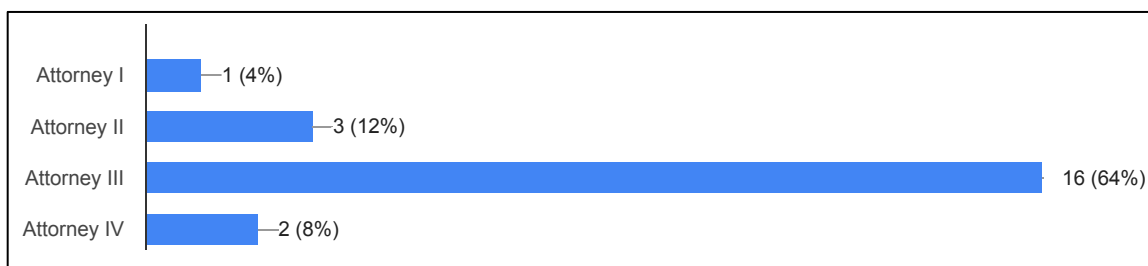


FIGURE 4

### **How SCFO and Texas’s Inmate Indigent Defense System Measure Up to the ABA’s Ten Principles**

In the following sections we examine the extent to which SCFO and Texas’s indigent defense system for inmates complies with the ABA’s *Ten Principles of a Public Defense Delivery System*. We provided excerpts of the “Commentary” for each of the principles to explain the principles further. It should be noted that we could not include in the survey questions a full exploration of all of the issues covered in the “Commentary” in order to keep the survey at a manageable length. All concepts contained in the “Commentary” may not be directly applicable to the provision of indigent defense services to inmates in various counties.

#### **Principle 1: The public defense function, including the selection, funding, and payment of defense counsel<sup>19</sup> is independent.**

As the “Commentary,” to Principle 1 explains,

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>20</sup>

Art. 26.051 of the Code of Criminal Procedure governs the appointment of counsel for an indigent inmate accused of committing a crime while in custody of the correctional

<sup>19</sup> The ABA *Ten Principles* defines “counsel” as including “a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments.” See n.1 at 4 of the ABA’s TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM.

<sup>20</sup> ABA, *Ten Principles*, *supra* note 14, at 2.

institutions division of TDCJ, though SCFO is never mentioned by name. A court shall notify the Texas Board of Criminal Justice if it determines that a defendant before the court is indigent and is an inmate and request that the board provide legal representation.<sup>21</sup> Statute requires the board to provide such representation, and it “may employ attorneys, support staff, and any other personnel required to provide legal representation for those inmates. All personnel ... are directly responsible to the board in the performance of their duties. The board shall pay all fees and costs associated with providing legal representation for those inmates.”<sup>22</sup> A court may appoint an attorney other than an SCFO attorney if it determines there is a conflict of interest.<sup>23</sup> When a court appoints an attorney other than from the SCFO, provisions of the Texas Fair Defense Act regarding appointment of counsel apply to that appointment, and the county in which the correctional facility exists shall pay the expenses of conflict counsel, to be reimbursed by the State.<sup>24</sup>

As previously noted, SCFO is a division of TDCJ, the same agency that incarcerates SCFO’s clients. It is true that SCFO is not directly supervised by the Executive Director of TDCJ, but rather, as previously noted, the division reports directly to the Texas Board of Criminal Justice, which oversees all TDCJ operations. Nonetheless, SCFO does not have independent budget authority, and falls under TDCJ’s budget, although one would not know it by looking at TDCJ’s budget in the General Appropriations Act for the 2016-2017 Biennium. SCFO is never mentioned, nor is the provision of legal services to inmates.<sup>25</sup> SCFO is mentioned in TDCJ’s FY 2016 annual budget, listed under Goal C, “Incarcerate Felons,” Strategy C.1.4, “Offender Services.”<sup>26</sup>

The lack of independence for the public defender in charge of defending Texas inmates stands in stark contrast to the agency in charge of prosecuting inmates accused of committing crimes in prison, the Special Prosecution Unit (SPU). According to the statute establishing the SPU, “[t]he special prosecution unit is an independent unit that cooperates with and supports prosecuting attorneys in prosecuting offenses and delinquent conduct described by Article 104.003(a), Code of Criminal Procedure.”<sup>27</sup> Art. 104.003(a), Code of Criminal Procedure, refers to crimes committed on TDCJ or Texas Juvenile Justice Department (TJJD) property. The SPU is governed by a board of directors composed of each prosecuting attorney from a county in which a correctional facility or TJJD facility is located who has entered into a memorandum of understanding with SPU

---

<sup>21</sup> TEX. CODE CRIM. PROC. ANN. art. 26.051(d) (West 2015).

<sup>22</sup> TEX. CODE CRIM. PROC. ANN. art. 26.051(e) (West 2015).

<sup>23</sup> TEX. CODE CRIM. PROC. ANN. art. 26.051(g) (West 2015).

<sup>24</sup> TEX. CODE CRIM. PROC. ANN. art. 26.051(h)-(i) (West 2015).

<sup>25</sup> Gen. Appropriations Act, 2016-2017 Biennium, H.B. 1, 84th Sess. V-4 to V-21 (Tex. 2015), [http://www.lbb.state.tx.us/Documents/GAA/General\\_Appropriations\\_Act\\_2016-2017.pdf](http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2016-2017.pdf) [hereinafter Gen. Appropriations Act].

<sup>26</sup> Tex. Dep’t of Criminal Justice, *Agency Operating Budget 2016 as prepared for the Texas Board of Criminal Justice* (Aug. 7, 2015), [http://tdcj.state.tx.us/documents/finance/Agency\\_Operating\\_Budget\\_FY2016.pdf](http://tdcj.state.tx.us/documents/finance/Agency_Operating_Budget_FY2016.pdf).

<sup>27</sup> TEX. GOV’T CODE § 41.302 (West 2015).

to prosecute crimes committed in those facilities.<sup>28</sup> The executive board employs a prosecutor to serve as the chief of the unit, and other persons are employed at the SPU as well.<sup>29</sup> The SPU is mentioned 20 times in the latest General Appropriations Act, and has a specific line item under the Comptroller’s Judiciary Section budget.<sup>30</sup>

Our survey asked three questions regarding SCFO’s independence from the influence of TDCJ management, control over its budget and operations, and the independence of defense lawyers who work at SCFO to zealously represent their clients. The first question was as follows:

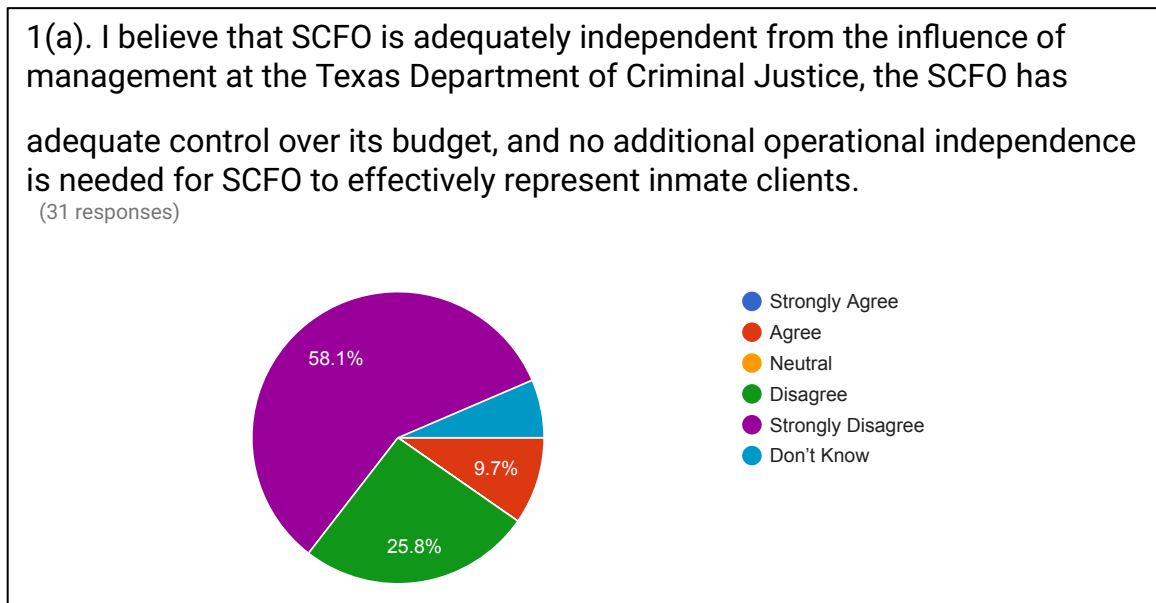


FIGURE 5

Nearly 84 percent of respondents either strongly disagreed or disagreed with the statement that SCFO was adequately independent from TDCJ management, had adequate control over its budget, and did not need additional operational independence to effectively represent inmate clients. No respondent strongly agreed.

Some of the negative comments provided by survey respondents were as follows. Comments in all of the following sections were edited for length and to correct typographical errors.

- You cannot be independent from the Agency that controls the purse strings. Their goal seems to be providing an illusion of representation rather than actively advocating for a position contrary to the Agency's interests.

<sup>28</sup> TEX. GOV'T CODE § 41.303(a) (West 2015).

<sup>29</sup> TEX. GOV'T CODE § 41.308 (West 2015).

<sup>30</sup> Gen. Appropriations Act, *supra* note 24, at IV-35 to IV-37.



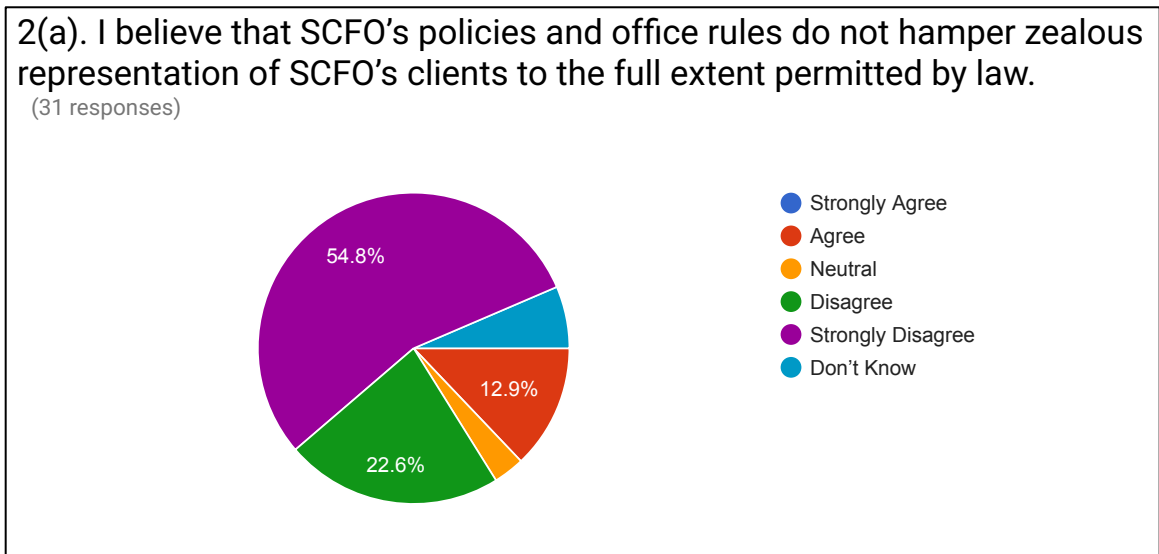
- I was directed to withdraw from representing a client after the SCFO Director returned from a TDCJ Board meeting in the summer of 2013. A number of other attorneys were also directed to change legal strategies in particular cases when the SCFO Director returned from the TDCJ Board meeting.
- SCFO leadership bends to the will of TDCJ and doesn't want to rock the boat. For instance, TDCJ supplied subpoenaed documents with redactions to SCFO attorneys, while real world attorneys had no such redactions. ... SCFO attorneys may not subpoena high ranking individuals or even parole division employees without receiving approval from the SCFO Director. ...TDCJ has objected to SCFO making videos inside the units for their cases, so SCFO attorneys must take still photos only. Other real world attorneys do not have this limitation. Although in theory, the SCFO attorneys could file a motion for court order to video, all such requests must be first justified and approved by the SCFO Director. To my knowledge, none have been permitted as justified since this policy was imposed. Attorneys at SCFO have also been prohibited from filing some motions to assist their mentally ill clients, since TDCJ does not have a program to treat and restore mentally ill inmates who are pending new charges. SCFO attorneys are not allowed to challenge TDCJ's failure to treat or restore and seek dismissal of the charges for their clients. The civil commitment section was also limited by complaints from TDCJ brass to the SCFO Director about the vigorous representation of civil commitment clients.
- TDCJ controls every part of SCFO's operations through the inadequate budget.
- Any out of the ordinary filings must be approved by the SCFO chief, who usually takes the request to the TDCJ Board. This was the major issue I had, because if SCFO was independent from TDCJ that would not have to happen. I understand the chief needing to review for the sake of SCFO, but the Board determining what legal actions SCFO lawyers can take is very inappropriate.
- We had severe restrictions on travel (which is absolutely necessary to see client's scattered around the State), we had faulty and bad equipment that was emblazoned with TDCJ logos (like laptops to attempt to use in court), and our director (both Kim Vernon and Rudolph Brothers) would share managerial tips and direction from other directors at TDCJ.
- It is an ongoing problem that top management gives orders that conflict with the interest of clients we serve to support the actual or perceived desires of the Board of Criminal Justice. This included an ongoing order not to subpoena TDCJ witnesses in criminal cases, orders not to seek correction of prison refusals to provide privileged communication with clients, and an order from the director

not to file any motion for mentally ill clients who were not receiving restoration services ordered by the courts. These are only a few examples.

There were two respondents who did not have negative comments in response to this question:

- In my time there, I never personally felt hindered by the TDCJ affiliation, but I had colleagues who did.
- I worked there for about 9 years, from 1997 to 2006. I mostly worked appellate, habeas, and time credit. I never had any trouble with funding or oversight. I think having the close relationship helped me because I had access to prison records as an employee that outside lawyers didn't. I never felt that TDCJ ever influenced any decisions I made for my clients or for the inmates to whom I sent general letters or information.

The second question pertaining to independence examined whether SCFO policies and rules hampered the zealous representation of SCFO clients.



**FIGURE 6**

More than three-out-of-four (77.4%) respondents either strongly disagreed (54.8%) or disagreed (22.6%) with the statement that “SCFO’s policies and office rules do not hamper zealous representation of SCFO’s clients to the full extent permitted by law.” No respondent strongly agreed.

Some of the representative comments provided by survey respondents were as follows:

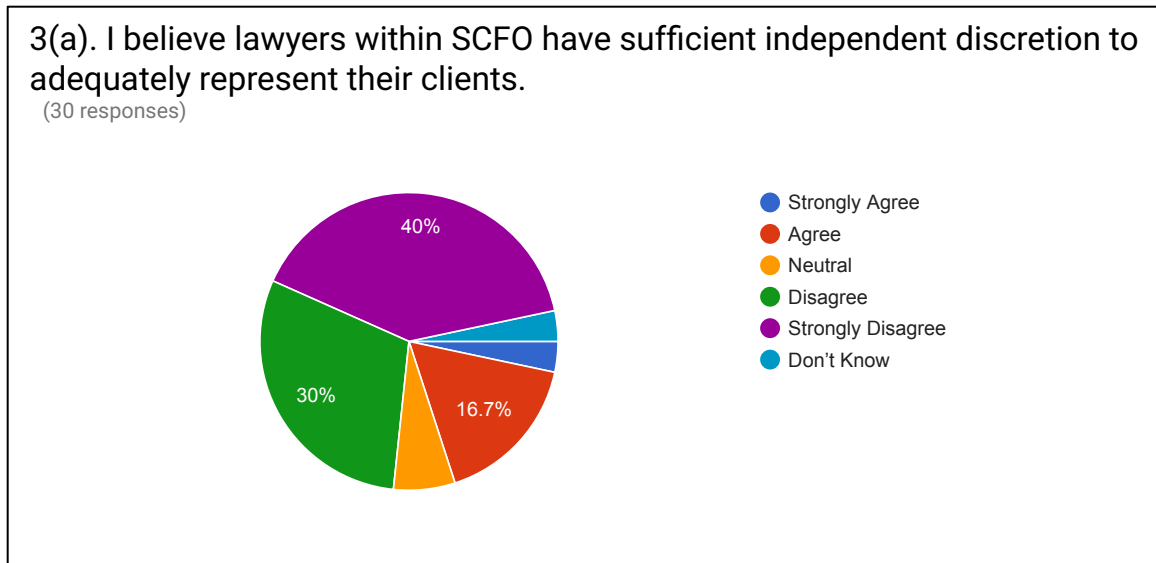
- I once had a client that wanted to refuse parole in order to complete sex offender treatment and try to avoid civil commitment. I called the parole division just to try and find out the status of his parole review. General Counsel for the Parole Board contacted the SCFO director who told me not to ever contact the Parole Board or Parole Division again.
- Many of SCFO's policies and office rules are unwritten. Sometimes, instructions about what can't be done are put into emails. After I was transferred from civil commitment section to the trial section, I was told I could have no contact with any of the civil commitment clients, and I was told I should not even take phone calls or risk discipline. Despite the fact that I still had hundreds of appeals pending for a time after my transfer. ... Attorneys are not encouraged to take lots of cases to trial because of the associated costs. Doing so is viewed as a failure, not a success even when the outcome is better at trial than a settlement could have achieved.
- I frequently found that SCFO policies and rules either directly hampered basic representation (not to mention zealous representation) or discouraged zealous representation by attempting to dis-incentivize zealous representation. This included: limiting working hours (even directly preceding trials), failing to provide functioning access to legal research, prohibiting accessing office legal research from outside the office, ongoing failure to provide basic legal material necessary for trials (such as pattern jury charge books), and refusing to let investigators access social media or run records searches for missing witnesses. Again, this only notes a few of the many problems.
- State Counsel has an internal policy that keeps State Counsel attorneys from requesting authorized petitions for releases from the Texas Civil Commitment Office. Supposedly, management will make the contact, but that has never happened.

Once again, there were two respondents to the survey who did not generally express problems with SCFO policies hampering representation of staff counsel. Their comments were:

- During my time at State Counsel there was very little interference with the manner in which I pursued the cases in which I was assigned. This is especially true while I was in the appellate section where I encountered no interference whatsoever. However, the time it did occur troubled me as I (along with the rest of the civil commitment section) were told not to pursue a certain type of defense in civil commitment cases.

- I agree with the above [survey] statement except for having to get approval for recusals and mandamus issues.

A third question that was asked pertained to the independent discretion of SCFO lawyers to adequately represent their clients:



**FIGURE 7**

Seventy percent of respondents either strongly disagreed (40%) or disagreed (30%) with the statement that SCFO attorneys “have sufficient independent discretion to adequately represent their clients.” One respondent (3%) strongly agreed with the statement.

A recurring theme among respondents to the survey and some individual interviews with former SCFO employees was that SCFO management inappropriately interfered with their ability to represent their clients. Comments included:

- It depends on what department and administrator were in charge. Traditionally, appellate and trial were left alone. However, civil commitment traditionally took away much of the discretion of the individual lawyers to fight for their clients.
- SCFO management is eager to restrict the independent discretion of the attorneys who try civil commitment cases. Despite the fact that the agency had never won a case, management discouraged every single innovative strategy attempted while I was at SCFO.
- There is no doubt that the Legal Assistants are more valued than the Attorneys. The system in place is designed and highly favorable towards the Legal Assistants, and unfavorable for the Attorneys. For the most part, the Legal

Assistants are trained and expected to generate the same cookie cutter documents. If an Attorney wishes to have "independent discretion" that goes outside the norm, the Legal Assistant will likely notify the supervisor who will return the Attorney back within the parameters. SCFO is not set up for Attorneys to have independent discretion and zealously represent clients, but again, the appearance of representation and not stepping on the toes of the Special Prosecution Unit.

- While some lawyers take the approach of ignoring legally indefensible orders, not all do. Consequently, some of the lawyers do maintain the independence to adequately represent clients. Some whole sections have reached the point where client service seems to be second to the mere appearance of client service. The general legal section is notorious for refusing to answer client legal questions, and merely directing clients to seek the answers on their own from the prison law library. When an attorney writes an in depth legal response, this can bring the attention of management, who, in turn, recommends a form letter instead. An attorney not complying can expect to have their work scrutinized for the purpose of pursuing disciplinary action against the employee if legal fault can be found.
- We must remain concerned about whether upper management and the Board will prevent us from filing motions or taking other actions that would be in the best interests of our client and that would be available to a zealous free-world attorney.

Once again, there were two respondents who generally did not have negative responses:

- Perhaps because I had better relationships with people, I never felt restricted, but I had colleagues who did.
- I always have independent discretion minus mandamus and recusal issues.

**Principle 2: Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

The "Commentary" to Principle 2 states:

The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with

the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.<sup>31</sup>

The statute that provides for indigent inmate defense, Art. 26.051, Code of Criminal Procedure, does not contemplate the need for private appointed counsel due to high caseloads *per se*. The only reference to the appointment of counsel “other than an attorney provided by the board” (Texas Board of Criminal Justice) is in those cases where a conflict of interest exists, including “any conflict of interest ... under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas that precludes representation by an attorney appointed by the board.”<sup>32</sup> Arguably, when an attorney has too many cases, there is a conflict of interest between a prior client and the new client. Such a conflict would fall under Rule 1.06(b)(2): “a lawyer shall not represent a person if the representation of that person ... reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.” A lawyer also has an interest in providing “competent and diligent representation,” as required by Rule 1.01. Nonetheless, it is not completely clear if the caseload required for inmate representation is “sufficiently high” enough that active participation of the private bar is warranted, assuming the SCFO is adequately staffed and resourced.

The current statutory scheme addresses the concern about *ad hoc* appointments and effectively creates a plan for the appointment of counsel for indigent inmates. The state does provide funding for SCFO as well. According to the response to the information request of SCFO, the following was the department’s budget for the last five years:

**SCFO Annual Budget<sup>33</sup>**

FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
\$3,454,067	\$3,356,465	\$3,342,451	\$3,332,792	\$3,348,443

**FIGURE 8**

According to the latest state budget, \$30,000 per year was appropriated for private counsel to represent indigent inmates in conflict cases, which must be paid by the state per Art. 26.051(i), Code of Criminal Procedure.<sup>34</sup> Whether SCFO’s and the conflict counsel budget are adequate for effectively representing indigent Texas inmates is a question that will be addressed later in this report.

We did ask one question in the survey that addressed the issue of whether SCFO has the appropriate policy and ability to request assistance from the private bar and courts when SCFO is “overloaded with too many cases.” Respondents answered as follows:

<sup>31</sup> ABA, *Ten Principles*, *supra* note 14, at 2.

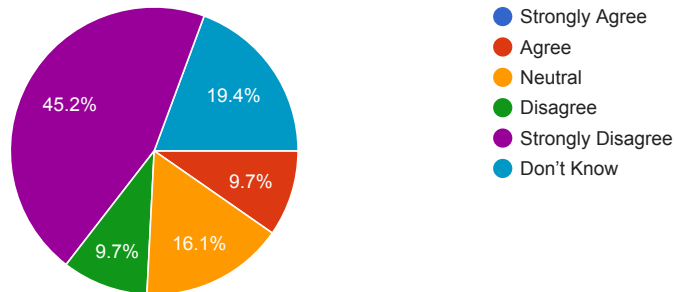
<sup>32</sup> TEX. CODE CRIM. PROC. ANN. art. 26.051(g)(3) (West 2015).

<sup>33</sup> *Information Request on State Counsel for Offenders (SCFO)*, provided to the Office of Sen. Rodney Ellis by email (March 7, 2016), at 1 [hereinafter *Information Request on SCFO*].

<sup>34</sup> Gen. Appropriations Act, *supra* note 24, at IV-35.

4(a). I believe that SCFO has the appropriate policy and ability to request assistance from the private bar and courts when SCFO is overloaded with too many cases.

(31 responses)



**FIGURE 9**

As one can see from the graph, nearly 56 percent of respondents either strongly disagreed (45.2%) or disagreed (9.7%) with the statement that SCFO has an appropriate policy and ability to request assistance from the private bar and courts if they have too many cases. Nobody strongly agreed and approximately 10 percent agreed with the statement.

Representative comments from respondents included:

- At the behest of my supervisor, I filed motions to withdraw on 19 clients because we were understaffed and unable to handle the caseload. We withdrew our motions when the judges contacted the Administration, and they reluctantly agreed to let us borrow some people from other sections and hire two more lawyers for ours. Ultimately, it was a political grenade that reached its target and solved the problem.
- Attorneys have been specifically told they may not discuss cases with those whom the SCFO Director feels have been disloyal to him, or not in agreement with his policies. SCFO attorneys have been told that they may not discuss cases or office policies with outsiders. There is no office-wide policy that requires monitoring of caseloads, nor any attempt to farm out cases due to a number that is too high. There is an incredible turnover of staff at SCFO due to poor working conditions, poor management and low pay. Whenever a staff member leaves, the SCFO Director prefers to allow the position to lapse for a time to save money.

- There was no policy for requesting assistance from private attorneys while I was at SCFO. In fact, when another attorney and I reached out to a private attorney simply to compare strategies, we were strongly discouraged from doing it again.
- When I was employed in the trial section, I regularly had a higher caseload than the ABA standards recommend. There was never a time that the office refused cases because caseloads were too high.
- There is no such policy, no ability, and the last time SCFO tried to move cases over to the private bar due to being overloaded, it was stopped by the Board.
- Attorneys employed by SCFO have been told not to discuss SCFO matters with attorneys outside the agency. It is impossible to have frank and open conversations with SCFO about matters pertaining to clients or work collaboratively on legal strategies in civil commitment.

There were two respondents who did not experience these problems:

- This was not a problem during my tenure with SCFO.
- I never had any issues regarding this topic within SCFO, but the only time I had issues were because of the sitting Judge or the Judge's Coordinator.

**Principle 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

The "Commentary" to Principle 3 states: "Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter."<sup>35</sup>

We asked the following question in the survey to determine if SCFO was adequately addressing this principle:

---

<sup>35</sup> ABA, *Ten Principles*, *supra* note 14, at 2.



6(a). I believe that SCFO's clients or potential clients are appropriately screened for indigency, and SCFO attorneys are assigned and notified as soon as possible after arrest, detention, or request for counsel.

(31 responses)

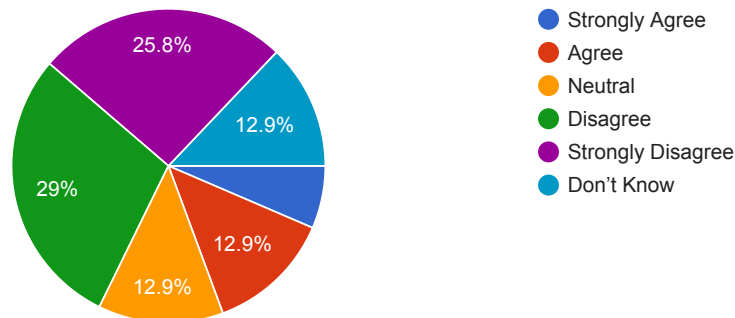


FIGURE 10

Once again, over half of the respondents disagreed with the statement, with nearly 55 percent either strongly disagreeing (25.8%) or disagreeing (29%) that SCFO's clients or potential clients are appropriately screened for indigency, and that SCFO attorneys were assigned and notified as soon as possible after arrest, detention, or request for counsel. Less than one-in-five (19.3%) of respondents agreed or strongly agreed.

Many respondents said that they did not have a problem with the manner in which SCFO clients were screened for indigency, but rather were concerned about the delay in appointment. Some of the representative comments expressed by respondents in this regard included:

- This is a compound question, so as to the first part - yes, I believe indigency is appropriately assessed. As for the second part, no, SCFO attorneys are not appointed in a timely manner. SCFO attorneys are not usually appointed by the Board until after indictment. In my time at SCFO, I had many cases where indictment took YEARS. I also had cases where we weren't appointed until YEARS after indictment when the cases first appeared on a district court docket.
- Appointment is made when the case is indicted, the cases are often months and sometimes years old before SCFO is appointed.
- In my experience, and I believe this procedure continues, SCFO attorneys are not provided until post indictment in criminal cases. In civil commitment cases the attorney is not appointed until after the petition for civil commitment has been filed. I have been involved in these cases as a private attorney and have found that oftentimes much can be done on the client's behalf between the time they

are targeted for prosecution/civil commitment and the time where an indictment or petition for civil commitment is filed. I'm not sure what can be done in this regard, but it merits looking into.

- Indigence is not an issue, but timeliness of access to lawyers is affected by geographic barriers.

Even though most negative responses to this question focused on the timeliness of appointment, some respondents did express concerns about indigency determinations:

- During my tenure at SCFO, I witnessed SCFO violate its own internal indigency screening standards to refuse representation to a client. This situation is made more egregious by the fact these decisions are functionally made by a non-attorney, and are followed even when the section chiefs voice disagreement.
- I don't think that courts are looking into inmate trust accounts. I think they just send all inmate cases to us. That being said, the person screening these accounts for us to double check the courts' work is not a lawyer. She is a TDCJ bureaucrat. That's where I have a problem.

**Principle 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**

The “Commentary” to Principle 4 states:

“Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.”<sup>36</sup>

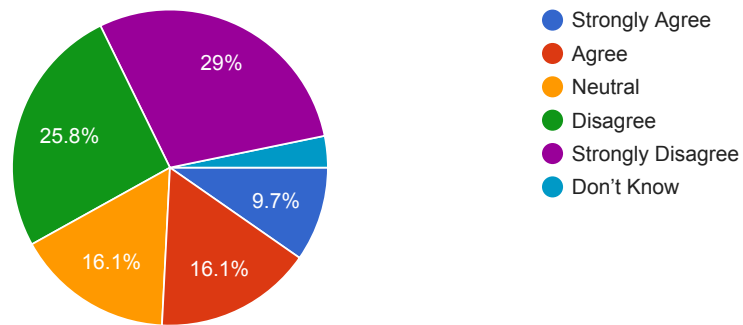
The following question was asked to determine if SCFO attorneys were provided sufficient time and confidential space to meet clients:

---

<sup>36</sup> ABA, *Ten Principles*, *supra* note 14, at 2.

7(a). I believe that SCFO lawyers are provided with sufficient time and a confidential space to meet with their clients.

(31 responses)



**FIGURE 11**

Here there was a slight majority (54.8%) of respondents who believed that SCFO lawyers were not provided with sufficient time and confidential space to meet with clients. Twenty-nine percent of respondents strongly disagreed and 25.8 percent disagreed with the statement that SCFO lawyers were provided with sufficient time and confidential space to meet with their clients.

Comments of interest included:

- Most prison visitation rooms are not adequate for a confidential conversation. Only the units which provided private office space allowed for truly confidential meeting space.
- Unfortunately, this answer depends on which TDCJ unit you are visiting. Some are really good about attorney-client visits (The Walls Unit) and some are not so good (Ferguson Unit). If I did not feel I was afforded sufficient privacy, I could (and would) explain the situation to the executive director who would call the unit and the address the situation. However, this was always a temporary fix as the unit would revert back to its behavior in due time.
- This all depends on the prison unit. Some of the prisons have private booths where you can meet with clients, some prisons dump lawyers in the unenclosed visitation room, and some prisons allow client visits in between the control picket and the warden's office!
- The TDCJ guards routinely stay inside the room with the client and his attorneys during civil commitment trials, including during discussions relating to jury

selection where all can be heard. Despite having brought this to the court's attention and the attention of the SCFO Director, the practice continues. Many units are not set up for private discussions as well. Attorneys and clients can be side by side in an interview room where discussions can be overheard by TDCJ security staff.

- While there is generally sufficient time and space to confidentially meet with clients, there have been problems. Most recently the interim director refused to seek remedy when the Hughes Unit refused to permit confidential phone calls to clients being housed in the segregation area. The interim director's proposed internal remedy (when the warden refused to budge) was to have the attorney travel to the unit to speak with the client in person. That requires a 6 1/2 hour round-trip drive plus the time needed to actually get into the prison and wait for the client to be brought out, etc.
- I was often denied contact visits with my clients as I prepared for trial. Having to talk through phones that do not always work was problematic, and as a private attorney I know that the attorney visitation phones do not always work. More problematic is the lack of training prison officials have in the requirement to have an attorney slot through which to pass documents. I often had to pass documents to correctional officers who would then have to walk the documents (out of sight of client and attorney) to the client. The same procedure existed when the documents had to be passed from client to attorney. Sometimes it was because the attorney visit was in a booth with no legal slot, while other times it was because the slot was welded shut. This is not an issue that only impacts SCFO appointed attorneys.

**Principle 5: Defense counsel's workload is controlled to permit the rendering of quality representation.**

The "Commentary" to Principle 5 states:

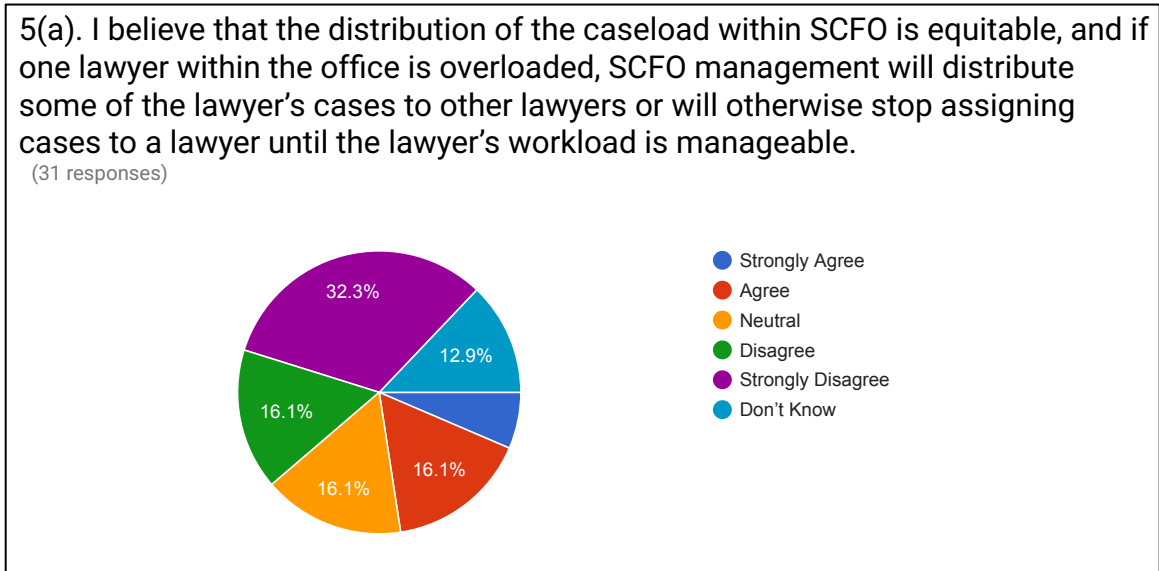
Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e. caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.<sup>37</sup>

---

<sup>37</sup> ABA, *Ten Principles*, *supra* note 14, at 2.

We asked two different questions that addressed caseload limits and controls at SCFO. The first question addressed whether caseload distributions were equitable in the office and if cases would be redistributed or halted if a lawyer’s caseload was too high.

The survey results for that question were as follows:



**FIGURE 12**

Just under 50 percent of respondents strongly disagreed (32.3%) or disagreed (16.1%) with the statement that caseload distributions were equitable at SCFO and that management would redistribute or stop assigning cases to a lawyer until a lawyer’s workload was manageable. Just over 22 percent of respondents agreed (16.1%) or strongly agreed (6.4%). There were a number of respondents who said that management would divide up cases if certain attorneys became overloaded. However, there were also complaints that caseload levels were used as a form of retribution against attorneys that management did not like or that redistribution of cases resulted in less effective representation.

Respondents noted the following regarding equitable caseload distributions and redistributions if cases became excessive:

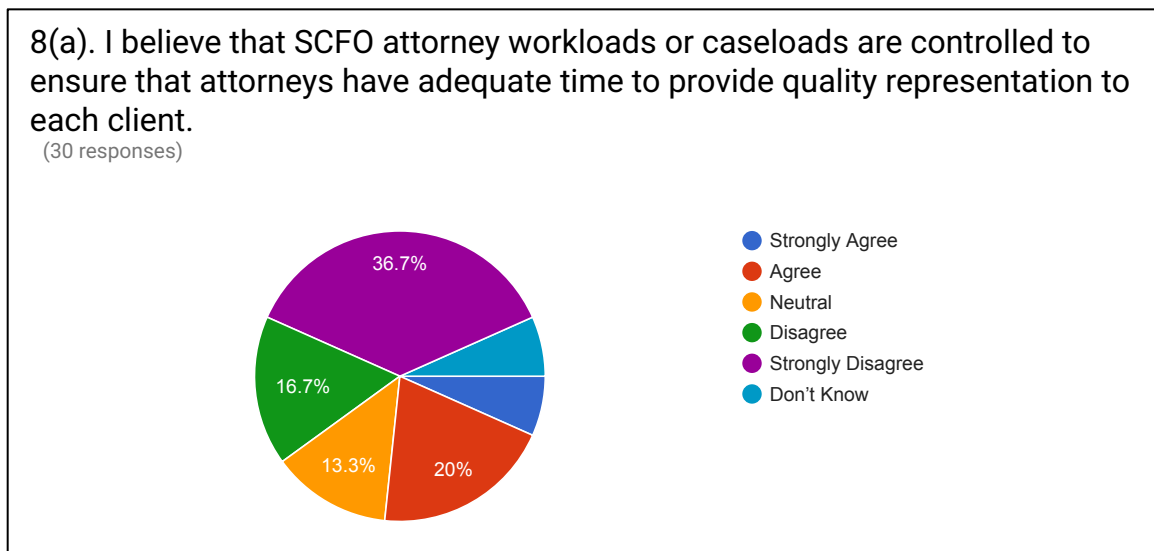
- Our Section divvies up cases by territory, so each lawyer's caseload is dictated by SPU's indictment practices (also worthy of a second look).
- It is not uncommon anymore for lawyers in other sections to aid sections that are short-staffed. For example, I, along with another SCFO attorney from a different section, was assigned a partial criminal defense case load in order to relieve the burden of the criminal defense section after two attorneys left SCFO

within a span of a couple of months. Because of this assignment, my appellate chief gave me fewer cases to handle in order to keep my caseload manageable.

- I feel that lawyers that are unpopular with the SCFO director or section chief were overloaded. For example the Anderson County attorney was not popular with the trial chief or SCFO director. She routinely had eighty or more cases, while certain protégés of the trial chief had less than 25 cases.
- While the civil commitment section was very overloaded with trials, the general legal section was just doing a few immigration matters and sending out lots of "I can't help you" postcards to inmates who wrote with legal questions for help. At times, a few trial cases were given in a pinch to members of general legal to work on, but due to their lack of training and experience in this area, they bobbled the cases, which eventually came back to the trial section. ... [A]ssigning biennial civil commitment matters to general legal gave them more work, but they were hardly trained and did not have any interest in the process, knew nothing about the law, and hadn't conducted civil commitment trials. There was no coordination between the sections.
- The times that I had issues or saw that other lawyers had issues, management would divide the cases appropriately while taking pending case loads into consideration.
- One reason for the high turnover in the department is because of the disparity in treatment and overloading certain attorneys. The stronger the representation or the more zealously one represents the client, the heavier the distribution of the caseload.
- It really depends on how loudly the attorney complains. There is not an independent policy in place that would have attorney IV's or V's review case distribution.
- While I agree with the question as phrased, there has been little to no attempt by SCFO to determine how much time any particular case will take. Due to the extensive travel needed by the Criminal and Civil Defense Sections to reach both courts and clients scattered across the state, general public-defender-caseload standards would not be applicable. SCFO is aware of this, but makes no effort to determine what a appropriate caseload would be based on the time needed for SCFO's Criminal and Civil cases.
- Depends on the management. Current section chiefs actually do a decent job of this, but if they failed to do so, there is nothing that a lawyer could do.

- The inequity is primarily due to assignment of cases to the wrong attorney. Unlike other professional defense services, SCFO does not place attorneys with their strengths. Attorneys with little or no trial experience are often assigned to the trial section and required to defend clients facing life sentences. Likewise, attorneys with little or no civil commitment experience are assigned to the civil commitment section where individuals face lifelong civil commitment. It doesn't matter whether an attorney feels they are more qualified to handle particular types of cases, i.e., criminal defense versus civil commitment, they are placed wherever the Director wants them. It seems the goal is to make each attorney a "jack of all trades and master of none." This is not how a professional defense service should run.
- The regional distribution means that redistribution of cases is often not done because it is considered impractical.

The second question was similar but resulted in somewhat more negative results:



**FIGURE 13**

Slightly more than a majority of respondents strongly disagreed (36.7%) or disagreed (16.7%) with the statement that SCFO attorney workloads or caseloads are controlled to ensure attorneys have adequate time to provide quality representation to each client. Just over a quarter (26.4%) either strongly agreed (6.4%) or agreed (20%) with the statement.

Respondents noted the following:

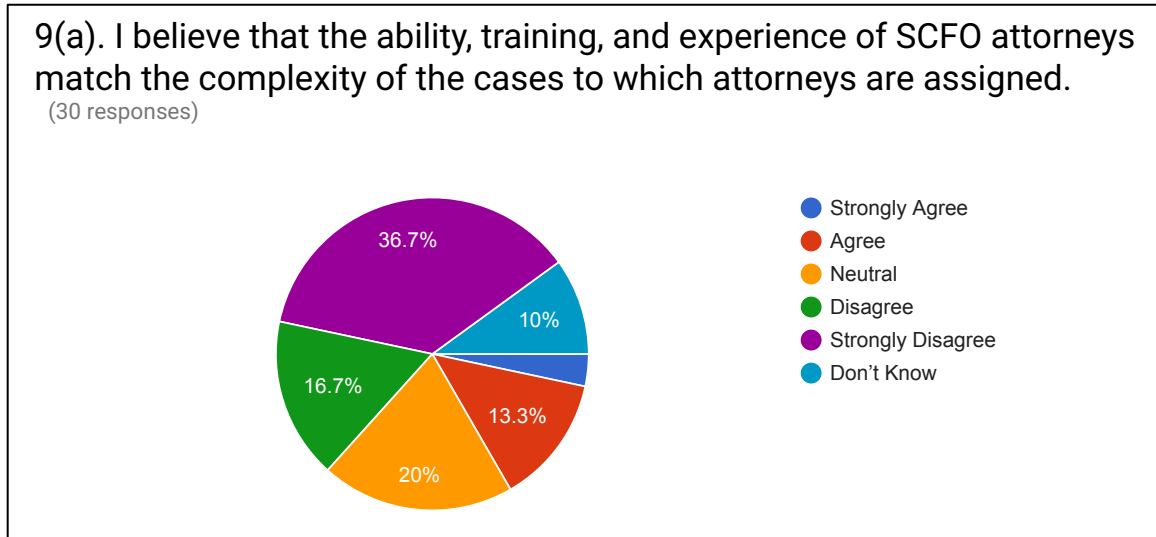
- Our new supervisor recently reworked our territories to insure that we have decent caseloads. Mine has been as low as 25 and as high as 86 in almost 3 years.
- It depends on the section in which you are assigned. If you are in the criminal defense section then your caseload average is about 50 cases at any given time and this includes travel all over the state. The 50-case average usually includes cases from a number of different counties. So for the criminal, I do not believe the caseload is adequately controlled as that section needs more lawyers. In the appellate section I would strongly agree that it is as the cases are assigned based on the number of active case you have and all attempts to keep the cases even among the attorneys is made. The same could be said for civil and legal services. So overall I agree as to the whole of SCFO, but not so much as to the criminal section.
- When I resigned from SCFO I had eighty enhance-able felony cases in courts from Anderson County in east Texas to the tip of South Texas and inmates housed in every region of the State, from Beaumont to Amarillo to Beeville.
- This was not a problem during my tenure.
- The cases come as court appointments, and they are distributed in the trial section according to the territories covered by the assigned attorneys, or distributed to civil commitment attorneys in an effort to give the same number of cases to each attorney.
- A recent Criminal Defense Section Chief (who was previously a line attorney) commented that she found it difficult to find the time to prepare investigation requests in her cases. Nonetheless, she allowed actual caseloads to increase to a level up to 50% higher than they had been when she was doing line attorney work. There is no attempt to correlate the time needed on a case with the caseload of the attorney.
- SCFO Section Chiefs actually do a decent job of this at this time. But that hasn't always been the case and there are no policies to prevent this if it happens in the future.
- Lawyers are given more cases than studies by the Texas Indigent Defense Commission have found are the maximum to provide competent representation.



**Principle 6: Defense counsel’s ability, training, and experience match the complexity of the case.**

The “Commentary” to Principle 6 states: “Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.”<sup>38</sup>

There was one survey question that addressed Principle 6:



**FIGURE 14**

A slight majority disagreed with the statement that SCFO was abiding by this ABA principle, and only 16.6 percent agreed or strongly agreed. Here, 36.7 percent strongly disagreed and 16.7 percent disagreed with the statement that the ability, training, and experience of SCFO attorneys match the complexity of cases to which they were assigned.

Some respondents expressed the opinion that inexperienced attorneys were assigned to cases that were more serious than they were qualified to handle. Some representative opinions included:

- I was hired to supervise attorneys in the civil commitment section. Attorneys in that section are required to represent clients in jury trials on a weekly basis. When I was hired I explained that I had only one jury trial experience decades earlier and that I was second chair. I was told it didn't matter.
- Many attorneys have never had a client or a case, and have never worked in court. They have recently passed the bar. In civil commitment, the result of

<sup>38</sup> ABA, *Ten Principles*, *supra* note 14, at 3.

losing a case is that the person goes to civil commitment/prison for the rest of their life if there is a minor rule violation. The consequences are huge and the clients are difficult. The cases are very complex because they involve principles of criminal law as well as civil law with depositions and civil discovery and many deadlines. Even though the cases are worked as first and second chair, new attorneys are given first chair responsibility within a few months of arrival. In the trial section the same problems apply, and there is no attorney supervisor routinely on the road to supervise what happens in court. Most attorneys who are at SCFO do not understand what objections to make, and as a result do not preserve error for appeal.

- Experienced attorneys do not come to work for SCFO because the pay is so low and the management is so bad. Many of the young attorneys who work there are highly skilled, but they leave before their clients can benefit from their growing skillset.
- There is absolutely no control over this. A brand new lawyer assigned in the trial section could be handling 20 first-degree cases, 15 second degree, and 25 third degree felony cases at a given time. Some of the first degrees might include murder, sexual assault, etc.
- It is routine to hire attorneys with no trial experience to handle a heavy caseload of felony or civil commitment cases. From what the sections chiefs stated, it was often the case that no attorneys with the relevant experience would apply for open positions.
- State Counsel's turnover rate is ridiculous even beyond the usual stereotype of a public defender agency. Furthermore, they cannot even hold onto a couple of experienced attorneys to provide institutional knowledge. That being said, their attorneys generally have a high level of ability. But training is subpar or nonexistent (and in at least one section, is conducted by the least proficient attorney in the section) and every attorney who actually has a case is handling a genuinely serious case such as an enhanced felony, a civil commitment, or an appeal from such.

Others were less concerned about this issue or felt like there was adequate matching of cases to experience level:

- Attorneys can come to SCFO straight from law school and in a few months be handling civil commitment and felony cases. It is up to the attorney to rise to the occasion.
- We're exempt from the Fair Defense Act, so we've handled cases that we

wouldn't be able to touch in the free world. It's hard for me to get mad about this because I think that we do a good and admirable job on our serious cases. Personally, I'm grateful for SCFO giving me an opportunity to get the experience that I didn't have when I arrived. I'm a better lawyer for having worked here.

- It was that way when I was there – and they had a great wealth of knowledge from the older attorneys who were always willing and able to lend advice or assistance if asked.
- For the most part I agree, however, SCFO does sometimes have a tendency to place inexperienced lawyers in the civil commitment section due to the constant retention problems that the section has faced in the past. Currently, the section is made up of lawyers who have mostly been together for a while now, so that is a plus. For its criminal lawyers, SCFO has in recent history hired lawyers with criminal experience to handle the case, although that was not always the case. In legal services, newer attorneys tended to be assigned to that section at the highest rate, but that section's caseload is the least demanded. Appellate is a good mix of experience.
- Different divisions had different people with different work experiences. ... I always had someone to bounce ideas off of or someone to provide me with the tools and information to guide me in obtaining the knowledge that was necessary for a specific task...and that was if I did not have experience with a particular topic. I really liked how a number of the employees have been working in the TDCJ system for decades because they were a wealth of knowledge in my learning of how the prison system runs.

SCFO reported the experience of its 27 attorneys as follows:<sup>39</sup>

- Attorney I (0 to 1 yr. experience): 2 (1 yr. licensed)
- Attorney II (1 to 2 yrs. experience): 3 (1 yr., 9 mos. and 2 yrs. licensed)
- Attorney III (2+ yrs. experience): 14 (three with 2 yrs. experience; 3 yrs.; four with 4 yrs. experience; 5 yrs.; 7 yrs.; 9 yrs.; 10 yrs.; 22 yrs.; and 41 yrs.)
- Attorney IV, V, and VI (these are supervisory/managerial positions with each attorney holding these positions having more than 2 yrs. experience): nine (5, 7, 8, 16, 20, 28, 29, 31, and 38 yrs. licensed respectively)

---

<sup>39</sup> *Information Request on SCFO, supra* note 18, at 2.

**Principle 7: The same attorney continuously represents the client until completion of the case.**

The “Commentary” to Principle 7 states: “Often referred to as ‘vertical representation,’ the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.”<sup>40</sup>

We did not ask a question addressing this principle.

**Principle 8: There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.**

The “Commentary” to Principle 8 states:

There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.<sup>41</sup>

We asked three questions related to parity between the defense and prosecution functions and issues related to the commentary. The question that most directly addressed parity between defense counsel and the prosecution was the one question that approached unanimous agreement among respondents. The question and survey results were as follows:

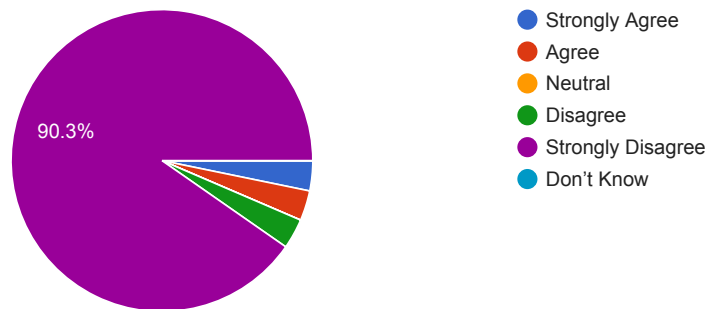
---

<sup>40</sup> ABA, *Ten Principles*, *supra* note 14, at 3.

<sup>41</sup> ABA, *Ten Principles*, *supra* note 14, at 3.

10(a). I believe that, as a whole, State Counsel for Offenders receives equal resources as the prosecution, SCFO attorneys are paid equally to their prosecutor counterparts, and that SCFO and the prosecution are treated as equal partners in the justice system.

(31 responses)



**FIGURE 15**

As one can see from the above graph, over 90 percent of respondents strongly disagreed with the statement that SCFO receives equal resources as the prosecution, SCFO attorneys are paid equally to their prosecutor counterparts, and that the SCFO and the prosecution are treated as equal partners in the criminal justice system. One respondent strongly agreed (3.2%) and one agreed (3.2%) with the statement.

Respondents noted in their survey responses:

- SCFO never had equal resources as the prosecution, particularly in civil commitment and immigration cases. SCFO lawyers were always treated as (and viewed themselves) as unequal partners in the system.
- Look at the average salaries and you will have your answer. We make less than the OIG police officers that investigate our cases. Each SPU prosecutor has his own investigator. Most SPU prosecutors have their own secretaries. I have access to a team of investigators and a team of legal assistants. Resources are spread thin and, often, the left hand has no idea what the right hand is doing.
- SCFO lawyers are paid at a much less rate than SPU and I honestly believe SPU have more resources available to them.
- SCFO has historically and continues to receive less funding than SPU (for example, they can only pay \$150/hr for experts while SPU can pay \$250/hr). SCFO attorneys and staff are paid less than their counterparts at SPU.
- In the civil commitment section, every case had two prosecutor expert

witnesses, but only one (if any) defense witness. The prosecutors also paid their experts much more than SCFO did. Also, the prosecutors were better paid than SCFO attorneys.

- The prosecutors at SPU (Special Prosecution Unit) make roughly 50% more in base salary than their defense counterparts. Their additional coverage for travel costs is also greater. Finally, the prosecutors have much greater flexibility in how/where their work is completed. (work from home, law library, etc.)
- In my time at SCFO the State had more funds to prosecute cases, and much more funding in civil commitment cases. I believe that to still be the case based upon more recent comments from SCFO attorneys. Particularly in the civil commitment arena attorneys have commented on funding inequalities that impact their ability to represent clients. Pay parity was non-existent when I was at SCFO. Prosecutors made substantially more than defense attorneys, as evidenced by the fact that SCFO turnover rate was dramatically higher than at the Special Prison Prosecution Unit.
- Prosecutors are paid more and get more respect from the courts.

SCFO reported the average salaries of its employees as follows:<sup>42</sup>

**Staff and Average Salaries of SCFO Staff**

<i>Title</i>	<i>Auth</i>	<i>Filled</i>	<i>Average Annual Salary</i>
<b>SCFO DIRECTOR (ATTORNEY VI)</b>	<b>1</b>	<b>1</b>	<b>\$116,252</b>
ATTORNEY V	4	3	\$76,356
ATTORNEY IV	4	4	\$64,682
ATTORNEY III	14	13	\$56,564
ATTORNEY II	3	1	\$48,278
ATTORNEY I	2	2	\$46,287
<b>TOTAL ATTORNEYS</b>	<b>27</b>	<b>23</b>	
INVESTIGATORS	6	6	\$46,213
MANAGER I	1	1	\$56,211
INTERPRETER II	1	1	\$41,525
LEGAL ASSISTANTS	20	20	\$39,304
SUPPORT STAFF	3	2	\$31,242
<b>SCFO FTE's</b>	<b>59</b>	<b>54</b>	

\*As of 1/31/16

**FIGURE 16**

Comparing budgets between SCFO and the SPU, the agency charged with cooperating with and supporting prosecuting attorneys in prosecuting offenses and delinquent conduct in Texas prisons and juvenile facilities, one can see that the SPU's budget is

<sup>42</sup> Information Request on SCFO, *supra* note 18, at 1.

higher than SCFO's.

**FY 2016 Operating Budgets**

<b>State Counsel for Offenders<sup>43</sup></b>	<b>Special Prosecution Unit<sup>44</sup></b>
\$3,431,151	\$5,347,247
	\$4,508,810 (budget w/o Juvenile Div.)

**FIGURE 17**

It should be noted that the SPU has a Juvenile Division to prosecute juveniles accused of offenses committed in Texas Juvenile Justice Department facilities, whereas SCFO does not defend juveniles. At the same time, SCFO is charged with providing legal services beyond those cases that are handled by SPU.

An added difficulty in comparing the two organization's budgets in that SPU is assisting or cooperating with local prosecutors in prosecuting offenses committed in TDCJ facilities, so there are added resources being provided by local prosecutors to prosecute cases, whereas SCFO must defend these cases on its own. There are also indigent inmates who SCFO does not defend when there is a conflict, but the State is only spending \$30,000 per year on those cases.<sup>45</sup>

One area where there is a lack of parity between the SCFO and SPU was previously discussed under Principle 1-Independence, and that is the lack of parity regarding organizational independence. Whereas the SPU is governed by an independent board and has operational independence, SCFO does not. SCFO is a division of TDCJ and has no independent ability to request an increase or any other modification to its budget from the legislature.

Respondents also strongly disagreed with the statement that SCFO has adequate resources for experts and ancillary services to effectively represent its clients:

---

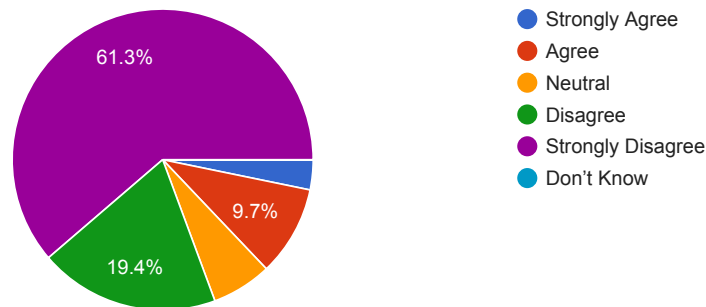
<sup>43</sup> TDCJ, *Agency Operating Budget 2016*, *supra* note 25, at 5.

<sup>44</sup> Gen. Appropriations Act, *supra* note 24, at IV-36-37.

<sup>45</sup> Gen. Appropriations Act, *supra* note 24, at IV-35.

11(a). I believe that SCFO has adequate resources for experts and ancillary services to effectively represent its clients.

(31 responses)



**FIGURE 18**

Over 80 percent of survey respondents either strongly disagreed (61%) or disagreed (19.4%) with the statement pertaining to adequate resources for experts and ancillary services. About 13 percent either strongly agreed (3.2%) or agreed (9.7%).

Respondents noted:

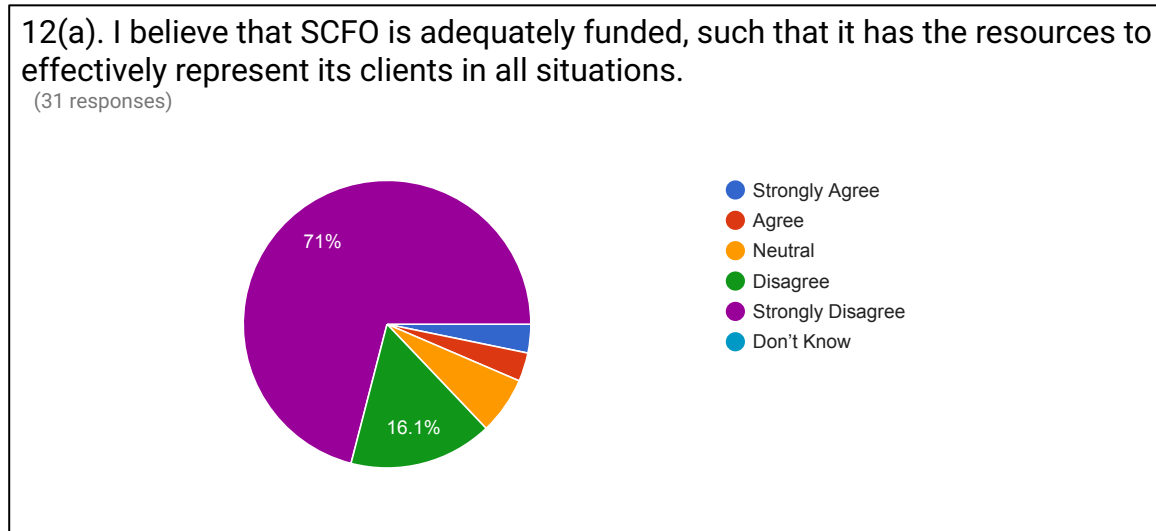
- SCFO was ALWAYS outgunned with it came to paying for experts. Particularly in civil commitment and immigration cases.
- The non-lawyer TDCJ bureaucrat decides what experts we can hire. The Director supposedly has the final say, but he listens to her. This is coming to a head because we have started requesting experts in fields aside from psychology. She is unfamiliar with our particularized need for such irregular experts, so we have gotten some push back.
- We were only allowed one expert for each civil commitment case. While I was in the civil commitment section, SCFO paid our experts \$125 to \$150 an hour. The Special Prosecution Unit paid the State's expert \$250 an hour. At least one expert changed from the defense to the state side during my time.
- SCFO uses old equipment, antiquated computer equipment, cameras, technology. Very sad.
- There are serious problems with SCFO's in-house investigation capacity. Otherwise, I agree with the above statement.

One respondent did note:



- I was always able to obtain the resources I needed for trial and investigation.

The final question pertaining to Principle 8 and the principle’s commentary asked respondents about the extent to which they agreed with a statement that SCFO is adequately funded, such that it has the resources to effectively represent its clients in all situations.



**FIGURE 19**

Once again, a very strong majority believes that SCFO does not have adequate resources. Over 87 percent of respondents either strongly disagreed (71%) or disagreed (16.1%) with the statement that SCFO is adequately funded to provide effective representation to its clients. Only two respondents total either strongly agreed (3.2%) or agreed (3.2%) that SCFO was adequately funded.

Respondents provided us with the following comments regarding this issue:

- SCFO has a small budget. Administrators are concerned with making it even more restricted so as to be able to report a surplus to the Board.
- The lawyers must make more money so that the administration can be choosier about who it hires, and so that good people will stay. Had I been paid better, I would likely have stayed on for many more years.
- Our budget is controlled by an agency with goals diametrically opposed to our own. Our advocacy dies the death of a thousand budgetary cuts and fiscal considerations.
- There is virtually no funding for experts in the criminal trial section. The only experts ever employed in the criminal trial section are for competency or sanity

evaluation. There is inadequate funding for travel. I was once threatened with disciplinary action for renting a hotel room in the same city as the prosecutor when I was in trial in Karnes City, which is approximately 250 miles away from my office and home.

- I had to buy my own material for demonstrative evidence at trial because management categorically refused to spend any money on those things.
- SCFO lacks the funding to pay attorney in parity with their prosecutorial counterparts, and has a pay structure that discourages long-term employment. It is often a fight to receive basic office supplies; I was refused 3-tab folders when I started my SCFO employment. SCFO computers, internet access, remote storage, and vehicles often do not work. So some employees use their personal computers and pay for private internet service. SCFO often fails to repost vacant positions resulting in frequent understaffing.
- Check the attorney turnover rates. That should speak to whether there is adequate funding, at least with respect to personnel. In my experience there were extraordinarily high turnover rates that resulted in "horizontal representation" which is contrary to the ABA Standards for defense services.

Turnover rates were reported by SCFO as follows:<sup>46</sup>

**SCFO Turnover Rate**

	FY 2014	FY 2015
<b>Turnover Rate</b>	13.6%	11.9%

**FIGURE 20**

The average SCFO attorney tenure is approximately six years according to SCFO.

**Principle 9: Defense counsel is provided with and required to attend continuing legal education.**

The "Commentary" to Principle 9 states: "Counsel providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."<sup>47</sup>

The question pertaining to Principle 9 was the one question that was most evenly split among respondents.

<sup>46</sup> *Information Request on SCFO, supra* note 18, at 1.

<sup>47</sup> ABA, *Ten Principles, supra* note 14, at 3.

13(a). I believe that SCFO attorneys are provided with and required to attend continuing legal education.

(31 responses)

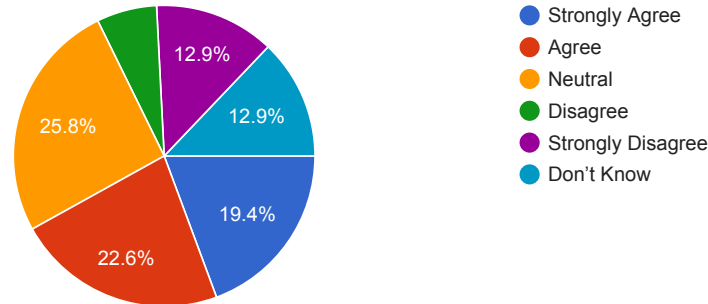


FIGURE 21

A “neutral” answer (25.8%) was the most popular response, and the only question we asked where over 40 percent of respondents agreed that SCFO was complying with the principle.

Respondents noted:

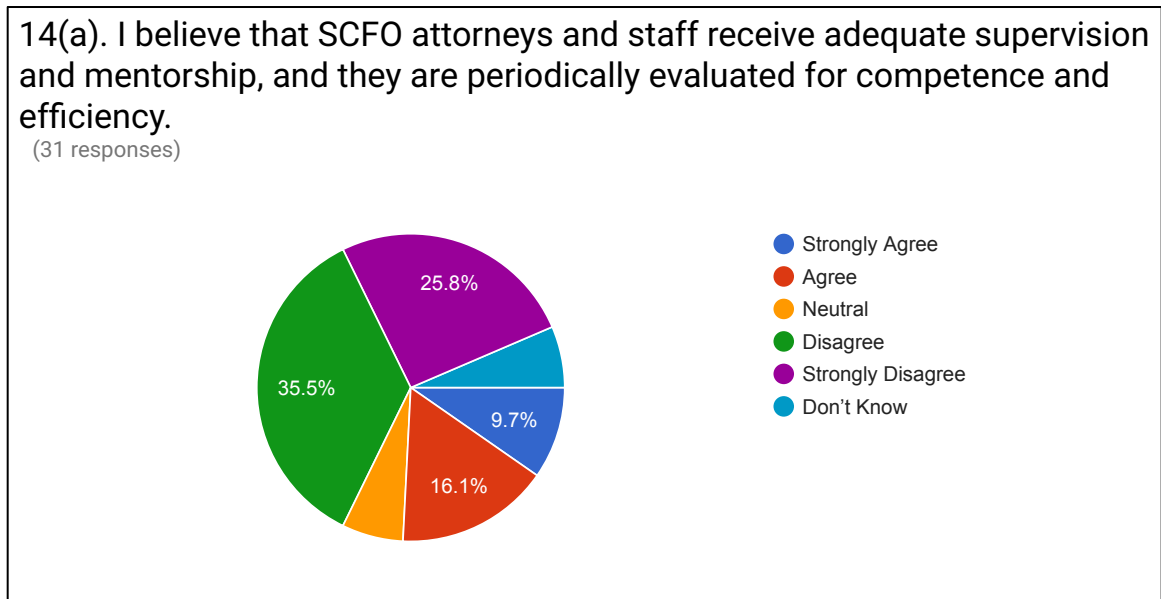
- The Director and his administrative assistant were highly selective in the type and amount of CLE that attorneys were allowed to attend without taking personal time to attend CLE.
- They let us get our 15 hours. If we want more, we have to take our own time and they won't pay us back. When you're making TDCJ officer pay, there isn't much room in a personal budget for CLE. I'm hoping that TCDLA starts putting more programs on video so I can do CLE on my own time.
- We attend CLE's where speakers encourage us to speak out against injustice and to zealously represent our clients, but if we were to do those things encouraged or suggested, won't be long before we are without a job.
- Generally, one significant CLE will be supported with agency time. Generally there is no other financial support for CLE, and even receiving work time for attending a CLE is on a case-by-case basis. The agency culture does not have a commitment to continuing legal education. It also lack a commitment to in-office training generally. That is a glaring deficiency given the generally low level of experience of the agency's incoming attorneys.

- I believe they have the opportunity to attend CLE, the problem is the office will not pay for it. Attorneys are limited by what they can afford and/or get scholarships to attend.
- They get CLE, but inexperienced lawyers do not get sufficient advocacy training.

**Principle 10: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.**

The “Commentary” to Principle 10 states: “The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.”<sup>48</sup>

There was one survey question pertaining to the adequacy of supervision and review of defense counsel working at SCFO.



**FIGURE 22**

Over 60 percent of respondents either strongly disagreed (25.8%) or disagreed (35.5%) with the statement that “SCFO attorneys and staff receive adequate supervision and mentorship, and they are periodically evaluated for competence and efficiency.” Just over a quarter of respondents either strongly agreed (9.7%) or agreed (16.1%) with the statement.

Some of the concerns expressed by respondents included:

<sup>48</sup> ABA, *Ten Principles*, *supra* note 14, at 3.

- There is an annual review, but no mentorship, at least not in my experience. My direct supervisor only provided guidance at my insistence. There was no mentorship structure. If the new attorney did not insist on help, often repeatedly, none was provided. When provided, it was by ineffectual and apathetic supervisors.
- There was absolutely no training available to me when I started working at SCFO. I was once asked by the SCFO director to revise the civil commitment manual that I was not even aware existed before the request. When I asked the section chief about it, he vaguely waived toward it. I thought he should have made me aware of the section's procedures when I was hired as a supervisor.
- When I was hired the civil commitment chief came to the office at noon, shut his door, and was not seen for the rest of the day. He was fired and replaced by a highly motivated and productive chief. She was reassigned to the criminal trial section without her consent and with no explanation. The criminal trial chief was assigned to the civil commitment section without his consent and with no explanation. It was very demoralizing because each section chief was devoted to their particular section and was highly regarded by their staff. It appeared that the SCFO Director was deliberately trying to make each section less effective.
- I feel that younger attorneys are more or less thrown to the wolves and are not given sufficient training or mentorship before representing clients. SCFO was always looking for warm bodies to throw at civil commitment cases, without regard to whether the lawyers were particularly qualified for the task at hand. Young lawyers were promoted as supervisors, and failed to adequately prepare the next generation of lawyers to represent clients. In addition, SCFO is very insular and is very removed from any bar association which could offer mentorship outside the office.
- Basically, the so-called supervision and mentorship is geared towards micromanaging attorneys. Also, we are not evaluated for competence and efficiency the number of times required by the Employee Manual.
- Astonishingly there was no mentorship available in the criminal trial section. I represented a man that was facing a life sentence for Aggravated Assault of a Public Servant. The client insisted on trial. I had no criminal trial experience. I asked for assistance from the criminal trial section chief or a seasoned criminal trial attorney for a year before the trial. I received no assistance though the trial chief told me he thought he might help me. He had previously assisted in trial for every attorney that had previously worked in that section. One week before trial he told me he would not assist me in trial. I had to beg to have a recently hired

attorney sit in trial with me. She had no time to prepare and did not participate in the trial. The client was found guilty and received a 50-year sentence.

- Supervision tends to include internal rule enforcement and not mentoring.

There were some positive comments regarding supervision and mentorship at SCFO as well:

- In the two sections I was primarily assigned, I worked with good people, a few of whom I consider mentors. Some included my supervisors in civil commitment and appellate sections.
- There are some great lawyers at SCFO and I was able to learn from many people that I got to work along side. Everyone was always eager to help and provide whatever mentoring I requested.
- My supervisors were always available for mentoring and were always generous with their time. To the extent this was attributable to SCFO as an entity, it was because they were hiring lawyers out of law school and it was incumbent upon the office to mentor the new lawyers. Most of it was due to the personal characteristics of the supervisors, none of whom are there anymore, and many of whom were driven out by unduly punitive management.

### **Views of SPU Prosecutors Regarding SCFO Operations**

Although no prosecutors responded to the survey, four prosecutors from the SPU were interviewed (out of five contacted) to get a sense of prosecutors' views on SCFO attorneys and the agency's operations.<sup>49</sup> These prosecutors were recommended by a former SCFO attorney, and one was also recommended by a member of the LSPCM. Two of the attorneys are current SPU employees; two are former employees who left fairly recently. All four prosecutors who were interviewed have significant experience at SPU and being a prosecutor in general. Three of the four preferred that their responses be kept anonymous, so the author has decided to keep all responses anonymous.

Prosecutors were asked a standard set of seven questions, focusing on issues of concern that were raised by survey respondents and issues that prosecutors would likely know about or have an opinion of from their regular interactions with SCFO attorneys. The questions and summaries of their responses are as follows:

---

<sup>49</sup> Interview notes on file with report author, Scott Ehlers.

**1) General Views: What are your general thoughts on State Counsel for Offenders in terms of the office's reputation; quality of representation they provide to their clients; quality of attorneys in terms of knowledge of the law; etc.?**

Respondents believed that SCFO attorneys generally do a good, "adequate," or "more than adequate" job. One said "the quality is high." There was an acknowledgement that SCFO attorneys had a difficult job and they were doing a good job under the circumstances. One attorney expressed the view that SCFO attorneys "think outside the box," and that they seem well-trained. Another expressed the view that SCFO attorneys were "conscientious," made sure their clients were competent, and that clients understood the plea paperwork. Another SPU attorney said that the SCFO attorneys he worked with in the civil commitment section were "outstanding." The fourth respondent noted that SCFO had a high turnover rate among criminal attorneys, which negatively effects the performance of the office. From his perspective, this high turnover rate was due to poor pay levels because attorneys leave the office to go to higher paying offices like the Harris County Public Defender's Office. Finally, this same attorney said that he had heard from SCFO trial attorneys that they were too micromanaged by management.

**2) Operational Independence: Do you believe SCFO is adequately independent from the influence of management at TDCJ, SCFO has adequate control over its budget, and do you believe additional operational independence is needed for SCFO to effectively represent inmate clients?**

Three attorneys acknowledged some concern regarding the relationship between SCFO and TDCJ or TBCJ; the other was not sure when it came to the budget but generally felt that the relationship did not effect the representation of clients. One attorney noted that while SCFO is independent from TDCJ operationally, they were not independent in terms of their budget. He felt like SCFO was "probably the lowest person on the totem pole in terms of pay" and that SCFO "lawyers are not paid what they should be." Another attorney felt like individual attorneys were exemplary and were not influenced by TDCJ management, but that "the administration [of SCFO] is cognizant that they work for TDCJ, especially in regard to the salaries for these young attorneys." The third attorney expressed the strongest views regarding independence, saying that if SCFO was "an independent state agency like SPU, that would be the best thing to happen." This attorney felt like "for appearance sake, they [SCFO] should not be under the same umbrella as the prison system." He noted that inmates will say that SCFO attorneys work for the prison system, and this makes it difficult for SCFO attorneys in terms of having to explain to their clients that they are not "selling them out." The fourth attorney acknowledged that clients might think that SCFO attorneys were "in cahoots with the State" but he felt like SCFO attorneys took pride in their independence from TDCJ.

**3) Interference by SCFO Management into Staff Attorneys' Representation: Are you aware of or have an opinion regarding whether SCFO attorneys have sufficient independent discretion to adequately represent their clients or any knowledge of SCFO policies, rules, or management that hampers SCFO attorneys' representation of their clients?**

None of the attorneys were aware of any written policies or procedures limiting attorneys' discretion. One attorney said there were likely some guidelines just like prosecutor offices have. Three of the four SPU attorneys did say that they had heard SCFO attorneys complain about not having the necessary independence to deal with certain cases, being micromanaged, or having to report back to management on too many issues. One SPU attorney had been involved in some cases where SCFO management "reigned in" the SCFO attorney and he felt like it was appropriate. But nobody felt like management was interfering with their representation.

**4) Caseloads: Do you have a sense of whether SCFO attorneys are handling too many cases to provide effective representation?**

None of the SPU attorneys believed that caseloads were excessive for SCFO attorneys. One attorney noted that some SCFO attorneys complained that they had too many cases but did not believe SCFO attorneys were any more overworked than SPU prosecutors. One SPU attorney complained about SCFO's process for handling cases in which an inmate was transferred to another prison. Rather than transferring that inmate's case to another SCFO attorney closer to the unit, the original SCFO attorney would be required to keep the case, oftentimes resulting in long drive times and case delays.

**5) Case Matching: Do you believe the ability, training, and experience of SCFO attorneys match the complexity of the cases to which they are assigned?**

In general the SPU attorneys thought that SCFO attorneys were qualified to handle the cases to which they were assigned. One attorney said that it seemed like SCFO had less experienced lawyers but seem to be getting more experienced lawyers lately. Another noted that SCFO has "lots of newbies" due to turnover because the pay is low and attorneys leave to other offices to make more money. Nonetheless, this lawyer felt like SCFO was doing a good job of training new lawyers and that for the most part the criminal division did not have very complex cases. Another SPU prosecutor noted that when SCFO did bring in new lawyers, the more experienced lawyers did a good job of mentoring and supervising the younger lawyers.

**6) Adequacy of Resources: Do you believe that SCFO has adequate resources to effectively represent their clients, including attorney and support staff salary levels, and funding for experts?**



All four SPU attorneys said that SCFO attorneys were not paid adequately. One SPU attorney estimated that SCFO attorneys should be paid at least 15 percent more, probably 20 percent more. One attorney remembered being told by one SCFO attorney that they had to buy their own blue pens. Another SPU attorney felt like SCFO's expert funding was adequate because an expert reviewed all or most cases in which he was opposing counsel and then testified in a significant number of cases.

**7) Parity of Resources with Prosecution Function: Do you believe that SCFO receives equal resources as the prosecution, SCFO attorneys are paid equally to their prosecutor counterparts, and that SCFO and the prosecution are treated as equal partners in the justice system?**

Once again, all four SPU attorneys believed that SPU attorney salaries were higher than SCFO attorney salaries. One attorney said that SPU attorneys will have an annual starting salary of approximately \$75,000, while an SCFO attorney who has been with the agency for a number of years would only be making \$65,000. Another attorney expressed the belief that there was a problem of equality of funding between the two agencies, noting that the cars used by SPU were newer, laptops at SCFO were not as good as SPU, and the pay schedule for SPU attorneys was "quite a bit more" than SCFO attorneys. This attorney expressed the concern that SCFO attorneys don't "have the promise of rising up the ladder to have longevity and experience," and that SCFO attorneys will leave to go work for a DA's office or the Harris County Public Defender's Office to get paid better.

**Conclusions Regarding SCFO's Compliance with the ABA Ten Principles**

There were a number of the ABA Ten Principles that SCFO is not complying with based on a review of the survey results, interviews with prosecutors, statutes, and budgets. The principles that appear to have the most serious compliance problems are Principle 1-Independence and Principle 8-Parity Between Defense and Prosecution (including parity in attorney salaries and adequate resources for SCFO). It is easy to see how a lack of independence for the department can negatively impact its ability to have adequate resources to defend its clients and have parity with the prosecution function. There were also numerous complaints about management not allowing adequate independence for attorney decision-making.

Numerous other principles were not complied with according to a majority of survey respondents, including Principle 2-Private Bar and Public Defender Participation; Principle 3-Adequate Screening and Rapid Appointment of Counsel; Principle 4-Sufficient Time and Adequate Space to Meet with Clients; Principle 5-Workload Controls; Principle 6-Proper Case Matching to Counsel Abilities; and Principle 10-Supervision and Performance Review.

Principle 9-Providing and Requiring Continuing Legal Education, was the only principle where over 40 percent of survey respondents agreed that the principle was being followed, but that is to be expected considering that the State Bar requires a certain number of CLE hours every year for attorneys to retain licensure. There were still many negative comments regarding this principle because respondents felt like there was inadequate agency financial support for attorney training.

### **Provision of Indigent Defense Services to Inmates in Other States**

The committee also investigated a select number of other states to determine if lessons could be learned from other jurisdictions.<sup>50</sup> The committee determined that it was not feasible to conduct a comprehensive 50-state survey of indigent inmate legal services due to constrained time and resources, so it limited its research to states with large populations like Texas; surrounding states; and states the LSPCM determined through inquiries among defense practitioners would have offices devoted to inmate legal services.

The eleven states the committee examined included: Arkansas; California; Florida; Illinois; Louisiana; Massachusetts; New Mexico; New York; North Carolina; Oklahoma; and Washington.

The committee determined that these eleven states could be broken down into two categories based on how they provide criminal defense services to indigent inmates:

**Category 1:** States with a statewide public defender system, where the office in which a specific prison is located would be tasked with representing the prisoner in that particular prison. The states in this category include: Arkansas; Florida; Massachusetts; New Mexico; and Oklahoma.

**Category 2:** States with no statewide public defender system where local private counsel or local public defender offices in which the prison is located would be appointed to represent the prisoner. The states in this category include: California; Illinois; Louisiana; New York; North Carolina; and Washington.

It should be noted that Massachusetts and New York do have independent offices that provide legal services to inmates, but their services are limited to civil matters only. North Carolina also has a separate office that represents inmates in post-conviction matters, which is discussed in more detail below.<sup>51</sup>

---

<sup>50</sup> Thanks to Melissa Fischer, Gen. Admin. Counsel, Bexar Co. Criminal Dist. Ct. Admin., for providing the research for this section of the report.

<sup>51</sup> *Our Work*, NORTH CAROLINA PRISONER LEGAL SERVICES, <https://www.ncpls.org/work/> (last visited July 28, 2016).

Based on our limited review, there is no other state with an office analogous to SCFO, that is a state with no statewide public defender office but which has a statewide public defender that is limited to defending prisoners accused of a crime committed in a correctional facility.

In regard to criminal defense services provided to indigent inmates, here are some of the key elements we discovered about other states:

**Arkansas**<sup>52</sup>: Legal services to prisoners are provided by the Arkansas Public Defender Commission, a statewide public defender comprised of 23 judicial districts. The PD in the district where the prison is located would handle any criminal matters for those prisoners. The office handles criminal legal services to prisoners, trial and appellate cases, juvenile, and mental health cases. The judicial districts report to an executive director, who reports to a seven-member commission. There are caseload standards, but according to a recent news report, attorneys are severely beyond ABA recommended caseload standards.<sup>53</sup> Average attorney salary is \$66,000. Attorneys are hired on two-year contracts. There are minimum qualifications. There is no training program for attorneys. There is no parity with the prosecution.

**California**<sup>54</sup>: Legal services to prisoners are provided by private attorneys or public defender offices that are appointed by the district or county where the prison is located. Some counties contract with law firms to provide this representation. While the California Office of the State Public Defender was established in 1976 to represent indigent criminal defendants on appeal, since 1990 it has been mandated by all three branches of government to focus on death penalty appeals and habeas corpus matters.<sup>55</sup> The Habeas Corpus Resource Center also represents indigent inmates in death penalty habeas corpus proceedings. The Prison Law Office in Berkeley is a non-profit law firm in existence for over 40 years that provides free legal services to California inmates to improve conditions of confinement through class action and other impact litigation, as well as public education and providing technical assistance to attorneys.<sup>56</sup> The office also publishes *The California State Prisoners Handbook: A Comprehensive Guide to Prison and Parole Law*. Most of the public defender offices are

---

<sup>52</sup> Melissa Fischer phone conversation with Bill Simpson, Arkansas Public Defender Commission, District 6. See also <http://www.arkansas.gov/apdc/>.

<sup>53</sup> David Koon, *Arkansas public defenders stretched thin*, ARKANSAS TIMES (January 29, 2015), <http://www.arktimes.com/arkansas/arkansas-public-defenders-stretched-thin/Content?oid=3640129>.

<sup>54</sup> Melissa Fischer phone conversation with Corene Kendrick, Prison Law Office in San Quentin. See also the Office of the State Public Defender website at <http://www.ospd.ca.gov>. Melissa Fischer also spoke to an employee in the Office of the State Public Defender. See also the Habeas Corpus Resource Center website at <http://www.hcrc.ca.gov>.

<sup>55</sup> *About Us*, OFFICE OF THE STATE PUBLIC DEFENDER, <http://www.ospd.ca.gov/about.asp> (last visited Oct. 3, 2016).

<sup>56</sup> *About Us*, Prison Law Office, <http://prisonlaw.com/about-us/> (last visited Oct. 3, 2016).

independent. Budgets, salaries, caseload standards, and training differ from office to office. There is no parity with the prosecution.

**Florida**<sup>57</sup>: Legal services to prisoners are provided by public defender offices in 20 judicial circuits, with each office led by an elected public defender. The elected public defender in the circuit where the prison is located would handle any criminal matters for those prisoners. The offices handle misdemeanors, felonies, capital offenses, and juveniles. Office budgets are appropriated by the legislature according to historical formulas but offices can request more. Caseload standards vary by district. Attorney salaries range from \$40,000 to \$85,000. There is extensive training. There is no parity with prosecution.

**Illinois**<sup>58</sup>: Legal services to prisoners are provided by each county's public defender office where the prison is located. Appellate services are provided by the Illinois Office of the State Appellate Defender (OSAD). There is no statewide oversight board or commission that oversees the county PD offices. All indigent criminal trial cases are handled. Each county PD reports to their county Board of Commissioners. OSAD is a state agency that reports to an advisory board. Budgets and caseload standards differ by office. Training is offered through the Public Defender Advocacy School and the statewide PD organization. There is no parity with the prosecution.

**Louisiana**<sup>59</sup>: Legal services to prisoners are provided by each of the 42 judicial district public defenders in Louisiana, depending on where the prison is located. The Louisiana Public Defender Board (LPDB) administers the Public Defender Fund, which provides funds for expert witness fees and some DNA testing. The LPDB contracts with eight non-profits to provide appellate representation, capital trial conflict representation, capital post-conviction representation, and claims of actual innocence for prisoners serving life sentences. Each district PD office handles indigent criminal trials for the county. The LPDB reports to the legislature. PD offices are funded by the legislature and the city where they are located. Caseload standards exist but are often not followed. Salaries range from \$30,000 to \$100,000. Turnover rates are high at 49 percent. There are no minimum qualifications for attorneys. There are many training opportunities. There is no parity with the prosecution.

**Massachusetts**: Legal services to prisoners in criminal matters are provided by the Massachusetts Committee for Public Counsel Services (CPCS), who oversees the provision of legal representation to indigent persons in criminal and civil cases and

---

<sup>57</sup> Melissa Fischer phone conversation with the Hon. Stacy Scott, Public Defender-8th Circuit. *See also* the website for the Florida Public Defender Association, <http://www.flpda.org>.

<sup>58</sup> Melissa Fischer phone conversation with Michael J. Pelletier, Ill. Office of the State App. Defender. *See also* <http://www.illinois.gov/osad/>.

<sup>59</sup> Melissa Fischer phone conversation with a representative of the La. Corrections Dep't., Legal Affairs Div. Phone conversation with James T. Dixon, La. Pub. Defender Bd. *See also* the website for the La. Pub. Defender Bd., <http://www.lpdb.la.gov/>.

administrative proceedings in which there is a right to counsel. There are about 20 CPCS offices in Massachusetts. There is an oversight committee of fifteen persons appointed by the Governor, Speaker of the House, President of the Senate, and the State Supreme Court. There are reports that offices are understaffed and underpaid. Attorneys must be certified by CPCS to accept appointments and go through some training. The office has its own training unit. Unclear if parity with the prosecution.

**New Mexico:** Legal services to prisoners are provided by the Law Office of the Public Defender (LOPD), a statewide public defender comprised of 13 district offices. The PD in the district where the prison is located handles criminal matters for those prisoners, though the district office in Albuquerque handles all post-conviction matters for the entire state. The Public Defender Commission, comprised of 11 members, provides oversight of the agency and appoints a chief. Salaries range from \$42,000 to \$160,000 for the chief. There is some internal training for new attorneys. No parity with the prosecution.

**New York**<sup>60</sup>: Legal services to prisoners in criminal matters are provided by private attorneys or legal services organizations such as the Legal Aid Society, Criminal Defense Office in New York City, depending on where the prison is located. There are also organizations like Prisoner's Services of New York that represent prisoners in civil matters. The Mental Hygiene Legal Service represents people with special needs in prisons and those receiving care at facilities for persons with mental disabilities. They do represent prisoners on civil liberties matters and respondents in civil actions under the Sex Offender Management and Treatment Act. Individual organizations representing indigent inmates in criminal matters represent them at trial and on appeal. Funds for offices are provided to an extent by the New York Office of Indigent Legal Services. Budgets, salaries, qualifications, training, and caseload standards differ from office to office. No parity with the prosecution.

**North Carolina**<sup>61, 62</sup>: Indigent inmates who are accused of committing a crime in prison are appointed counsel like any other indigent defendant in North Carolina. If an inmate commits a crime in one of the counties that has a public defender office, then the public defender office represents the inmate. If the crime is allegedly committed in a county without a public defender office, then a private attorney is appointed to represent the inmate. The state also has a statewide direct appeal office called the Office of the Appellate Defender which would represent an indigent inmate on direct appeal or

---

<sup>60</sup> Melissa Fischer phone conversation with Andrew Davies, Dir. of Research, N.Y. Office of Indigent Legal Serv. *See also* the website for The Legal Aid Soc'y, <http://www.legal-aid.org>; website for Prisoners' Legal Serv. of N.Y., <http://plsny.org>; and website for the Mental Hygiene Legal Serv., <http://www.justicecenter.ny.gov/mental-hygiene-legal-service-mhls>.

<sup>61</sup> Melissa Fisher phone conversation with a representative from the N.C. Prisoner Legal Serv. *See also* <http://www.ncpls.org>. Melissa Fischer phone conversation with John W. King, Research Dep't, N.C. Office of Indigent Defense Serv. *See also* <http://www.ncids.org>.

<sup>62</sup> Scott Ehlers phone conversation with Thomas K. Maher, Executive Director, Office of Indigent Defense Services (Oct. 3, 2016).

appoint a private lawyer to do so. Post-conviction legal services to prisoners are provided by the North Carolina Prisoner Legal Services Inc., a contractor of the North Carolina Office of Indigent Defense Services. This office was established to provide inmates with their constitutional right to meaningful access to the courts pursuant to *Bounds v. Smith*, a U.S. Supreme Court case originating out of North Carolina.<sup>63</sup> The office handles post-conviction relief mainly and some civil rights claims. The organization is an independent, non-profit law firm. There are no caseload standards and no parity with the prosecution according to persons interviewed.

**Oklahoma**<sup>64</sup>: Legal services to prisoners in almost all counties are provided by the Oklahoma Indigent Defense System (OIDS). Prisoners are represented by the Tulsa and Oklahoma county public defender offices. The System is responsible for trial, appellate, and post-conviction matters for all indigent accused, including prisoners. The executive director of OIDS reports to a board of directors, whose members are appointed by the governor. Attorneys must meet minimum standards including letters of recommendation and good standing. There is in-house and outside training.

**Washington**<sup>65</sup>: Legal services to prisoners are provided by private attorneys or public defender offices that are appointed by the appointing authority where the prison is located. Some counties contract with law firms to provide this representation. The Washington State Office of Public Defense contracts with private individuals or firms to provide inmate appellate representation. Types of cases handled differs from office to office, as do budgets, staffing, caseload standards, salaries, training programs, and minimum qualifications. There is no parity with the prosecution.

If the committee had the time and resources, it might be possible to compare the resources provided in those states with statewide public defender offices to defending indigent inmates accused of committing crimes in prison to the resources available to SCFO. Unfortunately we do not. As a result, a more comprehensive comparison with other states was not viable at this time.

## **Recommendations**

The Committee is most concerned with SCFO's lack of independence from TDCJ, inappropriate interference by SCFO management into staff attorneys' representation of clients, and lack of parity with the prosecution function in regard to prisoners charged with crimes allegedly committed in correctional institutions, parity of institutional independence, and parity of resources.

---

<sup>63</sup> *Bounds v. Smith*, [430 U.S.](#) 817 (1977)

<sup>64</sup> Melissa Fischer phone conversation with Joe P. Robertson, Okla. Indigent Defense Sys. *See also* <http://www.ok.gov/OIDS/>.

<sup>65</sup> Melissa Fischer phone conversation with Katrin Johnson, Wash. State Office of Public Defense. *See also* <http://www.opd.wa.gov/>.

The Committee also believes that a more comprehensive review of SCFO's operations may be helpful. If such a review were conducted, the most appropriate entity to carry that out would be the Texas Indigent Defense Commission, the state agency that is most qualified to review the operations of a Texas public defender office.

**As such, the State Bar of Texas' Legal Services to the Poor in Criminal Matters Committee recommends that:**

(1) SCFO should be an agency that is funded and operated independently from TDCJ and TBCJ in order to comply with Principle 1 of the ABA's *Ten Principles of a Public Defense Delivery System*.

(2) State funding for SCFO and the defense of indigent inmates charged with crimes committed in TDCJ institutions, as well as the defense of indigent offenders who are subject to court proceedings under the Sexually Violent Predator (SVP) civil commitment statute, should be increased in order to provide quality, effective representation. Such state funding should ensure parity between the defense and prosecution functions, including staff and attorney salary levels, as required by Principle 8 of the ABA's *Ten Principles of a Public Defense Delivery System*.

3) In lieu of the creation of an independent SCFO and parity in funding between SCFO and the prosecution function, the Texas Indigent Defense Commission (TIDC) should coordinate with the Texas Department of Criminal Justice (TDCJ) to conduct an evaluation of the operations of SCFO. The study should include an evaluation of attorney caseloads as they compare to national standards; attorney salaries as they compare to attorney salaries in the SPU; the SCFO budget as it compares to budgets in similar offices in other states; the use of investigators and experts, case outcomes, and how the structure and operations of the SCFO compare to the recommendations of the American Bar Association's *Ten Principles of a Public Defense Delivery System*; as well as any other best practices determined by the TIDC. A report including the results of the study should be submitted to the Legislative Budget Board and the Governor not later than September 1, 2018.<sup>66</sup>

---

<sup>66</sup> Similar language was included in Contingent Provision Sec. 17.12, H. Comm. Sub., S.B..1, 83rd Sess. IX-66 (Tex. 2013), [http://www.lbb.state.tx.us/Appropriations\\_Bills/83/House\\_CSSB1.pdf](http://www.lbb.state.tx.us/Appropriations_Bills/83/House_CSSB1.pdf).

APPENDIX A

**ABA**



**TEN**

**PRINCIPLES**

**OF A PUBLIC DEFENSE DELIVERY SYSTEM**

*February 2002*



ABA STANDING COMMITTEE  
ON LEGAL AID AND INDIGENT DEFENDANTS

---

2001 - 2002

**Chair**

L. Jonathan Ross  
Manchester, NH

**Members**

Phyllis J. Holmen  
Atlanta, GA

Lonnie Johnson  
Baytown, TX

Norman Lefstein  
Indianapolis, IN

James C. Moore  
Rochester, NY

John H. Pickering  
Washington, DC

Ragan L. Powers  
Seattle, WA

Sarah M. Singleton  
Santa Fe, NM

Randolph N. Stone  
Chicago, IL

Janet R. Studley  
Washington, DC

William Whitehurst  
Austin TX

**Staff**

Terrence J. Brooks, Committee Counsel  
Beverly Groudine, Associate Committee Counsel  
Shubhangi Deoras, Assistant Committee Counsel  
Janice Jones, Program Manager  
Michaeline Glascott, Administrative Assistant

*Copyright © 2002 by the American Bar Association*

All rights reserved. No part of this document may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review.



# TEN PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM

*February 2002*

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

# INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at <http://www.abanet.org/crimjust/home.html>.

# ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled “The Ten Commandments of Public Defense Delivery Systems,” which was later included in the Introduction to Volume I of the U.S. Department of Justice’s Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross  
Chair, Standing Committee on  
Legal Aid and Indigent Defendants

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

---

## *Black Letter*

- 1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.
- 2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- 3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
- 4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
- 5 Defense counsel's workload is controlled to permit the rendering of quality representation.
- 6 Defense counsel's ability, training, and experience match the complexity of the case.
- 7 The same attorney continuously represents the client until completion of the case.
- 8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
- 9 Defense counsel is provided with and required to attend continuing legal education.
- 10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

---

*With Commentary*

**1** The public defense function, including the selection, funding, and payment of defense counsel,<sup>1</sup> is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.<sup>2</sup> To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>3</sup> Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.<sup>4</sup> The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.<sup>5</sup>

**2** Where the caseload is sufficiently high,<sup>6</sup> the public defense delivery system consists of both a defender office<sup>7</sup> and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.<sup>8</sup> The appointment process should never be *ad hoc*,<sup>9</sup> but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.<sup>10</sup> Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.<sup>11</sup>

**3** Clients are screened for eligibility,<sup>12</sup> and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,<sup>13</sup> and usually within 24 hours thereafter.<sup>14</sup>

**4** Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.<sup>15</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.<sup>16</sup> To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.<sup>17</sup>

**5** Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.<sup>18</sup> National caseload standards should in no event be exceeded,<sup>19</sup> but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.<sup>20</sup>

---

**6** **Defense counsel’s ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.<sup>21</sup>

**7** **The same attorney continuously represents the client until completion of the case.** Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing.<sup>22</sup> The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

**8** **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.<sup>23</sup> Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.<sup>24</sup> Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess,

unusual, or complex cases,<sup>25</sup> and separately fund expert, investigative, and other litigation support services.<sup>26</sup> No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.<sup>27</sup> This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

**9** **Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.<sup>28</sup>

**10** **Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.<sup>29</sup>

# NOTES

<sup>1</sup> “Counsel” as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. “Defense” as used herein relates to both the juvenile and adult public defense systems.

<sup>2</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter “NAC”], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter “NSC”], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3<sup>rd</sup> ed. 1992) [hereinafter “ABA”], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter “Assigned Counsel”], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter “Contracting”], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter “Model Act”], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter “ABA Counsel for Private Parties”], Standard 2.1(D).

<sup>3</sup> NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter “ABA Monitoring”], Standard 3.2.

<sup>2</sup> Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

<sup>5</sup> ABA, *supra* note 2, Standard 5-4.1

<sup>6</sup> “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

<sup>7</sup> NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

<sup>8</sup> ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

<sup>9</sup> NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

<sup>10</sup> ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

<sup>11</sup> NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

<sup>12</sup> For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

<sup>13</sup> NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

<sup>14</sup> NSC, *supra* note 2, Guideline 1.3.

<sup>15</sup> American Bar Association Standards for Criminal Justice, *Defense Function* (3<sup>rd</sup> ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

<sup>16</sup> NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

<sup>17</sup> ABA Defense Function, *supra* note 15, Standard 4-3.1.

<sup>18</sup> NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

<sup>19</sup> Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

<sup>20</sup> ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

<sup>21</sup> Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

<sup>22</sup> NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines

III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

<sup>23</sup> NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

<sup>24</sup> ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

<sup>25</sup> NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

<sup>26</sup> ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

<sup>27</sup> ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

<sup>28</sup> NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

<sup>29</sup> NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.





**FOR MORE INFORMATION OR TO ORDER PUBLICATIONS, CONTACT STAFF AT:**

American Bar Association, Division for Legal Services

321 N. Clark Street, 19<sup>th</sup> Floor

Chicago, Illinois 60610

(312) 988-5750

<http://www.abalegalservices.org/sclaid>



## **APPENDIX B**

### **MOTION: PROPOSED RESOLUTION FOR TCDLA TO SUPPORT AN INDEPENDENT STATE COUNSEL FOR OFFENDERS ESTABLISHED PURSUANT TO ABA made by John Convery seconded by Nicole DeBorde – Motion Carries.**

#### **GUIDELINES**

WHEREAS, the State Counsel for Offenders (SCFO) is designated to provide representation for indigent inmates confined in the Texas Department of Criminal Justice (TDCJ);

WHEREAS, SCFO representation includes, inter alia: trial defense representation to indigent inmates indicated for alleged offenses occurring in the Texas prison system; representation in appellate and habeas corpus matters; representation on time credit issues; and, representation in proceedings for the civil commitment of sexually violent predators;

WHEREAS, SCFO provides its services at substantial savings to the taxpayers of Texas;

WHEREAS, SCFO purportedly comes under the direct supervision and control of the Texas Board of Criminal Justice, who also sets the salaries for SCFO's personnel;

WHEREAS, SCFO does not have a line item appropriation by the legislature, though the original intent of the legislature in HB 80 (1990) was for it to have its own line item with the State Comptroller;

WHEREAS, SCFO the Texas Board of Criminal Justice apportions money for SCFO out of the funds appropriated by the legislature for TDCJ;

WHEREAS, SCFO must compete for its funding among other departments and priorities within TDCJ, including the Office of Inspector General (the office that investigates TDCJ Offenders who are indicted for crimes allegedly committed in TDCJ and who, once indicted, are represented by SCFO attorneys);

WHEREAS, SCFO salary structure establishes defense lawyer pay significantly less than prosecuting attorneys at the Special Prosecution Unit, the Attorney General's Office, and other State and County public defender offices;

WHEREAS, SCFO salary for attorneys not being on parity violates the ABA's Ten Principles of a Public Defense Delivery System and the National Right to Counsel Committee's recommendation;

WHEREAS, SCFO salary for non-supervising attorneys is set at three levels so an attorney with three years of experience makes the same as an attorney with substantially more years' experience;

WHEREAS, the Texas Board of Criminal Justice has not provided for any promotions beyond three years of experience, step increases, or increases in pay for SCFO attorneys based on longevity, productivity, performance, or any other criteria;

WHEREAS, the result of the pay structure for attorneys at SCFO perpetuates inadequate attorney salaries, precipitates attorney resignations, and destroys morale within SCFO;

WHEREAS, the failure to adequately fund SCFO has resulted in unacceptable attrition rates in all attorney sections, including excessive turnover rates in all sections;

WHEREAS, the turnover rate has created continued inadequate staffing rates that have seriously and adversely impacted the ability to provide effective legal representation;

WHEREAS, the inability to attract quality attorneys has resulted in SCFO reducing the

required qualifications for attorneys,  
WHEREAS, SCFO has to hire attorneys for the criminal trial section with no criminal trial experience to be assigned a full caseload of enhanced felony cases;  
WHEREAS, SCFO has to hire attorneys for the general legal and immigration section with no immigration law experience;  
WHEREAS, SCFO has to hire attorneys for the appellate section who have no trial experience or appellate experience;  
WHEREAS, SCFO has to hire attorneys with no trial experience to represent inmates accused of being sexually violent predators that face a potential life time confinement in civil commitment;  
WHEREAS, the trial section is appointed to represent clients accused of felony offenses in counties across the State of Texas which requires driving in State vehicles for hours to visit clients who are often reassigned to a new prison unit after the alleged offense occurs;  
WHEREAS, the trial section has to travel to the county of the offense (in many cases hundreds of miles away) for scene visits and court appearances;  
WHEREAS, SCFO will not provide the attorneys in the Civil Commitment Section with funds for overnight travel to meet with clients in person, many of whom are located well outside the Huntsville area;  
WHEREAS, both the high attorney attrition rate and the office policy that the client is represented by the office, not the assigned attorney, has resulted in horizontal representation where many, if not most, inmates have different attorneys representing them throughout their legal proceeding, which practice is discouraged by the American Bar Association;  
WHEREAS, inadequate salaries have been a continuing problem at SCFO for decades;  
WHEREAS; the Texas Board of Criminal Justice not only hires and oversees the Director of the SCFO, but also hires and oversees other TDCJ Department Directors, including the Office of Inspector General, ;  
WHEREAS, the Texas Board of Criminal Justice does not require any specific years of experience representing criminal defendants or commitment to indigent representation;  
WHEREAS, the Texas Board of Criminal Justice allows candidates from TDCJ and the Parole Office to qualify for employment as the Director of SCFO;  
WHEREAS, the Director for SCFO is considered a Division Director in TDCJ and attends TDCJ Executive Committee Meetings sharing information about office policies, caseload, case management, and other internal issues with TDCJ and the Texas Board of Criminal Justice;  
WHEREAS, the Director of SCFO has presented legal motions and orders for the court to the TDCJ General Counsel Director for that directors approval before allowing them to be filed in court;  
WHEREAS, this level of comingling and comfort with executives in TDCJ allows the Texas Board of Criminal Justice and TDCJ to interfere with attorney client relationships and legal strategies;  
WHEREAS, a SCFO attorney was forced to resign from SCFO in order to continue representation of the indigent client after she was directed to uncommit herself from representing the client and the Director of SCFO testified in State District Court that the former SCFO attorney could provide more legal services for an indigent client in pro

bono representation than SCFO attorneys could provide for the same client;  
WHEREAS, the Office of Inspector General (OIG), who also conducts investigations into criminal matters of SCFO clients indicted for criminal offenses in prison, has investigated SCFO employees;  
WHEREAS, OIG investigated and conducted the disciplinary hearing of a SCFO attorney Section Chief and recommended termination, which ultimately resulted in the attorney's resignation;  
WHEREAS, had the attorney who was disciplined by OIG attempted to defend his representation he would have divulged attorney-client information to OIG, who had also investigated the client for the alleged criminal offense that was the basis of the attorney-client relationship;  
WHEREAS, OIG personnel and investigator office spaces are adjacent to, and in the same building as, SCFO (and were moved into those spaces during a prior investigation of a SCFO employee);  
WHEREAS, the ongoing investigation and the shared location with OIG Investigators in SCFO work environment has an adverse impact on morale within SCFO;  
WHEREAS, the location of OIG Investigators in office spaces adjacent to SCFO creates at least an appearance that privileged attorney client information may be jeopardized;  
WHEREAS, OIG's location adjacent to SCFO employees and privileged files, their investigation of SCFO employees, and their disciplinary action against an SCFO attorney, seriously undermines the client confidence in the sanctity of the attorney client privilege;  
WHEREAS, and considering the foregoing, there is not only an appearance of a conflict of interest, but an actual conflict of interest in having the Texas Board of Criminal Justice as the oversight organization for SCFO;  
WHEREAS, there is a prosecutorial counterpart to SCFO criminal trial and civil commitment sections, which counterpart is known as the Special Prosecution Unit (SPU);  
WHEREAS, SPU does not come under the supervision of the Board of Criminal Justice, but is funded by a Governor's Grant;  
WHEREAS, the oversight of SPU rests with a Board of Texas Criminal District Attorneys; and  
WHEREAS, attorneys at SPU make a substantially higher salary than attorneys at SCFO and are eligible for regular salary increases;  
WHEREAS, attorney attrition rates at SPU are substantially less than at SCFO;  
WHEREAS, all of the aforementioned has created a climate that is not conducive to professional and zealous defense representation, client trust, or the appearance of fairness;  
WHEREAS, the structure and operations for SCFO does not meet the recommendations of the American Bar Association's Ten Principles of Public Defense Delivery System and the best practices determined by the Texas Indigent Defense Commission;  
WHEREAS, many of the aforementioned conditions have been ongoing for many years; and,  
WHEREAS, TCDLA has previously approved a "Resolution to Support an Independent State Counsel for Offenders Established Pursuant to ABA Guidelines, and to

Encourage TCDLA Members Not to Accept Employment with State Counsel for Offenders Until Such Office is Created;

BE IT THEREFORE RESOLVED THAT TCDLA, by and through its Board of Directors, urges the reorganization of SCFO to be independent of the Texas Board of Criminal Justice and TDCJ, pursuant to guidelines recommended by the American Bar Association. BE IT FURTHER RESOLVED THAT after this reorganization, the reorganized entity be directed by a person who has significant experience of at least ten years of representing criminal defendants or in indigent representation

**By Laws, *Adam Kobs and Coby Waddill***

Emmitt Harris recognized and congratulated Coby Waddill for being elected judge in Denton County. The board gave applause.

Adam and Coby solicited any amendments or modifications to the current board. Adam distributed copies and Melissa will send on the board listserve. Review the suggested changes. All are in infancy stage. Timeline: board will need to vote in March for them to be presented to membership within 75 days of the annual meeting.

1. Board of Directors: Each past president of the Association shall have the right to be heard on any issue before the Board.
2. Nominations Committee: Each member shall be an attorney who is a current member of TCDLA and has a minimum of five years of practice in criminal law.
3. Nominations Committee: member in good standing may seek election for the position as ~~an officer, other than President~~ Secretary, director

**Amicus, *Angela Moore***

Angela gave an update on the recent Amicus activities. Contact Angela if you have a blood draw going in front of the Court of Criminal Appeals. Bring any amicus matter you have to the committee. The committee has included Patricia Cummings as General Counsel for input. Any issues the committee cannot agree on they will bring to the executive committee.

**Strike Force, *Nicole DeBorde***

Strike force was busy this past quarter. The committee has gotten involved with Montgomery County, they were unaware of how broken the system was. The committee will rewrite the purpose and send to office so the website can be updated.

**DWI Committee, *Mark Thiessen***

Thanked everyone that spoke on the Stuart Kinard Advanced DWI seminar thanked Michael Gross, Adam Kobs and Mark Stevens for being course directors and doing a fantastic job. Mark also thanked board members who came out and supported the seminar.

Mark thanked Patricia Cummings, Larry Boyd, Grant Scheiner, Doug Murphy, Gary Trichter, and Troy McKinney regarding ALR Witness fee issues. The Intoxlyizer 9000 has come out and will be used summer 2015.