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CRIMINAL LAW

REPLACING LAWYERS: A CASE STUDY OF THE SEQUENTIAL REPRESENTATION OF CRIMINAL DEFENDANTS*

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INTRODUCTION

This article examines a matter of great public concern: the replacement of one defense lawyer by another in the course of providing legal services to defendants in criminal felony cases in Chicago. Replacement may adversely affect the quality of legal service by fragmenting it among lawyers whose work is uncoordinated. Communication of case information from the initial lawyer to his successor may not occur at all[1] and subsequent counsel may have to duplicate work and reconstruct the history of the case from various written records[2] and from his client's recollection. Information useful to trial preparation and strategy, such as observations of witnesses' demeanor when testifying in pre-trial proceedings,[3] off-the-record conversations between a previous counsel and the prosecutor,[4] and witness interviews[5] may be other-

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[1] Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 543, 549 (1970).

[2] In some jurisdictions it may be more difficult for successor counsel to determine what occurred in a case prior to his representing a defendant without the cooperation of prior counsel, since no court transcript may be made of early proceedings such as the preliminary hearing. *See* D. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA 133 (1974) and Harris, *The Annals of Law in Criminal Court-I*, THE NEW YORKER, April 14, 1973, at 52. In such jurisdictions, the successor lawyer is dependent upon oral communication or written transmittal of the initial lawyer's notes or his tape recording of the preliminary hearing to learn who testified or what was testified to by witnesses.

In the jurisdiction studied, Cook County (Chicago), testimony at the preliminary hearing was preserved by a court reporter at each court appearance of the defendant. Thus, trial court counsel were not dependent on communications from the branch lawyers to learn about what was testified to at the preliminary hearing stage.

[3] Pre-trial proceedings, such as the preliminary hearing, produce an opportunity for the assessment of witnesses who testify. The lawyer evaluates the prosecution's and his own witnesses in a public situation under the pressures of a court proceeding and cross-examination. Assessments are made concerning expressiveness and coherence of speech, appearance and manner of presentation, and the potential of confusion and contradiction under cross-examination pressures. Assessments are also made about the complainant's likely availability at trial in light of his age, health, and apparent willingness to pursue the case further as indicated by his appearance at each court date. These observations may not be contained or apparent from transcripts of court proceedings and are the type of information which may be lost if not communicated by the initial lawyer to his successor.

[4] In the course of representation, a defense lawyer may be told or may observe things of use to him in preparing his client's case. One source of information about the case is plea negotiation. During these conversations, the prosecution may discuss the strength of its case, including the availability of witnesses at trial, and may touch on subjects which round out the defense's own picture of the strengths and weaknesses of his case. These off-the-record conversations between defense lawyer and prosecutor are lost to a successor lawyer unless communicated by the earlier counsel.

[5] On entering a criminal case a successor lawyer is obviously not prevented from reinterviewing the defendant and witnesses or otherwise pursuing his own case investigation. However, a major problem facing the lawyer is whether in his interviews or investigation he is able to reproduce the same information about the case as the previous lawyer. Both defense and state witnesses may be reluctant to spend time being reinterviewed by the successor lawyer. Moreover, memories fade and new interviews may lack the quality and depth of earlier interviews. Reinvestigation may not uncover the same leads. The identification of persons on the scene or living near where the event took place or of others knowledgeable about the case may be difficult. The setting itself may be disturbed, making it impossible to take relevant photographs or to provide an opportunity to familiarize oneself

wise unavailable to trial counsel if uncommunicated by an earlier lawyer in the case.[6]

Uncommunicated information is not the only problem caused by replacement. In addition, the lack of coordination of a succession of lawyers' work may result in no lawyer taking responsibility for pursuing preparation of portions of a case.[7] Moreover, an initial lawyer, who does not expect to be a defendant's trial counsel, may fail to assume necessary case preparation responsibilities at the pre-trial stages.[8] Gaps in legal representation may also occur between the time of the withdrawal of one lawyer and the appointment of his successor, leaving a defendant without effective assistance of counsel at critical stages of his case.[9]

visually with the setting as it was during the event. Thus, the cooperation of the initial lawyer is needed in some cases to overcome these problems of interviews and investigation upon late entrance to a criminal case.

[6] Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. Rev. 916, 919-20 (1971).

[7] For example, in at least one extreme case involving a public defender's office, lack of coordination of the work of public defenders assigned to different stages of a case resulted in no lawyer taking full responsibility for the out-of-court preparation (the contact of witnesses) in the case. This led Judge Frankel to conclude that the defendant had been denied the effective assistance of counsel. United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971).

[8] The legal literature is abundant with references to the trial preparation functions of the preliminary hearing, which include "pinning" prosecution witnesses down to a statement and "discovery" of the prosecution's case. J. Casper, American Criminal Justice: The Defendant's Perspective 52 (1972); D. Karlen, Anglo-American Criminal Justice 143-48 (1967); F. Miller, Prosecution: The Decision to Charge a Suspect With a Crime 64-82, 110-36 (1969); O. Rosengart, Busted: A Handbook for Lawyers and Their Clients With Reference to the New Criminal Procedure Law 49-60 (1972); Graham & Letwin, *supra* note 6, at 916-31; Wald, *Poverty and Criminal Justice*, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 143 (1967); Note, *Metropolitan Criminal Courts of First Instance*, 70 Harv. L. Rev. 320, 326-28 (1956).

In the Chicago criminal courts, some private lawyers will only handle the preliminary hearing stage in felony cases and if a case is bound over for trial will withdraw from the case. *See* text at notes 50-51, *infra*. Other private lawyers interviewed suggest that these "preliminary hearing" lawyers do not prepare cases for a possible future trial, and thus the beneficial uses of the preliminary hearing for trial preparation are left undeveloped. One private lawyer vividly describes the practices of "preliminary hearing" lawyers and the problems they create for the preparation of cases for the trial court stage:

> These lawyers are hustlers, going for the buck. It's a good way to hustle and get money. If an attorney is able to get two clients that's $300 a day—he's making good money. It's a job with no responsibilities, no continuances. You can dispose of a case quickly. These attorneys go to court around seven in the morning and the bailiff goes in and tells the prisoners that there's an attorney that will take their case. The attorney talks to the defendant and asks him what money he has or he will approach the relatives in the hallway of the courthouse. There are consequences for the defendant. The preliminary hearing is a crucial stage; without preparation, many issues in a case are not explored and the defendant suffers.

Interview with private defense lawyer, September 28, 1972.

Other practices, such as waiver of the preliminary hearing by a defender who will not pursue the case beyond the preliminary hearing, have been observed. This may result from a lack of interest in trial preparation of a lawyer who will not be pursuing the case beyond the preliminary hearing stage. Katz, *supra* note 1, at 549.

Where two or more lawyers handle a case over time, there also exists the problem that one lawyer will engage in a different case strategy from the one which the trial court lawyer would have employed. A preliminary hearing may be waived where the first lawyer considers a plea of guilty appropriate at the trial court stage. This may hamper a trial court lawyer's defense plans, such that:

> [T]wo deputies may have different notions about how the defendant should plead. The preliminary hearing deputy may waive the preliminary hearing because he believes the defendant should plead guilty in the superior court. And the trial deputy may wish the strength of the district attorney's case had been pushed at the preliminary hearing before advising the defendant to plead guilty. If the defendant waives the preliminary hearing by making a judicial confession before the committing magistrate the trial attorney is put at a special disadvantage since the prosecution can introduce the confession in evidence against the defendant should he plead not guilty in the superior court.

Note, *Representation of Indigents in California–A Field Study of the Public Defender and Assigned Counsel Systems*, 13 Stan. L. Rev. 522, 543 n.137 (1961).

[9] A gap in legal services to indigent defendants in the period immediately after sentencing is reported to exist in federal criminal cases, resulting in defendants being left to take steps to effect an appeal without legal assistance. Furthermore, after final action has been taken in the court of appeals, indigent defendants once again are often left without assistance of counsel in deciding whether to file a petition for certiorari and in preparing that petition if they decide to file one. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 787-91, 796-99 (1961).

Similarly, between the preliminary hearing stage and arraignment in the trial court, several actions are likely to be required of counsel (advice at the grand jury, motions for bail), yet counsel appointed at the preliminary hearing stage may have unofficially withdrawn from the case leaving the defendant without legal representation. In at least one case, a court has reacted negatively

Replacement of lawyers may also make a difference to the clients' experience of their cases. Persons receiving continuous service from other kinds of professionals are reported to be more satisfied with their services than those receiving fragmented services from different providers.[10] Recipients of fragmented services often feel like "an object to be processed"[11] or like a "case."[12] Successive counsel thus may severely limit the scope of the attorney-client relationship.[13] For example, in situations where indigent defendants are served by different public defenders at different stages of the case, defendants have been reported to experience their cases as unconnected fragments, since each time the defendant appears in court he encounters a different lawyer "who is only concerned with the particular segment of the matter to be dealt with that day."[14]

Research regarding the activities of the legal profession has paid little attention to the subject of successive representation.[15] Indeed, some commen-

to a defense lawyer who represents defendants for such a truncated appointment. In Jones v. United States, 342 F.2d 863, 870 (D.C. Cir. 1964), the defendant Short had been appointed counsel by the committing (preliminary hearing stage) judge. Without notice to the defendant's lawyer, the defendant was taken before the grand jury where he acknowledged previous confessions. The government prevented Short from consulting with his lawyer by not informing counsel that Short was to be questioned. In addition, it appears that counsel may have felt that his responsibilities to the defendant terminated at the preliminary hearing stage; the defendant never saw this lawyer again, although the lawyer had never obtained leave of court to withdraw from the case, or given notice to Short. The court held that the absence of counsel at this crucial time was a defect of constitutional proportions. In describing the continuing duties of the lawyer, the court stated:

> Any practice of assigning a lawyer for the few moments the accused is before the magistrate and no more would mock the requirement of assistance of counsel. The appointment must continue until the prosecution is terminated or other counsel is appointed, which should normally be before arraignment. Except in rare emergencies no lawyer should be asked to accept a truncated appointment. There is no contention that Short's counsel, either with or without notice to Short, obtained leave of court to withdraw. Unauthorized withdrawal cannot be tolerated.

Jones v. United States, 342 F.2d 863, 870–71 (D.C. Cir. 1964).

[10] One experimental study evaluating two methods of organizing ambulatory care in a pediatric clinic, found that patients expressed greater satisfaction with a clinic designed to provide continuity of physician care, than with a clinic which assigned a patient to whatever physician was available at the time of his visit. Becker, Drachman, & Kirscht, *A Field Experiment to Evaluate Various Outcomes of Continuity of Physician Care*, 64 AM. J. PUB. HEALTH 1062, 1066–67 (1974).

Providers of professional services are also thought to be more satisfied in a system of continuous services. One study reported that on every dimension of satisfaction studied, staff in the clinic setting providing continuous services reported more satisfaction than their counterparts in the traditional clinic setting where patients were linked to the first available physician. *Id.* at 1064–65. In another study, the researchers reported that the most important determinant of physician and ancillary medical personnel satisfaction was whether such personnel worked in a clinic where patients see the same physician on return visits. Caplan & Sussman, *Rank Order of Important Variables for Patient and Staff Satisfaction with Outpatient Service*, 7 J. HEALTH & HUMAN BEHAVIOR 133, 136 (1966).

It is also suggested that providers of services may be more satisfied when they are able to follow the course of a case over its various stages because such work arrangements help them see themselves as professionals with individual clients. Note, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 451 (1969). Lawyers may have lower morale in stage representation systems. S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN, 220 (1976). Other researchers suggest that public defenders may experience meaninglessness in their work due to its fragmentation when they are assigned to one court to handle only one stage of criminal cases and are unable to obtain an overall view of the system. Platt & Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 ISSUES IN CRIMINOLOGY 1, 26–27 (1974).

[11] Casper, *Non-Professional Participants in Criminal Justice*, in THE COMMISSION ON A NATIONAL INSTITUTE OF JUSTICE, QUEST FOR JUSTICE 77, 81 (1973).

[12] Schlesinger, Davis & Milliken, *Out-Patient Care—The Influence of Interrelated Needs*, 52 AM. J. PUB. HEALTH 1844, 1848 (1962).

[13] Katz, *supra* note 1, at 550. *See also*, O'Brien, Pheterson, Wright, & Hostica, *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 301 (1977).

[14] A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 173 (1976).

Sequential representation may cause the defendant to become confused by the process of prosecution, resulting in the alienation of the defendant in the process of finding him guilty. A variety of important consequences such as resistance to the rehabilitative goals of the system may follow.

[15] Currently this important area of the delivery of legal services is extremely underdeveloped in terms of both the availability of basic statistical data on the subject and the development of explanations for its existence and frequency. Some limited data on replacements in criminal cases in Los Angeles are reported from *Public Hearing of Assembly Committee on Criminal Procedure in Los Angeles*, Nov. 13, 1959 in Note, *Representation of Indigents in California—A Field Study of Public Defender and Assigned Counsel Systems*, *supra* note 8. It is reported that in Los Angeles County, 25% of the defender's clients retain counsel following the preliminary hearing and an equivalent number of cases are turned over to the defender's office by retained counsel. *Id.* at 547, n.164.

tators have even suggested that replacement is unlikely to occur frequently in the legal profession.[16] "Unitary" representation (where one lawyer represents a defendant through the various stages of a case) is generally assumed to be the method by which legal services are provided to defendants in the United States.[17] Occasionally, literature on lawyers does describe instances of replacement precipitated by lawyers or their clients,[18] but these instances have never prompted serious investigation into the problem.

Criminal court files are a useful resource by which sequential professional services can be studied: such files are centralized, accessible and possess relatively complete information on who has provided legal services in a case. The data presented in this paper, derived largely from such files, should challenge the notion that defense lawyers usually serve clients for the entire period of the prosecution of the case. Statistics indicate that in about three-fifths of the felony cases reaching the trial courts in Chicago, defendants are represented by different lawyers in the branch and trial courts.[19] Private lawyers are involved (solely or together with public defenders) in slightly under one-half of these sequentially represented cases,[20] and sequential representation occurs in about one-half of all cases reaching the trial courts in which private lawyers participate.[21] After presenting data on the extent, patterns, and sources of replacement, the paper considers factors which may affect the extent of cooperation among lawyers sequentially representing defendants and discusses ethical and legal problems concerning the replacement of lawyers in a case. The article concludes with suggestions for future research.

Data Source and Methods

The Circuit Court of Cook County, Illinois, the jurisdiction which encompasses Chicago, includes two tiers of criminal courts known as "branch" and "trial" courts. Judges in the branch courts hear preliminary matters (such as bail and preliminary hearings) in felony cases, and all stages before appeal in misdemeanor cases. If felony charges are not disposed of in the branch court, the defendant is held over for trial and his case assigned to a trial court. The tiered structure of Illinois courts is also found in most state court systems in the United States.[22]

The data presented in this paper describe the representation of felony defendants by one defense lawyer in the branch court and a different lawyer in the trial court. The general descriptive materials about this phenomenon were obtained from unstructured interviews with public defenders and private defense lawyers. Public defenders from the five branch courts handling the major adult felony offenders in Chicago were interviewed, as were four public defenders working either in a trial court or as supervisors in the main office. The description of private defense work was based on interviews with forty private lawyers, who described their cases and the characteristics of their own and other lawyers' law practices. As the research proceeded, lawyers were selected for interviews who were observed in court or were reported by other lawyers to practice in ways previously not examined (*e.g.*, practiced only in the branch courts, specialized in representing defendants charged with particular offenses). These extended interviews and observations were supplemented by discussions with other private defense lawyers, who were interviewed briefly in the courts, over lunch, and in rides to and from the courthouse.

The statistical research involved examination of the court files of defendants bound over to the grand jury from October through December, 1973, from the five major branch courts in Chicago in which felony cases are prosecuted.[23] Data on the

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A recent study which included both criminal and civil matters reported that in those cases in which lawyers were used, only 4% (of all consultations and contacts between a respondent and any one lawyer about any one matter) involved a matter previously taken to another lawyer. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 219, n.28 (1977).

[16] D. Rueschemeyer, Lawyers and Their Society 126–27 (1973).

[17] D. Karlen, *supra* note 8, at 32.

[18] L. Auchincloss, The Partners 93–110 (1975); D. Rosenthal, Lawyer and Client: Who's in Charge? 47–52 (1974); P. Schrag, Counsel for the Deceived: Case Studies in Consumer Fraud 88 (1972); A. Wood, Criminal Lawyer 45 (1967).

[19] *See* Table 1. 57.5% of the cases were sequentially represented.

[20] *See* Table 1 (b)–(d). Private lawyers are involved in about 44% of all sequentially represented cases.

[21] Of all cases reaching the trial court in which private lawyers participate, 48% are sequentially represented. Specifically, private lawyers provided unitary representation in 223 cases and were involved in sequential representation in 206 cases (Table 1, (b)–(d)).

[22] L. Katz, L. Litwin, & R. Bamberger, Justice is the Crime: Pretrial Delay in Felony Cases 132–33 (1972).

[23] During the three months in which data were compiled, we gathered: (a) information about cases bound over to the grand jury which were old enough at the time

extent of replacement in criminal felony defense work and on the patterns of involvement of private and public lawyers in sequential representation, were derived from lawyers' appearance slips which had been filed with the court and placed in the court files.[24] For purposes of this study, measurement of replacement is limited to identifying the participation of different defense lawyers at the conclusion of the proceedings in the two courts (branch and trial) through which each case moves. It should be noted that in some cases, more than one lawyer filed appearance slips in the branch court or in the trial court. Thus, the data on replacement of lawyers based solely on differences between the branch and trial courts underestimate the total amount of replacement taking place in criminal felony cases.

of the statistical research so that most of them had been disposed of in the trial court, and (b) information about cases during a time when cases in the branch courts were observed and criminal defense lawyers were interviewed.

A final updating of the files took place in July, 1975. At the completion of the file study, 86% (698 of 810 cases) had been disposed of in the trial court. Of the 112 uncompleted cases, 70 were already sequentially represented cases. In 19 of these cases, the same lawyer who last represented the defendant in the branch court was still representing the defendant in the trial court. In 23 cases, because of missing information, it is unknown whether the cases are sequentially or unitarily represented cases. Because of the uncompleted cases, the frequency of replacement between the branch and trial court may be slightly higher than reported in Table 1.

This study excludes "direct indictment" cases in which prosecution was begun by grand jury indictment and thus where the defendant would have had his case originally docketed in the trial rather than branch court. No figures are kept on the number of direct indictment cases, but they are reported by prosecutors to be a very small fraction of all grand jury indictments.

In examining cases prosecuted in both the branch and trial courts, this study focuses on only a small segment of all felony cases since felony cases are frequently winnowed out in the Chicago branch courts by dismissals, discharges and pleas of guilty. J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 191 (1977); McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968).

[24] In the Circuit Court of Cook County, a defense lawyer is required to file an "appearance slip" indicating that he is counsel for the defendant. The form has spaces available for the defendant's name, the offense charged, the identifying court case number, the lawyer's name, address and telephone number, and the date the appearance slip was filed in the court. Defense lawyers are required to fill out an appearance slip once in the branch court and again in the trial court. The appearance slips become a permanent part of the court file and are not removed by the court when one lawyer succeeds another as the counsel of record in a case. The court file is considered a public document and its contents may be examined by anyone at any time, either before or after the disposition of the case.

EXTENT, PATTERNS AND SOURCES OF REPLACEMENT

Table 1 shows that in about three-fifths of all felony cases which reach the trial court stage, the lawyer who last represented the defendant in the branch court was not the same lawyer who last represented the defendant in the trial court. Four patterns can be described in cases represented sequentially: by private lawyers from different law offices, by two different public defenders, by a private lawyer at an earlier stage and a public defender at a later stage, and by a public lawyer first and then a private lawyer.

Of the sequentially represented felony cases reaching the trial court level, public defenders participated at one time or another as counsel in 82% of the cases and private lawyers in 44% of the cases. (*See* Table 1(a) (b) (c) (e) (f), and Table 1(b)-(d), respectively). In about one-third of these cases, defendants were represented by one public defender in the branch court and another in the trial court. Defendants in another 16% of the sequentially represented cases initially had a lawyer from the public defender's office and subsequently, in the trial court, had private counsel. In another 10% of these cases, private lawyers who had appeared in branch court were replaced in the trial court by a public defender appointed to represent the defendant. Finally, in about 19% of the sequentially represented cases, defendants were represented by different private lawyers in the branch and trial courts.

Public Defender/Public Defender

Approximately one-third of the sequential representation is attributable to the particular organization of the delivery of legal services to indigents by the Cook County Public Defender Office.

At the beginning of this study,[25] the work of public defenders in all felony cases was divided into six stages with particular lawyers assigned on a continuing basis to only one stage. (*See* Model 1). First, the public defender's office assigned lawyers to the jail in order to identify immediately those persons who would probably be represented by the

[25] During the study, lawyers were assigned to individual cases rather than stationed in a courtroom in homicide and rape cases. These lawyers represented defendants charged with these offenses from the branch court stage through disposition of the case in the trial court. Post-conviction motions and appeals were handled by other lawyers.

TABLE 1

EXTENT OF SEQUENTIAL AND UNITARY REPRESENTATION IN CRIMINAL FELONY CASES, CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Cases (by Defendant/Indictment)	Number	Percent
I. Sequential Representation		
(a) Public defender to public defender[a]	153	18.9
(b) Public defender to private lawyer	74	9.1
(c) Private lawyer to public defender	46	5.7
(d) Private lawyer to private lawyer	86	10.6
(e) Unknown to public defender[b]	106	13.1
(f) Public defender to unknown[c]	1	.1
Total	466	57.5
II. Unitary Representation	223	27.5
III. Other Representation[d]	2	.3
IV. Trial Level BfW's[e]	14	1.7
V. Incomplete Information[f]	105	13.0
Grand Total	810	100.0

Source: Statistics were compiled by recording the names of defendants and the complaints filed against them bound over to the grand jury from Branch Courts 24, 25, 44, 57 and 66 during October, November, and December, 1973. From this information the relevant indictment files were located and statistics about the branch court and trial court lawyers were compiled for each defendant in each indictment.

[a] Murder and manslaughter cases were sequentially represented by the public defender's office at the time these data were collected.

[b] Appearance slips were missing or never filed in the branch court in these cases. Regardless of whether the branch court lawyer was a public or private lawyer, all cases represented in the trial court by the public defender are counted as sequentially represented cases and are included in this category since the public defender's office assigned different defenders to the branch and trial courts.

[c] Appearance slip was missing or never filed in the trial court in this case.

[d] Defendants represented themselves at the branch or trial court.

[e] BfW's are cases in which bond forfeiture warrants were issued by the court after defendants free on bond pending trial failed to appear in the trial court.

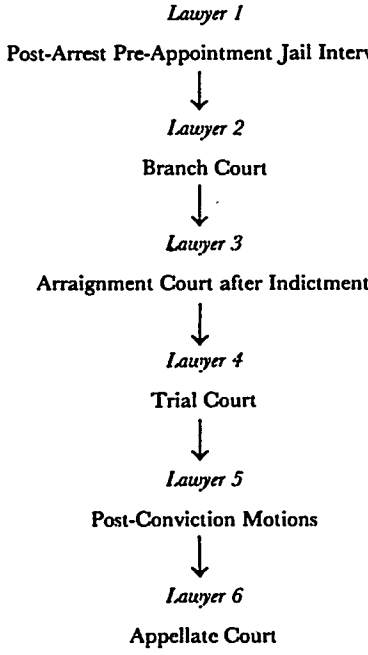
[f] This includes ninety-nine cases represented by private lawyers in trial courts, but for which branch court information is missing. In six cases no trial court information was available.

office and to conduct early interviews and investigation. At the time of the jail interview, the public defender had not been formally appointed to the case. The interview information was entered on a file and was sent to the public defender assigned to the branch court in which the case would be docketed. At the branch court, a public defender was appointed to the case to handle bail motions, preliminary hearings, plea negotiations, and sometimes pre-trial motions to suppress illegally obtained evidence. If there was a finding of probable cause at the preliminary hearing, or if the preliminary hearing was waived by the accused, the defendant was bound over to the grand jury. If indicted, he was represented by a different public defender at an arraignment before a judge who assigned cases to the trial courts. In the trial court, yet another public defender represented him. If he were convicted and sought post-conviction remedies or an appeal, he was represented by still other public defenders at these two stages.

The Chicago public defender's office studied is typical in its mode of organizing and providing legal services.[26] Stage representation is in effect in many other metropolitan areas in the United States with public defender offices. In the cities with stage representation, the division of work among defenders generally parallels the structure of the court system.[27] A number of factors have contributed to this. Historically some judicial systems, including

[26] Wice & Pilgrim, *Meeting the Gideon Mandate: A Survey of Public Defender Programs*, 58 JUDICATURE 400, 406-07 (1975). For examples of stage representation in public defender offices in other cities, *see*: J. CASPER, *supra* note 8, at 103; J. EISENSTEIN & H. JACOB, *supra* note 23, at 72–77; Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 636, 649 (1971); Note, *supra* note 10, at 449–51.

[27] For example, in Philadelphia, Los Angeles and Baltimore, public defender offices parallel the tiered court systems. *See* J. EISENSTEIN & H. JACOB, *supra* note 23, at 72–77; Graham & Letwin, *supra* note 6, at 919–20, and note 26, at 649; Note, *supra* note 10 at 449–51.



Model 1. Sequential representation of felony cases by the Cook County Public Defender Office, Cook County, Illinois.

Cook County, were divided into city and county court systems which handled preliminary and trial matters in felony cases respectively. City and county defender offices were financed separately and existed as separate organizations to handle the work in one or the other court systems. Subsequently these offices merged, sometimes as the court systems themselves became integrated,[28] but the original structure of the offices was perpetuated in the new organization.[29]

In addition to distinct city/county court systems as a source of the parallel organization of public defender offices, the judiciary has participated more directly in this process. Judges have often demanded that lawyers for indigents be assigned to their courts for their convenience in processing large numbers of indigent defendants.[30] Moreover, the role of the judiciary in shaping the mode of service in defender offices into sequential representation has taken other forms. For example, in one jurisdiction, where there was no defender office, judges at each level of the lower court system created public defender positions and filled them.[31]

The cost of providing continuous services by defender offices operating in a tiered court system probably sustained these arrangements in the older defender organizations and elsewhere stimulated similar parallel structuring of defender offices.[32] The assignment of public defenders to handle individual felony cases on a unitary basis is costly in such a court system. Unitary representation means "dead time" for a public defender who must wait in court for his cases to be called and who must consume time traveling between courts.[33] This compares to the advantages of staying in one courtroom and handling all of the cases that come through it. Given limited legal resources, a tiered court structure makes a similarly tiered organization of the public defender's office more efficient.[34]

Judicial Administration of the American Bar Association).

[28] This occurred in Cook County, when the city and county public defender offices merged after city and county courts were unified into the Circuit Court of Cook County.

[29] For instance, the parallel development of the organization of the public defender's office in Los Angeles with the court system was as a result of city and county financing of separate public defender offices for those two divisions of local government. Historically, the city defenders handled preliminary hearings in felony cases and county defenders the subsequent stages of prosecution. Although today these offices have merged, the Los Angeles County Public Defender Office handles all stages of felony cases, lawyers' assignments to work in city or county courts (with felony cases being prosecuted consecutively through both courts) reflect the earlier parallel organization. *See* Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 726-30 (1961); Graham & Letwin, *supra* note 26, at 649-51; J. HOLBROOK, A SURVEY OF METROPOLITAN TRIAL COURTS: LOS ANGELES AREA 84, 86 (1956) (Prepared for the Section of

[30] Historical discussion of the New York Legal Aid Society indicates that the Society developed patterns of allocating defense counsel in response to the demands of magistrates and others that lawyers be assigned to handle the large volume of cases of indigents in particular courts. H. TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY, 1871-1951, at 82-90 (1954). In recent years, however, Legal Aid assigns lawyers to represent defendants from beginning to disposition of their cases. Gassler, *The Proposed New York City Public Defender Office: An Interview with Judge Harold J. Rothwax*, 7 COLUM. HUMAN RIGHTS L. REV. 417, 422 (1975).

[31] Newman, *Prosecutor and Defender Reform: Reorganization to Increase Effectiveness*, 44 CONN. B. J. 567, 569-71 (1970).

[32] S. KRANTZ, *et. al.*, *supra* note 10, at 219; Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 172-73 (1974).

[33] A. ROSETT & D. CRESSEY, *supra* note 14, at 120.

[34] The apparent absence of financial constraints on the Detroit public defender's office as contrasted to offices in other metropolitan areas may account for this city's delivery of continuous legal services in a tiered court structure. In Detroit, the office does not receive a "fixed budget", as do other public defender offices. Instead, the office is appointed and paid on a case-by-case basis. This method of financing would, for example, permit them financial aid to operate unitarily regardless of the possi-

Combination of Public Defender and Private Lawyer Services

Approximately 25% of all sequential representation cases involve representation provided by a combination of private and public legal services.[35] In 16% of the sequentially represented cases, a lawyer from the public defender's office initially and a private lawyer (privately retained or appointed) subsequently represented the defendant.[36] A number of reasons for this pattern may be suggested.

First, some defendants prefer to wait until the trial court stage before hiring a private lawyer.[37] The point in a case at which a private lawyer is retained may be in part a function of the way defendants view the seriousness of their cases. Some private lawyers suggest that clients often see the seriousness of their case, and hence, their need for a private lawyer, at each progressive stage of the prosecution. A public defender is used for preliminary matters in the branch court, and if the defendant is held for trial, a private lawyer will be hired.[38] Client choice to utilize the public defender in this manner also exists because the financial resources of defendants are not always closely examined at the branch level. A defendant who appears in the branch court without a private lawyer may be asked by the judge if he can afford a lawyer. A decision to appoint the public defender is often based solely upon the defendant's reply and the amount of his bond. If the bond is a small amount or if the defendant can successfully argue that the money posted did not belong to him, the public defender may be appointed. Other times, the public defender will be appointed without a judge reviewing the defendant's financial situation, simply as a means of getting a case off the court's call.

Another reason for this pattern may be that in the latter stages of cases, defendants are financially able to retain private counsel; for example, the pooling of resources of relatives[39] and friends for private legal services may occur as the case proceeds. The fact that the public defender's office provides representation only on a sequential basis may itself be a factor leading clients to shift from the public defender to private representation. If the public defender's office provided unitary representation, defendants might be more likely to choose continuous representation by the defender appointed to represent him in the branch court, rather than exploit the resources of family and friends to hire a private lawyer for trial court work. The Cook County Public Defender's Office switch in 1974[40] to unitary representation in homicide cases and the subsequent growth in the proportion of defendants remaining with the defender office after the branch court, is thought in part to be a result of this preference of defendants.[41]

In 22% of the cases represented by the public defender in the branch court and private counsel in the trial court, the trial court judge had ap-

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bility of an expanding caseload. *See generally,* on the court and the manner of providing public services in Detroit, J. EISENSTEIN & H. JACOB, *supra* note 23, at 155-60.

[35] *See* Table 1 (b) (c).

[36] In 16 of the 74 cases in which there had been a public defender in the branch court and a private lawyer in the trial court, the private lawyer had been appointed by the court to represent an indigent defendant. In 5 cases there was no information.

In two of the branch courts, Branch Courts 24 and 44, the public defenders almost never filed their appearances in any case. The public defender's office case files provided some information about whether their office represented a defendant in the branch court, but usually these files existed only in cases in which a public defender was appointed to represent the defendant at the trial level. If a public defender had represented the defendant in the branch court and was not appointed in the trial court, there were no files prepared containing branch court informations: these had been thrown away by the public defender office. As a result, the statistics probably underrepresent the number of cases represented by public defenders in the branch court, and specifically underrepresent the number of cases represented by public defenders in the branch court and then represented by private lawyers in the trial court. A large portion of the information missing (in Table 1) were cases in Branch Courts 24 and 44. We have not assumed, however, that where information is missing at the branch level these were cases all represented by the public defender. A branch court judge who is lax about the filing of an appearance slip by a public defender may also have been lax about private lawyers filing their appearance slips.

[37] In 58 of the 74 cases in which the defendant was represented by the public defender in the branch court and by a private lawyer in the trial court, the private lawyer was retained rather than appointed by the court to represent the defendant.

[38] This initial usage of the public defender was reported to occur in some cases even where the private lawyer regularly handled criminal matters for a particular individual.

[39] It has been reported elsewhere that it is not uncommon in criminal cases for the relatives of a defendant to contribute toward a lawyer's fee. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession,* 1 L. & SOC'Y REV. 15, 27-28 (1967).

[40] *See* note 25 *supra.*

[41] This phenomenon has not been systematically studied. Other explanations, for example inflation, may account for the rising proportion of defendants represented at the branch court who are also represented by the office at the trial court stages.

pointed the private lawyer to serve with compensation being provided by the state.[42] This usually occurs because of a conflict of interest on the part of the public defender's office. For example, the office may represent two or more co-defendants who plan to assert antagonistic defenses.[43]

The reverse pattern of replacement, a shift from private legal representation in the branch court to public defender representation in the trial court, occurs in about 10% of all sequentially represented cases. This probably reflects a situation where defendants who can afford to hire private lawyers to represent them at the early stages of a case are unable to finance these services through the trial stage, resulting in the appointment of the public defender.

Private Lawyer/Private Lawyer

In about one-fifth of the sequentially represented cases, a private lawyer in the branch court has been replaced in the trial court by a private lawyer from a different law firm.[44] Very few of these cases, about 13%, involve the appointment of a private lawyer by the court at the trial court level.[45] This means that 16% of all sequential representation involves cases in which defendants have retained different private lawyers in the branch and trial courts. Table 1 also provides data on the portion of all criminal cases, entailing sequential as opposed to unitary representation, in which private lawyers are involved. It appears that sequential representation is present in 48% of the cases which reach the trial stage and involve private lawyers.[46] This figure presents a dramatic contrast to the picture portrayed by some scholars of the private defense lawyer as engaged in unitary representation of clients from the beginning to the end of the criminal prosecution process.[47]

Sequential representation is in part a by-product of the conscious efforts made by some lawyers to restrict their practice to certain stages of the criminal justice system.[48] On the one hand, some private lawyers are willing to handle criminal felony cases in their entirety from the branch court through the appellate courts. However, other lawyers choose to represent a client only through the stage of post-conviction motions. If the case is appealed, the same lawyer will not handle it even if his client can afford his services.[49]

One type of practitioner represents defendants only at the branch court stage and leaves to other lawyers the representation of the defendant at the trial and appellate court stages. Lawyers who represent defendants only at the branch court end their work in a variety of ways, even when defendants are interested in retaining them for work at later stages. Some lawyers may raise their fee for work at the trial court level to an excessively high amount, thus forcing the defendant to seek another lawyer to represent him.[50] Other lawyers may "farm" their cases out, arranging to have another private lawyer handle the case at the trial court level. Still others may simply withdraw, forcing the defendants to find other lawyers.

Law practices limited to the branch courts are motivated by the lawyer's economic interests.[51] Many defendants do not have a large amount of

[42] *See* note 36 *supra.*

[43] Replacement has been minimized in one jurisdiction by initially appointing private counsel for multiple defendants at the early stages of a case rather than at the time of trial. *See* Gassler, *supra* note 30, at 420.

[44] Table 1 (d).

[45] In 11 of the 86 cases in which there had been a private lawyer in the branch court and another in the trial court, the private lawyer had been appointed by the court to represent an indigent defendant. In 2 cases there was no information.

[46] *See* note 21 *supra.*

[47] *See* notes 16 and 17 *supra.*

[48] In addition some replacement may be due to the death, illness and retirement of lawyers.

Some sequential representation is precipitated by defendants themselves. The replacement of one privately-retained lawyer by another may be a result of the preference of a defendant dissatisfied with his lawyer to hire a different private lawyer for trial court work. Further, defendants may decide to change lawyers because the successor lawyer is less expensive.

[49] Although inability to pay is probably the most common reason why private lawyers do not represent defendants at the appellate level, some lawyers will not take an appeal even where there is a paying client. One reason given is that appellate work is "office" work, which lacks the attraction, for some lawyers, of a law practice that keeps them continually in the courts and away from paperwork.

[50] This practice is possible by playing on the ignorance of some defendants who do not clarify in their initial fee arrangements what is covered by the fee being charged. They believe that the price quoted to them is for representing them for the entire case while the lawyer intends it to cover only his branch court work.

[51] It has been suggested by Alschuler that there are two primary ways to be financially successful in criminal law: by developing a reputation as a trial lawyer or by handling a large volume of cases. Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L. J. 1179, 1182 (1975). In Chicago, lawyers can handle a large volume of cases not only by having their clients plead guilty as suggested by Alschuler, but also by restricting their work to the branch court in a felony case and withdrawing when a case is held for trial.

money, often not enough to make it worth the lawyer's time to work on the case at the trial court level. Work limited to the branch court moves quickly and many cases can be represented in one day. Motions to suppress evidence and preliminary hearings are brief, running usually from around fifteen minutes to half an hour. In an average day's work at the courthouse, a branch lawyer may thus be able to put on several preliminary hearings and appear in other branch courts to continue cases. In contrast, trials can be lengthy, running an entire day and often even longer. This disrupts a lawyer's business at the branch level, and a partner, associate, or friend may have to be called on to handle the lawyer's other court work. Consequently, a lawyer working solely at the branch court stage may be able to turn over a large number of cases rapidly, taking as his fee most of what a defendant can afford, and leaving trial work to the public defender or a private lawyer willing to make the greater time commitments.

One-stage private representation of this sort depends on an ample supply of clients and means to gain access to them. Scattered reports from lawyers indicate the existence in the Chicago branch courts of well-developed relationships between some private lawyers and bailiffs, police officers, and clerks. For example, one lawyer arrived early each morning at the criminal courts building and was present when defendants were brought from jail to the branch court "lockup" to await their court appearance. He was allowed access to the lockup to solicit clients for the day. Other means of gaining a supply of clients may be contrived. Some lawyers increase their visibility when they are not busy by walking aimlessly into the branch and trial courts. They walk up the main aisle between the public benches hoping to attract the attention of old clients, as well as others who need a lawyer or desire a new one. Storefront office space across from courthouses increases the likelihood of a healthy number of "walk-in" clients on which one can support a practice of one-stage representation.

The differentiated court system in Chicago facilitates one-stage representation and the practice of terminating relations with clients after the branch court stage. Little control by trial court judges is exerted over the exit of lawyers from felony cases.[52] A lawyer files his appearance in a case in both the branch and trial courts.[53] The appearance of the defense lawyer as counsel for the defendant in the branch court of the Municipal Department of the Circuit Court is not taken as an indication of his representation of the defendant in the trial court of the Criminal Division of the Circuit Court. The informal withdrawal of lawyers from cases which proceed to the trial courts can be achieved because the different judges at each stage require lawyers to reaffirm their intent to represent defendants, however there is no need for lawyers, when the case moves forward, to "justify" their withdrawal.

Implications of the Mode of Replacement for Cooperation Among Lawyers

As has already been described, lawyers replace one another in criminal cases for a variety of reasons. The public defender's office structures its legal representation in a way which results in cases constantly being transferred among lawyers. It assigns lawyers to courts, not cases, and thus defendants are represented by different lawyers as their cases are prosecuted through the various courts. Other shifts of cases among defense lawyers arise from client preferences, changes in client financial resources and private lawyers' preferences not to work at certain stages of a case. In these cases, defendants may be referred by one lawyer to another or clients may seek out and hire their own successor counsel. These various arrangements in the selection of successive lawyers are likely to differ in the potential for cooperation between lawyers and in the sharing of ideas, knowledge and documents in a case.[54]

Table 2 presents an outline of six factors which,

[52] One reason why control by trial court judges may be limited is that they may not particularly care whether a lawyer at the branch court stage withdraws before the trial court stage. Unlike cases where a lawyer has filed his appearance in the judge's court and the judge makes it difficult or refuses to allow a withdrawal, a similar concern may not attach to cases where a lawyer informally withdraws between the branch and trial court stages. The trial court judge's concern lies with lawyers' activities and withdrawal practices "within" his court, the work sphere for which he sees himself as responsible. In this way, the segregation of work among judges may impede control over withdrawals occurring between stages of a case and facilitate the growth of a group of private lawyers whose work is limited to one stage of a case.

[53] At the branch court level a lawyer is expected to fill out an appearance slip which becomes a permanent part of the file. If the case is held for trial, the same lawyer is required to fill out a second appearance slip either at the trial or arraignment after indictment or information, or in the trial court.

[54] The importance for communication of the way a client is put in contact with a subsequent professional is suggested by Freidson in his discussion of how the cooperative practice of referrals among physicians aids dissem-

TABLE 2

MODE OF REPLACEMENT AND DETERMINANTS OF COOPERATION AMONG DEFENSE LAWYERS

	Ties between Lawyers	Assumptions Underlying Shift of Cases	Claims to the Work Product	Sanctions	Work Orientation among Lawyers	Cost to Trial Counsel of Information Requests
"Transfers"	Shared knowledge of various cooperative behaviors expected by office; many lawyers know each other personally.	"Routine" method by which organization represents indigent defendants.	Work product belongs to the office, not the lawyer.	Both organizational sanctions as well as informal pressures among lawyers.	"Building" a case together.	Minimum costs to self-esteem and minimum risks of an encounter with an uncooperative lawyer.
"Referrals"	Numerous personal ties which at least one lawyer wishes to maintain.	Shift "preferred" given initial lawyer's inability or lack of desire to represent the client further.	Personal relationship between lawyers encourages information transmittal.	Informal sanctions.	Cooperation is expected if requested.	Minimum to high costs to self-esteem and minimum risks of an encounter with an uncooperative lawyer.
"Client Selection"*	No organizational ties, few if any personal ties.	Client may have been "stolen", lawyer's price undercut or client was "dissatisfied". Lawyer was interested in further work in the case.	Some work products are the property of the defendant.	Limited informal sanctions.	Client desired another lawyer's services, not his further participation.	Minimum to high costs to self-esteem and higher risks of an encounter with an uncooperative lawyer.

* "Client selection" of a successor counsel occurs in very diverse situations. The table refers to situations where: (1) the client was dissatisfied with the private lawyer at the branch level and hired a different private lawyer, and (2) where after being represented by a public defender he hires a private lawyer.

from interviews with defense lawyers, suggest varying degrees of cooperation. Three ways in which successor lawyers are selected are identified: "transfers" among public defenders in the same office, "referrals" among lawyers, and "client selection."[55] Concerning each mode of replacement, it is useful to ask:

> (1) Are there likely to be any organizational or personal ties between initial and successor lawyers?
>
> (2) What are the underlying assumptions about the reasons for the shift of a case from one lawyer to another and how is the initial lawyer likely to view the shift?
>
> (3) What claims are there to the initial lawyer's work product?
>
> (4) What sanctions may a trial lawyer use to persuade a previous lawyer to comply with his requests for information?
>
> (5) What is the work orientation of the initial and successor lawyers involved in the same case?
>
> (6) How does a request for information affect a lawyer's self-esteem?

Transfers

A basic characteristic of the Cook County Public Defender Office is that work is divided among lawyers who handle portions of a case rather than one lawyer representing a defendant from the beginning to disposition of his case.[56] The interdependence among lawyers[57] working on a case creates a need for communication among them and coordination of their work. In the public defender's office studied, although there was no overall coordinator of the work of lawyers in particular cases,[58] there did exist procedures for coordination of lawyers' work. The office required preparation of case files which were to be transferred routinely among lawyers in a case. There were also other organizational procedures with the purpose of diminishing the potential for disruption in cases shifting among lawyers; for example, in one court[59] the notes of the branch defense lawyer about the preliminary hearing in a case were written into a standard volume used by the public defender office and constituted a permanent office record that the branch court lawyer could use if contacted by the trial court lawyer.

Within an organization such as the public defender's office, lawyers are also likely to know many of the other defense lawyers personally and be willing to cooperate with information requests by the lawyer to whom the case is transferred.[60] On the other hand, a deterrent to such exchanges between defense lawyers is that the transfer of cases among lawyers does not involve a personal decision by a public defender in one court to transfer the case to another lawyer in a trial court. Rather, which public defender will receive a case at trial will depend on the particular trial court assignment made by the assignment judge. The trial lawyer stationed in the courtroom to which the case is assigned will represent the defendant at trial. Thus, while organizational ties may facilitate personal bonds between lawyers,[61] well-integrated work arrangements among two or more defenders are not

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ination of information about a patient and his illness. According to Freidson: "Fairly well-integrated arrangements among physicians become important not only as a way of gaining and regulating access to patients but also as a way of establishing among physicians regular channels of communication for information about the patient and his illness." E. FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE 94 (1970).

[55] These do not exhaust the modes of replacement. Another is judicial appointment of a successor lawyer in the following circumstances: (1) Where a conflict of interest between two co-defendants using the same defender exists, a private lawyer may be appointed to represent one defendant. (2) A defendant represented by the public defender may request that a private lawyer be appointed instead to represent him. (3) In a jurisdiction where private lawyers are appointed to provide indigent defense services, a trial court judge may appoint a different private lawyer to handle the trial than the one initially appointed by his colleague at an earlier stage of the case. This fourth mode of replacement is not elaborated here since it was not discussed with or mentioned by criminal defense lawyers.

[56] *See* text accompanying note 25 *supra.*

[57] *See* text accompanying notes 3-5, 7-8 *supra.*

[58] Cook County public defenders are supervised. The functions of the supervisor are largely administrative. For example, the supervisor staffs courts and sees that case disposition statistics are kept by public defenders for the office. The supervisor's role in criminal cases is apparently one of a "trouble shooter"; he is consulted by a branch or trial court public defender about a problem in a case rather than initiating involvement himself in each case.

[59] Notes concerning the preliminary proceedings were taken in those courts where preliminary hearings were conducted.

[60] A similar observation has been made about Legal Aid in New York City. Gassler, *supra* note 30, at 423.

[61] Office arrangements of branch and trial lawyers, however, may make cooperation more difficult. Typically, the branch court lawyers have offices near the preliminary hearing courts and many lawyers assigned to the trial courts have their offices in another court building across the city where many of the trial courts are found. An important determinant of communication may be the relative ease by which information from the initial counsel may be obtained.

insured, as they may be in regular referrals among private lawyers.

The assumption underlying the transfer of cases from one lawyer to the next is that it is the "routine" way of representing clients in the public defender organization. Almost every felony case handled by the office is provided legal services in this fashion. When a trial court lawyer requests information about a case, therefore, the initial lawyer's ego is not likely to be vulnerable in this working relationship; a client has not preferred or selected another lawyer as may occur in private practice.

All of the work product of the public defenders belongs to the office. The office, not an individual defender, represents a defendant. Files are office files and not those of the individual lawyer and would not be taken with a lawyer who leaves the employment of the public defender office. Files prepared at the branch court are regularly sent to the trial court where the case has been assigned. Similarly, any additional notes of lawyers made in the office would be available for the trial court lawyer's perusal in the event the initial lawyer was not available.

Organizational ties create a special opportunity for colleague and organization control over the work of branch lawyers. Given the limited number of trial lawyers, each can become somewhat familiar with the work of branch lawyers whose cases are reaching them and can judge the quality of work in the branch courts. Where files are inadequately developed, cases improperly prepared, or where a lawyer is not responsive to the inquiries of another, complaints may not only be made individually to one another but filtered through a supervisor. These sources of assessment and complaint may be effective sanctions if the public defender perceives them as affecting his chance for desired assignments or advancement.

On the whole, cooperation among lawyers in an organizational setting such as the public defender's office is enhanced by the absence of competition for business among practitioners in the office. The work identity of the lawyers is that they are cooperating in "building" a case for their client. There are also minimum costs to the self-esteem of the trial court lawyers in requesting information, since a request is no more than an exchange by two lawyers jointly preparing the case, although in different courts.

As a practical matter the factor which is most likely to affect the extent of cooperation among lawyers in the public defender office is the limited knowledge of the initial lawyer about his cases rather than his reluctance to comply with a request for information. The branch court defender for almost all offenses is appointed to a case on the day the court expects him to proceed with the preliminary hearing.[62] The interviewing of his and the prosecution's witnesses depends on whether he has time during the court session to do so and whether the witnesses have appeared in court that day. Out-of-court investigation and the interviewing of potential witnesses to be called at the trial court level are not very likely to take place at that stage.[63]

There is tremendous routine and repetition in handling initial proceedings and cases are difficult to remember after the case is completed. This problem is compounded by the large number of cases handled daily by lawyers assigned to the early court stages. Even if a trial lawyer were to call the branch counsel, the combination of limited interviewing, no investigation, short lawyer-client contact for impressions of a client and case, and difficulty in recollecting particular aspects of cases because of work repetition and caseload, make his help unlikely to be of any substance.[64] Such a situation is frustrating to public defenders, as illustrated here by one branch court defender's description of his experiences:

> The transcript is there [for the trial lawyer's use] and unfortunately there are so many cases this is how it has to be. I know lawyers who in their lifetime haven't handled as many preliminary hearings as I handled in four months. You lose track. You lose perspective. And when you try to tell another lawyer what you know of a guy at the preliminary hearing—what his feelings are, how

[62] After a public defender is appointed to a case, the case is passed by the court for a few minutes so that the lawyer can confer with his client in the lockup or out in the courthouse halls. When a case is recalled later in the day, the judge will ask the public defender whether he has had adequate time to confer with his client and whether he is now ready to proceed to a preliminary hearing. Except in homicide cases, a case is rarely continued for out-of-court investigation or to locate witnesses.

[63] The public defender office investigators are rarely used at the branch court level in felony cases other than homicides. The reason given by public defenders working at the branch court was that it would take at least two weeks before any investigator could find the time to work on the case and cases could not be continued for that period of time.

[64] Elsewhere it is reported that in large public defender offices in California contact between the preliminary hearing and trial lawyer is limited to written materials between defenders. Note, *Representation of Indigents in California—A Field Study of Public Defender and Assigned Counsel Systems, supra* note 8, at 542.

> you think he'll react if called to testify, is he sure of himself, does he speak clearly, does he perspire, get nervous, fidget, does he look like he's alive, truthful, does he shave—you can't remember. That's why just getting into a general conversation around here a lot of lawyers who try the felonies upstairs, I don't know generally, but quite a lot don't put their clients on. They don't trust them because they haven't had enough experience with them; they don't know how they'll react, and the reason for that is they don't get enough time together with a guy.[65]

Trial lawyers depend heavily on the transcript of the preliminary hearing to gather information about a case before it was assigned to them. Although the organization requires preparation and transfer of files at the branch level, files tend to be limited in content. They contain little apart from a single interview sheet on which the lawyer may have scrawled some key remarks that his client made to him.[66] Observations about the demeanor of witnesses at the preliminary hearing or off-the-record exchanges with the prosecutor rarely are recorded and placed in the files.

In sum, because there are both organizational and interpersonal ties among public defenders, the transfer of cases in the public defender's office involves an opportunity for extensive cooperation among lawyers. However, because of the circumstances in which lawyers find themselves at the initial stages of a case, cooperation is generally a futile exercise. The public defender in the branch court has little to communicate to a trial court lawyer about a case apart from what appears in the preliminary hearing transcript.

Referrals

In some sequentially represented cases a referral has been made by the former to the successor counsel. These include referrals among private lawyers, as well as referrals made by public defenders to private lawyers. However, sequential representation rarely is a result of referrals for specialized services among private lawyers in the criminal defense field. The emergence of cooperative arrangements because of legal expertise is not characteristic of the criminal defense lawyers studied.[67]

One primary situation in which a private lawyer will refer a client to another private defense lawyer is in a case involving a co-defendant requiring co-counsel. In such a case, there may be two or more defendants with antagonistic defenses at trial. To be adequately represented, each requires his own counsel. Some lawyers prefer to encourage a client to utilize the services of a lawyer they know and trust.[68] The referral can benefit the lawyer to the

[65] Interview with a public defender, December 11, 1972.

[66] It has been observed elsewhere that although a public defender's office may prepare a case file which is passed from defender to defender, cryptic and illegible notes undermine adequate communication between lawyers. A. Rosett & D. Cressey, *supra* note 14, at 129.

[67] In sequentially represented cases where shifts occur among private lawyers, one might speculate that there is a possibility of a coordinator role with one private lawyer referring his client to various other criminal defense lawyers for them to handle particular technical aspects of the case. For instance, one lawyer could handle the branch court work, and then for trial or appellate work refer the client to another lawyer, while still coordinating the work of the other lawyers. Private criminal defense practice, however, is a specialized area of legal practice where the type of practice of criminal lawyers is very similar. When most criminal defense lawyers accept a case, they plan to work on the case in its entirety, assuming the defendant can continue to afford their services. The criminal defense bar is not generally broken down into appellate specialists, trial specialists, and preliminary motion specialists, and defense lawyers do not regularly refer clients who come to them to other lawyers for these specialized services.

An exception is the "preliminary hearing lawyer" who will sometimes "farm" cases out to other lawyers to handle the trial court work. *See* text accompanying notes 50-51 *supra*. The authors believe that this practice accounts for a negligible number of "referrals" among lawyers between the branch and trial courts.

See also, on the existence of some specialization in criminal law, A. Wood, *supra* note 18, at 45.

[68] A principal worry of lawyers in a co-defendant case is an unpredictable co-counsel. Some lawyers are viewed as untrustworthy and, if brought into the case by a defendant, will make the defense of the other defendants more difficult. Lawyers, for example, do not want to practice law with colleagues who they say "play footsy" with the state. By this, lawyers refer to a situation in which, while pretending to prepare a case jointly for trial, the other lawyer is secretly negotiating a deal with the prosecutors for his client. Not only may the other lawyer be negotiating a deal that his client turn state's witness, but he may also be sharing with the prosecutor the defense's strategies and evidence. Nor do defense lawyers wish to work with a co-counsel who will at trial allow his client to point an accusing finger at all other defendants in the case rather than attempt to work cooperatively for the acquittal of all the defendants.

For defense lawyers who do exclusively criminal work, their belief that defendants are unable to judge the competence of professional legal services is one reason they intervene in the selection of co-counsel. They are hostile to lawyers who practice only occasionally in crim-

extent that he can expect reciprocal referrals in the future. Moreover, the referral of a co-defendant to another lawyer may be related to and supportive of other cooperative arrangements. The personal ties between private lawyers may be quite extensive. The same lawyers may "pinch hit" for each other while one is on trial in another case or on vacation.

Referral networks are not limited to private lawyers, but include the channeling of defendants from public defenders to private lawyers. Some public defenders, while still in the office, hope to make their futures more secure. They hope that when they are ready to break away from the public defender's office and become private practitioners, which is the typical career pattern, they will be able to make a living by being invited to work with other lawyers or sent cases which others are not interested in handling. For these reasons, when it comes to their attention that a defendant utilizing the services of the office can afford or desires private counsel, they will refer the defendant to particular private lawyers.

The tone of referrals is set by the assumption that the referring private lawyer is unable or does not wish to continue representing the defendant. Whether for legal reasons, such as the co-defendant situation noted earlier, or for personal reasons, such as the fact that he prefers not to handle cases at the trial level, he has willingly initiated the shift of the case to another lawyer. Similarly, in the case of the public defender who at the trial level learns of his client's ability or desire to hire a private lawyer, a referral is seen as necessary. There is no danger of misinterpreting the source of the shift of cases from lawyer to lawyer, since the referring lawyer has full knowledge of it and views it as a conventional solution to a recurrent situation.

Because referrals are invoked with the aim of producing or enhancing relations, a branch lawyer is likely to share his ideas and knowledge about the case if asked. The referring lawyer wishes to maintain cordial relations with the other lawyer and the possibility of disrupting this is threatened by his non-cooperation. If necessary, the new counsel has the informal sanction of refusing to refer business to an uncooperative lawyer.

Lawyers will sometimes limit their seeking of cooperation to requesting copies of transcripts, motions, and investigations in the former lawyer's possession. This makes it more difficult, or at least more time consuming, for the successor lawyers to prepare their cases, but some lawyers see it as allowing them a greater freedom to view the case anew. In other cases, lawyers do not consult previous lawyers because they feel confident that they have explored the case thoroughly by themselves. Others lack the self-confidence to seek the ideas and opinions of another lawyer with its potential implication of inability to prepare one's own case. Lawyers suggest that in some cases they probably should have called the former counsel about the case but did not get around to it before the case was ended.

The extent of actual cooperation is also heavily conditioned by the amount of information prior counsel will have in his possession. Lawyers vary enormously in the amount of preparation they will have undertaken during their representation of the defendant. Preparation varies, for example, with access to and ability to afford investigatory services. As noted earlier, public defenders at the branch court stage are neither appointed in time to do their own investigation, nor are services usually available to them at this stage of the criminal process except for the most serious felonies. In private practice, variations in whether an investigation is undertaken, the kind of investigation, and its timing are governed largely by the fee. A lawyer with an outstanding legal reputation can command high fees to be paid largely before he works on the case. Such a lawyer is likely to employ an investigator if necessary and to employ one early in the case.

It should be noted that referrals among private lawyers or between public defenders and private lawyers appear to be a relatively small-scale practice. Public defenders are not likely to know about or be involved in a client's hiring of a private lawyer. Co-defendant cases are a limited category. After representation at the branch level, private legal representation is likely to be terminated by a client's desire for a different lawyer or the exhaustion of his financial resources—two situations unlikely to involve referrals between lawyers.

Client Selection

Defendants may seek out replacements of their initial lawyers. At least four sources of this practice can be identified: (1) dissatisfaction with the per-

inal cases. They feel very strongly that criminal defense work requires a specialist and not a "dabbler", as some refer to the occasional criminal law practitioner. Through referrals, they attempt to deter clients from hiring these lawyers as co-counsel.

formance or price of the lawyer at the branch court level; (2) ability to hire a private lawyer rather than continue with the public defender at trial, if financial resources have increased or if money was saved to hire a private lawyer for this stage; (3) exhaustion of personal resources resulting in a request for appointment of the public defender; or (4) withdrawal of a private lawyer for personal or legal reasons requiring the defendant to hire a successor private lawyer for trial court work.

Because the replacement depends upon the defendant's choice of a new lawyer and the shift of cases between the former and successor lawyer ceases to be determined by organizational or interpersonal ties between lawyers, client selection is very vulnerable to lack of cooperation among branch and trial lawyers. However, the variety of situations under which a client comes to choose a successor lawyer are diverse enough to create different levels for cooperation among lawyers.

Chronic disruption of communication is likely to appear where a private lawyer believes another has encroached on his "turf" by soliciting a defendant already represented by him. The branch lawyer is annoyed over the loss of otherwise good business and suspicious of the successor lawyer's role in obtaining the case. The lawyer representing the defendant in the trial court is thought to have characterized the branch court lawyer as incompetent or undercut his price, in this way creating defendant dissatisfaction with performance or price. Even when a lawyer does not suspect another of foul play, he may have a "sour grapes" approach to the case, and if asked about it may reply as one lawyer did, "Counsel, you have the case now. You have the papers, read them yourself. Talk to your client; he can tell you everything."[69]

Although replacements involving no threat to private business would seem to have less pronounced foundations for lack of cooperation, such as replacements of a public defender by a private lawyer, private lawyers report situations to the contrary. One private lawyer summarized what he believed to be the reasons for tense relations between public defenders and private lawyers about this situation:

> Public attorneys don't like private attorneys. And private attorneys think if they [public defenders] had anything they'd be out in private practice. That's not true. There are some good public defenders. When a private attorney gets a case from a public attorney, the attorney won't cooperate and give him information about the case. I think it has to do with their position. They feel that if a defendant gets a private attorney it reflects on them. They should be glad the defendant got a private attorney since they have one less case to handle. But they don't think that, and hurt their client. They should cooperate since the defendant is their client. They think that when a defendant gets a private attorney it has something to do with them. They've heard it said so often by the public that public attorneys are no good that they believe it.[70]

In this way, then—because they see a shift of a case to a private lawyer as a reflection on their legal competence—public defenders may hesitate or be reluctant to assume a cooperative posture in a case. In the converse situation, where a public defender has assumed the role as counsel after a private lawyer, there is a lesser possibility of limited cooperation: the shift occurs primarily because of the financial indigency of the client and this is not likely to be a shift provoking attorney jealousies.

There are two circumstances exemplifying why private lawyers reject clients after representing them early in a case. The first situation involves the private lawyer who, as a matter of general policy, does not handle cases at the trial level.[71] In some way, such as by raising his fee to an exorbitant price if the case is bound over to the grand jury, he will force the client to hire another lawyer. As in the "referred" case, the lawyer is not interested in further representing the client and therefore has no reason of this sort to refuse to cooperate. But the same forces of trying to make money quickly, which led him to reject a client whose case may have required lengthy work at trial, may be expressed in his unwillingness to spend any further time discussing the case with new counsel.

The second situation involves a lawyer who has reached the point of exasperation with a client or who has had difficulty gaining his client's cooperation. One lawyer, for example, told a client to go elsewhere not only because the defendant's money for his fee was tied up in successive bonds as he got into more trouble, but the lawyer also was tired of having continually to go into court to have these bonds reinstated after the defendant had not come into court on his court date. In this particular case, the defendant eventually hired a lawyer who was a friend of the former counsel.

[69] Interview with a private defense lawyer, February 13, 1975.

[70] Interview with a private defense lawyer, April 26, 1973.

[71] *See* text at notes 50-51 *supra*.

These situations in which a private lawyer rejects a client are diverse in content and tone of the prior relationship between lawyer and client, and in the possible relationships between former and new counsel. The result is a broad range of possible levels of cooperation between lawyers. Under hostile situations, the cooperation among lawyers may occur but be limited to the exchange of the work products which are viewed as the defendant's property. Transcripts of the preliminary hearing or bail hearing which have been ordered by the public defender's office or may have been paid for by the defendant out of his fees to a private lawyer are examples of materials which belong to the defendant and are most easily obtainable by the successor counsel.

Unlike lawyers who receive cases through referrals from other lawyers, successor lawyers selected by clients are often in a position of not knowing the former lawyer. No cooperative arrangements tie these lawyers and the force of informal sanctions is unlikely to be available. The successor counsel has sometimes been hired by defendants who have strained their own relationships with the former counsel in the case to the point that the counsel is angry with the defendant and likely to be reluctant to cooperate with the successor counsel. Other lawyers are indifferent to the case once they are no longer being paid; they neither like nor dislike the defendant or his new lawyer, but merely do not want continued dependency where the defendant has made it obvious, by hiring a new lawyer, that he no longer desires the former counsel's services. The extent of cooperation will also depend on how a request is perceived by the trial lawyer. As suggested previously, some lawyers who represent defendants at trial perceive that their requests to the lawyer who handled the case in the branch court will possibly reflect poorly on their legal abilities to prepare a case.[72] Further, the trial lawyer may prefer to think about and develop his own case and does not like to place himself in a position where a lawyer may press a "theory" of the case on him.

In spite of an opportunity to discuss a case at length with the branch lawyer, trial court lawyers sometimes feel that it is unlikely that the branch lawyer will have much more to contribute beyond what they can read themselves in the court transcripts or learn about the case in interviewing their own clients and witnesses. Only a handful of private lawyers, and rarely the public defender, actually can afford or will have taken the time to do an out-of-court investigation of the case at the branch court level.

[72] *See* text section on *Referrals, supra.*

Ethical and Legal Implications of Sequential Representation

Ethical Questions About Withdrawal and Replacement of Lawyers

The representation of a criminal defendant by a succession of lawyers may raise ethical issues, in addition to the cooperation problems already discussed. The most serious ethical questions arise in the case of private practitioners who deliberately limit their practice to the branch court stage of the criminal process, leaving to another private lawyer or to the public defender the representation of the defendant at trial.[73]

The ABA Code of Professional Responsibility states that a lawyer may not withdraw from representation of a client in a pending matter except under certain specified circumstances, such as improper conduct by the client (including deliberate disregard of an obligation to pay fees), the development of a conflict of interest or other ethical impediment to continued representation, or the lawyer's own incapacity.[74] The Ethical Considerations accompanying the Code state that:

> A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, . . . A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal.[75]

These ethical standards permitting withrawal only under unusual circumstances seem on their face to be violated by the practice of a "branch court lawyer" who withdraws as a matter of course if a case proceeds to trial.

The only defense of such a practice would seem to be a conclusion that the branch court proceeding is a separate matter and thus does not involve a real "withdrawal". Such a conception is perhaps reflected in the informal practice of the Cook County courts of not requiring permission to withdraw after the branch court stage, but instead providing for a new appearance by a lawyer to be filed if the case goes to trial.[76] The idea that the branch court proceeding is a distinct legal matter

[73] *See* text at notes 50-51 *supra.*

[74] *See* ABA Code of Professional Responsibility, Disciplinary Rule 2-110(c) (1976).

[75] *Id.* at Ethical Consideration 2-32.

[76] *See* text accompanying notes 52-54 *supra.*

seems, however, to be an artificial notion contrary to the way that both lawyers and clients generally perceive the process. Lawyers speak of a single criminal case as proceeding through its various stages. Lawyers generally do not conceive of these successive stages of a criminal case as separate legal matters any more than the discovery or motion stages of a civil case are matters separable from the subsequent stages of trial preparation and trial. If that is true for lawyers, it is equally true for criminal defendants who certainly see themselves as involved in a single case in which they require representation.

The one situation in which automatic and predetermined limitation of representation to the branch court stage would seem justifiable would be a situation in which the lawyer explicitly advised the client and obtained the client's advance consent to such a limited form of representation. In such situations, withdrawal after branch court proceedings might be justified under the acknowledged exception for cases where termination of employment is agreed to by the client.[77] Under the Code, however, any such consent to termination must be given "knowingly and freely" and lawyers are also subject to a general obligation to avoid dishonesty or misrepresentation.[78] This obligation of full disclosure whenever there are potential risks in a particular relationship has been developed clearly in connection with matters such as representation of multiple defendants or other potential conflicts of interest.[79] To avoid violation of these standards, it would seem that a lawyer seeking consent to a limitation of representation to the branch court stage should disclose fully to the client the potential disadvantages of segmented representation. An explanation of the risks of limited representation has generally been required in far less consequential civil matters. Although this study did not attempt to examine specifically the nature of communication between lawyers and clients, no practice of obtaining consent to limited representation, with or without a disclosure of the risks entailed, was evident in the case of the "branch court lawyers" discussed in this paper.

No court case or reported disciplinary proceeding appears to have considered the ethical propriety of a lawyer deliberately limiting his practice to the branch court stage of the criminal process. Courts have had occasion to consider the question of withdrawal in the context of ruling on motions for permission to withdraw. As noted earlier, however, such motions are not made by the branch court practitioners in Cook County because the informal practices of the court permit automatic withdrawal unless a new appearance is filed in the trial court.

Cases dealing with motions to withdraw generally indicate a reluctance to prevent withdrawal, possibly because of a feeling that an unwilling lawyer is not likely to provide an effective defense. In court cases and in disciplinary proceedings dealing with withdrawal practices, two major concerns seem evident.

First, at the time of withdrawal there must be time for a new lawyer to prepare effectively for trial. In some cases, courts have refused on this ground to permit withdrawal shortly before trial.[80] In the case of the "branch court lawyers," time alone is not usually a problem since withdrawal typically takes place immediately after the branch court proceedings. In the cases citing the time factor, however, the courts appear to assume that with sufficient time a successor lawyer will be able to prepare effectively for trial.[81] The same concerns would come into play, and might warrant denial of permission to withdraw, even if there was substantial time before trial, if it were demonstrated that the successor's lack of access to or experience in the branch court stage of the case would severely prejudice the defense. Further research on the consequences of sequential representation, even when there is time for further work prior to trial, may give rise to a greater reluctance to permit withdrawal in all cases. It may be noted, moreover, that

[77] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, at Disciplinary Rule 2-110(c)(5).

[78] *Id.* at Disciplinary Rule 102 and related Ethical Considerations.

[79] *Id.* at Disciplinary Rule 5-105 and related Ethical Considerations.

[80] *See, e.g.*, Jacobs v. Pendel, 98 N.J. Super. 252, 255, 236 A.2d 888, 889 (1967) ("The granting of leave [to withdraw] by the court is generally in the discretion of the court and depends upon such considerations as proximity of the trial date and possibility for the client to obtain other representation."); Kriegsman v. Kriegsman, 150 N.J. Super. 474, 479, 375 A.2d 1253, 1255-56 (1977) ("When a firm accepts a retainer to conduct a legal proceeding, it impliedly agrees to prosecute the matter to a conclusion. The firm is not at liberty to abandon the case without justifiable or reasonable cause, or the consent of its client.... With trial imminent, it would be extremely difficult for the plaintiff to obtain other representation and therefore she clearly would be prejudiced by the [firm's] withdrawal.")

[81] *See, e.g.*, Jacobs v. Pendel, 98 N.J. Super. 252, 254, 236 A.2d 888, 890 (1967). ("[H]e must make his application promptly for the purpose of affording his client an opportunity to obtain other counsel sufficiently in advance of the trial date as will permit reasonable preparation.") Fessler v. Weiss, 348 Ill. App. 21, 107 N.E.2d 795 (1952).

this is a concern which is not limited to cases where a lawyer has adopted a deliberate policy of limiting practice to the branch court stage. It applies also to cases where withdrawal is motivated by other factors, and it may even be applicable to the situation in the public defender's office if it were shown that a succession of lawyers, even within such an organization, adversely affects the quality of representation.

A second concern evident in a number of cases is that the withdrawing lawyer must cooperate fully with the lawyer who replaces him. There are a number of reported disciplinary proceedings in which lawyers have been severely sanctioned, even disbarred, for, among other things, failure to carry out this obligation.[82] As discussed earlier, there are a number of factors which may affect the likelihood of real cooperation among successor lawyers in the defense of a criminal case. It seems possible that a showing that cooperation is unlikely might warrant a denial of permission to withdraw in certain types of cases. The extent of sequential representation would seem to warrant substantially greater attention to the issue of cooperation among successor lawyers by disciplinary authorities, commentators on legal ethics or supervisors of organizations such as public defender services.

Sequential Representation and Claims of Ineffective Representation of Counsel

Apart from the ethical issues discussed above, sequential representation may conceivably give rise to a claim by a criminal defendant that he has been denied effective representation of counsel so that his conviction should be reversed on appeal or on collateral review.

Some courts have held that a denial of constitutional due process occurs only when legal representation is so lacking in competency that the defendant is effectively without representation and the trial "becomes a mockery of justice."[83] Other courts have held that the constitutional standard for legal representation is one of "normal competency."[84] There is also dispute over whether the same standard is applicable to cases involving privately-retained counsel and to cases where indigents are represented by the public defender or by court-appointed lawyers. However the constitutional standard of effective assistance is defined, the question may be raised as to whether the fact of sequential representation is significant in applying it.

In one case, *Moore* v. *United States*,[85] the defendant made what amounted to a claim that sequential representation within a public defender organization was *per se* a denial of effective representation. However, the defendant's claim was rejected. *Moore* arose in the context of a Third Circuit rule established in *Mathis* v. *Rundle*,[86] that an untimely appointment of counsel for an indigent will create a presumption that the defendant was prejudiced and will shift the burden to the state to show that the defendant received effective representation. Defendant Moore argued that this presumption applied in his case because he did not meet the individual lawyer from the public defender's office who represented him at trial until the day before trial. Rather, a different member of the public defender's office had appeared on his behalf at arraignment a month and a half earlier. Still, the court rejected the claim and stated:

> It is clear, however, that in one form or another the legal staff of the Defender Association of Philadelphia supplied representation to the petitioner both at the arraignment and at trial.
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> * * *
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> The recognition of the right of a defender organization to supply legal services to the indigents makes

[82] *See, e.g.*, State v. Weber, 55 Wis. 2d 548, 551, 200 N.W. 2d 577, 578 (1972) (disciplinary proceedings where, *inter alia*, the lawyer "was allowed by the court . . . [in one case] to withdraw from the case on the condition he cooperate with . . . [the client's] new counsel, . . . [the client] obtained new counsel who made repeated requests for the file but the . . . [lawyer] failed to turn the file over to him").

See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations 2-32:

> Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed and otherwise endeavoring to minimize the possibility of harm.

[83] *See, e.g.*, Bell v. Alabama, 367 F.2d 243, 247 (5th Cir. 1966). *See generally*, Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973), arguing that "this standard puts an unduly heavy burden on the defendant." *See also* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964).

[84] *See, e.g.*, Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970). *See* Finer, *supra* note 83, at 1079, supporting this standard which Finer notes is also the general standard for malpractice. Conceivably, therefore, a claim of ineffective assistance could be a basis for a legal malpractice action as well as relief on appeal or in a post-conviction proceeding. As a practical matter, however, actions for malpractice against attorneys are virtually non-existent.

[85] 432 F.2d 730 (3rd Cir. 1970).

[86] 394 F.2d 748 (3d Cir. 1968).

> it at once apparent that in such institutional representation the timeliness of the appointment must be measured by the time of the court's appointment of the institution and not by when individual staff members are assigned to perform their specialized duties.[87]

While refusing to apply a presumption, however, the court did maintain that the adequacy of the defendant's representation could only be determined through an evaluation of the services rendered on his behalf. The court looked to the case record to determine whether or not the defendant had received adequate representation despite the sequential nature of that representation. In doing so, the court compared the representation given to the defendant with that rendered by large private law firms divided into specialized departments[88] and claimed:

> It may well be that the specialization in the various stages of a criminal proceeding which is made possible by the vast volume of cases which comes to the Voluntary Defender's office promotes efficiency and provides expert service in every stage of a proceeding. These twin qualities of division of labor and specialization are the pillars of the large modern private law firm. On the other hand, in such an institutionalized system there are inherent the risks of a loss of the close confidential relationship between litigant and counsel and the subordination of an individual client's interest to the larger interests of the organization. These risks of course are greater in the case of indigents for whose clientele there is no compensating pressure of competition.
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> Whether an indigent is represented by an individual or by an institution, he is entitled to legal services of the same level of competency as that generally afforded at the bar to fee-paying clients.[89]

The court went on to find evidence in the record tending to support the defendant's claim that the defense counsel had failed to carry out an adequate investigation of the case and otherwise prepare for trial. The court therefore remanded for an evidentiary hearing on the adequacy of services provided to the defendant.

An argument that a criminal defendant is generally entitled, as a constitutional matter, to unitary representation by a single lawyer would seem to depend upon empirical evidence sufficient to persuade a court that there are substantial inherent disadvantages in sequential representation, whether within or outside the framework of the public defender's office. The American Bar Association, in its Standards for Providing Defense Services, implies that counsel initially provided should continue to represent the defendant throughout the trial court proceedings.[90] And, in the Commentary on the Tentative Draft of the Second Edition of these Standards, it is stated:

> This standard requires that the attorney initially appointed to provide representation continue to do so throughout the trial proceedings. This affords the best opportunity for the development of a close and confidential attorney-client relationship. The standard thus rejects the practice in some public defender programs in which "stage" or "horizontal" representation is used, meaning that different public defenders represent the accused at different stages of the proceedings, such as preliminary hearings, pretrial motion hearings, trials, and sentencings. The utilization of stage representation in defender offices has developed due to the belief that it is cost efficient, and also because it enables defenders to specialize and often reduces travel time and scheduling conflicts. The disadvantages of such representation, particularly in human terms, are quite substantial. Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been "processed by the system." Stage representation is equally unsatisfactory from the viewpoint of public defenders.[91]

At present, however, this standard of unitary representation seems clearly to be one of policy rather than of constitutional norm.

While refusing to apply any *per se* rule, the courts may nevertheless take into account the fact of sequential representation in considering claims of ineffective representation. The most significant example of a case considering this factor is *United States ex rel. Thomas* v. *Zelker*,[92] in which Judge Marvin Frankel upheld a claim of ineffective representation. In that case, the defendant was arrested and assigned a public defender for his probable cause hearing. After this initial hearing, the defendant never saw the original attorney again, was placed in jail for a period of two months and was assigned a number of different public de-

[87] 432 F.2d at 733-34.

[88] *Id.* at 735-36.

[89] *Id.* at 736.

[90] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5.2 (Approved Draft, 1968). *See also* related Commentary to Standard 5.2, *id.* at 46-49.

[91] ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to the Administration of Criminal Justice, Providing Defense Services, Commentary to Standard 5-5.2 at 24 (Second Edition Tentative Draft, Fall, 1978).

[92] 332 F. Supp. 595 (S.D.N.Y. 1971).

fenders for different court appearances, without ever having the opportunity to consult with any of them. Even after the defendant was finally given one public defender to handle his entire case, this attorney was replaced by another attorney before he had the chance to interview the defendant's witnesses. And, by the time of defendant's trial, the newly appointed public defender still had never met with any of the people that the defendant had proposed as witnesses.[93]

On reviewing these facts, Judge Frankel was appalled at the counsel treatment given to the defendant. Thus, he ruled in favor of the defendant's claim of ineffective representation and maintained that:

> One of the more familiar causes of ineffective assistance is the appointment of counsel too late for adequate investigation, including, of course, the discovery and interviewing of possibly helpful witnesses. E.g., Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967). But timely appointment becomes a cruel joke when the defendant officially has a lawyer, but is actually being ignored.
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> * * *
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> The grim picture seems clear enough. From first to last—from the failure to confer adequately with petitioner, through the pattern of insufficient inquiry in the state courts blocking petitioner's efforts to obtain decent legal assistance, to the total failure to do any of the work appropriate for the defense in the circumstances of this case—petitioner's so-called representation at his trial was such as to "shock the conscience of the Court and make the proceedings a farce and mockery of justice."[94]

Cases like *Zelker*, raising problems of sequential representation, are as yet so scattered that general conclusions must be limited. At a minimum, however, there is some judicial recognition of the dangers of such practices. It seems likely that any constitutional claim in this area will remain dependent on a specific factual showing of adverse impact in the particular case.[95] Attitudes toward the evidence of such prejudice may well be affected by general research and commentary on the extent and consequences of sequential representation.

[93] *Id.* at 596-98.

[94] *Id.* at 600-01 (citations omitted). *See also,* United States v. Rundle, 419 F.2d 118 (3d Cir. 1969) (concurring opinion of Judge Freedman), in which a claim of ineffective assistance was rejected, but Judge Freedman described the situation of representation by a succession of lawyers in the public defender's office and noted:

> The modern trend toward larger law firms, both private and public, diminishes the completeness of a client's relationship with an individual legal representative. Since the courts must operate impersonally in their consideration of the case of the accused, the accused has the right, even in an increasingly institutional age, to look to those who represent him for some personal, individual attention.

419 F.2d at 120 (Freedman, J., concurring).

Future Directions for Research

As the prior discussion indicates, scholarly attention to the issue of replacement has been extremely limited. An understanding of the phenomenon of replacement, including answers to the questions about its consequences which are critical in assessing the ethical and legal issues potentially raised, depends upon further research and analysis.

Studying the Extent of Replacement

Before discussing future research about other aspects of replacement, it may be helpful to identify some of the sources of data about the actual extent of replacement in criminal cases and to consider briefly their usefulness and limitations. These sources of data include court files, personal interviews and questionnaires.

Court files provide a useful source of data about the participation of lawyers in cases to the extent that they are accurate and complete. Files can provide data on the number of lawyers who have worked in a case, the order of their appearance, and the duration and stage of their work. The files are a convenient source of data for researchers to the extent that they are centralized. Limitations of this data source stem from the fact that appearance slips from files are incomplete records of the total amount of replacement in a case since they record only the extent of different lawyers' involvement in a case *in court.* Pre-court activities, including the withdrawal of lawyers, "shopping" for lawyers and referrals among lawyers, are not known from court files.

Data about replacement occurring outside the courtroom is obtainable from personal interviews or questionnaires. Apart from providing data about the extent of replacement, surveys using these modes of data collection also provide the possibility of collecting data on the reasons for replacement. A major problem in the use of these sources of data

[95] Finer, *supra,* note 83, sets out a series of specific issues to which courts might look in assessing claims of ineffective representation. A number of these might be affected by the fact of sequential representation - notably "Failure of Counsel to Investigate the Facts" and "Insufficient Time to Prepare for Trial Because of Late Appointment."

is the question of the validity of self-reporting. The use of interviews and questionnaires to gather retrospective data about lawyer contacts raise the question of the ability of persons to remember this information and the possibility of selectivity in the type of information remembered.

Whatever sources of data are used, it will be important to describe clearly how replacement is defined. For example, in the present study, court files were used; replacement was measured by the lawyer appearance slips located in the files and the definition of replacement was narrowed to include only situations where the lawyer who last represented the defendant in the trial court was different from the lawyer who last represented the defendant in the branch court. As other studies of replacement are conducted, it will be important to attempt to develop and employ uniform definitions of replacement. Without such efforts, comparative analyses of replacement in different jurisdictions will be severely hindered by studies which are unique in their definition of replacement or provide no clear record of how the extent of replacement has been calculated.

Studying the Sources of Replacement

There are a number of research approaches to the factors bringing about replacement which may be utilized in future research.

Economic Approach. One important determinant of replacement may be the cost of legal services in relation to the financial abilities of clients. For example, financial inability to afford continuous private legal services is one explanation for utilization of private lawyers initially and public defenders at later stages of cases.[96] The converse pattern of representation—from a public defender to a private lawyer—may reflect the existence, in later stages of a case, of an ability to obtain money for private legal services,[97] as well as other factors such as defendants' preferences as to how to spend their money (whether to have an expensive private lawyer only at the trial court stage versus having a less expensive lawyer to handle the case continuously) and their perceived legal needs (a case held for trial is serious enough to warrant expenditure of defendant's monies).[98] General studies of the relationship of replacement to financial characteristics of clients may provide an indication of the significance of financial factors.

Specific data about financial arrangements between lawyers and clients would also provide important information in assessing these patterns of replacement. Other financial aspects of retaining private counsel, apart from simply whether defendants can afford to do so in some absolute sense, may be significant. It would be very useful to know more about the financial arrangements lawyers are willing to make with clients—for example, whether and how large a retainer is required by lawyers, whether payment in full is required before a case is disposed, and how this relates to judicial willingness to permit frequent continuances of a case to give a lawyer time to collect his fee[99] and to withdraw from a case when the fee is not collected.

Examination of rates of replacement for different offenses may also be useful in assessing the importance of financial factors as a determinant of replacement. It may be that for less serious cases, which require less effort, lawyers may charge lower fees for legal services and defendants would be more able to hire lawyers for representation for the duration of this case. On the other hand, while there are probably substantial differences in the costs of retaining private lawyers for different offenses, rates of replacement may vary less because of these differences than because of other reasons such as perceptions of need. For instance, unitary representation may occur *more* frequently in serious cases where the need for private legal services seems stronger and where family resources for legal services may be more readily provided.

Social-Psychological Approach. A different approach is to attempt to understand replacement by studying perceptions of clients of their cases. This approach would concentrate on the individual clients and would analyze how they perceive their legal needs and behave in accordance with the way they view their situations. For example, clients' perceptions of the likelihood of a conviction and severity of sanction on conviction may significantly explain the cause of replacement. With an increasing sense of seriousness of a case, clients may have a greater concern for use of private legal services or for use of continuous services.

Perceptions of clients may also be important in

[96] *See* text at note 43 *supra.*

[97] *See* text at note 39 *supra.* It has been suggested, however, by some lawyers in the Cook County Public Defender Office that shifts of cases from public defender office to private lawyers in some cases comes as a result of explicit arrangements early in a case between private lawyers and clients with limited resources to use the public defender's office initially for the preliminary work in a case, and specifically for the investigative services which the defendant might otherwise not be able to afford.

[98] *See* text at note 38, *supra.*

[99] Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 265 (1968).

explaining unitary versus sequential use of private legal services. The manner in which a client perceives that his case is being handled may be important as a determinant of whether a client continues with a lawyer or seeks out another lawyer to represent him.[100] A research focus on perceptions of clients as to the satisfactory character of their lawyer's work and its relation to utilization of legal services would necessitate studying cases of unitary as well as sequential representation since the same beliefs underlying the need to change lawyers in cases sequentially represented may also exist in cases in which no action is taken by clients to terminate their relationship with a lawyer.

The effects of client experience on replacement may also be a focus of the social-psychological approach. A factor determining willingness to use different lawyers over time may be a client's prior experience with sequential representation or prior experience with prosecution in the criminal justice system.

The ways in which clients perceive their cases and act upon them is probably influenced by family, relatives and friends. It would be useful to examine whether these are certain situations, such as when the defendant is in custody, in which the family plays a more important role in determining whether to continue utilizing the services of a particular lawyer.

Generally, the social-psychological approach is valuable since it recognizes that different individuals perceive their cases differently and that behavior may thus vary according to these differences. Such an approach may suggest explanations for variations among individuals who, having comparable financial or other characteristics and receiving apparently comparable services, decide to act in different ways—one remaining with the same lawyer, while another utilizing a succession of different lawyers.

Delivery of Legal Services Approach. The previous approaches focus on describing individual characteristics of clients as they relate to replacement. A different approach is concerned with revealing how features of the legal profession, criminal justice system and organizational characteristics of the delivery of legal services, may affect the utilization of legal services.

[100] The relationship between dissatisfaction with a lawyer and a decision to retain another lawyer is unclear. One study reports that clients' negative perceptions of their lawyers' performance did not necessarily result in taking their cases elsewhere. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 50-52, 60 (1974).

Certain features of the profession of law may be strong forces in precipitating replacement. One such factor may be that salaried employment of lawyers in law firms doing only criminal work is very rare and consequently criminal defense lawyers, or those hoping to develop a practice in this area, are usually solo practitioners whose incomes depend solely on obtaining their own business. Because of their marginal economic status upon beginning their practice, lawyers may engage in substantial attempts to attract clients, such as by undercutting other lawyers' fees and thus drawing clients away from their initial lawyers. In addition, in the early years of their careers, lawyers may be willing, for their own experience and for visibility to other prospective clients, to handle cases very inexpensively—with the consequence that cases initially handled by a public defender may be subsequently represented by private counsel or that defendants may utilize a different private lawyer over time because a less experienced lawyer will handle the case less expensively. In these ways, replacement may occur as a product of the client-seeking behavior of lawyers in economically marginal practices of law. In general, successor private lawyers may not be drawn from the full spectrum of experience or length of establishment as a defense lawyer but instead be limited to newer entrants to the practice of criminal law. As discussed earlier, replacement is also related to the conscious effort of some lawyers to establish a one-stage branch court practice.[101] Studies of replacement in relation to the characteristics of lawyers and their law practice would provide information as to the impact of these factors.

Efforts should also be made to look at sequential representation in relation to other aspects of the criminal justice system, such as the structure of the courts. It was suggested earlier that "branch court lawyers" form a distinct group in response to the differentiation and assignment of stages of cases to different courts[102] and that public defender offices, also in response to conditions formed by the differentiated court system, establish their offices in a parallel fashion.[103] More detailed analyses are needed of similarities and differences in other jurisdictions and explanations for these variations. For instance, the size of defender offices and their resources vary, and organizational structure may be influenced by differences in these and other characteristics. There is also a need for cross-juris-

[101] *See* text at notes 50-51, *supra.*

[102] *See* text at notes 52-53, *supra.*

[103] *See* text at notes 27-34, *supra.*

dictional study of various characteristics of judicial work and their implications for replacement. In smaller cities with fewer courts and lawyers, replacement may occur less frequently since trial court judges may feel better able to exercise control over matters outside their courtrooms.

Various characteristics of public defender offices may affect the way they are utilized by clients. A number of studies have suggested that the mass processing techniques of defense organizations handling large caseloads may affect the manner of service, making it impersonal and fragmented.[104] Elsewhere it is suggested that the stage system of representation creates a work group atmosphere between defenders and prosecutors which may give the appearance to defendants of a lack of commitment of public lawyers to the individual defendant's case.[105] The extent to which clients continue to use defender services when financial aid may be available may be affected by such organizational characteristics.

Studying the Consequences of Replacement

The study of the implications of sequential representation for the services received by defendants may be undertaken in many ways. For instance, one approach would be to study an organization such as a public defender's office which has utilized both sequential and unitary systems of representation over time. By comparing differences in case dispositions of offenses for a number of years, before and after the introduction of the alternative mode of representation, comparisons of case outcomes would be possible.[106]

In asking the question of the significance for the disposition of clients' cases of the appointment of a succession of different lawyers, rather than continuous participation of one, at least two outcome measures are identifiable: changes in the type of disposition and in sanctions on conviction, and changes in the length of time to complete cases in the courts.

Possible Impact on Disposition and Sanction. Lawyers in any case, whether sequentially or unitarily represented, encounter the problem of generating information useful to case strategy and preserving it for trial court use. Modes of delivery of professional services which replace the professional initially providing services with one or more other professionals may exacerbate this preparation of a case in ways that modes of providing legal services by one provider do not. Two major forces, communication gaps and lags in commitment to preparation of a case, may have implications in causing differences in dispositions in cases unitarily or sequentially represented. First, in systems in which there is a succession of providers, communication between the initial lawyer and his successor may not occur. Although for some types of information (*e.g.*, preliminary hearings) communication may not be a problem since there are other sources of information such as transcripts, for other types of information, such as observations of witness demeanor and off-the-record conversations with prosecutors, information may not be available to successors without communication with the initial lawyer.[107] Second, replacement of lawyers may undermine commitment of each to the case preparation. Since an initial lawyer will not be involved in the trial court stages of a case, investigation may not take place; interviewing of witnesses may be left to his trial court successor; and the use of various legal procedures to develop the case for trial may be neglected by the initial lawyer.[108] Comparison of the disposition of cases sequentially or unitarily represented may show that cases unitarily represented have higher rates of dismissals, reduced rates of conviction on trial, increases in reduced charges, or lesser sentences on conviction. Such differing outcomes may also be related more specifically to particular patterns of replacement.

Possible Impact on Case Completion Time. Replacement of lawyers may also mean that additional time is required in the defense of cases since a successor lawyer must, where communication about the history of a case is not forthcoming from the initial lawyer, reconstruct the previous portions of a case.[109] Even where the documents are available about the initial stage activity in a case, and the initial counsel has communicated his knowledge about information not otherwise quickly obtainable, a successor provider of legal services may spend some additional amount of time familiariz-

[104] *See* notes 11-14, *supra.*

[105] Casper, *Did you have a lawyer when you went to court? No, I had a Public Defender*, YALE REV. L. & SOC. ACTION, at 7, 9 (Spring 1971).

[106] One of the authors (Gilboy) is presently studying the impact on the disposition of homicide cases of the change from sequential to unitary representation in the Cook County Public Defender's Office. *See generally*, about this change in representation, note 25 *supra.*

[107] *See* notes 3-6, *supra.*

[108] *See* note 8, *supra.*

[109] On the other hand, assignment of lawyers to cases rather than courts may result in greater time to complete cases due to the additional time spent in court waiting for cases to be called, travel time between courts, etc. *See* note 33, *supra.*

ing himself with the case by conducting interviews with his client, witnesses, and reading police reports, transcripts, etc. We might expect then that where a defendant is represented unitarily there may be less elapsed time between the arraignment after indictment and the trial of the case (the period within which a successor would presumably be acquainting himself with the case). Dismissals may also occur earlier in a case, since with unitary representation investigation of a case by the lawyer may occur earlier in a case, such as at the preliminary hearing stage, rather than such work being left to the trial court counsel as it may be in a sequential representation system.

How the Processes of Representation Differ

If there are differences in case outcomes, it would be important to study how they may be produced: how does legal representation differ when a lawyer represents a client continuously or sequentially? The focus here would be on what a lawyer does when he is the only lawyer in a case as compared to what he does when he is one of a number of professionals providing services. This can be studied in a number of ways. One way is to look at who undertakes certain work and in what manner it is performed. The segregation of the work of defenders in a sequential representation system may be reflected in the deferring of most trial preparation tasks to the trial court stages and trial court lawyers. In the extreme case, commitment to trial preparation may not occur at all in the initial stages of a case: initial lawyers may undertake no more than a narrow sector of work in a case relating most clearly to the sphere of work they handle, like bail hearings and preliminary hearings.

Moreover, an initial lawyer may not only not perform certain work at the stage at which he provides services, but his perspective may also be short-ranged and focused only on results of proceedings at his stage of work, rather than on a broader one encompassing the implications of the way he carries out his work for the trial stage. One set of variables relating to the perspective on work are the usage of available legal procedures such as the preliminary hearing and bail hearing for trial court preparation.[110] Whether such procedures are initiated, and their content, may be related to the quality of preparation for trial. It would be useful to analyze the usage of such procedures in relation to whether cases are unitarily or sequentially represented.

In addition to these specific suggestions, a more general study of factors which might increase or diminish the adverse consequences of sequential representation is needed. The various patterns of sequential representation raise the question of whether social organizational remedies, such as referral networks, operate to preserve meaningful ties between portions of a case handled by different providers. Subsequent research might also examine whether and how replacement in an organizational setting differs from that which occurs among autonomous providers or those unrelated by these organizational ties.

Clients' and Lawyers' Experiences

A final area of research about the consequences of sequential representation is its implications for clients' experiences of their cases as well as lawyers' attitudes toward their work. It is possible that sequential representation may alienate defendants and build their resistance to the criminal justice system's rehabilitative goals. Regardless of any impact on case outcomes, it is important to study how unitary or sequential representation affects clients' experiences of their case and attitudes toward their case dispositions. It has also been suggested that stage representation may affect lawyer morale and performance,[111] which may in turn have various impacts on the process of representation. Interviews or questionnaires directed to lawyers in private practice as well as in public defender organizations could provide information as to existence and severity of such attitudes.

Conclusion

Sequential legal representation occurs in a majority of the criminal felony cases which reach the trial stage in Chicago. Further, it is not a phenomenon limited to the organization of the public defender's office. Private lawyers are involved in about one-half of the cases in which replacement takes place.

A key feature of cases involving the replacement of one lawyer by another is the absence of a centralized authority to coordinate the work of the various lawyers and thus the need to rely on cooperation between a lawyer and his successor for communication of case information. The way one lawyer comes to replace another as the defendant's counsel is important in determining the types of tensions and obligations between lawyers which may enhance, negate or otherwise affect coopera-

[110] *See* note 8, *supra.*

[111] *See* note 10, *supra.*

tion. Modes of replacement of one lawyer by another vary in the ties between lawyers, the assumptions underlying the shift of cases, claims to legal work products, available "sanctions," work orientations among lawyers, and the personal costs of information requests by the successor counsel. In examining whether the potential for cooperation is realized, it is important to remember that the actual degree of cooperation among branch and trial lawyers is also related to the reality of other features of legal work. Thus, where contacts between a defendant and branch court lawyer are limited to the day of appointment (as in the public defender office), or where little out-of-court investigation is believed to have taken place at the branch court level (as may be true where a full-time branch court lawyer handled the case), the trial lawyer will not expect anything useful to arise out of contacting the branch lawyer, and cooperation is unlikely to be requested.

In light of the substantial amount of sequential representation in the criminal law profession as reported in this study of the Chicago criminal courts, there is a clear need for further study of the sources of sequential representation and its consequences. The study of replacement is necessary to an understanding of the nature of the delivery of legal services in criminal cases. In addition, important ethical questions concerning the permissibility of withdrawal and the necessity for subsequent cooperation and legal questions concerning claims of ineffective legal representation may depend heavily on empirical research into the implications of sequential representation.