



NAVIGATING THE DWI SYSTEM: PERSPECTIVES OF PUBLIC DEFENDERS



Traffic Injury Research Foundation, *October 2018*

Introduction

Persons charged with driving while impaired¹ (DWI) offenses represent a significant proportion of criminal caseloads in the US. Research indicates that DWI defendants may account for between 20% and 50% of criminal caseloads, particularly in lower courts where misdemeanor offenses are presented (Robertson & Simpson 2003). Many defendants and offenders who are processed through the criminal justice system each year utilize the services of public defenders in court and parole proceedings. For example, in Minnesota, during fiscal year 2018, public defenders opened 11,800 (25%) misdemeanor, 4,818 (24%) gross misdemeanor and 2,178 (7%) felony DWI cases. DWI cases opened for all three levels of offense represented 20% of those crime classifications (Ward 2018). In addition, among the almost 3.8 million adults on probation in the United States, 13% were convicted of a DWI offense (Kaeble & Bonczar 2017), and data from 2013 revealed that among those convicted of a DWI offense, approximately 8% had been convicted of multiple DWIs (Glaze & Kaeble 2014).

Little attention has been paid to the experiences and perspectives of public defenders who provide a defense for persons arrested and charged with DWI, and who may have been convicted previously of DWI. In fact, often, defense counsel is not represented at working groups and task forces where criminal justice system policies and practices are discussed, and strategies developed. Due to the adversarial nature of the criminal justice system, other professionals (e.g., law enforcement and prosecutors) may exhibit distrust for defense counsel when it is suggested that they be represented at meetings addressing system issues. In short, defense counsel is often viewed as an opponent who aims to prevent other representatives of the criminal justice



1. The abbreviation DWI (driving while intoxicated or impaired) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) or DUI (driving under the influence), and in some states they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with drunk drivers.

system from obtaining a successful outcome in their case. While more often it is defense counsel in the private sector who specialize in DWI defense work who are perceived to be adversaries, scant attention has been given to the plight of publicly-funded defense counsel who represent DWI defendants and the corresponding challenges they both face pre- and post-adjudication.

In 2017, the Working Group on DWI System Improvements turned their attention to the role of private attorneys and public defenders who represent DWI offenders in the criminal justice system. Research has clearly demonstrated that persons charged with DWI are a diverse and heterogeneous population, and the Working Group aimed to explore whether the experiences of private defense attorneys and public defenders were similar or different. As such, some private defense attorneys and public defenders who had experience with many DWI defendants were invited to the 14th Annual DWI Working Group meeting, which was held in Savannah, Georgia on September 25th to 27th, 2017. They were invited to share their experiences and proffer ideas to improve criminal justice system processes for DWI defendants.

The purpose of this meeting was to inform the DWI Working Group and learn from the experiences and perspectives of private attorneys as well as public defenders who do not have the capacity to specialize or have limited training and resources to defend DWI defendants.

To have a positive impact on recidivism, defendants need adequate legal representation.

Parenthetically, if the criminal justice system is to run efficiently and yield outcomes that have a positive impact on recidivism reduction, all sides of a case need to be prepared and well-informed. To that end, the DWI Working Group agreed it was necessary to better understand the similarities and differences in experiences of private and public defense attorneys, as well as the perceptions and experiences of individuals tasked with representing low-income defendants that were eligible for a public defender. This fact sheet summarizes general experiences of public defenders in the DWI system, as well as their shared experiences

with DWI defendants generally, and experiences with first, as compared to, repeat or persistent DWI defendants specifically.

General Experiences in the DWI System

Public defenders identified some common features of the justice system that are routinely encountered and that may influence the processing of cases. These features provide important context for the management of DWI defendants.



- > There is a lack of uniformity across jurisdictions. Offenses that occur in one jurisdiction may be handled differently and have different outcomes than offenses that occur in another jurisdiction.
- > DWI cases are one of many types of criminal cases that public defenders must manage as part of a high-volume caseload, meaning specialization is rare.
- > There is limited time to prepare for cases.
- > There is a high turnover among public defenders, and new attorneys often start with DWI cases before moving on to other types of criminal cases once they have gained experience. This means that most public defenders handling DWI defendants have limited experience with criminal defense generally, or DWI defense work specifically.
- > Public defenders interact with defendants at various stages of the court process, and the public defender assigned at each stage may change throughout the process. Oftentimes, the first time that public defenders meet with defendants is after arraignment and, often, less than 30 minutes before trial.

- > Generally, public defenders feel unprepared for DWI cases because of limited educational opportunities regarding the characteristics of DWI defendants, the science of breath alcohol testing and technical evidentiary issues, or evidence-based countermeasures. This limitation often undermines the confidence of public defenders and can contribute to case delays and hearing postponements as they aim to gather the requisite knowledge.

General Experiences with DWI Defendants

This section highlights important characteristics of DWI defendants who utilize the services of public defenders as identified by defense counsel at the Working Group. Important factors that can influence the ability of defendants to participate in their defense or comply with court-ordered requirements are noted.

- > There is a barrier to establishing rapport with defendants because they may not view public defenders as legitimate attorneys. Often defendants ask, “Do I need to retain a real attorney?” and public defenders must first overcome this perception with many defendants before being able to work with them on their defense.
- > Defendants are rarely equipped to participate effectively in their own defense due to limited understanding of criminal justice process, the relevant facts of the case, or the meaning of evidence to be presented.
- > Defendants often assume that all court entities share information that defendants or other government staff/agencies provided. Public defenders often require this information as part of court preparation, but defendants may not know it is needed or be unable to provide it.
- > The costs associated with arrest and conviction for a DWI offense are daunting and discouraging for defendants. There is a plethora of fines and fees that must be paid, often without a reasonable payment plan, which leads to non-compliance of court-ordered conditions.
- > It is often difficult to help defendants locate and access the services that they need, or such services are simply unavailable. Court-ordered services and programs are often not accessible, not readily available to defendants, or simply inappropriate (e.g., substance abuse

assessments, treatment). Literacy or inability to speak English can also be significant barriers.

- > Few defendants acknowledge they need treatment. Substance abuse may be the “tip of the iceberg,” and merely external evidence of more complex issues that are often not diagnosed or treated (e.g., mental health issues, history of trauma).

Factors such as limited understanding of the criminal justice process, legal costs, lack of information, literacy or inability to speak English can influence the ability of defendants to participate in their defense or comply with court-ordered requirements.

While public defenders deal with a heterogeneous population of DWI defendants, there are some important distinctions between first and persistent DWI defendants that are quite pronounced and that have bearing on the ability of public defenders to mount a case. These distinctions are highlighted below.

Experiences with First DWI Defendants

The following are some manifested characteristics of first offense DWI defendants identified by public defenders, overall or to some degree, that were highlighted during the Working Group meeting. In general, they:

- > Are more likely to be guilty of bad judgment and will not re-offend after experiencing the court process.
- > Are young drivers with a high-BAC due to binge drinking.
- > Believe that they are not criminals, and that “it was only a DWI.”
- > They have unrealistic expectations as to likely outcomes and wish to minimize the consequences of their actions with a pre-trial disposition such as diversion with no record of a conviction.
- > Do not understand the process or know what to expect.
- > Have a great deal of anxiety related to not knowing what comes next and have a palpable fear of court and jail.

- > Do not understand what breath or blood evidentiary results mean or that there may be mandatory minimum penalties.
- > Want to know when they can drive and get their license re-instated.
- > Often assume that once the license revocation period expires that they are able to drive legally.
- > Are often unaware that “completion” may require payment of all fines and fees or other steps to license reinstatement.

Experiences with Persistent DWI Defendants

Unlike many first offense DWI defendants, persistent DWI offenders present a different set of characteristics and issues with which public defenders must recognize and address to effectively represent them.

- > Persistent offenders are more likely to be high-risk to re-offend and require more intensive services and interventions. They may present with one or more of the following:
 - » Anti-social behaviors, attitudes and friends
 - » Severe substance abuse issues, including:
 - ♦ poly-substance use (e.g., combining prescription medications or illegal drugs with alcohol)
 - ♦ failure to recognize they have a problem
 - ♦ resistance to change and treatment
 - » Mental health issues:
 - ♦ failure to take prescription medications and substituting alcohol
 - ♦ exhibiting suicidal thoughts
 - » Prior criminal offenses and/or driving violations
 - ♦ previous alcohol-related, non-traffic offenses (e.g., domestic abuse, disorderly conduct, assault)
 - » Limited fear of jail
- > Persistent offenders may also be:
 - » Older, problem drinkers with a constellation of other issues.
 - » Risk-taking young drivers that have high-BACs, previous driving violations and other identified problem behaviors. They may

exhibit a propensity for poor judgment, making poor choices and engaging in risky behavior.

- » Considered impoverished or have limited income. Going through the criminal justice process maintains or accelerates the cycle of poverty and an inability to pay fines and fees and maintain employment due to the conviction and loss of transportation. What a middle-income individual considers a hefty fine may become insurmountable to a low-income offender. They become stuck in the system because of the inability to pay court-ordered financial obligations, treatment costs and the lack of reliable transportation to attend treatment, employment or other required activities.
- » Survivors of traumatic events with ineffective coping skills
- » Stuck in jail, unable to post bail or waiting for an opening in a treatment facility

Differences Between Public and Private DWI Defense Attorneys



Public defenders throughout the US are burdened with unmanageable caseloads and significant under-funding. About three-quarters (73%) of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney in 2007. The 22 state public defender programs handled 1.5 million indigent defense cases, which averaged 349 cases per year assigned to a single attorney. Across both county-based offices and state programs, misdemeanor and ordinance violation cases accounted for the largest percentage of cases received. Felony non-capital cases were the second largest type of case received. Most county-based public defender offices

and state defender programs employed fewer than the recommended number of support staff, such as paralegals, investigators, indigency screeners, and clerical staff (Snyder & Strong 2007). As an example, each Kentucky public defender's workload in 2017 averaged 459 newly assigned cases (does not include cases carried over from the previous year) with funding of \$276 per trial case (Kentucky Department of Public Advocacy Annual Litigation Report 2017). This is 55% above the recommended caseload standards (National Legal Aid and Defender Association National Advisory Commission on Criminal Justice Standards and Goals). Additionally, public defenders often have hybrid caseloads which can include adult felony, gross misdemeanor and misdemeanor cases as well as juvenile delinquency and other civil cases.

Public defenders are burdened with unmanageable hybrid caseloads and lack the recommended support staff resulting in less time to effectively prepare their defense.

Defendants with well-paying employment and, thus, the financial wherewithal to hire a private attorney who specializes in defending DWI offenses have a significant advantage in either avoiding a conviction or receiving a more favorable court disposition. Private attorneys may have the capacity to reserve adequate time to effectively prepare their defense strategy, the time and money to receive training specific to the latest scientific information related to DWI case defense and their clients have the financial resources to retain DWI experts. Additionally, financially stable defendants have the monetary resources to post bail, more immediately seek assessments or related treatment (covered or not by insurance) and the funds to more immediately pay case-related fines and fees, including those related to monitoring programs. This means they are more equipped to present themselves to the court as pro-social and pro-active in addressing their issues prior to trial or sentencing, as well as getting a head-start on completing court-ordered conditions.

Private defense attorneys are more likely to have the capacity to reserve adequate time to effectively prepare their defense strategy.

Conversely, defendants that are dependent on publicly-funded defense counsel are typically unemployed or under-employed and, thus, do not possess financial resources. Nationally, public defender systems are significantly under-funded and overwhelmed by myriad criminal cases. Attorneys working as public defenders are typically unable to specialize in any type of criminal case or choose the types of cases they handle. Generally, they have unmanageable caseload demands consisting of a wide variety of cases that leave them limited time to adequately prepare an effective defense. Many criminal justice systems in the U.S. provide public defense services on an ad hoc basis. In such systems, a judge may order members of the private bar to represent indigent defendants as the need arises. In their worst manifestation, the accused's lawyer is the lowest bidder or, in some cases, new lawyers without trial experience, DWI or otherwise. In other areas of the U.S., public defenders are employees of a state or county system. Most of these systems with limited funding are unable to provide the necessary education and training for the expansive types of criminal cases they are asked to defend. For example, the State of Maryland has created 54 specialty courts in 21 jurisdictions across the state, without adding any support for public defenders to serve on the court teams and represent participants (Maryland Office of Public Defender 2017 Annual Report). As stated previously, the DWI defendants represented by public defenders may have difficulty posting bail for



pre-trial release and if they are employed, they risk losing their job due to absenteeism. Whether they are unemployed or employed in a low-paying job these defendants often are making ends meet on a benefit payment or paycheck with little ability to self-fund assessments or treatment and no ability to immediately pay fines and fees.

Public defender systems need to be adequately resourced to close the gap between their capacity and those of private counsel.

The inequity gaps in effective representation between private and public counsel will only be closed when there is parity in the way public defense systems are funded and trained as compared to prosecutors. Additionally, a means-based system that considers a DWI defendant's ability to post bail and pay fines and fees would even the scales of justice and provide greater opportunity for DWI offenders to comply with court-ordered conditions equally.



Conclusions

The United States justice systems presume an arrested person's innocence. The Sixth Amendment of the U.S. Constitution guarantees a person's right to counsel. However, there is a disparity in the quality of representation defendants can access often based on one's ability to pay. Public defenders throughout the U.S. are predominantly dedicated and hard-working, but they are overworked and out-resourced representatives of low-income defendants. The people they are assigned to defend who are considered persistent DWI offenders have myriad financial, mental health and substance abuse issues coupled with a limited ability to address these issues. This factsheet

based on the outcomes from the 2017 DWI Working Group meeting underscored significant issues faced by public defenders that need to be addressed to ensure not only proper representation of first and persistent offenders, but also to assist in long-term public safety through recidivism reduction.

About the Working Group

The Working Group on DWI System Improvements is a prestigious coalition of senior leaders of organizations representing frontline professionals in all segments of the criminal DWI system (law enforcement, prosecution, judiciary, supervision, and treatment). This coalition was formed in 2003 to advance the recommendations stemming from the DWI System Improvements report series, previously funded by Anheuser Busch. During its 14-year tenure, this distinguished consortium has shaped the focus on and development of drunk driving initiatives in the United States with its unique perspective on knowledge transfer of critical research findings, as well as the translation of legislation, policies, and programs into operational practices. The Working Group is a recognized source of institutional knowledge and expertise that has become a valuable resource to practitioners, agency administrators, and policymakers across the country. The efforts of the Working Group on DWI System Improvements have served to identify critical system needs, to make needed educational materials available, to articulate the complex issues associated with program and policy implementation embedded within broader systems, and to give voice to the concerns of practitioners in the DWI system and identify achievable solutions.

Since 2004, the Working Group has met annually to produce much-needed educational primers, policy documents and guides for justice professionals to help strengthen the efficiency and effectiveness of the DWI system for dealing with persistent impaired driving offenders. These documents can be accessed at www.dwiwg.tirf.ca.

- > 2004 – Working Group on DWI System Improvements: Proceedings of the Inaugural Meeting
- > 2006 – A Criminal Justice Perspective on Ignition Interlocks

10 Steps to a Strategic Review of the DWI System: A Guidebook for Policymakers

- > 2007 – Screening, Assessment, and Treatment: A Primer for Criminal Justice Practitioners
Improving Communication and Cooperation
- > 2008 – Impaired Driving Priorities: A Criminal Justice Perspective
- > 2009 – Impaired Driving Data: A Key to Solving the Problem
Funding Impaired Driving Initiatives
Understanding Drunk Driving
- > 2010 – Effective Strategies to Reduce Drunk Driving
- > 2011 – Performance Measures in the DWI System
- > 2012 – Impaired Driving in Rural Jurisdictions: Problems and Solutions
- > 2013 – DWI Dashboard Report: A Tool to Monitor Impaired Driving Progress
- > 2014 – DWI Dashboard Strategic Guide: Addressing Gaps in the DWI System
- > 2015 – Post-Conviction Services for DWI Offenders: Building Community Partnerships

References

Commonwealth of Kentucky Department of Public Advocacy Annual Litigation Report - Above and Beyond: Not the Probable, the Possible September 2017 Fiscal Year 2017. Accessed from: <https://dpa.ky.gov/News-and-Public-Information/Documents/DPA%20AR%202017.pdf>

Glaze, L.E., & Kaeble, D. (December 2014). Bulletin: Correctional Populations in the United States, 2013. Bureau of Justice Statistics. NCJ 248479. Office of Justice Programs. U.S Department of Justice. Accessed from: <https://www.bjs.gov/content/pub/pdf/cpus13.pdf>

Kaeble, D., & Bonczar, T.P. (Revised February 2, 2017). Bulletin: Probation and Parole in the United States, 2015. Bureau of Justice Statistics. December 2016. NCJ 250230. Office of Justice Programs. U.S. Department of Justice. Accessed from: <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>

Minnesota Board of Public Defense. Correspondence with William Ward, State Public Defender

National Legal Aid and Defender Association. National Advisory Commission on Criminal Justice Standards and Goals, The Defense – Standard 13.12 Workload of Public Defenders

Robertson, R., & Simpson, H. (2003). DWI System Improvements for Dealing with Hard Core Drinking Drivers – Adjudication and Sanctioning. Traffic Injury Research Foundation

State of Maryland Office of the Public Defender. Fiscal Year 2016 Annual Report with Strategic Plan. Accessed from: http://dlslibrary.state.md.us/publications/EXEC/OPD/CP16-401_2016.pdf

Snyder, H., & Strong, S. (Revised June 17, 2010). Bulletin: Census of Public Defender Offices, 2007. Bureau of Justice Statistics. November 2009, NCJ 228538. Office of Justice Programs. U.S. Department of Justice. Accessed from: <https://www.bjs.gov/content/pub/pdf/pdo07st.pdf>

Traffic Injury Research Foundation

The mission of the Traffic Injury Research Foundation (TIRF) is to reduce traffic-related deaths and injuries. TIRF is a national, independent, charitable road safety institute. Since its inception in 1964, TIRF has become internationally recognized for its accomplishments in a wide range of subject areas related to identifying the causes of road crashes and developing programs and policies to address them effectively.

Traffic Injury Research Foundation (TIRF)

171 Nepean Street, Suite 200,
Ottawa, Ontario K2P 0B4

Phone: (877) 238-5235

Fax: (613) 238-5292

Email: tirf@tirf.ca

Website: www.tirf.ca

ISBN: 978-1-988945-75-0



ANHEUSER-BUSCH

Bringing People Together for a Better World

This initiative was made possible by a charitable contribution from Anheuser-Busch.