NAPD Policy Statement on Workloads

All Public defense systems must actively work to implement reasonable workloads for all defense team members according to prevailing professional norms

(Approved by the NAPD Board of Directors on February 23, 2024)

NAPD has previously issued guidance on public defense workloads, including:

- *Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems* (2015)
- *Statement on Reducing Demand for Public Defense* (2017)
- *Foundational Principle 5: Workloads of Defense Attorneys Must Always Be Reasonable* (2017)

This policy statement begins with the newly-revised standard followed by commentary which explains the research, methodology, and import of moving to implement workloads that allow for public defense practitioners to provide constitutionally-sound representation to each client.

In light of new research and developments in public defense, NAPD adopts this statement:

Public defense workloads must be reasonable, ensuring that public defense counsel is able to represent each client according to prevailing national professional norms. Public defense leaders should work to develop plans to implement workload limits, guided by the 2023 National Public Defense Workload Study (NPDWS) and these guiding principles:

1. **The Constitution requires public defenders to have reasonable workloads.**
2. **Workload limits should be based on rigorous research.**
3. **Workload limits should be implemented according to local plans with clear deadlines.**
4. **All defense team members must have reasonable workloads.**
5. **Excessive workloads harm everyone and disproportionately harm people of color.**
6. **To achieve reasonable workloads, the criminal legal system's demands on public defenders must be reduced.**

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Introduction

The liberty of hundreds of thousands of persons and the integrity of the criminal legal system are threatened by excessive workloads. When lawyers and their staff are unable to provide effective testing of the government's case against their clients, the fundamental fairness of the American justice system is denied.

Excessive workloads and inadequate resources are critical challenges for public defense nationally

Excessive workloads in public defense delivery systems are foremost an ethical issue. Where excessive workloads exist, public defense providers have a duty to remedy them. Where excessive workloads do not exist, public defense providers have a duty to avoid them. While this responsibility sounds simple, public defense providers, with rare exceptions, have been historically unsuccessful in maintaining reasonable workloads.

The U.S. Department of Justice has stated:

> "…caseload limits are no replacement for a careful analysis of a public defender's *workload,* a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties." [Emphasis in original.][1]

The American Bar Association has also opined that excessive defender caseloads threaten the integrity of the justice system:

> "… ABA policy and well-established legal principles support public defenders in assertively seeking relief from excessive workloads. Courts, in turn, should provide relief when excessive caseloads threaten to lead to representation lacking in quality or to the breach of professional obligations. *To do otherwise, not only harms individual defendants but our entire justice system.*" [Emphasis added.][2]

The most significant impediments to meeting this obligation have been the inability to: 1) define convincingly what constitutes an excessive public defense workload; 2) demonstrate effectively how and when it exists; and 3) possess the resources and independence to achieve workloads that allow meaningful representation for every client according to prevailing national norms. Without essential information, adequate resources, and independence, public defense providers have been unable to persuade funders to provide the necessary resources, or alternatively, to prove to judges their need for reduced workloads. The result has been a long-standing and widespread epidemic of excessive public defense workloads in jurisdictions across the United States.

The COVID-19 epidemic has aggravated the excessive workload of public defense providers across the country. In many instances, it threatened their ability to provide constitutionally effective representation for every client. Delays in bringing cases to trial, dramatic increases in discovery caused in part by digital evidence, the increased recognition of the need for comprehensive "holistic" representation, and significant reductions in staff resulting from "the great resignation" have made public defense workloads unmanageable in many jurisdictions.

In other words, public defenders have continued to do more with less. Despite impossible obstacles, they remain committed to their clients. NAPD recognizes and supports the thousands of dedicated public defense lawyers who are prevented from representing each client to the full extent of their abilities because of too many cases, inadequate support, and a lack of resources. The expectation that

public defenders sacrifice their professional commitments and personal well-being to provide some measure of justice must end.

Seventeen Previous Studies Have Led to the New National Standards

In the past 17 years, there have been 17 workload studies in 16 states from Rhode Island to Oregon that have generally concluded that public defense providers need up to triple the number of their existing attorneys and support staff to provide constitutionally required representation. In the National Public Defense Workload Study, national workload experts (the RAND Corporation, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, the National Center for State Courts, and Lawyer Hanlon) have produced a new set of workload standards, informed by those 17 studies. These standards should inform the development of local standards in each jurisdiction.

Public defense counsel should be guided by the new national standards, existing American Bar Association (ABA) standards, ethical rules of professional conduct, the American Bar Association's *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009), and NAPD's policy statements to determine reasonable workloads and to work with courts, prosecutors, and funding agencies to implement workload limits.

NAPD understands that there are varying political considerations across the country that affect public defense providers and their ability to implement swift changes to their public defense systems. Public defense leaders are encouraged to use new, revised, and existing resources to develop plans to implement workload limits guided by the new national standards. Resources can include, but are not limited to:

- ABA Eight Guidelines of Public Defense Related to Excessive Workloads (2009)
- ABA Ten Principles of a Public Defense Delivery System (2023)
- NAPD Foundational Principles (2017)
- NAPD Policy Statement on Public Defense Staffing (2020)
- National Public Defense Workload Study (2023)

The publication of the first national, evidence-based workload study provides a tool for change to reduce public defense workloads.

Commentary

1. The Constitution requires public defenders to have reasonable workloads.

A. Reasonableness, according to prevailing national norms, is the constitutional standard for assessing effective representation.

The constitutional standard for determining whether counsel provides effective assistance is whether the representation is in accord with prevailing national norms.[3]

Prevailing national public defense norms include those published by the American Bar Association, the National Legal Aid and Defender Association, the American Council of Chief Defenders, and the National Association for Public Defense. These prevailing national standards in turn have been informed by the National Study Commission, the National Advisory Commission, and the Uniform Law Commissioners public defense norms. These include both litigation and ethical norms.

B. Public defense workloads must be reasonable to ensure public defense practitioners have the ability to represent each client according to prevailing national norms.

The amount of work counsel is assigned must be reasonable and not exceed a level that would prevent counsel from providing representation to each client according to prevailing national norms. "Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations."[4]

The work assigned must allow a well-trained lawyer to provide competent, meaningful, conflict-free representation to all clients in every case amidst the other responsibilities of the lawyer and in consideration of the staff supporting the lawyer.[5]

Public defense programs should not "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."[6]

National prevailing professional defense responsibilities are substantial. Prevailing national norms include the following responsibilities:

- Interview[7] each client;
- Consistent communication[8] with each client;
- Investigate:[9] Counsel "has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges. ….The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt."[10] Investigators who interview witnesses, obtain records and survey the crime scene allow a lawyer to meet the ethical responsibilities of not becoming a witness in a case as required by ABA *Model Rule of Professional Conduct,* Rule 3.7 Lawyer As Witness.[11]
- Use of expert witnesses as appropriate.
- Research and knowledge of the law: Counsel "must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law."[12]

- File appropriate motions: "Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant…. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case."[13]
- Negotiate: Counsel shall explore with the client the desired for a negotiated disposition and if the client consents, counsel shall explore a negotiated sentence with the prosecutor.[14]
- Prepare for and conduct court hearings, including trials when the client decides to go to trial.
- Disposition: Counsel "should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed."[15]
- Develop sentencing plan: Counsel should advocate for a complete and accurate presentence investigation report and present a defense-generated sentencing proposal.[16] This can include researching prior criminal history.

2. Workload limits should be based on rigorous research.

A. The 1973 National Advisory Commission (NAC) workload standards substantially overstate the work that can be performed according to national prevailing professional norms.

Some public defense providers have caseload standards based on the NAC on Criminal Justice Standards' recommendations for maximum annual caseloads for public defense providers from 1973.[17] The NAC Standards recommended no more than 400 misdemeanors or 150 felonies per attorney, per year.

The August 24, 2007 *Statement on Caseloads Workloads* of the American Council of Chief Defenders stated that the 1973 NAC Standards could not be exceeded as they "reflect the maximum caseloads for fulltime defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified."[18]

As helpful as the NAC standards have been since 1973, our country has seen significant changes in criminal defense practice since 1973, including: 1) scores of new criminal offenses that did not previously exist; 2) ever-increasing complexity in criminal practice, procedure and sentencing laws; 3) an explosion in the number of people charged each year with criminal offenses; 4) a ballooning system of "collateral consequences" of criminal convictions; 5) greater volume of discovery, especially video, in an increasing number of cases; 6) increasingly harsh criminal penalties; 7) new standards of practice in cases, especially death penalty and juvenile life cases.[19] Additionally, the NAC standards do not account for travel that is especially time consuming and necessary in rural jurisdictions. These factors have drastically increased the amount of time, knowledge, skills, and staffing required for a lawyer to provide effective representation to each client.

The 1973 NAC method of merely counting the number of cases is no longer a valid measurement as it does not account for all the factors in casework and undercounts the work required. Merely counting undifferentiated misdemeanors and felonies does not adequately account for the work necessary as it does not precisely take into consideration such things as the level and complexity of the case, the experience and skills of the attorney, and the degree of investigation, mental health, and administrative support available.

State workload studies and the new NWDS demonstrate that the NAC case maximums are out of date and are too high to ensure representation of every client according to prevailing national norms. This holds true because the NAC standards did not account for changes in technology, forensic sciences, discovery, new categories of offenses, harsher penalties, etc. that clients face today. Based upon these and many other changes to the practice of criminal defense, it is axiomatic that case limits should be substantially lower.[20]

B. The American Bar Association's (ABA) Ten Principles and Model Rules of Professional Conduct can help guide public defender providers in creating new workload standards.

Recently, on August 7, 2023, the American Bar Association adopted revised *Ten Principles of a Public Defense Delivery System* (August 2023) and renumbered some of the Principles. Notably, principle 3 speaks to the import of controlling workloads:

> Principle 3: Control of Workloads
>
> The workloads of Public Defense Providers should be regularly monitored and controlled to ensure effective and competent representation. Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations. Workload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately, but national workload standards should never be exceeded. If workloads become excessive, Public Defense Providers are obligated to take steps necessary to address excessive workload, which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments, and if necessary, seeking to withdraw from current cases.

This 2023 revised workload standard, Principle 3, in footnote 20, references the new national workload standards recently issued:

> Notably, in 2023, new National Public Defense Workload Standards (NPDWS) were published by The RAND CORPORATION, ABA SCLAID, The National Center for State Courts, and Stephen F. Hanlon. The NPDWS are grounded in a rigorous study of 17 prior jurisdiction-specific workload studies conducted between 2005 and 2022 and use the Model Rules and ABA Criminal Justice Section standards as the reference for reasonably effective assistance of counsel. The NPDWS then used the Delphi Method to obtain a reliable professional consensus of criminal defense experts, both public and private, from across the nation. **These new national standards are intended to replace the 1973 NAC Standards.** See National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, The Defense (1973). **The NPDWS reflect the changes in defense practice that have occurred in the fifty years since the creation of the NAC Standards, including the significant role of digital evidence from body-worn cameras to smart phone data and forensics in modern defense practice, as well as the expanded role of defense attorneys.** [Emphasis added.][21]

In addition, compliance with rules of professional conduct is required in the courts of all state and federal jurisdictions. The ABA *Model Rules of Professional Conduct* specify that competent, diligent representation of a client requires timely communication, maintenance of the knowledge and skills necessary for the competent representation of each client, avoidance of conflicts of interests, and control of workload to be able to perform these professional responsibilities for every client.[22]

The American Bar Association Formal Ethics Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation* reviewed these ethical responsibilities and determined that defenders had a responsibility not to take on excessive workloads, stating, "The Rules provide no exception for lawyers who represent indigent persons charged with crimes. Comment 2 to Rule 1.3 states that a lawyer's workload 'must be controlled so that each matter may be handled competently.'"

Lawyers cannot accept[23] and public defense programs cannot assign work beyond what can be competently accomplished.[24] Lawyers who fail to represent a client adequately because of too much work can be sanctioned.[25]

C. Workloads should be determined by the best methodology available to assess what is a reasonable amount.

Workload methodology continues to evolve and increase in accuracy. The American Bar Association Standing Committee on Legal Aid and Indigent Defense has conducted workload studies in Missouri, Rhode Island, Louisiana, Colorado, New Mexico, Oregon, and Indiana. These studies use the most developed methodology and illustrate that previous workload standards have substantially underestimated the amount of work needed to represent a client competently according to national prevailing norms.[26]

The current "breed of workload studies is more rigorous than its predecessors."[27] The Missouri Project has a National Blueprint for a workload study included at the end of that report.[28] The ABA has detailed the methodology for state-of-the-art workload studies.[29]

In September 2023, the new NPDWS was released. The NPDWS is the result of an in-depth process engaging 33 veteran criminal defense lawyers from around the country. The study was sponsored by the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, The National Center for State Courts, the Rand Corporation, and Stephen Hanlon, a veteran lawyer who has led workload studies for the ABA. The study has been peer reviewed.

The NPDWS produced "case weights," which is what the research study advances as the average attorney time needed for eleven categories of adult felony and misdemeanor cases:[30]

Table S.1. Final Results of the Expert Panel Session with Example Caseload Standards

Case Type	Case Weight (Hours per Case)	Annual Caseload Standard
Felony–High–LWOP	286.0	7
Felony–High–Murder	248.0	8
Felony–High–Sex	167.0	12
Felony–High–Other	99.0	21
Felony–Mid	57.0	36
Felony–Low	35.0	59
DUI–High	33.0	63
DUI–Low	19.0	109
Misdemeanor–High	22.3	93
Misdemeanor–Low	13.8	150
Probation/Parole Violations	13.5	154

NOTE: Annual caseload standards were calculated using an assumption of 2,080 hours available annually to a defender for case-related work.

The NPDWS and state studies highlight that the 50-year-old NAC caseload limits of 150 felonies or 400 misdemeanors per year far exceed workloads in which an attorney can provide representation according to prevailing professional norms. And while the new NPDWS only addresses certain categories of felonies and misdemeanors, a similar approach can be used to determine appropriate workload limits for the other parts of public defense practice, including civil commitment, juvenile, dependency cases, and appeals.

3. Workload limits should be implemented according to local plans with clear deadlines.

A. Public defense providers should assess and move to implement plans that are appropriate for their jurisdictions.

While reducing workloads is an urgent priority for public defense providers, in most places, it will not be possible to implement the recommended standards overnight. Rather, public defense providers should set ambitious but realistic goals for workload reduction that make sense for their jurisdiction.

NAPD recognizes, as Lawyer Hanlon has stated, that it will not be possible to implement the recommended standards overnight. For some jurisdictions, a five-year plan, similar to what New Mexico's public defenders have adopted, may be appropriate.[31] As a starting point, each jurisdiction will need to map their statutes to the eleven categories highlighted in the NPDWS to determine what their "billable year" of case related work is and adjust the case weights to their own practice.

When determining the "billable year" that attorneys can spend on casework, a jurisdiction must factor in time for holidays, vacation, sick days, training, administrative work, casework for other case types (like civil or juvenile cases), and any other attorney time not spent on casework covered by the NPDWS.[32] Training and supervision[33]and time off[34] are essential to ethical and sustainable public defense practice, and jurisdictions must allocate time for them when setting workload standards.

B. Accurate timekeeping can be a valuable tool to support and improve public defense systems.

As NAPD stated in its 2015 Workload Statement:

> Contemporaneous, conscientious, and ongoing timekeeping allows public defense counsel to demonstrate concretely what they have (or have not) done for their clients. It also provides public defense counsel with the data necessary to assess whether what they are doing for clients comports with what they should be doing for clients based on professional performance standards. Finally, and perhaps most significantly, it allows public defense counsel, funders, judges, and anyone else interested to examine for themselves whether any deficiencies in performance are related to an excessive workload.

Keeping time for public defense counsel and staff can provide valuable information for funders to understand what is needed to provide effective representation. Defenders in some jurisdictions have successfully used time records to support court motions and to obtain an increase in funding for their systems. For example, in Lincoln, Nebraska, the chief defender used time records "to set binding caseload standards and to establish protocols for when we withdraw from cases."[35]

C. Measures to reduce workloads should be developed with the input of all staff so as not to increase burnout.

Because excessive workloads cause significant stress and burnout, public defense providers should weigh the benefits of workload reduction measures (like timekeeping, or criticism of attorney performance) against possible harm to staff morale. Leaders should regularly communicate with staff about implementation plans. NAPD has recommended that public defense offices promote career sustainability both by normalizing time off (typically by reducing workloads) and by inclusively setting office policy: "There are times when the interests of clients and the interests of staff may not align. Leadership [should seek] input from staff when creating policies or guidelines to address this tension and [provide] transparency in decision-making."[36]

4. All defense team members must have reasonable workloads.

A team of professionals is necessary for the defense of a client. Investigation, mental health, mitigation, paralegal and administrative assistance are essential to the proper representation of clients. "Without access to what the Supreme Court has called the 'raw materials' of an effective defense, defenders cannot provide competent representation to indigent defendants."[37] The NPDWS assumes that attorneys are working with "investigators, social workers, paralegals," and other defense team members at "existing" levels.[38] In places where attorneys are taking on the roles of other defense team members, increasing staffing levels for other defense team members can reduce attorneys' workloads.[39]

Future workload studies must rigorously account for the work of all team members. According to NAPD's policy statement on public defense staffing, "until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide one investigator for every three lawyers, one mental health professional, often a social worker, for every three lawyers, and one supervisor for every 10 lawyers.[40] Additionally, there should be one paralegal and one administrative assistant for every four lawyers.[41] Public defense organizations must have adequate staff or have access to adequate staff who perform necessary financial, IT, and human resource services.[42]

5. Excessive workloads harm everyone and disproportionately harm people of color.

A. Excessive workloads exacerbate costly staff turnover with negative consequences for clients, the criminal legal system, and the public.

In addition to causing inadequate assistance to clients, unreasonable workloads contribute to burnout and turnover. The costs and consequences of turnover[43] to clients, the criminal legal system and the public are considerable:

- Delayed resolution of cases because newly hired attorneys have little knowledge of the cases they inherit;
- Substantially lower productivity results because the newly hired attorney often has less experience than his/her predecessor;
- Remaining staff become overburdened as they are assigned more work in order to cover the cases of attorneys who left;
- Costly training of new attorneys is required because of their inexperience;
- Time-consuming recruitment of prospective replacements must be undertaken;
- Frustration of victims, witnesses and judges, who wait for resolution while defenders leave and are replaced, increases as cases are continued;
- Costs increase because delays mean that incarcerated defendants spend more time in county jails;

Staff turnover costs taxpayers unnecessarily. It inhibits the effective, timely resolution of cases in our criminal justice system, all of which undermines the confidence of the public in the judicial process.

B. Public defense clients are disproportionately people of color, and excessive workloads disproportionately affect them.

The Sentencing Project has documented that "Black Americans are incarcerated in state prisons across the country at nearly five times the rate of whites, and Latinx people are 1.3 times as likely to be incarcerated than non-Latinx whites."[44] In 12 states, more than half the prison population is Black, and seven states maintain a Black/white disparity larger than 9 to 1.[45] More than 80 per cent of people convicted of felonies in state court are represented by publicly appointed counsel.[46] As an example, in San Francisco, 75 percent of the clients are people of color, and more than 50 percent are Black. [47] In New York, a recent report found that although Black and Latinx people comprise just 52 percent of New York City's population, they make up 90 percent of jail admissions.[48]

Public defense counsel must recognize and make efforts to educate their funders about the racially disparate impact of excessive workloads.

C. Reasonable public defense workloads benefit the criminal legal system with a high return on investment.

Significant financial benefits can be reaped by municipalities, counties, the state, and taxpayers when public defense systems are invested in and properly funded.[49] Public defenders who carry reasonable workloads and possess professional independence are able to protect the rights guaranteed by our Constitution are protected and ensure that no one's liberty is taken unless proven guilty through fair process.

Public defense counsel can lower costly incarceration rates by:

- Being present at first appearances and advocating for pretrial release;[50]

- Advocating for reduced sentences that are proportionate based on the facts of the case;
- Developing alternative sentencing options that avoid incarceration by providing less costly and more effective community-based treatment that addresses the underlying needs of clients;[51]
- Assisting clients upon adjudication with reentry needs including employment and housing that reduce likelihood of recidivism; and
- Preventing expensive wrongful convictions.

Investing in public defense systems can produce some cost savings, but most importantly, it will result in better service to clients, the criminal legal system, and the community. Judges, prosecutors, and victims are often less frustrated when adequate public defense systems are in place because there are fewer requests for continuances, resulting in cases resolving earlier. Investing in public defender offices also helps with reducing costly turnover and communities are better served when there is an increased confidence in the validity and reliability of results.

6. To achieve reasonable workloads, the criminal legal system's demands on public defenders must be reduced.

A. With defenders experiencing a recruitment and retention crisis, it will not be possible to achieve reasonable workloads through hiring alone.

Public defenders around the country are reporting record staffing shortages due to recruitment and retention issues, which have been driven by law school debt and the COVID-19 pandemic. As Professor John Gross has written, "Indigent defense providers have gone from worrying about whether an attorney has too many cases, to worrying about whether they can hire enough public defenders or find attorneys who are willing to take cases."[52]

Few public defense providers have ever met the 1973 NAC standards. Meeting the 2023 NPDWS recommendations would, in most states, require hiring hundreds of new staff, while current positions have remained persistently vacant. While public defense must have greater resource parity with other criminal legal system functions to effectively recruit and retain attorneys,[53] it will never be feasible for public defenders to hire most of the new lawyers in their state.[54] Sustainable plans for implementing workload standards must address both the supply and demand for public defense.[55]

B. The capacity of public defense to do the work is driven by the laws enacted by policymakers; reclassification of laws can reduce the need for and cost of public defense.

Many jurisdictions have reclassified some criminal statutes to remove criminal penalties, reducing the need for public defenders, and simultaneously have developed effective diversion programs to provide treatment and support for people who used to be incarcerated. This can dramatically reduce the number of cases in criminal courts:

> In some courts, the combination of driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can total between 40% and 50% of the caseload. Many of those courts are overwhelmed with cases and the defenders in those courts, if they are present at all, are often overwhelmed and unprepared. The financial impact on both the defendants and the local governments is significant. [56]

Diversion can produce significant savings. In King County, Washington, a pre-filing diversion program for suspended driver license cases "saved approximately $300,000 in prosecution and public defense costs,

and cut 1,330 jail days. The county received more than two dollars in benefits for every dollar spent, including increased fine payments received.[57]

As NAPD has stated in its 2017 Workloads Demand statement:

> There are literally hundreds of thousands of minor, non-violent misdemeanor or low-level felony cases that could be handled outside of criminal court with no danger to public safety and no need for lawyers. Many of those clients would benefit from access to treatment services to address issues of homelessness, mental illness, or substance abuse. In many places, the largest facility housing mentally ill people is the county jail. As Minnesota Judge Kevin Burke has said, "There are certainly behaviors we want to change, but the institutions of the criminal justice system aren't necessarily very effective in dealing with them."[58]

Public defense counsel are often in the best position to identify systemic problems in the criminal legal system and to develop proposals for change. The ABA *Criminal Justice Standards for the Defense Function* state that defense counsel should seek "to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action."[59]

In Seattle/King County, public defenders worked with prosecutors, police, and business leaders to develop an effective diversion program that has been replicated across the country.

> The Law Enforcement Assisted Diversion (LEAD) arrest diversion program is a collaborative community safety effort that offers law enforcement a credible alternative to booking people into jail for criminal activity that stems from unmet behavioral health needs or poverty.
>
> LEAD diverts individuals who are engaged in low-level drug crime, prostitution, and crimes of poverty away from the criminal legal system—bypassing prosecution and jail time—and connects them with intensive case managers who can provide crisis response, immediate psychosocial assessment, and long-term wrap-around services including substance use disorder treatment and housing.[60]

The program is now known as Let Everyone Advance with Dignity, and "Independent evaluations show that LEAD reduces recidivism, LEAD is less expensive than the arrest-and-charge system, and LEAD participants are significantly more likely to obtain housing, employment, and legitimate income after a LEAD referral. [61]

Other defender offices have developed diversion and redirection efforts to address clients' underlying challenges outside of the criminal legal system.[62]

Investing in more comprehensive defender representation can yield significant results, including budget savings. Holistic representation has been the model of the Bronx Defenders since 1997. This model "reduced the likelihood of a custodial sentence by 16 percent—and it reduced the expected sentence length by 24 percent. Over the ten-year study period, holistic representation in the Bronx resulted in nearly 1.1 million fewer days of incarceration, saving New York taxpayers an estimated $160 million on inmate housing costs alone."[63]

Public investment in the criminal legal system must be driven by equitable values and demonstrated results.[64] As Professor Bruce Western said, "The fact that poverty and race go hand-in-hand with jail incarceration rates underscores the need to replace the mass incarceration system with community solutions to public safety that advance fairness and economic well-being."[65]

Conclusion

Lawyers must have reasonable workloads which enable them to provide conflict-free representation of each of their clients consistent with their duty to furnish competent and effective assistance of counsel pursuant to rules of professional conduct and prevailing professional norms.

To provide such representation requires initial and ongoing training, adequate support services, including access to investigators, social workers, paralegals, and expert witnesses, as well as ongoing supervision of the representation provided.

When lawyers and/or providers determine that workloads are preventing or are about to prevent the delivery of defense services consistent with ethical and constitutional duties to clients, the lawyers and/or provider should be authorized to refer cases to another public defense provider participating in the jurisdiction's plan for representation. Alternatively, lawyers and/or the provider must take appropriate steps pursuant to their state's rules of professional conduct either to refuse additional cases and/or seek to withdraw from existing cases.

Endnotes

[1] United States Department of Justice. Statement of Interest of the United States in *Wilbur v. City of Mount Vernon*, United States District Court of the Western District of Washington, Case 2:11-cv-01100- RSL, page 9, found at: https://www.opd.wa.gov/documents/00523-2013_WilburDOJSOI.pdf

[2] ABA SCLAID finds resource deficiencies in its workload study of New Mexico public defense system, January 14, 2022. https://www.americanbar.org/news/abanews/aba-news-archives/2022/01/aba-sclaid-finds-deficiencies-in-its-workload-study-of-new-mexic/

[3] See *Padilla v. Kentucky*, 559 U.S. 356, 366-367 (2010) ("'proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable …' Although they are 'only guides,' and not 'inexorable commands,' these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law."). See also, *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 Fordham Urb. L.J. 147, 167 (2012); Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 ABA Criminal Justice 10, 14-15 (Winter 2009).

[4] The ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-1.8, Appropriate Workload:

> (a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.
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> (b) Defense organizations and offices should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads (including intake) when necessary and as permitted by law to ensure the effective and ethical conduct of the defense function.
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> (c) Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload. Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.

[5] Norman Lefstein, *Securing Reasonable Caseloads: Ethics and law in Public Defense* (2011), p. 26:

> In evaluating whether a lawyer's caseload is reasonable, relevant factors include the complexity of the cases, the availability of support services (*e.g.*, investigators, social workers, and paralegals), and the speed at which cases proceed through the court system. Further, the range of a lawyer's other professional activities, such as attendance at training programs, staff meetings, and participation in bar activities, must be assessed. These activities do not constitute a lawyer's 'caseload,' but they obviously bear on a lawyer's overall 'workload.' As explained in ABA standards, '[c]aseload is the number of cases assigned to an attorney at a given time. Workload is the sum of all work performed by the individual at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which that attorney is responsible.' Whether the focus is caseloads or workloads, professional conduct rules, performance standards, and numerous other recommendations should be

fully considered." See also, ABA *Ten Principles of a Public Defense Delivery System,* Principle 5, "Defense counsel's workload is controlled to permit the rendering of quality representation.

[6] ABA *Standards for Criminal Justice: Providing Defense Services* (3d ed. 1992), Standard 5- 5.3 Workload:

> (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
>
> (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

[7] NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 2.2, Initial Interview.

[8] ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-1.3 Continuing Duties of Defense Counsel: "Some duties of defense counsel run throughout the period of representation, and even beyond…. These duties include: …(d) a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes;…."

[9] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1097 (2006):

> Adequate investigation is the most basic of criminal defense requirements and often the key to effective representation. An early study of public defender offices in the wake of the expansion of the right to counsel in Argersinger found that institutional resources were the most prevalent explanation for the variation in effectiveness scores among defender programs. Specifically, an in-depth analysis of nine urban public defender programs found that success in the courtroom was frequently tied to the availability of investigators. Investigators, with their specialized experience and training, are often more skilled than attorneys, and invariably more efficient, at performing critical case preparation tasks such as gathering and evaluating evidence and interviewing witnesses. Without the facts ferreted out by an investigation, a defender has nothing to work with beyond what she might learn from a brief interview with the client. With such limited information regarding the strength and nature of the case, any attorney would be hard pressed to make the sensible strategic decisions necessary to adequately defend an accused or even have any leverage in plea bargaining.

[10] ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-4.1, Duty to Investigate and Engage Investigators:

> (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
>
> (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
>
> (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include

evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made ex parte if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

[11] ABA *Model Rule of Professional Conduct,* Rule 3.7, Lawyer As Witness:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[12] NLADA *Performance Guidelines for Criminal Defense Representation,* Guideline 1.2, Education, Training and Experience of Defense Counsel:

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

[13] NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 5.1, The Decision to File Pretrial Motions

(a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.

(b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

(1) the pretrial custody of the accused;

(2) the constitutionality of the implicated statute or statutes;

(3) the potential defects in the charging process;

(4) the sufficiency of the charging document;

(5) the propriety and prejudice of any joinder of charges or defendants in the charging document;

(6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;

(7) the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including;

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;

(D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

(8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

(9) access to resources which or experts who may be denied to an accused because of his or her indigence;

(10) the defendant's right to a speedy trial;

(11) the defendant's right to a continuance in order to adequately prepare his or her case;

(12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

(13) matters of trial or courtroom procedure.

(c) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

(1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

(2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;

(3) later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

[14] NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 6.1, The Plea Negotiation Process and the Duties of Counsel; Guideline 6.2 The Contents of the Negotiations.

[15] ABA *Standards for Criminal Justice, Defense Function* (4th ed. 2017), Standard 4-6.1, Duty to Explore Disposition Without Trial:

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

[16] NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 8.1, Obligations of Counsel in Sentencing; Guideline 8.2, Sentencing Options, Consequences and Procedures; Guideline 8.3, Preparation for

Sentencing; Guideline 8.4, The Official Presentence Report; Guideline 8.5, The Prosecution's Sentencing Position; Guideline 8.6, The Defense Sentencing Memorandum; Guideline 8.7, The Sentencing Process.

[17] The National Advisory Commission on Criminal Justice Standards and Goals issued a report in 1973 that included a number of suggestions to improve public defense services, and recommended caseloads limits for public defenders. Standard 13.12 Workload of Public Defenders provides in pertinent part as follows:

> The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150 misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court [delinquency] cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25. For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.

[18]See also, Washington Supreme Court Cr R 3.1, Standards for Indigent Defense, Standard 3.3: "General Considerations. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year."

[19] National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* (1994) "provide guidance to criminal defense attorneys (by identifying potential options, actions, and relevant considerations) for the purpose of ensuring that all defendants receive the zealous and quality representation that should be their right." *Id*., Introduction, p. xi (1994). See also ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017); ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised edition February 2003); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008); Edward C. Monahan, James Clark, editors, ABA *Tell the Client's Story: Mitigation in Criminal and Capital Cases* (2017).

[20] *Stephen F. Hanlon*, *The Gideon Decision: Constitutional Mandate of Empty Promise? A Fifty-Year Deal Under Fire*, 52 University of Louisville L. Rev. 32 (2013) "The NAC Standards … did not account for changes in technology, changes in complexity or even different degrees of seriousness (*e.g*., the category 'felonies' was not broken down into felonies of various seriousness)."

[21] See, ABA Ten Principles of a Public Defense Delivery System (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/603-annual-2023.pdf.

[22] See ABA *Model Rules of Professional Conduct*, Rule 1.1, Competence; Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer; Rule 1.3, Diligence; Rule 1.4., Communication; Rule 1.7, Conflict of Interest: Current Clients; Rule 1.16, Declining or Terminating Representation; Rule 6.2, Accepting Appointments.

[23] Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 Indiana L. Rev. 59, 87 (2018). "Public defenders are lawyers. Lawyers can no longer do what we have done for the last fifty years. Trial judges can no longer order public defenders to do that. On the contrary, trial judges have the primary obligation to ensure reasonably effective assistance of counsel in their courtrooms. State supreme courts have the primary obligation to ensure that the criminal justice system in their state is constitutional and ethical. Public defenders now have the tools available to them to initiate proceedings to bring this tragic state of affairs to an end. We must provide the courts with the reliable data and analytics that they need – in addition to the anecdotes, reports and caseload numbers untethered to any reliable standard we have traditionally given them – to grant us the case refusal relief that we must seek, and to protect those we cannot competently and effectively represent from unconstitutional deprivations of their liberty."

[24] "A lawyer who has so much work, so many cases, so many other clients that she is materially limited in her ability to effectively represent another client has an impermissible personal conflict of interest and cannot assume responsibility for an additional client. Rules clearly establish that a lawyer cannot ethically accept another case or other work when she has so much work that accepting another case will preclude her from competently representing the new client or performing any other ethical requirements, for example, communicating fully and

promptly with the client, or investigating the case and adequately advising the client." Edward C. Monahan and James Clark "Coping with Excessive Workload" American Bar Association's *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* (1995).

[25] See, Order, *In re* Karl William Hinkebein, No. SC96089 (Mo. Sept. 12, 2017), defender suspension stayed, defender put on probation for failing to communicate with clients. https://www.courts.mo.gov/page.jsp?id=117575. See also, Letter from Stark Ligon, Ethics Counsel, Supreme Court of Arkansas, January 6, 2022, re: OEC file No. 2I-026 - Informal Advisory Opinion: "A lawyer's primary ethical duty is owed to existing clients. ABA Formal Op. 06-44I, fn. 14. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in the lawyer's workload becoming excessive."

[26] The studies are available at https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications/.

[27] Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies,* 4 Ohio St. J. Crim. L. 403, 429 (2017).

[28] *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (June 2014), pp 11-21, at https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications/.

[29] According to Stephen F. Hanlon, Malia N. Brink, and Norman Lefstein, *Use of Delphi Method in ABA SCLAID Public Defense Workload Studies: A Report on Lessons Learned* (2021), pp. 12-13, the following are the essential features of a public defense workload study:

- The professionals conducting the workload study must be the facilitators of the study, not the arbiters of what is "appropriate". The governing principle with respect to the professional judgment of the Delphi panel must be "[l]et the chips fall where they may."
- The professional judgments must come from both public defenders and private practice criminal defense lawyers.
- A successful workload study requires two areas of expertise: (1) surveying and data analysis, and (2) law and standards.
- Legal, practice and ethical standards, not the results of any timekeeping data, are the appropriate anchors for the professional judgments in the study.
- In this standards-based inquiry, the standards that drive the study are the ABA Criminal Justice Standards, the applicable Rules of Professional Conduct, and the United States Supreme Court's holding in Strickland v. Washington that an indigent criminal defendant is entitled to "reasonably effective assistance of counsel under prevailing professional norms."
- In particular, the instructions to the adult criminal Delphi panel, which serve much the same function as jury instructions, would emphasize ABA Defense Function Standard 4-6.1(b): "In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest."
- Timekeeping data should not be used as an anchor for the professional judgment of the Delphi panel to avoid institutionalizing current practices, which may be deficient.

[30] The Study used a 2080-hour year for case-related work but made clear that this number is an extremely high estimate and should be evaluated in each jurisdiction. It does not take into full account other responsibilities

lawyers have, and the Study noted that in judicial workload studies, "The judicial year value typically ranges from 1,100 hours to 1,400 hours per year for case-related work." National Public Defense Workload Study at xii, and 100, fn.187.

[31] See, "The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency", at https://www.lopdnm.us/wp-content/uploads/2022/10/Final-Draft-LOPD-5-Year-Plan.pdf.

[32] The Study's example annual caseload standards are based on an assumed 2,080 billable hours, or 40 hours per week for 52 weeks per year, not allowing for any of these other time commitments. The Study also provides a breakdown of a 1,785.2 billable-hours year, and annual caseload estimates based on this and other billable-hour estimates from state-level workload studies. See NPDWS at 99-100.

[33] NAPD, *Policy on Active Supervision of the Representation of* Clients (October 2020), https://publicdefenders.us/resources/policy-on-active-supervision/.

[34] NAPD, *10 Principles for Creating Sustainability in Public Defense* (March 2021), https://publicdefenders.us/app/uploads/2023/10/Principles-for-Creating-Sustainability-in-Public-Defense-Offices.pdf.

[35] See, "Closing Arguments with Dennis Keefe," Sixth Amendment Center (January 23, 2014), found at: https://sixthamendment.org/closing-arguments-with-dennis-keefe/.

[36] NAPD, *10 Principles for Creating Sustainability in Public Defense* (March 2021), https://publicdefenders.us/app/uploads/2023/10/Principles-for-Creating-Sustainability-in-Public-Defense-Offices.pdf.

[37] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1102 (2006) citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985):

> "Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not, by itself, assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, *see Ross v. Moffitt,* 417 U. S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.* at 417 U. S. 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina,* 404 U. S. 226, 404 U. S. 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

[38] NPDWS at 78. These are the "existing … levels" of staffing for the Delphi method panelists' practices. Id. Panelists were asked "not to artificially adjust their estimates to account for, for example ... offices with greater or lesser support staff or other resources." NPDWS at 79. But, when applying the NPDWS standards, offices should consider whether particularly a low or high level of non-attorney staffing is – per the study's terminology – a compelling local "factor" that affects attorneys' "supplemental duties" and thus their available casework hours. NPDWS at 100 (the study's limits should be applied "absent compelling additional information that would suggest otherwise about the individual cases, specific clients, prosecutorial policies, attorney experience and competency, and other factors"); NPDWS at 102 ("case weight–based estimates for attorney need should be viewed as minimum requirements and must be adjusted appropriately based on expectations about such supplemental duties" such as mental health proceedings).

[39] Id.

[40] NAPD, Policy Statement on Public Defense Staffing (2020), https://publicdefenders.us/app/uploads/2023/10/NAPD_Policy-Statement-on-Public-Defense-Staffing.pdf. See also Sixth Amendment Center, *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* (September 2018), p. 109; found at: http://sixthamendment.org/6AC/6AC_NV_report_2018.pdf (Support staff necessary for effective representation "includes one supervisor for every ten attorneys; one investigator for every

three attorneys; one social service caseworker for every three attorneys; one paralegal for every four felony attorneys; and one secretary for every four felony attorneys." See also, Bureau of Justice Assistance, United States Department of Justice's *Keeping Defender Workloads Manageable* (2001), p.10:

> The Indiana Public Defender Commission's workload standards were designed for use by indigent defense practitioners who have access to adequate support staff, in recognition of the important role support staff play in providing quality indigent defense. The Indiana standards … represent the caseload standards for offices that maintain an adequate level of support staff consistent with the guidelines listed below. The ratio of support staff to attorneys should be as follows:
>
> - Paralegal - Felony, 1:4 - Misdemeanor, 1:5 - Juvenile, 1:4 - Mental Health, 1:2
> - Investigator - Felony, 1:4 - Misdemeanor, 1:6 - Juvenile, 1:6
> - Law Clerk Appeal, 1:2
> - Secretary - Felony, 1:4 - Misdemeanor, 1:6 - Juvenile, 1:5)

[41] Id.

[42] See 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services the *National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States* (1976) found at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf:

> Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that, attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.
>
> Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.
>
> Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.
>
> Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.
>
> Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.
>
> The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.
>
> Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.
>
> Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the

suitability of any given program and in expediting the client's entry into a program when the client so desires.

[43] Florida TaxWatch analyzed the salary and turnover rates for Florida prosecutors and public defenders. That report concluded that it costs more to replace prosecutors and defenders than it does to pay them higher salaries and retain those professionals, their experience, and intellectual capital. *When It Costs More to Pay Less: Starting Salaries for Assistant State Attorneys & Assistant Public Defenders in Florida Among Lowest in Nation* (2014).

[44]The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons, October 13, 2021, available at https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[45] Id.

[46] Defense Counsel in Criminal Cases, U.S. Department of Justice, November 2000, available at https://bjs.ojp.gov/content/pub/pdf/dccc.pdf.

[47] San Francisco Public Defender Fiscal Year 2020-2021 Annual Report, available at https://sfpublicdefender.org/wp-content/uploads/sites/2/2021/12/FY-2020-2021-Annual-Report.pdf.

[48] Emily Riley, The Crime Report, Glaring Racial Disparities Persist in NYC Jails: Study, supra note 43.

[49] John P. Gross and Jerry J. Cox, "The Cost of Representation Compared to the Cost of Incarceration: How Defense Lawyers Reduce The Costs of Running the Criminal Justice System," NACDL's *The Champion* (March 2013), p. 22.

[50] Alissa Pollitz Worden, Kirstin A. Morgan, Reveka V. Shteynberg, and Andrew L. B. Davies, "What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts," *Criminal Justice Policy Review*, 2018, Vol. 29(6-7) 710–735.

[51] When public defender alternative sentencing plans are developed and proposed by defense professionals, often master level social workers who employ scientifically-based Motivational Interviewing skills, the cost of the sentence is substantially less and with a more engaged, motivated client the treatment compliance is greater. Studies show that for every $1.00 invested on an alternative sentencing program thee was a return of $3.76-$5.66. See, Dr. Gerard Rod Barber and Dr. Romona Stone, University of Louisville Kent School of Social Work, "Social Worker Pilot Project" (2007); Robert Walker, M.S.W., L.C.S.W., University of Kentucky Center on Drug and Alcohol Research, SFY 2014 EVALUATION REPORT KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY ALTERNATIVE SENTENCING WORKER PROGRAM (MAY 2016), found at: https://dpa.ky.gov/who_we_are/ASW/PublishingImages/Pages/ASW%27s-in-the-News/DPA%20ASW%20UK%20Outcome%20Study%20FY%202014.pdf ; Cara Lane Cape, M.S.W. Kentucky Department of Public Advocacy Robert Walker, M.S.W., L.C.S.W. University of Kentucky Center on Drug and Alcohol Research (September 2017), found at: https://dpa.ky.gov/who_we_are/ASW/Documents/DPA%20ASW%20Outcome%20Study%20FY%202015.pdf

[52] See John Gross, "Why Our Public Defense Systems Are Collapsing," NAPD Blog (June 5, 2023), https://publicdefenders.us/blogs/why-our-public-defense-systems-are-collapsing/.

[53] See Radley Balko, "The States of Indigent Defense: Part One" https://radleybalko.substack.com/p/the-states-of-indigent-defense-part (first of a state-by-state series on resource disparities between public defense and law enforcement).

[54] For legal education statistics, see ABA, *Profile of the Legal Profession 2022: Legal Education*, https://www.abalegalprofile.com/legal-education.php.

[55] See, e.g., Moss Adams LLP, *The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency* at 2 (2022), https://www.lopdnm.us/wp-content/uploads/2022/10/Final-Draft-LOPD-5-Year-Plan.pdf.

[56] Robert C. Boruchowitz, "Diverting and Reclassifying Misdemeanors Could Save $1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel", American Constitution Society, December 2010, footnotes omitted. https://www.acslaw.org/wp-content/uploads/2018/04/Boruchowitz_-_Misdemeanors.pdf

[57] Id.

[58] *Alternatives to Traditional Prosecution Can Reduce Defender Workload, Save Money, and Reduce Recidivism* NAPD, March 2017, available at https://www.publicdefenders.us/files/NAPD%20Demand%20Side%20paper_FINAL.pdf, footnotes omitted.

[59] ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-1.2 Functions and Duties of Defense Counsel.

[60] Law Enforcement Assisted Diversion, https://kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/lead.aspx. See also, Public Defender Association web page at http://www.defender.org/projects/lead

[61] https://leadkingcounty.org

[62] Edward Monahan, "Smart Justice," *The Public Lawyer*, Volume 29, No. 2 (Summer 2021)

[63] James M. Anderson et al., RAND Corp., Holistic Representation: An Innovative Approach to Defending Poor Clients Can Reduce Incarceration and Save Taxpayer Dollars—Without Harm to Public Safety 2 (2019), https://www.rand.org/pubs/research_briefs/RB10050.html.

[64] One approach is to provide federal funding to states that reduce their incarceration rates. Several Senators proposed the ''Reverse Mass Incarceration Act of 2018'' to provide funds to states "to implement evidence-based programs designed to reduce crime rates and incarcerations.'' Text of the bill is available at https://www.judiciary.senate.gov/imo/media/doc/S.1917%20Booker4%20-%20ALB18157.pdf. See, "Lawmakers Introduce Bill to Incentivize Reductions in Prison Populations", May 21, 2019, Brennan Center, at https://www.brennancenter.org/our-work/analysis-opinion/lawmakers-introduce-bill-incentivize-reductions-prison-populations

[65] Emily Riley, The Crime Report, Glaring Racial Disparities Persist in NYC Jails: Study, April 20, 2021, available at https://thecrimereport.org/2021/04/20/glaring-racial-disparities-persist-in-nyc-jails-study/.