
ARTICLES

ADMINISTERING EFFECTIVE ASSISTANCE OF COUNSEL

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ABSTRACT

Although the public defender institution has long battled an epidemic of chronic underfunding and under-resourcing of its work, existing scholarship has failed to provide sufficient guidance to public defender institutional leadership about distributing those limited resources. Insufficient resources do not absolve institutional leaders from their professional responsibility to manage whatever resources are available in a way that better facilitates the provision of competent and effective assistance of counsel. Leadership must still walk a delicate tightrope of trying to honor constitutional and ethical obligations, even if the dearth of available resources may make that obligation nearly impossible. This Article attempts to fill the existing scholarship gap on how best to meet that duty in such an environment.

This Article explores underregulated organizational choices public defender leaders must make when distributing insufficient resources. While some of these choices focus on avoiding constitutional and ethical violations, others are made without a clear understanding of the negative impacts such choices might have on the institution's ability to more fully meet its obligations to provide sound assistance of counsel. This Article describes the strengths and deficiencies of three structural decisions public defender leaders must make: internal case distribution policies, hiring decisions, and what level or type of representation the office will provide its client population. This Article then illustrates the questions public defender leaders must be able to answer to ensure their distribution decisions more closely adhere to its professional obligations and central constitutional and ethical missions of providing effective client representation.

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INTRODUCTION

In September 2023, the RAND Corporation, in collaboration with other organizations, published a new National Public Defense Workload Study.¹ This study forged an updated understanding of the number of cases public defenders could realistically be expected to handle while remaining steadfast to their constitutional and professional obligations to provide quality assistance of counsel to the nation's indigent defendants.²

The previous guidelines promulgated nearly fifty years prior recommended that attorneys spend an average of 13.9 hours of work for each felony case and 5.2 hours for each misdemeanor case on their docket.³ These outdated recommendations failed to adequately recognize the varying time commitments and obligations inherent to each criminal case. They significantly minimized the amount of time attorneys needed to effectively represent those facing life sentences and other harsh multi-year criminal punishments. The previous guidelines also perpetuated an antiquated understanding of mental health needs, noting that public defenders could represent 200 cases involving mental health a year without any recognition of the vast differences in mental health disorders.⁴ Failure to adequately recognize those differences has led to a systematic failure to require adequate representation hours for defenders whose clients are experiencing mental health challenges.⁵

¹ NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, THOMAS REUTERS NATIONAL PUBLIC DEFENSE WORKLOAD STUDY i, xii (July 27, 2023) [hereinafter RAND CORP. 2023 WORKLOAD STUDY], https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbm0drzpq/RAND_RRA2559-1.pdf [<https://www.perma.cc/K4WF-DXAU>]. Report collaborators include the RAND Corporation, the National Center for State Courts, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, and Stephen F. Hanlon, with funding provided by Arnold Ventures. The results were based on data from seventeen state-level public defense workload studies and expertise from thirty-three criminal defense attorneys. The author of this Article serves on the board of the Quality Defense Alliance, founded contemporaneously with this report's publication, aiming to implement the new guidelines for public defense across the country. *Groundbreaking Report Finds Many Public Defenders Are Dangerously Overworked and Outlines New Standards for Reducing Their Caseloads*, ARNOLD VENTURES (Sept. 12, 2023), <https://www.arnoldventures.org/newsroom/groundbreaking-report-finds-many-public-defenders-are-dangerously-overworked-and-outlines-new-standards-for-reducing-their-caseloads> [<https://perma.cc/K3QU-HZMD>].

² RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 111. This study was sparked by the increased recognition that the 1973 caseload standards did not reflect the growing complexity of representing those charged with criminal offenses and the detrimental consequences of ineffective representation. *Id.*

³ NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, REP. ON CTS. 276 (Joseph Foote et al. eds., 1973); RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at viii, 111.

⁴ RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 15.

⁵ *See id.* at viii.

Contrary to the original study providing guidelines for public defender caseloads, the 2023 study recommended—as a standard component of providing constitutional and professional defense representation—that defenders spend 35 hours for each low-level felony case and 22.3 hours for each high-level misdemeanor case on their docket.⁶ The resulting updated guidelines further differentiated between types of cases, noting the average time for a case in which the client faced a sentence of life without parole should be 286 hours; a case involving a murder charge should require 248 hours; a case involving a sex crime allegation should demand 167 hours; and high-severity felonies cases should be budgeted 99 hours.⁷ These caseload guidelines capture a more thorough analysis of how the type and severity of criminal charges impact an attorney's representation of differently situated clients.

One immediate implication of these newly promulgated caseload standards was the need for already overwhelmed public defender offices to engage in additional hiring, a feat that could only provoke concern about an institutional ability to meet these requirements. As often repeated in national conversations, the public defender institution is notoriously understaffed and under-resourced.⁸ These conversations started in earnest over sixty years ago soon after *Gideon v. Wainwright*,⁹ in which a unanimous Supreme Court forever changed the landscape of the criminal process by issuing a decision recognizing a criminal defendant's right to counsel.¹⁰

The *Gideon* Court held that the right to the presence of counsel in criminal proceedings, afforded by both the Sixth and Fourteenth Amendments to the U.S. Constitution, was so fundamental to the human experience of life and liberty that states were required to provide legal representation to those who could not themselves afford to hire attorneys.¹¹ Despite consensus at the time of the *Gideon* decision, the case has since come under frequent criticism, especially in scholarly literature, which posits that *Gideon*'s promises have failed to reach fruition.¹²

⁶ *Id.* at xii.

⁷ *Id.*

⁸ Carrie Johnson, *You Have the Right to a Lawyer, but Public Defenders Note a Lack of Resources, Respect*, NPR (Mar. 18, 2023, 5:00 AM), <https://www.npr.org/2023/03/18/1164296236/gideon-wainwright-anniversary-public-defender> [https://perma.cc/MTC9-C9JS].

⁹ 372 U.S. 335 (1963).

¹⁰ *Id.* at 344-45.

¹¹ *Id.* This right to counsel was eventually extended to misdemeanor offenses and juveniles in delinquency proceedings. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding accused must be provided with counsel when facing imprisonment); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (limiting right to counsel in misdemeanor cases to those resulting in actual imprisonment); *In re Gault*, 387 U.S. 1, 41 (1967) (holding juveniles in delinquency proceedings entitled to counsel as part of due process).

¹² The promise of *Gideon* has been defined as the idea “that a poor person unable to afford a reasonable attorney's fee is treated substantially the same in our criminal and juvenile justice

Much of the criticism of *Gideon*'s failure centers on public defenders' lack of resources.¹³ Indeed, scholars and practitioners often note that the nation's indigent defense system is broken due to decades of insufficient resources and inadequate attention on the impact such underfunding has on a defendant's access to quality counsel.¹⁴ Some stakeholders admit that any positive impact the right to counsel could have on the experience of impoverished people in criminal processes is made impossible by the lack of funds and resources provided to indigent defense.¹⁵ This perennial underfunding of indigent defense services may reflect societal values on the role or importance of defense counsel for indigent defendants. However, as the new study details, the constitutional provisions and professional regulations for such legal practice have a floor for basic levels of competence and effectiveness that must be met.¹⁶ This contradiction—a required behavior for the public defender institution without

systems as a person of financial means.” Norman Lefstein, *Will We Ever Succeed in Fulfilling Gideon's Promise?*, 51 IND. L. REV. 39, 40 (2018).

¹³ See, e.g., Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783-84 (2016) (“The largest funding problem in indigent defense delivery systems is, quite simply, that not enough money is allocated to indigent defense[.] . . . [a]nd severe underfunding certainly contributes to the cultural problems that plague indigent defense delivery systems.”); John A. Lentine, *Gideon at Fifty: The Broken Promise*, 37 AM. J. TRIAL ADVOC. 375, 384-85, 388 (2013) (arguing “[t]he idea that indigent defense is important has been lost in the debate between the three branches of government because the Court did not seek to *maintain* the promise of *Gideon*” and suggesting “[t]he failure to make the promise of *Gideon* a budgetary priority has placed the public defender system in dire jeopardy”). Some commentators focus their criticism on specific problems created by a lack of funding of public defense work, including heavy caseloads and institutional pressure to engage in plea bargaining. See, e.g., Lefstein, *supra* note 12, at 47 (“Of all the problems in public defense, none is more vexing than the excessive caseloads of public defenders.”); Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 447 (2015) (“For many defenders, the institutional demands of docket clearing and the pressure to enter standardized pleas strip them of the ability to act as traditional legal advocates in the *Gideon* sense.”).

¹⁴ See Abbe Smith, *Defending Gideon*, 26 U.C. DAVIS SOC. JUST. L. REV. 235, 238 n.9 (2022); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312-13 (2013).

¹⁵ See, e.g., Primus, *supra* note 13, at 1784 (noting that “severe underfunding” in criminal defense “means too few lawyers for too many cases, and an attorney with a crushing caseload is compromised in his ability to zealously represent his clients in obvious ways”); Natapoff, *supra* note 13, at 449 (explaining that in only well-resourced public defender offices, which are rare, “public defenders actually have the time and resources to fully occupy their roles,” and can offer representation that “includes a service-oriented, welfarist approach that recognizes the links between their clients’ criminality and poverty”).

¹⁶ See U.S. CONST. amend. VI; *Gideon*, 372 U.S. at 344-45; MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 1983) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

sufficient resources to meet those obligations—places unacceptable pressure on the leaders of these institutions, who are tasked with daunting decisions about how to delegate insufficient resources.

Neither the Federal Constitution nor the American Bar Association (“ABA”) (the professional licensing mechanism for lawyers) provide clear rules or direction on how institutional leaders should aim to balance the reality of overwhelming need in the face of insufficient resources. Instead, taken together, they vaguely call for effective and competent representation that maintains the legal profession’s integrity while providing little concrete guidance for achieving this.¹⁷ This Article seeks to fill that void by providing a path forward for acceptable guidance in public defender leadership decision-making.

This Article elucidates the inherent problems of the predicament public defender institutional leaders face by examining three critical decisions they must make about prioritizing the overwhelming need for limited available resources: (1) how to assign and distribute cases to its workforce, (2) whom to hire to fulfill its work obligations, and (3) the appropriate distribution of funds to its trial practice or the appellate or special litigation issues that more frequently trouble its client population. This Article proceeds in four parts, examining these resource distribution decisions and suggesting questions that must be answered or data provided to ensure leaders make the better decision.

Part I explores the choice between vertical representation—in which the same lawyer represents the defendant throughout the entire criminal proceedings—and horizontal representation—in which different lawyers assume responsibility for certain stages of each defendant’s proceedings. While the ABA has expressed a preference for vertical representation due to its continuity,¹⁸ Part I details how this type of representation can undermine an individual public defender’s longevity by limiting skill development and increasing the likelihood of burnout. This, in turn, reduces the available workforce and those attorneys with the experience necessary to represent defendants with more complicated cases effectively.

Part II examines the tradeoffs public defender leaders face in hiring different types of professionals to meet their representative obligations. Specifically, leaders must balance hiring additional attorneys to meet caseloads with hiring

¹⁷ DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [<https://perma.cc/QEN4-AAV9>]. Even defining “effectiveness” and “competent representation” has proven difficult. The ABA gives so little guidance that scholars and think tanks have tried to fill in the gaps themselves. For example, the Institute for the Advancement of the Legal System at the University of Denver worked with AccessLex Institute and the Ohio State University Moritz College of Law to issue this report, seeking to provide a definition. *Id.*

¹⁸ AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 6 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendant/s/ls-sclaid-ten-princ-pd-web.pdf [<https://perma.cc/AVE7-8KPB>].

other support staff, such as investigators, paralegals, and social workers. Although hiring more attorneys may immediately reduce caseloads, support staff may be better positioned to assist their team of attorneys in accomplishing their clients' objectives and reducing each attorney's workload on a specific case. Thus, a public defender leader must also make informed decisions about who should be hired with limited resources without automatically defaulting to hiring only licensed attorneys.

Part III details the dilemma between dedicating resources to trial representation versus appellate litigation or special litigation projects. While prioritizing trial representation may prove more beneficial to individual clients and attorneys in the short term, appellate work and impact litigation can establish favorable precedents that could improve the criminal legal system on a broader scale and benefit a larger swath of individuals in the public defender client community. Since appellate or special litigation projects could reduce the incidence of community interaction with the criminal legal system, thereby reducing the public defender institution's client population, focusing on such work could be the more advantageous way to distribute limited resources because it could reduce future need for those resources.

Part IV proposes methods for improving decision-making for public defender administrators. It articulates specific questions public defender leaders should ask when making distribution decisions to help them determine the organizational framework or choices that would best ensure they provide constitutional and professional representation to their specific client population. Criminal law and procedure are local or largely jurisdictional, meaning each defender agency retains the flexibility to tailor its services to meet constituent needs in different ways given their distinct environment. This also means individual offices have different oversight mechanisms and capacities for control over its legal practice. Thus, the ideal prioritization scheme for meeting constitutional and professional obligations may (and, in fact, should) differ across jurisdictions and evolve over time. Part IV, therefore, considers how leaders may broadly examine their systemic or community needs, as well as mechanisms for control, distribution, or supervision of the services they provide. It also discusses how the results of this examination would impact an office's distribution decisions, especially concerning whether a specific decision facilitates (or hinders) effective assistance of counsel within their jurisdictional boundaries.

Public defender offices have few formal requirements and limited guidance for optimal institutional design. As a result, distribution choices remain primarily subject to an individual public defender leader's personal philosophy about complying with professional and legal obligations, with little legal scholarship available to help them thoroughly examine the appropriateness of their decision.¹⁹ By illuminating these critical decisions regarding the

¹⁹ See Irene Oritseweyinmi Joe, *Regulating the Public Defender Identity*, 92 *FORDHAM L. REV.* 1335, 1344 (2024).

distribution of extremely limited funding earmarked for indigent defense, this Article equips public defender leaders with valuable strategies to more intentionally allocate finite and often insufficient resources to better comply with the legal profession and its controlling constitutional rules.

I. ASSIGNING CASES

The lack of sufficient resources for public defenders can wholly destroy notions of fairness in the criminal process.²⁰ This is because decisions concerning how to dedicate the few available resources can either limit or expand a public defender's ability to represent clients effectively. Legal counsel that meets constitutional and ethical obligations involves more than providing the bare minimum of attorneys arguing for clients in the courtroom; it involves attorneys (and other support staff) having the capacity to form relationships with clients, the time to allocate sufficient attention to the facts of a case, and the funding to make this a sustainable practice.²¹ Every service-providing individual or entity must make foundational decisions about how their services should be organized to achieve such goals. These judgments can be particularly fraught in urgent situations when the services needed far outweigh the institution's capacity, such as in the public defender setting detailed in this Article.²²

Managers of the types of overwhelmed and under-resourced public defense offices detailed in this Article face a crucial resource-balancing issue when deciding how to distribute cases to available public defender staff. These leaders can assign clients and cases to individual public defenders according to either a *vertical scheme* or a *horizontal scheme*. The chosen scheme significantly affects an attorney's role in a client's matter, a client's experience of that attorney's representation, and how the representation as a whole can comply with constitutional and professional mandates.

The ABA endorses the vertical representation scheme for indigent defense representation.²³ Under this arrangement, the same attorney(s) represent(s) the same defendant throughout an entire case.²⁴ The representation will ideally start from the moment a defendant is arrested or faces a potential arrest.²⁵ That same

²⁰ AM. BAR ASS'N, *supra* note 18, at 10 n.17.

²¹ See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 8.

²² This situation is comparable, for example, to performing medical triage and executing a battle plan. These situations all require a thorough knowledge of the available resources and a careful analysis of how to best allocate them. This is especially critical when lives are at stake. Like in emergency medicine and on the battlefield, the public defender must contemplate the loss of life and liberty, and act accordingly. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632 (2013).

²³ AM. BAR ASS'N, *supra* note 18, at 6.

²⁴ See *id.*

²⁵ See *id.* at 15 n.43.

attorney then serves as the defendant's counsel in the criminal process until the final disposition of the defendant's case.²⁶

Conversely, in a horizontal representation assignment scheme, different attorneys assume responsibility for the defendant's legal matter at various stages of the criminal case.²⁷ For example:

- One attorney can be assigned to a client's matter once the government has indicated an interest in pursuing criminal charges against them.
- Another attorney could then meet with the client once charges are formally instituted.
- A third attorney could handle the client's interests until they enter a formal plea of guilty or not guilty to the charges filed against them.
- If the client were to exercise their right to plead not guilty and go to trial, another attorney could then be assigned to the client to accept the discovery materials turned over by the prosecuting entity and handle the client's pre-trial motions.
- Finally, a fifth attorney could represent the client for an actual trial.

This process of assigning different attorneys to different stages of a client's trial could continue through sentencing.

With various attorneys assigned to different portions of the case, this scheme can leverage each attorney's skills and experiences to handle all the proceedings related to several potential outcomes, including dismissal, conviction, and sentencing. There is insufficient data on the prevalence of horizontal representation over vertical representation schemes (or vice versa) in public defender offices nationwide. Still, the ABA considers horizontal representation the lesser representative scheme because of some of the consequences noted in this Article.²⁸

Despite the ABA's designation of vertical representation as the preferred model, this is not a mandate. Indeed, some public defender offices throughout the nation, including several well-respected offices, opt instead for horizontal

²⁶ A criminal case can be disposed of in any of the following ways: (1) the end of any further investigation by law enforcement or the prosecutor about levying potential charges, (2) the dismissal of the charges at any stage of the proceeding after charges have been instituted, (3) a guilty plea at any stage of the proceedings, (4) a conviction by a judge or jury after a trial, or (5) sentencing for a convicted offender. *See generally* CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, CRIMINAL PROCEDURE: CASES AND MATERIALS (2d ed. 2016).

²⁷ *See* DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUST. STATS., U.S. DOJ, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1, 6 (2007), <https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf> [<https://perma.cc/7AFP-GSTJ>] (last visited Feb. 17, 2025).

²⁸ *See infra* Section I.B.1 (providing problematic example of Louisiana's Public Defender Office's usage of horizontal representation).

representation schemes (or something similar to them).²⁹ Managers of public defender offices may prefer one scheme over the other based on their personal preferences, their desire to maintain historical consistency or alleviate stress on an already overtaxed system, or their individual interpretation of the relevant constitutional and professional obligations.³⁰

A. *The High Cost of Vertical Representation*

A dominant rationale concerning the preference for a vertical representation scheme is its similarity to traditional private law practice, where clients hire a specific attorney or law firm to handle all matters of legal representation until the case ends or the clients choose to end the representation. Because a criminal defendant with a single attorney engages with that person as the legal authority for their defense throughout the entire process, trust and reliance can develop more naturally.³¹ The client knows who to contact with questions and concerns; the specifically chosen attorney is more familiar with all aspects of their case. This reality suggests that consistent representation by the same attorney throughout the legal proceedings may facilitate a more symbiotic working relationship conducive to effective representation. It may also prevent the type of deficient representation that can result from various attorneys trading off responsibility throughout the case.

It is worth considering, however, whether this type of vertical representation, which promotes consistency and trust, translates so seamlessly beyond the private sector. Most indigent defendants are appointed attorneys by the government without any input from the defendant themselves. Absent some conflict developed during the course of the representation, the indigent defendant must accept their assigned attorney.³² This lack of agency in hiring or

²⁹ See, e.g., *About Our Office*, SACRAMENTO CNTY. PUB. DEF., <https://publicdefender.saccounty.gov/Pages/AboutOurOffice.aspx> [<https://perma.cc/QV9A-2R3T>] (last visited Feb. 17, 2025) (explaining that, “[p]rimarily, [its] office works horizontally,” which includes initial assessment by “lead attorney” and assignment of “senior attorney” and “trial attorney” to each case, depending on its projected disposition); see also *infra* notes 87-91 and accompanying text (discussing horizontal representation system used by Defender Association of Philadelphia).

³⁰ Joe, *supra* note 19, at 1351.

³¹ Because trial and appellate defense work can be considered different specialties, vertical representation does not necessarily require the same attorney(s) to represent the client on appeal as they did at trial. Indeed, the author has previously noted that it is best if those attorneys are different so the appellate attorney can more easily notice or be more willing to assert certain defenses like the ineffective assistance of trial counsel. See generally Irene Oritseweyinmi Joe, *Learning from Mistakes*, 80 WASH. & LEE L. REV. 297, 317, 345 (2023) (“The prevalence of successful ineffective assistance of counsel claims in these wrongful convictions and the dominance of the indigent defense function in criminal cases combine to provide an area of possible reform.”).

³² *People v. Marsden*, 465 P.2d 44, 47 (Cal. 1970) (en banc) (holding client needs to “enumerate specific examples of inadequate representation”). “[T]he right to such discharge

maintaining a specific attorney can limit the degree of trust implicit in the private attorney hiring model regardless of whether the assigned attorney remains with the client throughout the criminal proceedings.

That said, some public defender offices prefer the general theory of vertical representation and employ such a model.³³ While vertical indigent representation may not encourage the same level of trust that emerges in a private attorney-client relationship given the defendant's lack of choice in selecting an attorney, it does foster the familiarity and confidence that comes with having the same lawyer throughout the representation. Accordingly, a vertical representation scheme initially appears to offer undeniable advantages.³⁴ Upon a closer look, however, the limits of vertical representation reduce the assurance of greater attorney-client trust.

Vertical representation may invite a greater incidence of burnout and compassion fatigue among its lawyers than a horizontal representation scheme. These emotional and mental responses, detailed more fully below, have been well researched in the scholarly literature for people in other professions who work with severely disadvantaged populations. Thus, public defender leaders should consider these limitations and how they will affect their individual offices when making case-assignment decisions.

1. Burnout

Professionals who serve marginalized populations are often more vulnerable to burnout. Indigent defense providers, like others who provide critical services

or substitution is not absolute, in the sense that the court is bound to accede to its assertion without a sufficient showing . . . that the right to the assistance of counsel would be substantially impaired . . . in case the request is not granted, and within these limits there is a field of discretion for the court.” *Id.* (quoting 157 A.L.R. 1225, 1226 (1945); *see also* *People v. Hines*, 938 P.2d 388, 409 (Cal. 1997) (holding court is not required to appoint separate counsel in these kinds of motions to help client)).

³³ For example, the Louisville-Jefferson County (Kentucky) Public Defender's Office “operates a mixed caseload/vertical representation system.” *See History of the Office*, LOUISVILLE-JEFFERSON CNTY. PUB. DEF., <https://www.louisvillemetropublicdefender.org> [<https://perma.cc/LYF5-HADX>] (last visited Feb. 17, 2025) (utilizing vertical representation system where “individual clients are represented by the same attorney throughout all stages of the proceedings from appointment until final disposition of the case”). The public defender's office in Nashville, Tennessee, uses a similar model. *See Representation Standards*, NASHVILLE DEFS., <https://publicdefender.nashville.gov/about-us/representation-standards> [<https://perma.cc/PC2N-L6N9>] (last visited Feb. 17, 2025) (noting attorneys “represent a client from the time of case assignment until the case is closed,” “appear with a client at all substantive court appearances,” and represent same clients if “charged with any new offenses during the course of representation”). The New Hampshire Public Defender's Office also employs a vertical model for all stages of representation at criminal trials, although “[s]taff attorneys do not handle their clients' appeals to the New Hampshire Supreme Court.” *See Employment & Internships*, N.H. PUB. DEF., <https://www.nhpd.org/employment> [<https://perma.cc/634Q-7C7Z>] (last visited Feb. 17, 2025).

³⁴ *See* AM. BAR ASS'N, *supra* note 18, at 6.

to the most marginalized members of the community, must balance the demands of offering care and protection to those who need it while also protecting their own well-being and capacity to continue performing well.³⁵ The constitutional and professional obligations imposed on the public defender institution and the applicable professional rules for indigent criminal defense add a unique burden to the resourcing decisions public defenders must make.³⁶ These obligations require a particular level of representation that is both opaque and exacting. This added difficulty enhances the risk of burnout.³⁷ Further, it reduces both the ability of attorneys to do the work effectively and competently and the availability of those even willing to take on this difficult task. Because burnout can lead to tragic outcomes for individual public defenders—both in their personal health and in the work they do for their clients—some leave the profession altogether, despite their deep commitment to the value and mission of public defense work.³⁸

Burnout is popularly characterized as fatigue from work conditions. The effects and incidence of burnout in the context of public defenders are still being studied. Regardless, researchers have compared the work of public defenders to that of emergency room physicians: not only do public defenders practice triage,³⁹ but they also assist people through some of the most challenging life circumstances.⁴⁰

³⁵ See *Access to Justice Means Confronting Bar Advocate Burnout*, MASS. LAWS. WKLY. (Jan. 31, 2025), <https://masslawyersweekly.com/2025/01/31/letter-access-to-justice-means-confronting-bar-advocate-burnout> [<https://perma.cc/5XLN-FVGC>].

³⁶ See U.S. CONST. amend. VI; *Gideon*, 372 U.S. at 344-45; MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

³⁷ See Alisa Smith, *Stress and Public Criminal Defense: Comparing Male and Female Defender Experiences and Coping Strategies*, 61 IDAHO L. REV. 1, 3 (2025).

³⁸ Beatrice Ferguson, *The Relentless Mental Toll of Public Defense*, SLATE (Jan. 4, 2023, 5:55 AM), <https://slate.com/technology/2023/01/public-defender-mental-health-trauma.html> [<https://perma.cc/XE9S-W3M5>] (quoting Megan Ring, head of the Office of the Colorado State Public Defender, who stated “There’s nothing more heartbreaking to me than getting a resignation letter from someone who says: ‘This is what I want to do, but my mental health can’t take it anymore, and that’s why I’m leaving’ . . .”).

³⁹ See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at xv (“Overloaded public defense attorneys simply cannot give appropriate time and attention to each client. . . . A justice system burdened by triage risks unreliability, denying all people who rely on it—victims, witnesses, defendants, and their families and communities—efficient, equal, and accurate justice.”); see also Song Richardson & Goff, *supra* note 22, at 2632 (“Similar to hospital emergency rooms, PD offices face demands that far outpace their resources.”).

⁴⁰ See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 106-07 (describing multitude of personal challenges public defenders are frequently called on to help their clients navigate, including acquiring housing and other social benefits and services, getting treatment for mental illnesses, and reinstating drivers licenses); Ferguson, *supra* note 38 (“Public defenders represent clients facing devastating, potentially life-destroying punishments; they witness the effects of criminalizing mental health needs, substance use, and poverty.”).

Of all the elements of defense representation that can perpetuate burnout, fast-paced and high-pressure moments can cause unique, nonobvious damage. These traits, characteristic of criminal trials, can energize attorneys yet can also take a toll on attorneys' professional and personal lives. This may be due in large part to the lack of control or ability to foretell the outcome.

Public defenders are particularly vulnerable to experiencing a distinct lack of control. The very nature of the role is to be responsive to actions by law enforcement, prosecutors, and other government actors. The government can be described as the largest, most well-funded, and highly dominating force in modern society. The very act of working in opposition to such an immense entity could impact individual psyches—especially when they are doing so on behalf of somebody else relying on their ability to do right by them.

Scheduling is also often subject to the whim of the judges' and prosecutors' calendars.⁴¹ Consequently, public defenders' other work (both professional and personal) will sometimes take a backseat to the needs of the other professionals in the courtroom. And this is without even accounting for a public defender's need to respond to their own clients' scheduling constraints. This reality not only makes their physical ability to do the job more difficult, but it can also impact their mental and emotional ability to do the job.⁴² Public defenders are often left with little to no time or capacity to engage in professional development and training, which ultimately affects their ability to provide the high degree of competent and effective representation required.⁴³

The legal profession has begun to respond more sensitively to burnout and its impact on individual attorneys and their clients.⁴⁴ Professional bar associations have started paying greater attention to the significantly higher rates of depression and substance use disorder among lawyers compared to other professions.⁴⁵ As these associations take steps to address this reality among lawyers in general, public defender institutional leaders should also prioritize their lawyers' mental health and well-being by considering the role its chosen representation scheme may play.

⁴¹ See *Court Organization and Administration*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/courthouseplanning/construction-and-renovation/court-organization-and-administration> [<https://perma.cc/MK9V-ZCD6>] (last visited Feb. 17, 2025).

⁴² See Sue Halpern, *How a New Approach to Public Defense Is Overcoming Mass Incarceration*, NEW YORKER (Oct. 5, 2023), <https://www.newyorker.com/news/daily-comment/how-a-new-approach-to-public-defense-is-overcoming-mass-incarceration> [<https://perma.cc/2RA3-U9N9>].

⁴³ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

⁴⁴ Bar associations have presented steps for attorneys looking to avoid such outcomes. See, e.g., Christie Sprowls, *Compassion Fatigue and Attorneys: What is Your Self-Care Plan?*, 73 TEX. BAR J. 656, 657 (2010); Molly Ranns, *When Caring Takes a Toll*, 100 MICH. BAR J. 56, 56 (2021); Sarah Cearley, *Compassion Fatigue and the Toll It Takes in Life and Work*, 49 ARK. LAW. 46, 46 (2014).

⁴⁵ See Thomas E. Schimmerling, *Addressing Impaired Attorneys*, GPSOLO MAG., July/Aug. 2021, at 52, 52-53.

2. Compassion Fatigue

Compassion fatigue—a natural response to repeated exposure to individuals faced with difficult circumstances—can also hinder a public defender’s performance.⁴⁶ Unlike burnout, which is based on a lawyer’s direct experience of doing the work, compassion fatigue is a form of vicarious trauma linked to another’s trauma.⁴⁷ While compassion fatigue can lead to burnout, it can also manifest as a constant and harmful state of being for the overwhelmed and concerned public defender.⁴⁸ This constant state of heightened anxiety or emotional burden carries with it both personal and mental costs that can reduce the defender’s skill and ability to care for themselves and their clients.⁴⁹

Clinicians posit that compassion fatigue results from a combination of factors relating to personality traits and organizational expectations.⁵⁰ These can include unrealistic idealism, inadequate personal and professional boundaries, a mismatch between a person’s skills and interests, or mismanagement by institutional leadership.⁵¹ One way to combat the costs inherent to compassion fatigue is to distribute burdens among several people. Multiple attorneys sharing responsibility for each client’s case, rather than a single attorney bearing that responsibility alone, could reduce the impact of unrealistic personal and professional expectations. This would then better enable an attorney to meet work requirements.

During the COVID-19 pandemic, public defenders throughout the nation expressed their fears about being solely responsible for their individual clients’ well-being.⁵² Indeed, some lawyers described the despair they felt during the

⁴⁶ See Fiona Cocker & Nerida Joss, *Compassion Fatigue Among Healthcare, Emergency and Community Service Workers: A Systematic Review*, 13 INT’L J. ENV. RSCH. & PUB. HEALTH 618, 618 (2016) (“Compassion Fatigue (CF) is stress resulting from exposure to a traumatized individual.”); Valerio Bačak, Sarah Esther Lageson & Kathleen Powell, *The Stress of Injustice: Public Defenders and the Frontline of American Inequality*, SOC. FORCES (Feb. 19, 2024), 1, 3 (discussing how vicarious trauma impacts public defenders’ performance).

⁴⁷ See Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147, 167 (2014).

⁴⁸ See Bačak et al., *supra* note 46, at 14-15.

⁴⁹ *Id.*

⁵⁰ See Lee Norton, Jennifer Johnson & George Woods, *Burnout and Compassion Fatigue: What Lawyers Need to Know*, 84 UMKC L. REV. 988-90 (2016) (discussing how individuals who tend to be conscientious, perfectionist, and self-giving are at high risk for compassion fatigue, and how other risk factors include being exposed to environments with low social support).

⁵¹ *Id.* at 987-90.

⁵² See IRENE ORITSEWEYINMI JOE & BEN MILLER, JUST. COLLABORATIVE INST., WHEN EVERY SENTENCE IS A POSSIBLE DEATH SENTENCE: PUBLIC DEFENDERS SPEAK FROM THE FRONT LINES ABOUT COVID-19, at 4-6 (2020), <https://law.ucdavis.edu/sites/g/files/dgvnsk10866/files/media/documents/When-Every-Sentence-is-a-Possible->

pandemic in acting as the sole barrier between their clients and a possible death sentence, even if the defendant was not facing a capital charge.⁵³ Death was a concern for every client already incarcerated or facing the possibility of incarceration, due to the high rate of COVID-19 infections in prisons.⁵⁴

However, this experience for public defenders is not only attached to the heightened stress and anxiety that clouded the minds of many during the global pandemic. The ordinary work of a public defender involves representing people who may already be incarcerated with significant health challenges or who face the multitude of increased health risks associated with the nation's prisons.⁵⁵ Even for those defenders tasked with representing defendants in the nation's misdemeanor courts, sometimes referred to as petty offenses, the attorney represents someone who must make decisions that may result in a devastating loss of rights and liberty.⁵⁶

The vertical representation framework can exacerbate the emotional harm that can result from compassion fatigue among public defenders. The pressure of being primarily (or solely) responsible for a client's case can cause significant stress among even the most robust attorneys working in the healthiest environments.⁵⁷ The extended duration of stress that accompanies vertical representation can be overwhelming, exhausting, and detrimental. In the end, the consequences of constant exposure to emotional trauma throughout the criminal process can cause those currently doing the work to leave, as well as discourage new attorneys who may be interested in public defense work from pursuing jobs in the field.⁵⁸

3. Considerations for Leadership

One of the primary goals for a public defender leader—as with any professional manager overseeing workers who provide services to vulnerable members of the public—should be facilitating an environment that both acknowledges and minimizes, if not prevents, burnout and compassion fatigue.⁵⁹

Death-Sentence---Report-on-Public-Defenders-During-the-Covid-19-Pandemic-.pdf [https://perma.cc/PH8F-JQTX] (describing public defenders' feelings of personal responsibility for clients).

⁵³ *Id.* at 5.

⁵⁴ *See, e.g., id.* at 5 (“I am worried my clients are going to contract the virus and die in jail and it will be on my shoulders because I couldn’t successfully convince the judge to release them.”).

⁵⁵ *Health*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/health.html> [https://perma.cc/TKL4-UCE8] (last visited Feb. 17, 2025).

⁵⁶ *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL’Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [https://perma.cc/SNV9-DCXR] (discussing misdemeanor as “[m]inor offenses with major consequences”).

⁵⁷ *See* Bačak et al., *supra* note 46, at 23.

⁵⁸ *See id.* at 15-16; Ferguson, *supra* note 38.

⁵⁹ *See* Norton et al., *supra* note 50, at 1002.

A burnt-out attorney does not benefit current clients, future clients, or the integrity of the broader public defender system.⁶⁰ If burnout becomes so oppressive that an attorney leaves the practice, they take their skills and experience along with them. This leaves a hole in the industry for indigent defendants whose cases require representation by attorneys with such skills and experience to be handled effectively.⁶¹ Attorneys leaving also reinforces the idea that public defender work is all-consuming and damaging, which can deter future attorneys from pursuing this practice area. In the end, any significant employee turnover rates can lead to a lack of continuity and engagement in the profession necessary to sustain healthy workplace environments and best serve indigent defendants.

While these conditions may arise from different internal and external pressures, certain management decisions can positively impact the reduction of both.⁶² For example, as described in the following section, employing a horizontal scheme can alleviate burnout by ensuring more attorneys are responsible for each case rather than one attorney carrying the entire workload. The horizontal scheme can also ease compassion fatigue since no one attorney experiences the client's pain in isolation, and the emotional toll of representation is dispersed among a group of attorneys.

These possibilities suggest that the ABA's push for vertical representation may not be the most strategic choice for all public defender offices. While a public defender's choice to leave the profession may not necessarily reflect an office or ABA failure, the method by which cases are assigned and responsibilities assessed can directly contribute to burnout.

The figure of the lone defense attorney fighting passionately for a client may fulfill romantic and theatrical notions of the work that a public defender should do.⁶³ Still, this practice makes the work more difficult and can result in greater harm to the client in the long run. As psychologists and mental health researchers have found over decades of research, physical and mental health can suffer if an individual feels exorbitant amounts of stress with little environmental support.⁶⁴ This might cause the lawyer to develop medical problems, distaste for the work, or both, and could lead to a quicker departure.⁶⁵

⁶⁰ See *id.* ("Burnout and compassion fatigue are insidious, debilitating conditions that undermine the professional efficacy of practitioners and the agencies in which they work.")

⁶¹ See Andrew Engelson, *Defenseless: Lack of Public Defenders Creates a Crisis for Indigent Clients and Increased Caseloads for Lawyers*, ABA J. (Aug. 1, 2024, 3:00 CDT), <https://www.abajournal.com/magazine/article/defenseless> [<https://perma.cc/G6MX-8MQQ>] (noting loss of experienced lawyers increased workloads on remaining staff and compromised quality of representation for indigent clients).

⁶² See Bačak et al., *supra* note 46, at 26-27.

⁶³ See Ferguson, *supra* note 38.

⁶⁴ See Norton et al., *supra* note 50, at 992-93.

⁶⁵ *Id.*

According to the Bureau of Justice Statistics' 2007 Census of Public Defender Offices, at least 71% of public defender offices used vertical representation in some capacity for non-capital felony cases.⁶⁶ Despite the lack of clear data on what percentage of those offices experience personnel issues resulting from a vertical representative scheme, public statements addressing difficult times in some of these offices suggest some portion of the discontent could be alleviated if the offices did not use vertical representation for its case assignment scheme.⁶⁷

B. *Horizontal Representation & the Impact on Clients*

As discussed previously, in contrast to vertical representation, horizontal representation is designed so that individual attorneys focus only on specific parts of a client's case.⁶⁸ This configuration has a twofold benefit. First, it allows attorneys to develop a specialty in their law practice. By only handling a discrete aspect of a client's case—a particular unit in the criminal process such as preliminary hearings, motions practice, or trials—an attorney can become more familiar with navigating applicable case law and court procedure for that component of a criminal case, equipping them to better represent current and future clients at their assigned stage of the proceedings. Creating such team representation allows individual attorneys within those groups to develop expertise in a particular practice area, lessening the burden of requiring that every attorney maintain adequate levels of skill, knowledge, and competence across multiple areas of criminal law and procedure.

Second, horizontal representation can help prevent burnout by allowing an attorney to feel like they are part of a team representing an individual rather than carrying the entirety of the case on their shoulders alone. This reduction in responsibility may alleviate an individual attorney's guilt or stress about case outcomes and decrease the number of public defenders leaving the field for a less stressful legal practice. Retaining public defenders and helping to ensure their success can improve the overall reputation of indigent defense as a practice

⁶⁶ See FAROLE & LANGTON, *supra* note 27, at 6. Note that these findings are the most up-to-date data on this topic, as the Census of Public Defender Offices has not been conducted by the Bureau of Justice Statistics ("BJS") since 2007. However, in 2022, BJS issued a solicitation for funding applications of "the second iteration" of this census, which "will obtain information about the operations, workload, staff size, policies, and procedures of the approximately 1,000 public defender offices across the nation." *FY 2022 Census of Public Defender Offices*, BUREAU JUST. STATS. 1, 5 (2022), https://bjs.ojp.gov/content/pub/pdf/cpdo22_sol.pdf [<https://perma.cc/XL8Y-HMWZ>].

⁶⁷ See, e.g., *OPD to Begin Refusing Cases*, ORLEANS PUB. DEFS. (Dec. 11, 2015), <https://www.opdla.org/news/opd-to-begin-refusing-cases> [<https://perma.cc/Y8H8-H6RU>] (explaining Orleans Public Defenders refusing new case assignments due to excessive workloads, inadequate resources, and ethical concerns about inability to provide constitutionally mandated representation).

⁶⁸ See *infra* notes 87-91 and accompanying text (illustrating example of horizontal representation).

area, both in the eyes of the public and of future attorneys considering a career in public defense.

The above benefits of horizontal representation may encourage public defender system leaders to adopt it, despite the ABA's claim that vertical representation is the ideal form of representation for public defense.⁶⁹ The drawbacks of such a system, however, have proven so significant in certain environments that some public defender institutions have viewed the rejection of horizontal representation as a key to providing constitutional and professional representation. The following section provides both a concerning and a promising example of horizontal representation.

1. A Problematic Manifestation of Horizontal Representation: Louisiana

The ABA's concerns regarding horizontal representation schemes in public defense practice may, in some circumstances, be well-grounded. Some public defender offices practice horizontal representation by assigning one attorney to a particular courtroom: any matter arising in that courtroom on a given day becomes that attorney's responsibility.⁷⁰ However, this configuration can lead to significant and unacceptable challenges to the provision of effective assistance of counsel.

Despite the promise of the right to counsel after an arrest, it can take days, weeks, or even months after a defendant is arrested to be assigned to a particular judge or courtroom in a criminal district court.⁷¹ If an attorney is assigned to represent a client at the first critical stage of the proceeding through a courtroom assignment, that client may have had a different attorney at their first appearance for the formal charges and another attorney at their second court appearance.

Take the situation in Louisiana before it shifted to a vertical representation scheme. As allotted by Louisiana statute, the prosecution has a certain number of days to decide whether to proceed with a criminal case by formally instituting charges.⁷² Article 701 of the Louisiana Code of Criminal Procedure permits the state to use thirty days to determine if it is appropriate to formally charge an arrested and detained person with a misdemeanor offense and sixty days for a felony offense.⁷³ If the offense is punishable by death or life without parole, the code provision permits the state to use 120 days to make their decision.⁷⁴ If a

⁶⁹ AM. BAR ASS'N, *supra* note 18, at 6.

⁷⁰ See, e.g., *Frequently Asked Questions*, SUMMIT LEGAL DEFS., <https://www.summitlegaldefenders.org/faqs> [<https://perma.cc/5BX4-KSEF>] (last visited Feb. 17, 2025) (explaining defendant accused of misdemeanor will have an attorney "determined by the judge or magistrate that [their] case is assigned to"). This is exemplified by the public defender's office in New Orleans, Louisiana, prior to 2007.

⁷¹ *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 196 (2007).

⁷² See LA. CODE CRIM. PROC. ANN. art. 701(B)(1)(a) (2024).

⁷³ *Id.*

⁷⁴ *Id.* at art. 701(B)(1)(b).

defendant is not detained before the institution of a formal charge, the statutorily allotted time can double or triple.⁷⁵

Why does this matter for a discussion on horizontal representation? The Sixth Amendment requires an attorney to be assigned to an indigent defendant at critical stages of the proceedings following their arrest.⁷⁶ The first such proceeding could be a probable cause or preliminary hearing or a bail hearing.⁷⁷ Pre-2007, defendants in Orleans Parish Criminal District Court were not assigned to a particular courtroom until after the formal charges were instituted against them.⁷⁸ These interrelated criminal procedure rules allow the defendant to appear before one judge for the initial hearing and bond setting, as well as for any motions filed before the formal charges are instituted. If the defendant is represented by an attorney assigned to a particular courtroom—as opposed to an attorney assigned to that particular client—then the defendant could be represented by multiple attorneys, each of whom is assigned to one of the various courtrooms in which the defendant has appeared before the case is formally set to proceed.

Recognizing that this system of court assignment led to an unacceptable form of horizontal representation, the Orleans Public Defenders chose to transition to a vertical representation scheme in 2007.⁷⁹ This choice was made primarily because defendants found it difficult to develop a trusting relationship with an attorney while being assigned a new one at every pivotal point of their journey through the criminal process.⁸⁰ Their previous horizontal representation scheme was also more vulnerable to loss and confusion of information and strategies as

⁷⁵ *Id.* at art. 701(b)(2)(a).

⁷⁶ *See Rothgery*, 554 U.S. at 198-200.

⁷⁷ *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

⁷⁸ *See* Ari Shapiro, *Louisiana Overhauls Public-Defender System*, NPR (Sept. 14, 2007, 6:00 AM), <https://www.npr.org/2007/09/14/14412362/louisiana-overhauls-public-defender-system> [<https://perma.cc/Q8UJ-BBUW>].

⁷⁹ Interestingly enough, the court grew so frustrated with having to wait for attorneys to appear for particular clients that it eventually adopted a system where clients were assigned a courtroom from the day of their arrest through the entirety of their sentencing. This resulted after judges sought to hold public defenders in contempt of court for not being present in the courtroom (as they were representing individuals charged with offenses in other courtrooms) at the time a particular matter was called. These contempt convictions proved difficult to uphold given that those attorneys were in the other courtrooms pursuant to judicial orders to appear before other judges on behalf of other clients. *See, e.g.*, Albert Samaha, *Indefensible: The Story of New Orleans' Public Defenders*, BUZZFEED NEWS (Aug. 13, 2015, 10:21 AM), <https://www.buzzfeednews.com/article/albertsamaha/indefensible-new-orleans-public-defenders-office> [<https://perma.cc/VQU4-VHR3>].

⁸⁰ *See Principle 8: Vertical Representation*, AM. BAR ASS'N (Aug. 23, 2023), https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/standards-and-policies/ten-principles-pub-def/principle-8 [<https://perma.cc/4RWF-HHMM>].

attorneys transferred client files among each other.⁸¹ These problems were exacerbated in the aftermath of Hurricane Katrina and its devastating effects on the people and buildings in New Orleans.⁸² With these potential outcomes in mind, the ABA, in addition to other organizations that evaluate the efficacy of public defender services,⁸³ has described vertical representation as the more effective model for indigent defense over horizontal representation.⁸⁴

However, one cannot ignore the benefits of horizontal representation, particularly as a strategy to save costs when a public defender institution is overwhelmed and under-resourced.⁸⁵ Despite the findings of the ABA, a leading professional organization for attorneys in the United States which is “committed to its mission of defending liberty and pursuing justice,”⁸⁶ horizontal representation might be an acceptable system for providing legal services. Because criminal law is practiced on the local level, subjecting a jurisdiction’s diverse interests, needs, and restrictions, to a nationwide ABA standard may not work given that it resembles a “one-size-fits-all” solution. Despite the risks of an indigent defendant claiming their Sixth Amendment right to effective assistance of counsel was violated, horizontal representation may be the better distribution scheme for a public defender office facing overwhelming need and insufficient resources.

2. A Well-Respected Version of Horizontal Representation: Defender Association of Philadelphia

Some public defender offices have maintained a horizontal representation and received some admiration for their legal practice. For example, the Defender Association of Philadelphia (“Defender Association”) is a highly respected, client-centered public defender office known for its horizontal representation.⁸⁷

⁸¹ See Shapiro, *supra* note 78.

⁸² See Samaha, *supra* note 79 (“It became known as ‘Katrina Time’—inmates serving months behind bars for no reason other than for being in jail on the day the storm hit.”).

⁸³ See, e.g., *Defender Standards*, NAT’L LEGAL AID & DEF. ASS’N, <https://www.nlada.org/defender-standards> [<https://perma.cc/C8F7-9VPQ>] (last visited Feb. 17, 2025).

⁸⁴ See TONY FABELO, OFF. OF JUST. PROGRAMS, WHAT POLICYMAKERS NEED TO KNOW TO IMPROVE PUBLIC DEFENSE SYSTEMS 5 (2001), <https://www.ojp.gov/pdffiles1/bja/190725.pdf> [<https://perma.cc/GRN2-S5EQ>]; see also ABA, CRIM. JUST. STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 82-83 (3d ed. 1992).

⁸⁵ See, e.g., Jamison Koehler, *A New Perspective on Representing Indigent Criminal Defendants*, KOEHLER L. (Jan. 26, 2016), <https://koehlerlaw.net/2016/01/a-new-perspective-on-representing-indigent-criminal-defendants-in-d-c> [<https://perma.cc/3VWT-FHED>] (characterizing Philadelphia’s horizontal representation as better allocation of limited resources).

⁸⁶ *The American Bar Association*, AM. BAR ASS’N, https://www.americanbar.org/about_the_aba [<https://perma.cc/5C9N-ED4P>] (last visited Feb. 17, 2025).

⁸⁷ See *Adult Client Representation & Services*, DEF. ASS’N OF PHILA., <https://phillydefenders.org/adult-representation> [<https://perma.cc/B57X-QN9C>] (last visited Feb. 17, 2025).

The Defender Association divides itself into numerous practice groups, including: (1) Pretrial, (2) Investigations, and (3) Adult Trial Practice (as opposed to juvenile delinquency representation).⁸⁸ The Adult Trial Practice group is further separated into three units: (1) Municipal Court, (2) Waivers, and (3) Majors.⁸⁹

The horizontal nature of this organization's practice primarily concerns the units whose work involves the municipal court, motions, and pre-trial advocacy. The division of responsibilities for the adult trial practice group is outlined as follows:

- The Municipal Court Unit handles preliminary hearings once clients are formally charged with a criminal offense;
- The Waivers Unit handles most felony cases that go before a judge; and
- The Majors Unit handles cases decided by a jury.⁹⁰

In Philadelphia County courts, preliminary hearings for felony cases are scheduled by bail commissioners to take place in the Municipal Court within a few days following arrest.⁹¹ The prosecuting agency (the Commonwealth) must establish probable cause for the charges against the defendant before the court.⁹² Consequently, the Defender Association's Municipal Court Unit attorneys may represent a defendant only briefly before their representation is transferred to their colleagues in the Waivers Unit or the Majors Unit.⁹³ The Pretrial practice group, which features a "team of lawyers, social workers, and other staff," can also provide important services to clients during this stage in the representation, including information about "diversion programs, social services, and other connections" that could reduce a defendant's further interaction with the criminal process.⁹⁴

Admittedly, the reasons for the Defender Association's successes with the horizontal representation method despite the inherent shortcomings of such a distribution scheme, at least according to popular thought, are not immediately apparent. Other social service providers in the city have noticed and remarked on the team-based success of the Defender Association's model. In 2017, Curt Watkins, leader of a unit of social workers who work with attorneys in Philadelphia, described the advantages of the Defender Association's team-

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *The Criminal Justice Process*, PHILA. DIST. ATT'Y'S OFF., <https://phillyda.org/safety-and-justice/criminal-justice-process> [<https://perma.cc/BZ7K-UU5C>] (last visited Feb. 17, 2025).

⁹² Consistent with the Sixth Amendment, this hearing may not be necessary if a defendant has been indicted by a grand jury. *See* 18 U.S.C. §3060(e).

⁹³ *See Adult Client Representation & Services*, *supra* note 87.

⁹⁴ *See id.*

based approach: “[W]hen you have team representation, when you engage folks early with social services, the statistics show that folks will come back to court for their court hearing, and engaging in their issues early will preserve what they have that’s positive and lead to better future outcomes.”⁹⁵

There are several possible reasons the Defenders Association’s model is well respected. The first is how it enables its attorneys to develop expertise in certain pieces of criminal defense representation. Another is the program’s emphasis on relationship building with various professionals responsible for each client. Public defender offices should always ground their efforts in prioritizing trust-building between their attorneys and their clients. This ensures that multiple people and various personalities are present for an indigent defendant to build a relationship with on their defense team. The following section details what that might look like.

3. Benefits of Horizontal Representation

Lawyers routinely develop legal specialties during their legal careers and can inspire confidence and trust in their clients because of such expertise. A specialty can be as broad as a complete area of law—that is, civil law or criminal law—or as narrow as a particular law, such as Section 1983 police misconduct civil lawsuits. Public defenders, tasked with representing a wide array of clients, often develop a broad yet shallow expertise in criminal law since they must stay informed of changes within the entirety of criminal law.⁹⁶ For instance, they may be required to have the most up-to-date knowledge on the best practices for defending multiple types of crimes, from simple possession of a stolen object to arson to large-scale drug distribution and criminal homicide.⁹⁷ It is unsurprising then, that some indigent defendants might feel uncomfortable or discouraged by their assigned attorney, who may or may not be able to claim particular expertise in the matter relevant to their case.

Since states may have different definitions and caselaw further distinguishing each crime, the defender must also be familiar with the specifics of the jurisdiction in which she practices.⁹⁸ A defender will need to understand the particulars of the court or judge in which such cases routinely appear, as each judge will have a different understanding of the rules and processes. This wealth of knowledge does not even include the lawyer’s need to tailor representation dependent on the client’s mental health and intellectual disability experiences, which the interaction with the criminal process can often exacerbate.⁹⁹ Because

⁹⁵ Julie Zeglen, *Defender Association of Philadelphia Has Reform on Its Mind*, GENEROCITY (Nov. 2, 2017), <https://generocity.org/philly/2017/11/02/defenders-association-curt-watkins-phillycam> [<https://perma.cc/BT6P-9DN7>].

⁹⁶ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS’N 1983).

⁹⁷ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 1983) (explaining that lawyers should engage in continuing study and education).

⁹⁸ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS’N 1983).

⁹⁹ See Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact*

of the large number of possible crimes, the unique and specific client circumstances that can exist, and the laws and science surrounding each vary drastically, the availability of certain types of defenses and how best to convey them to a factfinder requires a certain level of competence and skill from a defense attorney for them to provide effective and ethical representation.

Public defenders are called upon to be experts in a wide variety of specialties.¹⁰⁰ For example, a lawyer representing a defendant charged with simple possession may need to be familiar with forensic science, to the extent that there may be biological traces of human interaction with an item. A lawyer representing a defendant charged with drug possession must be familiar with the scientific testing used to identify narcotics. Lastly, a lawyer representing a defendant charged with homicide must understand the death certificate process. It is only when lawyers are armed with the necessary legal and technical knowledge that they can: (1) adequately inform clients about how the law speaks to their alleged behavior,¹⁰¹ and (2) develop effective legal strategies and strong arguments for a judge or jury to consider when determining potential criminal liability.¹⁰²

This reality suggests that public defender offices could run more smoothly and efficiently if their attorneys could specialize in subgenres of law, thereby reducing the amount of information attorneys must learn to effectively represent an individual client. The possibility that a horizontal team approach diffuses responsibility suggests that it could also limit burnout and compassion fatigue.¹⁰³ This means that horizontal representation could be a more effective and sustainable method of case assignment. At the very least, an enterprising public defender leader should consider whether it would be a better fit for their own individual overwhelmed and under-resourced office.

C. *Choosing Between Horizontal and Vertical Representation*

The previous section does not suggest that the public defender institution must choose a horizontal representation scheme. Nor does it suggest, as the ABA Criminal Defense Practice Rules do,¹⁰⁴ that vertical representation is the only appropriate mechanism for assigning clients and cases to public defenders. Choosing between the two representation schemes is not easy for any public defender office leader. It is not always clear that one is better than the other. Instead, the consequences drawn out in this Article advocate for a close

and Mental Health, 82 AM. SOCIO. REV. 719, 722 (2017) (discussing ramifications of stressors of conviction on mental health); April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, 7 SOC. CURRENTS 29, 33 (2020) (describing how low-level contact with criminal justice system can increase anticipatory stress).

¹⁰⁰ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 1983).

¹⁰¹ See MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

¹⁰² See MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

¹⁰³ See Norton et al., *supra* note 50, at 1001.

¹⁰⁴ See AM. BAR ASS'N, *supra* note 18.

evaluation of an office's environmental needs to determine whether a horizontal or vertical scheme would offer better outcomes.

There may be some cases in which the clients themselves are best positioned to choose their preferred type of representation as opposed to the office leader choosing an absolute scheme. Sometimes, a client may want their case to be resolved quickly and raise no appellate issues or raise only specific appellate issues.¹⁰⁵ Alternatively, some situations may demand attorneys cycle in and out of different representation options, depending on a client's understanding and acceptance of the criminal proceedings against them.¹⁰⁶ What is not advisable, however, is for a public defender system or office to dogmatically accept vertical representation as its assignment scheme, especially if it is clear that the team-based representation central to horizontal representation could more greatly benefit clients in the short-term and both attorneys and indigent defendants in the long-term. While vertical representation may be the superior assignment scheme from the professional licensing perspective, it can impose high costs on the public defenders and their client population.¹⁰⁷ Vertical representation places enormous responsibility on attorneys who are likely already overwhelmed and under-resourced.¹⁰⁸ Horizontal representation, or some version of a team-based approach to representation, could lessen the stress on those overwhelmed and under-resourced.¹⁰⁹

II. HIRING DECISIONS

Deciding who to hire with limited funds is another prioritization decision for an office leader. Despite guidelines outlining the number of cases a lawyer can reasonably handle,¹¹⁰ neither the Constitution nor professional rules on the practice of law provide specific language determining an exact number of attorneys or support staff that must be hired to represent an individual client. Given the lack of an explicit requirement outlining a mandatory number of legal staff to meet a public defender office's caseload, office leaders are left with great

¹⁰⁵ This is similar to situations that encourage *Crosby* pleas. These plea agreements allow for early resolution of a case that permits the defendant to appeal, should they choose to do so, but not go through the process of an actual trial. *See* *State v. Crosby*, 338 So. 2d 584, 586-92 (La. 1976).

¹⁰⁶ This cycling of attorneys may occur during a formal, routine, or systematic evaluation of clients' mentalities and their abilities to understand the proceedings against them and assist in their defenses. If clients would benefit from attorneys better equipped to represent defendants given their mental health status, then the attorneys could be switched.

¹⁰⁷ *See supra* Part I.A (providing overview of costs of vertical representation).

¹⁰⁸ *Id.* (suggesting vertical representation increases burnout and compassion fatigue).

¹⁰⁹ Public defender agencies like the Bronx Defenders may provide an example of a well-respected hybrid approach. *See How We Work*, BRONX DEFS., <https://www.bronxdefenders.org/who-we-are/how-we-work> [https://perma.cc/7G5T-FFM4] (last visited Feb. 17, 2025).

¹¹⁰ *See, e.g.,* RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at xii.

discretion in who and what professional actors to prioritize in their hiring decisions.

The Sixth Amendment and its interpreting case law, such as the Supreme Court's 1984 decision in *Strickland v. Washington*,¹¹¹ establish the right to the effective assistance of counsel.¹¹² This right, however, is subject to different provision mechanisms. According to *Strickland*, the right to counsel is an empty guarantee unless the counsel provided is effective.¹¹³ Proving ineffective assistance of counsel requires satisfying a two-part test: (1) there must have been a "deficient performance," as determined by prevailing standards of defense representation; and (2) there must be "sufficient prejudice" that the deficient performance affected the outcome.¹¹⁴ This low assessment standard has allowed some jurisdictions to burden individual public defenders with unwieldy caseloads that would seem to defy logic about the degree of effective representation an attorney can provide any client when tasked with so many others to represent.¹¹⁵ The language and opinion itself were also centered solely on the attorney.¹¹⁶ It failed to consider the role that other professionals play in helping the attorney provide effective assistance of counsel to their clients.

Professional rules are similarly context-specific and often subject to the "we will know it when we see it" evaluation for providing competent representation. The ABA's *Model Rules of Professional Conduct*, for example, requires all attorneys, including public defenders, to provide competent assistance; however, it does not provide specifics on how many of which professionals are required to meet that standard.¹¹⁷ The rule does define competent representation as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" but does not describe the way that other professionals or the lawyer itself can establish that.¹¹⁸ While there may be good reasons for the standards for representation to be so loosely defined and subject to general perception,¹¹⁹ this generality can make hiring decisions more challenging and arbitrary. The following section details how decisions on who to hire and how many specific role-players a public defender leader may choose to have in their office can impact a defendant's right to the effective assistance of counsel.

¹¹¹ 466 U.S. 668 (1984).

¹¹² See *id.* at 686; U.S. CONST. amend. VI.

¹¹³ *Strickland*, 466 U.S. at 687-88.

¹¹⁴ *Id.* at 700.

¹¹⁵ See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 4.

¹¹⁶ See *Strickland*, 466 U.S. at 687 (framing question as whether counsel's assistance was defective).

¹¹⁷ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

¹¹⁸ *Id.*

¹¹⁹ Perhaps because a successful representation strategy may not include the exact behavior or filings that would be expected in another defense representation. See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 1983).

A. *The Numbers Piece of the Right to Counsel*

In the public defender's office, each criminal case starts with the appointment of counsel. The Sixth Amendment's guarantee of the right to counsel for criminal defendants who cannot afford to hire lawyers themselves requires that public defender offices, as a basic and central element of their staffing plans, hire attorneys to fill that necessary role.¹²⁰ These attorneys must be able to appear in court, file motions, and argue evidentiary issues on a client's behalf.¹²¹ In other words, they must be licensed to practice law in the jurisdiction encompassing the criminal court. Without enough licensed lawyers to do this work, the institution cannot meet the constitutional requirement to provide effective assistance of counsel.¹²²

It is essential to recognize that the *number* of staff members who should be hired to meet these newly issued guidelines is only a surface question. There are two more critical considerations for a public defender institution: (1) *whom* office leaders should hire to meet these new obligations, and (2) *how* the professional staff hired to work in public defender offices should spend their time. Perhaps it would be preferable for an office leader to hire more support staff such that each attorney can focus on litigation components of representation that require a licensed attorney's expertise, while leaving other components to support staff. Alternatively, an office leader may determine that more resources should be dedicated to mitigation specialists who could investigate a client's life circumstances in a particular way. Such an investigation would focus more on mitigating punishments even if that would further strain already limited resources. Mitigation, of course, is more conducive to developing a life history for the client and, thus, providing a more detailed report for the institutional body tasked with levying charges against and sentencing an indigent defendant.¹²³

Similarly, social workers or others trained in psychology or counseling could be an important use of limited hiring resources. A trauma-informed social worker's unique skills and understanding of clients' circumstances can offer powerful leverage in ensuring clients can relate to their public defender and,

¹²⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹²¹ See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008).

¹²² Recently, there have been larger conversations of the constitutionality of this type of decision in Alaska. See, e.g., Associated Press, *Alaska Public Defenders to Refuse Some Nome and Bethel Cases Due to Shortage of Attorneys*, ALASKA PUB. MEDIA (Feb. 3, 2023), <https://alaskapublic.org/2023/02/03/alaska-public-defenders-to-refuse-some-nome-and-bethel-cases-citing-staffing> [<https://perma.cc/QD2T-8DDB>] (reporting on public defender office's refusal of new cases due to institutional inability to ethically accept them in wake of resignations).

¹²³ This could be the judge, in the most formal sense of the word, or the prosecutor, to the extent an offered and accepted plea agreement dictates the sentencing. Mitigation specialists are certainly an essential component for jurors tasked with sentencing decisions in the death penalty context. See Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1150-51 (2003).

thereby, more fully participate in their defense.¹²⁴ Such counseling could also help witnesses articulate their experiences more comfortably to law enforcement, prosecutors, judges, or juries thereby reducing possible charges or punishments.

Lastly, increasing an office's paralegal or administrative support staff can improve a client's experience by reducing public defenders' workload when it comes to managing paperwork and filing. Paralegals could greatly reduce the public defender's workload with their memo drafting and editing expertise.¹²⁵ They or other administrative support could also help calendaring for courts, prosecutors or witness meetings.¹²⁶ For some criminal cases, a single attorney working alone without any support staff may be sufficient to represent a client. These circumstances may exist more for lower penalty cases carrying potential punishments of inactive probation or a small fine. Additionally, misdemeanors, which comprise approximately 80% of the criminal legal system,¹²⁷ may also be simple enough to warrant the work of a single attorney.¹²⁸ These cases, which involve a potential punishment of no more than a year of incarceration,¹²⁹ may

¹²⁴ See ANDREEA MATEI, JEANETTE HUSSEMAN & JONAH SIEGEL, URB. INST. JUST. POL'Y CTR., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE 3 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-worker-model-of-public-defense_1.pdf [<https://perma.cc/Z47M-S39Z>].

¹²⁵ See generally Moises Reynoso Colin, Addressing the Issue of Public Defender Excessive Caseload in Low-Income Communities (2024) (Master's thesis, California State University).

¹²⁶ See *id.*

¹²⁷ Amanda Agan, Jennifer Doleac & Anna Harvey, *Misdemeanor Prosecution and Recidivism*, CATO INST. (Dec. 8, 2021), <https://www.cato.org/research-briefs-economic-policy/misdemeanor-prosecution-recidivism> [<https://perma.cc/FWU7-DL8F>]; see also Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 (citing COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/9WEQ-3VUV>]).

¹²⁸ It is not, however, so simple to say that misdemeanors require minimal work or should be treated as minimally important. For an explanation of how and why misdemeanors should be elevated in assessing importance, see generally Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017).

¹²⁹ See N.Y. PENAL LAW § 70.15 (McKinney 2025) ("A sentence of imprisonment for a Class A misdemeanor . . . shall not exceed three hundred sixty-four days."); see also GA. CODE ANN. § 17-10-3 (2023) ("[E]very crime declared to be a misdemeanor shall be punished . . . by confinement in the county or other jail . . . for a total term not to exceed 12 months."); but see MASS. GEN. LAWS ch. 274, § 1 (2024) (categorizing all crimes other than felonies as misdemeanors, even those that exceed one year of imprisonment. See generally *Misdemeanor Sentencing Trends*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/misdemeanor-sentencing-trends> (Jan. 29, 2019) ("Generally, misdemeanors are punishable by less than one year or 365 days, whereas felonies are generally subject to more than one year of incarceration."))

be designated as simpler cases on a public defender's docket requiring less preparation or courtroom appearances compared to felony cases.

Both the previous caseload standards, promulgated in 1973 by the United States Department of Justice's National Advisory Commission, and the current public defender caseload standards, promulgated by the Quality Defense Alliance in 2023, provide that, on average, it is proper for a public defender to spend less time handling individual misdemeanors.¹³⁰ The 1973 guidelines proposed that attorneys could effectively handle 400 misdemeanor cases per year but only 150 felony cases in that same time period.¹³¹ Such an assessment may also speak to the lesser need for support staff to assist an attorney in representing clients facing misdemeanor charges.¹³²

The 2023 report's assessment, however, was more granular than the 1973 report, specifying that low-severity misdemeanor cases require an average of 13.8 hours of work from a public defender.¹³³ Despite its more granular description of the average amount of work required to effectively represent a defendant charged with a misdemeanor violation, the study also supported the claims from the previous guideline that felony cases would require, on average, more hours of work by the attorney.¹³⁴ These updated standards noted that even low-severity felony cases would require an average of 35 hours, almost three times as many hours as required for misdemeanor cases.¹³⁵ This suggests that support staff could be more helpful or a more necessary component for the higher-level felonies.

The numbers were even more stark when comparing low-severity misdemeanor cases to the multiple types of high-severity felony cases, for which the hour count recommendations were as follows:

- High-Severity Felony, Eligible for Life without Parole Sentence: 286 hours, 7 total cases annually
- High-Severity Felony, Murder: 248 hours, 8 total cases annually
- High-Severity Felony, Sex Crime: 167 hours, 12 total cases annually
- High-Severity Felony, Other: 99 hours, 21 total cases annually.¹³⁶

Considering the standard forty hour work week with two vacation weeks, an attorney has 2,000 available hours to work per year. Under these guidelines,

¹³⁰ NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 3, at 276; RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at xii.

¹³¹ See NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 3, at 276; see also RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at viii (describing caseload quantity recommendations in 1973 report).

¹³² This is only a general claim and would not be absolute and the answer for every case or client.

¹³³ RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at xii.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

handling the recommended number of high-severity felony cases, especially those for which the top possible sentence is life without parole, would consume a vast percentage of one attorney's workload.

At the most basic level, each office leader must consider the minimum number of attorneys each office will need at various points in time—given the institutional caseload—that would maximize the likelihood each attorney can provide effective assistance of counsel to their clients. This variable number will depend on whether the office leader accepts the caseload guidelines issued in 1973 or incorporates the updated, more granular hourly guidelines of 2023. This number can also change depending on whether the office leader believes that a variety of professionals are needed to fully realize a defendant's right to the effective assistance of counsel. Their decisions will greatly impact the quality of their work and its ability to comply with constitutional and professional mandates. It also means the office leader's decisions on which other professionals to hire and how many could be of great help.

B. *Filling out the Right to Counsel*

As noted above, the Sixth Amendment right to the effective assistance of counsel encompasses more than just a certified lawyer appearing on a defendant's behalf during formal court proceedings.¹³⁷ This means that defense representation cannot consist solely of the attorney's appearance in the courtroom or on the court record.¹³⁸ A lawyer cannot truly be effective without fulfilling certain preparatory obligations. For example, defendants are entitled to adequate investigation of the charges levied against them.¹³⁹ Such investigation could include visiting the crime scene, interviewing named witnesses, searching for additional witnesses, testing forensic evidence, and exploring the personal histories of the defendant and any other persons involved in the case.¹⁴⁰ They could also include extensive conversations with a client

¹³⁷ See *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¹³⁸ *Id.* at 690-91.

¹³⁹ *Id.* at 691.

¹⁴⁰ This is especially the case in juvenile and death penalty cases where mitigation specialists are increasingly becoming a standard part of the practice. See Maurice Chammah, *The Mercy Workers*, MARSHALL PROJECT (Mar. 2, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/03/02/death-penalty-mitigation-specialists-rare-look> [https://perma.cc/S622-XGZY].

experiencing a mental health disorder¹⁴¹ or some emotional harm related to the experience of being incarcerated¹⁴² or facing a criminal charge.

Generally, no specific guidance details how investigators should be assigned in collaboration with public defender offices, nor the role social workers and other professional administrative support staff must play in individual representation. Some public defender authorities, however, have adopted guidelines surrounding investigative work. For example, in 2010, the Louisiana Public Defender Board (“LPDB”) adopted Trial Court Performance Standards, which provide detailed investigative mandates, including a public defender’s duty to investigate each case promptly.¹⁴³ It also provides requirements for the types of investigation that must be completed, including reviewing all materials used by the prosecution to bring the criminal charges,¹⁴⁴ obtaining information from the defendant and other witnesses,¹⁴⁵ and relying on expert assistance when necessary.¹⁴⁶

Notably, however, this investigation standard does not detail any specific means or hiring requirements for the public defender to meet this investigation obligation.¹⁴⁷ Neither does it prescribe a set number of investigators for various cases nor does it recommend requisite levels of investigators’ experience and

¹⁴¹ See CRIM. JUST. STANDARDS ON MENTAL HEALTH § 7-1.4 (AM. BAR ASS’N 2016). Public defenders whose clients face mental health challenges can greatly benefit from being able to call on colleagues with specialized training in this area for assistance. The Maryland Office of the Public Defender, clearly having recognized this, maintains a Forensic Mental Health Division which, according to its mission, provides public defenders across the state with “access to the highest caliber expert consultative services, resources, training, and technical litigation support necessary for superior representation of clients with complex mental health issues.” *Forensic Mental Health*, MD. OFF. OF PUB. DEF., <https://opd.state.md.us/forensic-mental-health> [<https://perma.cc/N9PL-H87P>] (last visited Feb. 17, 2025).

¹⁴² Data on the number of incarcerated people who suffer from mental illness has varied over the years. However, according to a 2014 report by the National Research Council, “64 percent of jail inmates, 54 percent of state prisoners and 45 percent of federal prisoners report[ed] mental health concerns.” Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCH. 56 (2014), <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/QA25-KSM3>].

¹⁴³ LA. ADMIN. CODE tit. 22, pt. XV, § 717(A) (2024).

¹⁴⁴ *Id.* at §§ 717(B)(1), (4), (5), (7).

¹⁴⁵ *Id.* at §§ 717(B)(2), (3).

¹⁴⁶ *Id.* at § 717(B)(7).

¹⁴⁷ This might be because there are no specific training programs for public defender investigators. Some simply rely on retired law enforcement, others rely on recent college graduates or general applicants, while others turn to the attorneys or law student interns to complete the bulk of the investigative work. Regardless of the exact reasoning such language is not included, the absence of clear investigative standards leaves public defender leaders to rely on their own judgments.

skill.¹⁴⁸ The absence of such information requires office leaders to make their own judgments about how many investigators are necessary for compliance and whether more attorneys should be hired at the expense of investigators.

Investigation is not the only support service needed for effective and competent assistance of counsel. Social workers can offer a critical component to defense representation, particularly given their training and skill in developing relationships with the marginalized populations who often comprise the public defender's clientele.¹⁴⁹ Social workers are particularly adept at identifying reasons people act the way they do,¹⁵⁰ and articulating the ideal path for reform for consideration by sentencing bodies.

Additionally, while attorneys and investigators can and should maintain their own records, it is crucial for an institution to have administrative support staff that help maintain what can be voluminous legal records, especially to avoid conflicts of interest.¹⁵¹ In larger jurisdictions, public defender offices handle thousands of cases each year,¹⁵² and conflicts can sometimes outlast the case disposition of a previous client by years or decades. Because an attorney's duty of loyalty extends beyond the completion of representation of an individual client on an individual matter or even a client's death, record keeping within public defender offices becomes especially vital to ensure conflicts do not arise in current and future cases.¹⁵³

Lawsuits directed at the inadequate provision of indigent defense services—whether from individuals or organizations and whether directed at particular public defender offices or statewide administrators—sometimes result in settlements that emphasize the importance of support personnel in maintaining

¹⁴⁸ See generally LA. ADMIN. CODE tit. 22, pt. XV, § 717 (2024) (lacking any such means or hiring requirements, numerical requirements for investigators, or recommendations about investigators' experience).

¹⁴⁹ Public defenders, whose clients face challenging problems that include "unemployment, mental health, addiction, and alcohol abuse," can provide more effective counsel by "reach[ing] out to other professionals like social workers and mental health experts to help their clients." Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 423 (2001).

¹⁵⁰ Forensic social workers can "conduct basic mental health status exams" that allow public defenders to "counsel mentally ill clients more effectively and to find alternative treatment dispositions." Cait Clarke, *Community Defenders in the 21st Century: Building on a Tradition of Problem-Solving for Clients, Families and Needy Communities*, 49 U.S. ATT'YS' BULL. 20, 25 (2001). Additionally, social workers can "help identify potentially violent clients who may harm themselves or others due to the lack of adequate treatment, monitoring, and drug therapy." *Id.*

¹⁵¹ See MODEL RULES OF PRO. CONDUCT r. 1.7, 1.8 (AM. BAR ASS'N 1983).

¹⁵² See, e.g., *Criminal Defense Practice*, BRONX DEFS., <https://www.bronxdefenders.org/our-work> [<https://perma.cc/S3CT-FNE6>] (last visited Feb. 17, 2025)

¹⁵³ See, e.g., *In re Hostetter*, 238 P.3d 13, 20 (Or. 2010) ("[A]n attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased . . .").

an office's ability to provide effective representation. In an illustrative example, South Carolina's Lexington County Council settled a lawsuit by the ACLU challenging its compliance with the Sixth Amendment right to counsel in December 2022.¹⁵⁴ As part of the settlement, the city council increased its public defender funding by providing the circuit public defender with enough money to hire six additional attorneys, a paralegal, an investigator, an administrative assistant, and a social worker.¹⁵⁵ Notably, the settlement did not just include money earmarked for attorneys. This result emphasized the critical nature of these other non-lawyer working professionals.¹⁵⁶

Like in South Carolina, other lawsuits against the state or other entities tasked with providing indigent defense services have successfully resulted in agreements to fund the hiring of additional lawyers *and* support staff. For example, in February 2022, Los Angeles County settled a lawsuit against the sheriff's department by agreeing to fund the hiring of immigration attorneys, paralegals, and other specialists.¹⁵⁷

¹⁵⁴ *After More than Five Years of Litigation, Lexington County, S.C., Agrees to Dramatically Increase Funding for Indigent Defense*, ACLU (Dec. 16, 2022, 4:30 PM) [hereinafter *ACLU Lexington County, S.C., Agrees*], <https://www.aclu.org/press-releases/after-more-five-years-litigation-lexington-county-sc-agrees-dramatically-increase> [https://perma.cc/UHV3-V7CS]. It is true that at the time of *Gideon*, the ACLU suggested that the right to counsel for indigent defendants could be met with little cost to the state in part through volunteers and/or draft attorneys. See Brief of the ACLU and the Florida Civil Liberties Union, Amici Curiae Supporting Petitioner at 34-36, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155) (detailing "Assigned Counsel" and "Voluntary Defender" systems as options for indigent defendants with little cost to states).

¹⁵⁵ *ACLU Lexington County, S.C., Agrees*, *supra* note 154.

¹⁵⁶ In response to the settlement, the legal director for the ACLU of South Carolina asserted the six additional attorneys may not be sufficient in meaningfully handling the caseload. See Bristow Marchant, *Lexington County Settles ACLU Lawsuit Over 'Debtor's Prison,' Promises Improved Public Defense*, STATE (Dec. 19, 2022, 5:30 AM), <https://www.thestate.com/news/local/crime/article269995477.html>. This concern regarding the number of additional attorneys, however, did not diminish the belief that the other support staff would prove to be beneficial to the office's work. See *id.* (noting county agreed to create new support staff positions). In other words, the lack of calls to divert the funds earmarked toward hiring paralegals, investigators, administrative assistants, and social workers toward hiring more attorneys maintains an understanding that these support staff fill a critical need in the work of representing indigent clients. It suggests that office directors should not overlook the importance of hiring support staff in their rush to hire more attorneys.

¹⁵⁷ *Historic Settlement to Expand Public Defender Services for Immigrants*, ACLU (Feb. 4, 2022) [hereinafter *ACLU 2022 Los Angeles Settlement Press Release*], <https://www.aclusocal.org/en/press-releases/historic-settlement-expand-public-defender-services-immigrants> [https://perma.cc/4A4P-ZADE].

This lawsuit, *Roy v. Los Angeles County*,¹⁵⁸ concerned the sheriff's department's unlawful detention of immigrants due to "ICE hold" requests.¹⁵⁹ The complaint alleged the sheriff's department violated state law, the Fourth and Fourteenth Amendments to the U.S. Constitution, and the California Constitution.¹⁶⁰ As part of the settlement, the Los Angeles County Public Defender and the Los Angeles County Alternative Public Defender were deemed the best-equipped agencies to use the settlement funds to address these injustices;¹⁶¹ and the settlement funds were earmarked for hiring additional attorneys *and* support staff.¹⁶² This move reinforced a central truth: effective indigent defense cannot be achieved solely by assigning attorneys to the matter. Rather, effective indigent defense necessarily demands other vital professional services.

And yet, not all similar cases have settled in this manner. In 2022, civil rights attorneys made their second attempt to sue Oregon over inadequate delivery of indigent defense services.¹⁶³ Also, in 2022, a group of incarcerated individuals sued Wisconsin officials for delaying the appointment of several public defenders.¹⁶⁴ While these lawsuits focused on the number of attorneys available to handle caseloads in each jurisdiction, support staff may also be contemplated in negotiations and possible settlements. However, settlements in these Oregon and Wisconsin cases have been elusive thus far, and there has not yet been a formal acknowledgment of how other professionals are necessary in addition to the attorneys sought by the litigation.¹⁶⁵

¹⁵⁸ No. CV 12-09012, 2018 U.S. Dist. LEXIS 122432 (C.D. Cal. 2018).

¹⁵⁹ Complaint at 1, *Roy v. County of L.A.*, No. CV 12-09012, 2018 U.S. Dist. LEXIS 122432 (C.D. Cal. 2018).

¹⁶⁰ *Id.* at 37-40.

¹⁶¹ See *ACLU 2022 Los Angeles Settlement Press Release*, *supra* note 157.

¹⁶² Alene Tchekmedyan, *Judge Approves \$14-million Settlement over Sheriff's Department's Illegal Immigration Holds*, L.A. TIMES (Feb. 4, 2022, 7:18 PM), <https://www.latimes.com/california/story/2022-02-04/immigration-detainer-settlement> [<https://perma.cc/Z92N-R3BW>].

¹⁶³ Conrad Wilson, *Civil Rights Attorneys Make 2nd Attempt to Sue Oregon over Public Defense Failures*, OR. PUB. BROAD., <https://www.opb.org/article/2022/10/19/oregon-public-defence-failures-civil-rights-lawsuit> [<https://perma.cc/JSR2-HU7R>] (last updated Oct. 19, 2022, 8:03 PM).

¹⁶⁴ Evan Casey, *Class Action Lawsuit Calls Out Lack of State Public Defenders*, WIS. PUB. RADIO (Aug. 24, 2022), <https://www.wpr.org/justice/class-action-lawsuit-calls-out-lack-state-public-defenders> [<https://perma.cc/9247-VZNA>].

¹⁶⁵ See Conrad Wilson, *Federal Judge Gives Oregon 7 Days to Find Lawyers for Defendants or Release Them from Jail*, OR. PUB. BROAD., <https://www.opb.org/article/2023/11/03/federal-judge-gives-oregon-seven-days-find-lawyers-for-defendants> [<https://perma.cc/853G-LBCD>] (last updated Nov. 4, 2023, 8:05 PM); Bryan Polcyn, *Public Defender Delays Persist Despite Pay Increases*, FOX6 NEWS MILWAUKEE, <https://www.fox6now.com/news/public-defender-delays-persist-pay-increase> [<https://perma.cc/DG4Y-LA6W>] (last updated Jan. 10, 2024, 9:42 PM CST).

Some public defender offices welcome these types of lawsuits as an opportunity to draw attention to both the inadequate resourcing and the overwhelming need that their offices regularly face.¹⁶⁶ Using basic 1:1 math, the offices powerfully support their claims of woeful underfunding and understaffing, sometimes elucidating the issue of defendants lacking a public defender at the start of their criminal process, let alone access to other critical services best provided by non-attorneys employed by public defender offices.¹⁶⁷ These offices may occasionally rely on just the simple claims of increasing the number of attorneys because of the ease of making that argument to stakeholders. These stakeholders may not be as aware of the role that other professionals play in ensuring the effective assistance of counsel.

Importantly, there is no national regulating service or oversight mechanism for investigators or administrative support staff working in indigent defense.¹⁶⁸ Accordingly, the postings for these jobs vary significantly in terms of required qualifications. For example, the Public Defender Service of the District of Columbia (“PDS”) requires only that an applicant for their Administrative Support Assistant (Legal Intake Specialist) position be a U.S. citizen or otherwise authorized to work in the U.S. as of the opening date of the job announcement.¹⁶⁹ However, the posting for this job also lists several preferred qualifications for applicants, including: a high school diploma or its equivalent, one year of general clerical experience above the high school level (or college education), paralegal certification, Spanish fluency, and knowledge of the Microsoft Office Suites.¹⁷⁰

The lack of a paralegal training requirement in employment for certain administrative posts in a public defender office might be intentional or fortuitous

¹⁶⁶ “‘We don’t necessarily welcome being sued,’ says Derwyn Bunton, New Orleans’ chief public defender, ‘and I can’t pretend to know the ACLU’s strategy. But we’re approaching this lawsuit as an opportunity.’” Eli Hager, *Why Getting Sued Could Be the Best Thing to Happen to New Orleans’ Public Defenders*, MARSHALL PROJECT (Jan. 28, 2016, 7:15 AM), <https://www.themarshallproject.org/2016/01/28/why-getting-sued-could-be-the-best-thing-to-happen-to-new-orleans-public-defenders> [<https://perma.cc/4GL7-PBJH>].

¹⁶⁷ *See id.*

¹⁶⁸ Licensed lawyers are responsible for the work of those who help them with their representative responsibilities, but no formal ethical responsibilities bind those other actors. MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS’N 1983); *see, e.g.*, Constance V. Vecchione, *Thy Brother’s Keeper: Disciplinary Liability for Failure to Supervise*, MASS. BD. OF BAR OVERSEERS (Feb. 1999), <https://bbopublic.massbbo.org/web/f/supervis.pdf> [<https://perma.cc/35GJ-6NQY>]. Consequently, lawyers make their best guesses about appropriate behavior or rely on attorney guidelines to supervise the work of investigators and other support personnel.

¹⁶⁹ *Administrative Support Assistant (Legal Intake Specialist)*, Job Posting under *Job Opportunities at PDS*, PUB. DEF. SERV. FOR D.C. (Dec. 14, 2022), [https://www.pdsdc.org/careers/job-opportunities/job-details/administrative-support-assistant-\(legal-intake-specialist\)](https://www.pdsdc.org/careers/job-opportunities/job-details/administrative-support-assistant-(legal-intake-specialist)) [<https://perma.cc/WD6J-8JWK>].

¹⁷⁰ *Id.*

for under-resourced public defender offices. Severely under-resourced offices—unable to meet the demand for higher salaries or professional advancement opportunities expected among applicants with this additional certification—can take advantage of not having to meet the financial obligations of higher licensing requirements. Such moves come with a cost, though, as paralegal training and certification do ensure that certain tasks and responsibilities that may otherwise require the expertise or training of the lawyer assigned to an indigent defendant could be removed from the lawyer’s workload.

Regarding its investigative specialists—a position that assumes responsibilities similar to investigators in other public defender offices—PDS similarly does not require extensive formal training.¹⁷¹ According to a 2023 posting for one such position, a successful applicant must have sufficient education and experience to perform the investigative duties outlined in the announcement.¹⁷² Most notably, the applicant must work “in concert with legal defense counsel to gather information to assist the attorney in effectuating the client’s expressed interest.”¹⁷³ The posting’s education requirement is a “Bachelor’s Degree in Criminal Justice Administration, Law, Social Work, Psychology, Counseling, Criminology, Political Science, Sociology, English, Journalism/Mass Communication and/or other related field.”¹⁷⁴

Although the announcement lists several highly desirable qualifications, such as the ability to speak and write Spanish fluently and training in criminal defense investigations,¹⁷⁵ the generalized core requirements emphasize the lack of any central regulating authority or process for becoming a public defender investigator. Again, a dearth of a formal training process or requisite experience could enable more under-resourced public defender offices to hire additional staff who could do some of the investigative work even if their work may not be of the same or similar quality as a formally licensed investigator.¹⁷⁶

In contrast to PDS, the Orleans Public Defenders, an office developed in the wake of Hurricane Katrina committed to serving as a model for indigent defense

¹⁷¹ See *Investigative Specialist Mental Health Investigator*, Job Posting under *Job Opportunities at PDS*, PUB. DEF. SERV. FOR D.C. (May 15, 2023), <https://www.pdsdc.org/careers/job-opportunities/job-details/investigative-specialist-mental-health-investigator> [<https://perma.cc/5U8Q-W7Z5>].

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Certain well-respected offices like PDS have their own formal training programs. See *PDS Training Programs*, PUB. DEF. SERV. FOR D.C., <https://www.pdsdc.org/resources/professional-resources/pds-training-programs> [<https://perma.cc/6QW2-E97Q>] (last visited Feb. 17, 2025). Offices may also view the investigative specialist position as an opportunity for future lawyers or other support staff to obtain relevant experience that could then improve their work as a lawyer or in other support roles.

programs in southern states,¹⁷⁷ lists very different requirements for its staff investigators.¹⁷⁸ The job posting only requires that applicants possess certain skills, including proficiency at multitasking and ability to perform “good non-legal research.”¹⁷⁹ It also requires that applicants have “access to a reliable and insured vehicle and have a valid driver’s license.”¹⁸⁰ Applicants with “[t]wo years of investigative experience and/or fluency in Spanish or Vietnamese” are preferred, and there is no undergraduate education requirement.¹⁸¹

Unlike the investigator position in the D.C. office, the sole formal licensing requirement for the Orleans Public Defenders is a driver’s license.¹⁸² This requirement is likely a testament to New Orleans’s unreliable public transportation, rather than to the skills and knowledge necessary for the actual investigative work. However, it could also represent the need for investigators who are mobile enough to reach alleged crime scenes or witnesses in their own environments.

Unlike the limited employment requirements for investigators or administrative support specialists, social workers in most states are required to hold an advanced degree in the field, such as a Master of Social Work, and must obtain licensure by completing a formal program.¹⁸³ They are also required to finish additional coursework and register as social workers, which typically includes a criminal background check and a formal examination, all of which necessarily involves practical experience under the supervision of a licensed social worker.¹⁸⁴ This century has witnessed an increase in the number of social

¹⁷⁷ *About OPD*, ORLEANS PUB. DEFS., <https://www.opdla.org/about-opd> [<https://perma.cc/4YXT-EJHJ>] (last visited Feb. 17, 2025).

¹⁷⁸ *Experienced Staff Investigator*, Job Posting Under Employment Opportunities, ORLEANS PUB. DEFS., <https://web.archive.org/web/20230118032737/https://www.opdla.org/employment-opportunities?view=article&id=398&catid=88> (last visited Feb. 17, 2025).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *Information for Associate Clinical Social Worker (ASW) and Licensed Clinical Social Worker (LCSW) Applicants*, CAL BD. BEHAV. SCIS., <https://www.bbs.ca.gov/applicants/lcsw.html> [<https://perma.cc/4EWN-C97Z>] (last visited Feb. 17, 2025); *License Requirements for Licensed Master Social Worker*, N.Y. STATE DEP’T OF EDUC., <https://www.op.nysed.gov/professions/licensed-master-social-worker/license-requirements> [<https://perma.cc/5UJN-QMYB>] (last visited Feb. 17, 2025); *Requirements for Social Work Licensure in Massachusetts*, ASS’N SOC. WORKERS, <https://www.aswb.org/wp-content/uploads/2021/02/Licensing-Requirements-Summary.pdf> [<https://perma.cc/M378-ZLED>] (last visited Feb. 17, 2025); see also *Social Work Federal Requirements*, NAT’L ASS’N OF SOC. WORKERS, <https://www.socialworkers.org/Advocacy/Policy-Issues/Social-Work-Federal-Requirements> [<https://perma.cc/E8MA-GG7P>] (last visited Feb. 17, 2025).

¹⁸⁴ See *Information for Associate Clinical Social Worker (ASW) and Licensed Clinical Social Worker (LCSW) Applicants*, *supra* note 183; *Requirements for Social Work Licensure*

workers employed by public defender offices.¹⁸⁵ However, their limited numbers may stem from a lack of understanding regarding how significantly they enhance the client experience and alleviate the attorney's workload.

Illustrating the different requirements for hiring investigators and administrative support personnel is not meant to diminish the importance of those roles in providing effective assistance of counsel. Certainly, there have been successful lawsuits by individuals and nonprofits against public defender institutions based on their failure to adequately fulfill the types of duties that those *other* professional members of a public defender staff would have completed if they had been properly employed as part of the representative team.¹⁸⁶ Instead, this Part provides evidence that, since non-attorneys accomplish such fundamental work in indigent defense representation, office leaders should not easily de-prioritize their hiring in favor of increasing the number of available attorneys when operating under limited funds. Public defender leaders who understand the value of hiring support personnel with similar qualifications and salary demands as their attorneys may better ensure the provision of effective assistance of counsel.

III. TRIALS VS. APPEALS & SPECIAL PROJECTS

The indigent defendant's right to counsel does not only exist at one stage of the criminal proceedings.¹⁸⁷ Criminal defendants have the right to counsel through the first appeal and may, depending on the imposed sentence, have the right to counsel at additional procedural stages.¹⁸⁸ Thus, public defender leadership must also consider how to allocate funds to non-trial level representation when managing their limited resources.

Appellate representation is less common than trial representation.¹⁸⁹ This is generally due to the following reasons:

in Massachusetts, supra note 183; *see, e.g., Licensing FAQs*, NAT'L ASS'N OF SOC. WORKERS MASS. CHAPTER (Feb. 20, 2024), <https://www.naswma.org/page/LicensingFAQs>.

¹⁸⁵ *See Integrating Social Services into Municipal Public Defense*, WASH. STATE OFF. OF PUB. DEF., https://opd.wa.gov/sites/default/files/2023-08/01118-2022_SocWrk.pdf (last visited Feb. 17, 2025) ("In recent years an increasing number of cities have expanded their public defense teams to include social services."); *see also* Matei et al., *supra* note 124 ("Since the 1970s, social workers have been embedded in public defense offices across the US . . .").

¹⁸⁶ *See, e.g., Systemic Litigation*, NAT'L ASS'N OF CRIM. DEF. LAWS. (Mar. 17, 2023), <https://www.nacdl.org/Content/SystemicLitigation> [<https://perma.cc/2GP9-8C54>].

¹⁸⁷ *See Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) ("The Sixth Amendment safeguards to an accused who faces incarceration the right to a counsel at all critical stages of the criminal process.").

¹⁸⁸ *See Anders v. California*, 386 U.S. 738, 741-42 (1967) (holding that in both state and federal courts, indigent defendants have a right to assistance of counsel through appeal, "and such representation must be in the role of an advocate . . . rather than as *amicus curiae*").

¹⁸⁹ *See* SUZANNE M. STRONG, BUREAU OF JUST. STAT., U.S. DOJ, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 4 (2016), <https://bjs.ojp.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/NV5R-GGUX>].

- Defendants may have their charges dismissed;
- Defendants may enter into plea agreements that do not preserve appellate issues; or
- Defendants may not wish to pursue an appeal.

Although determining the exact breakdown of these outcomes is difficult, current numbers suggest that many, if not most, criminal cases end at the trial level.¹⁹⁰ The vast majority of criminal cases (by some estimates more than 80%)¹⁹¹ involve misdemeanors that carry punishments of a fine, probation, or less than a year of imprisonment.¹⁹² Because the appellate process can take years or decades,¹⁹³ other criminal cases on a public defender's docket often conclude before an appeal is heard or decided. The lengthiness of the appellate process may discourage some defendants who aim to put the trauma of the criminal process behind them from exercising their right to appeal.

The difference in allocated resources for trial-level representation and appellate or special litigation cases can be stark in certain jurisdictions.¹⁹⁴ It can also vary widely among different types of offenses.¹⁹⁵ As a result, appellate or special litigation projects' impact on public defender institutions is reduced, despite the impact these projects could have, and indeed should have given their obligation to improve the law.¹⁹⁶ Defendants remain entitled to the effective assistance of counsel in their appellate proceedings.¹⁹⁷ While some resources are dedicated to those projects, institutional leaders may tend to minimize these resources because of their bias toward trial-level representation. This may be a

¹⁹⁰ See Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUDS. 659, 660 (2004).

¹⁹¹ See AMANDA AGAN, JENNIFER DOLEAC & ANNA HARVEY, CATO RSCH. BRIEFS IN ECON. POL'Y, MISDEMEANOR PROSECUTION AND RECIDIVISM 1 (2021), <https://www.cato.org/sites/cato.org/files/2021-11/RB279.pdf>.

¹⁹² See sources cited *supra* note 129.

¹⁹³ See NICOLE L. WALTERS, ANNE GALLEGOS, JAMES GREEN & MARTHA ROZSI, BUREAU OF JUST. STATS., U.S. DOJ, CRIMINAL APPEALS IN STATE COURTS 7 (2015), <https://bjs.ojp.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/GT9L-GDYH>] (finding the median time for appellate court to resolve appeal was approximately ten months); James N. G. Cauthen & Barry Latzer, *Why So Long? Explaining Processing Time in Capital Appeals*, 29 JUST. SYS. J. 298, 298 (2008) (stating median time to resolve direct appeals in capital cases is 897 days).

¹⁹⁴ See, e.g., GABRIEL PETEK, LEGIS. ANALYST'S OFF., THE 2025-26 BUDGET: JUDICIAL BRANCH 3 (2025); RAND CORP 2023 WORKLOAD STUDY, *supra* note 1, at viii.

¹⁹⁵ As noted above, the length of the appellate process can serve as a prohibiting factor for defendants facing misdemeanor convictions. See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at 85 tbl.4.5 (demonstrating that median average hours worked by public defenders is greater in felony cases than misdemeanors).

¹⁹⁶ See MODEL RULES OF PRO. CONDUCT pmbl. 6 (AM. BAR ASS'N 1983).

¹⁹⁷ See *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

mistaken resolution. Appellate or special litigation cases can have a greater systemic impact and a more significant influence on the experience of indigent criminal defendants.¹⁹⁸ Consequently, if a public defender office allocates most of its limited resources to trial-level representation, that office undermines its ability to serve its client population most effectively.

Recognizing the impact that special litigation can have on the practice of law, some public defender offices have begun to rely on special litigation units.¹⁹⁹ Unlike appellate representation, special litigation can occur at the trial level. Such litigation does carry some of the larger implications of appellate litigation, as outcomes can impact more clients or potential clients than individual trial representation. A special litigation unit may focus more resources on a particular type of trial client or case, with an understanding that successful representation could improve the representative experience for a large body of current and future clients.²⁰⁰

This Part begins by detailing the value of trial attorneys for public defense services and then describes how the larger impact of appellate representation or special litigation projects can help a public defender office leader more strategically evaluate where to direct limited resources.

A. *Individualization and the Trial Attorney*

Historically, the right to counsel has been more clearly defined and established at the trial stage of criminal proceedings, where initial charges are brought, preliminary investigations are conducted, and verdicts are delivered, or guilty pleas are accepted.²⁰¹ The historical underpinning of the Sixth Amendment involves the accused's right to rely on counsel when facing charges levied by the king in a monarchy.²⁰² Despite rejecting monarchical rule, the Framers adopted a government that maintained the responsibility for bringing charges against alleged wrongdoers while guaranteeing the right to assistance of counsel.²⁰³

¹⁹⁸ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963) (noting how Constitutional right to counsel itself arose from appeal).

¹⁹⁹ See *San Diego County Public Defender*, SAN DIEGO CNTY. OFF. OF PUB. DEF., https://www.sandiegocounty.gov/content/sdc/public_defender.html [https://perma.cc/6UHK-X6TN] (last visited Feb. 17, 2025).

²⁰⁰ See, e.g., *Special Litigation Division*, PUB. DEF. SERV. D.C., <https://www.pdsdc.org/about/legal-services-divisions/special-litigation-division> [https://perma.cc/HUC8-5HBM] (last visited Feb. 17, 2025).

²⁰¹ See Helen Cassidy, *Right to Counsel on All Appeals*, 11 HOUS. L. REV. 725, 728-29 (1974) (revealing that right to counsel for preparation for permissive appellate review was unanswered question while right to counsel at pre-trial hearings was already cemented).

²⁰² See George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 561-69.

²⁰³ *Id.* at 569-73.

This right to assistance of counsel articulated at the Founding came to be understood, in the twentieth century, as requiring legal counsel for indigent defendants in criminal trials.²⁰⁴ In state courts, this started with defendants facing felony charges²⁰⁵ and eventually expanded to juveniles in delinquency proceedings²⁰⁶ and defendants facing misdemeanor charges.²⁰⁷ On the same day the Supreme Court delivered its decision in *Gideon*, it also held—in *Douglas v. California*²⁰⁸—that this right extended to at least the first appeal.²⁰⁹

Appellate practice generally involves reviewing trial stage procedures and rulings for error. The first appeal of the trial court proceedings can be considered mandatory in certain jurisdictions, even if other appeals are discretionary.²¹⁰ Every criminal defendant facing charges participates in initial criminal proceedings, regardless of whether their case proceeds to trial, but not every defendant experiences the appellate process for their charged offense.²¹¹ Charges are often dropped, defendants are found not guilty, or they waive their right to an appeal. Upon further consideration, however, this may be the result of the defendant's lack of a right to free counsel at various stages of the appellate process.²¹² In this way, while all criminal defendants who do not elect to represent themselves have experience with legal counsel at the trial stage, apart from a mandatory appeal, they may not experience legal counsel at the appellate level, thereby leaving them to face the process alone.²¹³

Unsurprisingly, the inconsistency with the experience of counsel at appellate stages can result in public defender resources being heavily reserved for trial representation. This is meant to ensure that trial-level representation, which is almost always in demand, will adhere to constitutional requirements and professional standards. Dedicating funding to trial representation can help alleviate the incidence of burnout among public defenders, many of whom, as previously discussed, may feel overwhelmed and under-resourced at the stage of the criminal process that is most clearly within the public defender's obligation and the client's experience.²¹⁴

²⁰⁴ See *id.* at 572 (“The modern rule is a strong default that criminal defendants are hopelessly disadvantaged if they represent themselves.”).

²⁰⁵ See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

²⁰⁶ *In re Gault*, 387 U.S. 1, 41 (1967).

²⁰⁷ *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

²⁰⁸ 372 U.S. 353 (1963).

²⁰⁹ *Id.* at 355.

²¹⁰ See Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1944-45 (2017).

²¹¹ See Eisenberg, *supra* note 190, at 660.

²¹² See Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 605-06 (2011) (asserting that right to counsel for defendants is cut off after initial mandatory appeal).

²¹³ See *id.* at 606.

²¹⁴ See RAND CORP. 2023 WORKLOAD STUDY, *supra* note 1, at xv.

However, focusing solely on the needs of those defendants facing charges at the trial stage of criminal proceedings can prove inadequate for meeting the public defender's constitutional and professional obligations. Because effective assistance of counsel can include considering the lived experiences of arrest, incarceration pending disposition of a criminal matter, and sentencing, a public defender should also seek to improve those areas on a larger scale as part of its mandate.²¹⁵ The same is true for the pieces of trial practice. By successfully litigating a common procedural issue that negatively impacts an indigent defendant's experience, a defender complies more with the professional obligation to improve the legal profession.²¹⁶ This is particularly so given how much of the criminal legal system involves "recurring actors" who may learn from litigation aimed at improving their decision-making. Recurring actors include:

- Defendants who face criminal charges as repeat offenders,
- Certain community members who possess identifiable traits that put them at higher risk for repeat interactions with law enforcement,²¹⁷
- Law enforcement officers who make specific types of arrests,
- Prosecutors who bring forth specific types of charges and hold trials in certain procedural ways,
- Judges who make rulings to manage the disposition of cases,
- Sentencing bodies and probation officers, and
- Defense attorneys who have specialized criminal law legal practices.

The appellate process not only protects the rights of the accused, but it also shines a light on the actions of certain actors in the legal community, thereby prompting calls for reform and change.²¹⁸ These repeat actors' presence can highlight shortcomings to licensing boards, lawmakers, and voters.²¹⁹

²¹⁵ See Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 584-85 (2011).

²¹⁶ See MODEL RULES OF PRO. CONDUCT pmbl. 6 (AM. BAR ASS'N 1983).

²¹⁷ Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, SENT'G PROJECT (Nov. 2, 2023), <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing> [<https://perma.cc/JV4Q-WFV6>].

²¹⁸ See, e.g., Robert L. Tsai, *After McCleskey*, 96 S. CAL. L. REV. 1031, 1047 (2023) ("A case like *McCleskey* can become so imbued with social meaning that it becomes part of a broader struggle over legal principles, thereby facilitating surprising shifts in organizational behavior and to the law itself."). For background on *McCleskey v. Kemp*, 481 U.S. 279 (1987), see generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 62-68 (2001).

²¹⁹ They can serve as the canaries in the coal mine, conveying evidence of unconstitutional or unethical legal practice. See Justin R. Arnold, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 95-98 (2005).

Allocating a public defense office's limited resources to the trial stage to the detriment of the appellate process can hamper the public defender's ability to represent the rights of its client population holistically. Notably, success on appeal or in a special litigation process might decrease the need for indigent defense services by future clientele, which would lead to lower caseloads and less stress on the public defender institution.²²⁰ In other words, an effective and robust indigent defense practice should encompass more than merely representing individual defendants during their initial criminal proceedings. As the next section outlines, public defender offices should consider expending more resources on appellate and special litigation advocacy as a way to better meet their constitutional and professional obligations.

B. *Systemic Possibilities of the Appellate and Special Litigation Process*

Over the last two centuries, the appellate process has arguably been one of the most powerful tools in working toward fairness and equity in the criminal justice system.²²¹ Appellate decisions have recognized and cemented some of the most fundamental and basic rights for indigent defendants.²²² Special litigation projects have similarly achieved significant advancements for the experience of indigent persons both as defendants in the criminal process and targets of criminal justice actors looking to embroil them in the criminal process.²²³

As previously noted, *Gideon v. Wainwright* itself was an appellate decision. Gideon, who had been charged with felony breaking and entering, was forced to represent himself at his criminal trial because he could not afford to hire a lawyer.²²⁴ After losing his trial, he submitted a handwritten petition to the Supreme Court, seeking review of the decision that deprived him of a state-provided defense attorney.²²⁵ When the Court agreed to hear the case, the legal community recognized the impact an appellate decision could have on the state of the criminal process.²²⁶ The Court appointed a lawyer, Abe Fortas—who later became an Associate Justice on the Court two years after the *Gideon* case—to

²²⁰ See *State v. Smalls*, 48 So. 3d 212, 215 (La. 2010) (finding that state magistrate judges may not conduct trials or accept guilty pleas in misdemeanor cases because they are not constitutionally authorized).

²²¹ Despite the expansion of rights among criminal defendants that has emerged from appellate proceedings in U.S. courts, the criminal justice system in this country is still deeply flawed. This is especially apparent with regards to the rates of arresting, charging, and incarcerating racial minorities, people living in poverty, and the mentally ill. See generally Janie L. Jeffers, *Justice Is Not Blind: Disproportionate Incarceration Rate of People of Color*, 34 SOC. WORK PUB. HEALTH 113, 119 (2019).

²²² See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *In re Gault*, 387 U.S. 1, 41 (1967).

²²³ See ANTHONY LEWIS, *GIDEON'S TRUMPET* 223 (Vintage Books ed., 1989) (1964).

²²⁴ See *Gideon*, 372 U.S. at 340.

²²⁵ LEWIS, *supra* note 223, at 4.

²²⁶ *Id.* at 11.

help Gideon litigate the issue.²²⁷ The legal community felt that *Gideon* was well-suited for their legal arguments on the right to counsel.²²⁸ In fact, the work advancing this issue was so successful that twenty-three state attorneys general signed amicus briefs in support of the claims presented in the Gideon petition.²²⁹

Ultimately, the *Gideon* decision impacted the experience of every criminal defendant facing felony charges in state criminal courts since the opinion was issued.²³⁰ Perhaps a testament to how wide-reaching this result has been for criminal defendants, Mr. Gideon's headstone reads: "Each era finds an improvement in law for the benefit of mankind."²³¹ The *Gideon* decision is just one example of how a single appellate case can transform a large number of varying defendants' experience in the criminal legal system, unlike a single episode of defense trial representation.²³²

The timing of appellate procedures can also improve the experience of public defenders, namely through recruitment and retention, by reducing the incidence of burnout and compassion fatigue. Although deadlines can be tight and workloads enormous, appeals' deadlines are structured in advance and often do not require immediate and emergency responses of the type seen in trial litigation.²³³ Significant work remains to be done to fully understand the problems that currently exist with public defender recruitment and retention, but the scheduling ease that arises with certain types of appellate practice may go a long way toward easing some concerns around high demand and low control that prevent attorneys from pursuing jobs as public defenders or remaining in them.²³⁴

Special litigation, like criminal appeals, is another area that could improve public defender recruitment and retention. Although special litigation projects

²²⁷ See *Gideon*, 372 U.S. at 335; *Abe Fortas*, OYEZ, https://www.oyez.org/justices/abe_fortas [<https://perma.cc/7X8B-96D4>].

²²⁸ See LEWIS, *supra* note 223, at 11.

²²⁹ Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2340 n.17 (2013).

²³⁰ Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 15 (2016).

²³¹ Letter from Clarence Earl Gideon to Abe Fortas (November 1962), in LEWIS, *supra* note 223, at 78; Jack King, *Clarence Earl Gideon: Unlikely World-Shaker*, NAT'L ASS'N CRIM. DEF. LAWS. (June 2012), <https://www.nacdl.org/Article/June2012-ClarenceEarlGideonUnlikelyWorl> [<https://perma.cc/AVN3-HZ2M>].

²³² See Mayeux, *supra* note 230, at 55-78.

²³³ *Compare Appeal Timelines*, SUPERIOR CT. OF CAL. CNTY. OF SAN DIEGO, <https://www.sdcourt.ca.gov/sdcourt/appeals2/appealstimelines> [<https://perma.cc/B9MH-YHCV>] (last visited Feb 17, 2025) (illustrating extended timeline for criminal appeal), with *Frequently Asked Questions*, ALAMEDA CNTY. PUB. DEFS., <https://publicdefender.acgov.org/FAQ.page> [<https://perma.cc/3NB9-ZCZC>] (last visited Feb. 17, 2025) (stating that within two days of arrest, arrestee will be brought to local court for arraignment).

²³⁴ See Alisa Smith, *Moving Beyond Yoga: An Exploratory, Qualitative Study of Public Defenders' Solutions for Improving Work-Life and Effective Assistance of Counsel*, 14 CRIM. L. PRAC. 1, 6 (2024).

may include the immediacy of trial deadlines, the workload is tempered by the minute focus of the nature of the work itself.²³⁵ Instead of assuming responsibility for all portions of a defendant's representation, the special litigation attorney can focus on the parts most critical to the special litigation project while the defendant's other attorneys handle the other responsibilities.²³⁶ The special litigation attorney can also be a bit more deliberate about which of the many cases assigned to the public defender for which they assume responsibility. This is yet another reason why focusing resources on appellate representation or special litigation might better support the office's overall effort to provide effective assistance of counsel by improving the experience of the public defenders doing the work.

IV. ADMINISTRATION QUESTIONS

Having described the possible advantages and disadvantages of pursuing various allocation decisions, this Part articulates a path for choosing an allocation process that better ensures compliance with constitutional and professional rules. In deciding (a) how to assign attorneys to indigent defendants, (b) which class of employees to hire to complete the necessary work for representing their clientele, and (c) how to balance resource allocation to trial-level representation against appellate or special litigation projects, public defender institutional leaders should engage in a more formal inquiry that identifies how the particularities of their client population would be best served.²³⁷

This inquiry should begin by detailing all relevant factors to be considered when determining an attorney allocation system.²³⁸ Public defender office leaders can do this by asking a preliminary series of questions:

- What types of cases is our office likely to handle?,
- What types of clients are we called on to represent?; and
- What are our attorneys' skills, abilities, and temperaments?

With this information, leaders can determine whether their objectives would be better met through a horizontal or vertical representation scheme, by hiring more attorneys or various support staff, or by dedicating more money to

²³⁵ Possible "special litigation" projects include the following: litigation involving policy decisions that impact criminal defendants and/or incarcerated people, reform of probation and parole policies, and bail reform. *See, e.g., Bail Reform Initiative*, BRONX DEFS. <https://www.bronxdefenders.org/programs/bail-reform-initiative> [https://perma.cc/7CD2-CZXB] (last visited Feb. 17, 2025).

²³⁶ *See id.*

²³⁷ *See* Jonah A. Siegel, Jeanette M. Husseman & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 584 (2017).

²³⁸ *See generally* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009).

appellate or special litigation projects instead of trial practice.²³⁹ Such a process can minimize the risk that leaders' prioritization decisions unknowingly contribute to a greater incidence of unprofessional or ineffective assistance of counsel.²⁴⁰ As a subsequent step, an office can adopt a more formalized system for reviewing allocation decisions to help determine how these decisions either contribute to or prevent such failures.²⁴¹

In light of these insights, this Part details three important aspects of resource allocation systems for public defender offices, each of which should be considered by the office as it develops its own allocation framework: (a) case typology, (b) employee needs, and (c) client requests.

A. Possible Decision-making Methods

A public defender office can employ one or more methods to decide how to distribute its limited resources. Some offices may find it best to employ different methods at various times, depending on circumstances related to caseloads and staffing profiles.²⁴² Preferred distribution methods might also change once an office has reached a certain previously defined threshold indicating office success.

This section details several possible distribution methods and their benefits and, importantly, outlines what a public defender leader must consider to ensure the adopted method actually serves the institution and its client population.²⁴³ Adopting one, a combination, or all of these methods alone will not be enough to limit the ways in which public defender offices unwittingly reinforce and perpetuate ineffective counsel assistance.²⁴⁴ These offices must also develop guidelines to review and reflect on the impact of the adopted method.

1. Case Typology

The criminal process of any given jurisdiction relies on discretion exercised by police and prosecutors. State criminal codes are so remarkably dense and expansive that, on any given day, thousands of citizens violate a host of seemingly innocuous crimes.²⁴⁵ Of those citizens, only a segment is perceived

²³⁹ See Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 29 (2011).

²⁴⁰ *Id.* at 28-29.

²⁴¹ *Id.*

²⁴² Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 428 (2016).

²⁴³ *Id.* at 429.

²⁴⁴ *Id.*

²⁴⁵ People often violate traffic laws and police officers have leeway to decide whether to actually charge someone for these offenses. This survey from the AAA Foundation interviewed people about their driving, in which many admitted to unsafe or illegal behaviors while driving. See Andrew Gross, *87 Percent of Drivers Engage in Unsafe Behaviors While Behind the Wheel*, AAA NEWSROOM (Feb. 25, 2016), <https://newsroom.aaa.com/2016/02/87->

by the community as deserving of criminal punishment.²⁴⁶ Police officers use their discretion in determining which neighborhoods to patrol and which criminal activity deserves warning, brief detention, or arrest.²⁴⁷

As legal scholars have noted, although an office must primarily exist to test the sufficiency of the state's evidence against an individual client, it can and should pursue a more comprehensive form of representation whenever possible.²⁴⁸ As John Mitchell noted in his seminal 1993 article, *Redefining the Sixth Amendment*, public defenders can meet their constitutional and ethical obligations by providing a more formulaic "pattern" representation to some clients, which allows for more space and energy for public defenders to offer a more thorough type of representation for other clients.²⁴⁹ This former fundamental level of representation focuses solely on providing indigent defendants with basic tests of the prosecutor's case against them instead of more detailed and rigorous testing.²⁵⁰

By Mitchell's reasoning, the Sixth Amendment does not always call for a deep form of representation, which would involve either broader improvement in the individual defendant's life moving forward or improvement of the environment or system in which the public defender works.²⁵¹ Case typology can have a significant influence on how many attorneys and what types of support staff are necessary for a client.²⁵² It could also determine the most strategic representative scheme and whether the client population would be better served through a robust appellate or special litigation practice.

Testing the sufficiency of the state's evidence alone always requires some legal, investigative, and administrative work.²⁵³ The type of case, however, can call for various levels of expertise within those workloads.²⁵⁴ It is perfectly

percent-of-drivers-engage-in-unsafe-behaviors-while-behind-the-wheel
[<https://perma.cc/74KK-3EC8>].

²⁴⁶ SALLY ENGLE MERRY, EVERYDAY PRACTICES AND TROUBLE CASES 15 (Austin Sarat et al. eds., 1998) (arguing that "criminalization of everyday life" has made it so that actions that are widely tolerated and routinely accepted are nonetheless defined as criminal).

²⁴⁷ Amanda Charbonneau & Jack Glaser, *Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity*, 11 U.C. IRVINE L. REV. 1327, 1327-28 (2021).

²⁴⁸ Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 918-20 (2005).

²⁴⁹ John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1246 (1994).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See Benner, *supra* note 239, at 24.

²⁵³ *Id.*

²⁵⁴ This might include hiring attorneys who are not involved in direct representation of clients, but who provide necessary community-based services in other ways. For example, the Public Defender's Office in Santa Clara County, California, employs a community outreach attorney, whose job it is "to help[] underserved or vulnerable communities by engaging in outreach to respond to their needs, facilitating access to care and services, and raising

acceptable, if not necessary, for the public defender leader to consider the frequency and type of cases arising within its client population when defining what ‘effective assistance of counsel’ looks like in its office.²⁵⁵

It should be noted that case typology cannot rely solely on the misdemeanor/felony distinction of the charged offense. Too often, the head of a public defender office will assume misdemeanor cases deserve a less significant amount of time and resources from their line defenders.²⁵⁶ An office guided by this philosophy will likely appoint the more experienced public defenders to felony units where they no longer represent clients charged with misdemeanor offenses.²⁵⁷ By shifting experienced attorneys away from misdemeanors, these leaders fail to adequately consider the greater impact expertise can have on misdemeanor defendants, given the dominance of misdemeanors in criminal cases.²⁵⁸

The question of case typology also should not rely on the degree or type of punishment.²⁵⁹ The right to the effective assistance of counsel is an individual right, guaranteed if any period of incarceration is to be served as part of the punishment.²⁶⁰ Using the data gathered from a case typology study, a public defender leader must ask careful questions about how many attorneys the office needs to sustain its caseload representing all defendants entitled to its services.²⁶¹

The community that the public defender represents might also have a particular relationship with a specific crime, in which case the public defender can and should consider structurally how to reduce the need for future indigent defense services to better serve their client population.²⁶² Examples of this include communities beset by criminal cases involving narcotics and those facing housing or employment shortages that lead to a particular type of heightened criminal activity.²⁶³ A public defender institution tasked with representing defendants in communities with these specific needs might consider spending more of their limited resources on the tools necessary to

awareness of Public Defender services.” *Community Outreach Attorney*, PUB. DEF.’S OFF. OF SANTA CLARA CNTY., <https://pdo.santaclaracounty.gov/cases-we-take/juvenile/community-outreach-attorney> (last visted Feb. 17, 2025).

²⁵⁵ See Benner, *supra* note 239, at 27.

²⁵⁶ See Joe, *supra* note 128, at 750.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See *id.* at 738.

²⁶⁰ *Shelton v. Alabama*, 535 U.S. 654, 672 (2002).

²⁶¹ Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87, 88 (2010).

²⁶² See Ralph B. Taylor, *The Impact of Crime on Communities*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 28 (1995).

²⁶³ See, e.g., Marilyn Ee & Yan Zhang, *Homelessness and Crime in Neighborhoods*, 70 CRIME & DELINQ. 2195, 2199 (2022) (discussing how homelessness significantly predicts increase in crime, often through “survival” offenses or due to increased visibility and stigmatization among those experiencing homelessness).

address these issues underlying those cases in a meaningful way. This may include instituting a vertical representative scheme for enhanced relationship-building for certain types of cases and reserving horizontal representation for others, adding social workers or drug rehabilitation specialists to the public defender office staff, or more heavily pursuing appellate or special litigation practice.²⁶⁴

2. Employee Needs

Another priority public defender leaders could weigh in making their prioritization decisions is the needs of their actual employees. At the base, a public defender leader must consider recruitment and retention of their attorneys to ensure some degree of adequate staffing. Much work remains to be done to determine proper recruitment and retention rates for public defender offices.

Public defender offices might operate best in a “Teach for America” format, where young people commit to teaching in under-resourced schools for two years before proceeding with the rest of their careers.²⁶⁵ Or public defender institutions could best operate similarly to historically government-funded jobs, to which people devote their entire careers.²⁶⁶ Like the vast majority of other jobs, the decision could be left to the individual employee; some can choose to work in a public defender office for a short period of time, while others can choose to remain for the entirety of their careers. A public defender office could benefit from any of these arrangements designed to draw and retain attorneys

²⁶⁴ For example, the Defender Association of Philadelphia has established community lawyering and social services departments in its offices in reflection of its mission to “provide[] high-quality, client-centered legal representation, connection to social services, and reentry support to adults and juveniles,” as well as to “engag[e] in advocacy and community collaboration to improve the lives of vulnerable populations, protect the Constitution, and ensure a fair and equitable justice system.” *Mission & History*, DEF. ASS’N OF PHILA., <https://phillydefenders.org/mission-history> [<https://perma.cc/RLT9-Q72B>] (last visited Feb. 17, 2025).

²⁶⁵ *Teacher Corps Program Basics*, TEACH FOR AM., <https://www.teachforamerica.org/experience/our-program> [<https://perma.cc/4A8N-RZWL>] (last visited Feb. 17, 2025). Note that this two-year format could risk the loss of institutional knowledge that we see with current burnout and turnover among public defender offices. This format could also be exploitative for young people even if designed to encourage significant commitment for a short time. Teaching is another profession known to be vulnerable to mental health and burnout challenges among its teachers.

²⁶⁶ Nathan Abse, *Pay and Prestige for Civil Servants: The Historical Advantages—and Disadvantages—of Government Work*, GOV’T EXEC. (Apr. 26, 2023), <https://www.govexec.com/pay-benefits/2023/04/pay-prestige-civil-servants-historical-advantages-disadvantages-government-work/385623> [<https://perma.cc/CBC9-3B3J>] (describing higher rates of job security and life-long retention among federal civil servant jobs, as opposed to private sector jobs). See, e.g., *Public Service Loan Forgiveness (PSLF)*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service> [<https://perma.cc/UB96-TJZK>] (describing careers that may be eligible for student loan forgiveness).

and may benefit even more from following one scheme at one stage of its existence and another at a later stage or permitting a mix.

Work as a public defender can prove frustrating if it is inconsistent with either the attorney's original motivation for pursuing the work, the attorney's particular expertise, or both.²⁶⁷ Successful leaders of all professions find ways to foster employees' sense of belonging within the workplace.²⁶⁸ Employee frustration and discontent are more likely to arise when an employee feels like they are not producing the kind of work or impacting the organization as they imagined they would when accepting the employment offer.²⁶⁹ It is important that employees feel "good" at their job or at least can envision the path for their improvement.²⁷⁰

Public defender office leaders must keep in mind that some attorneys may be more vulnerable to feeling lonely, overwhelmed, and incompetent when working in an office that prioritizes limited resources in a way that is incongruent with employee motivations for pursuing public defender employment.²⁷¹ The leader may then need to choose the prioritization schemes that best ensure their employees remain willing and able to do the work. For example, given the burnout that can result from horizontal representation schemes, an enterprising leader could adopt horizontal representation only during certain periods of the calendar year that better lend themselves to client populations less in need of relationship building.²⁷² This model could be effective for maintaining employee well-being in jurisdictions that experience massive, predictable caseload growth at particular times of the year.²⁷³

3. Client Requests

Public defender leaders could also work to incorporate any expressed desires from their client population in their distribution decisions. Despite the lack of

²⁶⁷ Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1269 (1993).

²⁶⁸ See Maria Elena Rivera-Beckstrom & Elisa Van Dam, *The Importance of Belonging in the Workplace*, SIMMONS UNIV. INST. FOR INCLUSIVE LEADERSHIP 1, 14 (2022), <https://inclusiveleadership.com/wp-content/uploads/2022/02/The-Importance-of-Belonging-in-the-Workplace.pdf> [<https://perma.cc/9FDS-EQ88>] (describing value of belonging and strategies leadership can rely on to foster belonging).

²⁶⁹ See Smith, *supra* note 234, at 6-13.

²⁷⁰ See generally Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113, 114 (2004) (describing bolder leadership within public defender offices that focuses everyone on organizational goals and articulates standards); see also Smith, *supra* note 234, at 14.

²⁷¹ See Smith, *supra* note 234, at 8.

²⁷² Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 486.

²⁷³ *Id.* at 484 (describing how horizontal representation systems are instituted to "increase [attorneys'] efficiency" and "cope with the high ratio of clients per attorney").

autonomy in choosing their public defender, indigent defendants remain the ultimate decision-makers in their case.²⁷⁴

The defendants and the communities from which they come hold significant wisdom regarding representation issues and their resolution.²⁷⁵ As Justice Ruth Bader Ginsburg noted in *McCoy v. Louisiana*,²⁷⁶ the Sixth Amendment inherently provides for the client to choose the objective of his defense.²⁷⁷ In the 6-3 opinion, Justice Ginsburg distinguished between “trial-management” decisions left in the hands of counsel and “case outcome” decisions reserved exclusively to the client.²⁷⁸ Client-reserved decisions include whether to assert innocence as a defense, plead guilty, waive the right to a jury trial, testify on one’s own behalf, or forgo an appeal.²⁷⁹ That these decisions are to be made by the client supports the client community’s agency to choose how the public defender’s office tasked with representing them might prioritize its limited resources.

B. *Reviewing for Success or Failure*

Public defender institutional leaders must not only make distribution decisions at the initial stages of an office’s creation or reformulation, but they should also adopt systems and processes to ensure the continuous achievement of these goals.

A community’s needs—including the legal community of public defenders, prosecutors, judges, and law enforcement officers—are not stagnant. As legal actors change employment or lose popular elections, the landscape of a community’s criminal legal system changes, thereby shifting the community’s needs. For example, a district attorney may be elected after campaigning on their dedication to addressing particular types of offenders.²⁸⁰ A police chief may

²⁷⁴ Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. 25, 25 (2014).

²⁷⁵ Clarke & Stone, *supra* note 270, at 118.

²⁷⁶ 584 U.S. 414 (2018).

²⁷⁷ *Id.* at 421.

²⁷⁸ *Id.* at 422.

²⁷⁹ *Id.*

²⁸⁰ Some large urban areas have recently seen a spate of district attorneys elected because of their focus on pursuing a progressive theory of prosecution, such as Philadelphia District Attorney Larry Krasner. Krasner spent his career as a criminal defense attorney and civil rights lawyer. In fact, immediately before being elected as district attorney, he represented members of the Occupy Philadelphia movement and was considered the anti-establishment candidate for the Democratic nomination. Upon his election, a number of ex-public defenders were employed as the new line of district attorneys. See Malik Neal & Christina Matthias, *Broken Promises: Larry Krasner and the Continuation of Pretrial Punishment in Philadelphia*, 16 STAN. J. C.R. & C.L. 543, 545 (2021) (describing Krasner’s campaign for Philadelphia District Attorney and his “promises to end cash bail” along with some initial reforms he made).

similarly be appointed based on a pledge to combat particular types of crimes.²⁸¹ The community's most pressing concern on a specific issue can evolve. Also, a selected prioritization scheme might not have the desired or expected effect.

Consequently, the institutional leader should ensure whichever scheme they choose for prioritizing limited resources remains consistent with institutional goals.²⁸² The ideal mechanism for this is providing an opportunity for reflection and review. Much like larger conglomerations, each institutional leader or entity should engage in systematic reviews and evaluations by at least the population using its services (the clients) and those tasked with providing the services (the attorneys and other staff).²⁸³ It might also be in an institutional leader's best interest to obtain a review and evaluation by a neutral third-party inspector or a public defender inspector general.²⁸⁴ Such reviews may require enhanced security to ensure attorney/client confidentiality. Still, they could go a long way toward ensuring institutional leaders do not make decisions that unwittingly lead to the ineffective assistance of counsel.

Overall, there are limited pre-existing opportunities for a public defender institution to reflect and review whether it marshals resources in a manner best suited to meeting its constitutional and professional obligations. Sentinel reviews are helpful when cases passed under the public defender authority are overturned on appeal as wrongful convictions due to prosecutorial misconduct, ineffective assistance of counsel, or actual innocence.²⁸⁵ But beyond that, a public defender office could benefit from incorporating a way to track its stated

²⁸¹ Changes in prioritization schemes are not limited to the prosecutor. The locality's chief law enforcement officer—usually the chief of police—also has authority to direct forces to focus resources on a particular type of crime or a particular area. In most jurisdictions, the prosecutor need not accept the police department's discretion in which crimes and offenders it pursues. Since the prosecutor is tasked with moving formal criminal charges forward, the prosecutor can choose to reject police arrests by either refusing to institute charges against a defendant or directing those charges to a diversion program. And yet, such decisions are unlikely, because prosecutors must maintain positive relationships with law enforcement, often their primary witness in criminal cases against defendants. Additionally, prosecutors find public value in portraying a unified front of protecting a community against crime. As a consequence, a public defender office must shift its practice in response to the particularities of the district attorney and law enforcement systems in its community to ensure the adequate and competent provision of counsel for indigent defendants. See Sarah Charman & Emma Williams, *Accessing Justice: The Impact of Discretion, 'Deservedness' and Distributive Justice on the Equitable Allocation of Policing Resources*, 22 CRIMINOLOGY & SOC. JUST. 404, 407 (2022).

²⁸² Joe, *supra* note 242, at 429.

²⁸³ Catherine A. Maritan & Gwedolyn K. Lee, *Resource Allocation and Strategy*, 43 J. MGMT. 2411, 2412 (2017) (arguing that resource allocation is part of effective management and require systems like "performance measurement, evaluation, and incentives that influence behavior").

²⁸⁴ Joe, *supra* note 31, at 298, 334-35.

²⁸⁵ See Beatriz Aguirre, *Beyond Bad Apples: Adopting Sentinel Event Reviews in Nevada's Criminal Justice System*, 18 NEV. L.J. 1059, 1066 (2018).

goal—with a routine process for reassessing whether this goal remains appropriate—and conduct follow-up analyses to determine whether its distribution scheme helps meet that goal.

CONCLUSION

In essence, every under-resourced public defender office makes prioritization decisions that could exacerbate its inability to provide competent and effective assistance of counsel.²⁸⁶ By calling attention to this balancing act, this project explores how the public defender's institutional decisions on resource allocation shape its ability to *actually* meet constitutional and professional obligations.²⁸⁷ It raises the following questions: how do public defender leaders guarantee the provision of quality assistance of counsel when making allocation decisions? Do their decisions increase the likelihood of providing ineffective assistance of counsel or incompetent representation, either by acting (or failing to act) for their clients, or by creating difficulties in the recruitment and retention of the public defenders who would represent those clients?

This Article details only three of the many decisions made by a public defender institutional leader in structuring the office and distributing its limited resources. Even within these three decisions, smaller choices about resource allocation also impact the institution's efficacy and compliance.²⁸⁸ Leaders must recognize their responsibility in making decisions within these constructs, the consequences of each of these decisions, and which choice best serves its goal of becoming a functional and constitutionally acceptable public defender system.

The public defender, both the institutional leader and the line defender, exercise some discretionary power in distributing its limited resources. Managing indigent defense practice with an overwhelming caseload and insufficient resources requires a careful balancing of individual and systemic interests. These institutions must not only provide effective representation for current clients using limited resources, but also sustainably manage those resources in order to support future clients. This Article elucidates this dilemma of public defender prioritization by examining three critical priority decisions facing public defender institutional leaders and provides available strategic responses that could go a long way towards improving its institutional integrity.

²⁸⁶ See Benner, *supra* note 239, at 25.

²⁸⁷ *Id.* at 33.

²⁸⁸ See Joe, *supra* note 242, at 406 (arguing that individual attorneys must also engage in resource rationing, though it may be problematic at times).