



NAPD Policy Statement on Public Defense Staffing¹ (May 2020)

Staff supporting public defense counsel must be adequate for meaningful representation (2020)

Meaningful representation requires proper staff assistance. Public defense clients are constitutionally entitled to an adequate opportunity to present their claims fairly within the adversary system. To receive this representation, clients must be provided attorneys who have the basic tools of an adequate defense. Necessarily, this includes adequate staff to support the work of the lawyer. The type and number of staff assistance to the lawyer greatly affects the amount of work the attorney can do competently.²

Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide one investigator for every three lawyers, one mental health professional, often a social worker,³ for every three lawyers, and one supervisor for every 10 lawyers. Additionally, there should be one paralegal and one administrative assistant for every 4 lawyers. Public defense organizations must have adequate staff or have access to adequate staff who perform necessary financial, IT, and human resource services.

Clients are constitutionally and ethically entitled to competent representation. A team of professionals is necessary for the competent defense of a client. Investigative, mental health, paralegal and administrative assistance are essential to the proper representation of clients. "Without access to what the United States

¹ This Statement does not address staffing for cases where the client faces life without parole or the death penalty.

² The particular dimensions of competent work duties of a criminal defense attorney are explained in American Bar Association's *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, Edward C. Monahan and James Clark, Chapter 23, "Coping With Excessive Workload," (1995), pp. 320-328. "A lawyer who has the regular assistance of competently performing staff and adequate resources is able to handle substantially more work than one who has inadequate resources and limited staff support." *Id.* at 328.

³ A social worker has particular legal meanings in various jurisdictions. Public defense systems that do not use social workers use professionals that include client services advocates, social service advocates, and mitigation specialists. Some of these professionals do not have a formal degree in social work but have professional skills that include interviewing, recognizing mental health and substance abuse disorders, understanding the subjective meaning of behavior, recognizing mitigating factors and developing life histories with mitigation themes, conducting motivational interviewing. See generally, *2008 Supplementary Guidelines*, Guideline 5.1-Qualifications of the Defense Team (2018), found at: https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/

Supreme Court terms the 'raw materials' of an effective defense, defenders cannot provide competent representation to indigent defendants."⁴

Scholars have recognized for at least 42 years the importance of support staff to quality representation. Professor Charles Silberman wrote:

...it is possible to provide a high quality of representation to indigent defendants. ...In Washington and Seattle... staff lawyers operate in much the same way as do members of large law firms. Indeed, they have access to a range of client services that only the largest and most prestigious law firms can command. These services include a staff of investigators...a staff of social workers or former probation officers to recommend sentencing alternatives to the probation department and/or the judge,...and "senior partners" to consult on difficult questions of law and strategy.⁵

National standards require support staff in order to be able to ensure competent representation.⁶ The American Bar Association (ABA) Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-1.4, Supporting services states, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation."⁷

More than investigators are required. "Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available other supporting services in addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing."⁸

⁴ Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1102 (2006) citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). "Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not, by itself, assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U. S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.* at 417 U. S. 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U. S. 226, 404 U. S. 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them."

⁵ Charles Silberman, *Criminal Violence*, *Criminal Justice* 255 (1978), p. 306.

⁶ Principle 8 of the ABA *Ten Principles of a Public Defense Delivery System* (2002) states, "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." Its Commentary states, "There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense."

⁷ Standard 5-1.4. Supporting services, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services." Found at:

<https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Written%20Submissions/General/ABA%20Standards%20for%20Criminal%20Justice%20Providing%20Defense%20Services%201992.pdf>

⁸ Commentary to ABA Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992) Standard 5-1.4.

Defenders have a responsibility to provide clients with both counsel and advice based on the law and facts of the case.⁹ Clients choose the outcome they desire. Attorneys are required to seek that outcome. However, along the way, clients deserve the best advice, including whether a community-based treatment option is in the client's best interest.

Also, counsel "must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."¹⁰ This responsibility is reflected in national standards which require defense counsel to advise the client during plea negotiations of the "other consequences of conviction such as deportation, and civil disabilities."¹¹

For sentencing, defense counsel must address both direct and collateral consequences¹² and with the assistance of sentencing specialists present an individualized sentencing plan with information about the defendant's background and circumstances of the offense that are mitigating and favorable to the defendant.¹³ These defense generated plans require investigation and assistance

⁹ The ABA Model Rules of Professional Conduct state: *Client-Lawyer Relationship*, Rule 1.1 Competence, "A lawyer shall provide competent representation to a client...."; *Client-Lawyer Relationship*, Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer, "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation...."; *Counselor*, Rule 2.1 Advisor, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...." See also, ABA Standards for Criminal Justice, Defense Function 4-5.1 Advising the Client; 4-5.2 Control and Direction of the Case (4th ed. 2017).

¹⁰ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹¹ ABA Standards for Criminal Justice, Defense Function 4-5.4 Consideration of Collateral Consequences; 4-5.5 Special Attention to Immigration Status and Consequences (4th ed. 2017); National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 6.2, The Contents of the Negotiations.

¹² ABA Standards for Criminal Justice, Defense Function 4-8.3 Sentencing; National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.2(b) Sentencing Options, Consequences and Procedures, "(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

- (1) credit for pre-trial detention;
- (2) parole eligibility and applicable parole release ranges;
- (3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
- (4) place of confinement and level of security and classification;
- (5) self-surrender to place of custody;
- (6) eligibility for correctional programs and furloughs;
- (7) available drug rehabilitation programs, psychiatric treatment, and health care;
- (8) deportation;
- (9) use of the conviction for sentence enhancement in future proceedings;
- (10) loss of civil rights;
- (11) impact of a fine or restitution and any resulting civil liability;
- (12) restrictions on or loss of license.

¹³ See, National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.1 Obligations of Counsel in Sentencing; 8.2 Sentencing Options, Consequences and Procedures; 8.3 Preparation for Sentencing; the Defense Sentencing Memorandum; 8.7 The Sentencing Process; American Bar Association *Standards for Criminal Justice: Prosecution and Defense Function* (4th ed. 2015), Standard 4-8.3 Sentencing, "... (d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by

from persons with skills to obtain information, identify and present mitigation and offer alternatives to incarceration.

Investigators

An investigator is necessary for a variety of reasons. A lawyer has the responsibility to investigate all cases.¹⁴ As part of their education, experience and professional networks, investigators have skills and expertise that attorneys do not have as part of their education. The investigation responsibilities for competent representation are substantial.¹⁵ Importantly, investigators who interview witnesses, obtain records

community services.”; American Bar Association *Standards for Criminal Justice: Sentencing*, (3d ed. 1994).

¹⁴ The ABA **Criminal Justice Standards, *Defense Function* (4th ed. 2015), Standard 4-4.1, Duty to Investigate and Engage Investigators, states:**

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client’s best interests, after consultation with the client. Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

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

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

¹⁵ NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 4.1 addresses the investigation responsibility of counsel:

Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.

(b) Sources of investigative information may include the following:

(1) *charging documents*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) *the accused*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client’s rights;

and survey the crime scene allow a lawyer to meet the ethical responsibilities of not becoming a witness in a case as required by ABA *Model Rule of Professional Conduct* Rule 3.7 Lawyer As Witness.¹⁶

The duty to investigate is not subject to making compromises based upon circumstances. ABA *Criminal Justice Standards for the Defense Function* (4th ed), Standard 4-4.1 states, “(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.”¹⁷

“The lack of adequate investigation is the most frequent reason that courts find ineffective assistance of counsel.”¹⁸

Most importantly, investigators assisting attorneys with their special skills change outcomes for clients.¹⁹

(B) explore the existence of other potential sources of information relating to the offense;
(C) collect information relevant to sentencing.

(3) *potential witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *the police and prosecution*

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) *physical evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

(6) *the scene*

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

(7) *expert assistance*

Counsel should secure the assistance of experts where it is necessary or appropriate to:

- (A) the preparation of the defense;
- (B) adequate understanding of the prosecution’s case;
- (C) rebut the prosecution’s case.

¹⁶ ABA Model Rule of Professional Conduct Rule 3.7 Lawyer As Witness, states:

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

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

¹⁷ Found at:

https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

¹⁸ Norman Lefstein, ABA *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011) p. 69.

¹⁹ “Adequate investigation is the most basic of criminal defense requirements and often the key to effective representation. An early study of public defender offices in the wake of the expansion of the right to counsel in *Argersinger* found that institutional resources were the most prevalent explanation for the variation in effectiveness scores among defender programs. Specifically, an in-depth analysis of nine urban public defender programs found that success in the courtroom was frequently tied to the availability of investigators. Investigators, with their specialized experience and training, are often more skilled than attorneys, and invariably more efficient, at performing critical case preparation tasks such

Mental health professionals

Mental health professionals, often social workers, are necessary to address mental health issues in an increasing number of cases and to develop defense generated sentencing alternatives. Mental health professionals have skills and expertise that attorneys do not have as part of their education. For instance, social workers are skilled at understanding the subjective meaning of behaviors, the undeveloped minds of juveniles and young adults. Social workers are trained in evidence-based motivational interviewing skills,²⁰ assessing substance abuse and mental health disorders, creating community-based alternative sentence plans focused on treatment, developing life histories and mitigation. They have networks of social service providers.

Most importantly, social workers assisting attorneys with their special skills change outcomes for clients.

Paralegals, administrative assistants

Much like nurses assisting doctors and meal assistants helping feed patients in a hospital or nursing home, dental hygienists helping dentists, paralegals and administrative assistants perform important tasks that allow the attorney to focus on matters unique to the responsibilities of the lawyer.²¹

Supervision

as gathering and evaluating evidence and interviewing witnesses. Without the facts ferreted out by an investigation, a defender has nothing to work with beyond what she might learn from a brief interview with the client. With such limited information regarding the strength and nature of the case, any attorney would be hard pressed to make the sensible strategic decisions necessary to adequately defend an accused or even have any leverage in plea bargaining.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1097 (2006).

²⁰ The scientific support for motivational interviewing is substantial:

- Baer, J.S., & Peterson, P.L. (2002). Motivational interviewing with adolescents and young adults. In W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332.
- Carroll, K.M, Ball, S.A., Nich, C., Martino, S., Frankforter, T.L., Farentino, C., Kunkel, L.E., Mikulich-Gilbertson, S.K., Morgenstern, J., Obert, J.L., Polcin, D., Snead, N., & Woody, G.E. (2006). Motivational interviewing to improve treatment engagement and outcome in individuals seeking treatment for substance abuse: A multisite effectiveness study. *Drug and Alcohol Dependence*, 81, 301-312.
- Ginsburg, J.D.I., Mann, R.E., Rotgers, F., & Weekes, J.R. (2002). Motivational interviewing with criminal justice populations.
- W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332.
- Lundahl, B. & Burke, B.L. (2009). The effectiveness and applicability of motivational interviewing: a practice-friendly review of four meta-analyses. *Journal of Clinical Psychology*, 65, (11) 1232-1245.
- Miller, W.R. & Rollnick, S. (1991). *Motivational Interviewing: Preparing People to Change Addictive Behavior*. New York, NY: Guilford Press.
- Miller, W.R. & Rollnick, S. (2002). *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press.

²¹ “In addition to access to experts and investigators, defenders need the full complement of support services and technology that a modern law office would require. Secretaries and paralegals can assist with clerical and administrative tasks, client communication, and case preparation and free up time for legal work only the attorney can handle.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1101 (2006).

Proactive supervision and coaching foster systematic competent representation and compliance with the Rules of Professional Conduct.

The days of the unsupervised lone ranger are long gone. Proactive supervision is essential in public defense systems. Principle 7 of the National Association for Public Defense Foundational Principles (2017) states:

Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential, Public defense providers must provide regular and timely supervision as needed of all lawyers and other professionals. The objective of supervision is to assure that all defense services provided by lawyers are competent within the meaning of rules of professional conduct and effective pursuant to prevailing professional standards. Accordingly, supervision should determine if sufficient time, thought, and resources are being devoted to a wide variety of defense tasks, such as interviewing and counseling of clients, securing pretrial release of incarcerated clients, completion of fact investigations prior to formulating recommendations about plea agreements, formal and informal discovery is conducted, and preparation for pretrial hearings, trials, and sentencing proceedings. Supervision should also include continuous monitoring of lawyer workloads to assure that all essential tasks of defense representation are being completed.

The ABA Rules of Professional Conduct, Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer, requires supervisors to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” The Comment to the Rule requires hands-on management. Lawyers with managerial authority within a firm must “make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Active management to help staff help clients receive quality representation includes setting expectations; conducting performance coaching process (mutually creating performance criteria making implicit expectations explicit, ongoing feedback, regular performance reviews); observing employees perform; conducting file reviews; delegating and staff reporting; brainstorming; doing mock presentations; conducting staff meetings; doing case reviews.²²

²² Case reviews are a pivotal discipline to advance competent representation in public defense systems. Case review is a method of “looking at, assessing, and analyzing an entire case from other professionals not directly involved in the case. ...Cases are comprehensively reviewed at a point in time when the defense team is ready for the next significant event in the case. Because case reviews invite defense teams to meet and share extant case facts and theories with attorneys and other professionals who are not representing the client, the review provides ‘multiple vantage points from which to view reality.’” See Ed Monahan, Jim Clark, Ph.D., (editors), Chapter 6 “Creating and Leading the Mitigation Team,” *Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases* (2017). P. 155. The case review process is a critical methodology because one “of the most robust discoveries in the scientific literature concerning decision making and judgment is that decision makers routinely select quick-and-easy, shoot-from-the-hip approaches to making important decisions instead of using approaches that are thoughtful, deliberative, and demonstrably most fruitful according to experience and national standards. ...This shortcut approach is known as *satisficing*, which is a neologism that combines *satisfy* and *suffice*. It values speed and closure over the delay required to deliberate and achieve optimal results. Professionals *satisfice* in order to deal with the overwhelming number of decisions and the complexity of possible alternatives. Without doubt, attorneys preparing to try difficult cases choose to *satisfice* because of such cognitive overload.” *Id.*

Essential organizational specialists

In addition to lawyers, investigators, paralegals, administrative staff and supervisors needed to support the office, a public defender program also requires most of the services a business needs including financial, information technology (IT), and human resources (HR). These services are not optional for a proper functioning professional organization.

Public defense programs have many organizational structures and relationships in state, county and city governments. Some public defense programs are freestanding nonprofits unattached to a governmental entity. These various structures mean that some public defense programs have some or all of these functions provided by the state, county or city financial, IT, human resource specialists while others do not have any governmental assistance. Because of this wide range of organizational structures and relationships, we do not offer specific ratios for the staff to provide these financial, IT, and human resources services.

Nevertheless, it is crucial that we communicate that these services are indispensable. The professionals who provide this type of assistance have the expertise organizations need that lawyers do not possess.

Public defense organizations must have adequate staff or have access to adequate staff who perform these services.²³

IT

As reliant as defenders are on IT resources to perform their day-to-day work, and considering the ever-increasing role that digital evidence plays in defense litigation,²⁴ the program's management of case information electronically, and the responsibility to provide funding authorities and the public with program data, it is essential that defender organizations have or have access to adequate IT staff to be able to represent their clients efficiently and effectively.²⁵

Defender IT staff can perform critical services such as:

²³ The National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) address the essential nature of professional business staff:

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

"...Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis....." Found at:

http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

²⁴ Increasingly, law enforcement has the IT technical acumen and manpower to develop their cases often with in-house forensics capabilities.

²⁵ See generally, a 2003 survey indicated that "IT staffing levels can vary significantly by the size of the company. For example, the typical IT staffing ratio (the number of employees supported by each IT worker) is 1:27 among all companies included in the survey. However, companies with 500 or fewer employees typically have an IT staffing ratio of about 1:18, while companies with 10,000 or more employees have a ratio of about 1:40." Organizing for Results: IT Structures and Staffing Survey by people3, Mercer Human Resource Consulting, and ITAA, found at:

<https://www.workforce.com/news/ratio-of-it-staff-to-employees> The Gartner 2013 Key IT Metrics Report shows that the Cross-Industry average of IT Full Time Employees as a percentage of Total Employees is 5%. <https://www.gartner.com/en/documents/2324316> Note that these survey and studies are not public defense specific and do not account for IT assistance and analysis of digital evidence in a legal context.

- Helping attorneys figure out how to access digital discovery, e.g., making accessible surveillance video contained in a forensic copy of a cheap, proprietary hardware security system;
- Modifying digital discovery to make it easier to work with, e.g., converting proprietary video to standard formats so it can be viewed on tablets or converting phone records to easy-to-read spreadsheets;
- "Enhancing" digital evidence to assist with case development, e.g., amplifying and noise-reducing a surreptitious recording so it can be understood and transcribed, or zooming into part of a surveillance video to focus on an incident taking place in a crowded area;
- Assessing and reporting on discovery contents, e.g., given a raw forensic dump of a computer or phone, the attorney may want to look at internet history or get a high-level idea of what significance the device contents has to the case;
- Documenting crime scenes and physical evidence via video, photography, and scale diagrams;
- Creating exhibits for use in court, ranging from physical models and large, mounted photographic prints to PowerPoint presentations;
- Acting as a liaison with digital forensic experts; translating geek-to-lawyer, helping attorneys identify issues for which they need experts.

HR

Human resource professionals provide knowledge, experience and expertise that attorneys do not possess. The nature of their services varies and depending on the organization can include creating job descriptions, recommending pay scales, doing employee relations, conducting training, recruiting, managing a performance evaluation process.²⁶

Ideally, the financial, IT, human resources services will be provided by staff directly accountable to the Chief Defender to make sure that the services are provided according to the priority of the Chief Defender and in a way that guarantees the necessary legal confidentiality.

If the financial, IT and human resource services are not provided by employees of the defender program, it is important to emphasize that the Chief Defender must guarantee that the financial, IT, and HR services are provided in a way that ensures the Chief Defender retains hiring and decision-making on personnel actions and in a way that ensures legal confidentiality necessary for a law firm, which is bound by the Rules of Professional Conduct.

Promotes reduced costs

Like support staff for medical doctors, it is cost effective for lawyers to have assistants perform administrative tasks.

Promotes timely, competent resolution of cases

²⁶ The ratio of human resource staff to employees reported in a 2015 Society for Human Resource Management *How Organizational Staff Size Influences HR Metrics* found at: <https://www.shrm.org/ResourcesAndTools/business-solutions/Documents/Organizational%20Staff%20Size.pdf> for small organizations was 3.40 per 100, for medium organizations was 1.22 per 100 and for large organizations was 1.03 per 100.

Adequate support staff promotes timely resolution of cases which reduces costs for jails and reduces frustrations by clients, client families, victims, prosecutors, judges. When lawyers have assistants who can answer phone calls, schedule meetings and locate and arrange court appearances for witnesses, obtain documents, take photographs, and prepare and file pleadings, the lawyers are less likely to need continuances.

As an expert witness stated in Louisiana litigation, “The lack of social work assistance adversely affects the Louisiana defenders’ ability both to obtain pre-trial release for their clients and to advocate more effectively at sentencing. Particularly given the lack of adequate mental health services in Louisiana, having social workers to assist defenders could make a tremendous difference for clients.”²⁷

Minimum staffing

Cases are becoming more complex across the range of cases. Recent changes in police and prosecution practices, including the widespread use of police video camera recordings, have increased the need for investigator and paralegal assistance for defender lawyers. Whether a lawyer has 150 felony cases a year or 400 misdemeanor²⁸ cases a year, many of those cases will require significant investment of time by non-lawyer professionals. Particularly complex cases, such as sex abuse felony cases or juvenile transfer of jurisdiction cases, or misdemeanor driving while intoxicated cases that have newly introduced scientific evidence, can increase the need for non-lawyer assistance.²⁹

Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide, one investigator for every three lawyers, one mental health professional, often a social worker, for every three lawyers, and one supervisor for every 10 litigators. Additionally, there should be one paralegal and one administrative assistant for every 4³⁰ lawyers.³¹ Public defense organizations must have adequate staff or have

²⁷ Affidavit of Robert C. Boruchowitz on the adequacy of the public defense system throughout the state of Louisiana *Bob Josh Allen Et Al v. LA State Governor Et Al*, Case Number C655079 (May 2017) p. 35, found at:

https://www.splcenter.org/sites/default/files/documents/2017.05.04_boruchowitz_report.pdf

²⁸ For purposes of this Statement, misdemeanor is used to mean a crime punishable by up to 12 months of incarceration.

²⁹ There are other factors that can increase or decrease the need for staff assistance. A defender who has cases in multiple rural counties that involve substantial regular travel will need more staff to assist with more of the work. A defender whose docket consists of primarily minor traffic violations will likely need less staff assistance.

³⁰ See Sixth Amendment Center, *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* (September 2018), p. 123; found at:

http://sixthamendment.org/6AC/6AC_NV_report_2018.pdf (Support staff necessary for effective representation “includes one supervisor for every ten attorneys; one investigator for every three attorneys; one social service caseworker for every three attorneys; one paralegal for every four felony attorneys; and one secretary for every four felony attorneys.”; Bureau of Justice Assistance, United States Department of Justice’s *Keeping Defender Workloads Manageable* (2001), p.10, found at: <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.)

³¹ See 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services, the National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) found at:

http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through

access to adequate staff who perform necessary financial, IT, and human resource services.

Conclusion: Meaningful Representation Requires Proper Staff Assistance

In order to have meaningful defense representation, the defense must put the prosecution's case through the "crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656-57 (1984).

To provide this meaningful defense, the responsibilities of an attorney representing a client facing the loss of liberty are substantial. The attorney must:

- meet with and interview the client promptly
- seek to have the judicial appointment decision made at first appearance prior to the consideration of pretrial release
- seek appropriate pretrial release
- investigate the case
- obtain expert analysis as necessary
- obtain and review discovery
- create the theory of the case
- conduct appropriate legal research
- file and argue motions with evidentiary hearings as appropriate
- communicate and negotiate with prosecutor
- respond to prosecutor motions

specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that, attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.

Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.

Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.

Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.

The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.

Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.

Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.

The attorney investigator and supervisor ratios are confirmed in Footnote 23 of Principle 8 of the ABA *Ten Principles of a Public Defense Delivery System* (2002): "See NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office)."

- prepare for trial
- present an alternative sentencing plan in appropriate cases
- keep the client informed throughout.³²

Proper staffing is necessary to enable a public defense lawyer to comply with all of these responsibilities to meet legal and ethical standards of practice. Public Defender attorneys cannot provide meaningful representation to the clients they are appointed to without proper staff assistance.

There are serious financial and social consequences to inadequate staffing. Clients pay the costs of representation that is not meaningful. The criminal legal system pays the costs of delayed resolutions. The public has less reason to have confidence that the process is properly adversarial and produces results that are reliable and valid. Public defenders who do not have the investigator, social worker, administrative and paralegal assistance to support their representation have far less capacity to provide meaningful representation to each client.

