COMMITTEE FOR PUBLIC COUNSEL SERVICES

Response to the Office of the Inspector General Report

"An Analysis of Indigent Defense in Massachusetts"

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Table of Contents

I. Executive Summary **3**
II. Where CPCS Agrees and What Comes Next **6**
Our Vision for Appropriate Reform 6
Already Underway or Substantially Complete 6
Recommendations CPCS Supports and Can Pursue Within Its Own Authority 7
What CPCS Asks of the Legislature and the Courts 8
What Success Should Look Like 10
III. A Brief History of CPCS **12**
IV. Four Themes **15**
Theme One: From Crisis Response to Long-Term Capacity 15
Theme Two: The 20 Percent Requirement and Attorney Capacity Measure Different Things 24
Theme Three: The Report Evaluates Public Defense Primarily Through a Fiscal Lens Rather Than a Constitutional One 32
Theme Four: Litigation and the Legal Issues Raised by the OIG Report 46
V. Proactive Structural Changes the Legislature and the Courts Should Consider **51**
VI. Conclusion **52**
Appendix **53**

I. Executive Summary

The Committee for Public Counsel Services (CPCS) welcomes meaningful oversight and agrees with several of the OIG's recommendations. But the report's central characterization of Massachusetts public defense, as an inefficient system that resisted oversight, failed to respond adequately to the 2025 counsel crisis and maintained substantial unused attorney capacity, is not supported by the full record. Some findings are useful, and CPCS will act on them, and in some cases already has. But several of the report's central conclusions rest on measures that do not test what they are said to test, and in places the report's own record does not support them. In the press release announcing the report, the Inspector General called the Commonwealth's public defense system "broken, expensive, and is resistant to oversight." That description does not reflect the work of the people who built one of the nation's most respected public defense systems, and this response answers it using the report's own record.

None of that means CPCS believes it has nothing to answer for. Massachusetts' indigent-defense system is imperfect, and CPCS works every day to improve it, because the people of Massachusetts deserve the best possible representation when they face the power of the state. CPCS welcomed the Inspector General's report the way it welcomes any outside assessment of its work: with cooperation, transparency and an open mind. Third-party review is an opportunity to learn and improve, and improvement helps CPCS's clients, who have been CPCS's first priority since its creation more than 40 years ago.

What follows is a nonexhaustive examination of what the OIG got right and how CPCS plans to address those findings, and a rebuttal of what was wrong or misrepresented. The response is organized into four themes, which track the report's own characterization point by point.

Theme One answers the report's characterization of CPCS as passive during the 2025 counsel shortage. CPCS built a response before the crisis even began, and when it hit, staff attorneys took on substantially more work, not less, until they reached the ethical ceiling on what a lawyer can carry. Its emergency incentive program worked well, with duty-day sign-ups climbing in both Middlesex and Suffolk within its first month. Neither county has held a Lavallee release hearing since it launched. The Supreme Judicial Court said as much in March 2026. As of late December, 74 percent of the defendants who had been unrepresented at arraignment had counsel assigned, measured against an assignment rate of 25 percent in early August, and no defendant in custody had required a seven-day Lavallee hearing since mid-October 2025. Those are the Court's findings. CPCS did not write them.

Theme Two answers the report's core factual claim: that CPCS staff attorneys had significant room to take on more cases. They did not. The report gets there by running two questions together. The first is how CPCS counted cases against the statutory 20 percent mandate. CPCS's method was wrong; it understated staff work for years, and CPCS is correcting it. The second is whether attorneys had capacity to take on more, and the 20 percent ratio cannot answer it. That figure is a retrospective measure of case coverage, calculated after a fiscal year closes, blind to staffing transitions, attrition, the obligations attorneys owe the clients they already have, and swings in annual caseload. Fixing

the count does not establish that anyone had time to spare. The measure that does answer the question is workload, and the report recommends it: the National Public Defense Workload Study (NPDWS), released in 2023 by the RAND Corporation, the American Bar Association and the National Center for State Courts, attached as Appendix VII. [1] Applied to the caseload of CPCS's Public Defender Division (PDD) during the period the report examined, that standard shows staff attorneys were carrying substantially more than the benchmark treats as sustainable, not less. A raw case count that ignores what each case requires is not evidence of capacity.

Theme Three answers the report's fiscal framing. The Legislature directed the OIG to identify best practices from other jurisdictions. The report presents extensive interstate comparisons but does not identify any state's system as a best-practice model, and does not test whether the cheaper systems deliver comparable representation. Massachusetts spends more per case than many of the states in the report's comparison. That establishes a difference in cost. It does not establish the cause of that difference, or whether the systems being compared provide comparable representation. Independent national assessments have identified significant strengths in Massachusetts' model, including statewide administration and funding, mixed delivery, oversight, training and supports. A November 2023 report sponsored by the U.S. Department of Justice's National Institute of Justice, marking the 60th anniversary of Gideon, singled out Massachusetts by name as a highly regarded, state-administered and state-funded model with robust oversight, training and supports and placed it among the states whose approaches others can adapt. After reviewing millions of lines of CPCS billing data, the report does not identify a single dollar spent improperly. It identifies statistics it finds suspicious and asks CPCS to explain them. This response does so.

One more finding needs an answer here. It is among the report's most serious, and it has nothing to do with attorneys. The report concludes that the Commonwealth's system for determining indigency is broken and that it would be wrong to believe most people who receive appointed counsel have been properly screened, citing gaps in spousal-income verification and follow-up checks over the course of a case. CPCS does not dispute that the verification process can always be improved. However, CPCS is not responsible for this process. Indigency screening is performed by the Massachusetts Probation Service, an independent division of the Trial Court, and CPCS has no statutory role in verifying a defendant's income or assets. CPCS supports modernizing that process, and it has gone further than the report by arguing that the counsel fee assessed on indigent defendants should be eliminated outright. Section II sets out that position in full.

Theme Four addresses the litigation and legal issues the report raises: that CPCS resisted oversight. It did not. Over an eight-month investigation, CPCS turned over roughly two million lines of data, met with the OIG's team at least six times, and responded to every category of request. For the docket-number request, CPCS provided alternative case identifiers and litigated the narrower legal question of whether it could disclose the docket numbers themselves. That question turns on the duty of confidentiality that binds every lawyer in the Commonwealth, and CPCS is litigating it openly, in court. One principled objection is not evidence of a pattern. The Superior Court agreed with CPCS that docket numbers are confidential client information under Rule 1.6 of the Massachusetts Rules

1 Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee & Stephen F. Hanlon, National Public Defense Workload Study (RAND Corporation, July 2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html.

of Professional Conduct, but concluded that the OIG's authorizing statute qualifies as "other law" permitting their disclosure, and granted the OIG's motion to compel. The narrow question on appeal is whether the OIG's authorizing statute overrides that protection.

Where CPCS Agrees

CPCS does not claim the system needs no improvement. The response that follows sets out where CPCS agrees with the report, where CPCS is already at work on reform, and where CPCS believes it can continue to work with the Legislature and the courts: raising bar advocate compensation further, eliminating the counsel fee assessed on indigent defendants and reducing how often people are held in custody at arraignment.

CPCS will not let a mischaracterization of its record stand unanswered. The pages that follow are its response.

II. Where CPCS Agrees and What Comes Next

Our Vision for Appropriate Reform

CPCS agrees with several of the report's recommendations and has already begun implementing some of them. Other reforms require legislative funding, judicial action or changes by institutions outside CPCS's control. This section gathers those items in one place: what CPCS has already completed or begun, what CPCS can pursue within its own authority, and what CPCS asks the Legislature and the courts to do.

Some of the needed changes are CPCS's responsibility to fix, and CPCS takes full responsibility for them. The shift from counting Notices of Assignment of Counsel (NACs) to docket-based counting is chief among them. Other changes respond to legitimate concerns raised by the report and are already underway. Still others address structural problems that CPCS cannot solve on its own, including compensation, pretrial detention and the volume and types of cases entering the indigent-defense system.

The goal is not to rebuild Massachusetts' public defense system from the ground up, but to strengthen the parts that need improvement while preserving the features that allow CPCS to provide effective representation statewide.

Already Underway or Substantially Complete

- Moving statutory case-ratio reporting from NAC counts to docket-based counting. CPCS is changing the methodology used to measure staff and private representation so that it more accurately reflects the work attorneys perform, with docket-based counting to begin with fiscal 2027 reporting at the earliest. As discussed in Theme Two, CPCS should have made this change sooner.
- Completed a Workload Study analysis for adult criminal caseloads, using the National Public Defense Workload Study standards. The results are reflected in the accompanying White Paper, Appendix I, and provide a more meaningful measure of adult criminal attorney workload than raw annual case counts.
- Implemented a weighted caseload methodology for the Youth Advocacy Division (YAD). Finalized a juvenile case-weighting system for YAD, effective fiscal 2027 and modeled closely on PDD's existing weights for consistency across divisions. The new system is designed to better account for differences in the demands of individual cases. YAD will review the results after fiscal 2027 and adjust them for fiscal 2028 if warranted.
- Moving toward comparable workload studies for the Children and Family Law Division (CAFL) and the Mental Health Litigation Division (MHLD). CPCS is reviewing a detailed proposal for a parallel CAFL workload study built on the same national methodology used in the NPDWS. The proposal contemplates work beginning in October 2026 with final reporting in August 2027. Selection of the evaluator will follow the Commonwealth's procurement process. MHLD's

workload study will be conducted alongside CAFL's, using the same evaluator, which is the most efficient way to do both. It will cover commitment work rather than guardianship cases.
- Revising CPCS's conflict policy and implementation practices. CPCS is finalizing a revised policy focused on ensuring compliance with professional and ethical obligations, and uniformity across offices. The revised policy is expected this fall, with training to follow. CPCS agrees this work is worth doing, though CPCS does not believe conflict policy reform will meaningfully change the overall number of cases CPCS can take on.
- Expanding conflict-office capacity within PDD. CPCS is developing a structure similar to the one already used in CAFL. The first position has been posted in Hampden, and CPCS plans conflict capacity in Hampden, Suffolk and Middlesex during fiscal 2027.
- Linking expert and vendor bills to individual public defender cases. This work has been underway since spring 2026 and will improve case-level tracking of costs associated with staff representation. (See Theme Three, "CPCS Is Already Linking Vendor Costs to Public Defender Cases.")

Recommendations CPCS Supports and Can Pursue Within Its Own Authority

Grow the Private Assigned-Counsel Pipeline

CPCS agrees that the Commonwealth needs a larger and more stable pool of qualified private assigned counsel. CPCS will continue expanding recruitment, strengthening relationships with bar advocate programs and bar associations, and improving the pipeline into assigned-counsel practice.

The report's recommendation treats bar advocate panel growth, Rule 3:03 student attorney assignments, and pro bono attorney assignments as interchangeable tools for the same purpose. They are not, and CPCS does not treat them that way. Growing bar advocate panel membership is the direct way to add real capacity, and it is where CPCS's recruitment effort is focused. Rule 3:03 student attorneys are supervised on every case they take, a practice CPCS does not intend to change; a client should not receive a lesser form of representation because they cannot afford a lawyer, and supervision is what prevents that. That supervision is also why expanding student assignments does not meaningfully add capacity: the staff or bar advocate time spent supervising a student largely offsets whatever time the student contributes, which makes Rule 3:03 a training and recruitment pipeline, not a capacity solution. Pro bono attorneys can help in specific areas, but CPCS's own experience argues against relying on them at scale: attorneys trained for pro bono panels have often taken on a case or two and then not returned, and CPCS is exploring whether that pattern can be improved rather than assuming it can be solved by asking more of the same pool.

CPCS will continue using and refining all three approaches while focusing its capacity-building efforts principally on recruiting and retaining qualified attorneys who can take sustained assigned-counsel caseloads.

Strengthen Collaboration with Bar Advocate Programs

CPCS already works closely with bar advocate programs on recruitment, retention, training, supervision and coverage. It supports strengthening that collaboration further, including more systematic sharing of information about panel membership, attorney participation, duty-day availability and emerging geographic shortages.

One point the report does not address: the legal distinction between staff attorneys and bar advocates remains important. Bar advocates are independent contractors who decide which assignments and duty days to accept, while staff attorneys are CPCS employees subject to scheduling and supervision. That difference limits what CPCS can formally require of bar advocates; it cannot mandate caseloads or schedules the way it can for staff, but it does not limit CPCS's responsibility to work actively with the private bar to sustain statewide capacity, and it does not mean CPCS ignores the private bar as the OIG report suggests.

CPCS meets and reports with bar advocates regularly, and bar advocates already have nearly the same access to CPCS training as staff attorneys.

What CPCS Asks of the Legislature and the Courts

Many of the reforms below predate the OIG report. They require funding or action outside CPCS's authority, within the purview of the Legislature, the courts or prosecutors. CPCS includes them here because they address the structural causes of many of the problems the report identifies. The referral bonus is the exception: it has been raised internally but never formally proposed, and CPCS puts it forward here for the first time.

A Referral Incentive for Recruiting New Bar Advocates

- Rate increases are essential to recruitment and retention, but CPCS also needs tools directed specifically at bringing new qualified attorneys onto the panels. CPCS therefore proposes a referral incentive for bar advocates who recruit qualified attorneys who successfully join and begin participating in assigned-counsel practice. CPCS already uses targeted incentive structures in other contexts, including duty-day coverage. A recruitment incentive would apply the same general principle to panel growth. The details would require careful design, including eligibility requirements and a meaningful participation threshold for the newly recruited attorney. But the objective is straightforward: reward successful recruitment that produces actual new case-taking capacity.

Continued Increases to Bar Advocate Compensation

- Nearly every recruitment and retention problem described in this response traces back, at some level, to what CPCS can pay the private bar relative to what those same attorneys could earn doing other work. The increases enacted in 2025 and 2026 were important and extremely appreciated. They have not, however, fully closed the gap between compensation for assigned-counsel work and the compensation qualified attorneys can obtain elsewhere.

- The Commonwealth should therefore continue increasing bar advocate compensation until rates are sufficiently competitive to recruit and retain a stable statewide assigned-counsel bar.
- Competitive compensation works as a capacity measure, not only as a benefit for existing bar advocates. A stable public defense system requires enough qualified private attorneys to remain in the work, accept new assignments and build careers that include indigent defense.

A Flat Daily Fee for Accepting Duty-Day Coverage

- The Commonwealth should establish a clear, uniform flat daily payment for attorneys who accept duty-day coverage, replacing the current patchwork of hourly waiting-time payment and division- or county-specific stipends. An advocate deciding whether to take a duty day should not need to know which division's or county's rules apply before knowing what the day is worth. A single daily fee would make compensation predictable and reduce administrative complexity.
- A flat fee for acceptance of duty day assignments would also target the problem the Commonwealth needs to solve: securing reliable courtroom coverage, rather than trying to compensate for waiting time through increasingly complicated hourly rules.

Elimination of the Counsel Fee Assessed on Indigent Defendants

- CPCS supports improvements to the indigency-verification process, but the counsel fee imposed on indigent defendants should be eliminated. [2]
- The fee is assessed on people the Commonwealth has already determined cannot afford a lawyer, and it collects relatively little revenue compared with the administrative effort required to assess, collect, monitor and enforce it. [3]
- Improving the accuracy and consistency of indigency determinations remains important, but CPCS believes the better long-term policy is to eliminate the fee rather than invest additional resources in administering it.
- CPCS has participated in discussions on this for years, including responding to an inquiry from the House Post Audit and Oversight Bureau examining indigency determinations and taking part in a 2018 Supreme Judicial Court working group, and remains willing to work with the courts, Probation Service and Legislature on a more consistent indigency-verification process.

Examine the Upstream Drivers of Appointed-Counsel Demand

- Any serious analysis of indigent-defense cost must examine not only how CPCS handles cases after appointment, but also the volume and types of cases entering the system. Attention must be paid to how charging decisions drive demand for appointed counsel.

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2 National Legal Aid & Defender Association, *At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees* (July 2022), at 76-80 (recommending the total elimination of public defense system fees), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf.

3 *Id.* at 1 (finding that in no state with available data do collections of public defense recoupment fees exceed 5 percent of the amounts assessed); id. at 11 (describing the $150 counsel fee Massachusetts assesses at the outset of a case); *see also* National Legal Aid & Defender Association, "NLADA Issues New Report on the Use and Harms of Public Defense Fees in the Criminal Legal System" (Aug. 2, 2022), https://www.nlada.org/node/54831.

- CPCS does not control charging decisions and does not suggest that it should. But any accounting of what indigent defense costs and why must include what drives the caseload in the first place, and charging practices are part of that picture the report leaves out entirely. CPCS asks the Legislature and the courts to look at how charging practices affect indigent-defense demand and cost, including whether diversion or citation-based alternatives could apply more broadly to offenses like operating with a suspended license, which rarely result in incarceration but still require full appointed-counsel representation.

Reduce Unnecessary Pretrial Detention at Arraignment

- CPCS also supports working with the judiciary and other justice-system partners to reduce unnecessary pretrial detention at arraignment. Bail and detention practice belongs to the judiciary. But custody sharply increases the consequences of delayed appointment and the urgency of securing immediate counsel. Fewer people held pretrial means fewer of the duty-day and *Lavallee*-style pressures. The 2025 counsel crisis demonstrated how quickly shortages in available attorneys can become constitutional emergencies when defendants remain incarcerated without representation.
- Reducing avoidable detention would not eliminate the need for counsel, nor should it be treated as a substitute for adequate public defense funding. It would, however, reduce the number of cases in which attorney shortages create immediate liberty consequences and *Lavallee*-style pressures.

What Success Should Look Like

These reforms should be judged by their outcomes. Adopting a new policy is only the first step. CPCS requests that the Legislature consider adopting two measurable commitments over the next five years.

The first is competitive compensation that closes the gap that Finding 18 itself identifies: rates that no longer trail every other Northeast state, sufficient to sustain a stable private assigned-counsel bar statewide. Massachusetts relies on private assigned counsel for the majority of indigent representation. The increases enacted in 2025 and 2026 were meaningful and CPCS is appreciative of the progress, but the 2025 shortage demonstrated that incremental improvement alone is not enough. The long-term objective should be compensation that allows qualified attorneys to enter, remain in and meaningfully participate in assigned-counsel practice.

The second is counsel at first appearance for every person entitled to appointed representation. Not counsel eventually, and not counsel only after a *Lavallee* hearing becomes necessary, but an attorney present when the client first appears before a judge. That is often when liberty is first at stake and when immediate legal advice and advocacy matter most.

Massachusetts came closer to failing that standard in 2025 than it had in many years, and this response documents both how that happened and how it was addressed. Making counsel at first appearance an explicit statewide goal would provide a simple and meaningful measure of whether the Commonwealth has built sufficient public defense capacity.

Neither goal can be achieved by CPCS alone, and neither can be accomplished in a single budget cycle. Both are achievable if the Commonwealth treats them as shared, measurable commitments and funds the system accordingly.

III. A Brief History of CPCS

Massachusetts recognized the right to counsel before the United States did. Article 12 of the Massachusetts Declaration of Rights, adopted in 1780, guaranteed that every person accused of a crime "shall have the right ... to be fully heard in his defence by himself, or his counsel." The federal Bill of Rights would not make the same promise for another 11 years. The Legislature made assigned counsel a statutory reality in capital cases in 1820,[4] though compensation did not follow until 1893, and then only in murder cases.[5] For most of the 19th century, in the gap before compensation existed, leading members of the Massachusetts bar took capital assignments without pay, as a service to the profession and the community. An 1870 opinion of the Supreme Judicial Court described the custom plainly: When a prisoner had no lawyer, the court would ask a member of the bar to help, and the bar always answered, giving its best efforts freely to anyone who could not pay.[6]

The promise Article 12 made was not self-executing, and for more than a century it went unmet outside capital cases. Massachusetts had no general statutory or constitutional guarantee of appointed counsel in serious noncapital cases, and the Supreme Judicial Court had said as much directly: Article 12's guarantee of a right to be heard "by himself, or his counsel" had "never been deemed to require the court to appoint" counsel in every case.[7]

In the 1930s, a young Massachusetts lawyer named Wilbur Hollingsworth set out to fill that gap. Hollingsworth raised private funds and established the Voluntary Defenders Committee in 1935, a charity, not a government program, that represented indigent defendants in Suffolk, Middlesex and Norfolk Counties, later joined by a Springfield committee covering Berkshire, Hampden, Hampshire and Franklin Counties. For a quarter century, until the state created a public defender agency, private charity carried a constitutional obligation the Commonwealth had not yet accepted as its own.

In 1942, in *Betts v. Brady*, the Supreme Court held that the federal Constitution guaranteed no right to counsel for the poor in noncapital felony cases absent exceptional circumstances. Massachusetts went in a different direction. In 1957, in *Pugliese v. Commonwealth*, 335 Mass. 471, and *Brown v. Commonwealth*, 335 Mass. 476, decided the same day, the Supreme Judicial Court rested the right to appointed counsel on Article 12 itself. The Court reversed a noncapital conviction because the defendant needed counsel to secure the fundamentals of a fair trial, cited the federal cases only by analogy, and said expressly that it rested its decision on Article 12. The standard the Court applied still tracked the federal special-circumstances rule of *Betts*, but the source of the obligation was the Massachusetts Constitution rather than the Fourteenth Amendment. The following year the Court went further on its own authority, adopting Rule 10 to require assigned counsel in all Superior Court noncapital felony cases, five years before *Gideon v. Wainwright* would require the same nationally. In 1960, the Legislature created the Massachusetts Defenders Committee, the state's first publicly funded defender agency, to help meet that obligation.

4 St. 1820, c. 14, § 8, now codified at G.L. c. 277, § 47.
5 St. 1893, c. 394, §§ 1-2, now codified at G.L. c. 277, §§ 55-56.
6 *Clark, petitioner*, 104 Mass. 537, 543 (1870).
7 *Allen v. Commonwealth*, 324 Mass. 558, 562 (1949).

The Commonwealth's role in the national story of public defense runs deep. When Clarence Earl Gideon's handwritten petition reached the Supreme Court, one of the most influential arguments for reversing *Betts v. Brady* came from Massachusetts. Attorney General Edward J. McCormack Jr. co-led the amicus brief filed on Gideon's behalf with Minnesota Attorney General Walter F. Mondale, joined by 20 other states and commonwealths, urging the Court to guarantee counsel as a matter of due process and equal protection. Writing for a unanimous Court, Justice Black adopted the states' description of *Betts* as "an anachronism when handed down" and overruled it. In 1964, a year after *Gideon*, the Supreme Judicial Court again moved ahead of federal law, extending Rule 10 to require counsel in any case carrying the possibility of imprisonment, anticipating by eight years the standard the U.S. Supreme Court would set nationally in *Argersinger v. Hamlin*. That standard governs today through Rule 3:10 of the Supreme Judicial Court Rules.

While this established the right to counsel, it did not resolve who would provide that representation or establish standards for how it would be delivered. Responsibility fell to the Massachusetts Defenders Committee and a patchwork of county bar advocate programs that grew up unevenly across the Commonwealth through the 1960s and 1970s. These groups and the private attorneys appointed under Rule 10 were chronically underfunded. The Committee's own coverage shrank as legislative appropriations failed to keep pace with its caseload, county programs offered low pay with no funds for investigators and imposed no meaningful caseload controls, and private Rule 10 attorneys were paid so little that accepting an assignment was, in the era's own description, tantamount to a pro bono commitment. The representation that resulted was frequently the poorest quality available.

By the early 1970s, Massachusetts' indigent-defense system was, by contemporary accounts, an assigned-counsel system run by judges rather than lawyers, paired with a public defender agency overwhelmed by caseloads and inconsistent leadership. Chief Justice Edward Hennessey concluded that an effective public defense system had to be independent of the courts it appeared before, not managed by them, and in 1976 established a committee to study the problem. The committee's recommendation led the Legislature to create the Committee for Public Counsel Services in 1983: one statewide agency, independent of the judiciary, with the funding and authority to set its own standards.

That new agency absorbed more than one existing institution, and it did not treat them all the same way. The Massachusetts Defenders Committee, CPCS's general predecessor, was folded into the new agency's structure without any specific statutory protection; the Legislature created CPCS and let it organize its own staff. The Roxbury Defenders, an independent public defense organization serving the Roxbury community before CPCS existed, was treated differently. The Legislature wrote the unit directly into CPCS's founding statute: G.L. c. 211D, § 6(a) requires the Public Defender Division to "include a unit to be known as the Roxbury Defender's Unit." No other CPCS trial office has that kind of statutory guarantee. More than 40 years later, the Roxbury Defenders Unit remains one of only three Public Defender Division trial offices serving Suffolk County.

CPCS's founding statute charges it to "plan, oversee, and coordinate" indigent defense across the Commonwealth through salaried staff attorneys, bar advocates and other assigned counsel and gives CPCS itself, not the courts and not the counties, the authority to set caseload standards and monitor compliance with them (G.L. c. 211D, §§ 9(c), 10), the same authority at issue throughout this

response. That was a deliberate choice: the Legislature built an agency independent of the courts it appears before, on the theory that judicial and defense functions work best kept separate. However, the funding fight did not end in 1983. A Massachusetts Bar Association commission reported in January 1994 that compensation rates for public defenders and bar advocates alike were not just inadequate but, in its own words, cast a chilling effect on the right to counsel itself. [8]

Since 1983, CPCS's structure has grown to include the Public Defender Division, the Private Counsel Division and three more divisions representing children and families, youth and people in mental health proceedings. The system has been tested since. In 2004, a shortage of bar advocates in Hampden County left indigent defendants unrepresented at arraignment, and the Supreme Judicial Court's response, the *Lavallee* protocol, still governs how the Commonwealth handles counsel shortages today, including the one the OIG report examines. What began nearly two and a half centuries ago as a constitutional promise, and more than 40 years ago as a fix for a fragmented, underfunded, unsupervised system, is the same system the OIG now examines. The Legislature built it and the courts refined it, and it still rests on the premise that drove its creation: the quality of a person's defense should not depend on the county where they were charged, on which office happened to be available that day, or on how much money they have.

8 Massachusetts Bar Association, *Striking a Balance: Adequate Compensation – Effective Representation* (Jan. 1994), at 23.

IV. Four Themes

Theme One: From Crisis Response to Long-Term Capacity

In Brief: *The report treats CPCS as passive during the 2025 bar advocate work stoppage. The record shows the opposite. CPCS built a containment plan before the stoppage began, and once it hit, staff attorneys dramatically increased new case volume. That continued until it became clear that taking new assignments at that pace would compromise competent representation. This section sets out what CPCS did before, during and after the crisis, and why the limit staff attorneys reached was a constitutional and ethical one rather than an administrative choice.*

The report calls CPCS "resistant to oversight" and, in describing the 2025 counsel crisis, effectively calls it absent: an agency that sat on unused capacity while defendants went unrepresented and courts worked through the Lavallee protocol. The first characterization is not accurate, and neither is this one. CPCS built an operational plan before the work stoppage began, based on what it then knew about how broad and deep the stoppage would be. Staff attorneys took on substantially more work once the shortage hit, and how much more they could take on was set by constitutional and ethical limits. What follows walks through that response in detail, then lays out the specific, dated record behind it.

CPCS Built a Response Before the Crisis Hit

When CPCS first learned that some bar advocates intended to participate in a work stoppage beginning on May 27, 2025, it did not yet know whether the stoppage would happen or how extensive it would be, but it moved immediately to reduce how many defendants would go unrepresented, and for how long. CPCS wrote to court leadership in advance, on May 21, 2025, setting out what it expected and what it was doing about it, and stayed in direct communication with the courts as the stoppage approached. It provided courts with a notice, in English and Spanish and then in other languages when requested, that could be handed to unrepresented defendants explaining the situation and providing a dedicated phone number to check on the status of their case and arranged for jails to post the same notice. It set up a dedicated email address in every county so courts could send CPCS the names of people who appeared without counsel that day, stayed in constant contact with each court's counsel on case lists and priorities and trained CAFL attorneys to conduct section 35 hearings so more attorneys could help absorb the load. In anticipation of the stoppage, CPCS encouraged bar advocates to accept a higher percentage of cases, preserving as much staff-attorney capacity as possible to handle the most serious cases if the stoppage in fact took place. The Lavallee protocol ultimately was not triggered in most counties because of this containment effort, and where the protocol did trigger, that effort delayed its implementation by roughly a month.

Staff Attorneys Expanded Their Work to the Outer Edge of Sustainable, Constitutionally Effective Representation

When the shortage hit, staff attorneys took on more work. Offices in the affected counties accepted a substantial increase in cases, prioritizing defendants held in custody and those facing the most

serious charges. Offices adjusted duty-day coverage and redeployed available staff to expand representation, and CPCS trained attorneys from other divisions to handle criminal matters during the shortage.

That increase was not confined to one office. Across all offices, new case volume rose from 944 to 1,737 between May 15 and July 15, an increase of 84 percent. Roxbury's caseload grew the most sharply at 170 percent and Malden rose 54 percent. Boston's caseload climbed steadily from 179 to 245 cases over the same period, and Lowell and Framingham each saw moderate growth as well.

That rate of increase could not be sustained indefinitely, and CPCS recognized it quickly. Within weeks, the strain was visible: attorneys carrying caseloads at the limit of what competent preparation allowed, and early signs that taking on still more would begin to affect the representation clients were receiving. CPCS therefore held staff intake at the maximum level attorneys could sustain without compromising a client's defense. That level remained well above precrisis volumes. It was a ceiling, not a retreat.

Roxbury illustrates what that ceiling looked like in practice. After growing faster than any other office, it held new intake at the level its attorneys could carry competently once the strain became apparent. That is an office that expanded as far as responsible practice allowed and then held there. Staff attorneys across the Commonwealth operated at that same ceiling throughout the crisis, expanding hard and then holding at the outer edge of what constitutionally effective representation permits, whatever any annual percentage required.

Where staff attorneys could not take an additional case, neglect had nothing to do with it. Those attorneys had already accepted as much as constitutional practice allowed and were declining work they could not competently handle. Judges' frustration in that moment is understandable. They were trying to move their own dockets forward without an attorney in front of them, and that pressure was real. But it does not follow that CPCS staff were not doing everything they could. A judge observing an attorney at capacity and a report counting that as absence are describing the same fact from two different vantage points.

That response was not limited to the Public Defender Division. Other CPCS divisions facing private-counsel shortages similarly adjusted their operations to ensure that clients received representation wherever attorney capacity permitted.

The Youth Advocacy Division's Response

YAD implemented a coordinated response to the shortage of private counsel, including an emergency placement protocol for unrepresented detained youth, rapid cross-county coverage, weekly tracking and outreach to address the backlog of released but unrepresented youth, and a coordinated staff/private-bar framework for arraignment coverage. YAD also pursued relief through its G.L. c. 211, § 3 petition and worked with the courts to monitor and address the growing number of unrepresented youth.

Capacity Decisions Were Constitutional, Not Administrative

Why Staff Capacity Could Not Simply Be Redeployed

The capacity decisions CPCS made during this crisis were constitutional and ethical decisions. The Lavallee protocol reinforced this. CPCS prioritized custody cases and the most serious charges, which meant staff could not simply maximize routine duty-day coverage. Doing so would have used up capacity on lower-priority matters before serious custody cases arrived, leaving more high-priority defendants without counsel. Custody cases also require immediate investigation, expedited hearings and intensive early advocacy, so concentrating staff time on those cases impacted attorney capacity in ways that annual case counts do not capture. Had CPCS done otherwise, the annual percentage might well have looked better on paper, but it would have meant more defendants facing more serious charges released at *Lavallee* release hearings. That was not a trade CPCS was willing to make.

At pages 13 and 14 of the OIG's Executive Summary, the report states that CPCS was largely absent and let the gap in coverage play out between the courts and the bar advocates, and it supports that with attributed interviews: Middlesex District Court and Boston Municipal Court judges told the OIG that CPCS staff attorneys were absent during peak hours, did not answer calls from court staff seeking to assign counsel, and failed to ensure duty-day staffing. It is the sharpest claim in the report, and it needs a direct answer.

Under the *Lavallee* protocol, CPCS staff were required to prioritize defendants in custody and the most serious charges, and an attorney's capacity at any given moment is finite, fixed by the professional responsibility obligations owed to existing clients. Meeting that obligation meant staff could not simply appear in court to cover duty days. CPCS's operational judgment at the time was that doing so would exhaust available capacity sooner and leave staff unable to absorb the serious custody cases as they arrived, putting more defendants at risk of release, including defendants facing more serious charges. That was the risk CPCS was managing, and it is the reason staff were not deployed to duty-day coverage.

The courts were not left to discover this approach on their own. On May 21, 2025, six days before the stoppage began, the chief counsel wrote to the chief justice of the Trial Court and the chief justice of the Superior Court, in a letter attached as Appendix III, to set out precisely how CPCS would proceed. The letter explained that staff attorneys would keep their scheduled duty days as long as they had capacity, that all remaining cases would go to the local bar advocate program and the trial panels with custody cases prioritized, and that if counsel could not be found within seven days for someone held, CPCS would assign the case to its staff attorneys wherever they had capacity and no conflict existed. It also said directly that staff could not be placed in arraignment sessions indefinitely without failing the clients they already had. What the judges later described to the OIG was the operation of a plan the judiciary had been given in writing before the shortage began.

The pattern across the rest of the Commonwealth makes the same point from the other direction. This was a statewide work stoppage. In counties where the *Lavallee* protocol was not in place, staff did cover additional duty days wherever capacity allowed, and the protocol ultimately proved

unnecessary in every one of those counties. The protocol was triggered only where there were not enough attorneys to begin with, and the system was already barely holding. If CPCS had been absent as a matter of practice, that difference between counties would not exist.

Also, attorney capacity was not one statewide pool that could simply be moved to where it was needed. The shortage of private assigned counsel reached nearly every county in the Commonwealth, not just Suffolk and Middlesex, which were hit hardest. Offices elsewhere in the state, apart from Bristol and Hampshire, were absorbing their own additional cases at the same time, to prevent the same *Lavallee* pressures from developing locally. Whatever capacity the OIG report imagines existed elsewhere in the state was not available to relieve Suffolk and Middlesex. There is also a management reality the report does not weigh: Directing attorneys to relocate their practice from one county to another, even temporarily, carries its own risk of increasing attrition, since it disrupts the caseloads, client relationships and personal circumstances that keep attorneys in place. Treating statewide capacity as freely movable ignores that cost.

The stakes were real, and CPCS does not minimize them. The OIG reports that between July and early December 2025, the courts held 2,345 *Lavallee* hearings that resulted in 1,689 dismissed cases and the release of 213 defendants. The OIG also notes that most of the dismissed cases were refiled and that district attorneys moved to detain most of the released defendants. But every one of those hearings involved a person who went without a lawyer, and that is the outcome CPCS's decisions throughout the crisis were designed to limit. [9]

Professional responsibility rules independently limited how many of the *Lavallee*-affected cases CPCS staff could have taken, regardless of capacity. Some of the defendants whose cases were dismissed or who were released under the protocol had co-defendants or other conflicts that would have barred CPCS staff from representing them no matter how much time was available. The report's assumption that staff could have absorbed all these cases does not hold up against the on-the-ground reality of the situation.

Consider what the seven-day and 45-day Lavallee benchmarks measure. Many defendants held in custody and then released after a seven-day hearing were held only because no attorney was available to argue for their release at all, not because a court had considered and rejected release. Had a hearing occurred on schedule, with counsel present, many of those same defendants would likely have been released on their own recognizance, with or without conditions, or would have had bail set. The harm in those cases is due to the absence of a hearing, not to a decision CPCS made about capacity.

The *Lavallee* protocol's own procedure confirms CPCS's efforts. Before a court could release a defendant held seven days without counsel, or dismiss a case after 45 days, the court had to find that CPCS made good-faith efforts to secure counsel. Those contemporaneous judicial findings, made in real time by the courts overseeing the crisis, cut against the report's after-the-fact assertion that CPCS had substantial unused capacity sitting idle.

9 Office of the Inspector General, *An Analysis of Indigent Defense in Massachusetts* (June 10, 2026), at 11 n.2, 34.

Capacity had to be assessed attorney by attorney and day by day, because the constitutional obligation runs to each client. Counting cases in the aggregate after the fact cannot capture that, yet that is the report's method. The report does not account for seriousness, complexity or constitutional risk, and it evaluates the crisis in hindsight rather than under the conditions CPCS faced in real time.

Once legislation addressing the crisis passed, CPCS moved immediately to accelerate hiring and deploy new attorneys, consistent with its approach throughout the shortage: doing everything possible to represent unrepresented defendants while keeping every attorney's workload within constitutional and ethical bounds.

What CPCS Did Once Additional Resources Became Available

How CPCS Executed Once the Legislature Acted

CPCS is grateful for the Legislature's response to this crisis. Before that funding arrived, CPCS had already absorbed the initial surge with existing staff, built a containment plan before the stoppage began, and brought staff intake to the maximum sustainable level, all as described above. The speed with which CPCS filled the newly funded positions shows an agency doing everything it could, at every stage of this crisis, with the tools it had at the time.

Once funding became available, CPCS moved expeditiously to fill the new positions: between July 1, 2025, and the September 2026 training class, CPCS hired 229 attorneys into the Public Defender Division alone, 199 of them in new expansion positions, began implementing expanded conflict offices and revising its conflict policy and onboarding process, all while continuing to add duty-day coverage. An agency that had been standing by, waiting for someone else to solve the problem, would not have moved this quickly the moment it had the means to do more.

This is not the first time CPCS has scaled rapidly under a legislative mandate, and its track record cuts against any suggestion that this kind of expansion masks unused capacity. During the 2011 to 2013 expansion of public counsel representation, CPCS grew from 22 offices to 41, centralized its data and voice infrastructure, built disaster-recovery redundancy and moved to a unified Voice over Internet Protocol phone system statewide, all while hiring 210 new public counsel positions and 122 support staff. The more important measure is how that expansion was carried out. In 2012 the OIG hired the Justice Management Institute (JMI), an independent research organization, to evaluate that expansion. JMI issued its final report, *A Study of the Expansion of the Committee for Public Counsel Services' Representation of the Indigent,* to the Senate and House Ways and Means Committees in June 2014. That report is attached as Appendix IV. That evaluation found no evidence that the rapid build-out reduced the quality of representation. If anything, it found the opposite: Public counsel resolved cases faster than bar advocates both before and after that expansion, by an average of 43 days before and 21 days after, and caseloads were distributed more evenly across offices once it was complete. CPCS has expanded before under real-time pressure without compromising quality, and it did so again in 2025.

CPCS's conflict policy is part of this picture, and the report's discussion of it reflects some confusion about how conflicts work. Every attorney, staff and private bar alike, is bound by the same

Massachusetts Rules of Professional Conduct. Comment 3 to Rule 1.7 calls for a lawyer to adopt reasonable procedures, suited to the size and type of practice, for identifying conflicts. CPCS's Conflict Policy is that procedure for CPCS staff. The current version dates to 2020, and CPCS expects to replace it this fall with a clearer version that includes more examples, to improve consistency across the Commonwealth. CPCS will conduct extensive training on the new policy with an eye toward ensuring uniform applicability. Whether a conflict exists is governed by the Rules of Professional Conduct themselves, not by CPCS's internal policy. The policy only documents how CPCS complies with those rules. Private bar attorneys, whether solo practitioners or members of a firm, are bound by the identical rules and are expected to maintain their own procedures for identifying conflicts. The report's suggestion that staff and private bar operate under different conflict standards does not reflect how the underlying obligation works.

The Broader Record on Attorney Recruitment and Capacity

CPCS's Efforts to Expand and Sustain the Private Bar Predated the 2025 Crisis

CPCS's efforts to ensure an adequate supply of qualified attorneys did not begin with the 2025 counsel crisis. For years, CPCS has worked to recruit, retain and expand the pool of attorneys available to represent its clients. The examples below, drawn from initiatives undertaken across CPCS's trial panels between 2021 and 2026, illustrate the breadth and continuity of those efforts. The list is representative.

Compensation and Legislative Changes

CPCS sought, and the Legislature enacted, rate increases across every division, an annual billing cap raised from 1,650 to 1,800 and now 2,000 hours, and statutory authority for the chief counsel to waive that cap. CPCS also implemented county-specific emergency incentive rate increases. CAFL separately obtained a $75-per-hour rate for care and protection assignments effective July 2021 and eliminated the 1,500-hour cap for new CAFL attorneys in 2017.

CPCS has sought increases in private-counsel rates from the Legislature on a recurring basis, including through its annual budget advocacy, and the Legislature has enacted rate increases in several recent fiscal years, most recently increasing rates again for fiscal 2026 and fiscal 2027. CPCS appreciates that support and recognizes that these requests must be considered within a difficult budget process involving many competing priorities. At the same time, the increases preceding the 2025 counsel crisis were not sufficient to reverse the underlying recruitment and retention trends. They did not produce enough additional case-taking by existing panel attorneys or attract enough new attorneys to replace those leaving assigned-counsel practice for retirement, career changes, financial considerations and other reasons.

These measures were not responses to the 2025 shortage. Each predates it, and together they describe an agency that had been working on private-bar capacity for years before the work stoppage began.

PRIVATE BAR RATE HISTORY

Court	FY15 (07/14)	FY16 (07/15)	FY17 (07/16)	FY18 (07/17)	FY19 (07/18)	FY20 (07/19)	FY21 (07/20)	FY22 (07/21)	FY23 (07/22)	FY24 (07/23)	FY25 (07/24)	CURRENT FY26 (08/25)	FY27 (08/26)
District Court	$50	$50	$53	$53	$53	$53	$53	$60	$65	$65	$65	$75	$85
CAFL	$50	$50	$55	$55	$55	$55	$55	$75	$85	$85	$85	$95	$105
Appeals	$60	$60	$60	$60	$68	$68	$68	$75	$85	$85	$85	$95	$105
Superior Court	$60	$60	$60	$60	$68	$68	$68	$75	$85	$85	$85	$95	$105
Mental Health	$50	$50	$50	$50	$53	$53	$53	$60	$65	$65	$65	$75	$85
Juvenile Court	$50	$50	$53	$53	$53	$53	$53	$60	$65	$65	$65	$75	$85
Murder	$100	$100	$100	$100	$100	$100	$100	$110	$120	$120	$120	$130	$140
CRAs	$50	$50	$53	$53	$53	$53	$53	$60	$65	$65	$65	$75	$85
GROSS EST. IMPACT[1]			**$6.99M**		**$3.70M**			**$28.06M**	**$19.06M**			**$26.80M**	**$26.80M**

Private-bar hourly rate history by case type, fiscal 2015 through fiscal 2027.

Building and Sustaining the Attorney Pipeline

CPCS has also invested in building a stronger and more sustainable pipeline of attorneys into private assigned-counsel practice. These efforts have begun to produce results, but developing a pipeline sufficient to offset attorney attrition and meet the Commonwealth's continuing need for assigned counsel is a long-term undertaking. In 2023, CPCS created dedicated Private Attorney Outreach Partners, at the urging of deputies in CPCS's Private Counsel Division who identified the need for a more coordinated recruitment effort. Since then, CPCS has expanded its relationships with law schools and county, affinity and specialty bar associations, increased its participation in recruitment events, and developed statewide outreach efforts designed to introduce attorneys and law students to assigned-counsel practice. The Outreach Partners also built a dedicated private panel attorney website and centralized statewide application and vendor portal to make becoming a private panel attorney easier.

CPCS has also worked to create a pipeline into assigned-counsel practice before lawyers even enter the profession. CPCS helped establish Zealous Advocacy Training as a for-credit law school course at Western New England University School of Law and, through Outreach Partners, expanded the program at Suffolk University Law School, the Massachusetts School of Law and the University of Massachusetts School of Law.

Students who successfully complete the course may satisfy the training requirement for panel certification after admission to the bar, providing a direct path from law school into assigned-counsel practice. Eight attorneys have entered the panel through that pipeline to date.

Other CPCS divisions have undertaken substantial training and certification efforts as well. CAFL has trained approximately 600 private attorneys and 80 staff attorneys since 2014, certified 31 new attorneys in fiscal 2025 and certified another 18 in fiscal 2026. MHLD trained 163 attorneys between 2020 and 2026. MHLD has eliminated barriers to certification training by removing a prior litigation-experience requirement, splitting its certification into separate commitment and guardianship tracks and moving to a hybrid in-person and online format. In fiscal 2026, it added a second certification course for experienced litigators on both the commitment and guardianship panels. Those efforts have not kept pace with attrition. MHLD had 234 attorneys in fiscal 2026, down

from 269 in fiscal 2020, which is itself part of the recruitment problem this response describes.

These efforts also illustrate why attorney recruitment cannot be measured simply by the number of lawyers CPCS trains or certifies. Not every attorney who completes training accepts assignments, and attorneys who join a panel do not necessarily remain active or accept the same volume of cases over time. Compensation differences among case types can also affect where attorneys choose to practice. For example, differences in compensation may draw attorneys from mental health cases to better-compensated District Court work or from juvenile delinquency to child welfare cases. Thus, CPCS must recruit continuously not only to expand its panels, but also to replace attorneys who leave assigned-counsel practice or reduce the number or types of cases they accept.

The Report Mischaracterizes the Purpose of CPCS's Hiring Plan and Incentive Program

Against this broader history, the OIG separately criticizes two measures CPCS adopted to address the 2025 counsel crisis: the *Lavallee* Incentive Program and CPCS's implementation of the Legislature's mandate to substantially expand staff representation. Those criticisms evaluate the initiatives against objectives they were not designed to achieve. The incentive program was an emergency measure intended to get existing unrepresented defendants counsel as quickly as possible. The hiring plan was built to expand staff capacity at a pace CPCS could sustain. Each should be evaluated against its actual purpose and the circumstances in which it was implemented.

The *Lavallee* Incentive Program Was Designed to Get Defendants Counsel Immediately

The program accomplished its intended purpose. When it began, roughly 3,000 defendants had appeared in court without receiving counsel at their first appearance. Suffolk and Middlesex had experienced *Lavallee* release hearings almost every week since July 7, 2025; the last one was held on Oct. 16, four days before the incentive launched on Oct. 20. Neither county has held a Lavallee release hearing since, and no *Lavallee* dismissal hearing has been reported to CPCS since December 2025.

The Supreme Judicial Court documented the program's impact in March 2026, in *Committee for Public Counsel Services v. Middlesex and Suffolk County District Courts*.[10] The Court found that nearly 100 attorneys applied to take more than 1,300 cases during the program's first 10 days, that the program was extended through March 31, 2026, because of that success, and that more than 1,800 cases had been assigned counsel through it as of Feb. 24. By late December, 74 percent of defendants who had been unrepresented at arraignment had been assigned counsel, compared with a 25 percent assignment rate in early August. By late February, only eight indigent defendants remained unrepresented in the affected courts, and no defendant in custody had required a seven-day *Lavallee* hearing since mid-October. The Court relied on the incentive program, together with the Legislature's rate increase and the *Lavallee* protocol, in declining to order further judicial intervention.

10 *Committee for Public Counsel Services v. Middlesex and Suffolk County District Courts*, 497 Mass. 287 (2026).

The OIG report's finding that 152 of 153 incentive recipients already had District Court assignments does not demonstrate that the program failed. It reflects the program's purpose and is evidence it worked the way CPCS intended. This emergency measure was designed to persuade qualified attorneys who were already able to handle District Court cases to accept additional assignments immediately while broader rate increases, hiring and other longer-term measures took effect. Recruiting and training new attorneys could not provide counsel to thousands of defendants who needed lawyers at that moment. The same is true of the report's observation that only 16 of the attorneys who received incentive payments had not taken assignments during fiscal 2025. CPCS did not design the program to find attorneys who were sitting out. It designed the program to move cases to attorneys who were already qualified and already working, because those were the only attorneys who could take a case that week. Measuring the program by how many newcomers it produced measures it against a goal CPCS did not set and would not have set. As of Aug. 30, CPCS had assigned 2,241 cases through the incentive program, at a cost of $1,120,500.

CPCS also deliberately established eligibility requirements for the program. Participating attorneys were required either to have billed at least 800 hours in fiscal 2025 or to have accepted at least five assignments in fiscal 2026. The purpose was to avoid creating a dynamic that could encourage a further work stoppage as a way of manufacturing a future incentive.

The OIG report in Finding 23 raises a related point: 41 incentive recipients had not taken assignments in Suffolk or Middlesex before the crisis. That, too, reflects how the program was designed. CPCS extended the incentive statewide for two reasons. Middlesex and Suffolk did not have enough attorneys to address the backlog, so CPCS needed to draw on qualified attorneys from elsewhere in the Commonwealth. At the same time, CPCS had to ensure that attracting attorneys to the two hardest-hit counties did not simply shift the counsel shortage elsewhere. Allowing attorneys to take cases in Suffolk and Middlesex Counties risked creating a crisis in other counties across the state, essentially exacerbating the existing crisis. CPCS therefore made the program available statewide while requiring participating attorneys to cover two duty days in their home counties by year's end, a requirement the Supreme Judicial Court recognized as designed to minimize disruption in other counties.

In the month after the program launched, bar advocates signed up for 52 additional duty-day slots in Middlesex and 69 in Suffolk, and coverage increased again each time CPCS extended the program. No county outside Suffolk and Middlesex experienced a *Lavallee* crisis during this period. Those objective results stand in contrast to the report's reliance on interviews with judges who stated that the incentive program had not "meaningfully improved" duty-day scheduling.

CPCS's Hiring Plan Implemented the Legislature's Mandate to Expand Staff Capacity

The report criticizes CPCS's hiring plan itself for proposing to hire approximately 220 new attorneys, rather than the 320 referenced in the statutory language. That comparison, however, treats two different measures as though they were the same.

The 220 figure was not a shortfall against 320. The two numbers measured different things. CPCS was asked what resources would be required to double its adult criminal staff representation. In

July 2025, the Public Defender Division had a complement of roughly 220 attorneys, so doubling its capacity required approximately 220 more. Attorneys cannot provide effective representation without the professional infrastructure that supports their work, and CPCS therefore also identified approximately 100 additional support personnel: investigators, social workers, paralegals and administrative staff. Those two figures together, 220 attorneys and 100 support staff, produced the roughly 320 full-time equivalents in CPCS's response. CPCS consistently described that figure in full-time equivalents rather than attorneys, in writing, throughout its discussions with the Legislature.

The final statutory language described the expansion as 320 attorneys. CPCS did not plan to hire only 220 attorneys because it intended to ignore the Legislature's mandate. Rather, its hiring plan reflected CPCS's determination of how the Legislature's objective, substantially expanding staff representation, could be implemented operationally and sustainably. Hiring 320 attorneys without the investigators, social workers, paralegals, administrative staff, training and supervision necessary to support their work would not have created the effective representation or the additional case coverage the Legislature sought.

Nor was CPCS funded to hire 320 attorneys in addition to the supporting infrastructure required for those attorneys to function.

Expanding staff capacity could not responsibly be accomplished simply by extending offers as quickly as possible. New public defenders require training and supervision before assuming full caseloads, and existing attorneys and supervisors must devote time to that process. CPCS therefore had to expand staffing at a pace that increased representation without compromising the quality of representation provided by either newly hired attorneys or the attorneys responsible for training and supervising them. Despite those practical constraints, CPCS moved quickly.

The record since the Legislature acted is substantial. Between July 1, 2025, and the September 2026 training class, CPCS hired 229 attorneys into the Public Defender Division, where the 2025 shortage was most acute. Of those, 199 filled new expansion positions and 30 replaced departing staff. Of the expansion hires, 63 trained in September 2025, December 2025 and April 2026 and are already in courtrooms accepting assignments, 117 began training in September 2026 and 19 are supervising attorneys. That is 199 of the roughly 220 new attorneys the hiring plan calls for, and hiring continues. Across the agency, CPCS hired 298 attorneys in that time, and the other divisions combined added 69 attorneys, 10 of them in expansion positions. CPCS reported its hiring progress to the Legislature in writing as that work proceeded.

Theme Two: The 20 Percent Requirement and Attorney Capacity Measure Different Things

In Brief: *The report's central finding is that CPCS fell below the 20 percent statutory figure and therefore had unused attorney capacity. That inference runs two questions together. How many cases were counted, and how much work an attorney was carrying, are different questions. CPCS counted wrong for years and is fixing it. But the 20 percent figure was never built to measure whether an attorney can take another case, and the measure that does answer that question, the national*

workload standard the OIG itself recommends, shows CPCS attorneys already carrying more than a sustainable load.

Theme One describes the capacity CPCS added in response to the counsel shortage. This theme answers a different claim: that CPCS already had substantial staff capacity that was going unused. The report reaches that conclusion largely from CPCS's performance against what this response refers to as the "20 percent requirement." It is therefore important to begin with what that requirement says.

The 20 percent requirement is not a standing provision of the General Laws. It appears in CPCS's annual appropriation, in line item 0321-1500 of the budget each year, which directs CPCS to "maintain a system in which not less than 20 per cent of indigent clients shall be represented by public defenders." It establishes an important statewide obligation: at least 20 percent of indigent clients are to be represented by CPCS staff public defenders. But the language does not establish a caseload for any individual attorney, prescribe how many additional cases a public defender must accept, or define when an attorney has capacity for another client.

The report's unused-capacity finding therefore involves two different questions that need to be separated.

The first is whether CPCS accurately counted staff and private cases for purposes of measuring compliance with the 20 percent requirement. CPCS did not do that as accurately as it should have. Its historical methodology compared different units of measurement and failed to capture some work performed by staff attorneys. CPCS should have corrected that methodology sooner and is doing so now.

The second question is whether falling below the 20 percent requirement means individual staff attorneys had room to accept more cases. It does not, by itself. The 20 percent requirement measures the overall distribution of representation between CPCS staff attorneys and private assigned counsel. Attorney capacity is a different question: whether a lawyer, given the work already assigned, can accept another client while continuing to provide competent and effective representation to every client the lawyer already represents.

That distinction matters because the evidence points in different directions on the two questions. CPCS agrees that its historical case-counting methodology needed improvement. But the workload measure the OIG itself recommends, the 2023 National Public Defense Workload Study, shows that carrying PDD's caseload at the national standard during the period analyzed would have required more than twice the attorneys PDD then had on staff. Correcting CPCS's case count therefore does not establish unused attorney capacity. The available workload evidence points in the opposite direction.

The discussion below addresses those questions in that order: first, what the 20 percent requirement measures and why CPCS's historical counting methodology needed correction; second, what the relevant workload evidence shows about actual attorney capacity.

What the 20 Percent Requirement Actually Measures

The 20 percent requirement is an annual organizational measure. It measures staff representation as a share of indigent representation across a fiscal year. The percentage itself is fixed, but the number of staff representations necessary to satisfy it cannot be known with precision at the beginning of the year.

The denominator, the total number of indigent clients requiring appointed counsel statewide, changes as cases enter the courts over the course of the fiscal year. CPCS can forecast that number and plan and manage its staffing and assignments to meet the 20 percent requirement, but it cannot know on July 1 exactly how many staff representations will constitute 20 percent when the fiscal year ends. The final ratio is affected by changes in court filings, the volume and types of cases requiring appointed counsel, staff hiring and attrition, attorney leave, conflicts and fluctuations in the availability of private assigned counsel.

None of that diminishes CPCS's obligation to comply with the requirement. It explains what the requirement measures and what it does not. As a measure of how representation was distributed between staff public defenders and private assigned counsel over the course of a fiscal year, the 20 percent figure is useful. As a measure of whether a particular attorney can accept a particular case at a particular time, it is the wrong instrument. An attorney deciding whether to accept a new appointment cannot rely on a projected year-end ratio. That decision turns on the attorney's existing workload, obligations to current clients, conflicts and ability to provide competent and effective representation to another client.

CPCS Should Have Counted the 20 Percent Requirement More Accurately

CPCS accepts responsibility for accurately measuring its performance against the 20 percent requirement. Its historical methodology did not do that as well as it should have. Until fiscal 2027, CPCS calculated the ratio using information drawn from two systems that were not designed to count cases in the same way. On the private side, CPCS principally relied on Notices of Assignment of Counsel, or NACs, associated with private-attorney billing. On the staff side, CPCS relied on cases entered into its internal case-management system, counted by Zelly case number. NACs are administrative identifiers used to manage appointments and pay private attorneys. They were not designed to serve as a statewide case-counting system, and a NAC does not necessarily correspond one-to-one with a court case. Reviewing caseload and capacity numbers in real time during the 2025 counsel shortage exposed the limits of that method.

CPCS's case-management system did not capture every matter PDD staff handled under G.L. c. 123, § 35, and PDD offices were not consistently entering every bail-only or § 35 matter. Some work performed by staff attorneys therefore was not reflected in CPCS's case count at all. NACs and dockets do not map onto each other one-to-one, and the numbers make the point concretely: In fiscal 2025, more than 35,000 dockets billed that year were associated with more than one NAC, often because an attorney withdrew, a client defaulted or new counsel was assigned. At the same time, nearly 9,000 NACs were associated with more than one docket. Counting NACs therefore was not the same thing as counting cases. The result was a basic measurement problem: staff and

private representation were not always being counted using the same unit. Trial courts count cases by docket number, which is why CPCS is moving its own reporting to the same unit of measurement. That transition began before the OIG report was issued.

CPCS is building that transition into both its systems and its practice. IT is creating a report that captures private-bar and staff cases by docket number rather than by internal case-management identifiers. PDD is conducting mandatory staff meetings on entering complete and valid docket numbers and on the importance of entering every bail-only and § 35 case. YAD has historically included those matters in its own case count. PDD staff are also being instructed to enter the identifiers necessary to ensure that the underlying data supporting CPCS's reporting are complete going forward. Even a docket-based count will not capture every form of staff work, including some § 35 and bail-only representation. But the underlying ratio will be measured on a substantially more consistent basis going forward. Docket-based counting will begin with fiscal 2027 reporting at the earliest, so no docket-based figure exists for fiscal 2025 or fiscal 2026. CPCS will report the corrected ratio to the Legislature once the new count is in place.

CPCS should have made this change sooner. This is an area where the report's underlying criticism has merit. But acknowledging a problem in how CPCS counted cases does not answer the different question whether staff attorneys had unused capacity.

Correcting the Count Does Not Establish Unused Attorney Capacity

Correcting CPCS's case-counting methodology does not establish that staff attorneys had unused capacity. A flawed case count is not a finding that attorneys had time to spare. Counting dockets tells CPCS how large the universe of court-appointed cases was in a fiscal year, which is what the statutory ratio needs. It does not tell CPCS whether any individual attorney could have responsibly taken another client. The workload standards discussed below answer that question.

Fixing the count changes the ratio. It does not change the hours in an attorney's week.

Why Staff and Bar Advocate Caseloads Are Measured Differently

The report also questions differences in the way CPCS measures and manages staff and private assigned-counsel caseloads. Some of that criticism identifies areas CPCS should review. But staff attorneys and private assigned counsel are not situated identically and need not be managed through identical mechanisms. The ratio CPCS reports to the Legislature is an unweighted count, regardless of charge. That is the right basis for comparing staff participation against the private bar's. For purposes of measuring compliance with the 20 percent requirement, CPCS should count actual cases consistently for staff and private counsel. That is why CPCS is moving to docket-based counting. Workload management presents a different issue.

Setting caseload targets for staff attorneys is a workload exercise, and it is weighted, because its purpose is to keep an attorney whose entire practice is CPCS cases within what she can competently carry. Private attorneys run their own practices and carry their own obligations to their own clients, so CPCS sets no target for them. It sets an outer cap, deliberately higher than the caseload CPCS wants

any one attorney carrying, to absorb data-entry lag and administrative error. Some bar advocates take a handful of cases a year; few ever approach the cap. That cap is an outer control rather than a workload target. Measuring staff workload against bar advocate workload compares two systems that are managed differently because they are different.

The premise that staff and bar advocate cases are weighted differently does not hold up as cleanly as the report suggests, either. In CPCS's assigned-counsel manual, and in practice, much of the weighting already lines up: District Court cases carry a weight of one and Superior Court cases a weight of two for both staff and private attorneys. The report's own chart weights murder cases at five for staff but lists no weight at all for the private bar. That gap is not an oversight. CPCS monitors the number of murder cases assigned to any one private attorney case by case, just as closely as it does for staff, and does so through direct supervision rather than a formula. Case-by-case monitoring is the right tool for independent contractors, and a formula is the right tool for employees whose entire practice consists of CPCS cases. The two approaches are not equivalent, and they are not meant to be.

CPCS will review its current caseload caps and case-weighting system for the private bar, to bring the numbers in line with actual practice and to determine whether further adjustment is warranted in light of the workload study. That review will pay particular attention to how private attorneys taking CPCS cases are managing their own practices to meet their ethical obligations to their clients. CPCS is conducting that review even though it does not intend to align the two systems, because the outer caseload cap for the private bar is a real control and it should reflect what private practice looks like today.

The National Workload Standard Shows PDD Attorneys Are Already at or Above Capacity

CPCS's internal workload guidelines exist to make sure every open case gets constitutionally effective representation, not to maximize how many cases an attorney can carry. The OIG identifies the 2023 National Public Defense Workload Study as the right national benchmark for measuring capacity. CPCS agrees and had begun that analysis before the OIG asked for it. That analysis is now complete, published as the accompanying White Paper, "Meeting the Mandate: Assessing PDD Attorney Workloads, Performance, and Capacity" (June 2026), attached as Appendix I.

The result is significant. Applying the NPDWS methodology to PDD's caseload for the period analyzed shows the division would have needed approximately 519 full-time attorneys to carry that caseload at the national standard, more than twice the number PDD had on staff during fiscal 2025. A second, independent workload study CPCS commissioned in 2014, the Answering Gideon's Call Project, reached a similar conclusion through its own methodology: PDD would have needed 301 attorneys. CPCS ran the current analysis with the same national workload-methodology experts who built the NPDWS, to be sure the standard was applied correctly rather than adapted informally. Two methodologies, developed a decade apart, point the same direction: PDD attorneys were not below capacity.

That older case-count standards are a poor measure of attorney workload is not a new observation,

and it does not originate with CPCS. When the Office of the Inspector General last commissioned an outside evaluation of this agency, its evaluator made the same point. JMI reported in 2014 that the standards then in general use, from the National Advisory Commission on Criminal Justice Standards and Goals, were not empirically based, were more than 40 years old, were written before the technology that now shapes case processing and did not account for differences between states. JMI also recorded the distinction that makes those comparisons unreliable in Massachusetts specifically: nationally, a felony is generally an offense carrying a year or more, while Massachusetts classifies offenses carrying up to two and a half years in jail as misdemeanors. JMI made one further point that bears directly on how the current report counts: national standards of that kind measure new assignments, while the case figures CPCS reports are cases assisted, meaning new assignments plus matters carried over from prior years. The two are not the same number and should not be read against each other. The 2023 National Public Defense Workload Study exists because those older standards were inadequate, which is why CPCS uses it and why the OIG recommends it.[11] Applied to PDD's caseload, the study's results are difficult to reconcile with a conclusion that PDD maintained substantial unused attorney capacity during the period the report examined.

Why the 72-Case Interstate Comparison Does Not Measure Workload

The report compares raw new case counts across states and finds Massachusetts staff attorneys average 72 new cases a year, the lowest of eight comparable states. Its own Figure 30 shows why that number should be handled with care. The same figure lists two Massachusetts attorney counts side by side: 354 "actual FTEs," which produces the reported 72, and 290 "calculated FTEs," CPCS's own metric, which discounts headcount for supervisors carrying reduced caseloads, attorneys on leave and new hires not yet at full capacity. That second figure produces 88. The report does not explain why it chose the undiscounted number for its headline comparison, even though adjusting for exactly those factors is the more accurate approach it favors elsewhere. Using CPCS's calculated figure narrows the gap with the next-lowest state by more than 20 percent, from the report's own data, without CPCS changing a single input.

A raw case count treats a one-day arraignment and a multiyear murder prosecution as equivalent and says nothing about the hours a case requires. The NPDWS measures the dimension a case count cannot: hours of constitutionally adequate work per case, weighted by case type. By that measure, the same attorneys the report counts as underworked are carrying more than the national standard treats as sustainable. A lower raw case count and a higher measured workload therefore are not inconsistent. Raw case counts simply do not control for case type, complexity, duration or the amount of attorney work each matter requires.

The 72-case figure also blends case types most other states do not combine. The 25,492 cases behind that average include not only PDD's criminal caseload but CAFL's child welfare matters, which by their nature run for years and close far less often than a typical criminal matter, and MHLD's civil commitment work, which runs on the opposite clock: statute requires trial within days of a filing, giving counsel as little as two to five days to prepare, gather records and retain experts. Neither pattern

11 Pace et al., *National Public Defense Workload Study* (finding that the 1973 National Advisory Commission standards are outdated, not empirically based and inadequate, in part because they fail to differentiate among types of felonies).

resembles the criminal case the report's average is built around, and in both the attorney handling the work still counts as a full-time equivalent (FTE) in the denominator. Some comparison states do handle similar work, but they route it differently.

Connecticut, for example, reports its own child-protection cases, but sends most of them, more than 10,800 of roughly 10,900, to assigned counsel rather than staff attorneys, according to the 2025 Connecticut Public Defenders Annual Report at page 7. Massachusetts handles a meaningfully larger share of that kind of work in-house, through CAFL and MHLD staff, which pulls the agency-wide average down in a way that has nothing to do with how many hours those attorneys are working. Interstate case counts can provide useful descriptive information. They do not measure attorney workload.

CPCS's Caseload Targets Are Longstanding Management Tools, Not Measures of Individual Capacity

CPCS's target annual caseloads, 190 for District Court, 55 for CAFL, 100 for mental health and 110 for juvenile delinquency, are not new and they were not developed in response to the OIG report. CPCS established this basic target structure in 2011 and 2012, during the last legislatively mandated expansion of public counsel representation, and reported the targets directly to the Legislature's Ways and Means Committees. The reasoning behind each of them is on the record in the Chief Counsel's Report to the Committee on CPCS Budget and Expansion Implementation Plan, dated Feb. 6, 2012, attached as Appendix V. That report sets out, target by target, what CPCS weighed in arriving at the numbers: national trends and jurisdictional comparisons, consultation with the courts, historical caseload levels, the time particular case types require and the variation among cases within a single category. The mental health figure has since been revised downward to 100 to reflect changes in practice and case law that require more attorney time per case. JMI, the independent firm the OIG itself hired to evaluate that expansion, documented these targets in its 2014 final report to the Senate and House Ways and Means Committees and found that CPCS had taken a reasonably sound approach in setting them. The targets CPCS uses today therefore are not new; their basic structure and rationale have been before the Legislature for more than a decade. But a numerical target is a management tool. It is not a determination that every lawyer who falls below the target has unused capacity.

Individual caseloads vary for ordinary and legitimate reasons. Attrition, parental and medical leave, the time required for newly hired attorneys to build full caseloads, geography, court scheduling, policies and practices of prosecutors and other government entities, and substantial differences in case complexity all affect the number of matters an attorney can handle in a particular year. Targets also miss work entirely and do not adequately account for differences in the demands of individual cases. A serious felony, a complex child-welfare proceeding, a forensic commitment matter or another intensive case may consume substantially more attorney time than a less demanding matter while receiving the same numerical weight, or no additional weight at all. Some representation and other attorney work is not counted in the numerical target.

PDD illustrates the point. Its attorneys have reached approximately 91 to 96 percent of their numerical target in each of the last three fiscal years despite performing significant work that is not

captured by that measure. Similar limitations affect the targets used in CAFL, YAD and MHLD.

CPCS is modernizing those measures. It has completed the PDD workload analysis described above, revised YAD's methodology to incorporate case weighting, and begun the process of conducting comparable workload analyses for CAFL and MHLD using the same national methodology. Those efforts are designed to replace or refine blunt numerical targets with measures that better reflect the actual demands of the work.

A numerical target can be useful for management. Falling below it does not, by itself, establish that an attorney could responsibly accept additional cases.

Constitutional and Ethical Obligations Limit Attorney Workload

This is not a theoretical point. In *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 388-389 (2020), the Supreme Judicial Court held that ordering public defenders to accept cases beyond their reasonable capacity risks both ethical and constitutional harm. Rule 1.3 of the Massachusetts Rules of Professional Conduct requires attorneys to act with reasonable diligence and promptness, and Comment 2 to Rule 1.3 states that a lawyer's workload must be controlled so that every matter can be handled competently. *Carrasquillo* also recognized that excessive workloads can force attorneys to choose among clients, creating the very concurrent conflicts of interest Rule 1.7 prohibits. The Court cited the American Bar Association's guidelines for public defense workloads, which call for avoiding excessive lawyer workloads because of the adverse impact they have on the quality of representation for all clients.

On the constitutional side, Carrasquillo reiterated *Lavallee v. Justices of the Hampden Superior Court:*[12] The right to counsel means the right to effective assistance of counsel. Assigning additional cases to public defenders already at capacity, the Court explained in Carrasquillo, risks making them ineffective by hindering their ability to contest pretrial detention, investigate cases, make strategic decisions, file pretrial motions and prepare for trial, defeating the purpose of the right to counsel itself. *Carrasquillo* put it directly: doing so "improperly shifts the burden of a systemic lapse" in the public defense system onto the defendants that system exists to protect, which Lavallee had already made clear is a burden defendants are not to bear. Those constitutional and ethical obligations, not an annual organizational percentage, governed CPCS's assessment of attorney capacity throughout the counsel crisis.

That brings the analysis back to the distinction at the beginning of this Theme.

CPCS should have measured its compliance with the 20 percent requirement more accurately. It should have corrected its counting methodology sooner, and it is doing so now. But an inaccurate case count does not establish unused attorney capacity.

The 20 percent requirement answers one question: how much of the Commonwealth's indigent representation is being provided by staff public defenders rather than private assigned counsel.

12 *Lavallee v. Justices of the Hampden Superior Court,* 442 Mass. 228, 235 (2004).

Workload answers another: whether an individual attorney can responsibly take another case.

On that second question, the evidence is consistent. The NPDWS analysis, the earlier independent workload analysis and the constitutional and ethical rules governing attorney workload do not show a staff system sitting on substantial unused capacity. Under the same national workload benchmark the OIG recommends, PDD's existing cases already generate substantially more work than its current staffing can sustainably carry.

Better counting is necessary, and CPCS accepts responsibility for getting that right. But better counting should not be mistaken for evidence that attorneys had more capacity than the workload evidence shows.

Theme Three: The Report Evaluates Public Defense Primarily Through a Fiscal Lens Rather Than a Constitutional One

In Brief: *The report measures Massachusetts against other states almost entirely on cost per case, and finds Massachusetts expensive. CPCS does not dispute the arithmetic. What the comparison does not test is what the money buys. The Legislature asked the OIG to identify best practices from other jurisdictions, and the report does not identify any. This section explains what the cost comparison leaves out, what the public record shows about the states being compared, and where CPCS agrees its fiscal oversight should be stronger.*

Fiscal stewardship matters, and CPCS does not dispute that public money spent on indigent defense should be spent carefully, efficiently and with appropriate oversight. However, the report evaluates Massachusetts' public defense system almost entirely through a fiscal lens: what it costs, how many cases attorneys handle and how those figures compare with other states. Those are legitimate questions and worthy of examination, but they do not answer the equally important question of whether a public defense system provides the effective assistance of counsel the Constitution requires. Cost and constitutional effectiveness are not interchangeable measures. A system can spend less per case because it operates more efficiently; it can also spend less because its attorneys carry excessive workloads, defendants wait longer for counsel, attorneys are inadequately compensated or the system provides fewer of the supports necessary for effective representation. A comparison showing that one system costs more than another does not, on its own, establish that the more expensive system is inefficient.

That approach runs through the report. The basic framework measures efficiency, meaning what representation costs, without examining effectiveness, meaning whether representation meets the constitutional standard. The state-by-state comparison lines up spending and caseload figures without asking whether any of the states being compared deliver constitutionally adequate representation. The report's billing and audit findings likewise repeatedly treat higher costs or statistical outliers as suspect without ever identifying an instance of improper spending. In each area, the real question is what the difference measures and what the evidence supports.

The sections below take them up, along with the fiscal oversight CPCS already has in place that the report's framing undersells.

Efficiency Is Not Effectiveness

Public defense exists to guarantee the effective assistance of counsel required by the Sixth Amendment and the Massachusetts Declaration of Rights. Cost per case is a real, legitimate metric and CPCS tracks it, but it is not a measure of constitutional adequacy. A public defense system can be inexpensive and appear highly efficient on paper, yet fail to provide attorneys with sufficient time, resources and support to represent their clients effectively and meet its constitutional obligations. The report does not meaningfully examine that side of the equation. Its interstate comparison examines spending and caseload figures without determining whether the systems being compared provide constitutionally adequate representation under sustainable attorney workloads. Its comparison of staff and private representation relies heavily on average cost without fully accounting for differences in the work each performs. And its billing analysis repeatedly identifies statistical outliers and higher costs without identifying improper expenditures. The result is an analysis of what public defense costs without a corresponding analysis of what the Commonwealth receives, and is constitutionally required to provide, for that expenditure.

That limitation is most apparent in the report's comparison of Massachusetts with other states.

The Interstate Comparison Does Not Test What It Claims to Measure

The clearest example of the report's fiscal-over-constitutional approach is its state-by-state comparison. The Legislature directed the OIG to examine "best practices from other jurisdictions to provide adequate and cost-effective representation of indigent defendants." The OIG's report presents data from other states including total spending, cost per case, staff attorney counts, cases per attorney, hourly rates and fee caps. But it never identifies which system, if any, constitutes a best practice or analyzes whether the representation those systems provide is constitutionally adequate. The report does not examine whether any of those states meet national workload standards, are working through their own counsel shortages, rely on contract counsel because staff offices lack capacity, delay appointments for lack of available attorneys, are underfunded relative to their own stated needs, handle comparable categories of cases, use comparable delivery models or produce comparable representation. Several face exactly those problems.

What results is a table of data, which is a different thing from a comparative analysis of public defense systems.

The distinction is significant because the systems being compared differ substantially from Massachusetts and from one another. Some rely predominantly on staff attorneys; others rely heavily or almost entirely on private contract counsel. Some contract out entire counties or operate public defender offices in only a portion of the state. The states also differ in the categories of cases handled, compensation and assignment structures, attorney workloads, administrative costs and the services included in reported expenditures. Those differences directly affect both reported costs and reported case counts, making a simple cost-per-case comparison an unreliable measure of relative efficiency.

The underlying interstate data also presents comparability concerns: in at least some jurisdictions, publicly reported attorney and budget figures differ from the figures supplied in the OIG's survey.

Several of the comparison states are themselves struggling with the very conditions a best-practices analysis should examine. Several report counsel shortages, delayed appointments, excessive workloads, attorney turnover or funding levels their own public defense agencies describe as inadequate. The record for each state appears below.

Massachusetts still has things to learn from other states. But lower spending and higher caseloads are not enough, on their own, to identify a best practice. Before concluding that another system delivers indigent defense more efficiently, the analysis must ask whether that system is delivering comparable representation under sustainable attorney workloads. The OIG's interstate survey does not answer those questions.

What the Public Record Shows About Each Comparison State [13]

Louisiana: Indigent defense is run by two state entities created in a 2024 restructuring, the Office of the State Public Defender (OSPD) and an independent oversight board, through a mixed model of staff attorneys, private contract attorneys and nonprofit providers for capital and appellate work. OSPD itself describes its funding as "critical," "unstable," and "inadequate," and says the state cannot afford its current system. A 2025 national report cited by the National Association for Public Defense found some Louisiana public defenders carrying as many as 1,000 clients.

Maryland: The state-funded Office of the Public Defender (OPD) runs 12 district offices and pays private attorneys hourly for conflict cases. OPD's own reporting says it would need 1,649 attorneys to meet workload standards across its practice areas; it currently has 623. Measured against the 2023 National Public Defense Workload Study, the same benchmark the OIG cites for Massachusetts, Maryland would need more than 1,600 attorneys, including a rise in juvenile defenders from 42 to 103. More than 80 percent of OPD's fiscal 2026 budget goes to salaries and benefits.

Minnesota: The Minnesota Board of Public Defense (MBPD) administers all 10 judicial districts directly, with no meaningful private-attorney component, making it structurally very different from Massachusetts' mixed system. Minnesota's fiscal 2025 appropriation of $167 million reflects emergency funding added in response to its own counsel crisis: $25 million in fiscal 2023, $50 million in fiscal 2024 and $50 million in fiscal 2025, approved after the state's chief public defender said caseloads had become so severe that attorneys could not do their jobs.[14] Public figures for Minnesota's own attorney count and budget are also inconsistent across sources: MBPD's website reports 530 attorneys, the OIG's survey response reports 590 (with a footnote putting the real number at 575) and the Legislative Auditor's office reports about 625. Budget figures likewise range from $165 million to $167 million depending on the source. That inconsistency is

13 Descriptions of each comparison state are drawn from that state's own public defense agency reports, commission filings and legislative budget materials, together with the survey responses reproduced in the OIG report.

14 Minnesota House of Representatives, Session Daily, "Judiciary panel approves proposal to boost funding for public defenders" (Jan. 2023), https://www.house.mn.gov/SessionDaily/Story/17501.

a useful caution: The report's state-by-state comparisons rest on self-reported numbers CPCS has no way to independently verify, the same limitation the report never acknowledges when it treats Massachusetts' own figures as suspect.

Missouri: The Missouri State Public Defender (MSPD) and a seven-member commission oversee a mixed staff and contract system. In November 2019, more than 5,800 cases sat on public defender waiting lists across 29 counties, some for more than a year; additional funding eliminated the list by late 2021. MSPD's own fiscal 2025 report says the state remains "far from meeting" national workload standards, with some attorneys carrying more than 200 cases, including life-without-parole matters, alongside 16.5 percent annual turnover and three straight years in which overload referrals to private counsel outpaced conflict-of-interest referrals.

Montana: The Office of the State Public Defender sits inside the executive branch with no independent oversight commission. Its own fiscal 2025 performance report shows the office could not assign about one-fifth of new matters within 14 days, a shortfall equal to more than 51 full-time attorneys' worth of work every month, delaying assignment for more than 7,500 cases affecting over 5,700 clients. CPCS notes that the figures the OIG cites for Montana come from a survey Montana's own office completed and were not independently verifiable from any other source.

New Hampshire: Indigent defense runs almost entirely through private attorneys under contract with the New Hampshire Judicial Council; no attorney providing representation is a state employee. A 2022 Sixth Amendment Center study found that the state's primary defender nonprofit needed 127.7 full-time attorneys just to handle cases newly assigned in fiscal 2021, with contract and assigned counsel needing another 20 full-time attorneys, before accounting for any other workload demands on those attorneys' time.[15] That analysis describes what New Hampshire would need, roughly 148 full-time attorneys in total. It does not establish what the state had, so the report offers no baseline against which to read the figures it reports for New Hampshire.

New Mexico: The Law Offices of the Public Defender (LOPD) and an independent constitutional commission oversee a hybrid model in which contract attorneys handle roughly a third of the state's public defense cases at flat fees the state's own reporting calls inadequate. LOPD's fiscal 2026 report says caseloads for both staff and contract attorneys are "high enough to cause serious concern about whether most defendants are receiving constitutionally adequate representation," and the state's Public Defender Commission has adopted an interim rule letting attorneys decline new cases when workloads would make accepting them unethical.

Vermont: The Office of the Defender General staffs seven of the state's 14 counties directly and contracts out the other seven entirely on a flat-fee basis. The defender general has told the Legislature the state cannot fill open attorney positions, and the Vermont Supreme Court convened a commission in October 2025 to study the state's counsel crisis, noting that half of Vermont's indigent-defense attorneys are over 56.

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15 Sixth Amendment Center, The Right to Counsel in *New Hampshire: Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal and Juvenile Delinquency Cases* (Oct. 2022), at iv-v, https://law.seattleu.edu/media/school-of-law/documents/centers-and-institutes/korematsu-center/initiatives-and-projects/defender-initiative/6AC_NHreport_10252022.pdf.

Virginia: The Virginia Indigent Defense Commission funds public defender offices in only 28 of the state's localities; the rest rely on court-appointed private counsel paid hourly rates subject to statutory fee caps. A 2023 legislative audit found that participation by court-appointed attorneys fell by more than half between fiscal 2013 and fiscal 2023, and 60 percent of surveyed attorneys said they were considering leaving or taking fewer cases, citing low compensation and pay caps that leave most cases undercompensated relative to hours worked.

Higher Cost Per Case Does Not Establish Inefficiency

The report calculates that Massachusetts spends $2,752 per new case, the highest of 14 comparable states it surveyed. CPCS does not dispute that Massachusetts costs more per case. It disputes what that fact, standing alone, establishes. A cost-per-case calculation measures spending, not value. It does not measure constitutional adequacy, case complexity, timeliness of appointment, attorney workload, quality of representation or the institutional supports provided to attorneys.

As the comparison above demonstrates, lower cost per case can coexist with conditions that no best-practices analysis would treat as measures of success: attorney shortages, excessive workloads, delayed appointments, inadequate compensation and acknowledged concerns about the constitutional adequacy of representation. A system is not necessarily more efficient simply because it spends less per case, particularly if the lower cost reflects fewer attorneys, higher workloads or fewer resources devoted to each client. Cost per case cannot distinguish between savings produced by genuine efficiency and lower spending produced by a system operating with fewer resources than effective representation requires.

Massachusetts has chosen to invest in statewide administration, attorney training and supervision, workload controls, social services, investigation and a mixed staff/private delivery system. Those investments help explain why Massachusetts may cost more than systems that provide different services or operate under different workload conditions. Whether those investments produce value is the relevant question; a ranking based solely on cost cannot answer it.

Massachusetts Has Been Independently Recognized as a Strong Public Defense Model

The qualitative evidence omitted from the OIG's comparison is particularly important because Massachusetts' public defense system has received independent national recognition for many of the features that distinguish it from the systems the OIG compares it against.

CPCS has been recognized for work in a number of areas including: statewide administration, independent governance, a mixed-delivery model and a working commitment to workload standards and constitutional representation. The OIG's comparison does not examine any of that. It measures reported spending, staffing and case counts and stops there.

That reputation is not just self-assessment. A November 2023 report by the U.S. Department of Justice's National Institute of Justice and Office for Access to Justice, marking the 60th anniversary of *Gideon v. Wainwright*, singled out Massachusetts by name as having "a highly regarded, state-

administered, and state-funded model that provides both private assigned counsel and public defenders with robust oversight, training and supports; enforces case standards; and offers starting pay that approaches parity with prosecuting attorneys."[16] The report identified Massachusetts among the states that "have long had strong systems" and that "offer approaches that other states can adapt."[17] This is an independent federal assessment, not CPCS's own characterization of itself.

That recognition does not mean Massachusetts' system is beyond improvement, nor does it mean that cost is irrelevant. It means that a table of expenditures and case counts, without any examination of whether the states being compared meet workload standards, are working through their own counsel shortages, or produce constitutionally adequate representation, is not the best-practices analysis the OIG says it conducted. It also means that some of the expenditures reflected in Massachusetts' higher cost per case support features that independent national experts have identified as strengths: statewide administration and funding, a mixed staff and private-counsel delivery model, oversight, training and attorney support, case standards and more competitive attorney compensation. A comparison that measures what those features cost without considering what they provide gives an incomplete picture of relative efficiency.

The contrast with several of the OIG's comparison states is significant. As discussed above, several states continue to report difficulties with excessive workloads, inadequate compensation and timely appointment of counsel or other concerns about their ability to provide representation. Massachusetts has spent decades building institutional structures trying to address many of those same problems. A meaningful best-practices analysis should examine those qualitative differences before concluding lower spending or higher caseloads in another jurisdiction demonstrate greater efficiency.

Praise does not exempt Massachusetts from comparison. But a fair comparison would measure the features that make a public defense system effective as well as what that system costs. The Legislature asked the OIG to examine practices that provide both "adequate and cost-effective representation." A table of expenditures, staffing levels and case counts, without evaluating the adequacy of the representation those systems provide, answers only part of that question.

Staff and Private Counsel Perform Different Roles in a Mixed-Delivery System

The report makes a second cost claim, and CPCS answers it directly. The report finds that representation by CPCS staff attorneys costs more per case than representation by private-bar advocates, and concludes that, unless staff caseloads increase, it would be more cost-effective for the Commonwealth to continue relying on the private bar, even at higher hourly rates, than to expand staff attorneys.

CPCS does not dispute the arithmetic. Bar advocate representation costs less per case than staff representation, and it has for as long as CPCS has measured it. CPCS's own fiscal 2025 report to the Legislature calculated staff representation at $2,721 per case compared with $1,365 for the private bar, a difference of roughly 50 percent. The OIG's methodology produces different absolute

16 U.S. Department of Justice, National Institute of Justice & Office for Access to Justice, *Gideon at 60*: A Look at Public Defense Systems (Nov. 2023), at 22.
17 *Id.* at 43.

numbers: $3,432 against $1,798, a difference of roughly 48 percent. The absolute figures differ between the two methods, but the result is essentially the same.

This conclusion is also not new. The OIG-commissioned JMI evaluation reached the same basic conclusion in 2014, finding that staff representation remained more expensive per case than private assigned counsel. CPCS does not dispute that finding. The question, then as now, is what follows from the difference in average cost, and it is the one the report does not ask.

A per-case average compares two populations that do not necessarily perform identical work and so it does not establish the cause of that difference.

There is an even more fundamental problem with treating the private bar as a lower-cost substitute for staff representation: In 2025 it could not. Bar advocates are independent contractors who decide for themselves which cases to accept and when. The 2025 counsel crisis demonstrated what happens when enough of them decide to take fewer cases or none at all. Staff attorneys, by contrast, provide a core capacity the Commonwealth can deploy directly, subject to the constitutional and ethical workload limitations discussed in Theme Two.

A delivery model weighted further toward the cheaper component is also a model with less capacity to guarantee representation when that component withdraws, and the events this response describes in Theme One are the demonstration. An unrepresented defendant at arraignment generates no cost per case at all.

Massachusetts' mixed-delivery system exists to prevent that. The private bar provides scale and flexibility at lower unit cost. The staff side provides depth on serious cases, supervision, training and a floor under the Commonwealth's constitutional obligation. Each does something the other cannot, and pricing one against the other on a single per-case average answers a narrower question than whether the Commonwealth has built a sustainable and effective public defense system.

The report's cost analysis also leaves out what generates case volume in the adult criminal system in the first place. The right to counsel in Massachusetts attaches whenever a charge carries the possibility of incarceration, even when incarceration is unlikely. Offenses like operating with a suspended or revoked license carry that possibility and rarely result in it, yet each one still requires appointed counsel to spend real hours on the case. A comprehensive examination of the cost of indigent defense should consider not only what CPCS spends to represent those cases but also all the factors that generate the demand for appointed representation, in adult criminal cases and in every other area where counsel is constitutionally or statutorily guaranteed.

The Report Identifies Opportunities to Strengthen Fiscal Oversight, Not Evidence of Improper Spending

The report's billing and audit findings raise questions about whether CPCS can strengthen its existing fiscal controls. CPCS takes its obligation to perform fiscal oversight seriously and is already implementing several changes to enhance its existing controls.

But an important distinction should not be lost. After reviewing millions of lines of CPCS case and billing data, the report does not identify a single instance in which legal fees or vendor expenditures were improperly authorized, improperly paid or unsupported by work performed. A recommendation that oversight procedures could and should be strengthened is fundamentally different from the finding that public money was improperly spent. The report argues the former. It does not attempt to argue the latter.

CPCS also begins from a more substantial existing oversight structure than the report's background discussion suggests. CPCS provided the OIG with information describing all 14 audit and review types during the investigation, including through the internal control plan and the annual compliance materials. Billing is subject to multiple levels of administrative and legal review. Vendor expenditures require judicial authorization before costs can even be incurred, are reviewed again by CPCS before payment, and cannot exceed court-authorized funding limits. Fiscal oversight exists. The real question is how to strengthen it.

External Audits of CPCS

CPCS is also not an unaudited agency. The Office of the State Auditor (OSA) has audited CPCS repeatedly over the last two decades: covering fiscal 2005; fiscal 2008 through 2011; fiscal 2015 through mid-2017; a 2018 post-audit review covering CPCS and other auditees; calendar years 2019 through 2021; and a current audit covering fiscal 2022 through 2024. Counting audit periods, the OSA has audited roughly 13.5 of the last 22 years of CPCS operations, or about 61 percent of that time.

Recent OSA reviews have found that CPCS complied with all recommendations, rated CPCS's Audit and Oversight (A&O) auditing functions and internal controls as "satisfactory," and described CPCS's own audit process as "an important control to ensure that submitted bills are accurate and proper."

CPCS is subject to independent audit from other state entities as well. The Massachusetts House of Representatives Post Audit and Oversight Bureau reviewed CPCS in 2012, examining indigency determinations, the indigency fee and decriminalization efforts under G.L. c. 277, § 70C and other diversion programs; that review is attached as Appendix VI. The Department of Criminal Justice Information Services conducted a Policy and Security Awareness Audit of CPCS, covering fiscal 2021 through fiscal 2024 and completed in October 2023, and found CPCS fully compliant with all applicable rules and regulations. Together with CPCS's 14 internal audit and review processes, these independent reviews provide an additional layer of oversight beyond the few mechanisms described in the OIG report.

Case Caps and Statistical Review

The report recommends that CPCS consider per-case fee caps. CPCS does not support that recommendation.

Massachusetts already imposes an annual statutory hour limit on private assigned counsel, and the

report's own findings cut against adding a second restriction on top of it. Finding 18 acknowledges that even after the Legislature's recent rate increase, Massachusetts' bar advocate hourly rates remain lower than every other Northeast state the OIG surveyed: Connecticut, New York, Vermont, New Hampshire, Maine and Rhode Island.[18] One of the report's own principal sources on public defense delivery models identifies the existing hour cap as a contributor to attorney-supply problems. In the same article the OIG cites for background on public defense systems, University of Michigan law professor Eve Brensike Primus points to attorneys who effectively work without compensation once they reach the statutory cap and to the resulting difficulty finding attorneys willing to accept cases late in the fiscal year.[19] Adding a per-case fee cap onto hourly rates the report's own data shows are already comparatively low does not solve that problem. It compounds two problems at once, a rate that lags the region and a ceiling that discourages sustained work, rather than solving either.

A per-case cap would not solve the problem the current annual limit creates. It would relocate it. An attorney who has done everything a case reasonably requires would hit a ceiling before the case is finished, and the financial incentive would shift from continuing to litigate toward closing the case quickly, the same dynamic Professor Primus identifies in the existing annual limit, reproduced case by case instead of once a year.

National standards and independent research point the same direction. The American Bar Association's Ten Principles of a Public Defense Delivery System, revised in August 2023, calls for assigned counsel to be paid a reasonable fee on top of actual overhead and expenses, and its commentary states directly that counsel should not be paid on a flat-fee basis because such payment structures "reward counsel for doing as little work as possible."[20] The Brennan Center for Justice and the Vera Institute of Justice have each independently concluded that per-case fee caps can create incentives for attorneys to do less work once the maximum payment threshold is reached.[21] The Sixth Amendment Center reached a similar conclusion in its 2022 evaluation of New Hampshire's system, finding that flat per-case fees and capped hourly rates both put an attorney's financial self-interest in conflict with the client's legal interests, and recommending that the state ban fixed-fee contracts.[22] An empirical study of felony cases in Bexar County, Texas, found that the weaker outcomes of assigned-counsel clients, compared with clients who retained their lawyers, were not explained mainly by less capable attorneys taking assigned work; the authors concluded that attorney incentives under the county's fee structure likely played a central role.[23] A per-case cap risks reproducing that same dynamic in Massachusetts.

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18 Office of the Inspector General, *An Analysis of Indigent Defense in Massachusetts* (June 10, 2026), Finding 18, at 80.

19 Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 Mich. L. Rev. 207, 214-240 (2023).

20 American Bar Association, *Ten Principles of a Public Defense Delivery System* (rev. Aug. 2023), Principle 2 cmt. n.6 (quoting ABA Standards for Criminal Justice: Providing Defense Services).

21 Bryan Furst, A Fair Fight: *Achieving Indigent Defense Resource Parity*, Brennan Center for Justice, at 6 (2019); Nazish Dholakia, "Public Defenders Are Underfunded. Justice Pays the Price," Vera Institute of Justice (Feb. 17, 2026).

22 Sixth Amendment Center, *The Right to Counsel in New Hampshire* (Oct. 2022), at vi-vii (describing flat-fee contracts and capped hourly rates as creating conflicts of interest and recommending that New Hampshire statutorily ban fixed-fee contracts).

23 Amanda Agan, Matthew Freedman & Emily Owens, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24579, 2018).

CPCS agrees, however, with the underlying objective of identifying unusually high bills for appropriate review. A&O is building on CPCS's existing automated controls with a refined eBill check, expected to launch July 1, 2027, that will flag bills falling outside the expected range for the relevant type of case and require the attorney to identify why additional time was necessary. The system will allow A&O to collect and analyze that information without automatically delaying payment.

That approach addresses the legitimate fiscal-control concern without imposing a blunt ceiling on the amount of work an attorney may be compensated for performing in an individual case. Cases vary substantially in the time they reasonably require, and an effective review system should account for those differences rather than assuming that every case within a broad category should cost the same.

Statistical Exception Framework

The report also recommends that CPCS adopt a statistical exception framework to flag bar advocate bills for audit and review. CPCS agrees with that objective and is already developing such a framework.

A&O is analyzing historical billing data to design a new audit framework for enhanced oversight of private-counsel billing. That work is more complex than establishing a single dollar or hour threshold because the amount of work reasonably required in a case can depend on multiple factors, including the nature and combination of charges, the court in which the case is heard, and other characteristics of the representation. CPCS expects to have a working model ready for testing in fiscal 2027, so that it can launch with the refined check on July 1, 2027, a concrete deadline.

Those controls also sit on top of aging infrastructure, and CPCS is working on that as well. The systems that carry billing, vendor and case data through the agency are not merely payment tools; they are where information enters CPCS and where most internal controls operate. CPCS has begun a modernization effort covering those systems as part of its strategic plan, and requirements gathering is underway. A modern platform designed with controls treated as a core requirement rather than an afterthought would allow stronger and more automated oversight than the current systems can support. CPCS is not putting a date on that work here, because the requirements phase has only just begun and a date CPCS could not keep would be worth less than the commitment itself.

CPCS Already Uses Automatic Billing Controls

Finding 29 asserts, at page 94, that "the current CPCS environment does not have any automatic controls that flag outlier bills for further review or audit." That statement is inconsistent with the report's own text. Fifty-two pages earlier, at page 42, describing CPCS's own billing system, the report states that the eBill system "automatically flags excessive billing submissions and requires attorneys to submit documentation supporting the billed services." At page 99, Figure 45 goes further still, describing CPCS's existing fiscal controls for bar advocates as "moderate" and expressly identifying controls "around known billing thresholds" as a control already in place, the same threshold-based review system CPCS described to the OIG in detail during the investigation.
A report cannot describe a system in its Background section, rate that same system "moderate" in a

comparison figure and then declare later in a finding that the system does not exist. The "moderate" rating is telling. The OIG reached it after examining two of the many audit and review types CPCS conducts. Even on that partial view, it rated CPCS's controls moderate rather than weak. CPCS believes a review of the remaining 12 audit and review processes would have supported a stronger conclusion, and CPCS would welcome that examination.

Those controls are in fact substantial. CPCS's automatic controls place every case assignment into one of 34 categories, each with its own established billing threshold, developed following advice CPCS received from the Office of the State Auditor. Any bill that hits a threshold is held for review before payment, and the attorney must explain the circumstances that required an unusually high number of hours before payment is made. Thresholds vary with case type, with District Court cases carrying the lowest thresholds, and murder assignments carrying the highest. CPCS does not release these thresholds to bar advocates, as an internal control that protects the integrity of the review system. What the OIG describes as a recommendation for a new "statistical trigger" is therefore better understood as a refinement of controls CPCS already has. A&O's ongoing work on a new audit model, discussed above, reflects that refinement, intended to make that system more sophisticated.

"*Subjective*" vs. "*Objective*" Billing Tasks: Statistical Outliers Do Not Establish Improper Billing

What the Outlier Bills Actually Show

The report examined single-charge misdemeanor cases with bills at the 99th percentile and found that those cases contain proportionately more time devoted to preparation, investigation, legal research and writing than ordinary cases. It labels many of those activities "subjective" or "discretionary" and recommends using their relationship to more "objective" activities, such as court appearances and travel, to identify bills for additional review.

Nothing in the finding identifies any bill, in any case examined, as improperly billed, unnecessary or excessive. What the analysis identifies is a statistical difference in how attorney time was allocated. What the finding shows is that cases requiring more preparation, investigation and legal research take more attorney time, and therefore cost more.

A demanding case should produce exactly that profile, with more preparation, more research and more motion practice. The report does not identify which of these tasks it believes should have taken less time, nor does it determine that the amount of time spent on them was unreasonable.
The report's own data illustrates the point. Figure 40, at page 95, shows that in the outlier cases, time spent on case preparation increased by 9 percent, legal research by 6 percent, and drafting motions and legal memoranda by 4 percent, relative to non-outlier cases.

That matters because attorney preparation does not necessarily bear a fixed relationship to courtroom time. A case involving substantial digital discovery, difficult witnesses, a novel legal issue or significant motion practice may require extensive preparation and research but result in only a brief hearing. Court appearances and travel are often driven by court scheduling and other factors

outside counsel's control. They therefore provide an imperfect benchmark for determining whether the amount of preparation time in a particular case was reasonable.

The report's comparison is unfair. A bill at the 99th percentile is not, on that basis alone, an unreasonable bill. Cases that generate the highest bills are frequently the cases that demand the most work: uncooperative or unpredictable witnesses, novel legal issues, extensive discovery, digital evidence or similar complications. Measuring those bills against the average, and treating any departure from the average as suspect, assumes the answer to the question the report is asking. The label "discretionary" also does work in the report that the underlying facts do not support.

Investigation, legal research, witness preparation, review of discovery, legal memorandum drafting and motion practice are not optional extras, merely because the amount of time they require depends on the circumstances of the case. When reasonably necessary to provide competent representation, they are what the Rules of Professional Conduct and the Sixth Amendment require, and they are part of counsel's professional obligation to the client. As an example, reviewing body-worn camera footage or researching a novel legal issue is not discretionary in any meaningful sense; it is an attorney's obligation to the client.

CPCS agrees that statistical outliers can appropriately trigger review. But being an outlier is a reason to ask a question, not an answer to the question. A statistical exception can identify a bill that warrants closer examination; it does not establish that the bill is improper.

None of this is unique to this one finding. The report identifies unusual billing patterns and recommends stronger mechanisms for reviewing them, but it does not identify a specific expenditure as improperly paid. CPCS therefore supports using data to target additional review while preserving the distinction between a statistical exception and evidence of improper billing. The enhanced statistical framework A&O is now developing is built on that principle.

Waiting Time and Duty-Day Coverage

The report identifies variation among courts in payments for attorney waiting and travel time. The report found that in the 10 District Courts with the highest share of payments for nonproductive court costs, more than 20 percent of bar advocate payments were for waiting and travel time, and that this share varies widely from court to court. That variation warrants attention, but it is substantially affected by geography and court scheduling. An attorney practicing in a geographically dispersed area, appearing in a court with a lengthy docket delay, or appearing in a court like Edgartown will necessarily spend more time traveling or waiting than an attorney practicing in a denser jurisdiction or a court with different scheduling practices. The report frames the variation itself as a finding, though it does not suggest that any of this travel or waiting time is avoidable, inappropriate or excessive.

The report does not attempt to explain why travel and waiting times would be expected to be uniform regardless of geography or local court practice, and large waiting-time bills more plausibly reflect District Court scheduling realities in smaller jurisdictions than any billing problem. CPCS agrees that waiting time is unproductive. Unproductive, however, is not the same as avoidable. Attorneys do not control court calendars. CPCS strongly supports working with the Executive Office of the Trial Court

(EOTC) on docket management, culture and process changes that could reduce waiting time, and is prepared to aggregate and report waiting-time data to the EOTC and to the chief and presiding justices of the relevant courts, as the report recommends.

CPCS does not support further limiting payment for unavoidable waiting time on assigned cases. CPCS already limits waiting time to two hours per client per court date and three hours per day across all of an attorney's CPCS clients, and an attorney may only bill actual time spent waiting, not the maximum allowed. CPCS believes these limits already balance fair payment for genuinely unavoidable waiting time against fiscal oversight, and that tightening them further risks discouraging attorneys from taking on indigent-defense work they cannot be fully paid for. CPCS welcomes any court-side process improvements that would reduce actual waiting time, which is the more direct way to address the underlying problem.

Duty Day Waiting Time

The report notes that CPCS pays for waiting time on assigned cases but not on duty days, before any case is assigned, and suggests that gap helps explain why duty days are hard to fill. It recommends revisiting CPCS's waiting-time reimbursement policy, both to tighten controls on assigned-case waiting time and to allow controlled reimbursement for duty-day waiting time.

CPCS agrees duty days are hard to fill and supports creating a pay structure for them, but not the one the report suggests. Rather than pay duty-day waiting time by the hour, CPCS recommends a flat daily fee for an attorney's agreement to appear in court on a duty day.

CPCS Agrees That Audit Capacity Should Increase

CPCS agrees with the OIG that A&O should conduct more individual case audits and reviews. Doing so will require additional A&O staffing and investment in the IT infrastructure necessary to support the automated and statistical systems described above.

CPCS should also be precise about the two figures the report uses to measure that work, because they measure different things. The 10 full audits over three fiscal years is accurate, and CPCS does not dispute it, but it describes one of the 14 audit and review types A&O conducts rather than the whole of CPCS's oversight activity. The second figure, fewer than six complex-case reviews per 1,000 new bar advocate assignments, compares two sets of data that do not correspond. Complex-case reviews are triggered by bills rather than by new assignments, and a single assignment can generate several reviews across the life of a case. Measured against the population the reviews are actually drawn from, the bills submitted, rather than against new assignments, the share of billing CPCS reviews is considerably higher than the report's figure suggests. CPCS raises this to clarify the measure. It accepts the underlying point: the volume of individual case audits should increase, and doing so requires staffing and systems CPCS does not currently have.

That agreement should not obscure the review already occurring. Each business day, A&O reviews automated reports covering eBills submitted, including total bills and dollars, the highest 5 percent of individual bills, and billing activity by attorney. Those reports are reviewed for programming errors

and indications of fraud, waste and abuse, in addition to the threshold-based prepayment controls already described.

The report found that CPCS conducts a minimal number of audits and reviews relative to the volume of attorney bills it processes. In support of that finding, Figure 38 on page 93 highlights billing on five single-offense cases, such as larceny, threatening and receiving stolen property. The median billed hours across the offense categories examined ranged from 3.7 to 10.1 hours, which reflects efficient, representative billing in most cases, with a small number of outlier bills reaching 94.3 to 124.8 hours. The report treats that gap as suspicious. The existence of that gap warrants review, but the report does not determine that the hours billed in any of those cases were unjustified, unnecessary or excessive. As discussed above, a statistical outlier identifies a question for further examination; it does not answer that question. It is equally consistent with what CPCS's own audit and review data shows elsewhere in this response: A small number of genuinely complex cases, even within a typically straightforward charge category, requiring substantially more preparation, investigation or motion practice than the median case of that type.

CPCS's commitment to fiscal oversight is also reflected in the leadership of the division. Every CPCS chief auditor has been recruited directly from the Office of the State Auditor, including its current chief auditor, who previously served as director of Judicial and Law Enforcement Audits there.

CPCS therefore agrees that A&O should be expanded. Additional staff and IT resources would allow CPCS to conduct more individual case reviews and make fuller use of the automated and statistical tools now being developed.

CPCS Is Already Linking Vendor Costs to Public Defender Cases

The report correctly identifies a data limitation involving Indigent Court Costs Act (ICCA) expenditures: expert and vendor bills associated with staff public defender cases have not historically been electronically linked to those cases in the same manner as private-counsel assignments. CPCS agrees that this should change and that change is already underway. Before publication of the OIG report, CPCS began implementing a system and policy in spring 2026 that links expert and vendor bills to the relevant public defender case, and permits case-level tracking of those expenditures.

Indigency Determinations Are a Trial Court Function

The report's indigency findings identify legitimate issues, but they concern a process CPCS does not administer. Indigency verification in Massachusetts is performed by the Probation Service, an independent division within the Trial Court, not by CPCS. CPCS has no statutory role in screening a defendant's income or assets, and it does not control how often those checks are repeated over the course of a case. The report's findings about incomplete spousal verification, inconsistent follow-up checks and gaps in how government income sources are checked are findings about Probation's process, not CPCS's.

Massachusetts already has a statutory standard for determining indigency under G.L. c. 211D. CPCS

supports consistent and adequately resourced application of that standard and welcomes reforms that improve the accuracy and consistency of indigency determinations. CPCS's position on the counsel fee goes further: it should be eliminated. Section II sets out that recommendation in full. CPCS shares the Legislature's and the OIG's interest in ensuring that appointed counsel is provided only to those who qualify. But reforms directed at the indigency-verification process should be directed to the entities legally responsible for administering that process, the Probation Service and the Trial Court.

Theme Four: Litigation and the Legal Issues Raised by the OIG Report

In Brief: *CPCS welcomes oversight and cooperated fully with this investigation, turning over roughly two million lines of data across an eight-month review and responding to every category of request. CPCS substituted alternative case identifiers for the docket numbers and litigated the narrower legal question whether it could disclose the numbers themselves, which identify clients by name and matter and which the Rules of Professional Conduct bar CPCS from disclosing without client consent. That single question is now on appeal. This section explains the legal basis for CPCS's position and the steps CPCS took to give the OIG the analytic capability it sought without breaching confidentiality.*

CPCS's lawyers are bound by the same duty of confidentiality that governs every attorney in the Commonwealth, and that duty, not any reluctance to cooperate, explains how CPCS responded to the OIG's request for docket numbers. The only dispute concerned the form in which one category of information could lawfully be produced. The report calls CPCS "resistant to oversight," the same phrase the Inspector General used in the statement announcing the report and in its press coverage. That characterization rests on a single fact: CPCS declined to produce one category of information, docket numbers, in the form the OIG requested, after producing everything else the OIG asked for across an eight-month investigation. A single, principled, litigated exception to an otherwise complete production is not resistance to oversight. It is what a lawyer bound by ethical rules is supposed to do when one request conflicts with those rules: raise the conflict, propose an alternative and let a court resolve it if the parties cannot agree. That is exactly what happened here, and a Superior Court judge agreed with CPCS that docket numbers are confidential client information, while ruling for the OIG on whether its statute permits their disclosure. An agency that turns over two million lines of data, sits for six rounds of meetings, gives a live walk-through of its case-management system, and litigates its one disagreement openly in an unsealed court record is not shunning oversight.

What follows lays out the governing rule, how CPCS responded and where the resulting dispute stands today.

A False Dichotomy: Confidentiality and Accountability Are Not Incompatible

CPCS's confidentiality obligations and its cooperation with this investigation are not in tension. An agency can meet both at once, and CPCS did. The report treats them as mutually exclusive, casting CPCS's handling of one category of information, docket numbers, as proof that CPCS resisted the investigation. It did not. CPCS's lawyers are bound by the same professional responsibility rules as every other lawyer in the Commonwealth and following those rules while fully cooperating with every other OIG request is exactly what CPCS did here.

What Rule 1.6 Requires

Massachusetts Rule of Professional Conduct 1.6 requires a lawyer not to reveal information relating to the representation of a client unless the client has authorized it or another exception applies. Rule 1.6 is deliberately broader than the attorney-client privilege: It covers all information relating to the representation, not only confidential communications, and it applies whether or not that information happens to be publicly available elsewhere.

Turning over a list of docket numbers would have violated that rule, because it would confirm, case by case, that a specific docket belongs to a CPCS client. Even though the docket itself is a public record, the fact that a particular person is a CPCS client, and the fact of representation itself, are both protected by Rule 1.6 unless disclosure is authorized or otherwise permitted. A docket number also does more than confirm who CPCS represents. It is a key that unlocks charging documents, hearing history, co-defendants, witnesses, filings, pending motions and the existence of any sealed entries, all in a single search.

CPCS cooperated fully with oversight while making sure the method of disclosure complied with CPCS's duties of confidentiality and loyalty to its clients. The report instead treats this ethical decision as though CPCS faced a binary choice, hand over docket numbers or resist oversight. The real question was never whether oversight should happen; it was whether this method of oversight was consistent with the ethical rules that govern every lawyer in the Commonwealth.

What CPCS Did

The record of that cooperation is extensive. The investigation ran eight months, beginning around September 2025, and CPCS supplied the OIG with an estimated two million lines of data during that period. CPCS accepted every meeting the OIG requested and met with OIG attorneys, investigators and data analysts at least six times, in person or virtually, in addition to a live, in-person demonstration of CPCS's case-management system in which CPCS staff answered every question the OIG's team raised. CPCS provided the requested data fields and data dictionaries for all four of its core information systems: Zelly, eBill, Vbill and D3/PICK. Some of the OIG's requests repeated earlier ones with only minor changes, and CPCS responded to each in turn.

CPCS provided redacted, case-level information for every case assigned to CPCS staff and every case assigned to the private bar, billing data for every bill submitted by private attorneys, and redacted information on every court cost vendor and expert bill submitted for payment on both public and private cases for the period from July 1, 2022, through Dec. 31, 2025. The date range shifted as the dispute moved into litigation; the range at issue on appeal runs from Jan. 1, 2023, through Jan. 27, 2026. CPCS also provided billing data for every private-counsel mentor, associate and paralegal bill the OIG requested, the specific caseload of every staff public defender, and copies of every supervisor, mentor and bar advocate program contract. CPCS gave the OIG its Internal Control Plan, its reports to the House and Senate Ways and Means Committees, copies of prior state audits and past reports from JMI and the National Legal Aid & Defender Association. CPCS also provided detailed written explanations of how staff cases are handled and supervised, how private counsel are overseen by supervising staff and bar advocate programs, the metrics CPCS

uses to evaluate both bar advocates and staff attorneys, and its current and prior conflict policies, including an in-person walk-through of how staff check for conflicts.

Nor is CPCS's cooperation with outside review unique to the current investigation. In 2012, pursuant to a legislative mandate, the OIG selected JMI to conduct an independent evaluation of CPCS's implementation of the Legislature's expansion of staff representation. The Legislature separately required CPCS to provide the evaluator full cooperation and access to necessary information and data. CPCS did so. JMI's two-year evaluation identified areas of disagreement with CPCS, including the relative cost of staff and private representation, but did not describe an agency resistant to scrutiny or unwilling to provide the information necessary for independent review.

The OIG asked a series of questions about the cases CPCS handled and assigned, including a request for docket numbers, and CPCS answered all of them. For the docket-number request, CPCS provided the requested case-level information using different unique identifiers: a Notice of Assignment of Counsel (NAC) number for bar advocate cases and an internal case number for staff cases. CPCS did so after consulting with former Massachusetts Bar Counsel because of the confidential information accessible through a docket number.

The OIG did not accept that substitution as sufficient. In December 2025, it moved in Suffolk Superior Court to compel CPCS to produce actual docket numbers, covering an estimated 400,000 docket numbers and thousands of clients. The Superior Court granted the motion on Jan. 27, 2026, and CPCS filed an appeal, which remains pending as of this writing.

CPCS is not appealing a loss on the underlying confidentiality question, because it did not lose that question. On that question, the Superior Court agreed with CPCS. Judge Catherine Ham found that docket numbers do constitute confidential client information protected by Rule 1.6(a). The Court ruled against CPCS on a narrower question, and that ruling is why it granted the OIG's motion: whether the OIG's authorizing statute, G.L. c. 12A, § 9, qualifies as "other law" under Rule 1.6(b)(6), which permits disclosure "to comply with other law or a court order." CPCS is appealing that specific legal question.

Why CPCS Opposes Production of the Docket Numbers

CPCS's opposition rests on the same rule that governed its original response. Rule 1.6(a) protects any information relating to a client's representation that is likely to be embarrassing or detrimental if disclosed, whether or not that information happens to be a matter of public record elsewhere. Given the range of matters CPCS handles, criminal charges, but also mental health commitment, involuntary medication, juvenile delinquency and child welfare proceedings, a docket number can reveal exactly the kind of information Rule 1.6 exists to protect. The Supreme Judicial Court has held that the relevant question is whether information is known in the community, not merely whether it is technically available in public records. In Matter of Michael J. Kelley, the Court read the rule to turn on whether information is known rather than whether it is knowable and directed attention to how many people in the relevant community, trade, field or profession have learned it.[24] Availability in public records is

24 *Matter of Michael J. Kelley*, 489 Mass. 300, 304 (2022).

not dispositive. The OIG has argued that docket numbers are publicly available in various locations. Under governing Massachusetts law, that misses the point. Information can be available without being known, and the test is whether the community actually knows it. The report itself makes the distinction plain. The OIG notes that it has already received docket numbers from the Trial Court in response to its own request. What the OIG sought from CPCS was therefore never access to docket numbers, which it had. It was CPCS's confirmation of which of those dockets belong to CPCS clients. That confirmation is the disclosure Rule 1.6 protects, and it is not cured by the fact that the underlying docket is public.

CPCS also argued that the OIG's own authorizing statute, G.L. c. 12A, § 9, contains no language specifically directing disclosure of docket numbers or the information a docket number leads to, and that general statutory authority does not override an ethical rule the Supreme Judicial Court has adopted to govern the practice of law, a core judicial function CPCS argued the Legislature cannot displace by general statutory language. CPCS considered a further argument under the criminal offender record information statute and did not press it. The governing regulation lists Inspector General offices among the examples of criminal justice agencies, and CPCS concluded that argument would not carry.[25] That matters because it shows how little CPCS contested: one rule, one question and only where CPCS believed the law supported it.

In its cover letter to the Ways and Means Committees, at page 5, attached as Appendix II, the OIG says it offered CPCS additional protective measures, comparable to those courts use to shield trade secrets and other highly confidential information, and that CPCS refused even after that offer. CPCS should be direct about why that offer, however well intended, could not resolve the problem.

A protective order controls what happens to information after it is disclosed. It restricts who may see it and what they may do with it. Rule 1.6 operates a step earlier. It governs whether the disclosure may be made at all, and permits it only with the client's informed consent, where it is impliedly authorized to carry out the representation, or where paragraph (b) allows it. The rule is not a rule about publication; it is a rule about revealing information relating to the representation to anyone outside it. Handing the OIG a list of docket numbers under seal is still handing over the list. The fact of each client's representation would become known to people outside the relationship, which is the disclosure the rule restricts, and no undertaking about redistribution changes that.

The consent point is what makes this unavoidable rather than merely cautious. Consent under Rule 1.6 belongs to the client, not to CPCS. CPCS cannot give it on a client's behalf, and it cannot trade it away in an agreement with another agency. Whether any other exception applies, including the provision for disclosure required by other law, is the question now on appeal. An arrangement between CPCS and the OIG, whatever its terms, is an agreement between two parties about a third party's rights. Thousands of clients were covered by the order at issue. None of them was asked, and none of them could practically have been.

CPCS's position is that the question is not only ethical. Clients are entitled to the effective assistance of counsel under both the federal and state constitutions, and CPCS reads that guarantee to assume

25 803 C.M.R. § 7.02.

a lawyer who complies with the rules governing the practice of law. On that reading, a protective order that leaves the underlying disclosure intact does not resolve the problem. CPCS did not refuse a reasonable compromise. It declined an arrangement that addressed the wrong risk, and it offered a substitute, the alternative identifiers described above, that would have given the OIG the analytic capability it needed without the disclosure the rule bars.

CPCS litigated this one narrow question openly, in court, while cooperating fully with every other request the OIG made. CPCS also moved to terminate the impoundment order covering this litigation, with the assent of the OIG, and the Court allowed the motion. Neither side wanted this dispute sealed. The docket-number dispute is public record today because CPCS asked that it be. Theme Three describes the broader record of external and internal oversight CPCS already operates under.

V. Proactive Structural Changes the Legislature and the Courts Should Consider

Below are six action items that CPCS believes would make the greatest difference to its delivery system. Each requires legislative or other action that CPCS cannot undertake on its own.

- Further increase bar advocate compensation, beyond the 2025 and 2026 legislative increases already secured.
- Fund a flat daily fee for duty-day coverage.
- Fund a referral bonus program for bar advocates who recruit other qualified attorneys onto the panel.
- Eliminate the counsel fee assessed on indigent defendants.
- Work with the courts on structural changes to reduce pretrial custody at arraignment.
- Fund additional Audit and Oversight staffing and IT resources to expand CPCS's own billing-review capacity.

There are also three recommendations in the report that CPCS urges the Legislature not to adopt, for reasons discussed in the themes above:

- Do not impose a per-case fee cap on bar advocate billing. The OIG report's own principal source identifies the existing statutory hour cap as a contributor to attorney-supply problems, and Finding 18 confirms Massachusetts' bar advocate rates remain below every other Northeast state even after the recent increase. A second cap, layered on rates the report's own data shows are comparatively low, would compound both problems at once. CPCS supports a targeted alternative instead: expanding Audit and Oversight staffing and its automated billing-review thresholds to flag genuine outliers directly, rather than capping every attorney's pay on every case of a given type.
- Do not tighten controls on assigned-case waiting time. CPCS already limits waiting time to two hours per client per court date and three hours per day, and attorneys may bill only actual time waited.
- Do not treat the statutory 20 percent case ratio as a measure of attorney capacity. The national workload standard the OIG itself recommends shows CPCS attorneys already carrying more than a sustainable load.

VI. Conclusion

CPCS takes the Inspector General's oversight seriously and has identified specific areas where change is warranted. CPCS is correcting its historical case-counting methodology and, separately, modernizing its workload measures to better reflect the demands of different cases. CPCS supports reform of the indigency-verification process, though it does not administer that process, and agrees that bar advocate compensation, duty-day incentives and CPCS's audit capacity should continue to improve. Work on each is already underway.

What CPCS rejects is the premise that these areas for improvement add up to a broken system failing the clients it exists to serve. The evidence does not support that conclusion, and several of the measures the report relies on do not test what they are said to test.

CPCS accepts responsibility for the changes within its authority to make, asks the Legislature and the courts to address the structural problems CPCS cannot solve alone, and remains committed to the measure that should govern every decision in this area: whether every person entitled to appointed counsel receives effective representation.

Appendix

Appendix I. *Meeting the Mandate: Assessing PDD Attorney Workloads, Performance, and Capacity, June 2026*. CPCS's workload analysis for adult criminal caseloads, applying the National Public Defense Workload Study methodology. Cited in Section II and Theme Two.

Appendix II. Cover letter of the Office of the Inspector General to the Senate and House Committees on Ways and Means, transmitting An Analysis of Indigent Defense in Massachusetts. Cited in Theme Four on the protective-order offer.

Appendix III. *Letter from the Chief Counsel to the Chief Justice of the Trial Court and the Chief Justice of the Superior Court, May 21, 2025*. Copied to the regional administrative justices, the district attorneys and the probation commissioner. Cited in Theme One.

Appendix IV. Justice Management Institute, A Study of the Expansion of the Committee for Public Counsel Services' Representation of the Indigent, final report to the Senate and House Committees on Ways and Means, June 2014. Commissioned by the Office of the Inspector General. Cited in Themes One through Four.

Appendix V. *Chief Counsel's Report to the Committee on CPCS Budget and Expansion Implementation Plan, Feb. 6, 2012*. Sets out the reasoning behind each division's target annual caseload. Cited in Theme Two.

Appendix VI. *Massachusetts House of Representatives Post Audit and Oversight Bureau, review of CPCS, 2012*. Examined indigency determinations, the indigency fee and diversion under G.L. c. 277, § 70C. Cited in Theme Three.

Appendix VII. *National Public Defense Workload Study, RAND Corporation, American Bar Association and National Center for State Courts, July 2023*. The national workload standard the OIG recommends and CPCS applies. Cited in the Executive Summary and Theme Two.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
COMMITTEE FOR PUBLIC COUNSEL SERVICES
PUBLIC DEFENDER DIVISION

MEETING THE MANDATE:
ASSESSING PDD ATTORNEY WORKLOADS, PERFORMANCE AND CAPACITY

A WHITE PAPER OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES
JUNE 2026

EXECUTIVE SUMMARY

The Committee for Public Counsel Services' (CPCS) Public Defender Division (PDD) fulfills one of the Commonwealth's most important constitutional obligations: providing effective legal representation to indigent defendants. This white paper assesses PDD attorney workloads through the 2023 National Public Defender Workload Study (NPDWS), the most comprehensive evidence-based assessment of public defense staffing ever conducted in the United States.

The analysis demonstrates that PDD attorneys are carrying exceptionally demanding workloads. Applying NPDWS methodology to Massachusetts caseload data shows that current PDD attorneys are performing work equivalent to approximately 2.1 full-time attorneys under nationally recognized workload standards. A separate workload study conducted for CPCS in 2014 reached the same fundamental conclusion: the demands placed on public defenders substantially exceed the capacity reflected in existing staffing levels.

The report further demonstrates that modern criminal defense practice is substantially more complex than it was a generation ago. Digital evidence, electronic discovery, forensic evidence, motion practice, client communication, investigation, and mitigation advocacy all require significant attorney time that is not captured by simple case counts. Workload is measured not merely by the number of cases assigned, but by the professional effort required to handle those cases effectively.

The central conclusion of this report is straightforward: PDD attorneys are meeting the

Commonwealth's constitutional obligations while carrying workloads that meet or exceed nationally recognized benchmarks. The data reflects a highly productive attorney workforce that continues to shoulder a substantial share of the Commonwealth's indigent defense responsibilities with professionalism, skill, and dedication.

OVERVIEW

This White Paper examines the workloads of staff attorneys in the Public Defender Division (PDD) of the Committee for Public Counsel Services (CPCS) in the context of the 2023 National Public Defender Workload Study (NPDWS). It presents evidence that PDD attorneys are performing at extraordinary levels relative to available resources while fully meeting their constitutional, professional, and ethical obligations to indigent defendants across the Commonwealth of Massachusetts.

The NPDWS represents a rigorous, evidence-based benchmark for public defense staffing. Its application to the PDD reveals a dedicated corps of attorneys carrying the weight of approximately 2.1 full-time equivalents each — an extraordinary testament to the commitment of every public defender in the Commonwealth. While full alignment with NPDWS standards is a worthy and necessary long-term goal, achieving it requires a sustained and substantial investment in attorney staffing that goes well beyond current levels. This paper makes clear that PDD attorneys are not falling short of their duties; they are exceeding them, often at considerable personal cost.

I. INTRODUCTION: THE MANDATE AND ITS WEIGHT

The Public Defender Division of the Committee for Public Counsel Services stands as one of the most consequential and demanding public law offices in the Commonwealth of Massachusetts. Responsible for the representation of more than one in four defendants in the criminal courts of the state, PDD attorneys carry not merely a caseload but a constitutional mandate — the assurance, embedded in the Sixth Amendment and reinforced by decades of Massachusetts jurisprudence, that no person accused of a crime will face the machinery of the state without competent legal counsel at their side.

This paper does not flinch from the findings of the 2023 National Public Defender Workload Study (NPDWS). Applied rigorously to the PDD, those findings reveal a meaningful gap between current staffing levels and what a fully resourced public defense system would look like. But context matters enormously, and an honest reading of the data leads to a conclusion that is at once sobering and affirming: CPCS attorneys are performing at an extraordinary level of professional commitment, sustaining representation that meets constitutional and ethical standards while managing a rapidly expanding and increasingly complex caseload.

The purpose of this White Paper is to present that evidence clearly and to make the case, grounded in the NPDWS methodology and the agency's own historical data, that PDD attorneys are not just keeping pace with their mandate, they are exceeding it, often at considerable personal cost. It is also to establish that any transition toward full NPDWS compliance requires a scale of attorney hiring that must be understood, planned for, and resourced accordingly.

II. BACKGROUND: WHO WE ARE AND WHAT WE DO

CPCS was established by the Massachusetts Legislature under G.L. c. 211D to fulfill the Commonwealth's constitutional obligation to provide legal representation to indigent defendants. The Public Defender Division is the staff component of that mission, employing attorneys in unified trial offices across the state to represent defendants in District and Superior Court criminal proceedings, as well as in related matters such as civil commitment hearings under G.L. c. 123 and witness privilege representations.

The PDD's statutory charge goes beyond simply providing representation. Chapter 211D requires CPCS to establish "specified caseload limitation levels" and to "monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants." As the Supreme Judicial Court recognized in *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367 (2019), "CPCS has experience and expertise in managing the caseloads of its staff attorneys." That expertise has been honed over decades of practice, and it has produced a body of institutional knowledge that informs every staffing decision the agency makes.

As of February 2026, the PDD employed the equivalent of 245 full-time attorneys (FTAs), defined as attorneys working full-time caseload equivalencies. This includes trial attorneys, supervisors, and Attorneys-in-Charge, the latter of whom count as 0.5 FTAs given their significant managerial and administrative responsibilities. In FY 2024 and FY 2025, the agency employed 205 and 200 FTAs respectively. Our aggressive growth in FY 2026 reflects both the agency's ongoing recruitment efforts and legislative direction to expand access to PDD representation within the Commonwealth's criminal docket.

245	732,230	~ 2.1X
Full-Time Attorney Equivalents (FY 2026)	Annual Case-Related Hours Mandated by Current Caseload	Average Workload Ratio Per Attorney vs. NPDWS Standards

III. THE CASE FOR THE PDD: ATTORNEYS WHO CARRY MORE THAN THEIR SHARE

Numbers, even well-constructed ones, can obscure as much as they reveal. The workload data compiled for this paper does not capture the full texture of what PDD attorneys do. It does not count the after-hours calls from clients in crisis, the weekend preparation for Monday morning hearings, the months spent building rapport with a client who has every reason not to trust the legal system, or the emotional weight of being the last line of defense for someone facing years of incarceration. It does not capture the vicarious trauma that accumulates in attorneys who represent victims of violence, or the intellectual labor of staying current with an ever-evolving body of criminal law.

What the data does show is that PDD attorneys are not shirking their responsibilities. They are not carrying light caseloads. They are not coasting through careers in public defense. By every available metric, they are working at levels that exceed what the leading national standard for their profession considers the sustainable maximum. They are doing so because the clients on the other side of their desks have nowhere else to turn.

> PDD attorneys are not falling short of their duties. They are exceeding them, absorbing the workload of a system whose staffing has not yet caught up with the demands of those duties.

Key Indicators of Professional Performance

The following performance dimensions — identified in the Answering Gideon's Call Project (GCP), a workload study conducted in 2014 by CPCS in partnership with the Center for Court Innovation — as measurable indicators of quality indigent defense practice, reflect the professional standards to which PDD attorneys hold themselves:

- **Client Relationship and Communication:** Attorneys maintain active communication with clients throughout the pendency of representation, ensuring informed participation in case decisions.
- **Discovery Review and Case Analysis:** Attorneys review and analyze all discovery provided by the prosecution, identify weaknesses in the government's case, and build defense strategies accordingly.
- **Independent Investigation:** Working with PDD investigators, attorneys independently investigate the facts of each case, interview witnesses, and develop their own record beyond what the Commonwealth provides.
- **Motion Practice:** Attorneys challenge unconstitutional searches, unreliable identifications, improper statements, and other evidentiary infirmities through vigorous motion practice at the trial level.
- **Social Services Advocacy:** Attorneys work with social services advocates to develop dispositional alternatives and present mitigation evidence that addresses the root causes of a client's circumstances.
- **Trial Litigation and Persuasion:** Where cases cannot be resolved through plea, attorneys prepare and try cases before judges and juries.
- **Client Counseling and Outcome Explanation:** Attorneys ensure that every client understands the charges against them, the rights they hold, the options available, and the likely consequences of any given course of action.

Each of these tasks consumes time — the same time that the NPDWS attempts to quantify and protect. That PDD attorneys perform all these functions, across caseloads that exceed national benchmarks, is a tribute to the quality and commitment of the PDD's attorney workforce. It is also a caution: The capacity to perform these functions under current conditions is not infinite. Sustained overwork erodes quality, accelerates attorney burnout and turnover, and ultimately undermines the constitutional protection that the entire system is designed to provide.

IV. PDD'S CURRENT CASELOAD STANDARDS: A FRAMEWORK BUILT ON EXPERIENCE

For decades, the PDD has employed a practical, internally developed framework for measuring attorney workloads. That framework, memorialized in the 2019 "Guidelines for the Implementation of Unified Public Defender Division Offices 2.0," is built around a weighting system that assigns one unit to District Court cases, two units to Superior Court cases or Superior Court-bound cases, and five units to murder cases — the so-called 1:2:5 standard.

Under this framework, a full-time staff attorney is generally expected to carry an active weighted caseload of 50 to 70 cases at any given time and to "touch" approximately 190 weighted cases over the course of a calendar year. The Guidelines acknowledge that these figures are advisory, and that an individual attorney's appropriate caseload is "an individualized determination based on multiple factors, including but not limited to an attorney's experience, volume of cases, types and

severity of cases, and other case-specific demands." This individualized approach is not a weakness; it reflects an understanding that quality legal representation does not reduce to numbers on a spreadsheet.

> "Requiring defense attorneys to take on more clients than they can reasonably handle may impede their ability to meet [their] obligation under Rule 1.3 of the Massachusetts Rules of Professional Conduct to act with reasonable diligence and promptness in representing a client." *Carrasquillo v. Hampden County District Courts, 484 Mass. 367 (2019).*

The SJC's ruling in *Carrasquillo* underscored the constitutional stakes of caseload management: When attorneys are overloaded, the right to effective assistance of counsel is not merely impaired — it is "defeat[ed]." The Legislature recognized this in G.L. c. 211D, § 9(c), expressly directing CPCS to set caseload limitation levels. The PDD's Guidelines represent the agency's good-faith response to that directive, grounded in the practical wisdom of senior practitioners who built those standards from the ground up.

While the 1:2:5 framework has served as a workable approximation for many years, PDD leadership recognizes that it is an imprecise instrument. It does not adequately differentiate among felony case types — treating, for example, an aggravated rape of a child and a drug distribution subsequent offense as equivalent in workload terms — and it does not capture the kind of granular, hour-based data that would allow for rigorous staffing analysis. PDD is committed to evolving its framework informed by the NPDWS.

V. THE NATIONAL PUBLIC DEFENDER WORKLOAD STUDY: AN EVIDENCE-BASED BENCHMARK

Published in 2023 through a collaboration among the RAND Corporation, the National Center for State Courts, the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, and attorney-researcher Stephen Hanlon, the NPDWS represents the most rigorous, scientifically grounded examination of public defense workloads ever conducted in the United States. It supersedes the 1973 National Advisory Commission standards, which lacked empirical backing and have long been criticized for producing unreliable guidance.

The NPDWS' methodology is built around a Delphi study process: a panel of 33 expert criminal defense attorneys, working through multiple rounds of anonymous deliberation, reached consensus on the average number of hours required to provide constitutionally adequate representation across 11 categories of criminal cases. That consensus was then cross-referenced against 17 state-level public defense workload studies conducted between 2005 and 2022, producing case weight standards that are both empirically grounded and nationally recognized.

NPDWS Case Weights Applied to PDD (1,411 Available Hours per FTA)

Case Type	Hours / Case / Year	Annual Max Cases
Felony – High – LWOP	286.0	4
Felony – High – Murder	248.0	5
Felony – High – Sex	167.0	8
Felony – High – Other	99.0	14
Felony – Mid	57.0	24
Felony – Low	35.0	40
DUI – High	33.0	47
DUI – Low	19.0	74
Misdemeanor – High	22.3	63
Misdemeanor – Low	13.8	102
Probation/Parole Violations	13.5	104

The case weights in the table above represent the average number of attorney hours, per year, that adequate representation of a case in each category requires. The "Annual Max Cases" column reflects how many such cases a single PDD attorney, working 1,411 available case hours per year, could carry while meeting those standards. This is not an aspirational figure. This is the ceiling above which representation becomes ethically inadequate.

PDD staff attorneys are compensated for 35 hours a week (no matter how many hours an attorney actually works), for a total of 1,820 hours per year (again no matter how many hours an attorney works). The 1,411-hour figure is the yearly amount of case-specific work hours for which full-time PDD trial attorneys are compensated. The remaining 409 hours consist of work done on non-case specific tasks such as training and administrative matters and paid leave time.

As mentioned, the 1,411 work hours per year encompasses all work done by a staff attorney in connection with their cases, including such things as discovery review and analysis, legal research, drafting and filing of various motions with supporting legal memoranda and affidavits, conducting necessary investigations and interviews of witnesses, interviewing and working with clients and social workers, retaining and working with expert witnesses, providing reciprocal discovery, communicating with prosecutors, appearing in court and litigating pretrial motions, trial preparation, and the trial of cases.

The remaining hours of yearly compensation for a staff attorney consist of paid leave time (holidays, vacation, personal, and sick leave) and other duties of a full time staff attorney such as participation in training and continuing legal education, attendance at mandatory office meetings, keeping client files updated, non-client related mailings, non-client related phone calls, scheduling, and travel time to court, jails and prisons and crime scenes.

In short, the 1,411 case-specific hours is a measure of how much case-specific work we should

reasonably expect full-time staff trial attorneys to perform considering their other necessary job responsibilities.

The 1,411 hourly figure for case-specific work of a full-time staff trial attorney should not be confused with the annual 2,000-hour cap for compensable work performed by a private attorney (Bar Advocate). That cap is an annual limit on the number of hours of work a Bar Advocate can be compensated for. A Bar Advocate is not expected or required to work that many hours and may work far less. On the other hand, the 1,411 case-specific hours is an expectation of the number of hours that a full-time staff trial attorney will spend working their cases. The reality is that most full-time staff trial attorneys far exceed that number.

VI. WHERE PDD STANDS: AN HONEST ASSESSMENT OF CAPACITY AND PERFORMANCE

Applying the NPDWS methodology to the PDD's actual caseload data — drawn from CPCS's case management system for the five-year period FY 2019 through FY 2024 — produces a clear picture of where the agency stands. The analysis required mapping each Massachusetts offense to an NPDWS case type, calculating the average annual hours devoted to each case type, and aggregating those figures to produce a total annual case-hour demand.

That total comes to 732,230 hours per year for criminal cases, plus an additional 23,903 hours for probation surrenders, for a combined annual demand of approximately 756,133 case-related hours. At 1,411 hours of available case time per FTA, meeting that demand in full would require 519 full-time attorney equivalents. The PDD currently employs 245.

Thus, on average, PDD attorneys in FY 2026 carried the equivalent workload of approximately 2.1 full-time attorneys under NPDWS standards. This is not evidence that attorneys are failing to do their jobs. To the contrary, it reflects extraordinary professional dedication sustained under conditions of chronic resource constraint. The same analysis — applied through the lens of CPCS's 2014 workload study — produces a somewhat more modest but still significant finding. This study, conducted before the significant expansion of digital evidence, electronic discovery, and other demands of modern criminal practice, employed its own Delphi methodology and identified nine case categories. The category weights ranged from 2.19 hours for a bail-only District Court appointment to 76.36 hours for a non-concurrent Superior Court felony, placing the PDD's average annual workload at approximately 425,000 hours. Under that standard, the PDD would need 301 FTAs. With 245 currently employed, the average attorney is carrying the work of 1.5 FTAs. In FY 2026, given current caseloads, that figure is approximately 1.2 FTAs per attorney.

Staffing and Workload Comparison at a Glance

Metric	Benchmark / Required	Current (FY 2026)	Context
FTAs Required (NPDWS Standard)	519	245	274 short
FTAs Required (GCP/2014 Standard)	301	245	56 short
Avg. Attorney Workload (NPDWS)	2.1×	-	Per FTA
Avg. Attorney Workload (GCP/FY'26)	1.2×	-	Per FTA
Annual Case Hours Mandated	732,230	-	Total PDD
Case Hours Available per FTA	1,411	-	After PTO & Admin

Two separate, rigorously conducted workload methodologies — one national, one developed by CPCS itself — reach the same fundamental conclusion: PDD attorneys are carrying significant caseloads within an overburdened system. Under either standard, the gap between demand and capacity is real. But the gap also tells a different story than simple institutional shortfall. That story is of an attorney workforce that has, year after year, shouldered more than its fair share of the Commonwealth's constitutional obligation and has done so with professionalism, skill, and commitment.

VII. THE NPDWS AS A BENCHMARK: UNDERSTANDING CAPACITY AND FUTURE NEEDS

The National Public Defender Workload Study is a nationally recognized, evidence-based benchmark that is widely regarded as the gold standard for measuring public defender workloads. Fully meeting that standard would require a substantial investment in additional attorneys and resources beyond those currently available. Nevertheless, CPCS measures itself against that benchmark because it provides the best available framework for understanding attorney workload and planning for the future.

CPCS also maintains rigorous caseload management protocols designed to ensure that its attorneys provide the zealous, competent representation required by the United States and Massachusetts Constitutions. Through the extraordinary efforts of its attorneys and staff, CPCS has continued to meet those constitutional obligations while operating within the appropriations provided by the Legislature. The study is valuable not because every jurisdiction can immediately meet its standards, but because it provides an objective way to understand attorney capacity, identify staffing needs, and plan responsibly for the future. The NPDWS provides important insight into the current state of the Public Defender Division. Regardless of how quickly full alignment with national workload standards can be achieved, the study makes clear that PDD attorneys are already operating at or beyond the workload levels that the leading national benchmark identifies as sustainable. That finding does not suggest that PDD attorneys are falling short of their professional or constitutional obligations. To the contrary, it demonstrates the extraordinary degree to which they continue to meet those obligations despite

carrying workloads that exceed nationally recognized standards.

For CPCS, the NPDWS should therefore be understood as a tool for evaluating capacity. It provides a data-driven framework for assessing whether existing staffing levels are adequate, for identifying the potential impact of additional responsibilities placed upon staff attorneys, and for informing future workforce planning. Most importantly, it demonstrates that current workloads should not be interpreted as evidence of excess capacity. The fact that PDD attorneys continue to provide high-quality representation under current conditions does not mean that additional caseloads can be absorbed without consequence; it means that attorneys are already performing at exceptionally high levels in service of their constitutional obligations.

Full alignment with NPDWS standards — or with the GCP standards that CPCS itself helped develop — requires moving from 245 FTAs to somewhere between 301 and 519, depending on the methodology applied. That is a meaningful expansion, and it will not happen overnight. The Legislature has already taken steps to direct CPCS toward expanding its attorney complement, and PDD leadership is actively engaged in developing staffing plans responsive to that direction. The target of 400 staff attorneys by FY 2027 represents a significant step, though it still falls short of full NPDWS compliance.

Full NPDWS compliance is the right long-term goal. Achieving it requires hiring between 56 and 274 additional attorneys, depending on the standard applied. That investment is essential if the Commonwealth is to achieve full alignment with evidence-based workload standards while continuing to fulfill its constitutional obligation to provide effective assistance of counsel. But the path to get there runs through an existing attorney workforce that is already performing at exceptional levels.

Critically, reaching for that goal should not be framed as a correction of current deficiency. The appropriate framing is this: PDD attorneys have been asked to do more than a fully resourced system would require, and they have answered that ask with professionalism and dedication. Adding attorneys does not fix a broken agency. It gives a high-performing agency the resources it needs to sustain quality at scale — to bring its case hours per attorney into alignment with national standards, to reduce the risk of burnout and turnover among its most experienced practitioners, and to ensure that as PDD takes on a greater share of the Commonwealth's criminal docket, it does so with the capacity to meet every client's needs fully and competently.

The transition to NPDWS-aligned case weights is also an essential piece of this work. The 1:2:5 system, whatever its historical utility, cannot serve as the foundation for evidence-based staffing decisions going forward. It cannot tell managers which offices are most stressed, which practice areas are most resource-intensive, or where new hires should be deployed to maximize impact. Adopting NPDWS-style case weight standards, or a refined version built on the GCP framework, will give the agency the data needed to make smarter staffing decisions, identify emerging workload pressures earlier, and deploy resources where they are needed most.

VIII. RECOMMENDATIONS

Based on the foregoing analysis, CPCS respectfully advances the following recommendations for the continued development and strengthening of the Public Defender Division:

1. Educate our Funders and the Public About the Volume of Work Undertaken by PDD's Attorneys

The data is clear: PDD attorneys carry more than their share of the Commonwealth's indigent defense obligation. CPCS should formally recognize and communicate this fact — to the Legislature, to the public, and within the agency itself. The narrative that public defenders are "overwhelmed" is incomplete; the more accurate and more dignifying narrative is that public defenders are exceptional professionals doing extraordinary work under difficult conditions.

2. Pursue Sustained Attorney Hiring Aligned with NPDWS Standards

CPCS should develop and publish a long-term staffing plan with the explicit goal of bringing FTA levels into alignment with NPDWS benchmarks. In the near term, reaching the 400 FTA target by FY 2027 is a meaningful milestone. In the medium term, the agency should set a target of 519 FTAs as the aspirational standard for full NPDWS compliance, with interim targets established for each fiscal year. This plan should be shared with the Legislature and the Governor's Office as part of CPCS's budget advocacy.

3. Adopt Evidence-Based Case Weight Standards

CPCS should formally retire the 1:2:5 weighting system and replace it with a more granular, evidence-based framework informed by the NPDWS and the GCP. This does not require wholesale adoption of a new system overnight. A phased transition, beginning with the implementation of NPDWS case type categories in the case management system, would allow the agency to generate the local data needed to calibrate Massachusetts-specific weights over time. The GCP's nine-category framework — developed with CPCS participation and tailored to Massachusetts practice — provides an immediate starting point.

4. Prioritize Attorney Retention and Wellness

An agency that asks its attorneys to carry the workload of two full-time practitioners cannot afford to lose experienced staff to burnout. CPCS should develop enhanced retention strategies — including competitive salary structures, meaningful supervision and mentorship, and access to wellness resources — designed to keep experienced attorneys in the agency and reduce the high turnover that is endemic to public defense. Every experienced attorney who leaves takes with them years of institutional knowledge and courtroom skills that cannot quickly be replaced.

5. Strengthen Data Collection and Performance Reporting

The Gideon's Call Project recommended in 2014 that CPCS develop a comprehensive statistical reporting system that tracks performance indicators across offices and practice areas. That recommendation remains as relevant today as it was then. The agency has made great strides in our data collection, but CPCS should further invest in the data infrastructure necessary to produce quarterly or annual reports that measure the full range of performance indicators — not just case

counts, but time invested, outcomes achieved, and quality metrics. This data will be essential for future workload studies, staffing justifications and legislative advocacy.

IX. CONCLUSION

The work of the Public Defender Division is, at its core, the work of the Constitution. Every day, in courthouses across Massachusetts, PDD attorneys stand between the state and the individuals it has charged with crimes, many of them among the most vulnerable members of our society. They do this work not because it is easy, or because the pay is commensurate with the demands, or because the caseloads are manageable by any national standard. They do it because it matters, and because the alternative — leaving indigent defendants to navigate the criminal justice system alone — is not acceptable in a just society.

This paper focuses on one practice area within CPCS, but the lesson is broader. The attorneys in the Mental Health Litigation Division, the Youth Advocacy Division, and the Children and Family Law Division also handle high volumes of difficult, demanding cases with professionalism and commitment. Their work, like that of the PDD, is central to the Commonwealth's obligation to provide meaningful legal representation.

The analysis in this paper confirms what experienced observers of the PDD have long known: these attorneys are working at the upper limits of what sustained professional performance allows. The NPDWS makes visible what the agency has long understood through experience: that the demands placed on public defenders are not measured solely in case counts or hours worked. They are measured in the emotional burden of representing individuals facing incarceration, the cumulative effects of exposure to trauma, and the personal sacrifices required to sustain a career in public defense.

PDD attorneys earn substantially less than similarly skilled attorneys in the private sector. For many, the pressures of housing costs, student loan obligations, family responsibilities, and financial insecurity exist alongside the demands of an already difficult profession. The Commonwealth asks these attorneys to shoulder some of the most consequential work in the justice system, and they continue to do so with professionalism, commitment, and integrity.

The National Public Defender Workload Study is a tool for improvement, not a verdict on the past. Applied honestly to the PDD, it tells a story of dedication in the face of resource constraints and provides a roadmap for the future. That future requires additional attorneys, stronger retention efforts, better data systems and sustained commitment from the Legislature and the Executive to fund public defense at a level consistent with the constitutional rights it protects.

Massachusetts has long been recognized as a national leader in public defense. By continuing to invest in its attorneys, embracing evidence-based workload standards, and using objective data to guide future staffing decisions, the Commonwealth can strengthen an already exceptional public

defense system. In doing so, it will ensure that every person entitled to counsel receives the zealous, competent, and constitutionally effective representation that justice demands.

Anthony J. Benedetti
Chief Counsel, Committee for Public Counsel Services

Arnie Lucinda Stewart
Deputy Chief Counsel, Committee for Public Counsel Services

June 2026

APPENDIX II

June 10, 2026

Via Electronic Mail

The Hon. Michael J. Rodrigues, Chair
Senate Committee on Ways and Means
Michael.Rodrigues@masenate.gov

The Hon. Aaron M. Michlewitz, Chair
House Committee on Ways and Means
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The Hon. Patrick M. O'Connor, Ranking Member
Senate Committee on Ways and Means
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The Hon. Todd Smola, Ranking Member
House Committee on Ways and Means
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Re: An Analysis of Indigent Defense in Massachusetts

Dear Chairs Rodrigues and Michlewitz, Ranking Members O'Connor and Smola:

Pursuant to Section 82 of Chapter 14 of the Acts of 2025 (Section 82), the Office of the Inspector General (OIG) herein presents An Analysis of Indigent Defense in Massachusetts. Section 82 directed the OIG to review the indigent defense system in Massachusetts, including existing practices, rules and requirements related to determining indigency, billing by and oversight of private "bar advocates," attorney caseloads, and best practices from other jurisdictions to provide adequate and cost-effective representation of indigent defendants.

The OIG's findings respond to the specific directives posed by the Legislature and also address related matters that arose during its investigation. This holistic assessment provides a more complete picture of the state of the indigent defense system in the Commonwealth. The OIG's findings include:

- The Committee for Public Counsel Services (CPCS) does not meet a legislative mandate to assign 20% of cases to its own staff attorneys;
- During the 2025 bar advocate work stoppage, CPCS could have assigned its staff attorneys to take over in many, if not all, of the hearings that resulted in 1,689 dismissed cases and 213 released defendants, and still would have come short of the 20% mandate;
- CPCS staff attorneys carry low caseloads compared to neighboring states and Massachusetts district attorneys;
- Massachusetts sets a maximum annual limit of 2,000 hours for bar advocates, but sets no cap on the amount paid in given cases, making it an outlier among states that regulate the fees paid to private appointed counsel;
- CPCS does not effectively notify the Legislature that CPCS staff attorneys do not handle 20% of indigent cases;

- The Commonwealth's system to determine if a defendant is indigent and qualifies for appointed counsel is broken, making it likely that a significant number of defendants have received state-funded attorneys without a verified need; and
- The Commonwealth's public defender system is one of the most expensive in the nation per new case taken.

The Commonwealth's expensive indigent defense system is inefficient and operates with impunity. The failings of the status quo came to a head in May of 2025, when many bar advocates stopped accepting new case assignments and sought an increase in the hourly rates set by law. CPCS filed a petition with the Massachusetts Supreme Judicial Court (SJC), asking the SJC to use its authority to unilaterally increase bar advocate pay. While that litigation proceeded, and to address the work stoppage, a single justice of the SJC implemented a practice called the "Lavallee protocol," which set hearings (known as Lavallee hearings) at which a defendant who went unrepresented for 45 days could have their case dismissed and a defendant who was held in custody for 7 days could be released from jail. Over the course of the summer and fall of 2025, 2,345 Lavallee hearings resulted in 1,689 dismissed cases and 213 defendants being released from custody. All the while, CPCS filed reports with the SJC saying that its staff attorneys were "at capacity."

The public outcry around the crisis resulted in the Legislature passing a law increasing bar advocate hourly rates, which Governor Healey signed in August 2025. The hourly rates increased by $10 in August 2025 and will increase by an additional $10 in August 2026. The law also gave CPCS $40 million to hire 320 new staff attorneys. As a result of these changes, the general appropriation for CPCS will grow from $339 million in Fiscal Year 2025 to a projected $380 million in Fiscal Year 2027.

Based upon the OIG's investigation, it is clear that the increased hourly rate and increased number of CPCS staff attorneys, by themselves, will not correct the crisis in the indigent defense system that boiled over in the 2025 work stoppage. For one thing, Massachusetts has seen this story before. Bar advocate work stoppages in 2004 and 2018 followed an almost identical pattern: bar advocates stop taking assignments, CPCS files a petition with the SJC, the SJC implements the Lavallee protocol, public outcry continues, and the Legislature issues a pay raise and tells CPCS to hire more staff attorneys.

There are two major underlying issues that the Commonwealth must address if it is going to balance the right to appointed counsel within the constraints of a fixed annual budget, while also avoiding future crises.

First, bar advocates are not sufficiently incentivized to take on additional cases. While the OIG found that their hourly pay rate is less than neighboring states, the OIG also found that Massachusetts is an outlier by setting an annual hour limit, but not setting a fee cap for the amount that appointed counsel can bill on individual cases. Most other states set fee caps that range based on the type of case. The OIG found many instances of high bills on even the most straightforward cases, which CPCS pays without any significant oversight.

Second, CPCS operates a public defender system that has too many supervisors and doesn't assign enough cases to staff attorneys. The OIG found that CPCS employs more support staff than it says it needs in hiring plan proposals and many of its staff attorneys do not handle caseloads that meet internal expectations. The Legislature requires that CPCS assign a mandated percentage of cases to its staff attorneys, but CPCS has not come close to reaching that percentage in the last 10 years. Indeed, the OIG found that CPCS staff attorneys work the lowest number of cases of any statewide public defender system for which the OIG could find comparable data, including Connecticut, New Hampshire, and Vermont.

The result is a highly expensive and highly inefficient indigent defense system. Among statewide systems for which the OIG could find sufficient data, the OIG found that Massachusetts was the most expensive system on a cost-per-new-case basis.

It is also a system that does not respond well to crisis. The OIG found that if CPCS assigned 20% of cases to its staff attorneys (as it is legislatively mandated to do) during the 2025 work stoppage and Lavallee protocol, those staff attorneys would have been assigned thousands of additional cases. The staff attorneys responsible for adult criminal cases – the cases primarily affected by the work stoppage –would have been assigned over 3,000 additional cases, well in excess of the 2,345 Lavallee hearings that resulted in 1,689 dismissed cases and 213 defendants being released from custody.

Stakeholders have the opportunity to correct this problem but must understand that simply raising the bar advocate hourly rate will not prevent future crises. Bar advocates should receive fair pay, but should also be subject to reasonable fee caps, based on acceptable ranges of hours billed by case that also incentivize taking additional cases. Low CPCS staff attorney caseloads and high rates of support staff (including higher-salary supervising attorneys) drive significant costs for CPCS. Lastly, a culture reset is needed within the CPCS organization. The OIG found that CPCS has created two different systems, one for public defenders and one for bar advocates. CPCS must address the ways that bar advocates and CPCS staff attorneys are treated differently and work to improve bar advocate retention and increase their ranks.

Finally, the OIG made deeply troubling findings that the system by which indigency is determined is broken. The methods used to verify indigency are outdated or not consistently used to validate indigency status. The OIG found that the Massachusetts Probation Service (Probation), an independent division within the Administrative Office of the Trial Court charged with reviewing the income and assets of a defendant and recommending whether a defendant qualifies for appointed counsel, often fails to complete the required initial steps and frequently fails to complete required follow-up checks during the course of the representation. In almost all circumstances, Probation makes a recommendation about indigency status without verifying spousal income and, with some frequency, does not verify indigency against a single government source. It would be wrong to believe most individuals who receive appointed counsel in Massachusetts have been properly screened. Additionally, the current indigency verification process should be strengthened and modernized, such as by checking additional government sources of information or by implementing screening processes much like those that would be completed by any merchant seeking to conduct a credit check.

While this report is thorough and fulfills the OIG's legislative mandate, it is not complete. As part of its investigation, the OIG sought to match case disposition data held by the Trial Court with CPCS data, which could only be accomplished using docket numbers. CPCS refused to produce the requested docket numbers, citing client confidentiality. The OIG informed CPCS that its concerns were misplaced considering that OIG records are confidential and that the OIG planned to aggregate the information for data analysis purposes. The OIG also offered additional protective measures – comparable to those used in the courts to protect trade secrets and other highly confidential information – to address CPCS's concerns. When CPCS still refused to produce the docket numbers, the OIG filed a motion to compel in Suffolk County Superior Court, which was allowed. Rather than comply with this order, CPCS filed an appeal.

If CPCS had produced the docket information as ordered, the OIG would have performed an analysis and comparison identifying general trends in case disposition among bar advocates and CPCS staff attorneys. This analysis would have been the best indicator of the quantity and quality of representation provided by CPCS staff attorneys and bar advocates. The OIG is concerned that CPCS is confusing fiscal responsibility and oversight with a denial of a defendant's right to counsel. While CPCS has an obligation to indigent defendants and the court, the OIG and the Legislature have an obligation to all residents of the Commonwealth. The Commonwealth can afford nothing less than mandated fiscal responsibility and oversight.

In closing, the OIG emphasizes that fiscal accountability and oversight is not inconsistent with the right to counsel and, indeed, is necessary for any public entity. An indigent defense system is a use of public dollars, and Massachusetts deserves to have a system that protects the Massachusetts residents who rely on its counsel at times of their greatest need while also appropriately protecting the expenditure of public dollars. CPCS must prioritize its mandate to provide appointed counsel while also living within its prescribed annual budget, like all state agencies.

Sincerely,



Jeffrey S. Shapiro, Esq., CIG
Inspector General

cc (via email):

OIG statutory recipients
Inspector General Council
The Hon. Lt. Gov. Kimberley Driscoll
The Hon. Bruce E. Tarr, Senate Minority Leader
The Hon. Bradley H. Jones Jr., House Minority Leader
The Hon. Lydia Edwards, Chair, Judiciary Committee
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The Hon. Marcus Vaughn, Ranking Member, House Post Audit and Oversight
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Daniel Sullivan, General Counsel, Executive Office of the Trial Court
The Hon. Dalila Argaez Wendlandt, Justice, Supreme Judicial Court
The Hon. Amy Lyn Blake, Chief Justice, Appeals Court
The Hon. Michael D. Ricciuti, Chief Justice, Superior Court
The Hon. Stacey J. Fortes, Chief Justice, District Court
The Hon. Heidi E. Brieger, Chief Justice, Trial Court
The Hon. Tracy-Lee Lyons, Chief Justice, Boston Municipal Court
The Hon. Dana M. Gershengorn, Chief Justice, Juvenile Court
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APPENDIX III

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CHIEF COUNSEL

May 21, 2025

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Chief Justice of the Trial Court
Executive Office of the Trial Court
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Honorable Michael Ricciuti
Suffolk County Courthouse
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Boston, MA 02108

Dear Chief Justice Brieger and Chief Justice Ricciuti,

As you may have heard, some bar advocates plan to stop taking duty days, starting next week. If this occurs, and from the information we have been able to obtain, it is extremely likely it will impact CPCS's ability to provide counsel at arraignment, and possibly to provide counsel at all. I therefore write to inform the court of CPCS's plans should this happen and to open up the lines of communication with the courts and district attorneys to "mitigat[e] the effects of a shortage of available defense counsel." *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 389 (2020). As the Supreme Judicial Court stated in *Carrasquillo*, we must all work together "to manage the impact of a shortage of defense counsel before it becomes constitutionally intolerable." *Id.*

The Committee for Public Counsel Services (CPCS) has the statutory responsibility to "plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis." G. L. c. 211D, § 1. For criminal cases, CPCS provides representation to indigent individuals through its Public Defender Division (PDD) and Private Counsel Division (PCD). The PDD provides staff attorneys to indigent persons in criminal proceedings in the district, superior, and appellate courts, and the Boston Municipal Court. The PCD provides bar advocates to indigent defendants in criminal proceedings who are not represented by the PDD. For delinquency and youthful offender cases, CPCS provides representation to indigent youth

through its Youth Advocacy Division (YAD). YAD provides staff attorneys and bar advocates, through the YAD Trial Panel, to indigent youth in juvenile proceedings in juvenile courts statewide.

Pursuant to "the clear dictates of G. L. c. 211D and S.J.C. Rule 3:10," CPCS is vested "with sole and independent authority to assign counsel for indigent defendants" between these two divisions. *Deputy Chief Counsel for the Pub. Defender Div. of the Comm. for Pub. Counsel Servs. v. Acting First Justice of the Lowell Div. of the Dist. Court Dep't*, 477 Mass. 178, 187 (2017). Under G. L. c. 211D, § 5, judges must assign cases to CPCS; they cannot assign cases to an individual attorney or group of attorneys. *Carrasquillo*, 484 Mass. at 384, citing *Deputy Chief Counsel,* 477 Mass. at 179. Accordingly, if there is a day where there is no duty day attorney in the arraignment session, the case must be sent to CPCS-PCD or the YAD Trial Panel for assignment, not to the local PDD or YAD staff office. See *Carrasquillo*, 484 Mass. at 384-385. By statute, CPCS is required to "maintain a system in which not less than [twenty percent] of indigent clients," across all practice areas, "shall be represented by public defenders." St. 2024, c. 140, § 2, line item 0321-1500. CPCS offices are not staffed to handle more than this. Especially in the district courts, CPCS relies on bar advocates to provide representation in the vast majority of the cases in which it assigns counsel. All of this is to say that the PDD and the YAD offices are not sufficiently staffed to handle all indigent criminal cases.

In the past, judges have asked the PDD and YAD offices to staff arraignment sessions for bail only. While the PDD and YAD are more than willing to step up when this happens occasionally, this is untenable during times of acute counsel shortages. PDD and YAD staff cannot meet their obligations to their current clients if they are always in court. PDD and YAD staff also report that it is confusing to indigent defendants who do not understand why the attorney at their arraignment is not their attorney going forward. It is also our understanding that in some courts, the clerks and court officers ask attorneys who are in court if they are able to take cases. While CPCS staff attorneys are always willing to help out in the normal course, staff attorneys will be told that they are not permitted to accept these cases, even for bail only purposes.

Instead, CPCS will implement the following system: first, as long as PDD and YAD staff have the capacity to take additional cases, the PDD and YAD will continue to appear for its scheduled duty days and accept the cases assigned to CPCS on those days, except for those cases in which there is a conflict of interest. The PDD and YAD will also continue to accept new cases for its current clients, even if those cases are arraigned on a day that the PDD and YAD are not on duty.

All other cases arraigned without counsel will be assigned to CPCS and sent to the local bar advocate program (BAP) and PCD and YAD Trial Panel. The PCD, in conjunction with the local BAP, will attempt to find counsel, prioritizing those cases where the defendant is held. If counsel is not located within seven days for an incarcerated defendant, CPCS will assign that case to the PDD and YAD as long as there is no conflict and the PDD and YAD office have the capacity to accept that case. CPCS will not be assigning all cases to the PDD and YAD in order to ensure that we

maintain the ability to comply with the SJC's mandate in *Carrasquillo* that we prioritize cases "where counsel are most urgently needed." *Id.*, 484 Mass. at 389.

The courts play an integral role in ensuring that no indigent defendant falls through the cracks. In those courts where there are days in which there is no attorney in the arraignment session, we need the court to send us a list of indigent defendants so that we can look for counsel. It is helpful if the court sends us not only the name and docket number of any unrepresented indigent defendants, but also the written docket, the police report, the amount of bail (if any), and the next court date. Based on our experience in Hampden County, we have found that it is helpful if incarcerated individuals are brought back to court within seven days and released defendants are given a court date within 45 days to make sure that everyone is accounted for.

Mitigating the damage of a counsel crisis will necessitate significant coordination between the courts and CPCS. It will also require patience and understanding on all sides as we grapple with the increased administrative efforts needed to deal with the situation. We hope to meet with you, as well as judges and clerks in the impacted courts, to discuss how we can work together to efficiently assign counsel and avoid a constitutional crisis.

Sincerely,



Anthony J. Benedetti
Chief Counsel

APPENDIX IV



A Study of the Expansion of the Committee for Public Counsel Services' Representation of the Indigent

Final Report to the Massachusetts
Senate and House Ways and Means Committees

THE JUSTICE MANAGEMENT INSTITUTE
THINK INSPIRE CHANGE

June 2014

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The Justice Management Institute, a non-profit organization based in Arlington, Virginia, provides cutting edge research, education and training programs, and technical assistance in justice policy, planning, and operations. JMI is known for innovative approaches and solutions for advancing knowledge and practice in the administration of justice. In essence, JMI's work focuses on "doing the right thing" as well as how "to do things right."

JMI's vision is to work collaboratively with justice professionals to shape systems that are responsive, outcome-driven, fairer, more equitable, and more efficient.

JMI's mission is to help courts and other justice system agencies achieve excellence in leadership, operations, management, and services by conducting rigorous research on emerging and persistent issues, providing education and training on evidence-based practices, and delivering in-depth technical assistance to help courts and justice systems implement effective strategies.

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TABLE OF CONTENTS

Executive Summary iii

Implementation Process iii

Intended Outcomes iv

Implications for the Future iv

Snapshot of Process and Outcome Findings vi

Introduction 1

Description/Brief History of Legislation Being Studied 1

Evaluation of the Indigent Defense Representation Expansion 1

Process Evaluation Methodology 1

Outcome Evaluation Methodology 2

Elimination of Some Process and Outcome Variables from the Analysis 3

Implementation of the Legislative Mandate 3

CPCS Hiring Plan 3

Alternatives to the CPCS Hiring Plan Methodology 5

Infrastructure Needs and Other Operational Matters in the Expansion Plan 6

Process Evaluation Findings 8

Did CPCS meet the 25 percent target? 8

Did CPCS hire the staff necessary to achieve 25 percent representation? 9

Were staff allocated appropriately to achieve 25 percent representation? 10

Barriers to Implementation 11

Outcomes Associated with the Expansion Plan 15

Impact of expansion on cost per case 15

Impact of expansion on cost certainty 18

Impact of expansion on quality of representation 19

Study Sample 20

Change in Types of Dispositions 21

Change in Length of Time to Dispose Cases 22

Change in Level of Effort Spent on Cases 23

Change in Pending Caseloads 24

Conclusion 26

Appendix A. Logic Model Developed to Document Implementation Process I

Appendix B. Data Tables For Calculating Average Cost Per Case II

Appendix C. Data Tables for Cost Certainty Analysis III

LIST OF EXHIBITS

Exhibit 1. Target Caseloads for Public Counsel As Defined By CPCS....4
Exhibit 2. Trend Data for Indigent Cases, FY2008 to FY2013....8
Exhibit 3. Percent of Case Volume Represented by CPCS Public Counsel, FY2013....9
Exhibit 4. New Hires by Fiscal Year (Only in Target Divisions)....9
Exhibit 5. Comparison of Overall Median Caseloads by Division to Target Annual Caseloads....11
Exhibit 6. Comparison of Adjusted Median Caseloads by Division to Target Annual Caseloads....11
Exhibit 7. Attrition by Position by Fiscal Year and Overall Attrition Rate....12
Exhibit 8. NALP-Reported Median Salaries for Public Defenders by Years of Experience....13
Exhibit 9. Average Cost Per Case Analysis....16
Exhibit 10. Cost Per Case Reported by CPCS....17
Exhibit 11. Overall CPCS Annual Costs Based on Accrual, Cash, and Budgeted Bases....18
Exhibit 12. Number of Cases in Sample by Year....20
Exhibit 13. Method of Disposition Pre-Implementation (FY2009-11)....21
Exhibit 14. Type of Disposition Pre-Post Implementation by Type of Attorney....22
Exhibit 15. Comparison of Case Processing Time between Public Counsel and Bar Advocates,....23
Exhibit 16. Average Hours per Court Case by Type of Attorney....24
Exhibit 17. Massachusetts Superior Court 10-Year Pending Caseload with Trendline....25

EXECUTIVE SUMMARY

In 2011, the Legislature of the Commonwealth of Massachusetts tasked the Committee for Public Counsel Services (CPCS) with increasing the proportion of indigent cases represented by public counsel from 10 percent to 25 percent under the premise that the transition of cases from private counsel to public counsel would make for a more cost effective indigent defense delivery system. Historically, Massachusetts' two pronged system of providing legal representation to the poor has leaned more heavily on private bar advocates than on staff attorneys, known as public counsel. The legislative mandate, requiring a shift from private to public by the end of FY2012, was anticipated to stabilize or lower costs, without diminishing the quality of service for indigent clients.

In 2012, the Justice Management Institute (JMI) was hired by the Massachusetts Office of the Inspector General to document the CPCS expansion process and to determine if indeed the Legislature's intended goals were met.

IMPLEMENTATION PROCESS

CPCS developed a detailed plan for the expansion which provided a strong foundation for JMI's process evaluation. With specific targets articulated in the plan and after a thorough documentation of the implementation process by working with the Legislature and CPCS and in-depth data collection JMI was able to address the three primary implementation questions:

1. Did CPCS meet the 25 percent target?

   By the end of FY2013, CPCS represented 21.4 percent of newly assigned cases, short of the 25 percent benchmark. However, CPCS made significant strides despite unprecedented attrition among its public counsel staff and a compressed implementation period.

2. Did CPCS hire the staff deemed necessary to achieve this goal?

   CPCS substantially met its overall hiring targets, having filled 210 new public counsel positions and 122 other staff positions for a total of 332 new staff. However, while it met its hiring targets, CPCS has had the challenge of making up for rapidly growing attrition and training entry-level attorneys year-round.

3. Were staff allocated appropriately to achieve this goal?

   Misunderstanding or miscommunication early in the planning and implementation process meant that staff were deployed across divisions, when a more efficient deployment might have focused on one division. Nonetheless, when considering deployment across offices throughout the Commonwealth, caseloads were more efficiently distributed in FY2013 than pre-implementation.

CPCS has been substantially successfully at meeting its implementation targets, even if it did not meet the 25 percent benchmark. JMI has documented a number of **challenges to implementation** of the legislative mandate faced by CPCS. The prevailing challenge is a high and growing attrition rate among public counsel that appears to be driven significantly by CPCS' inability to offer competitive salaries that will retain qualified staff.

Intended Outcomes

JMI also evaluated whether the expansion had the effects on cost and quality intended by the Legislature. Multiple sources were used to study the impact of the expansion, including extensive quantitative and qualitative data collected from CPCS and the Massachusetts Office of the Trial Court and onsite interviews with CPCS staff and management, private bar advocates, members of the judiciary, and the staff of the House and Senate Ways and Means Committees. Based on analyses of these data, JMI finds that the expansion of representation by CPCS public counsel did not have significant or meaningful outcomes related to cost efficiency, cost certainty or quality of service.

Intended Impact	Findings
Lower cost per case. The Legislature expected that shifting more cases to public counsel would reduce cost per case and therefore drive overall costs down.	The expansion produced a modest 3 percent decrease in average cost per case. However, cost per case for public counsel has been and continues to be *higher* than costs for private bar advocates.
Greater cost certainty. Related to the previous outcome, the Legislature was concerned about wide variation from year to year in the budget of CPCS, which was thought attributable to the volume of cases handled by private bar advocates. By increasing the percentage of cases represented by CPCS, it was expected that the budgeting process for CPCS would be more predictable.	Analysis of costs on an accrual basis does not show evidence of significant variation in costs from year to year. More significant variation is evident in cash spending and appropriations, but these variations cannot be analyzed in light of cost certainty because of ongoing expansion activities during the study period. Additional years of data would be necessary to understand the long-term impact on the predictability of operating costs.
Maintenance of high quality of representation (or increase of quality). Although the Legislature wanted to see public counsel representation expanded, it did not want to sacrifice the high quality of representation for which CPCS has built a national reputation.	Although difficult to measure, JMI did not find any indication that quality of representation changed significantly with the expansion. Proxy measures of quality, related to case processing times show little difference before and after the expansion. However, public counsel, on average, bring cases to resolution more quickly than private bar advocates.

Implications for the Future

Overall, JMI's evaluation does not find that the expansion achieved the longer term goals of cost certainty or cost efficiency. Considering that CPCS has faced significant barriers as a result of attrition in meeting the mandate and the immediate, short-term outcomes are limited at best, the utility of the legislation is questionable. Alternatively, while the quality of representation—one held in high regard across the country—may not have increased throughout the implementation process, it has ultimately remained unchanged.

Continued data collection and tracking in the coming years would provide a clearer picture of the long-term impact of expansion with respect to cost efficiency, cost certainty, and quality of representation. Longer-term analysis may provide more support for the expansion; however, it is important that CPCS and the legislature use clearly defined financial metrics, that all agree upon, for several years to allow for such an analysis.

This longer-term analysis will also need to control for a growing number of extraneous factors that impact expansion. Although not part of this analysis, CPCS has already reported two significant developments in FY2014. First, the Hinton Drug Lab scandal has greatly increased the workload for public counsel as thousands of cases mishandled by lab chemist Annie Dookhan from 2003 to 2012 had to be re-evaluated. Recent estimates place the total number of impacted cases at 46,000, most of which were handled by public counsel. CPCS leadership reports that the impact of this scandal continue are acutely be felt in FY2014, when the Inspector General completed its 15-month investigation.

Second, CPCS reports a 30 percent increase in Children and Family Law (CAFL) cases in the wake of a recent string of deaths of children in the care of the Massachusetts Department of Children and Families (DCF). Even with expansion of public counsel staff, this reported spike in CAFL cases in FY2014 necessarily impacts a variety of outcome measures, such as cost per case, and may complicate CPCS' continued efforts to expand its capacity, in accordance with the 2011 legislation.

While JMI's analysis raises significant questions about the success of the expansion legislation to improve cost effectiveness, cost certainty, and quality of representation, this study ultimately examines a very short time period of two years since expansion, making it difficult to understand what the persistent outcomes may be, as expansion activities are completed and the CPCS public counsel staff stabilizes.

SNAPSHOT OF PROCESS AND OUTCOME FINDINGS

JMI's methodology was grounded in a logic model created with the Massachusetts Legislature and CPCS leadership. In the following exhibits, JMI provides a high level summary of the findings keyed to the major activities, outputs, and outcomes from the logic model (Appendix A).

Activities	
• Assess caseloads in each practice area and distribution of cases among offices • Assess staffing needs • Identify priority hiring areas	As detailed in its implementation plan, submitted in September 2011, CPCS used baseline case data from FY2010 and trend information from the preceding three years to estimate the necessary volume of cases to meet the 25 percent benchmark. Using caseload targets for four target case types (e.g., District Court, mental health, CAFL, and juvenile), CPCS identified the number of additional attorneys and other staff necessary to represent clients on the additional cases.
• Hire 340 FTEs, including 201 public counsel	As of the end of FY2013, CPCS filled 210 public counsel positions (exceeding its plan) and 122 non-attorney positions, for a total of 332.
• Conduct recruitment through web notices, outreach, and off-site recruiting events	Recruitment has been ongoing since FY2011, in excess of the original plan, because of unanticipated high attrition.
• Increase and provide training	Training has continued to be offered to all new hires, whether entry-level or lateral. Entry-level attorneys receive at least 4 weeks of training, depending on the practice area, and are supervised more intensively during their first year of practice. They are expected to reach full capacity by the end of their second year of employment.
• Acquire, relocate, or expand offices • Redesign, restructure & implement improved information technology & telecommunications systems	At the onset of FY2012, CPCS maintained 22 offices. Over the course of that year, CPCS identified 19 additional offices. CPCS also made commensurate enhancements to its information technology infrastructure: centralizing data and voice infrastructure by consolidating file servers, building proper backup systems and live redundancy for disaster recovery and emergency situation operation, and establishing a Voice Over Internet Protocol (VoIP) phone system for all offices.
• Recertify public bar advocates • Communicate regularly with private bar advocates on expansion	Revised certification requirements as well as billing caps and rules were put into place during early expansion. In FY2012, CPCS also proactively communicated with the private bar advocates about expansion, especially regarding barriers to their transitioning to public counsel staff.

Outputs	
• Caseload standards established • Caseload targets established	Caseload targets were established in FY2012, as discussed in two reports to the Legislature from CPCS in September 2011 and January 2012. The targets set were: • District Court Criminal: 190 cases assisted annually • CAFL: 55 cases assisted annually • Mental Health: 150 cases assisted annually • Juvenile Delinquency: 110 cases assisted annually
• # of FTEs hired overall and percent from private bar	210 public counsel and 122 other staff positions were filled by June 30, 2013. 53 private bar advocates were hired as public counsel trial attorneys.
• New infrastructure in place for staff (telephones, computers, etc.)	Prior to FY2011, CPCS completed enhancements to its information technology infrastructure: centralizing data and voice infrastructure by consolidating file servers, building proper backup systems and live redundancy for disaster recovery and emergency situation operation, and establishing a Voice Over Internet Protocol (VoIP) phone system for all offices.

Outcomes	
• 25 percent of indigent cases handled by public counsel	By the end of FY2013, CPCS represented 21.4 percent of newly assigned cases, short of the 25 percent benchmark.
• Improved cost efficiency and cost certainty	By the end of FY2013, the expansion produced a modest 3 percent decrease in average cost per case. However, cost per case for public counsel has been and continues to be *higher* than costs for private bar advocates. Analysis of costs on an accrual basis does not show evidence of significant variation in costs from year to year. More significant variation is evident in cash spending and appropriations, but these variations cannot be analyzed in light of cost certainty because of ongoing expansion activities during the study period. Additional years of data would be necessary to understand the impact on the predictability of appropriations.
• Quality of representation maintained	Proxy measures of quality, related to case processing times show little difference before and after the expansion. However, public counsel, on average bring cases to resolution more quickly than private bar advocates.

INTRODUCTION

DESCRIPTION/BRIEF HISTORY OF LEGISLATION BEING STUDIED

In 1984, Massachusetts General Law Chapter 211D created an indigent defense system in the Commonwealth, bringing all representation of those entitled to counsel under one supervisory oversight agency – the Committee for Public Counsel Services (CPCS). Both public counsel and private bar advocates have fallen under the supervision of CPCS since then, but historically, public counsel have represented approximately 10 percent of all cases, with private bar advocates representing the 90 percent balance. CPCS's scope of service is not limited to adult criminal cases but includes protection "family law" cases, juvenile delinquency cases, mental health commitment cases, guardianship cases, probate proceeding cases, and housing court cases involving criminal contempt.

Under the premise that the split between public and private counsel is a more costly delivery system than alternatives in which public counsel would represent clients on more cases, the Governor and Legislature began to consider ways to change CPCS' system in 2010 and 2011, with proposals ranging from no change to having public counsel assume 100 percent of all cases. In 2011, the Legislature of the Commonwealth of Massachusetts directed CPCS to develop an appointed counsel system in which no less than 25 percent of cases involving indigent defendants or litigants be represented by *public counsel* (CPCS staff attorneys) by the end of fiscal year 2012.

Specifically, CPCS was directed to increase the proportion of cases represented by public counsel from 10 percent to 25 percent with a little over a year to implement the change. Shortly after the passage of the directive in July 2011, CPCS employed 252 staff attorneys and held contracts with approximately 3,000 private attorneys (i.e., private bar advocates) to fulfill its obligation to provide counsel to the indigent throughout Massachusetts.

EVALUATION OF THE INDIGENT DEFENSE REPRESENTATION EXPANSION

In 2012, the Justice Management Institute (JMI) was hired by the Massachusetts Office of the Inspector General to conduct an evaluation of CPCS's implementation of the legislation expanding its representation in indigent cases from 10 to 25 percent. The focus of the evaluation was two-fold: 1) document the implementation process and 2) determine if the legislation produced the intended outcomes of increased representation as well as increased cost efficiency and cost certainty.

PROCESS EVALUATION METHODOLOGY

JMI's process evaluation of the expansion involved three levels of analysis: 1) defining the planned process and comparative assessment with actual implementation activities using comparative logic modeling; 2) documenting the outputs of the activities undertaken; and 3) assessing the causal relationship between intended end results and actual implementation. JMI worked with the Legislature and CPCS to define a logic model that illustrates how the expansion of public counsel services to 25 percent of all cases involving indigent clients was expected to lead to increased cost efficiency and cost certainty while maintaining quality of service. JMI used the initial logic model (included in Appendix A) to document the implementation process, including:

- The impetus for and existing foundation for initiating the change *(inputs);*
- The specific *activities* undertaken as part of the implementation process;
- The immediate and short-term *outputs* produced as a direct result of the activities; and
- The *contextual conditions* that facilitated or hindered the expansion effort.

In February 2013, JMI conducted structured interviews with CPCS administrative staff, management, public counsel, and private bar advocates; judges and probation administrators; as well as the staff of the House and Senate Committees on Ways and Means to track and assess the overall implementation process. Throughout 2013 and 2014, supporting documents and quantitative data were also obtained by JMI to supplement the interviews and to evaluate claims about the implementation targets set forth as part of the expansion plan. To focus the interviews and document review, JMI examined five main program components: 1) hiring new FTE public counsel and staff, 2) providing them training, 3) making geographic assignments to offices, 4) providing quality service, and 5) increasing cost efficiency and certainty.[1] The table below shows the specific questions that JMI explored as they relate to the implementation (items #1-3).

Program Component	Process Evaluation Question(s)
Hiring	Was hiring completed as planned? What was the process used to identify and evaluate candidates? What percentage of the new hires was private bar advocates?
Training	Have all new staff successfully completed training? When did staff receive training?
Geographic Assignment	How were office placement decisions made (for office and division assignments)? How does the distribution of the new FTEs impact case assignments? How does the distribution of the new FTEs impact caseload in each office and division and by case type? How does the distribution affect caseload split between public counsel and private bar advocates?

Outcome Evaluation Methodology

As noted above, the outcome evaluation focused primarily on changes in the quality of service/representation provided to indigent defendants as well as the extent to which the legislation and expansion of CPCS representation increased cost-effectiveness and cost certainty. Using the logic model and the findings from the process evaluation that would predict certain outcomes, JMI conducted detailed statistical analysis of available quantitative data to determine if the intended outcomes were produced. In particular, JMI's analyses focused on answering several questions, shown in the table below.

Program Component	Related Question(s)
Quality of Service	How has the quality of representation changed? How has the change impacted pending caseloads and case processing times? How has the change impacted use of experts, investigators? How has the change impacted case outcomes? How has the change impacted the amount of hours spent on cases?
Cost	What are the costs associated with implementation? How has implementation affected the cost of providing legal services to indigent persons? What benefits, in terms of cost, have been realized?

[1] Note that the quality of service and the cost efficiency and certainty were the focus of the outcome evaluation, discussed in the next section.

Quantitative data for the analyses were obtained from CPCS, primarily in aggregate form, to document costs and hours per attorney. Other quantitative data, related to quality of service, were provided by the Massachusetts Executive Office of the Trial Court and included raw data, by defendant, on a random sample of cases processed in FY2009-13. Additional detail on the sample is provided in the discussion of the outcome evaluation (page 20).

Elimination of Some Process and Outcome Variables from the Analysis

There were a number of specific items detailed in the logic model related to activities, outputs, and outcomes that JMI was not able to document primarily because the data simply did not exist that would allow for an independent evaluation or because consistent measures were unavailable over time. In no case did JMI not receive the data it requested from CPCS or other agencies. Among the data that were not available for analysis:

- Case and respondent level process and outcome data for cases across divisions (e.g., District, Superior, Juvenile, CAFL, and Mental Health)
- Average number of hours per case for both public counsel and bar advocates by year and casetype
- Number of hours spent by existing staff on training and onboarding activities
- Specific instance data for training (attorneys, dates, type of training) and level of training by individual attorney

Implementation of the Legislative Mandate

In September 2011, CPCS submitted its implementation plan for expanding its representation of indigent defendants from 10 to 25 percent in compliance with the directive in the authorizing legislation. In its plan, CPCS projected that it would need to hire 340 full-time equivalent (FTE) staff, which included 201 public counsel and supporting staff such as investigators, social workers, administrative and clerical staff, and other supports. The plan assumed hiring all necessary staff in staggered phases with full staff capacity anticipated by January 1, 2012. The plan focused primarily on the hiring strategy but also included plans for addressing infrastructure needs and other operational matters associated with rapid expansion, to include the importance of not interrupting services to indigent clients and not compromising quality of representation.

CPCS Hiring Plan

CPCS management focused new hiring on four major case types: District Court (i.e., lower level criminal cases); juvenile or youth advocacy cases; children and family law (CAFL) cases; and mental health cases (i.e., guardianship and civil commitment). Notably, Superior Court (i.e., more serious, felony cases) cases were excluded because CPCS public counsel already handled about 60 percent of these cases in FY2010, 2011, and 2012, so focusing expansion efforts on these cases was appropriately deemed unnecessary.

For all four case types, CPCS used a standardized caseload target for public counsel, based on their experience with these cases since CPCS was created in 1984. These target caseloads, discussed by Chief Counsel Anthony Benedetti in his correspondence with the Legislature's Committee on CPCS Budget and Expansion Implementation Plan (February 2012), are summarized in Exhibit 1.

Exhibit 1. Target Caseloads for Public Counsel As Defined By CPCS	
District Court Criminal	190 cases assisted[2] annually
CAFL	55 cases assisted annually
Mental Health	150 cases assisted annually
Juvenile Delinquency (Youth Advocacy)	110 cases assisted annually

In the absence of clearly adopted standards at the national level, it is not possible for JMI to evaluate the appropriateness of these targets. The most commonly cited standards are those of the National Advisory Commission on Criminal Justice Standards and Goals (NAC), established in 1973, which recommended that case assignments per public defender not exceed 150 felonies or 400 misdemeanors per year. Unfortunately, they are also often criticized on a number of grounds, including the facts that they are not empirically based; they are more than 40 years old, developed at a time when indigent cases may have been significantly less complex; and there were fewer technology applications to expedite portions of case processing. Furthermore, the NAC standards do not account for differences across states that may have existed at the time and that may have developed since then. Benedetti notes a number of these differences between Massachusetts and other states that enhance the complexity of cases, including the classification of felonies and misdemeanors. The national trend is to define felonies as cases with potential penalties of one or more years. In Massachusetts, offenses which carry a potential punishment up to as much as 2½ years in jail are classified as "misdemeanors." No such national standards exist for other case types, such as dependency, mental health commitments, or guardianships.

Despite the fact that it is not possible to evaluate the appropriateness of the caseload targets, JMI did note that CPCS took a reasonably sound approach to establish the targets as part of the expansion implementation plan. A lengthy discussion of the basis for CPCS' target standards was provided by Benedetti in his "Report to the Committee on CPCS Budget and Expansion Implementation Plan" dated February 6, 2012.

The caseload targets established by CPCS were used as the foundation for its hiring plan. Based on the targets, CPCS management went through a five-step process to determine the number of staff attorneys (public counsel) necessary to meet the 25 percent benchmark. Specifically, CPCS management:

1. Identified the overall number of indigent defense cases in which counsel would need to be appointed by looking at the sum of assignments and carry-over cases (i.e., cases assisted) represented by private bar and by public counsel in FY2010;
2. Adjusted the 2010 case volume, based on trends over the previous three years (usually downward), to estimate the case volume in FY2012;
3. Multiplied that figure for FY2012 by 0.25 in accordance with the 25 percent legislative mandate;
4. Calculated the number of public counsel necessary to handle this number of cases based on target annual caseloads by case type (Exhibit 1); and
5. Subtracted the number of public counsel employed at the onset of FY2012 from the total number reached above to define the number of new attorneys needed.

[2] CPCS has used "cases assisted" or "cases touched" to refer to the sum total of new cases assigned to counsel within a given year (cases originating in that year) and any cases pending at the beginning of the year (or carry-over cases). The national standards referenced in this section refer only to new assignments, not cases assisted.

This approach was used for nearly all case types, with two exceptions. First, with mental health cases, CPCS decided to handle only civil commitment cases, which represented about 40 percent of all mental health cases. The other mental health cases – guardianship – were broadly distributed throughout the state and pend for many years, which made them impractical to include in the expansion. Second, CPCS had already begun an expansion of its Youth Advocacy Division (YAD), which handles juvenile delinquency cases, so this case type was omitted from this implementation plan.

Alternatives to the CPCS Hiring Plan Methodology

Using the methodology described above, CPCS determined that it needed to hire 340 full-time equivalent (FTE) staff, including 201 attorneys, in order to represent clients in 25 percent of all indigent cases in Massachusetts. However, there are alternative methodologies that CPCS might have considered that would have decreased the number of attorneys and staff necessary to be hired. Unfortunately, a lack of clarity about the nature of the legislative mandate may have impacted the cost efficiency of the expansion plan itself.

CPCS management focused expansion efforts on four case types. However, based on the target caseloads by case type, which range from 55 to 190, CPCS would have been better advised to focus on the least labor intensive cases – District Court criminal cases. Under its plan, CPCS planned to grow its public counsel staff by 201 from the 252 baseline staff in early FY2011 – an increase of nearly 80 percent. However, by focusing only on District Court cases, CPCS could have decreased the necessary growth to about 69 percent (or 27 fewer attorneys). These attorneys would all handle the target caseload of 190, instead of the lower caseloads for the other case types. The volume of District Court cases has been and remains high enough to accommodate this level of expansion of public counsel representation, while leaving tens of thousands of cases still represented by private bar advocates. In FY2010, there were more than 120,000 *new* criminal cases in Massachusetts District Courts, not including probation violations, bail only cases, or carry-over cases from prior years. In 2012, the volume of new cases dropped to about 113,000. If CPCS had chosen to focus on District Court cases, they would have only needed to provide representation in a total of about 40,000 newly assigned District Court cases, in addition to the preexisting caseload of other case types, to make the target 25 percent. (In FY2010, public counsel were assigned 9,573 District Court cases.)

Another consideration for the expansion plan could have focused on an expanded service delivery model to bring more consistency to a practice area or enhance quality. For instance, CPCS had already made a commitment to expanding its Youth Advocacy Division prior to the expansion directive. It is conceivable that management would want to continue that commitment even if it did cost more. CPCS public counsel had also not represented clients in any mental health cases in FY2010, but decided to include these types of cases as part of expansion. Again, it may have been a decision to enhance the practice in that area. Juvenile delinquency and mental health cases have target caseloads of 110 and 150, respectively. Although lower than the target for District Court cases, the difference among these caseload targets may not have been enough to dissuade CPCS from expanding those practice areas.

Even so, CPCS would again have been best advised to avoid expansion in its CAFL practice, because those cases are the most labor intensive (and costly) with a target caseload of 55. Indeed, CPCS chose not to take on mental health guardianship cases, because they were too time-intensive and complex. The effort necessary to represent clients on CAFL cases would not have served the goal of expansion well. Had CPCS avoided expansion of its CAFL practice, it could have hired fewer staff and met its target caseload more quickly, compared to the approach it did take.

The efficiency costs of CPCS' plan relative to alternative plans must be considered in light of a lack of common understanding of the mandate at the time the plan was developed in early FY2012. JMI found during its interviews with CPCS leadership and practitioners, as well as with the legislative staff involved in the expansion efforts, that

there had indeed been some conflicting understanding of the authorizing legislation. It was unclear for, at least some time, whether the mandate was for CPCS to represent 25 percent of all indigent cases or 25 percent of all indigent cases *within each practice area.*

If the plan had indeed been developed with the latter interpretation in mind, then CPCS certainly would have had to plan for hiring across the four chosen case types, with the exception of Superior Court cases where public counsel already represented more than 25 percent of the cases. In fact, that was indeed the understanding of CPCS leadership during plan development and early implementation, contrary to the explanation of the mandate provided to JMI by Senate and House staffers. The plan was developed only a few months after the legislation passed and after 75 attorneys were already hired, so CPCS was already well into execution before any misunderstanding could be rectified.

Infrastructure Needs and Other Operational Matters in the Expansion Plan

CPCS developed its hiring plan at the beginning of FY2012 with the goal of hiring 90 percent of 340 necessary staff by January 31, 2012. Such an aggressive hiring plan also meant that CPCS had to rapidly build its training capacity and grow its infrastructure to support all of the new attorneys and other staff.

Training new staff was an enormous effort with 80 new staff attorneys, who started in Fall 2011. CPCS pulled supervisors and trainers from throughout the state to orchestrate training for all of these new staff over the course of September 2011. Although CPCS reports that the training followed the same curriculum as they would normally use for new classes of attorneys, the size of the class did leave some gaps in staffing that individual offices reported they had to fill. These training challenges for offices where attorneys were ultimately assigned were exacerbated by limited room for training and meetings, due to the rapidly growing demand for space. Subsequent waves of newly-hired attorneys were trained through a similar program, but with significantly less disruption as expansion activities progressively stabilized over the course of FY2012.

For space planning, each individual office location was analyzed to determine what maximum number of new staff could occupy existing space by sharing offices, using conference rooms for multiple attorneys and any other available space that could house attorneys or support staff. Individual leases were reviewed to determine which locations had additional space within the same building and how many leases could be amended to provide temporary space without major construction. CPCS also worked with the Massachusetts Division of Capital Asset Management and Maintenance (DCAMM) to identify leased space occupied by other state agencies that could accommodate CPCS as an additional tenant.

Even with the assistance of DCAMM, CPCS faced significant challenges in identifying and setting up additional offices. At the onset of FY2012, CPCS maintained 22 offices. With DCAMM, CPCS identified 19 additional offices. Even though CPCS secured emergency certification for these spaces, which accelerates the procurement process, temporary offices still had to be identified pending the final acquisition and set-up of permanent office spaces. According to CPCS management, they might normally renegotiate two leases per year, but with the rapid expansion, their workload grew significantly. They had to negotiate 19 new leases and manage those spaces, including leasing and managing temporary office spaces, securing furniture and infrastructure, and preparing new, permanent offices.

The cost of expansion included not only the direct expenses of training materials and space as well as the value of new leases but also the amount of staff time dedicated to all of these activities, including a much more intensive procurement and personnel interview/onboarding process. Another major cost consideration was the loss of attorney time, which would have been dedicated to representing clients, but was reduced as a result of their participation in the training of new staff. Quantification of these costs is beyond the capacity of this study, since the

timekeeping data necessary to calculate these costs are not readily available, but are nonetheless an important consideration in calculating the start-up costs associated with the expansion.

In terms of actual cash outlays for infrastructure, the one-time start-up costs were indeed quite significant. Upon review of Massachusetts Management Accounting and Reporting System (MMARS) payments, purchase orders, and internal CPCS accounting reports, these non-recurring, start-up costs included:

- Leasehold improvements (amortized over 5-year lease terms): $1,420,756
- Other facilities costs (office furniture, temporary work station rentals, telephones, network wiring, and moving expenses): $2,419,656
- Information technology costs (upgrade of IT infrastructure, personal computer purchases, software licenses, technical support): $1,482,900
- **Total infrastructure, start-up costs: $5,323,312**
- **Total, non-CPCS personnel training costs: $122,777**

The grand total of ***$5,446,089*** in non-recurring costs only captures part of the total implementation expense. As previously stated, the limitations of the CPCS information systems does not allow for precise analysis of staff time spent away from representing clients in order to support expansion. To estimate what the additional costs *may have been,* JMI used the following assumptions to arrive at an estimate of the cost of staff time taken away from case processing to provide training:

1. The average salary for an attorney (public counsel) is $50,000/ year.
2. It takes one attorney to train 50 attorneys on a given day. (This number is likely high and very conservative.)
3. Training lasts 4-5 weeks depending on the practice area[3].
4. At least one attorney trainer is required for each of those 20 days (4 weeks of workdays).
5. Every 50 attorneys therefore requires 1/12 of an average attorney trainer's time for basic training (approximately $5,500 with a modest 0.30 multiplier for fringe).
6. Every 50 attorneys also requires those entry-level attorneys at $40,000/year to spend *at least* 4 weeks without taking any cases (50 X $4,400 with a modest 0.30 multiplier for fringe = $220,000).
7. Therefore the total personnel cost for training a class of 50 new attorneys could be $225,500.
8. For the 210 attorneys hired, the true training cost could have been $900,000 above the non-personnel training costs stated above.

Another cost, which is not taken into consideration because data were not available to calculate actual costs, is the expense associated with ongoing supervision over the course of a new attorney's first year. According to CPCS, new attorneys are under intensive supervision for the 11 months following their initial training with the expectation that they begin taking on full caseloads at the beginning of the second year and reach capacity at the end of the second year. Given that life cycle for a new attorney, start-up costs are still being incurred even as CPCS comes to the close of its third year of expansion.

[3] Training for public counsel in the Mental Health Litigation Division occurs on the job, but the level of training effort in this exercise is assumed to be substantially equivalent.

Process Evaluation Findings

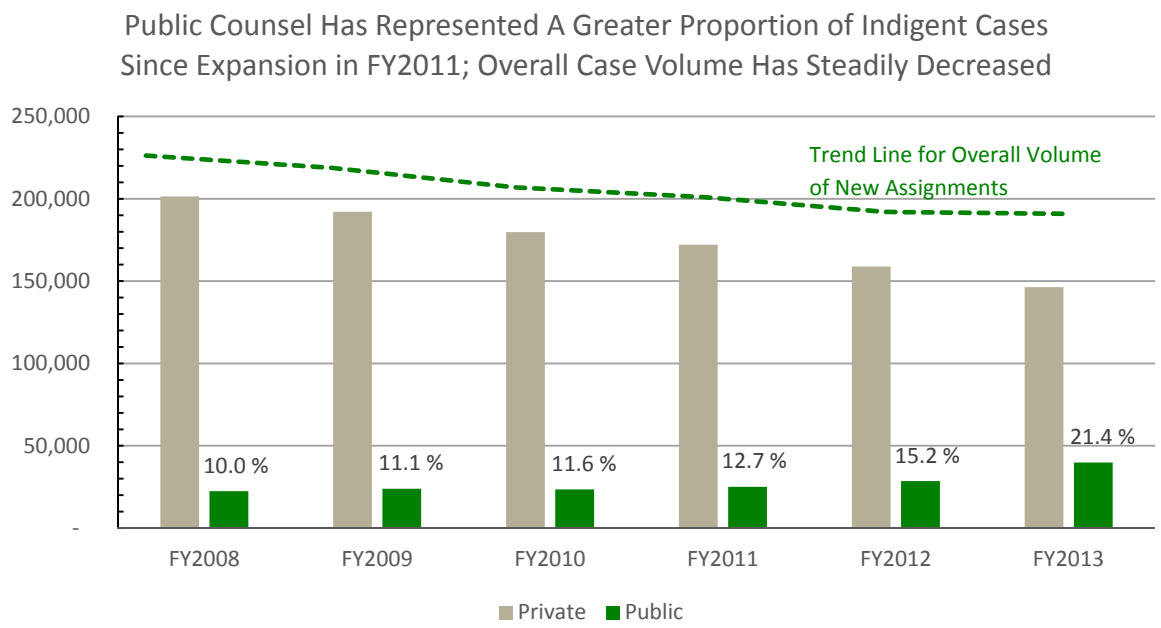
The detailed plan developed by CPCS for the expansion provided a solid foundation for the process evaluation. With specific targets articulated in the plan, JMI was able to address three primary questions regarding the implementation:

1. Did CPCS meet the 25 percent target?
2. Did CPCS hire the staff necessary to achieve 25 percent representation?
3. Were staff allocated appropriately to achieve 25 percent representation?

Did CPCS meet the 25 percent target?

CPCS was directed to represent clients on 25 percent of all indigent cases in the Commonwealth of Massachusetts by the end of FY2012. CPCS did not meet this goal by close of FY2012 or close of FY2013. By the end of FY2012, public counsel represented clients on approximately 28,500 cases out of 187,000 newly-assigned cases, which is 15.2 percent of the overall caseload. However, CPCS did make significant strides in FY2013, when representation by public counsel increased to 21.4 percent of all new assignments of indigent cases (Exhibit 2).

Exhibit 2. Trend Data for Indigent Cases, FY2008 to FY2013



Looking specifically at the breakdown by case type (Exhibit 3), CPCS has been representing the greatest proportion of cases in mental health and juvenile delinquency cases, but most of the additional cases during expansion have predictably been District Court cases. Because they are the least labor intensive (and least expensive to represent), it is appropriate that District Court cases are the majority of the expansion cases.

Exhibit 3. Percent of Case Volume Represented by CPCS Public Counsel, FY2013					
	District	CAFL	Mental Health	Juvenile	Totals
New assignments handled by private bar advocates	113,430	13,320	5,178	5,321	146,315
New assignments handled by public counsel	26,728	2,568	1,733	2,910	39,818
Total new assignments	**140,158**	**15,888**	**6,911**	**8,231**	**186,133**
Percent new assignments handled by public counsel	19.1%	16.2%	25.1%	35.4%	**21.4%**

In speaking with CPCS leadership, their projections for FY2014 still fall short of the 25 percent benchmark as new hires are still ramping up their capacity to handle full caseloads and as CPCS grapples with high rates of attrition. In FY2014, CPCS leadership estimates that public counsel will represent 22.6 percent of total case volume.

DID CPCS HIRE THE STAFF NECESSARY TO ACHIEVE 25 PERCENT REPRESENTATION?

According to its fourth quarter and final FY2013 reports to the Legislature, CPCS substantially met its overall hiring targets, having filled 210 new public counsel positions and 122 other staff positions for a total of 332 new staff. JMI's independent analysis of CPCS human resources data corroborated the reported public counsel positions filled with a small difference—JMI found that 207 public counsel positions were filled during FY2012 and FY2013. In FY2012, 117 public counsel positions were filled – *80 in August and September 2011.* Another 90 positions were filled in FY2013 – *all but 10 within the first quarter.*

More than 66 percent of the new hires were assigned to District Court, as shown in Exhibit 4 below. The next largest group, 25 percent of the new attorneys, was assigned to CAFL cases. Preceding the expansion, in FY2011, there was a dramatic rise in the number of hires dedicated to juvenile delinquency, which is consistent with the expansion of the Youth Advocacy Division (Juvenile Delinquency) already underway when the expansion mandate was passed.

Exhibit 4. New Hires by Fiscal Year (Only in Target Divisions)					
	District	CAFL	Mental Health	Juvenile	Grand Total
FY2012	71	29	13	4	117
FY2013	65	23	0	2	90
Grand Total	**136**	**52**	**13**	**6**	**207**

CPCS also committed in its implementation plan to hire laterally from the experienced pool of private bar advocates. In FY2012 and FY2013, CPCS hired 72 private bar advocates into a range of positions, including trial attorneys and supervising attorneys. Fifty-three of the private bar advocates hired became public counsel trial attorneys.

WERE STAFF ALLOCATED APPROPRIATELY TO ACHIEVE 25 PERCENT REPRESENTATION?

Another consideration in whether or not CPCS met the 25 percent representation goal is how the staff members were deployed across divisions and offices. As noted earlier in this report, JMI found that the distribution of staff across divisions (i.e., District Court, juvenile, CAFL, mental health) focused on numerous factors, even if a hiring plan focused only on the least labor intensive cases would have been more cost efficient. However, CPCS did efficiently deploy staff geographically, concentrating on higher volume and more centrally located courts.

In the case of District Court criminal cases, CPCS planned to deploy new staff to primarily urban areas. Similarly, CAFL staff were deployed to those offices that had the highest volumes of cases *and* that were nearest to the relevant courts, to minimize staff travel time. Staff for mental health commitment cases were deployed close to the public mental health facilities and the large private psychiatric facilities most served in the past. Juvenile delinquency cases were distributed among the existing offices.

To test the efficiency of the deployment, JMI looked at how the deployment impacted caseload per public counsel in FY2013, after the expansion had been underway, compared to FY2011, before expansion activities commenced. The findings revealed a more even distribution of caseload across all offices in FY2013 than in FY2011, indicating that deployment efficiently distributed cases across all offices.

Mental health cases had not been represented by public counsel in FY2011, so there was no point of comparison. However, in FY2013, the mean and median[4] caseloads were nearly equivalent. District Court criminal, juvenile, mental health, and CAFL cases all had similarly even distributions with equivalent means and medians in FY2013. Notably, the means and medians in FY2011 for District Court and for CAFL were quite different, indicating a skewed distribution of cases across offices. In both instances, some offices in FY2011 had attorneys working on 2-3 times more cases than their counterparts in other offices. These differences evened out almost completely in FY2013. Yet, the FY2013 median caseloads accounting for all attorneys do not seem to meet the targets established by CPCS in early FY2011 (Exhibit 1, on page 4).

The caseloads shown in Exhibit 5 were calculated by dividing all cases assisted (again, the sum of newly assigned and pending cases carrying over from the previous year) by the total number of attorneys in an office and division. This approach necessarily misses some important considerations when looking at caseloads (e.g., attorneys who were promoted during the year and took reduced caseloads, new attorneys hired who had no caseload or partial caseloads during the year, attorneys who did not work the full year). To control for these variables, JMI filtered the data set to look only at staff attorneys who worked within one division, who worked for the entire year, and who were trial attorneys throughout the year. This approach excluded newly hired attorneys who would not have worked the

[4] Mean (or average) and median are both measures of central tendency. When they are equivalent, the data analyzed are even distributed across the entire set. If they are not equivalent and vary significantly, the difference indicates that the distribution of values is skewed. In the current context, a major difference between mean and median would indicate that some offices have attorneys with far higher or far lower caseloads than others. Such a skewed distribution might indicate an ineffective method for deploying staff. As explained above, JMI did not find these indications of ineffective deployment.

entire fiscal year. The caseloads change dramatically and more closely match the caseload targets set forth by CPCS in its implementation plan (Exhibit 6).

Exhibit 5. Comparison of Overall Median Caseloads by Division to Target Annual Caseloads		
Division	Number of Assisted Cases Per Public counsel	Target Annual Caseload
District Court	111	190
Children and Family Law (CAFL)	39	55
Mental Health	88	150
Juvenile Delinquency (YAD)	89	110

Exhibit 6. Comparison of Adjusted Median Caseloads by Division to Target Annual Caseloads		
Division	Number of Assisted Cases Per Public counsel	Target Annual Caseload
District Court	165	190
Children and Family Law (CAFL)	50	55
Mental Health	115	150
Juvenile Delinquency (YAD)	110	110

Caseloads in District Court and mental health are notably below their targets, which may be explained in part by the long period new attorneys take to reach full capacity. In juvenile delinquency cases, it is not surprising that the target has been met, as that division's expansion activities preceded the 2011 expansion legislation.

Barriers to Implementation

In its initial report to the Legislature, CPCS leadership cited a number of barriers or challenges to implementation of the expansion plan. A number of the initial challenges, which diminished over time, include the following:

- Revising long-established duty assignments. With the assumption of more cases by public counsel, duty days and schedules by public counsel and private bar advocates alike had to be re-evaluated and re-developed. These tasks took considerable time by management.
- Lack of proper indigency verification. CPCS believed that gaps in the indigency screening and verification process in FY2011 was not an impediment to implementation of their plan but to the goals of containing costs. However, upon analysis by the Probation Department that handled this process and revision of the process, the assumed cost inefficiencies were revealed not to have existed.

- Procuring and setting up new infrastructure for staff. As noted earlier, CPCS devoted considerable time and other resources to securing new offices for its expanded staff. In addition to securing temporary and permanent spaces and outfitting those offices with appropriate equipment, CPCS also made significant changes to its voice and data infrastructure. In FY2011, CPCS centralized its file server infrastructure and built proper backup systems and live redundancy for disaster recovery and emergency situation operation. Standalone telephone systems in most offices were eliminated and replaced by a centralized Voice over Internet Protocol (VoIP) configuration. CPCS reports that to date two-thirds of its locations have been converted to VoIP, with additional installations expected throughout 2014 and 2015. These information technology upgrades were intensive but ultimately streamlined later outfitting activities.

In addition to the early challenges described above, CPCS encountered a number of more significant issues that have emerged as the primary and most persistent impediments to meeting the 25 percent goal—attracting and retaining staff, especially staff attorneys.

CPCS has faced higher attrition rates than normal, which keeps them in a continuous cycle of hiring and training new staff. Based on raw data provided by CPCS, JMI found that the baseline attrition trend (from July 1, 2008 to June 30, 2011) was that CPCS would lose about 20 attorneys per year, with about a third of those being attorneys with less than three years' experience. However, that trend began to shift in FY2012.

In FY2012, CPCS lost 27 public counsel through voluntary and involuntary separations. In FY2013, the number increased 33 percent to 36 attorneys (Exhibit 7). Notably, nearly two-thirds of the attorneys separated in the second half of that year, indicating an upward trend over time. This trend continues to grow in FY2014. At the time JMI concluded its evaluation (in the first half of FY2014), CPCS had already lost 34 attorneys. The trend is consistent though less dramatic when looking at supporting staff through the first half of FY2014.

Exhibit 7. Attrition by Position by Fiscal Year and Overall Attrition Rate

Fiscal Year	Trial Attorneys	Supporting Staff	Total	Overall Attrition Rate**
FY2012*	27	22	49	8.02%
FY2013	36	37	73	9.42%
Total Attrition	**63**	**59**	**126**	**18.83%**

** FY2012 data excludes the separation of three senior managers. No senior managers separated in FY2013.*
*** The overall attrition rate is calculated by dividing the total number of separated employees by the median total number of employees over the course of the year or time period.*

What exacerbates the disruptive impact of growing attrition is that the proportion of those staff attorneys separating who have less than three years of experience is growing. In calendar year 2012, 65.5 percent of the separated attorneys had less than three years' experience, which is significantly higher than in 2011, when the percentage was 30.4 percent. This number rose slightly in calendar year 2013 to 69.2 percent. The loss of attorneys so early in their careers is particularly costly for public defender offices. In these cases, CPCS like similar offices throughout the country spends a lot of time and other resources training new attorneys, only to lose them just as they become most effective at their work as litigators. CPCS is losing senior attorneys which decreases their capacity, but the increasing proportion of less experienced lawyers leaving makes it harder to replace lost capacity *and* build the additional capacity necessary for expansion.

CPCS is faced with the challenge of continuously hiring attorneys and training them, far beyond the original target number of 201 new attorneys. Recruitment, training, and supervision demands are much higher than they had been

historically, even after accounting for the increased size of the organization. Because new attorneys take up to two years to reach full capacity, the attrition is becoming very resource intensive, and it has created a significant barrier to CPCS reaching the 25 percent benchmark. Even with the attrition, however, it should be noted that CPCS did come very close to the 25 percent benchmark by the close of FY2013.

CPCS is not able to offer competitive salaries to attract new attorney applicants or retain existing staff. One driver for the high attrition that has been articulated by CPCS leadership is the lack of competitive salaries it can offer to new attorneys. The current base salary for an entry-level public counsel is $40,000 per year, which has remained constant since FY2009. Recently, the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation issued a report, "Doing Right By Those Who Labor For Justice" (May 2014), that details concerns about both the salaries of public defenders and prosecutors being far below what it defines as appropriate compensation. JMI will not repeat its analysis here, but instead will offer some context for the claims from CPCS that its salary structure may be a driver of attrition.

The fact that the base salary has not increased in the past 5 years is certainly a cause for concern as costs have risen over time. Furthermore, because CPCS' deployment strategy focused on urban areas with higher concentrations of cases, the impact of increasing cost of living may be further exacerbated as it is generally more expensive to live in urban centers.

The National Association for Legal Career Professionals (NALP) periodically publishes a survey of public interest salaries, including public defender salaries, which provides a national context for the entry-level compensation at CPCS (Exhibit 8).

Exhibit 8. NALP-Reported Median Salaries for Public Defenders by Years of Experience

Years of Experience	2004	2008	2012
Entry level	$39,000	$47,400	$50,500
5 years	$50,000	$60,000	$62,800
11-15 years	$65,000	$75,000	$78,600

According to the Bureau of Justice Statistics (BJS) 2007 Census of Public Defender Offices, offices accepting more than 5,000 cases per year paid entry-level attorneys between $44,000 and $49,000. Using both sources of compensation data, it appears that CPCS is not competitive with other states. The Council for Community and Economic Research (C2ER) publishes a number of reports that rank states and cities by cost of living. Boston, for instance, was one of the ten most expensive cities in the US in 2012, and in 2013 it dropped out of the top ten but remained one of the most expensive cities. The state of Massachusetts, like much of the Northeast region, is also among one of the most *expensive* states to work. Based on the higher cost of living, one would expect that the compensation of public defenders would similarly be above the median base salaries summarized here.

In fact, JMI's review of CPCS exit interviews with departing employees found that:

- 26 percent of the separated public counsel in FY2012 gave low compensation as a primary or secondary reason for leaving. The median number of years these employees worked for CPCS was just under 6 years. The overall median for all separated employees was 2 years, only after controlling for three attorneys with more than 30 years' experience who left.

- 27 percent of the separated public counsel in FY2013 gave low compensation as a primary or secondary reason for leaving. The median number of years these employees worked for CPCS was just under 4 years. The overall median for all separated employees was 2 years.
- 66 percent of the separated public counsel in FY2014[5] gave low compensation as a primary or secondary reason for leaving. The median number of years these employees worked for CPCS was just over 2 years. The overall median for all separated employees was the same.

Although starting salaries are certainly not the only explanation for why public counsel are leaving CPCS, it does appear that in FY2014, concerns about compensation levels are a major factor in the attrition

CPCS also has not been able to attract as many experienced, private bar advocates as initially planned. Although not as serious as the attrition issues, CPCS has been only somewhat successful at converting private bar advocates to public counsel staff. As previously explained, CPCS planned a more rapid expansion by hiring laterally from the experienced pool of private bar advocates. However, actual transitions from the private bar to public counsel were minimal relative to the overall number of individuals hired. CPCS expected the barrier to implementation to be less related to identifying these individuals than to transitioning them from their active cases, which could take months. In retrospect, CPCS's initial concern did not prove as significant because so few private bar advocates chose to become public counsel.

To better understand the relatively low interest, CPCS conducted an informal survey of private bar advocates in FY 2012. Respondents pointed to a potential decrease in income and in flexibility of work hours. Some reported additionally that the rapid expansion made them uncertain or anxious about joining CPCS as public counsel.

It is unclear how significantly this lack of interest might have impeded expansion. On the one hand, these lateral hires require less training to start accepting new assignments and have greater capacity to represent complex cases. On the other, transitioning private bar advocates with active caseloads that may need to be transferred in whole or in part would delay their readiness to contribute at full capacity as public counsel.

Overall, the implementation of the expansion mandate set in FY2011 took longer than anticipated and has experienced major hurdles in the face of increasingly high attrition. The speed with which the implementation had to be planned and executed, all while maintaining uninterrupted services to clients, could have been a recipe for failure, but in the end, the outputs from the implementation are generally on target. Although CPCS has not met the 25 percent target within the original time period planned, it was substantially close to the target by the end of the following year in FY2013. The hiring plan stayed on target with positions filled despite redoubled efforts in the face of high attrition. In addition, although caseloads are not quite at the projected targets, the life cycle of new attorneys is a plausible explanation for the delayed realization of those targets. All things considered, however, the true test of CPCS' success in expanding is in the outcomes.

[5] FY2014 data were only available for the first half of the year (July 1, 2013 to December 31, 2013).

OUTCOMES ASSOCIATED WITH THE EXPANSION PLAN

Consistent with the logic model that formed the basis of JMI's process evaluation, outcomes in three areas were examined:

- Impact of expansion on cost per case. The Legislature expected that the shift of more cases to public counsel would reduce cost per case and therefore drive overall costs down.
- Impact of expansion on cost certainty. Related to the previous outcome, the Legislature was concerned about wide variation from year to year in the budget of CPCS, which was thought attributable in part to the volume of cases handled by private bar advocates. By increasing the percentage of cases represented by CPCS, it was expected that the budgeting process for CPCS would be more predictable.
- Impact of expansion on quality of representation. Although the Legislature wanted to see public counsel representation expanded, it did not want to sacrifice the high quality of representation for which CPCS has built a national reputation.

IMPACT OF EXPANSION ON COST PER CASE

The expansion has produced a modest 3 percent decrease in average cost per case. However, cost per case for public counsel has been and continues to be higher than costs for private bar advocates.

In JMI's initial interviews with stakeholders in Massachusetts' courts, CPCS, and the legislature, it found an ongoing debate about the unit costs of representation and how the expansion would impact those costs. At the time, the unit of analysis was the cost of a single attorney. As some were beginning to realize at the time, this unit of analysis is flawed for a number of reasons. First, conceiving of an "average" attorney is challenging when considering four very different practice areas and when considering the variation in number and severity of cases that can be handled by attorneys as a function of their years of experience. Furthermore, the driver of costs and workload for public counsel and other justice system actors is not the number of personnel but the number of cases or justice-involved persons. JMI's analysis of cost per unit has therefore used case as its unit of analysis.

Ideally, cost per case is calculated as an average cost (total cost of representation divided by the total number of cases) and as a marginal cost (an estimation of the cost of handling one additional case, which would exclude overhead or fixed costs). Unfortunately, marginal cost requires very detailed cost information which JMI did not have at its disposal for this study. However, as shown in Exhibit 9, JMI was able to conduct an average cost analysis, which does provide some insight into the impact on case-related costs. In order to provide the most accurate picture given the data available, average cost has been derived using four base cost numbers:

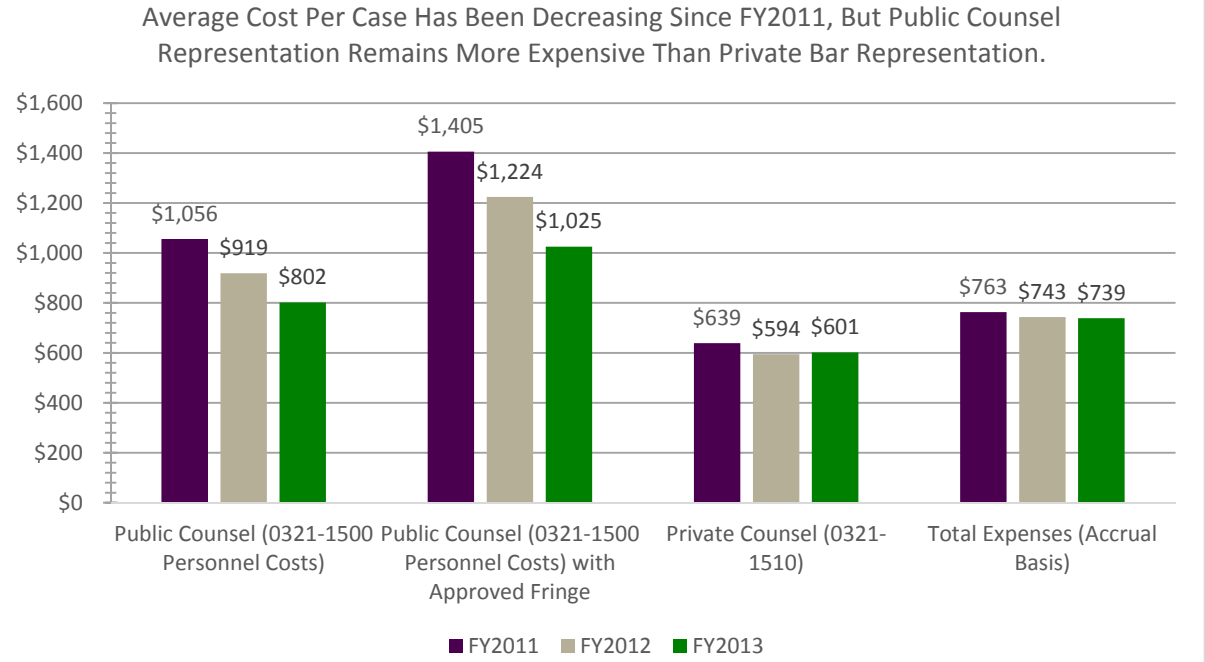
(1) The cost of public counsel personnel excluding all other costs;
(2) The cost of public counsel personnel including related fringe expenses not included in CPCS appropriations;
(3) The cost of the private bar advocate section of CPCS; and
(4) The total costs per year.

All of the figures used in this analysis reflect costs on an accrual basis – costs that pertain to a given year and are expensed in that year. The accrual basis excludes expenses paid within a given year for items encumbered in the previous year, and similarly excludes items prepaid in the given year that will actually be delivered in the following

year. Accrual basis accounting is consistent with Generally Accepted Accounting Principles (GAAP). It is also the best method to ensure that the analysis is not skewed by carryover costs or prepaid expenses.

For the same reason, court costs have been excluded since the distribution across public and private counsel could not easily be externally validated given the data available to JMI. The cost of public counsel personnel was found to include some support staff costs related to the private bar advocates, but the costs were immaterial in the final calculation of cost per case. The public counsel costs under CPCS' appropriation, however, are not inclusive of fringe costs that are paid through other budget line items. For that reason, JMI included not only the CPCS personnel costs but also adjusted personnel costs that account for this fringe rate. (These rates are set independently by the Massachusetts Office of the Comptroller on an annual basis and are applicable throughout the Commonwealth's public agencies.)

Exhibit 9. Average Cost Per Case Analysis



For a more detailed review of the data, please see Appendix B.

According to JMI's analysis, the cost per case for public counsel has dropped considerably – by 24 to 27 percent since FY2011. This trend holds true whether including operational costs or not. (Here, the number of cases includes all cases assisted during a given year, not just those cases assigned.) JMI did not find a similar trend in the cost per case for private bar advocates. Although the cost per case ultimately drops slightly (5.8 percent) from FY2011 to FY2013 for private bar advocates, it rises from $594 in FY2012 to $601 in FY2013. Changes in the cost per case for private bar advocates were expected, because CPCS changed some billing policies during the study period that limited or capped billable hours. Therefore, whereas there were few controls placed on billing before the expansion, these limits contained private bar advocate costs during expansion.

When considering overall expenses per year relative to the total volume of cases assisted, the cost per case does indeed decrease from FY2011 to FY2013 but only by 3.1 percent. Because the majority of cases (75-80 percent) are represented by private bar advocates and their change in cost per case has been small, the overall cost per case has also changed only marginally. However, it is still notable that even though the cost per case for public counsel has decreased, it remains consistently higher than that for private bar advocates. However, the decrease in cost per case may not be attributable in part or at all to the expansion activities, as numerous factors have an impact on case volume, case length, and caseloads.

CPCS has also presented cost per case data as part of its quarterly reporting to the legislature. As shown in Exhibit 10, while the details vary from JMI's independent analysis of costs, the data tell a similar story. Public counsel cost per case has decreased more rapidly than private bar advocate cases. The reported figures from CPCS show a more moderate decrease of 14 percent from FY2011 to FY2013. Yet, the cost per case for public counsel remains consistently higher than that for private bar advocates. In both JMI's independent analysis and in that of CPCS, the cost per case is based on a snapshot of cases active during a given year, instead of a more sophisticated longitudinal analysis of the cost of cases from beginning to end, which in many cases would span multiple years. While the method used here provides some indication of cost, it can be skewed by large numbers of cases carrying over from one year to the next. Future analysis as the expansion has taken more hold should consider this impact carefully.

Exhibit 10. Cost Per Case Reported by CPCS	
FY2013 Annual Report	
Public Counsel	$ 973
Private Bar Advocate	$ 695
FY2012 Annual Report	
Public Counsel	$ 1,276
Private Bar Advocate	$ 701
FY2011 Annual Report	
Public Counsel	$ 1,129
Private Bar Advocate	Not Reported

The true impact of the legislative mandate on cost will need to be re-evaluated over time. Costs for public counsel would be expected to decrease as CPCS hired large numbers of entry-level attorneys, whose $40,000 starting salaries would reduce the overall average salary for attorneys. However, as the CPCS public counsel staff stabilizes, the average cost of an attorney will likely increase as attorneys gain more experience and demand higher salaries. Even if costs per case stabilized at the FY2013 levels, future spending is likely to increase as more cases are diverted to public counsel where representation costs more. Based on the financials alone, it would appear that private bar advocates are more cost efficient. Of course, the legislature, the courts, and CPCS have far more to consider than cost – they need to consider quality of representation, fairness, equity, and efficiency, discussed later in the report.

IMPACT OF EXPANSION ON COST CERTAINTY

Analysis of costs on an accrual basis does not show evidence of significant variation in costs from year to year. More significant variation is evident in cash spending and appropriations, but these variations cannot be analyzed in light of cost certainty because of ongoing expansion activities during the study period. Additional years of data would be necessary to understand the impact on the predictability of appropriations.

JMI looked at the cost of CPCS services in three ways: (1) total expenses by dates of service; (2) total expenses as recorded in the Massachusetts Management Accounting and Reporting System (MMARS); and (3) total approved budget. The first figure captures all costs on an accrual basis, which again includes only costs that are related to delivery of services in a given year.

The second figure captures costs on a cash basis – what actual expenses were paid within a given year regardless of whether or not they pertain to that year. The third and final figure is an approved budget, which does not capture actual expenses but rather reflects a spending plan approved by the Legislature and an appropriation based on that plan. Exhibit 11 shows all three figures from FY2010 to FY2013 and summarizes the percent change on a year-to-year basis.

Exhibit 11. Overall CPCS Annual Costs Based on Accrual, Cash, and Budgeted Bases

Fiscal Year	(1) Total Expenses by Dates of Service[6]	% Change	(2) Total Expenses MMARS	% Change	(3) Final Budget MMARS	% Change
2010	$ 198,917,040		$ 199,590,001		$ 201,245,715	
2011	$ 199,209,920	0.1%	$ 197,368,081	-1.1%	$ 197,368,099	-1.9%
2012	$ 193,687,777	-2.8%	$ 191,561,107	-2.9%	$ 191,741,617	-2.9%
2013	$ 198,024,945	2.2%	$ 203,918,351	6.5%	$ 205,187,389	7.0%

The cash basis expenses and budget figures track very closely to one another, which is to be expected since CPCS would expend in a year what it has been is appropriated by the Legislature. Consistent with the initial interviews JMI conducted with legislative staff, CPCS's annual budget, and the final budgets, vary by several million dollars from year to year. These variations however should be interpreted in the context of a massive expansion ordered in early in FY2011. As such, it is not possible from these data alone to determine if the legislative mandate has produced cost certainty. Data from FY2014 and following years will provide a more accurate picture of the predictability of these figures in the future.

[6] See Appendix C for additional detail on the expenses based on dates of service broken into three main categories: Public Counsel and Operations, Private Counsel, and Courts Costs.

On the other hand, expenses on an accrual basis, the best measure of the cost of services within a given year, vary from the cash basis and budget figures discussed above. With the exception of a small decrease in expenses in FY2012, CPCS expenses have remained stable at about $198 million to $199 million. In terms of predictability of cost, it would seem that the accrual expenses of CPCS have been quite predictable over the 4-year period that includes pre- and post-implementation. However, what is striking is that during this same period, the number of new assignments was actually declining (Exhibit 2, page 8). One might expect that with fewer new *assignments* that the costs would decrease accordingly. Yet as discussed in the previous section, the number of cases *assisted* – the number of cases on which attorneys are actively working – has not followed the same trend in recent years. It was relatively stable in FY2011 to FY2013 at about 260,000 cases, with a small rise in FY2013 to 267,000 cases. The stability of the cases assisted figure when considered in light of the decreasing number of assignments suggests that carryover cases have been growing from year to year. Cases assisted may therefore be better metric to explain variations in spending and projections of future spending.

The overall stability of costs over the past several years may also be driven partly by a growing number and proportion of cases being represented by public counsel at a higher cost per case. These cases would otherwise have been represented by private bar advocates whose cost per case is significantly lower, as shown in the previous section.

IMPACT OF EXPANSION ON QUALITY OF REPRESENTATION

Although difficult to measure, quality of representation, based on the data available to JMI, has not changed dramatically with the expansion.

Massachusetts has long been considered a national model in many respects for the provision of services to indigent defendants and respondents. The legislation increasing the percentage of cases handled by CPCS public counsel was intended to contain public costs without diminishing the quality of representation provided to the poor. "Quality" largely depends for whom quality is being defined—defendants, attorneys, the legislature, or the public. Favorable case outcomes or feelings that one was treated fairly may be more important indicators of quality for defendants, whereas others may consider case processing time, pretrial release or detention, or provision of key due process protections to be adequate or more important measures of quality. Based on the scope of this evaluation, budget, and availability of data, JMI ultimately focused on four indicators of quality that are more systems-based and in line with the intent of the legislation:

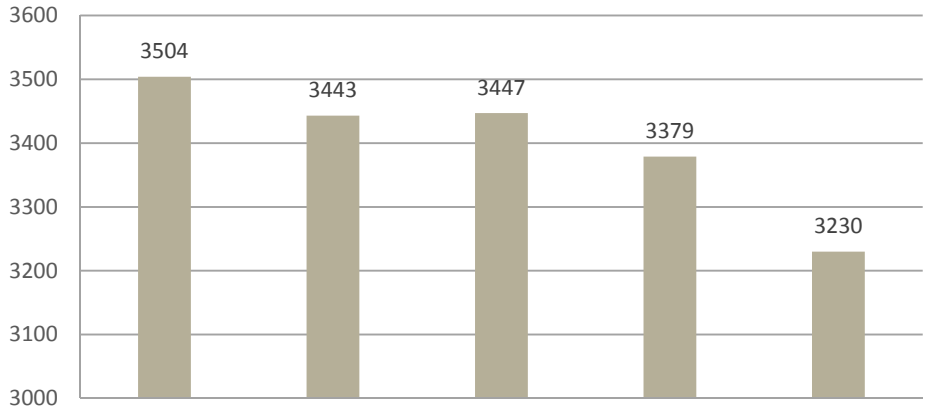
- Change in types of dispositions
- Change in the length of time to dispose of cases
- Change in the level of effort, in terms of hours, spent on cases
- Change in pending caseloads

It should be noted that JMI's assessment of quality was focused on a subset of criminal cases only, as similar data necessary for analysis were not available for indicted felonies, juvenile, CAFL, or mental health cases. JMI was also advised that the Senate and House Ways and Means Committees were not concerned with an absolute measure of quality (i.e., whether CPCS public counsel and private bar advocates provide quality representation), since CPCS already has a reputation for excellence, but with any indications of *change* in quality (i.e., did public counsel and private bar advocates do better or worse at their work after expansion). In JMI's analysis, substantiating the reputation of CPCS as a high quality counsel program for the indigent is therefore not the focus, only whether there have been positive or negative changes in what was already presumed to be high quality representation.

STUDY SAMPLE

Data were drawn from the MassCourts database on a random sample of criminal cases disposed prior to and after the implementation of the legislation. The sample included a total of 17,003 defendants over a five year period (2009 to 2013). The sample data and the following analysis should be considered in light of the fact that MassCourts does not include data about all case types that are handled by public counsel and private bar advocates. MassCourts only captures misdemeanor and some felony criminal cases handled in District Court, so juvenile delinquency, CAFL, and mental health cases are not represented[7]. Therefore, JMI's sample is skewed to cases involving less serious criminal offenses. Furthermore, the discussion of changes in quality does not address the impact of expansion on representation in juvenile delinquency, CAFL, or mental health cases.

Exhibit 12. Number of Cases[8] in Sample by Year



Cases were drawn from nearly all available District Courts and Boston Municipal Courts (BMC) in the Commonwealth (see Footnote 7), with the majority of the sample handled in Suffolk and Worchester counties. The fewest cases in the sample were handled in Dukes, Hampshire, and Nantucket counties.

Among the cases included in the sample, there was an average of 2 charges per case, ranging from 1 charge to 28 charges per defendant. There were a number of outliers in terms of charges per defendant: 147 defendants had

[7] During the study period, the Massachusetts justice information system, MassCourts, had not been expanded to include Superior Court, so it did not include information on any indicted felony charges. The data from MassCourts do include information on felony charges that were not indicted and were disposed in District Court or Boston Municipal Court. These would only be felonies that are described as "joint jurisdiction" felonies where both the general jurisdiction court (the Superior Court) and the limited jurisdiction courts (District and BMC) have joint jurisdiction. These are felonies where the statutory penalty structure has a maximum state prison sentence of five years or less, where there is a jail alternative, and where there is discretion about whether to proceed with the indictment process. The MassCourts data also only included cases filed in all but two District Court divisions (Brockton and Barnstable) and in 7 of 8 BMC divisions (excluding BMC Central Division).

[8] Cases are defined by defendant, i.e., cases are counted by defendant, by highest charge.

between 37 and 129 charges. However, from an analytic perspective, the outliers do not skew the results of the analyses as JMI only included the highest charge.

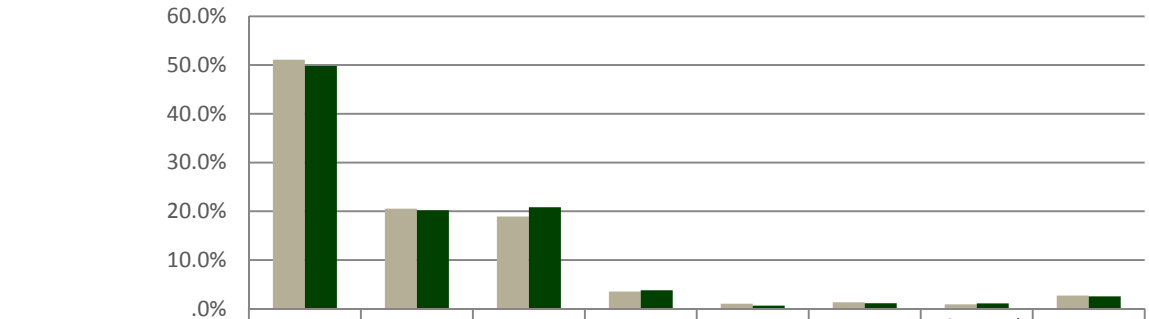
Charges ranged in severity from murder to failure to provide the Department of Motor Vehicles with a change of address. The majority of felony-level charges were drug-related offenses along with theft, larceny, robbery, and assault and battery. Criminal traffic charges, which accounted for a very large percentage of the charges, ranged from serious offenses such as "Operating under the Influence" to less serious such as "Improper Turn" and "Window Obstruction."

Change in Types of Dispositions

The method of case disposition can reveal a piece of the "quality" puzzle in that zealous advocacy should result in appropriate dismissals of extraneous charges as well as alternatives to incarceration to include diversion of the defendant or deferred prosecution opportunities. A major role of the defense is to ensure that defendants are treated fairly, impartially, and with due process and to guard against police or prosecutorial abuses of power. By advocating on behalf of clients, counsel can help ensure fairness by providing the defense against criminal charges, which can result in charges being dismissed, or with mitigating factors, case outcomes that focus on reducing long-term collateral consequences of a criminal conviction for a defendant. Counsel can also help address these underlying, destabilizing factors in the lives of defendants through diversion and deferred prosecution.

In line with this thinking, JMI's hypothesis was that the legislative change and the increasing coverage of indigent defense by public counsel would not negatively impact how cases were being disposed (i.e., fewer dismissals and diversions).

Exhibit 13. Method of Disposition[9] Pre-Implementation (FY2009-11) Compared to Post-Implementation (FY2012-13)



	Dismissed	Deferral	Plea	Hearing	Bench Trial	Jury Trial	Disposed as Civil Infraction	Other
Pre-Implementation	51.1%	20.5%	18.9%	3.5%	1.0%	1.3%	.9%	2.7%
Post-Implementation	49.8%	20.2%	20.8%	3.8%	.6%	1.1%	1.1%	2.5%

[9] Disposition categories are those used by the Massachusetts Office of the Trial Court in the MassCourts database.

Preliminary analysis of disposition data shows that there are slight differences in how cases were disposed prior to and after implementation of the legislation, but the differences are not significant enough to suggest that they occurred for any other reason than chance alone.

Further analysis, comparing differences by type of attorney (i.e., public counsel or private bar advocate) reveals more significant differences with dismissals more likely to occur in cases represented by public counsel and a greater number of deferrals in cases represented by bar advocates. However, the differences pre- and post-implementation based on type of attorney were not statistically significant, suggesting that in fact, there has been no marked change in how cases are disposed prior to and after implementation of the legislation.

Exhibit 14. Type of Disposition Pre-Post Implementation by Type of Attorney

	Disposition Method							
	Dismissed	Deferral	Plea	Hearing	Bench Trial	Jury Trial	Disposed as Civil Infraction	Other
Public Counsel Pre-Implementation	56.4%	17.6%	15.6%	4.0%	0.9%	1.7%	1.2%	2.5%
Public Counsel Post-Implementation	50.8%	19.5%	19.0%	3.7%	0.8%	1.3%	2.1%	2.8%
Bar Advocate Pre-Implementation	48.5%	21.9%	20.6%	3.3%	1.1%	1.1%	0.7%	2.8%
Bar Advocate Post-Implementation	49.3%	20.6%	21.7%	3.8%	0.5%	1.0%	0.7%	2.4%

The method of case disposition also has cost implications. In particular, the increase in deferrals, although small, requires additional court appearances by counsel, along with other administrative costs for probation supervision. Increased dismissals, on the other hand, terminate all costs associated with the case. In analyzing costs per case, the mixture of dispositions, and associated administrative costs, should be taken into account.

Change in Length of Time to Dispose Cases

As a measure of quality, the length of time it takes to dispose of a case serves in part as a proxy for whether or not public counsel and private bar advocates are working to ensure a timely resolution of cases in keeping with the ABA Criminal Justice Section Standards for Defense Counsel (Standard 4-1.3). Although the amount of calendar time that passes between filing and disposition may be impacted by factors outside the defense counsel's control, one would expect that there would be no significant increase in case processing time after the implementation of the legislation.

Prior to implementation, the average elapsed time between filing and disposition was 208.44 days; after implementation, the average decreased to 168.82 days, which is a statistically significant difference. This preliminary comparison of averages suggests that increased representation of indigent defendants by public counsel results in a reduction of unnecessary delay in cases and more prompt resolution.

Further analysis supports this finding, as shown in Exhibit 15 below, which explores the analysis of variance between the type of attorney and pre-/post-implementation case processing time.

Exhibit 15. Comparison of Case Processing Time between Public Counsel and Bar Advocates,				
Type of Attorney	Pre or Post Implementation	Mean (in Days)	Std. Deviation	N
Public Counsel	Pre-Implementation	179.34	191.733	3,313
	Post-Implementation	154.72	125.395	2,103
Private Bar Advocate	Pre-Implementation	222.01	221.123	6,994
	Post-Implementation	175.58	136.997	4,404

The analysis of variance found that the time period (pre-/post-implementation) and the attorney type both have a statistically significant impact on the average case processing time (significant at the 0.01 level). This confirms that cases handled by public counsel average a fewer number of days from filing to disposition than those cases handled by private bar advocates, which both pre-existed the expansion and remained after the expansion. A closer look, however, reveals that the difference in case processing time is less pronounced after expansion than it was prior to the implementation. The case processing time for public counsel dropped by 13.7 percent after the expansion, but the time for private bar advocates decreased more significantly post-expansion, by 20.9 percent. One possible explanation, that would warrant additional exploration, is that fewer indigent appointments to private bar advocates have reduced delays on their part. Furthermore, the higher proportion of entry-level attorneys among public counsel staff may actually increase case processing time, which may explain the smaller reduction in time post-implementation. Likewise, a number of case-specific factors, such as whether or not the defendant is in custody, can also impact how quickly a case is resolved. Finally, with an overall downward trend in number of days, other factors related to prosecutorial practices or court operations could also be causing the decrease. Additional data and analysis of these different factors, as well as whether or not the assignment of cases is random, if public counsel represent more in-custody defendants, etc., should be conducted to further assess case processing times.

Change in Level of Effort Spent on Cases

Overall case processing time, as noted above, provides a limited view of quality from a work perspective as the time to disposition can be influenced by many factors outside an attorney's control. To develop a better understanding of case processing it is important to look at the level of effort associated with handling cases—the hours spent working on a case. There are no national standards that describe how many hours per case are appropriate, in part because cases vary in complexity and contextual factors such as access to resources. The numbers vary dramatically from state to state and often even within a single state.

Using data from CPCS for FY2011 (the year immediately prior to the expansion) and FY2013 (the first full year after expansion), JMI was able to look at the average number of hours reported by public counsel and private bar advocates handling cases in the different courts, as shown in Exhibit 16.

Exhibit 16. Average Hours per Court Case by Type of Attorney				
	FY2011		FY2013	
	Public Counsel	Private Bar Advocates	Public Counsel	Private Bar Advocates
District Court	9.27	9.81	9.82	8.07
Juvenile Delinquency	23.6	10.18	14.21	7.06
Superior Court	19.69	26.48	19.83	34.77
Appeals	57.77	48.78	56.07	46.88
CAFL	41.83	22.52	31.56	19.06
Mental Health	9.45	9.05	19.65	8.38
Sexually Dangerous Persons	21.2	39.52	N/A	N/A
Other	N/A	N/A	N/A	10.95

Based on the reported hours in each court, public counsel spent fewer hours on average handling cases in District and Superior Courts in FY2011. Higher average times were reported for juvenile delinquency, CAFL, mental health, and appeals in which public counsel spent a higher average number of hours than private bar advocates. After the expansion, the comparisons remained consistent with a few notable exceptions.

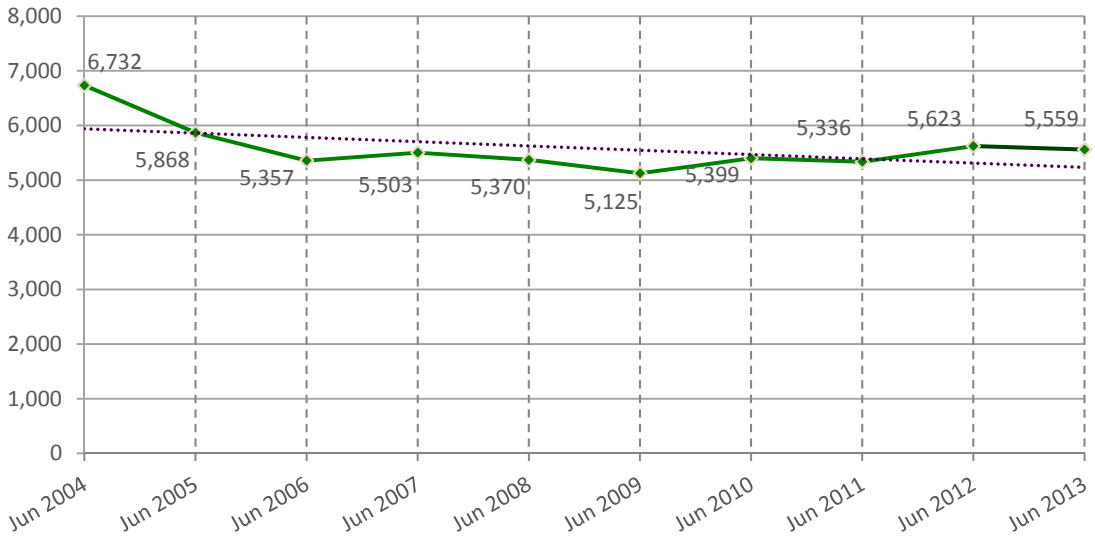
Generally, the same trend is seen in FY2013 between public counsel and private bar advocates with some notable exceptions. In FY2013, public counsel spent more hours handling cases in District Court than private bar advocates. One possible explanation is the sheer volume of cases in District Court and how CPCS implemented its staffing plan to facilitate the expansion. Another explanation is the higher proportion of entry-level attorneys among public counsel, who are less efficient at processing cases. Conversely, private bar advocates had a significantly higher average number of hours in Superior Court than public counsel, where the average remained relatively the same pre- and post-implementation. Finally, the average number of hours spent by public counsel on mental health cases more than doubled after the expansion. This last finding is not surprising, because CPCS had only just expanded its public counsel division into mental health as the expansion began.

Change in Pending Caseloads

Pending caseload is another way to examine how effectively cases are being processed through the system. Ideally, a measure of pending caseload would focus exclusively on cases assigned to public counsel or private bar advocates that remained pending at year end. However, such data were not available; JMI used cases pending in the courts as a proxy measure. Although not all cases that are processed through the courts involve indigent defendants, a large enough majority do, making cases pending in court a satisfactory measure of pending caseload. Like the elapsed time to dispose of cases, one would not expect there to be a significant change in the pending caseload at year end, based on the increased number of indigent cases being handled by CPCS. As shown in Exhibit 17 below, the general 10-year trend in the Massachusetts Superior Court is downward, dropping from a high of 6,732 cases pending on June 30, 2004 to 5,559 pending on June 30, 2013. Since the initial decrease between 2004 and 2005, pending caseloads have remained around 5,300 with slight annual fluctuations, averaging plus or minus approximately 200

cases. There does, however, appear to be a slightly larger increase in pending cases between FY2011 and FY2012, when the expansion initially started, and the number of pending cases remained above average in FY2013.

Exhibit 17. Massachusetts Superior Court 10-Year Pending Caseload with Trendline



As with elapsed time to dispose cases, there are numerous other factors that can influence the pending caseload. The results of the analysis are only suggestive that the legislative change may be part of the cause, and in fact is more likely related to some other factor that is outside the scope of JMI's study.

JMI attempted to do similar analyses for the District Courts, Juvenile Courts, Family Courts, and the Boston Municipal Court. However, a change in how pending caseloads were reported occurred after FY2010 which made direct comparisons invalid.

CONCLUSION

The provision of cost-effective and quality representation of indigent defendants is a high priority for the Commonwealth of Massachusetts. Indeed, the public defense system used in Massachusetts, and in particular the CPCS training, has long been considered a model throughout the country. The legislative mandate to increase the percentage of indigent cases for which CPCS provides representation was well-intended and was believed to stabilize or lower costs, without diminishing the quality of service for indigent clients.

JMI's evaluation of CPCS's implementation of the expansion mandate, along with the outcomes produced by the expansion, found mixed results. Ultimately, based on the various analyses conducted as part of the process and the outcome evaluation, it does not appear that the expansion of CPCS representation to 25 percent of indigent cases produced significant or meaningful outcomes related to cost certainty or quality of service.

Although CPCS has come close to meeting the 25 percent benchmark, they have not fully met the target as of the first half of FY2014. In JMI's estimation, there are a number of factors that contributed to the fact that the 25 percent target has not been met, but the primary factor was a high and increasing rate of attrition. To the credit of CPCS, even with a significant attrition rate, it was able to substantially increase representation for indigent defense cases to just over 21 percent.

The outcomes observed as a result of the expansion have been limited. In terms of improving cost certainty and cost effectiveness, the expansion has produced a modest 3 percent decrease in average cost per case. However, cost per case for public counsel has been and continues to be higher than costs for private bar advocates. Analysis of costs on an accrual basis does not show evidence of significant variation in costs from year to year. More significant variation is evident in cash spending and appropriations, but these variations cannot be analyzed in light of cost certainty because of ongoing expansion activities during the study period. Additional years of data would be necessary to more fully understand the impact on the predictability of appropriations.

Quality of service, based on the limited comparisons that JMI was able to make given available data, also has not changed markedly since the expansion. JMI found no evidence that quality suffered, consistent with the legislation's intent to maintain (if not to improve) quality. In terms of case outcomes, indigent clients are more likely to have their cases dismissed when represented by public counsel, but are also more likely to have their cases deferred pending completion of some type of terms, when represented by private bar advocates. These differences, however, pre-existed the implementation of the expansion mandate, and in fact were quite small.

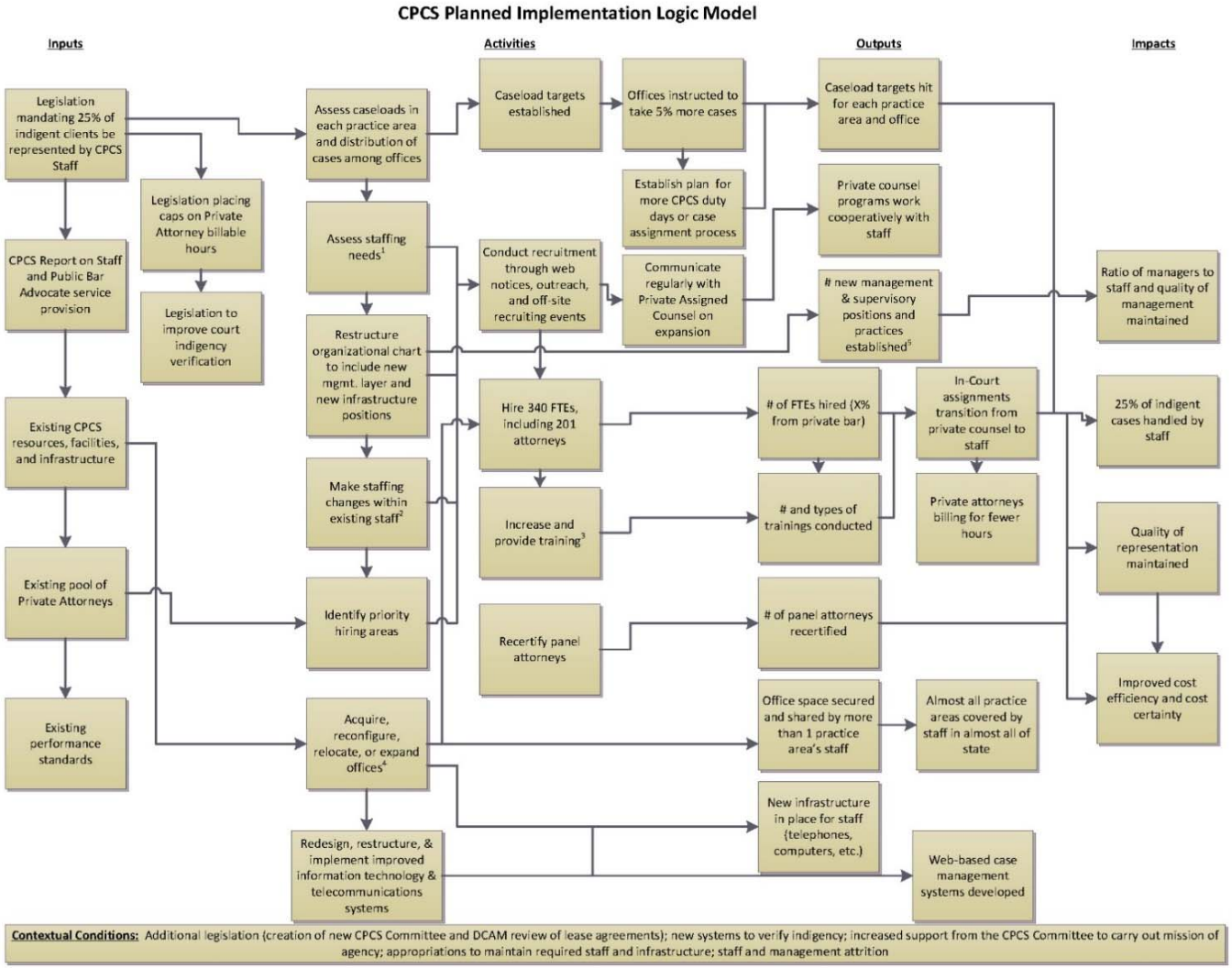
Another way in which JMI examined quality was to look at both the level of effort associated with case processing as well as the number of days that elapsed between filing and case disposition. Level of effort did show some changes, pre- and post-implementation, and by type of attorney. In particular, public counsel spent fewer hours on average handling cases in District and Superior Courts as well as mental health cases in FY2011 than private bar advocates. Higher average times were reported for juvenile, CAFL, and appeals in which public counsel spent a higher average number of hours than private bar advocates. After the expansion, similar results were found by JMI with a couple of notable exceptions – public counsel spent more hours handling cases in District Court than private bar advocates while bar advocates spent more hours handling cases in Superior Court than public counsel. Although this finding is of interest, it does not in fact reveal much about quality of service. First, one possible explanation for the difference is the sheer volume of cases in District Court and how CPCS implemented its staffing plan to facilitate the expansion. Second, no national standards exist against which comparisons can be made to judge whether the level of effort observed in Massachusetts is appropriate.

The final primary assessment of quality did produce the most significant outcomes observed by JMI. An analysis of variance in the elapsed time from filing to disposition showed that the time period (pre-/post-implementation) and the attorney type both have a statistically significant impact on the average case processing time. This confirms that cases handled by public counsel average a fewer number of days from filing to disposition than those cases handled by private bar advocates, which both pre-existed the expansion and remained after the expansion. As a measure of quality, care again must be taken to avoid placing too much emphasis on this finding since comparative national data or national standards for defenders do not exist to assess whether the average elapsed time is consistent with the ABA mandate for timely resolution of cases.

Overall, JMI's evaluation does not find that the expansion achieved the longer term goals of cost certainty or cost efficiency. In fact, a conservative calculation of implementation costs was more than $5 million. Although most of these costs are non-recurring, the facts that CPCS has faced significant barriers as a result of attrition in meeting the mandate and that the immediate, short-term outcomes are limited at best, the utility of the legislation is questionable. Longer-term analysis associated with costs may provide more support for the expansion in terms of cost certainty; however, it is important that CPCS and the legislature use clearly defined financial metrics, that all agree upon, for several years to allow for such an analysis.

Moreover, based on interviews conducted by JMI in February 2013 focusing on the impetus for the legislative change, it was reported that consideration has been given to further increasing the percentage of cases for which CPCS would provide representation. Based on the results of the evaluation, JMI would discourage another similar expansion effort in the near term, particularly in light of the significant cost implications associated with an expansion effort.

APPENDIX A. LOGIC MODEL DEVELOPED TO DOCUMENT IMPLEMENTATION PROCESS



APPENDIX B. DATA TABLES FOR CALCULATING AVERAGE COST PER CASE

Average Cost Per Case Analysis			
FY2013	Total Expense	Cases Assisted	Cost/ Case
Public Counsel (0321-1500 Personnel Costs)*	$40,969,680	51,114	$802
Public Counsel Personnel with Approved Fringe (27.87%) ŧ	$52,387,930	51,114	$1,025
Private Counsel (0321-1510)**	$130,444,018	216,867	$601
Total Expenses (Accrual Basis)	$198,024,946	267,981	$739

** Includes supplement from 0321-1518 that applied only to public counsel personnel ($6,108,628)*

*** Includes supplement from 0321-1518 that applied only to private bar advocates ($1,575,236)*

FY2012	Total Expense	Cases Assisted	Cost/ Case
Public Counsel (0321-1500 Personnel Costs)*	$34,622,128	37,687	$919
Public Counsel Personnel with Approved Fringe (33.25%) ŧ	$46,133,986	37,687	$1,224
Private Counsel (0321-1510)**	$132,506,110	222,895	$594
Total Expenses (Accrual Basis)	$193,687,778	260,582	$743

** Includes supplement from 0321-1518 that applied only to public counsel personnel ($1,168,125)*

*** Includes supplement from 0321-1518 that applied only to private bar advocates ($3,085,418)*

FY2011	Total Expense	Cases Assisted	Cost/ Case
Public Counsel (0321-1500 Personnel Costs)	$26,432,162	25,037	$1,056
Public Counsel Personnel with Approved Fringe (33.12%) ŧ	$35,186,494	25,037	$1,405
Private Counsel (0321-1510)	$150,766,345	236,099	$639
Total Expenses (Accrual Basis)	$199,209,921	261,136	$763

** Includes supplement from 0321-1518 that applied only to private bar advocates ($750,000)*

ŧ Even though these fringe expenses do not come out CPCS' appropriation, these fringe costs are associated with the cost of CPCS personnel. This fringe rate is set by the Massachusetts Office of the Comptroller annually and approved by the US Department of Health and Human Services.

APPENDIX C. DATA TABLES FOR COST CERTAINTY ANALYSIS

The table below provides additional detail on the expenses based on dates of service broken into three main categories: Public Counsel and Operations, Private Counsel, and Courts Costs.

Fiscal Year	Public Counsel and Operations	Public Counsel (Personnel Only)	Private Counsel	Court Costs
2010	$ 29,395,022	$ 24,028,228	$ 155,044,907	$ 14,477,109
2011	$ 33,005,075	$ 26,432,162	$ 150,857,732	$ 15,347,112
2012	$ 41,537,311	$ 34,622,128	$ 137,699,822	$ 14,450,643
2013	$ 51,010,763	$ 40,969,680	$ 130,906,997	$ 16,107,184

APPENDIX V

The Commonwealth of Massachusetts

Committee for Public Counsel Services

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ANTHONY J. BENEDETTI
CHIEF COUNSEL

TO: CPCS Committee Members

From: Anthony J. Benedetti, Chief Counsel

Date: February 6, 2012

Re: Report to the Committee on CPCS Budget and Expansion Implementation Plan

Attached is an informational report that responds to questions raised at the January 10th Committee meeting, and also contains material that we have provided you before but is consolidated here for your convenience. We believe the detailed information contained in this report will be helpful to you in your ongoing discussions about the CPCS FY 2012 and FY 2013 budgets and the expansion implementation plan. We had planned on providing you with this information at the next regularly scheduled meeting on February 21st, but expedited it to get it to you prior to tomorrow's meeting.

As always, please contact me if you have any questions.

Report to the Committee on CPCS Budget and Expansion Implementation Plan

Executive Summary

The Committee for Public Counsel Services (CPCS) is charged with ensuring that the Commonwealth of Massachusetts meets its duty to provide quality representation to indigent persons in criminal and civil court cases and administrative proceedings in which there is a constitutional or statutory right to counsel.

The FY 2012 General Appropriation Act, Chapter 68 of the Acts of 2011, signed into law on July 11, 2011, required that the CPCS develop a system of appointment of counsel in which no less than 25 percent of indigent defendants be represented by CPCS staff attorneys by the end of fiscal year 2012.

CPCS has taken aggressive action since the beginning of fiscal year 2012 to create and begin the implementation of a plan to alter the delivery system model. A report filed by CPCS on September 1, 2011 laid out the details of this implementation plan. CPCS has worked diligently since the beginning of the fiscal year to meet the directive of the FY 2012 budget.

The first step taken was to assess what the average annual caseloads of attorneys in each practice area should be. The Committee has spent years managing staff caseloads in each of the practice areas in which it provides representation and they have changed over time. A number of factors go into the assessment as to what appropriate staff caseloads should be. In addition to various practice area-specific considerations, all annual caseload targets depend upon the complexity of a typical case, the length of time between assignment and resolution of the typical case, the amount of time that an attorney spends on the typical case in each practice area, and an evaluation of historic caseloads specific to each practice area. The complexity of this assessment process is explained in the section What the CPCS Staff Attorney Annual Caseload Targets Are and Why.

There has been much discussion about appropriate caseloads nationally and while national standards do exist for some areas of practice, they do not account for key distinctions in Massachusetts law, jurisdiction-specific requirements and diversity in types of cases handled by the attorneys working in a particular practice area. Although these national standards are considered when determining the appropriateness of annual caseload targets, wide variations between Massachusetts law and the laws of other jurisdictions prevent direct application of existing national trends to local practice. The many reasons why these national standards are not relevant to Massachusetts are outlined in the section Why the National Advisory Commission on Criminal Justice Standards and Goals (NAC) Are Not Relevant.

Once the appropriate staff caseloads were set, the number of attorneys needed to meet the legislative mandate was determined. In the section How the Expansion Plan Was Constructed to Meet the 25% Legislative Mandate, the step-by-step process that was undertaken to make this determination is detailed.

In the section How CPCS Gets Case Assignments From the Court, the process by which CPCS staff attorneys and private counsel get assigned cases is explained. There are various methods by which the court notifies CPCS of assignments. The variation in these methods creates obstacles to the consistent and accurate counting of cases assigned. Additionally, the methods used for counting cases varies by practice areas. As a result of discrepancies in how cases are entered into the electronic assignment transmission system by the court and the continued use by many courts of paper assignments, transmission errors and data entry errors can and do occur. Thus, the effective caseload of many staff attorneys and private attorneys is lower than the actual caseload generated by the electronic assignment transmission system.

To counter these discrepancies and errors and to ensure that private attorneys have an appropriate caseload, annual caseload caps for private counsel are purposely set at a number higher than the actually desired number, as detailed in the section Why the Private Counsel Annual Caseload Caps Are Not Completely Relevant to Staff Attorney Caseloads. Failure to set the annual caseload cap artificially high would result in a substantial number of attorneys prematurely reaching annual caseload caps due to erroneous assignments.

The section The Development of the CPCS FY 2012 Expansion Plan and the FY 2013 CPCS Budget Request discusses the steps taken after staff annual caseloads were set. These steps included constructing a plan to increase staff by over 300 positions that took into consideration how many staff could be hired, trained and placed in offices during the hiring period. As part of the annual Spending Plan process that occurs every September as a first step in creating the Governor's budget, CPCS provided detailed information on this staffing plan and all other costs expected to be incurred during fiscal year 2012. Also discussed is the development of the FY 2013 budget from the above FY 2012 spending plan assumptions, and adjustments that have been made since the filing of that document to reflect the challenges with hiring and acquiring space.

What the CPCS Staff Attorney Annual Caseload Targets Are and Why

The Committee for Public Counsel Services has spent years managing staff caseloads in each of the practice areas in which it provides representation. Staff caseloads have changed over time for a number of reasons, many of which are discussed below. Adjustments to caseloads are made only after an examination of a number of factors including statutory changes, judicial decisions, practice area idiosyncrasies, and numerous systemic issues.

The latest adjustments are in response to a mandate in the FY 2012 General Appropriation Act which requires that CPCS staff attorneys handle 25% of the overall indigent defense assignments. Previously, staff attorneys handled approximately 10% of overall indigent assignments while private assigned counsel handled approximately 90% of assignments. The actual difference between the percentage of cases handled by staff attorneys and private assigned counsel varies depending upon the particular practice area.

We are confident that our latest assessments of appropriate staff caseloads are accurate and that they reflect caseloads designed to maximize efficiency while at the same time guaranteeing zealous competent representation to those individuals who are constitutionally and statutorily entitled to representation. Additionally, they respond to the mandate that CPCS handle more of the overall caseload and that staff increase individual caseloads.

CPCS will continue to monitor caseloads and make adjustments where appropriate and continue to assess deficiencies in the different systems that currently exist in an ongoing attempt to make improvements.

Superior Court Criminal – 90 Annually

Cases handled by the staff attorneys in the 13 Public Defender Division Superior Court offices are primarily serious felony cases, within the exclusive jurisdiction of the Superior Court. These are cases in which the defendant is subject to sentencing to the state prison system. The caseload of a Superior Court staff attorney consists of such serious crimes such as rape and aggravated rape, assault with intent to murder, mayhem, home invasion, drug trafficking, armed robbery and enhanced gun and drug offenses. The increasing seriousness and complexity of such cases requires that individual caseload levels be monitored carefully and appropriately adjusted to account for attorney experience levels, and supervisory responsibilities.

Statewide, the Public Defender Division's Superior Court staff attorneys already accept well over 50% percent of the Superior Court's criminal assignments, and handle an average of approximately 90 cases per year. Thus, there is no staff expansion plan in this practice area.

District Court Criminal – 190 Annually

In determining the appropriate caseloads for District Court staff attorneys, CPCS considered national trends and jurisdictional distinctions, consulted with the court, considered historical District Court caseload levels and the time typically required for various types of cases. As discussed below, significant variations between cases have a direct impact on the caseload size appropriate for an individual attorney. Wide variations in the seriousness of cases, whether the client is on probation, the individual experience level of the attorney and the behavior of opposing counsel must be considered to ensure that the caseload of each attorney is appropriately balanced and provides the client with the effective assistance of counsel.

As an initial matter, it should be noted that the caseloads of our District Court attorneys are a mix of both felonies and misdemeanors. Using the prevailing nationally-accepted definition of a felony, i.e., a crime "punishable by imprisonment for more than one year," United States v. Burgess, 553 U.S. 124, 130 (2008), **approximately 65% of the cases within the concurrent jurisdiction of the District Court -- and to which our staff PDD attorneys are routinely assigned – are felonies, not misdemeanors**. Thus, in addition to disorderly conduct and trespassing cases, clients represented by PDD District Court attorneys are accused of such serious matters as indecent assault and battery on a child under 14, possession with intent to distribute drugs within a school zone, assault and abuse of an elderly person, breaking and entering in the nighttime with intent to commit a felony, and assault and battery on a correctional officer.

Of course, "[c]ounsel should never be assigned a case that counsel lacks the experience or training to handle competently," ABA Ten Principles of a Public Defense Delivery System, and if counsel is unable, by dint of lack of experience or otherwise, to provide "high quality representation," she is ethically "obligated to refuse appointment." For this reason, the supervising attorneys in our District Court offices have the significant responsibility of determining whether staff attorneys have the experience to competently handle each case to which that staff attorney is assigned. Many of our District Court offices are staffed by brand new attorneys or attorneys with very little experience. The size and seriousness of the caseloads for such attorneys must be managed accordingly.

Many other factors beyond our control also affect caseloads: The policy of a particular DA's office– e.g., the more vigorously discovery requests are opposed, or the harsher the sentencing recommendations – can make it more challenging and time consuming to resolve cases. Similarly, the more inefficient a court – e.g., the more times a case has to be continued because the DA has not had time to review the file or summons a witness, or the challenges of scheduling a case with multiple defendants – the fewer cases an attorney will be able to resolve. Whether or not a client is on probation affects the time it takes to resolve the case, and there are significant variations among the courts in the number of cases which involve probation matters.

CAFL (Combined C&P's and CHINS) – 55 Annually

The annual target for CAFL staff attorneys (55) is a function of several factors: a) the length of time that CAFL cases typically take to be resolved; b) the anticipated split in an experienced staff attorney's caseload between care and protection and CHINS assignments (likely to be in the range of 3-to-1, with some variation from county to county); and c) the number of cases that an experienced CAFL attorney can typically carry at any given time.

With respect to the first factor, the age of CAFL cases can vary considerably. While a quarter of care and protection cases are disposed of within the first six months, more than 18% are open for more than two years, with some remaining open for ten years or more. (Some children enter foster care in their youth and can remain there until they turn 22.) The average number of days that an attorney assignment remains open is around 500 days, with a median of 351 days. CHINS assignments remain open, on average, about half as long. CAFL staff attorneys also represent children in guardianship-of-a-minor cases under the Uniform Probate Code.

The number of cases that an experienced CAFL staff attorney can typically carry at any given time is 35-40 cases which, given assignments to represent sibling groups, may mean substantially more *clients*. A prior range of 30-35 cases was established in 2006 in consultation with senior CAFL staff, based on their years of collective experience in the field. The 2006 case range, however, assumed that staff attorneys would take only a limited number of CHINS cases. Based on the budgetary requirement that CPCS staff attorneys handle 25% of all assignments in right-to-counsel cases, the open case limit for staff was revised upward this fiscal year, in anticipation of staff attorneys handling more CHINS cases.

The range also reflected the caseloads of experienced private attorneys who have been viewed as representing their clients in accordance with CAFL's performance standards. The performance standards (which apply to private and staff attorneys) specify the wide range of tasks that CAFL attorneys for children and parents are expected to perform. These include preparing for and conducting emergency custody hearings within days (or even hours) of being assigned a case (which may involve complex medical or mental health issues); working with parent clients who may have a mental illness or substance abuse issues; addressing a variety of issues relating to social services arising during the course of a case; and preparing for and conducting multi-day hearings in which the state seeks to terminate the legal relationship between the parent and child. These performance standards are generally consistent with *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.*

There are no generally accepted national standards regarding the number of cases that parents' or children's attorneys should carry at one time. Instead, most experts in the field recommend that caseloads be set at reasonable levels, consistent with the requirements of state law and local practice, the attorney's skill level, and the complexity of individual cases assigned to that attorney.

Juvenile Delinquency – 110 Annually

To determine the appropriate caseloads for juvenile representation, several steps were taken: we reviewed national standards and consulted with public defender practitioners in other states as well the experts at the National Juvenile Defender Center (NJDC). We also consulted with judges in the Juvenile Court. We reviewed past caseloads for CPCS juvenile defenders and also reviewed the caseloads of superior court attorneys.

Finally, scheduling and logistical considerations in the various juvenile courts were also analyzed. Both practitioners and judges consistently raised the issue of juvenile court logistics. Because the courtrooms are closed and because of the number of lawyers involved in many of the child welfare cases, juvenile court inevitably involves far more waiting time than other courts. In some parts of the state lawyers must travel great distances to visit clients in detention facilities and in their homes, as well as to argue bail petitions.

Important factors that were also considered include the following:

- very few states have bail or jury trials for kids like Massachusetts does
- very few juvenile courts nationally have adult sentencing authority (Youthful offender here in Massachusetts)
- most cases are resolved very quickly nationally

- many lawyers and judges in other jurisdictions expressed frustration because the lawyers clearly did not have enough time to properly prepare the cases

The national standards (NAC) are not appropriate for Massachusetts juvenile caseloads for the reasons outlined below. Additionally, they are not applicable because they were set long before a widespread understanding of issues specific to juveniles: serious collateral consequences (such as school exclusion), adolescent development, the complexity of pediatric mental health issues, trauma, family dynamics, cross practice issues due to care and protection issues (Department of Children and Family in Massachusetts) and school services and placement issues. As a result, juvenile cases today are far more complex than they used to be and juvenile cases in Massachusetts are far more complicated and time consuming than in most (possibly all) other states.

The number of appropriate cases for an attorney to handle at any one time is 30-35 cases. One critical reason is because juvenile clients and their family members require a lot of explanation, communication and attention, significantly more than the average adult client.

Mental Health – 150 Annually

The caseload of 150 cases per mental health commitment attorney per year is based upon an assessment that the attorney can competently prepare for and try an average of 3 cases per week. This is based upon an average number of hours per case, from initial intake through disposition. The average hours per case is based upon the experience of the former director of the Mental Health Division, who has overseen the work of approximately 450 private panel attorneys handling these types of cases since the MHLD's inception in 1991.

It is important to note that civil commitment has been held to be a "massive deprivation of liberty." (*Humphrey v. Cady*, 405 U.S 504 (1972); *Worcester State Hospital v. Hagberg*, 374 Mass. 271 (1978)) and that the standard of proof in Massachusetts is beyond a reasonable doubt, due to the gravity of these consequences. The U.S. Supreme Court has held that the stigma and additional deprivations of liberty associated with confinement in a mental institution require additional due process procedures even following conviction and sentence. See *Vitek v. Jones*, 455 U.S. 480 (1980) (convicted prisoners cannot be transferred to a mental health facility without additional due process procedures due to added stigma associated with being labeled as mentally ill and confined to a mental health facility).

Preparing to defend a civil commitment proceeding often involves multiple client meetings, as clients' disabilities or experiences with the system may prevent them from quickly forming trusting and effective working relationships with counsel. Preparation also involves a thorough review of medical records and a comprehensive exploration of less restrictive alternatives to commitment. Contacting potential witnesses can be made more difficult by the fact that many clients with mental disabilities are estranged from family and friends. In addition, many civil commitment petitions are accompanied by petitions to administer antipsychotic medication or electro-convulsive therapy (ECT) over the person's objection. These bi-furcated hearings involve evidence on the individual's competency to make treatment decisions and substituted judgment concerning the proposed treatment plan, in addition to the testimony on mental illness, danger to self or others and whether there are less restrictive alternatives to hospitalization. In many of these cases, retaining and working with an independent medical expert is also necessary to provide competent representation.

Why the National Advisory Commission on Criminal Justice Standards and Goals (NAC) Are Not Relevant

The Ten Principles of a Public Defense Delivery System, approved by the American Bar Association (ABA) in 2002, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." Norman Lefstein, Securing Reasonable Caseloads – Ethics and Law in Public Defense (2011) (http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/case_guidebook.html)

The black letter of ABA Principle 5 is as follows: "Defense counsel's workload is controlled to permit the rendering of quality representation."

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) were established in 1973 and recommended annual maximum caseloads for public defense programs. **It is critical to recognize that these were not intended to be goals.**

Specifically, the NAC recommended that annual maximum caseloads "of *a public defender office* should not exceed the following:

- Felonies - not more than 150 per year
- Misdemeanors – not more than 400 per year
- Juvenile - not more than 200 per year
- Mental Health - not more than 200 per year

No other national caseload numbers, whether expressed as maximum numbers or in some different fashion, have ever been recommended. It appears that the NAC did not actually do any work of its own in order to come up with the caseload standards attributed to it for so many years. They were recommended during the 1970s, when defense lawyers did not need to be especially concerned about collateral consequences of criminal convictions. Lefstein, Securing Reasonable Caseloads – Ethics and Law in Public Defense

Professor Lefstein comments: "Some persons might wonder why it matters if the NAC caseload numbers are too high, because they are expressed as maximums, not recommended numbers of cases that public defense lawyers should annually represent. The answer is that caseload numbers expressed as maximums all too frequently are regarded as the norm, i.e., the number of cases that a defense lawyer should be able to represent over a twelve-month period. Warnings about relying upon the numbers are soon forgotten, and public defense programs are reluctant to seek financial support to enable their lawyers to handle caseloads at any number below "national standards," even though the NAC numbers were never intended to be used as a nationwide measure of how many cases an individual lawyer should be able to handle each year."

Reference to caseload limits for felony and misdemeanor cases in other states or at the national level , such as the 1973 NAC limits, must always be informed by the fact that **the definition of a felony and a misdemeanor *is different under Massachusetts law* than it is nationally and in most other states**. It is not accurate to view our District Court cases as misdemeanors for the purpose of national caseload limits. The national definition of a felony is a case carrying a possible penalty of 1 year. In Massachusetts, offenses which carry a potential punishment up to as much as 2 ½ in a Jail or House of Correction are classified as "misdemeanors." **In Massachusetts, a substantial portion (approximately 65%) of the cases within the District Court's concurrent jurisdiction), would be considered felonies by national standards and under the NAC limits.**

The American Council of Chief Defenders (ACCD) in a 2007 statement on the NAC caseload standards raised the following points

(http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf):

- The many ways in which criminal defense representation has become substantially more demanding since the "NAC Standards" were written in 1973
- The ways in which the representation of juveniles has changed since 1973
- The increased use of forensic evidence which requires time for attorneys to understand, defend against, and present scientific evidence and the testimony of expert witnesses

[T]he ACCD … statement...[about the NAC standards] outlines how over the years legal developments and procedural changes have made indigent defense much more difficult, placing on defense lawyers far greater time demands and requiring a higher level of expertise. As the ACCD explains, defense attorneys now have to deal with "entire new practice areas, including sexually violent offender commitment proceedings, and persistent offender ('three strikes') cases which carry the possibility of life imprisonment." Further, the statement discusses the increased complexity of juvenile defense work, [and] the importance of defenders understanding the collateral consequences of convictions …(from Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel; Report of the National Right To Counsel Committee (April 2009): http://www.constitutionproject.org/pdf/139.pdf

The National Juvenile Defender Center, which has done formal assessments of juvenile defense in nearly half the states, has concluded that variation in law and practice across the states is so dramatic that it would be impossible to establish national caseload standards.

Finally, it is worth noting that there are no "national caseload standards" for prosecutors who handle criminal and juvenile cases in state courts. The National Association of District Attorneys has a research arm—the American Prosecutors Research Institute (APRI). In 2002, APRI published the results of a national project it undertook respecting prosecution workloads. The report's conclusion applies with equal force to public defense:

"On the national level, APRI spent 3 years collecting information to determine if national caseload and workload standards could be developed. After examining all the information collected to date and attempting to control for the effects of various external, and internal, and individual case factors on the overall workload, **APRI found that it was impossible for such standards to be developed.**

Although it is desirable to many to have national standards, **APRI'S findings demonstrate that such standards would be fatally flawed without significant efforts to create a national method of case counting and for tracking those factors most likely to impact caseload." (American Prosecutors Research Institute, How Many Cases Should A Prosecutor Handle? Results of the National Workload Assessment Project 27 (2002): http://www.ndaa.org/pdf/How%20Many%20Cases.pdf**

Pursuant to G.L. c.211D, the CPCS in the 1980's promulgated Caseload Limits as well as Performance Standards to provide a clear statement for both staff and assigned private counsel of what constituted effective, ethical , high quality representation of indigent clients in each area of law in which cases were assigned. These Performance Standards are used to measure attorney performance by CPCS in conducting its oversight duties. The CPCS Performance Standards have also been cited by the SJC as describing the appropriate level of performance for attorneys, Care and Protection of Georgette, 439 Mass. 28,44 (2003) and are often considered by the Office of Bar Counsel in assessing attorney performance. Examination of the CPCS Performance Standards demonstrates the complexity of CPCS cases, all of which implicate the most basic and precious rights of the clients.

Compliance with these Performance Standards is inextricably linked with the maintenance of reasonable caseloads; you can't have one without the other. The capping of billable hours for private counsel and the work schedules of staff counsel dictate the attorney time available which, together with the complexity of cases, provides the basis for the determination of appropriate caseload limits. As mandatory sentences and collateral consequences of assigned cases grew more onerous, the CPCS has adjusted caseload limits over the years to assure that cases could be properly handled in the time available.

The Caseload Limits set by the CPCS comport with the actual practice of responsible attorneys. Thus not only does our staff maintain limited caseloads, the vast majority of private attorneys handling assigned cases voluntarily stay well below the CPCS Caseload Limits. In FY2011, only 2.9% of private assigned counsel handled more than a weighted caseload of 190 under the CPCS weighted case counting system, even though the upper limit was 250.

How the Expansion Plan Was Constructed To Meet the 25% Legislative Mandate

District Court Expansion:

- Estimated the overall number of indigent defense cases in which counsel would need to be appointed by looking at number of assignments to private bar and to staff attorneys in fiscal year 2010
- The trend in caseload assignments over the last three fiscal years has been consistently down but it has been erratic. The statistics are as follows:

  FY'09: - 0.23% reduction in new and carry-over case assignment

  FY'10: - 7.72% reduction in new and carry-over case assignment

  FY'11: - 2.42% reduction in new and carry-over case assignment

Based on this downward trend over the last three fiscal years (- 4.1% multi-year average) and an anticipated reduction due to renewed efforts in indigence determination, we factored in a 5% reduction in overall assignments for fiscal year 2012.

- Determined the number of cases the Public Defender Division would need to handle to reach the legislative mandate of 25% of overall indigent defense assignments

- Calculated the number of attorneys necessary to handle this number of cases based on an average annual caseload of 190. This number is a significant increase over the actual number of cases PDD staff attorneys handled in previous fiscal years

- In determining where to locate new attorney staff to ensure meeting the legislative mandate of 25%, we looked at the number of cases in each district court within each county. A determination was made that in order to maximize efficiencies of office space and support staff, new attorney staff should be located primarily in urban areas, in existing CPCS staff offices. This was to avoid wasting time driving to the small volume courts and/or have to open smaller offices to reach the more remote locations; e.g., extreme example of this is the logistical challenge involved in covering the District Courts on Nantucket and Martha's Vineyard; but the same basic challenge is presented by trying to cover courts in other remote, low volume locations

- The number of new attorneys needed was calculated by subtracting the number of present staff attorneys from the total number of attorneys necessary to handle the overall number of indigent defense cases

Children and Family Law Expansion:

- Estimated the overall number of indigent defense cases in which counsel would need to be appointed by looking at number of assignments to private bar and to staff attorneys in fiscal year 2010.

- The trend in caseload assignments has over the last three fiscal years been consistently down but it has been erratic. The statistics are as follows:

	C&P's	CHINS
FY'09	3.21%	-1.23%
FY'10	-9.02%	1.16%
FY'11	-4.74%	-.4.90%

Utilizing this recent data combined with an anticipated reduction due to renewed efforts in indigence determination, we factored in a 5% reduction in overall assignments for fiscal year 2012.

- Determined the number of cases the CAFL Division Staff would need to handle to reach the legislative mandate of 25% of overall indigent defense assignments

- Calculated the number of attorneys necessary to handle this number of cases based on an average annual caseload of 55. This number is a significant increase over the actual number of cases an

attorney handled in previous fiscal years. Staff CAFL Attorneys primarily focused on C&P cases in previous years; going forward, staff will handle a mixed caseload of Care and Protection (C&P) and Children in Need of Services (CHINS) cases. Cases are weighted differently as CHINS cases are generally not as intensive and not as time-consuming

- In determining where to locate new attorney staff to ensure meeting the legislative mandate of 25%, we looked at the number and types of cases (C&P's vs. CHINs) in each county. The percentages of C&P's and CHINS cases within a county are not uniform and can dramatically differ. A determination was made that in order to maximize efficiencies of office space and support staff, new attorney staff should be located primarily in existing CPCS staff offices close to the relevant courts
- The number of attorneys needed within each county reflected the specific caseloads of that county; i.e., the proportion of C&P's to CHINS cases in each county. We calculated the number of attorneys needed within each county using an average mixed caseload of C&P's and CHINS

Mental Health Expansion

- Estimated the overall number of indigent defense cases in which counsel would need to be appointed by looking at the number of assignments to private bar and to staff attorneys in fiscal year 2010
- The mental health caseload is split between approximately 60% guardianship cases and 40% civil commitment cases
- For two reasons, the decision was made to NOT have staff handle guardianships. The first reason is that guardianship cases are geographically spread throughout the state, rather than centralized. The second reason is that the nature of guardianship cases more often than not involves representation throughout the life of the incapacitated person who is the client. Following the initial hearing on the need for a guardian and the scope of the guardian's authority, continued representation typically involves a small number of hours required for annual treatment plan reviews. These two factors make it impractical and inefficient to establish a staff model for representation in these cases

- Of the commitment cases, a determination was made to have staff attorneys handle civil commitments originating out of major public psychiatric facilities. The public facilities are well-established and they have hearings on a regular basis as opposed to mostly small private psychiatric facilities which are scattered throughout the state. Additionally, while most civil commitment petitions arise from private psychiatric facilities, the vast majority of patients in these facilities typically receive acute care, in which they are quickly stabilized and released. Thus a smaller number of these cases go all the way to a full hearing. In contrast, the vast majority of clients with mental illness who have complex needs and are deemed in need of longer-term, continuing care are housed in the several public state hospitals and mental health centers. Given the large concentration of clients within these public facilities, the geographic spread of the private facilities and the small number of clients within any particular private facility, it made sense fiscally and for efficiency purposes to focus staff expansion primarily on the public facilities

- Projected the number of cases that arise out of these public mental health facilities and the large private psychiatric facilities in close geographic proximity (based on NACs issued in previous years) to arrive at the number of yearly cases to be handled by staff attorneys assigned to these hospitals
- Calculated the number of attorneys necessary to handle this number of cases based on an average annual caseload of 150

Youth Advocacy Department (Juvenile) Expansion

- During FY'11, YAD was in the midst of opening up to seven new offices to add to the two existing offices in response to the FY'11 General Appropriation Act
- By the beginning of FY'12, YAD had six of the possible seven new offices open and operational
- Assessed the percentage of juvenile cases our offices were already set up to handle by looking at the number of assignments to private bar and to staff attorneys in fiscal years 2010 and 2011
- The trend in caseload assignments has over the last three fiscal years been consistently down
- Because the Juvenile Court counts complaints and not cases or probation surrenders and because the CPCS E-Bill system often receives multiple cases bundled onto a single NAC, it was impossible to count the exact number of cases in the Court. As the Office of the Commissioner of Probation make its data more readily available, we have become better at estimating the true number of cases. Our current estimate of the downward trend in juvenile assignments is as follows:

  FY'09: -6.58% reduction in case assignments
  FY'10: - 12.47% reduction in case assignments
  FY'11: -13.27% reduction in case assignments

  The Juvenile Court currently estimates approximately a 39% drop over the past five years.

- Estimated the number of cases likely to be available by adding three numbers: 1) the total projected NACs, 2) the total projected cases to be handled by staff attorneys, and 3)the total projected number of probation surrenders
- With the average annual caseload target of 110, and the newly staffed offices primarily in place, YAD was already set up to meet or exceed the legislative mandate
- If caseloads continued to drop, the staff will dramatically exceed the legislative mandate within the juvenile department
- Because of the dramatic decrease in juvenile cases, we decided not to open an office in Brockton and instead added two new lawyers in Hampden County to cover cases in Berkshire, Franklin, and Hamden and Hampshire Counties and two lawyers were added in Hyannis to cover the Cape and lower Plymouth County. This enabled us to establish a staff presence in every county
- As the year has progressed we have monitored the case loads carefully so that we are positioned to make staffing changes as needed based on the total number of cases in the juvenile court and staff capacity

How CPCS Gets Case Assignments From the Court

There are various methods by which the court notifies CPCS of the assignment of counsel depending upon the practice area. The variation in these methods creates obstacles to the consistent and accurate counting of cases assigned. For the private bar, which in FY 2011 accounted for approximately 90% of the representation, a Notice of Assignment of Counsel (NAC) is issued by the court or by CPCS directly to the assigned private attorneys for each case. The public staff assignments are counted using an internal case tracking system with subsystems for each practice area. The methods used for counting cases are described below for each practice area.

- **Criminal Cases:** Counting the number of assignments or NACs does not result in an accurate calculation of the total number of criminal cases assigned to private counsel. This is because the NAC transmission by the Court to CPCS bundles all pending cases against a client into one transmission, regardless of the total number of charges or incidents included. Some NACs may include several cases or incidents resulting in one or more criminal charges, as well as resulting probation surrenders. The bundling of multiple cases into one NAC also means that it is very difficult to determine whether CPCS is severely undercounting the number of cases represented

- **Juvenile Cases:** Similar to adult criminal cases, the transmission of data by the Juvenile Court also creates a discrepancy by creating a single NAC for each individual. This single NAC may contain multiple cases. Moreover, the date published by the Juvenile Court reflects not the number of cases, but the number of charges handled by the court. One case may involve multiple charges and each individual may have multiple cases. As a result, neither of these methods of creating a NAC clearly translates into "cases"

- **Children and Family Law Cases:** The workload of children and family law cases assigned to private counsel is also difficult to assess because of the number of counsel needed to assist in each proceeding. In child in need of services (CHINS) cases, there is typically just one attorney assignment per petition (for the child), though in some cases, a separate CPCS attorney may be assigned to represent a parent in the case. In care and protection (C&P) cases, there are three assignments per petition on average, with one attorney assigned to represent the mother, another attorney assigned to represent the father, and a third attorney assigned to represent the child(ren). Many cases, however, involve numerous parents, requiring additional attorneys to be assigned to represent them. In some cases the interest of one child conflicts with the interest of siblings involved in the case. For example, one child may want to remain home while another may want to be placed in substitute care. Their divergent interests require that they be assigned separate attorneys

- **Mental Health Cases:** Counsel in mental health cases may be assigned in numerous ways depending upon whether the case is a district court commitment and/or antipsychotic treatment case, a Probate Court guardianship and/or antipsychotic treatment case or a commitment in connection with a criminal case. In addition, Probate Court cases are assigned directly by the Probate Court, and involuntary hospitalization or commitment cases, as well as district court treatment cases, are assigned directly by CPCS

Why the Private Attorney Annual Caseload Caps Are Not Completely Relevant to Staff Attorney Caseloads

District Court - Criminal – 250
Superior Court – Criminal – 125
Mental Health – 125
Youthful Offender – 125
Juvenile Delinquency – 165
Care & Protection – 125 CHINS – 165

> *Note: If an attorney is on multiple practice area panels, there is a weighting system so that these caseload caps are not violated. See CPCS Assigned Counsel Manual: http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf*

The annual caseload caps have been set intentionally higher than the actual desired caseload limit in order to account for errors in Notices of Assignment of Counsel (NAC) issuance by the courts. We must set a caseload limit with a cushion large enough to account for data entry errors that understandably occur when dealing with over 230,000 private counsel appointments annually. To not do so would require a dramatic increase in our small administrative staff.

Prior to implementation of the MassCourts system of electronic assignment transmission, when NACs were issued by hand on paper by court clerks, the practices of different clerks varied widely. Some clerks would issue an assignment for every docket number making some attorneys' caseloads appear grossly inflated; many would issue a separate assignment if a case transferred from one court to another causing each one of those cases to count as two. Despite attempts to resolve the issue in cooperation with court authorities, the problem still exists. When the court introduced electronic assignment transmission through the MassCourts program, the court designed that program to require the issuance of a new assignment *as the only way to correct any error in data entry by court clerks*. Thus, it is still true today that depending on what court an attorney practices in and what court personnel handle the issuance of assignments, the attorney's caseload can be inflated by errors that are not reported to CPCS and may be unknown even to the attorney. We therefore must set a caseload limit with a cushion large enough to account for the vast majority of data entry errors by all court clerks or our tiny CPCS administrative staff would be unable to enforce the limit.

If caseload limits for private counsel were set at the actual desired level, substantial numbers of attorneys would hit the limit due to erroneously issued NACs. Notice to an attorney that they had reached the limit would be delayed since the court's transmission of NACs to CPCS is often delayed. Also, the data entry for data on the paper NACs still in use by many courts requires as much as ten days to reach CPCS. Enforcement of the limit would interrupt representation of the client and require reassignment to another attorney, necessitating that the representation begin anew and that many tasks be repeated. Clearly it is important from both a cost and quality perspective to avoid erroneous enforcement of a caseload limit. Thus the private counsel limits are set high so that they will be triggered by only an administratively manageable number of true outliers.

The complexity of CAFL cases led the Committee to establish separate open case limits for these cases. The open case limits, however, do not necessarily reflect the number of cases that a CAFL attorney can *actually* carry at any one time, consistent with CPCS performance standards. The open case limit for care and protection cases (set in 1994) was based not only on the nature of cases handled by CAFL (then called the Family Law Advocacy Project or FLAP) private attorneys, but also on concerns that an open caseload limit of lower than 75 would drive attorneys out of this practice area and make it difficult to ensure that attorneys could be assigned in every case.

Since these caseload caps were originally set, CAFL practice has changed significantly. Care and protection cases, which were regularly heard in District Court in 1994, are now heard in Juvenile Court, making each care and protection case a potential termination of parental rights case. In 1994, nearly all termination cases were separate proceedings in the Probate and Family Court. Changes in federal law also placed care and protection cases on a faster track toward termination of parental rights. In addition, two 1995 SJC decisions (Care and Protection of Isaac, 419 Mass. 602, and Care and Protection of Isaac, 419 Mass. 616) created significant hurdles and additional procedures for attorneys challenging DCF decisions about services, placement, and visits, which require attorneys to engage in more discovery, file more detailed motions and affidavits, and call more witnesses in such cases. As a result, each open case limit is significantly higher than the number of cases that most CAFL attorneys now carry. Less than 5% of CAFL attorneys whose caseloads have been verified have more than 50 open care and protection cases.

Of note are the following statistics: in FY 2011 a) no attorneys accepted more than 100 CHINS cases, b) no attorneys accepted 75 or more CAFL cases, c) only 1 attorney accepted 150 or more Mental Health cases, d) only 1 attorney accepted 110 or more Juvenile Delinquency / Youthful Offender cases and e) only 19 attorneys accepted 190 or more District Court Criminal cases. These numbers demonstrate that the CPCS staff caseload targets are realistic and reflect the true volume of cases an attorney can handle when they conform to the mandated CPCS Performance Guidelines.

The Development of the CPCS FY 2012 Expansion Plan and the FY 2013 CPCS Budget Request

After staffing patterns were established to provide a sufficient number of attorneys, supervisors and support staff to achieve representing 25 percent of all indigent defense cases, a hiring plan was developed to schedule and budget for increasing staff by over 300 full time equivalent positions. The hiring schedule extended over the full fiscal year with 90% of the hiring to take place during the first seven months of the fiscal year. The schedule was developed by determining how many staff could be hired, trained and placed in offices during the hiring period. The primary factors affecting hire dates were the capacity of training resources (how many new attorneys with no prior experience could be trained at one time) and the availability of space to house new staff once training and hiring were completed. For space planning, each individual office location was analyzed to determine what maximum number of new staff could occupy existing space by sharing offices, using conference rooms for multiple attorneys and any other

available space that could house attorneys or support staff. Individual leases were reviewed to determine which locations had additional space within the same building and how many leases could be amended to provide temporary space without major construction. DCAM also reviewed leased space occupied by other state agencies to determine if any could be amended to include CPCS as an additional tenant. The above training and space resource analyses resulted in a hiring plan for over 340 positions with each position being assigned a target hire date.

Once the hiring plan was completed, finance staff calculated the cost of filling the positions according to the hiring schedule and determining all other ancillary costs associated with bringing on new staff. As part of the annual Spending Plan process that occurs every September as a first step in creating the Governor's budget, CPCS provided detailed information on staffing and all other costs expected to be incurred during fiscal year 2012. As part of that process the hiring plan was included in the salary budget section of the spending plan. Unfortunately the new budget system that Administration and Finance implemented for building the FY 2012 budget could not accommodate a new hire list that included over 300 planned new hires. Therefore, in order to submit the data in the template available positions with the same job title were grouped by title and salary and hire dates were adjusted to provide average salary figures and mid-point hire dates so the calculations were in line with the detailed hiring plan. The 300 plus FTE's budgeted had to be grouped and consolidated to a 42 line summary to provide an acceptable submission. All data required for the FY 2012 spending plan was submitted on or before October 24, 2011.

The development of the FY 2013 budget from the above FY 2012 spending plan assumptions (the second requirement of the annual spending plan submission) used the assumption that all new hires would be continued for a full year in FY 2013 at the estimated salaries contained in the FY 2012 spending plan. Any onetime startup costs (e.g. furniture, computers, office equipment purchases, etc.) were not carried forward to the FY 2013 budget.

For subsequent FY 2013 budget proposals (the CPCS request and the Joint Ways and Means request) the salaries and benefits were adjusted as adjustments were made to the FY 2012 hiring plan. The only significant change was that some of the budgeted hires for FY 2012 were moved to the first quarter of FY 2013 primarily because space was not available to accommodate new hires on the dates in the original spending plan. Adjustments were also made to reflect the challenge in hiring as quickly as planned because of the lower than expected level of private attorney interest in staff positions.

APPENDIX VI

March 14, 2012

Preliminary Report

of the

House Post Audit and Oversight Bureau

Massachusetts House of Representatives

Fair and Cost Effective – Ensuring an Adequate Defense While Protecting the Taxpayers;

Review of the Indigent Defense Counsel Program

In the Massachusetts District and Boston Municipal Courts,
Administrative Office of the Trial Court,
Commonwealth of Massachusetts.

Including:

- Efforts at Decriminalization Motion (MGL c 277 s 70C)
- Other Diversion Programs For Certain Misdemeanors
- Indigency Verification
- Revenue Reconciliation of Indigency Fee
- New England States/ Other States Indigency Programs

Members of the House Post Audit and Oversight Committee

Representative David P. Linsky, **Chairman**
Representative Benjamin Swan, **Vice Chairman**

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Representative Bruce J. Ayers
Representative David M. Torrisi
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Chairman, House Committee on
Post Audit & Oversight

March 14, 2012

Citizens and taxpayers of Massachusetts,

On behalf of the House Post Audit and Oversight Committee I am pleased to present to you with the Committee's Report "Fair and Cost-Effective – Ensuring an Adequate Defense While Protecting the Taxpayers; A Review of the Indigent Criminal Defense Program" and the Committee's subsequent recommendations.

After last year's budget debate I began a discussion regarding the amount of funding provided for court-appointed counsel and I instructed the House Post Audit and Oversight Bureau to conduct a review of the indigent defense counsel program. The Commonwealth is appropriating approximately $200,000,000 of funding to the Committee on Public Counsel Services (CPCS) every year for the purpose of providing court-appointed counsel for criminal defendants. My concern is this appropriation continues to strain the Commonwealth's budget and impacts its ability to provide services in other vital areas.

Providing effective public counsel to those who cannot afford their own is an important right that we work to protect here in the Commonwealth. However, vital funding is being used for appointed counsel on cases where no jail time is being sought by the prosecution. Under the Constitution, the Commonwealth is not legally obligated to provide counsel in those cases. These tens of thousands of cases a year cost the Commonwealth millions of dollars and cause those who are deemed indigent to produce fees which otherwise could have been avoided. Now, more than ever, as we approach another difficult budget in which we are working hard to ensure that government spending is being regulated, we need to look at possible ways to cut excess in order to locate necessary funding to help support so many of the other programs and services on which our citizens depend.

During their review the Bureau discovered that there were inconsistencies with the indigency verification process across the court system. During this review the Probation Department implemented a pilot program into four of its courts which, based on the data collected, has proven to include a more successful set of verification procedures. So far the Probation Four Court Pilot Program finds only 1.15 percent of those claiming indigency at arraignment, are

misrepresenting their income and indigency status. In addition, the Bureau also determined that there were a great number of cases that were being appointed public counsel for single misdemeanor charges, where no jail time was either sought by the prosecution or imposed by the court. In Fiscal Year 2011 (FY11) there were 43,757 misdemeanor crimes charged in which the defendant was being arraigned on a single misdemeanor and which the court appointed counsel. These cases alone cost the Commonwealth $17,355,893.60 for court-appointed counsel in cases in which incarceration was only a possibility in a few cases.

The Committee presents three recommendations based on these findings, the first of which is to universally implement the pilot system that the Probation Department has implemented in four courts. In order to make the state-wide implementation of this program easier, the Committee proposes some minor statutory changes which are included in this report in "Appendix G". The second recommendation of the Committee is that once the Civil Infraction Commission finishes their review and issues their report, that the legislature implement their recommendations. Our final recommendation is to amend the law relative to the appointment of counsel on misdemeanors in order to cut back on the amount of defendants who will be eligible for appointed counsel and eliminate court-appointed attorneys for those cases in which no incarceration will ever be sought by the prosecution or imposed by the court. Based upon the research that has been collected on the most common misdemeanor offenses in which jail time is rarely being sought, it is the Committee's recommendation that the General Laws be amended to change the presumption on forty-one misdemeanor offenses so that it is presumed that jail time is not being sought by the Commonwealth and therefore there would be less of a need for public counsel. In FY11 alone, had these forty-one types of misdemeanors cases not been appointed public counsel, the Commonwealth could have saved $3,642,254.00 in single-charge misdemeanor cases alone.

I have included the language of this proposed statutory change which I recommend be incorporated into the FY13 General Appropriations Act. I believe that as we approach another difficult budget year that these recommendations to implement a more efficient indigency verification process combined with the recommendations of the Civil Infraction Commission and the amendment of current misdemeanor crimes could help to save the Commonwealth upwards of $10 million.

Sincerely,



Chairman David P. Linsky
House Post Audit and Oversight Committee

Representative David Linsky

Suggested Amendment to MGL c211D s 2B

See Appendix E for Current Law

Massachusetts General Laws c 211D s 2B

Chapter 211D Committee for Public Counsel Services

Section 2B Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

Mr. Linsky of Natick moves to amend the bill by inserting after section XX the following new section:-

SECTION YY. Chapter 211D of General Laws is hereby amended by striking section 2B and inserting in place thereof the following section:-

Section 2B. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the Commonwealth, on motion of the defendant, or by the court sua sponte, shall not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

A criminal defendant charged only with violations of: sections 10, 11, 23, the crimes of operating a motor vehicle negligently or recklessly so as to endanger, leaving the scene of an accident, causing property damage, under section 24 (2)(a), 25, or 34J of chapter 90; sections 34 or 35 of chapter 94C; section 75 of chapter 130; section 34C of chapter 138; section 12 of chapter 140; section 39 of chapter 148; section 218 of chapter 160; section 30 (1), if said property is valued at less than two hundred and fifty dollars, section 30A, clauses (b), (i) and (k) of section 37B, sections 60, if said property is valued at less than two hundred and fifty dollars, sections 87, sections 120, 126A, or 127 of chapter 266, or sections 12, clauses (a) and (b) of sections 53, or clause (a) of sections 53A of chapter 272 shall not be appointed counsel unless said offense requires a mandatory period of incarceration or the Commonwealth notifies the court in writing that it will recommend to the court that the defendant's sentence, if convicted, will include a period of incarceration. Such notice may be filed at any time prior to trial and the court may then appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial.

Fair and Cost Effective – Ensuring an Adequate Defense While Protecting the Taxpayers:

Review of the Indigent Defense Counsel Program

In the Massachusetts District and Boston Municipal Courts,
Administrative Office of the Trial Court,
Commonwealth of Massachusetts.

Findings

- Disparity of Data and Lack of Data Make Comparisons Difficult
- Use of Decriminalization Motion of MGL c 277 s 70C Not Extensive
- Other Criminal Court Diversions Used by Prosecutors
- Reliability of Previous Indigent Verification Process Doubtful
- Other States Experience Similar Indigent Defense Counsel Challenges

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Committee Recommendations

1. Universally implement the pilot system that the Probation Department has implemented in four courts. In order to make the state-wide implementation of this program easier, the Committee proposes some minor statutory changes which are included in this report in "Appendix G".
2. Once the Civil Infraction Commission finishes their review and issues their report, that the legislature implement their recommendations.
3. Amend the law relative to the appointment of counsel on misdemeanors in order to cut back on the amount of defendants who will be eligible for appointed counsel and eliminate court-appointed attorneys for those cases in which no incarceration will ever be sought by the prosecution or imposed by the court.
   - Amend the General Laws to change the presumption on forty-one misdemeanor offenses so that it is presumed that jail time is not being sought by the Commonwealth and therefore there would be less of a need for public counsel.

Methodology

The House Post Audit and Oversight (HPAO) Bureau wrote and distributed several survey tools, requested documents and conducted interviews or exchanged correspondence with authorized persons in the Administrative Office of the Trial Court (AOTC), and its District Court and Boston Municipal Court departments; the Office of the Commissioner of Probation; the Massachusetts District Attorneys Association; and the individual District Attorneys offices. The HPAO Bureau also interviewed the chairman and the former general counsel of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. The Bureau interviewed the chief counsel and the general counsel at The Committee on Public Counsel Services (CPCS) and requested documents from CPCS. The HPAO Bureau also spoke individually to various persons in District and Boston Municipal Courts who contacted the HPAO Bureau upon receipt of the survey research tool distributed by the HPAO Bureau. The HPAO Bureau sought data and/or documents from the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV) both to determine what means of indigency verification were used either for the Probation department or AOTC, or at their specific agency. The HPAO Bureau was given the management revenue reconciliation reports of the AOTC and after analyzing those reports requested further information from the AOTC, and discussed the reports with the fiscal affairs division of the AOTC. The HPAO Bureau also contacted the Fiscal Affairs Division of the Office of the Secretary of Administration and Finance, and the Massachusetts Comptroller. The HPAO Bureau also discussed the indigent verification program with the Office of the State Auditor. All documents provided to the HPAO Bureau were reviewed and where necessary follow up interviews or questions were made to the particular source of the document, interview, letter, inquiry, or statement. The HPAO Bureau also attended the meetings of the Civil Infractions Commission as an observer. The HPAO Bureau also reviewed the indigent defense council programs of other states including but not limited to the New England region. The HPAO Bureau conducts its performance audit and review based upon the Government Auditing Standards of the United States General Accounting Office.

Sections

1. **Efforts at Decriminalization Motion (MGL c 277 s 70C)**
2. **Other Diversion Programs for Certain Misdemeanors**
3. **Indigency Verification**
4. **Indigency Fee Revenue Reconciliation**
5. **New England States/ Other States Indigency Programs**

Appendices/Attachments

A- Review of AOTC Revenue Reconciliation Reports for Indigent Defense Counsel Fees: FY09, FY10, FY11

B- Charges Amended to Civil Complaints under MGL c 277 s 70C for Calendar Year 2010

C- Flow Chart regarding Massachusetts Indigency Verification Process draft copy by Kennedy School of Government for Office of the Commissioner of Probation

D- 2004 Commissioner of Probation: Interim Indigency Verification Protocol Change; 1990 AOTC on Indigency Fee Collection

E- Massachusetts General Laws Chapter 211D s 2A and 2B, Committee for Public Counsel Services

F- 188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost, FY 2011

G- Commissioner of Probation Suggested statutory changes

Commentary following appendices - Letter, Commissioner of Probation

Table of Contents

Section One:
Efforts at Decriminalization Motion (MGL c 277 s 70C) Page 1

Use of the Decriminalization Motion of MGL c. 277 s. 70C is Not Extensive

Indigent Defense Counsel Provisions
Systemic Problem, Not Limited to a Single Concern Page 2

Other Diversion Programs Utilized:
Pilot Programs, as Recommend in 2005 Needed: Page 2

Probation Verification
Pilot Program Underway: Page 2

Motion for Civil Infractions Statistics Page 4

Massachusetts Sentencing Commission Pamphlet Page 5

Clarification Requests Made of AOTC:
Single Charges versus Multiple Charges; Page 11

Clarification Requests Made of AOTC: Page 13

Comparative Analysis
"Disorderly Conduct/Disturbing the Peace" by County Page 14

Massachusetts Civil Infractions Commission Page 18

Pilot Programs Page 18

Section Two:

District Attorneys and MGL c 277 s 70C
Decriminalization and Diversion Page 20

Survey of the District Attorneys Regarding MGL c 277 s 70C Page 20

Decriminalization and Diversion Page 20

MGL c 218 s 35A Provision:
Ability of a Police Officer to:
Issue Citation and Offer Clerk Hearing Page 20

Pre-trial Community Service Diversion Program Page 21

Non-qualifying Misdemeanors Make Page 22
- **Also: Issue of Single and Multiple Charges**

No Record of Defense Counsel Ever Moving to
Convert a Criminal Offense to a Civil Infraction Page 25

"Case management system…does not provide sufficient information"
- **Data Systems Issue in Some DA Offices** MULTIPLE PAGES

Section Three:

Indigency Verification
Determining a Person's Poverty Page 27

Audit Difficult if Not Impossible Page 27

The Cost of Constitutional Rights Page 28

Verifying the Earnings and Asset
Status of Offenders Applications Page 30

Verification of Verification Page 31

Indigency and Interagency Service Agreements
Required by Statute; Only One of Four Operational Page 31

- **The Department of Transitional Assistance (DTA)**
- **Department of Medical Assistance (DMA)**
- **Registry of Motor Vehicles (RMV)**
- **Department of Revenue (DOR)**

Department of Revenue (DOR) Explains Its Role Page 32

Commissioner of Probation Explains Its Role Page 33

Indigent Verification Statistics Flawed
High Misrepresentation 'Yield' Not Expected Page 35

Four Court Findings on Indigency Misrepresentation Page 37

Governor's House One Proposal:
Indigent Defense Counsel Reform Page 38

Prosecutors Indicate
Need for Indigent Verification Page 40

Questionable Claims of Cost Savings for
Misrepresented Indigency Page 42

- **Claim as Much as 15 Percent of Applicants Invalid**
- **Department of Transitional Assistance (DTA) Model**
- **Fiscal Affairs Division; Source of Claim**

Fiscal Affairs Division Queried; Estimates Questioned Page 43

Recommendation:
Expand Pilot Program into All Courts Page 45

Section Four:

AOTC Revenue Reconciliation Reports Page 46

(FY 2009 through FY 2011)

Smallest Criminal Caseload District Court Recorded
<u>More</u> Indigent Fee Revenue than Courts Much Larger; Page 46

- **A13 (601 average criminal cases)** reported: $20,580.00
- **A19 (7,004 average criminal cases)** reported: $8,070.00
- **A11 (9,434 average criminal cases)** reported: **no** reported revenue
- **A3 (12,360 average criminal cases)** reported: **<u>negative</u>** revenue ($-1,750.00)

Disproportionate Pattern in Collection
of Indigent Fees in District Courts Page 46

AOTC Revenue Reconciliation Disparity Page 51

Section Five:

Indigent Defense Legal Services - Public Defender Functions

Connecticut – Maine – New Hampshire – Rhode Island – Vermont Page 52

Indigent Defense Legal Services - Public Defender Functions

Georgia - Iowa - Michigan - North Carolina - Oklahoma – Texas Page 57

Endnotes

Appendices/Attachments (A, B, C, D, E, F, G)

Commentary Following Appendices- Letter, Commissioner of Probation

Brief Synopsis of the Findings of This Preliminary HPAO Bureau Report:

Disparity of Data and Lack of Data Make Audit Difficult to Impossible

For further information see pages: 3, 27, 28, 30- 36, 42, 46 - 50

No single source could provide an adequate assessment of the status of the indigent defense counsel verification provision. Sources used in comparison were often conflicting

For example:

- Verification of income and assets for persons claiming indigency is required by statute and requires that the Commissioner of Probation shall enter into an interagency service agreement with the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV);

- Only DOR maintained an ISA with Probation and DOR was careful to strictly limit their role in verification; DTA, RMV, Medicaid Office, like DOR were also careful to maintain their distance from indigent verification;

- A 2004 memo from a former Probation Commissioner that allowed a subjective indigent status assessment in each court;

- Revenue reconciliation for AOTC reported instances of zero and negative revenue collection for indigent defense counsel fee;

- No apparent collection effort that approaches the full $150 for indigent defense counsel base rate;

- Estimates of actual indigent collections based on a fee of $150 contrast sharply with reports of actual collections of fees in the $80-$90 range. If accurate this optimistic outlook and actual revenue collected disparity is guaranteed to produce revenue shortfalls;

Use of Decriminalization Motion of MGL c 277 s 70C Not Extensive

For further information see pages: 4, 5, 8, 9

- 2010 list of 2,932 charges comprised 51 categories of misdemeanor charges. Only 6 of the criminal misdemeanors on the list from 2010 were amended by MGL c 277 s 70C motions in more than 100 instances. Leading the list is "Disorderly Conduct" (838 charges), "Operate (a motor vehicle) after suspension" (646 charges), "Shoplifting" (450 charges), and "Trespassing" (293 charges), "Compulsory Insurance Violation" (152 charges), and "Attaching Wrong MV plates" (111 charges).

- Twenty (20) of the charges were represented by only one instance in District or BMC courts in the entire state of Massachusetts in 2010.

Other Criminal Court Diversions Used by Prosecutors

For further information see pages: 20, 21, 24

Individual District Attorneys noted diversion programs in their offices. These include: "juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program."

Reliability of Previous Indigent Verification Doubtful

For further information see pages: 18, 34, 36

- "high yield" of indigent applicants who misrepresented their status is questionable;

- The Office of the Commissioner of Probation, responding to the HPAO inquiry, stated that indigent verification process was flawed particularly the tabulation of verifications;

- Week after week "open" cases were not distinguished from the previous week's indigency verifications; All of Probations' "open cases" were re-submitted every Sunday night. Consequently, there is no way to accurately tabulate verifications submitted by Probation to DOR and there has been "massive over-counting" of indigent verifications.

- Probation memorandum dated 24 August 2004, and provided to HPAO by Office of the Commissioner of Probation indicated a selective verification of indigency; memo stated that "a Chief Probation Officer, or his or her designee, does not have to request information from the [ISA] agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim."

Revenue Reconciliation Disproportionate; Indigent Fee Collection
Revenue Reconciliation Reports of AOTC reported disparities in indigent fee collection ($150):
For further information see pages: 46, 50

Revenue Reconciliation Reports time period (FY 2009 through FY 2011) three year average for District and BMC Courts:

Court A13
Three year average number of **601** criminal cases
Reported a total "$150 fee" revenue of **$20,580.00**

Court A19
Three year average number of **7,004** criminal cases
Reported a total "$150 fee" revenue of **$8,070.00**

Court A11
Three year average number of **9,434** criminal cases
Reported a total "$150 fee" revenue of **No Reported Revenue**

Court, A3
Three year average number of **12,360** criminal cases
Reported a total "$150 fee" revenue of **Negative Revenue ($-1,750)**

Cost Savings Uncertain and Unknown;

For further information see pages: 18, 35, 37, 42 – 45

- The Fiscal Affairs Division (FAD), Administration and Finance (ANF) Secretariat [in a letter to HPAO] … assumed that, through an inter-agency agreement that would shift indigency verification activities to an agency such as DTA, approximately 15 percent of CPCS applicants that would otherwise be determined to be eligible…would be found ineligible…ANF projected that up to $25 million in savings could be achieved on an annualized basis."

- In fact: the DTA [in a spreadsheet provided to HPAO Bureau] demonstrated that denials for eligibility based on **"earnings and assets"** was only **8.17%** of total applicants for Transitional Aid to Families with Dependent Children (TAFDC) and even fewer DTA applicants were determined ineligible based on "earnings and assets" when the Emergency Aid to Elders, Disabled and Children program (EAEDC) was examined. The EADC denial rate based on "earnings and assets" was 102 denials, or **3.02%,** out of a total of 3,380 cases reviewed.

- Based on the DTA estimate the "yield" of misrepresentation is not 15 percent but just over 8 percent based upon an "earnings and assets" criterion.

- In addition, FAD does not demonstrate a similarity between DTA applicants and indigent defense counsel applicants;

- Current Office of the Commissioner of Probation "four court study" is demonstrating a misrepresentation of indigent status of **just greater than 1 percent**.

Other States Experience Similar Indigent Defense Counsel Concerns.

For further information see pages: 52; 57

Connecticut – Maine – New Hampshire – Rhode Island - Vermont

Georgia - Iowa - Michigan - North Carolina - Oklahoma - Texas

Section 1
MGL c 277 s 70C

> UPON ORAL MOTION BY THE COMMONWEALTH OR THE DEFENDANT AT ARRAIGNMENT OR PRETRIAL CONFERENCE, OR UPON THE COURT'S OWN MOTION AT ANY TIME, THE COURT MAY, UNLESS THE COMMONWEALTH OBJECTS, IN WRITING, STATING THE REASONS FOR SUCH OBJECTION, TREAT A VIOLATION OF A MUNICIPAL ORDINANCE, OR BY-LAW OR A MISDEMEANOR OFFENSE AS A CIVIL INFRACTION... IF A MOTION TO PROCEED CIVILLY IS ALLOWED, THE COURT SHALL NOT APPOINT COUNSEL. IF COUNSEL HAS ALREADY BEEN APPOINTED, THE COURT SHALL REVOKE THE APPOINTMENT...

MGL c 277 s 70C

> THE ULTIMATE ISSUE ... IS TO MAKE RECOMMENDATIONS TO ENSURE THAT THE COMMONWEALTH OF MASSACHUSETTS IS MEETING ITS CONSTITUTIONAL DUTY TO PROVIDE COUNSEL TO INDIGENT PERSONS IN THE MOST EFFICIENT AND EFFECTIVE MANNER.[1]

Report of the Commission
to Study the Provision of Counsel
to Indigent Persons in Massachusetts

In pursuit of the efficient delivery of constitutional protections to benefit the accused and the taxpayer, the House Post Audit and Oversight (HPAO) Committee asked its Bureau to inquire into the frequency of use of a provision of the Massachusetts General Law - MGL c 277 s 70C - which allows a decriminalization motion for certain misdemeanors, removes the possibility of a penalty of incarceration from the misdemeanor or misdemeanor amended to a civil infraction, and therefore avoids the appointment of a state paid defense counsel for persons who successfully apply for indigent status. Massachusetts allows bona fide indigent individuals a state paid defense counsel for crimes that include incarceration as a possible penalty.

The Committee also asked its Bureau to be alert to other forms of diversion from criminal court proceedings which would protect the constitutional rights of indigent individuals accused of a crime when the penalty for a conviction might include incarceration.

The HPAO Committee further instructed its Bureau to gather information on indigent verification, indigent verification re-checks, and the incidence of fraud in the claiming of indigency as well as any identifiable efficiency which might be found through a review of the Massachusetts indigent defense counsel program. In addition, the HPAO Committee requested that its Bureau observe the proceedings of the Massachusetts Civil Infractions Commission.

The Issue of Indigent Defense Counsel

In 2005, "The Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", or as it is more usually known, the Rogers Report, explained that both Massachusetts Supreme Judicial Court in a general rule of that court (1959) and several years later the United States Supreme Court in a landmark decision, Gideon versus Wainwright, (1963) ordered the provision of defense counsel to persons who are indigent –without appreciable material assets – as a constitutional protection afforded to both state and federal criminal defendants who are faced with the potential penalty of jail upon conviction in a criminal case. "States vary in the application of this constitutional standard and Massachusetts provides counsel for defendants in criminal matters where incarceration is possible," according to the Massachusetts Sentencing Commission.[2]

Use of the Decriminalization Motion of MGL c. 277 s. 70C is Not Extensive

After a lengthy examination of documents, analyses, and interviews with principals and participants of the Massachusetts judicial system, the HPAO Bureau reports to its Committee that the use of the decriminalization motion of MGL c. 277 s. 70C is not extensive.

However, the HPAO Bureau cautions the Committee that the limited use of the decriminalization motion belies the intricacy of all diversions from the Massachusetts criminal justice and judicial systems and distorts the circumstances that defendants, judges, prosecutors, defense counsel, and law enforcement generally face in the adjudication of crime. The statistics can be misleading, and it is worthwhile to review the intricacies and the tools to deal with those intricacies so as to comprehend the sheer scope of the criminal justice system's costs, and the obstacles to satisfactorily contain those costs, while providing access to Constitutional rights.

In its examination of some of the features of the indigent defense counsel program in the District and Boston Municipal (BMC) courts the HPAO Bureau found a systemic and long standing problem of undependable data, questionable verifications, revenue disparities, and a general indication that the indigent defense counsel program is in need of specific changes. This report to the House Post Audit and Oversight Committee addresses, preliminarily, some of the indigent defense counsel program's damaged components.

The HPAO Bureau believes that targeted pilot programs with defined protocols and anticipated and measurable results are the most useful tool to cost containment. Pilot programs were the choice of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts but they were never conducted. Specific alteration of misdemeanor penalties, as well as the penalty reduction to civil infractions with fines rather than incarceration, also holds promise; but that decision requires a careful case by case consideration. That is, in part, the role of the Civil Infractions Commission and that study is underway as this preliminary report is produced.[3]

MGL c 277 s 70C allows judges, defendants, defense attorneys, and prosecutors use of a motion to reduce a criminal charge to a civil infraction, if accepted by the court and not objected to by the prosecutor in writing (who can also make the motion). This motion avoids the appointment of a state paid defense counsel for persons who successfully apply for indigent status. The HPAO Committee asked its Bureau to examine the frequency of use of the MGL c 277 s 70C decriminalization motion as it affected indigent defense counsel status. In the course of the examination, one prosecutor noted to the HPAO that there is not a single known case or even anecdote of a defendant ever utilizing this provision of MGL c 277 s 70C in that prosecutor's district. This HPAO Bureau report contains a separate section dedicated to the responses of the District Attorneys of Massachusetts regarding MGL c 277 s 70C.

Surveys to the Massachusetts District and Boston Municipal Courts

As a means to obtain the statistical information regarding the application of MGL c 277 s 70C the HPAO Bureau composed and distributed a survey response instrument to the 62 Massachusetts District Courts and eight Boston Municipal Courts inquiring about the use of this motion in their court.

Shortly after the distribution of the HPAO survey, the Massachusetts District Court chief justice and the Boston Municipal Court chief justice and the chairman of the HPAO Committee agreed to have the Administrative Office of The Trial Court, or AOTC, assemble the statistics and data for the HPAO Bureau's survey rather than collect individual statistics from the District and Boston Municipal Courts.

The Chief Justice of Administration and Management, the Chief Justice of the District Court and the Chief Justice of the Boston Municipal Court committed to open and transparent cooperation and effort in responding to the inquiries regarding indigent defense counsel issues by the HPAO Committee and its Bureau. That cooperative effort by the AOTC was fulfilled to the point of releasing information to the Committee which exhibited the numerous difficulties of a data and statistic conversion from a "legacy" automated management system to a comprehensive automated management system for the entire AOTC and its seven departments, and the presence of disproportionate revenue reconciliation data. A "legacy" system is an automated electronic structure which was operational when implemented but which is made obsolete by technological progress and must be converted, revised and/or replaced.

The District Courts and the Boston Municipal Courts are two of seven departments of the Administrative Office of the Trial Court. The HPAO Bureau information request concerned indigency defense counsel operations in each state District Court and the divisions of the Boston Municipal Court. The large volume of indigent defense counsel are primarily in District and Boston Municipal courts, the HPAO Bureau has been consistently advised in interviews and through examined documents. Prior to the decision to have the AOTC assemble the data, and the arrival of that information, the HPAO Bureau received some communications from both clerks and judges of the various Courts regarding the data requested by the HPAO Committee.[4]

In its information request, the HPAO Bureau sought specific information on a civil infraction motion (MGL c. 277 s 70C), especially how often that motion had been utilized by prosecutors. The HPAO Bureau also requested information on indigent verification, indigent verification re-checks, and the incidence of fraud in the claiming of indigency. These later questions are discussed in other sections of this report and include surveys of the Massachusetts District Attorneys, and the Office of the Commissioner of Probation.

Motion for Civil Infractions Statistics

In early June the AOTC responded to the survey of the Massachusetts District Court and the Boston Municipal Court departments forwarding to the HPAO Bureau statistics which had been, the AOTC said, initially "compiled by the Sentencing Commission for review by the Civil Infraction Commission." These statistics were provided as a preliminary response to the Bureau's inquiry, the AOTC advised the Bureau.[5]

Upon receipt and review of these statistics and upon attending and observing the Massachusetts Civil Infractions Commission, the HPAO Bureau further requested the pamphlet of statistics compiled by the Massachusetts Sentencing Commission which was being used by the Civil Infractions Commission. The AOTC supplied that pamphlet to the HPAO Bureau.[6]

The First Statistics on Criminal Misdemeanors Amended to Civil Violations

The preliminary statistics provided to the HPAO Bureau by the AOTC were products of the data developed for the Civil Infractions Commission. This data concerned " ... initial statistics for offenses on which charges were amended to civil infractions under c. 277 s. 70C during 2010. ... [and] were compiled by the Sentencing Commission.[7]

However, the AOTC cautioned the Bureau regarding the statistics that "[b]ecause of the methodology used, we believe that these statistics may be an underestimation of the actual number of cases and we are hoping to implement a more comprehensive effort here."

This "Charges Amended to Civil Complaints under c. 277 s. 70C," list of 2,932 charges comprised 51 categories of misdemeanor charges. Only six of the criminal misdemeanors on the list from calendar year 2010 were amended by MGL c 277 s 70C motions in more than 100 instances. The most frequent criminal misdemeanor charges amended to civil violations were

"Disorderly Conduct" (838 charges), "Operate (a motor vehicle) after suspension" (646 charges), "Shoplifting" (450 charges), and "Trespassing" (293 charges), "Compulsory Insurance Violation" (152 charges), and "Attaching Wrong MV plates" (111 charges). The AOTC's list indicated that 45 other charges that utilized MGL c. 277 s 70C were all used on less than 100 occasions; for example, the charge of "Alcohol, Possession by Minor" (57 charges). Twenty (20) of the charges were represented by only one instance in District or BMC courts in the entire state of Massachusetts in 2010, according to the AOTC list. For example, only one charge of "Vandalism" was amended to a civil infraction in 2010. Similarly, there was one charge of "Common Night Walker" that was amended to a civil infraction, and there was a single case of "Annoying Phone Call" amended from a criminal misdemeanor to a civil violation.[8]

In 16 instances of the 51 categories of misdemeanor offenses using the decriminalizing feature of MGL c 277 s 70C, that amendment motion was used 10 times or less in either the state District Courts or Boston Municipal Courts. Among the 10 times or less use of the decriminalization motion were: charges of "RV on Public Way" amended from criminal misdemeanor to civil infraction 10 times, a charge of "False Report of a Crime" was amended twice throughout the District or Boston Municipal court systems, while charges of "Fireworks" (without further explanation) was amended to a civil infraction five times in Massachusetts in calendar year 2010, according to the AOTC statistics. See Appendix B.

The AOTC indicated that this list and data was preliminary and the HPAO Bureau and the AOTC continued to refine the data.

Massachusetts Sentencing Commission Pamphlet

Two weeks after the preliminary list of criminal misdemeanors amended to civil infractions in 2010, the AOTC provided the HPAO Bureau with The Massachusetts Sentencing Commission pamphlet, (provided to the Civil Infractions Commission) dated February 2011. That pamphlet, outlined the revision to MGL c 277 s 70C in the Acts of 2005 and also a compilation of "information which may be useful in addressing the initial reporting requirements assigned to the Commission…" that compilation included data and narrative on "all violations of the general laws that are currently classified as a misdemeanor."[9]

The Sentencing Commission pamphlet was composed of two sections; an introduction with definitions, narrative observations and data, and four appendices: Appendix A listed the members of the Civil Infractions Commission; Appendix B consisted of "Selected Offenses from the Felony and Misdemeanor Master Crime List"; "Appendix C" of the Sentencing Commission pamphlet contains "selected misdemeanors not punishable by imprisonment"; and Appendix D contained a series of four statistical tables.

The definitions were particularly instructive to the Bureau. For example, the pamphlet opened the narrative with this observation:

> G.L. Chapter 274 s.1 sets forth the definition of misdemeanors and felonies for the Commonwealth, "A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors."

And also:

> The designation of behaviors as civil or criminal, felony or misdemeanor can change over time as the legislature amends the general laws. For certain behaviors, the designation as civil or criminal can also be determined in a discretionary manner as the case proceeds through the judicial system.

The several appendices of the pamphlet prepared by the Sentencing Commission "in Response to an Information Request from the Civil Infraction Commission" were:

"Appendix A "contained a list of commission members of the Civil Infractions Commission which was established by "Section 6 of chapter 54 of the acts of 2005 … to study and analyze the imposition of civil penalties under section 70C. This appendix was not in the copy of the pamphlet that the HPAO Bureau received.

Appendix B was a spread sheet of "Selected Offenses from the Felony and Misdemeanor Master Crime List." This list of 59 pages includes a grid of information the categories of which were the following: "Excluded Under c. 277 s. 70C; Offense Seriousness Level; Notes; Offense Reference; Offense Penalty Reference; Offense; Penalty Type; Staircase Factor; Mand. Time (Mandatory Time); Min H/C (Minimum House of Correction); Max H/C (Maximum House of Correction).

Of interest to the HPAO Bureau in Appendix B were these items from the master crime list grid (see also "Clarification Requests Made of AOTC" (page 10) and discussion of "Appendix C"): "Disorderly Conduct, Subsq. Off" and "Disturbing the Peace, Subsq. Offense" found on page 66 of the pamphlet section entitled: "Felony and Misdemeanor Master Crime List"

"Disorderly Conduct" with 838 charges was the most frequent misdemeanor listed in the earlier statistics provided to the HPAO Bureau as noted above.

The grid for these two offenses after the initial offense included incarceration in a "house of correction," as a possible penalty, the master crime list for the two offenses included, in part:

Excluded Under c. 277 s. 70C	Offense Seriousness Level	Offense Reference	Offense	Min H/C	Max H/C
No	(1)	c. 272 s. 53(b)	DISORDERLY CONDUCT, SUBSQ. OFF. c. 272 s. 53(b)		6 months
No	(1)	c. 272 s. 53(b)	DISTURBING THE PEACE, SUBSQ. OFF. c. 272 s. 53(b)		6 months

All of the various offenses listed on the master crime list followed the spreadsheet pattern and had a placeholder for each category. This example here (above) is an excerpt and lists an HPAO Bureau selected category for illustration purposes.

"Appendix C" of the Sentencing Commission pamphlet contains "selected Misdemeanors not punishable by imprisonment". Among these misdemeanors is "Disorderly Conduct" which was amended in mid-2009 to exclude imprisonment (apparently, as noted above, on the first offense) as the pamphlet states; thus, the use of the decriminalization motion of c 277 s 70C for a first offense does not require an appointment of defense counsel for a person with an approved claim of indigency. In a later request of the AOTC, the HPAO Bureau requested that this "Disorderly Conduct" offense be tabulated separately across the Commonwealths courts for an MGL c 277 s 70C motion. The HPAO Bureau requested this action for several reasons. It was first and most often decriminalized on the list of the "Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010"; the Bureau also wanted to review a charge that would most likely appear in most District or BMC courts and this charge appeared to satisfy that requirement. It was not the perfect choice though because the imprisonment penalty for a first offense was removed at the beginning of FY 2010, according to the pamphlet. Nevertheless, it would demonstrate a statewide measurement of the decriminalization motion allowed under MGL c 277 s. 70C for a common misdemeanor. (See the section that discusses the breakout of the disorderly conduct statistics: "Clarification Requests Made of AOTC:" pg 11.)

Also part of the pamphlet that was forwarded to the HPAO Bureau was "Appendix D." Appendix D contained a series of four statistical tables. These four tables categorize various aspects of misdemeanors first, by arraignment with the number of charges brought and the lead offense of the charges; second, by "misdemeanor cases arraigned in calendar year 2010 not excluded from MGL c 277 s 70C"; third, by misdemeanor's of "cases convicted" in fiscal year 2009 by "governing offense"; and fourth, by misdemeanors with sentences that resulted in incarceration in fiscal year 2009 listed by governing offense. The first two tables were tabulated by calendar year; the last two tables were tabulated by fiscal year.

For comparison and demonstration, the HPAO Bureau excerpted selections of Table One of Appendix D that listed several common misdemeanor offenses and the categories indicated whether the charges were single, or multiple. These categories of charges appear in both of the initial statistics provided to the HPAO Bureau.

As noted earlier in correspondence with the AOTC most misdemeanors were single charge offenses. That was more of a general observation though, not a hard and fast rule, and depended upon the particular offense. For example, in the excerpted chart, "Disorderly Conduct", was almost as likely (40 percent) to be a part of a multiple charge against an offender as it was to be singularly charged. However, trespassing was multiply charged only 23 percent of all offenses in calendar year 2010.

Single Charges versus Multiple Charges

Offense	One Charge	Two or More Charges	Total
All Misdemeanor Incidents	**89,012**	**40,722**	**129,734**
Disorderly Conduct	3,854	2,568	6,422
Trespassing	2,338	673	3,011
Alcohol Possession by a Minor	1,995	293	2,288
Prostitution	760	72	832
Common Nightwalker	182	15	197
Fireworks	15	10	25

Similarly, under **Table Two** which illustrated in "misdemeanor cases arraigned in calendar year 2010 not excluded from MGL c 277 s 70C" the number of cases charged with a particular misdemeanor as the **lead offense** included:

Offense	One Charge	Two or More Charges	Total
All Misdemeanor incidents not excluded from MGL c 277 s 70C	**58,096**	**22,639**	**80,735**
Disorderly Conduct	3,854	2,568	6,422
Trespassing	2,338	673	3,011
Prostitution	760	72	832
Alcohol Procure for Minor	228	64	292
Common Nightwalker	182	15	197
Fireworks	15	10	25

Table 3 of Appendix D demonstrated "misdemeanor cases convicted in fiscal year 2009 by governing offense" which included:

Offense	Number
Disorderly Conduct	1,940
Trespassing	868
Prostitution	456
Alcohol Possession by a Minor	200
Common Night Walker	53
Fireworks	9

Table 4 listed "misdemeanor cases sentenced to **incarceration** in fiscal year 2009 by governing offense:"

Offense	Number
Disorderly Conduct	385
Trespassing	271
Prostitution	186
Alcohol Possession by a Minor	13
Common Night Walker	20
Fireworks	Nothing listed

In the first part of the pamphlet provided to the HPAO Bureau and assembled at the request of the Civil Infractions Commission, the sentencing commission noted "The [Sentencing] Commission is working with the Massachusetts Sheriffs Association to determine the number of persons incarcerated at the current time for a misdemeanor violation."

Disparity in Totals of Criminal Misdemeanor Charges

In reviewing the Massachusetts Sentencing Commission pamphlet the HPAO Bureau noticed that the total statistics quoted to the Bureau in early June, and the total statistics quoted in the pamphlet provided to the Massachusetts Civil Infractions Commission, which were attributed to the same source, differed slightly. The Sentencing Commission's Civil Infractions Commission pamphlet stated:

> In reviewing the disposition records of all charges, the Commission worked with MSC and OCP and identified 3,035 charges arraigned in calendar year 2010 which have been disposed of as a civil infraction at this time.[10]

While the material supplied to the Bureau in early June, attributed also to "statistics [that] were compiled by the Sentencing Commission for review by the Civil Infraction Commission" identified that total as "all charges amended to civil for the same period [calendar year 2010] as 2,932." [11] See Appendix B.

The HPAO Bureau notes that there is a continued problem of data disparity throughout the indigent defense counsel program.

In noting the disparities, the HPAO Bureau also recognizes that the conversion of automated systems in the seven departments of the Trial Court has had its "challenges" as one official noted, including the need to convert from "legacy" or pre-existing and obsolete automated systems. After its documentary review, aided in large part by the cooperative effort of the Trial Court, the Bureau is persuaded that the AOTC has made a genuine effort to present the data and to refine that data at every instance and as requested by the HPAO Bureau.

The Bureau is aware, and finds in multiple locations not limited to the AOTC, that the need to collect, preserve, display, and utilize data and statistics is a daily and ongoing endeavor. These efforts are hampered by a reduction in agency personnel, who have not been replaced – the trial court personnel rolls have been substantially reduced and not replaced over the last several years by the austerity imposed by the recession, the Bureau was consistently told during interviews. This personnel reduction certainly hampers data collection. In addition, a lack of funds for training of personnel due to the enforced austerity also impedes the AOTC operations. This austerity frustrates the coordinated, and system wide plan for recording indigent defense counsel statistics (including revenues which is dealt with in another section of this report); and the austerity coupled with the in-progress installation of MassCourts obstructs operations throughout the Administrative Office of the Trial Court.

Clarification Requests Made of AOTC:
Single Charges versus Multiple Charges; Is Decriminalization an Empty Gesture?

After reviewing the documents "Material Prepared in Response to an Information Request From the Civil Infraction Commission" and "Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010" the Bureau requested clarification on some of the issues raised in these documents.

One issue regarded a discussion of single and multiple charges. The HPAO Bureau wanted to know how often individuals involved in a single incident were singularly charged and how often an individual involved in a single incident were multiply charged. This matter was outlined in a section of the report for the Civil Infractions Commission entitled: "Determine the number of such arrests which result in charges being filed by a district attorney's office and the percentage of such charges for which the commonwealth sought incarceration".

The issue of the incidence of single and multiple charges was raised to the HPAO Bureau during the course of the indigent defense inquiry. The charges listed in this Sentencing Commission report consist of statistics gathered from Superior, District and BMC Courts.

The HPAO Bureau wanted to know the AOTC experience with the incidence of single charges – because that would offer an insight into how often the use of the motion for decriminalization under MGL c 277 s. 70C was at least possible. The HPAO Bureau was interested in this item because the Bureau was advised by one letter from prosecutors: "...of the few offenders who might otherwise qualify for decriminalization, many often face companion charges - - e.g., one of the many non-qualifying misdemeanors listed in sec. 70C - - that would make decriminalization an empty gesture."[12]

The AOTC document (Sentencing Commission pamphlet) appeared to indicate that in the case of misdemeanors, single charges proliferated.

> [In calendar year 2010] A total of 193,870 incidents were arraigned in these three court departments.
> Of these incidents, 107,447 (or 55.4%) involved a single charge and 86,423 (or 44.6%) involved two or more charges:
>
> • Of the incidents involving one or more felony charges, 28.7% had a single charge and 71.3% had more than one charge; and,
> • Of the incidents involving only misdemeanor charges, 68.6% had a single charge and 31.4% had more than one charge.

Felonies are not eligible for amendment to civil infractions by MGL c 277 s 70C.

The Bureau recognizes – as the prosecutors' statement indicated - that there are certain misdemeanors for which the decriminalization motion is not applicable; the statute explicitly removes certain charges from consideration. However, it is worthwhile to know how often single charges are present as noted in the excerpted statement above and what that indicates to the AOTC.

The AOTC responded that the analysis of the charges had several aspects to consider. First, the AOTC noted a total of "193,870 incidents or cases" in calendar year 2010 of which it further classified these incidents as either principally felonies or misdemeanors. "If the incident had one or more felony charges, then it was considered a felony incident. Only incidents that had all misdemeanor charges were considered misdemeanor incidents."

And the AOTC stated that: "Reducing charges to incidents was important because of the issue of indigent defense. The defense attorney would be assigned once to represent all of the charges in the incident and eligibility for indigent defense would be established by any one of the charges having the option of imprisonment."

The AOTC stated that its "...felony incidents are more likely to have multiple charges, misdemeanor incidents were more likely to have a single charge." and added that "cases in the Superior Court are more likely to involve multiple charges than those in the District Court and Boston Municipal Court."

The AOTC also cautioned that the identification of single charges to misdemeanors is "...an important issue that the impact of modifying the treatment of any particular charge needs to be carefully considered against the overall charging patterns for that offense. It appears then that the issue can be addressed, but it must be thoughtfully addressed with both accurate data and careful application.[13]

At the request of the HPAO Committee, the CPCS produced case and financial data for fiscal year 2011 regarding single charges and the cost of those charges. The CPCS data which includes the misdemeanor charge description, the total number of cases handled by CPCS in FY 2011, and the total amount paid by CPCS for the specific charge is included as Appendix F.

See Appendix F: 188 Single Misdemeanor Charge and Cost per Charge FY 2011[14]

188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost FY 2011

CHARGE DESCRIPTION	Total Cases	$ Amount Paid
TOTALS	43,757	$ 17,355,893.60

Clarification Requests Made of AOTC:

In addition to the issue of single charges for misdemeanors, the HPAO Bureau was also interested in obtaining context to the earlier issued document "Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010." That document listed 51 categories of charges which had some amending activity from criminal misdemeanor to civil infraction in calendar year 2010. The HPAO Bureau requested that the AOTC provide some context to the decriminalization activity.

In its response the AOTC produced two documents in which the context was refined to break down the statistics of the use of MGL c 277 s 70C by county. Both documents were entitled: "Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C, District Court and Boston Municipal Court Departments."

The first document produced data earlier than calendar year 2008. That pre-2008 data is less than reliable because it extracts statistical information from the legacy systems operating in the AOTC. "Of the original 19,458 charges, 17,042 were disposed of from 2008 through June 2011. These cases represent the most systematic compilation of c 277 s 70C dispositions because the transition from the WMS legacy system to MassCourts was complete by 2008. Therefore, the remaining analysis focuses only on those charges resolved from 2008 through June 2011," the HPAO Bureau was told, which avoided the question of reliability for statistics older than calendar year 2008.[15]

Therefore, the HPAO Bureau refined its request to the AOTC and limited the data request to 2008 and later. A second document was provided to the HPAO Bureau also called "Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C, District Court and Boston Municipal Court Departments" with the data time period of 2008 to June 2011.

For both data requests the HPAO Bureau asked that the use of MGL c 277 s 70C be presented by county. Both documents presented the annual uses of the decriminalization motion by county; the order of the use of the decriminalization motion did not change in either the first submission of data from the AOTC, which included data earlier than 2007, nor the reiterated report for data since 2008. The numeric statistics were slightly lower for the second data issue excepting the numeric statistics for Nantucket, Norfolk, Barnstable, and Dukes, which remained the same.

Comparative Analysis "Disorderly Conduct/Disturbing the Peace" by County

However, for the second data report (2008+) the HPAO Bureau further requested that the AOTC break down a charge of "disorderly conduct" which was listed as the most frequently criminal misdemeanor charge amended to a civil infraction in the initial data submission sent to the HPAO Bureau by the AOTC. That data comprised "statistics compiled by the Sentencing Commission for review by the Civil Infraction Commission." In responding to that breakdown request the AOTC added a further charge of "disturbing the peace" to the requested "disorderly conducts" data search. See earlier discussion of this choice of charge as the incarceration penalty was removed in FY 2010, altering the appointment of indigent defense counsel possibility for a first offense.[16]

The use of the decriminalization motion of MGL c. 277 s. 70C is not extensive.

As noted in this report quoting from the document offered to the HPAO Bureau, "In calendar year 2010 (alone), the [Massachusetts Sentencing] Commission considered a total of 372,880 charges arraigned in the Superior Court, District Court, and Boston Municipal Court. The HPAO Bureau concentrated its examination only on District and BMC courts."[17]

The second AOTC report to the HPAO Bureau listed **the following tabulation of county by county** results between the years 2008 to June 2011 for the use of MGL c 277 s 70C decriminalization motion:

County	
Worcester	6,658
Middlesex	3,603
Hampden	3,580
Hampshire	877
Berkshire	675
Franklin	622
Plymouth	372
Essex	361
Bristol	205
Suffolk	34
Nantucket	17
Norfolk	16
Barnstable	14
Dukes	8
Total	17,042

In a separate section of this report all of the Massachusetts District Attorneys commented on the use of this decriminalization motion and other alternative means to offender court appearances under charges that may require the appointment of indigent defense counsel.

To the HPAO Bureau's second request, regarding the charge of disorderly conduct, the AOTC provided the following:

> For this analysis, the 1,280 dispositions for disorderly conduct and the 654 dispositions for disturbing the peace were combined in order to facilitate a comparison with all criminal arraignments for these offenses. During the period calendar year 2008 through 2010 there were 49,495 arraignments in the District Court Department and Boston Municipal Court Department for disturbing / disorderly (see Table 2). Table 3 shows the county and court division for the 1,934 charges.

Table 2.
Number of Arraignments and Dispositions under c. 277 § 70C for Disturbing the Peace or Disorderly Conduct, District Court Department and Boston Municipal Court Department, Calendar Years 2008 to 2010[3] and 2008 to June 2011

Calendar Year	Arraignments	c. 277 § 70C Dispositions
2008	17,950	121
2009	16,354	513
2010	15,291	830
2011 (to June)	N.R.	470
Total	49,595	1,934

Table 3.
Court Division and County, Disturbing/Disorderly Charges
Disposed Under the Provisions of Chapter 277 § 70C, 2008 to June 2011

County	Court Division	Number	County	Court Division	Number
Berkshire	Northern Berkshire	22	Hampshire	Eastern Hampshire	171
	Pittsfield	78		Northampton	26
	Southern Berkshire	13		Sub-Total	197
	Sub-Total	113			
			Middlesex	Cambridge	27
Bristol	Attleboro	1		Lowell	17
	New Bedford	13		Marlboro	1
	Taunton	2		Somerville	1
	Sub-Total	16		Sub-Total	46
Essex	Gloucester	1	Plymouth	Hingham	12
	Lynn	1		Plymouth	41
	Peabody	1		Sub-Total	53
	Salem	15			
	Sub-Total	18	Worcester	Clinton	11
				Dudley	134
Franklin	Greenfield	147		East Brookfield	23
	Orange	15		Fitchburg	20
	Sub-Total	162		Gardner	30
				Leominster	58
Hampden	Chicopee	59		Milford	23
	Holyoke	174		Uxbridge	45
	Palmer	27		Westborough	20
	Springfield	115		Winchendon	9
	Westfield	17		Worcester	564
	Sub-Total	392		Sub-Total	937
			Total		1,934

[3] Source: Office of the Commissioner of Probation, District/BMC Court Departments Total Number of Arraignments: Calendar Year 2008 – 2010.

Date: 9/1/2011

As noted above the use of the decriminalization motion against the context of total criminal charges is not extensive. In addition to the county breakdowns for total uses of the decriminalization motion for MGL c 277 s 70C, and the breakdown of two charges often decriminalized by county, namely, "disorderly conduct" and "disturbing the peace", for context purposes the AOTC also compiled a list of total criminal caseload and charges for District Court and the Boston Municipal Court. The AOTC noted in producing this chart for the HPAO Bureau that "over the five year period, FY 2006 through FY 2010… over one and one-quarter million new criminal cases were filed in the District Court Department and Boston Municipal Court Department."

Summary of Criminal Case Filings, District Court Department and Boston Municipal Court Department FY 2006 through FY 2010 [1]

Year	District Court	Boston Municipal Court	Total
FY 2006	224,068	34,742	258,810
FY 2007	233,013	35,537	268,550
FY 2008	233,224	38,531	271,755
FY 2009	219,154	38,179	257,333
FY 2010	200,572	35,251	235,823
Total	1,110,031	182,240	1,292,271

As the reader can see the caseload of the two departments of the trial court is extensive with the state District Court reducing its criminal caseload by nearly 25,000 cases, while the BMC courts remained about the same in their caseloads.

The HPAO Bureau also notes that the statistics on criminal case filings are compiled by fiscal year, while the statistics provided for the use of the decriminalization motion and the specific tally of the use of the decriminalization motion for disorderly conduct and disturbing the peace are provided for calendar years. The calendar year is January to December, while the fiscal year (for the Commonwealth of Massachusetts) is 1 July though and including 30 June.

Comparisons, while generally understood, are not strictly "apples to apples" and caution in comparisons, auditing, and oversight is necessary and proper.

[1] Source: Massachusetts District Court – Summary of Case Filings and Boston Municipal Court Statistics. From http://www.mass.gov/courts/courtsandjudges/courts/stats/index.html

Finally, there is one further caution from the AOTC on this analysis of MGL c 277 s 70C, offered to HPAO Bureau as a result of its query of the data regarding the decriminalization motion:

Appointment of Counsel

- There are some considerations that would suggest that it is unlikely that the appointment of public counsel was avoided in all cases in this analysis:
- It is possible that these defendants were not indigent and would not qualify for the appointment of counsel;
- It is possible that the case involved other charges that were not disposed of via Chapter 277 s 70C ; and,
- It is possible that the use of Chapter 277 s 70C occurred after the appointment of counsel.

Massachusetts Civil Infractions Commission

The HPAO Bureau attended the meetings of the Massachusetts Civil Infractions Commission beginning in June 2011.

The Massachusetts Civil Infractions Commission was established pursuant to Section 6 of Chapter 54 of the Acts of 2005, which "established a permanent commission to study and analyze the imposition of civil penalties under section 70C."

The HPAO Bureau used the booklet compiled for the Civil Infractions Commission as both a research tool and a guide to informing itself. The HPAO Bureau was instructed by the Committee to observe the work of the Civil Infractions Commission, but it was not in any way assigned any other oversight responsibility on behalf of the Committee in regard to the Civil Infractions Commission. The HPAO Bureau's task to examine the use of MGL c 277 s 70C and certain aspects of the indigent defense counsel at times ran parallel to the work of the Commission. This parallel interest was noted in the minutes of the Civil Infractions Commission: "House Post-Audit and Oversight Committee is engaged in parallel research on reclassification."[18]

Pilot Programs

Pilot programs were the recommendation for possible solutions to the indigent defense counsel cost problem by the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. However, the pilot programs were never conducted. As this report is produced, the Office of the Commissioner of Probation is undertaking a four court study regarding the tabulation, verification, and efficiency of an individual's indigent status application. Because of the issues surrounding MassCourts and its final installation, the difficulties of analyzing the

statistics compiled by the AOTC, and the need to contain costs with a realistic proposal (developing a "realistic program" was the most common complaint of the line employees of the judicial system to the HPAO Bureau) the HPAO Bureau believes that targeted pilot programs with defined protocols and anticipated and measurable results are the most useful tool to cost containment.

Section 2
District Attorneys and MGL c 277 s 70C
Survey of the District Attorneys regarding MGL c 277 s 70C

The HPAO Bureau, at the direction of the House Committee on Post Audit and Oversight, polled the 11 District Attorneys of Massachusetts and received a response from each office.

The responses included five individual District Attorneys' responses and a letter from the Massachusetts District Attorneys Association (MDAA) on behalf of six of the 11 District Attorneys of Massachusetts. Those responses addressed the issue of amending a criminal misdemeanor to a civil infraction with the use of MGL c 277 s 70C as well as other means of keeping offenders out of the court system on criminal matters and avoid the potential appointment of a taxpayer funded defense attorney for a person who was granted indigent status and whose offense, if found guilty, could include jail as a possible penalty.[19]

Decriminalization and Diversion

Shortly after the survey was distributed to all District Attorneys, the HPAO Bureau received a letter from the Massachusetts District Attorneys Association (MDAA). The MDAA letter sought "to place the role of the civil infractions statute (MGL c 277 s 70C) in context as that statute is the last in a series of filters employed by the police, clerks and prosecutors to divert cases out of the criminal justice system." The MDAA letter also noted that "many of the District Attorneys also do not keep the specific data that you [HPAO] request."[20]

The MDAA letter recognized that the House and Senate were engaged in a "broad examination" and that the "legislators view the civil infraction statute as a vehicle for cost savings."[21]

Among the diversions that the MDAA identified which occur before arraignment of a defendant were the ability of a police officer under the provision of MGL c 218 s 35A to both issue a citation and offer an offender the opportunity for a hearing before a court clerk. The section of the statute cited allows this hearing to be conducted by either a District Court clerk, Boston Municipal Court clerk, or Juvenile Court clerk.[22]

This police/offender referral process which the MDAA letter indicated was an "informal diversion of criminal charges [that] occurs daily in our courthouse" allows the clerk to determine "probable cause" and "weigh an offender's record and the nature of the offense(s)". "And," the MDAA letter continued, the clerk may "notwithstanding probable cause, elect to continue the hearing for a period of time, effectively placing the offender on an informal probation, after which the case is dismissed." [23]

The MDAA letter provided no statistics to this type of diversion or "informal probation" stating only that: "This informal diversion of criminal charges occurs daily in our courthouses."

If an offender is not removed from the arraignment process, the MDAA letter stated, and the clerk determines there is "probable cause" as well as "an absence of justification for diversion the case will be scheduled for arraignment. "

If the offender reaches arraignment, the MDAA letter states:

> ... at this point that the District Attorneys themselves evaluate cases for diversion. All of the District Attorneys operate juvenile diversion programs; some also run youthful offender (under age 21) and/or adult diversion programs. Essex also has an extremely successful pilot drug diversion program. In the last two years alone, these programs have collectively diverted roughly ten thousand offenders away from criminal prosecution. Using CPCS's FY 2010 data (which reports that the average cost of a criminal case is $604.51), the District Attorneys' diversion programs have provided a $6 million savings to the Commonwealth.

The cost savings diversion mentioned in the above paragraph by the MDAA is based on an assumption of 10,000 diversions multiplied by 604.51 for a total cost savings of $6,045,100.

In addition to the MDAA letter, individual District Attorneys noted diversion programs in their offices. The Suffolk County District Attorney noted that it operated "juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program. The Bad Check Restitution program alone has diverted more than 3,400 cases over the last three years." [24]

The Worcester County District Attorney stated that "Our office utilizes a pre-trial diversion program which allows appropriate offenders the opportunity to avoid a criminal record while giving back to the community in providing structured community service to clean up parks and playgrounds." [25]

The Worcester District Attorney said that record keeping was an issue and that office's "case management system…does not provide sufficient information to provide a detailed numeric response" to the HPAO Bureau survey. The HPAO survey polled the District Attorneys for information and statistics including those regarding that number of cases handled and how many offenses were amended from criminal misdemeanors to civil violations. The Worcester District Attorney added that his office planned to train assistant district attorneys to identify appropriate cases for civil treatment and increase utilization of the statute (MGL c 277 s 70C). The AOTC provided statistic breakdowns to the HPAO Bureau (discussed in another section of this report) that indicated that the Worcester District Attorney's office was the most frequent user of this statute (MGL c 277 s 70C) in Massachusetts. See table at the end of this section.[26]

The Middlesex District Attorney reported that their office was "maintaining our statutory and court-imposed mandates, including our volunteer attorney program, our Juvenile Diversion Program, and our Community Based Justice Program for court involved students."

In a letter to the HPAO Committee Chairman, the chief legal counsel to the Middlesex District Attorney noted that "it is the practice of this office, in cases where it can be confidently shown at arraignment that the Commonwealth will not seek jail time, to have the prosecutor indicate so on the record that the court may refrain from assigning counsel, thereby achieving the cost savings associated with such assignment of counsel… [h]owever …in many cases, the qualifying misdemeanor is accompanied by a non-qualifying offense (or offenses) and counsel is assigned regardless of whether and when decriminalization occurs."[27]

The position of the Middlesex District Attorney regarding multiple charges with only one charge eligible for decriminalization was similar to the MDAA letter to HPAO where the Executive Director stated that a "…few offenders who might otherwise qualify for decriminalization, many often face companion charges - - e.g., one of the many non-qualifying misdemeanors listed in sec. 70C - - that would make decriminalization an empty gesture."[28]

In the section of this report regarding the use of the decriminalization motion of MGL c 277 s 70C, the AOTC statistics indicate that misdemeanors generally tend to be singularly charged. A discussion of the single charge/multiple charge issue can be found on pages 8 and 9.

The Middlesex District Attorney attached two letters sent in 2010 and 2011 to the Senate and House Ways and Means Committees regarding MGL c 277 s 70C satisfying the statute's reporting requirements which require each District Attorney to report to the General Court's Ways and Means Committees. In the letter dated 3 June 2010 the Middlesex District Attorney reported filing for decriminalization in 314 cases "with zero objections" in calendar year 2010. A second attachment (also a letter) dated 8 April 2010 for calendar year 2009 reported that office "filed for decriminalization in 463 cases" and registered three objections to decriminalization motions made under MGL c 277 s 70C. [29]

These letters to the Ways and Means staff of the Massachusetts General Court from the Middlesex District Attorney also noted a decrease in the "case data" due to decriminalization of small amounts of marijuana in its 2011 letter to the Ways and Means staff. The letter noted:

> In reviewing the case data of calendar year 2009 against the data from calendar year 2010 you will notice a decrease. Prior to 2010 the MDAO (Middlesex District Attorney's Office) often decriminalized by motion possession of small amounts of marijuana and our decriminalization numbers reflected that fact. Following the statutory change that automatically decriminalized the possession of small quantities of marijuana this class of criminal case no longer exists for conduct occurring on December 2008 or later and the decrease in our calendar year 2009 numbers appear to be in part attributable to the marijuana law change.

The Middlesex District Attorney in the letter dated 3 June 2010 and addressed to the budget analysts at the House and Senate Ways and Means Committees stated that decriminalization may offer an opportunity to increase monetary penalties.

> When the Commonwealth moves to have a case decriminalized and the court orders such a change, there is an opportunity to attach a civil fine. Specifically, GL c 277 sec 70C states: "When the court has treated a violation of a municipal ordinance or bylaw or misdemeanor offense as a civil infraction under this section..., the court may impose a fine of not more than $5000..." based upon the 314 decriminalization cases during this reporting period, the court had the opportunity and ability to impose civil fines of up to $1,570,000.[30]

The other attached letter dated 14 months earlier and also addressed to the Massachusetts House and Senate Ways and Means Committee stated that the Middlesex District Attorney's office "filed for decriminalization in 463 cases". That letter also noted that the "court may impose a fine of not more than $5,000" and noted too that "based upon the 463 decriminalization cases during this reporting period, the court had the opportunity and ability to impose civil fines of up to $2,315,000."[31]

Similarly, the letter from Middlesex District Attorney's legal counsel quoted the potential revenue expectations in the letter to the HPAO Committee Chairman stating that that MGL c 277 s 70C allowed the court to impose civil fines, with the legal counsel estimating that that fine

imposition could amount to as much as "$3,885,000 on cases decriminalized in Middlesex County in 2009 and 2010."

The potential revenue total in both letters to the Ways and Means Committee analysts, and the quote of the aggregate "fine imposition" or revenue of $3,885,000 in the letter from the Middlesex District Attorney chief legal counsel, to HPAO, were estimated by multiplying the two reported decriminalization case totals noted in the letter from the Middlesex District Attorney (463 and 314 for a total of 777) and multiplying that sum by the stated maximum fine ($5,000) for the total of "$3,885,000". Absent more reliable data, the HPAO Bureau believes that the potential court imposed "fines" revenue suggested in the letters to Ways and Means and to the HPAO Committee tends more toward an optimistic assumption than to a realistic expectation of possible revenue.

The Suffolk County District Attorney also responded individually to the HPAO Committee and its Bureau. In a letter to the HPAO Chairman, the Suffolk District Attorney both concurred with the statements contained in the letter from the MDAA and offered some examples specific to his office.

The Suffolk District Attorney, similar to the Worcester District Attorney's letter, noted that "some of the specific information you seek [HPAO survey] was not routinely captured in the time period you specified...but those records are being kept now in order to capture our actions in this area."[32]

The Suffolk District Attorney letter stated that the Office has:

> ...a number of programs that divert cases out of the criminal courtroom, including juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program. The Bad Check Restitution Program alone has diverted more than 3,400 cases of the last three years... There is no appointed counsel, to date we have had no criminal referrals from the program (indicating a high level of compliance), and it operates at zero expense to the taxpayer. [33]

The Suffolk District Attorney said that the cases "that do not qualify" for any diversion program "proceed to arraignment" but the "considerations" of the decriminalization statute (MGL c 277 s 70C) was mostly accomplished and satisfied the intent of that statute "namely, to move cases out of the criminal courts and avoid the costs of appointed counsel and further prosecution."

The Suffolk District Attorney noted that an amendment (2003) to MGL c 277 s 70C

> "specifically allow[ed] the defendant to move independently of the Commonwealth to treat a criminal misdemeanor, not specifically excluded by the statutory language, as a civil infraction under the statute. Further, the Court is also empowered to act sua sponte to do so. Only written objection from the Commonwealth can prevent the court amending from criminal to civil…We have no record, or even and anecdotal example of our office objecting to such a motion by the court, nor do we have any record or even anecdotal recollection of defense counsel ever moving to convert a criminal offense to a civil infraction."[34]

The Suffolk District Attorney's office concluded its letter by stating:

> A review of our records indicates that since 2008, approximately 20,000 misdemeanor and minor cases have been disposed at an early stage of the proceedings, or entirely diverted from the criminal justice system, without compromising public safety…in a large number of cases the need for appointed counsel has either been eliminated entirely, or at a minimum significantly limited…at significant cost savings and benefits to the tax payer…[35]

There were no specific cost savings stated, however, the Suffolk District Attorney, like the Worcester District Attorney, noted that there were no record keeping data that was "routinely captured"; similarly the MDAA letter also noted that "many of the District Attorneys also do not keep the specific data that you [HPAO] request." Without the data it is difficult to accurately determine and/or quantify what efficiencies and/or cost savings can be obtained. [36]

The responses from the District Attorneys in regard to the use of both the decriminalization statute and the other means to avoid the appointment of indigent legal defense counsel were helpful and illuminating as insights into the practical means to avoid costly court proceedings where non-criminal action was an appropriate route and public safety was not, in the view of the prosecution, compromised or threatened. The cost estimates, absent specific data, however, assumed optimistic and unreliable revenue projections. As also noted in other areas of this report, the identification of specific cost savings, and/or the efficiencies require more reliable and consistent statistics; this is a future rather than a present capacity. The AOTC, for example, told the HPAO Bureau that MassCourts, the AOTC automated case system, will have a financial collection component and a data operations component. MassCourts, however, is not yet fully operational.

For table below: **Criminal Charges Amended to Civil Infractions – 2011-2008**

Table 1[37]
Criminal Charges Amended to Civil infractions
Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C,
District Court and Boston Municipal Court Department,
2008 to June 2011

County

Worcester	6,658
Middlesex	3,603
Hampden	3,580
Hampshire	877
Berkshire	675
Franklin	622
Plymouth	372
Essex	361
Bristol	205
Suffolk	34
Nantucket	17
Norfolk	16
Barnstable	14
Dukes	8
Total	17,042

Disposition

Responsible 16,576
Not Responsible 466
Total 17,042

Section 3
Controlling the Cost of Indigent Defense Counsel
Better Verification of Defendants in District Court Claiming Indigency

There is a constitutional duty to provide counsel to indigent persons. This duty creates the practical need to pay for indigent counsel and provide for all other operational requirements that the judicial system, or any system, requires, as noted in the 2005 "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", customarily called the Rogers Report. In difficult and tumultuous economies, cost control becomes a more highlighted aspect of operations.[38]

Indigency Verification

The HPAO Committee asked its Bureau to examine the available data regarding misrepresentation of indigent status in the District Court and Boston Municipal Court departments of the Massachusetts Administrative Office of the Trial Court (AOTC).

Audit Difficult If Not Impossible

The HPAO Bureau's performance audit and examination of the available data found it impossible to assess or audit the provision of indigent defense counsel because the data was either missing, disparate, conflicting, or voluntarily collected but without continued auditing and oversight. Following an interview with the HPAO Bureau regarding revenue reconciliation reports, the AOTC provided the HPAO Bureau with a 1990 memo proposing categories of indigent fee collection, answering the question of why separate categories of fees were collected.[39] The AOTC noted that the separation of indigent fee revenue was voluntarily categorized as either indigent fee, or marginally indigent fee, but this process was not adequately overseen. The other issue, creating disproportionate data representation in the revenue reconciliation reports, was caused in large part both by an inability to train or offer training in the recording of revenue due to budget austerity, and this training inability was exacerbated by a shortage of personnel, coupled with a system-wide conversion and automation of AOTC functions known as MassCourts.

No single source could provide an adequate assessment of the status of the indigent defense counsel verification provision. Sources used in comparison were often conflicting; For example:

- Negative numbers for indigent defense counsel revenue collection;
- A memo from a former Probation Commissioner that allowed a subjective indigent status assessment in every court; these court by court indigent analyses may at least explain the

disparities represented in the revenue reconciliation reports from the AOTC (see Appendix A);

- No apparent collection effort that in any way approaches the full $150 for indigent defense counsel base rate;
- Estimates of actual indigent collections based on a fee of $150 contrast sharply with reports of actual collections of fees in the $80-$90 range. If accurate this optimistic outlook and actual revenue collected disparity is guaranteed to produce revenue projection shortfalls;
- Accounts receivable function not yet operational in MassCourts automated management system;
- Only DOR maintained an ISA with Probation, and/or AOTC
- DOR was careful to strictly limit their role in verification;
- Despite a statutory provision, there is no ISA with DTA, RMV, or the Office of Medicaid;
- DTA, RMV, Medicaid Office, like DOR were careful to maintain their distance from indigent verification.

The Cost of Constitutional Rights

The cost for indigent defense counsel from FY 2008 through FY 2011 hovers around $200 million dollars annually. The total expenditures for Fiscal Year 2010 (1 July 2008 – 30 June 2009) by the Committee on Public Counsel Services (CPCS) is $199,590,001. The fiscal statistics available for FY 2011 increase by $5 million (to $205,175,000). This year, the General Appropriation Act provided the Committee on Public Counsel Services with 158,950,073.[40] This is $40,639,928 less than the expenditure of funds ($199,590,001) by the Committee on Public Counsel Services in FY 2010.

Annual Appropriations and Expenditures for CPCS For FY 2009- FY2012 (as of December 2011)[41]

	FY 2012	FY 2011	FY 2010	FY 2009
Total Available	$158,950,073	$205,175,554	$201,245,715	$193,284,490
Expenditures	$76,792,324	$197,368,082	$199,590,001	$193,104,103

Based on FY 2010 actual spending and absent an extraordinary efficiency it does not appear to the HPAO Bureau that the Committee on Public Counsel Services will be able to complete this year without receiving a supplement to their General Appropriation Act allocation.

The Search for Efficiency in the Provision of Indigent Defense Counsel

The Governor's budget development narrative stated that the escalating cost of CPCS indigent defense counsel "is mainly due to the increases in the hourly billing that is done by the private bar advocates who represent 90% of the annual indigent case load." This increase was also a result of the Lavallee ruling by the Massachusetts Supreme Judicial Court according to the Governor's budget. The increase in indigent defense attorney compensation was recommended by the Rogers' Commission and was authorized by statute. The Rogers Commission noted:

> The Supreme Judicial Court declared that the shortage of lawyers in the Hampden County bar advocates program was caused by a low rate of attorney compensation authorized by the annual budget appropriation. The court also stated that there had been "little change" in the hourly rates for private counsel since 1986 and that the rates were "among the lowest in the nation." The court, however, took notice that the "Legislature is keenly aware of the defendants' constitutional right to counsel and of the demands that right makes on the public treasury." Accordingly, the court declined to exercise its inherent powers and did not order judges to authorize compensation rates in excess of what the Legislature had appropriated. Instead, the court focused its decision on formulating a remedy to the "continuing constitutional violation suffered by indigent criminal defendants in the courts of Hampden County."[42]

The Rogers' report noted that after the Lavallee decision the judiciary urged "cooperation between the legislative, executive, and judicial branches of government in "fashioning a permanent remedy for what can now fairly be seen as a systematic problem of constitutional dimension." The legislature, at that time - 2004 - , funded the bar advocate program for the recommended amount and the then Governor vetoed nearly twenty percent of the appropriation. The Bar Advocates lobbied for a veto override and the legislature delayed an override in anticipation of gubernatorial action on indigent defense reform. The then Administration

suggestions were contentious and neither the bar advocates organization, nor CPCS could reach a suitable agreement with the then Administration. Consequently, the legislature restored the funds vetoed by the governor in a FY 2004 supplemental budget signed by the Governor in April 2005.[43]

In an interview with the HPAO Bureau, the Chairman of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts (Rogers' Report) said that the commission recommended and the legislature accepted the need for "a reasonable" rate (of compensation for indigent defense attorneys) but not "a great rate." There is no desire to make it a great rate of compensation to represent indigent individuals because that would encourage an "indigent counsel industry" for which there is no interest, the chairman of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts told the HPAO Bureau. At the same time, it has to be a reasonable rate in order to attract a "decent quality" of attorney to serve as an indigent defense counsel, he said.[44]

Current rates were raised by the General Court to $50/hour for district court cases, $60/hour for superior court and care and protection cases, and $100/hour for murder cases. The web site of the Committee on Public Counsel Services lists current rates which range from $50 through $100 dollars depending upon the particular offense and the court that has jurisdiction. In documents provided, CPCS pointed out that "The maximum number of billable hours permitted per year is 1,800. Attorneys may not accept new appointments after they bill 1,400 hours in a year. Attorneys may not bill more than 10 hours per day without the special permission of CPCS."[45]

Verifying the Earnings and Asset Status of Offenders Applications

Indigency verification has been required for years. The process is described by statute. The HPAO Bureau inquired of DOR, DTA, RMV and DMA to determine what means of verification were used. The HPAO Bureau also spoke to the Office of the Commissioner of Probation and the Committee on Public Counsel Services (CPCS) regarding verification. In addition, the HPAO Bureau was given the management revenue reconciliation reports of the AOTC and after analyzing those reports requested further information from the AOTC, and interviewed the fiscal affairs director of the AOTC. The HPAO Bureau also contacted the Fiscal Affairs Division of the Office of the Secretary of Administration and Finance, and the Massachusetts Comptroller. All of these contacts provided the HPAO with indigency data.

In the budget recommendations for Fiscal Year 2012, the Governor of the Commonwealth of Massachusetts noted that the indigency verification process was "currently inadequate":

> Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By

> increasing the controls of the eligibility determination and re-determination process, it is expected that the department's case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.[46]

Verification of Verification

The HPAO Bureau surveyed the Office of the Commissioner of Probation regarding its role in indigency verification.

The verification of income and assets for persons claiming indigency is conducted by the Office of the Commissioner of Probation as required by MGL c 276 s 99E. That statute states in part: "The commissioner of probation shall enter into an interagency service agreement with…" that statute lists the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV) as the agencies with which the Probation Commissioner "shall enter into an interagency service agreement with… to verify income data and other information relevant to the determination of indigency of recipients of counsel pursuant to section 2 chapter 211D."[47]

In addition to surveying the Office of the Commissioner of Probation, the HPAO Bureau also requested in writing copies of the interagency service agreements that each agency named in the statute had with the Office of the Commissioner of Probation. [48]

Only the Department of Revenue had an in-force agreement with the Commissioner of Probation.

Correspondence from the other three agencies advised the HPAO Bureau as follows:

The Department of Transitional Assistance (DTA)

In its response to the HPAO Bureau, and writing at the request of the DTA Commissioner, the Acting General Counsel of the Department of Transitional Assistance stated that "to the best of my knowledge, the Department of Transitional Assistance does not have any interagency service agreements with the District Court of Massachusetts, the Boston Municipal Court Department, the Massachusetts Office of the Commissioner of Probation or with the Massachusetts Trial Court. Nor does the Department have a process for verifying "indigency" beyond the various eligibility requirements of its public assistance programs."[49]

Department of Medical Assistance (DMA)

The Director of the Office of Medicaid, Executive Office of Health and Human Services, responded to the HPAO Bureau and indicated that "Neither the Commissioner of Probation nor the Massachusetts Trial Court has entered into such an ISA [Interagency Service Agreement] with the Office of Medicaid related to indigency verification…cannot provide you with this ISA or with information regarding statistics or an 'indigency verification process for the purposes of such an ISA."[50]

Registry of Motor Vehicles (RMV)

The Registrar, of the state Registry of Motor Vehicles, advised the HPAO Bureau that she was "not aware of any such ISA [Interagency Service Agreement]… between the Massachusetts Department of Transportation, Registry of Motor Vehicles Division and the Massachusetts Commissioner of Probation or with the Massachusetts Trial Court that are used to determine the 'indigency' of recipients of state paid defense counsel." The Registrar of Motor Vehicles further noted that she had "spoken to the MassDOT [state Department of Transportation] Controller and she is not aware of any ISA between the Registry of Motor Vehicles and the Massachusetts Commissioner of Probation or the Massachusetts Trial Courts."[51]

Department of Revenue (DOR)

The only agency that responded affirmatively to the existence of an interagency service agreement to verify indigent status for a person applying for a court appointed and state paid defense counsel was the Department of Revenue (DOR).

The tax counsel for DOR's litigation bureau wrote to the HPAO Bureau director on behalf of the DOR Commissioner indicating that the DOR general counsel had recently forwarded a copy of the existing Interagency Service Agreement (ISA) "established between DOR and the Administrative Office of the Trial Court (AOTC) and the Office of the Commissioner of Probation."

Department of Revenue (DOR) Explains Its Role

Regarding indigent verification, DOR's tax counsel explained in his letter to the HPAO Bureau that "DOR's responsibility is limited solely to matching wage reporting files to information provided by AOTC regarding individuals that have claimed indigency….DOR does not conduct reviews of verifications of the information provided…"

DOR receives and processes approximately five electronic [batch] transmissions per month from AOTC, the DOR letter to HPAO Bureau stated. [52]

DOR's process was explained as follows:

> The data match process performed by DOR is automated with very little manual involvement. DOR receives an electronic file from AOTC through CommBridge statewide network. The file contains the names and SSN's of individuals for whom COB [Commissioner of Probation] must verify income status. Upon receipt of the electronic file, DOR downloads the file from the CommBridge server to DOR's Unisys system to perform the data match process. The information provided in the AOTC file is matched against DOR wage reporting files to identify those individuals who are receiving wages and have claimed indigency. An individual is deemed to be positively identified for the purposes of wage reporting if the individual's SSN contained within the AOTC file matches the SSN in DOR's wage reporting files, and a name match is reported under the enhanced matching program. DOR provides the following wage reporting information of only those individuals who have been positivity identified: name, SSN, employer name, employer identifying number, and the amount of wages reported for the individual for the last twelve available months or for the total number of months available, if fewer than twelve. DOR returns the matched file to AOTC through the CommBridge statewide network.[53]

Office of the Commissioner of Probation Explains Its Role

After requesting information from the agencies specifically named in the statute, the HPAO Bureau met with the Commissioner of Probation and members of the Office of the Commissioner of Probation staff. The Bureau had previously surveyed the Commissioner of Probation on topics including: indigency determination, misrepresentation of indigency status, indigency revenue statistics, indigency assessment follow-ups, and indigent defense counsel termination statistics.

The HPAO Bureau told the Commissioner of Probation and the staff that only the Department of Revenue indicated that there was an existing interagency service agreement with the Office of the Commissioner of Probation. The Probation staff indicated that their office has access to an "identity specialist tool" maintained with the Registry of Motor Vehicles; however, that "identity

specialist tool" data only indicated the manufacturer, model, and year of any motor vehicles registered to an indigent defense counsel applicant.

The Office of the Commissioner of Probation said that DOR estimated that there were between 700,000 and 800,000 verifications checked annually by the Office of the Commissioner of Probation. The highest recorded verification for a one year period with DOR was 1.3 million instances. However, there was a possibility that these statistics were multiply counted. The Probation indigency verification is required for every approved applicant in each Superior, District, Boston Municipal, and Juvenile Courts. The verifications are conducted by the chief probation officer of that court or his/her designee.

The HPAO Bureau requested confirmation of the verification process with DOR. The Office of the Commissioner of Probation, after its own inquiry, later stated that in fact the verification process was flawed particularly the tabulation of verifications. The HPAO Bureau was advised that each Sunday evening when the Office of the Commissioner of Probation submitted its verifications to DOR, that submission contained all of the "open" cases in Probation. Thus all of Probations' "open cases" were re- submitted every Sunday night. These "open" cases were not distinguished from that weeks' indigency verifications. Consequently, there is no way to accurately tabulate verifications submitted by Probation to DOR and there has been "massive over-counting" of indigent verifications.

The Office of the Commissioner of Probation also noted to the Bureau, and provided documentation, that the previous commissioner had issued a memorandum titled "Interim Indigency Verification Protocol Change", dated 24 August 2004, regarding a selective verification of indigency in August 2004. In that memorandum, the then Probation Commissioner stated that as of 24 August 2004 to "comply" with the amended MGL. c 211D, s 2 1/2, "a Chief Probation Officer, or his or her designee, does not have to request information from the agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim."[54]

The Interim Indigency Verification Protocol Change memorandum of 2004 notes that "This change does not negate the necessity of having the defendant read and sign the "Definition of Indigency and Acknowledgement of Penalties for Misrepresentations Form and the Waiver Authorizing Release of Information to Verify Claim of Indigency."[55]

The 2004 memorandum further notes that "Probation Officers should also continue to use past methods of determining indigency when assessing the defendant's need for counsel." This last sentence was not explained in the memorandum.[56]

Following the resignation of the Commissioner of Probation on the last day of 2010, an acting commissioner of probation was appointed by the AOTC in early January of 2011. The Office of the Commissioner of Probation provided a list of actions taken since that appointment. Those actions included: train staff in the administering of indigency verification; undertake random compliance checks to determine if the checks were in compliance with the statue and the

expectations of the AOTC; and determine where additional training in verification techniques may be required.[57]

In its General Appropriation Act the Massachusetts General Court introduced new procedures for indigency verification.

The Office of the Commissioner of Probation advised the HPAO Bureau that following the change in the procedure a specific staff person within the Office of the Commissioner of Probation was appointed to "field inquiries regarding the new statute" on indigency verification. In September of 2011 the Office of Commissioner of Probation began regional chief probation meetings throughout the state to "review new statute and related operational questions" and formed a three person team to address "future efforts related to indigency verification."

In October of 2011 a "four court study" to monitor indigency verification began. The four courts in the project are Middlesex Superior Court, Worcester District Court, Stoughton District Court, and Berkshire Juvenile Court, according to a Probation Commissioner email to the HPAO Bureau.[58]

The purpose of the four court study "is to examine all requests for court-appointed counsel, assess best method(s) for indigency verification, and obtain results in terms of overturned appointments due to misrepresentation. (Courts have been prepared for the study in two preceding months.)" Harvard University's Kennedy School of Government is conducting the study on behalf of the Office of the Commissioner of Probation (OCP). The study is a class project that benefits both the OCP and Harvard's Kennedy School Operations Management class. The survey project began in early October, and is scheduled to be completed by the end of 2011. "Preliminary results of the four-court study will be distributed in January, 2012, followed by follow up data from the same courts in the Summer of 2012," according to the Office of the Commissioner of Probation.[59] A sample of the flow chart for the indigency verification process is attached as an Appendix C.

In the HPAO Survey of the Office of the Commissioner of Probation, and in the interviews conducted by the HPAO Bureau, the Acting Commissioner of Probation and his staff indicated that a substantial amount of misrepresentation of indigency is unlikely. However, there is a lack of statistical evidence to determine misrepresentation of indigency one way or another.

Indigent Verification Statistics Flawed; High Misrepresentation 'Yield' Not Expected

As preceding paragraphs detailed, there was a subjective approach to conducting indigent verifications at least since August of 2004 (and possibly much earlier). Until the most recent efforts within the AOTC and the renewed commitment to collect the data and analyze that data, the evidence of misrepresentation is just not available. Nor were all of the tools mandated by the statute (M.G.L. c 276 s 99E) to test for indigent verification operational. Only DOR had an in force interagency service agreement. The RMV tool – an "identity specialist tool" – simply identified a make, model, and description of a car possibly registered to an indigent applicant.

Further, the role of DOR, as described by the DOR litigation bureau, was extremely limited. Complicating that DOR limited involvement was the inattention to the submission of weekly applications that resulted in a massive over counting of the weekly statistics. The data and statistics needed to assess the indigent verification operations were invalid and unreliable.

In its first meeting with the Acting Commissioner of Probation and his senior staff, the Acting Commissioner did not believe there would be a "high yield" of persons who misrepresented their lack of affluence, and, therefore, misrepresented their ability to afford an attorney to represent them in a court proceeding which could potentially send them to jail if they were found guilty. Since the initial interview with the Office of the Commissioner of Probation, the HPAO Bureau conducted a follow up telephone interview, and then with a face to face review of the Office of Commissioner of Probation's "Quarterly Indigency Report, July 2011 – September 2001."

In the telephone interview with the HPAO Bureau, the First Deputy Commissioner of Probation said that now all indigent applicants who are approved for state paid defense counsel are verified. This full verification process has been underway since July 2011. In these three months this process had not found significant amount of misrepresentation of indigent status among approved applicants.[60]

In a quarterly assessment of statistics for July through September 2011 provided to the HPAO Bureau, the tally for total persons "determined indigent" in District Court was 18,915 individuals. Of that number, 194 individuals were found to have misrepresented their financial status. That is one percent of the applicants at District Court. The Office of the Commissioner of Probation is skeptical of the results of the first two months because it was the first full time assessment of indigency conducted by probation officers. However, the Office of the Commissioner of Probation is confident that the September component of the survey is valid and that month's survey of district courts in Massachusetts found 6,222 offenders who were approved for indigent status, but only 104 of those September approvals were found to have misrepresented their financial status. That number of indigent misrepresentations is about 1.5 percent of the total applicants for state paid indigent defense counsel system wide in the District Court department of the AOTC for the one month period.[61]

Indigent Misrepresentation and Verification- District Court

District Court Department	# Indigent	# Found Not Indigent	# Misrepresent Indigency	# No Longer Qualified	# Indigent Verifications	Reduced Indigent Counsel Fee	Average Reduced Counsel Fee[62]
July 2011	6,111	1,692	23	32	3,146	$361,423	$59
August 2011	6,582	2,033	67	58	5,784	$420,524	$64
Sept. 2011	6,222	1,898	104	52	6,855	$342,144	$55
3 Month Total	18,915	5,623	194	142	15,785	$1,124,091	$59

Indigent Misrepresentation and Verification- Boston Municipal Court

Boston Municipal Court	# Indigent	# Found Not Indigent	# Misrepresent Indigency	# No Longer Qualified	# Indigent Verifications	Reduced Indigent Counsel Fee	Average Reduced Counsel Fee
July 2011	1,407	187	0	6	95	$30,039	$21
August 2011	1,276	198	0	3	565	$28,005	$22
Sept. 2011	1,318	140	2	2	833	$28,446	$22
3 Month Total	4,001	525	2	11	1,493	$86,490	$22

Four Court Findings on Indigency Misrepresentation

In a telephone interview with the HPAO Bureau, the First Deputy Commissioner said that in the latest survey of the four courts, in the four court study project that began in July, there was little evidence of indigent misrepresentation.

The four courts being studied by the Office of the Commissioner of Probation are Worcester District Court, Stoughton District Court, Middlesex Superior Court, and Berkshire Juvenile Court. The HPAO examination of issues surrounding indigency is limited to the District Court Department of the Administrative Office of the Trial Court. (AOTC).

The First Deputy Commissioner said that Worcester District Court in the first week of October conducted 154 indigency verifications out of 154 indigency status requests approved by judges of the Worcester District Court. Sixty-one (61) percent of the verifications undertaken in the first full week of October were completed within seven days, and 29 percent of the verifications took longer than seven days. The seven day benchmark was recently promulgated by language in the General Appropriations Act, or state budget, passed by the General Court and signed by the Governor in June 2011. Only two of those approved (154) at Worcester District Court were found to have misrepresented their indigent status. This is an indigency misrepresentation rate of just slightly over one percent. Out of the 154 cases verified, the First Deputy Commissioner told the HPAO Bureau, 48 were immediately found to have approved benefits with the Department of Transitional Assistance (DTA). This qualified them for indigent status, the First Deputy Commissioner of Probation said.

In the Stoughton District Court in the first full week of October, 17 individuals who appeared as offenders potentially facing penalties that include a "loss of liberty" if found guilty were approved for indigent status. None of those 17 were found to have misrepresented their financial wherewithal, and were found to be indigent and eligible for state paid defense counsel.

In the Middlesex Superior Court there were 22 requests for indigent defense counsel while in Berkshire Juvenile Court there were nineteen 19 requests for indigent defense counsel; only one individual was found to have misrepresented his financial status during the first full week of October, the First Deputy Commissioner told the HPAO Bureau in a telephone interview. All but one of the indigent verifications in either Middlesex Superior Court, or Berkshire Juvenile

Court were completed within the 7 day requirement. This HPAO Bureau examination was limited to the District and BMC courts.

Governor's House One Proposal: Indigent Defense Counsel Reform

Indigency verification was a part of the Administration's budget proposal to re-organize the Probation department, currently an agency organized in the Judiciary, and to re-organize the Committee for Public Counsel Services, currently an independent agency. The intent, the budget document stated, was efficiency and cost savings. A principal part of the reorganization was indigency verification which the Governor's budget specifically referenced. [63]

Released in late January, 2011 The Governor's budget submission stated:

> ### Indigency Verification:
>
> The determination of eligibility is currently being performed by the Probation department, which the Governor is proposing to transfer to a new Executive Branch agency. This process will now be managed by the new Department of Public Counsel Services which will enhance and tighten the eligibility determination process. Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By increasing the controls of the eligibility determination and re-determination process, it is expected that the department's case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.[64]

In the Governor's budget proposal he suggested several changes which remained – although altered slightly by the legislative process – in the final budget enacted by the General Court and signed by the Governor. One of those changes was indigency definition and verification. For example, the Governor's budget proposal found "significant concerns about the rigor of the current (indigent defense counsel) eligibility determination process" and recommended that "a new independent executive branch agency called the Department of Public Counsel Services" be established which would assume the determination of eligibility from the Office of the Commissioner of Probation for those individuals who seek state paid defense counsel due to their financial status (impoverished and unable to pay). The General Court did not reorganize the Committee on Public Counsel Services (CPCS) into an executive department agency, but it did statutorily instruct CPCS to "establish a definition of "indigency" …and uniform standards and procedures for the determination by the courts of the commonwealth…" The legislature further instructed in statute that "The definition [indigency] and standards, and any amendments thereto,

shall be subject to the approval of the Supreme Judicial Court…" Also, the General Court commanded the CPCS that in constructing the indigency definition, CPCS was to "utilize: (1) the reporting system operated by the commissioner of transitional assistance for the purpose of verifying financial eligibility of participants in state or federally funded programs; (2) the accessibility of income data available from the department of revenue; and (3) verifying material assets through the registry of motor vehicles."[65]

As demonstrated in preceding paragraphs it is difficult, if not impossible, with current available data, to determine if increased eligibility verifications will produce significant results. The Office of the Commissioner of Probation told the HPAO Bureau on several occasions that it didn't expect to have any significant "yield" in indigent verification, but nonetheless agreed that the lack of a pilot demonstration, and a lack of data, made any determination of the scope of indigency misrepresentation view difficult to prove. Since the first meeting with HPAO Bureau, the Acting Commissioner of Probation implemented increased training, reporting, and oversight.[66]

Also, the "significant concerns about the rigor of the current eligibility determination process…" remained, and the expectation persisted, that careful attention to eligibility would enhance the fee collection and decrease the case load. The Governor's proposal stated:

> Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By increasing the controls of the eligibility determination and re-determination process, it is expected that the department's case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.[67]

In the Governor's budget proposal, the possibility of uncovering large scale misrepresentation in the indigent defense counsel process was held out as a potential cost savings measure.

Two days before the Governor's budget proposal was released, the state Secretary for Administration and Finance (ANF), was quoted in the State House News Service promising "tens of millions in cost savings" from greater accountability and program integrity which, the ANF secretary said, "will allow us to preserve indigent defense services and other critical programs…."[68]

Prosecutors Indicate the Need for Indigent Verification

The Governor's budget proposal was, in the words of one prosecutor "an excellent conversation starter."

Several prosecutors indicated that there is a significant savings to be found in an examination in the indigent defense counsel program. Throughout the interview and document examination process the HPAO Bureau heard many claims regarding indigent misrepresentation and savings estimates as high as 15 percent of applications for indigent defense counsel. The HPAO Bureau was not able to verify a specific claim of misrepresentation although the 15 percent claim appears too high. The HPAO Bureau wrote to the Fiscal Affairs Division and requested information from the Department of Transitional Assistance and that action is addressed in another section of this report. The Office of the Commissioner of Probation is conducting its own pilot program on verification.

At a late January 2011 State House event one prosecutor stated:

> Often you will see somebody say 'I can't get a lawyer.' They apply for indigent status, and invariably it comes back the person is in need of a free lawyer," the state prosecutor said. "And sometimes you will see the defendant gets in a better car than you or I could afford. That certainly is something that has to be tightened up.[69]

The automobile anecdote is in the phase of the other District Attorney "an excellent conversation starter," however, it is not sufficient to determine indigency. Also, and as noted earlier, there was no in-force ISA with the state Registry of Motor Vehicles to utilize automotive assets as indicators of "earnings and assets." While the Probation Department told the HPAO Bureau that it has an "identity specialist tool" the letter to the HPAO Bureau from the RMV made no mention of this assessment instrument. The HPAO Bureau simply does not know if RMV records are useful in determining "earnings and assets."

The current definition of indigency is based upon a formula outlined in statute (MGL c 261 s 27A) and the process is promulgated by a rule of the Massachusetts Supreme Judicial Court (SJC Rule 3:10). The apparent guide for indigency when determining defense counsel eligibility is the second definition of MGL c 261, s. 27A", according to a memorandum on the website of the Massachusetts Supreme Judicial Court and addressed to the Commissioner of Probation.

That definition is "...a person whose income, after taxes, is 125 per cent or less of the current poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended...", according the SJC memo regarding applying a definition to an "affidavit of indigency."[70]

In that memo to the Commissioner of Probation, and available on the website of the Massachusetts Supreme Judicial Court, dated 26 January 2011, regarding "Poverty Guidelines for Affidavits of Indigency (M.G.L. c 261, s 27A: Applicable under S.J.C. Rule 3:10" the memo's author noted that "as you know, the form ("Affidavit of Indigency") follows the language of G.L. c 261, s 27A providing three different definitions of the word "indigent." The second definition is "a person whose income, after taxes, is one hundred and twenty-five percent or less of the current poverty threshold annually established by the Community Services Administration*..." The asterisk directed the reader to this comment by the memo's author that "Section 27A has not been updated to state that the poverty guidelines are now issued by the (Federal) Department of Health and Human Services."

The memo attached the "New Federal Poverty Guidelines", as they appear in the Federal Register of January 20, 2011, noted that these made exceptions of Alaska and Hawaii, and then instructed that "by multiplying each figure in the Federal Register table by 125%, one gets the following guidelines for G.L. c 261, s 27A"; the guidelines were attached in a chart.

The 26 January 2011 memo attachment indicated that a "size of family unit" of one person the "125% of Poverty Threshold" was $13,612.50. While the "Size of Family Unit" in the attached chart listed its last category and the dollar amount for a family of eight, for the "125% of Poverty Threshold" as $47,037.50.

The memo further stated: "Please inform probation officers, as soon as possible, of the existence of these standards which are to be used with the affidavit of indigency until new standards are published next year. Also, please note that pursuant to S.J.C. Rule 3:10, s 1 (f) (ii), as amended effective October 1 1993, this poverty standard applies to appointment of counsel for indigents."[71]

The section of the General laws quoted in the 26 January SJC memo reads in full:

MGL c 261 s 27A

Section 27A. As used in sections twenty-seven A to twenty-seven G, inclusive, the following words shall have the following meanings:

"Indigent", (a) a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans' benefits programs or who receives assistance under Title XVI of the Social Security Act or the Medicaid program, 42 U.S.C.A. 1396, et seq.; (b) a person whose income, after taxes, is 125 per cent or less of the current

> poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended; or (c) a person who is unable to pay the fees and costs of the proceeding in which he is involved or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing, but an inmate shall not be adjudged indigent pursuant to section 27C unless the inmate has complied with the procedures set forth in section 29 and the court finds that the inmate is incapable of making payments under the plans set forth in said section 29.

New Indigency Definition Sought

The most recent General Appropriations Act shifts the responsibility for the indigency definition to the Committee on Public Counsel Services (CPCS). Motor vehicle records are included in the statute governing verification and that statute requires an interagency service agreement with the Department of Motor Vehicles.[72]

Currently, the First Deputy Commissioner of Probation told the HPAO Bureau, the Probation office is negotiating Memorandums of Understating (MOU) and interagency service agreements (ISA) with the Department of Revenue (DOR), the Registry of Motor Vehicles (RMV) and the Department of Transitional Assistance (DTA). Only the DOR has a current, in force interagency service agreement with the Office of the Commissioner of Probation; the First Deputy Commissioner told the HPAO Bureau. Once the under-negotiation ISA's are signed, the in force ISA at DOR will be replaced with a new MOU and/or ISA. The other ISAs will be put in place, probation officers will be trained regarding the new ISAs, MOUs and other pertinent procedures, and indigent verification will be conducted on a uniform basis throughout the court system the First Deputy said.[73]

Claims of Misrepresented Indigency As Much As 15 Percent of Applicants

During the HPAO Bureau's examination a claim of a 15 percent savings from indigency verification, as noted in the news account of an early 2011 winter Ways and Means hearing, continued to be referenced. During several interviews, the HPAO Bureau asked and was told that that statistic of misrepresented indigency was based upon an estimate developed by the Administration and attributed to the current misrepresentation and denial rate for Transitional Assistance applications at the state Department of Transitional Assistance (DTA). The DTA denial rate was 30 percent and the Administration took half that number and arrived at an indigency verification misrepresentation rate of 15 percent, the HPAO Bureau was told.

After hearing several iterations of this statistical estimate of misrepresentation, the HPAO Bureau made an inquiry of both the Department of Transitional Assistance and the Fiscal Affairs Division of the Executive Office for Administration and Finance.

The HPAO Bureau requested the Department of Transitional Assistance (DTA) to provide a representative approval/denial rate for its public assistance applications.

The DTA provided the HPAO Bureau with a June 2011 spread sheet which demonstrated that out of 5,334 total transitional assistance applications for Transitional Aid to Families with Dependent Children (TAFDC), 1,716 individuals were denied transitional assistance benefits. That number, 1,716 individuals denied benefits, comprised 32 percent of total TAFDC applications. Out of those 1,716 individuals denied TAFDC or DTA benefits, 436 were determined ineligible for Transitional Assistance benefits due to earning or assets reasons. That number of individuals represented 25.5 percent of the applicants that were denied transitional assistance benefits (not total applicants). The bulk of transitional assistance applicant denials, however, (74.5 percent) were disqualified for "other" reasons than earnings or assets disqualifications. So attention to the "yield" of earnings or assets denials, which is the denial reason that indigent defense counsel qualifications are based on, is important.

That number of actual denials for transitional assistance benefits due to "earnings and assets" is 436 individuals, or only 8.17 percent, of the total applicants for transitional assistance (5,334 applicants in June 2011); it is important to note that the applicants applying and denied for reasons of "earnings or assets" is not 30 percent of the total applicants, or even 15 percent of the total applicants. Therefore, the DTA estimate of the "yield" of misrepresentation, is not 15 percent but just over eight percent when based upon an "earnings and assets" criterion.

In addition, there is no similarity demonstrated between DTA applicants and indigent defense counsel applicants; so, if the claim of misrepresentation is based upon DTA criterion even the eight percent estimate of misrepresentation is questionable. Whether the two client populations are similar is unknown.

HPAO Bureau requested a full year of transitional assistance; no response was received from DTA.[74]

Fiscal Affairs Division Queried; Estimates Questioned

In addition to its inquiry of DTA, the HPAO Bureau also made an inquiry of the Fiscal Affairs Division (FAD) of the Executive Office of Administration and Finance. The FAD is the agency responsible for the development of the Governor's budget proposal.

The HPAO Bureau indicated to the FAD that it "had been told, and have seen some written references, that there is a claimed 15 percent cost savings available by implementing a rigorous program of indigent verification" for those seeking state paid defense counsel if an offender is found guilty and a jail sentence is possible. The HPAO Bureau also noted that it had searched the FAD and A&F websites and found no direct cost savings reference, yet the HPAO Bureau

continued to encounter references to this 15 percent cost savings attributed to rigorous indigent verification.

The FAD responded affirmatively that it had in fact assumed a 15 percent rate of denial for state paid indigent defense counsel and it was based upon DTA experience with "a more rigorous process and system (of verification) in place that supports eligibility reviews."

In a letter, the FAD told the HPAO Bureau that "ANF (the Executive Office of Administration and Finance) reviewed a number of areas of current practice at CPCS. This included the indigency verification process employed by the Probation Department on behalf of CPCS..."

"ANF found," the FAD letter stated, "that the existing process consisted of a 2-page pretrial intake/indigency report which did not appear to include any further systemic verification of income and asset levels and did not encompass a regular re-verification....consistent with many other state programs."

"ANF compared the existing process by the Probation Department with that at the Department of Transitional Assistance (DTA)." FAD's letter to the HPAO Bureau stated that discussions with DTA regarding that agency's "rigorous process" of eligibility determinations demonstrated to "ANF" that "a more rigorous process and system in place that supports eligibility reviews, including wage matches with Department of Revenue and other databases, DTA ultimately determines that as many as 30 percent of the applicants for its programs are, in fact, not eligible."

The FAD letter closed its explanation by asserting its belief that its assumptions were "fair and reasonable" and explained that "in order to plan for savings conservatively, ANF assumed that, through an inter-agency agreement that would shift indigency verification activities to an agency such as DTA, approximately 15 percent of CPCS applicants that would otherwise be determined to be eligible...would be found ineligible...ANF projected that up to $25 million in savings could be achieved on an annualized basis."[75]

The FAD confirmed the source of the claim of 15 percent misrepresentation among indigent applicants. Yet, based on the HPAO Bureau examination, the DTA rate does not achieve 15 percent based on "earnings and assets", nor is there a connection established between DTA applicants and indigent defense counsel applicants.

The representative sample of eligibility and denials for TAFDC and EAEDC provided to the HPAO Bureau by DTA - as noted above - appear at odds with the FAD claim.

The DTA had a 30 plus percent denial rate on <u>all</u> its applications in the sample (June 2011); but DTA's ineligibility finding was based on a multitude of disqualifications most of which did not involve verification of a lack of "earnings and assets" which is the only current eligibility criterion that applicants for indigent defense counsel must meet. As noted above the DTA denials for eligibility based on "earnings and assets" was only 8.17% of total applicants for TAFDC (Transitional Aid to Families with Dependent Children) and even fewer DTA applicants were determined ineligible based on "earnings and assets" when the EAEDC program

(Emergency Aid to Elders, Disabled and Children) was examined. The EADC denial rate based on "earnings and assets" was 102 denials, or 3.02%, out of a total of 3,380 cases reviewed.[76]

The FAD cost savings estimate of "up to $25 million in savings" based on the "conservative" estimate outlined in the letter to the HPAO Bureau is questionable. The data and statistics simply do not support that conclusion.

Further, there is no indication, and FAD does not mention in its letter, whether the DTA benefit applicants and those applying for indigent defense counsel are comparable populations. The HPAO Bureau finds no data, or statistics, or even anecdotes which lend any validity to assuming that DTA's experience will replicate itself in the indigency verification process.

Pilot Projects to Determine Realistic Expectations Recommended

In one of its first acts, the HPAO Bureau interviewed both the Chairman of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts and the chief counsel to the Commission. The Commission held eight public hearings over six months and took testimony from "more than forty witnesses" including the Attorney General, the Chief Justice for Administration and Management of the AOTC, the chief justices of the Superior District, Boston Municipal Court and Juvenile Court Departments of the AOTC, six of the eleven District Attorneys, and the chief counsel for CPCS. The Commission and its staff also reviewed "a substantial amount of written materials from all quarters of the judicial system." Both the Commission Chairman and the Commission chief counsel independently told the HPAO Bureau that the Commission recommended one or more pilot projects to monitor, examine and analyze the concept of cost savings for indigent defense counsel against what actually was workable. The Commission finished its work in April 2005 after six months of inquiry. The pilot projects were discussed but never implemented, the HPAO Bureau was told.

In October, the Office of the Commissioner of Probation told the Bureau that a four court pilot project had begun to examine indigency verification. The Probation Department also has been training its officers on the indigency verification protocols, and monitoring the results. As noted above, the Probation Commissioner and the First Deputy Commissioner and staff are becoming more comfortable with the results of that monitoring and more confident that the results that project is obtaining are valid.

The HPAO Bureau finds further indication that the current data, statistics, and other sources of information are unreliable, most probably un-auditable. This makes projections, cost savings estimates, misrepresentation estimates, and other data dependent promulgations unreliable.

A valid, controlled, and representative pilot project(s) whose results instill confidence is a necessary first step to achieving management produced cost savings. It will take time to produce valid information.

Section 4
Revenue Reconciliation Reports of AOTC

- Concern regarding the indigent defense revenue reconciliation reports of indigent defense counsel fees;
- Disproportionate pattern in collection of indigent defense counsel fees in district and Boston Municipal courts;
- AOTC needs to audit and analyze the revenue reconciliation for indigent defense counsel fees;
- MassCourts when fully implemented should have the ability to record accounts receivable and to implement a system-wide accounts receivable function to track revenue receipts in each court of the department;

Revenue Reconciliation Reports of AOTC indicate that (Appendix A):

- For three years (FY 2009 through FY 2011) District Court **A13 with a three year averaged number of 601 criminal cases** recorded indigent defense fee ("$150 fee") for a total revenue of $20,580.00;
- While court **A19 with a three year averaged number of 7,004 criminal cases** recorded indigent defense fee ("$150 fee") for a total revenue of only $8,070.00 during the same period of time;
- Court **A11 with a three year averaged number of 9,434 criminal cases** reported the collection of **no** indigent defense fee ("$150 fee") revenue;
- And one court, **A3, with a three year averaged number of 12,360 criminal cases** reported total **negative** revenue ($-1,750) for FY2009 through FY2011.

Identifying the money and the source of the money to operate an effective indigent defense counsel program and using that money efficiently is a necessary component of the judicial system's constitutional duty to the indigent, as noted in both the Rogers Report and in the Governors January 2011 budget proposal.

In the course of its examination the Bureau was given several AOTC documents termed: Trial Court Revenue Reconciliation Management Report. These documents are Excel spreadsheets that report on monies collected and applied as revenue from all the courts of the AOTC. These Revenue Reconciliation Reports contained three categories of interest to the HPAO Bureau: a category that reported on the collection of indigent defense revenues termed "Indigent Defense"; a category that reported on "Legal Counsel Fees"; and a category termed: "Total Reimburse

Indigent Counsel." These categories represent either the revenue obtained from approved applicants for indigent defense who were either declared indigent and unable to pay for an attorney ("Indigent Defense") or the category labeled "Legal Counsel Fees" that represent revenues collected from those who were found to be on the margin of indigence and for whom was negotiated a payment of an agreed percentage of their assigned public counsel costs; the third category represented the total of those two revenues as collected from each court in the Superior, District, BMC, and Juvenile courts of the AOTC, as a partial payment toward the state paid defense counsel costs. The total collected revenue over three fiscal years (FY 2009 through 2011) is approximately $8 million in each year, for a total of $24 million; that annual collected revenue is deposited to the Commonwealth's General Fund.

As noted earlier, the HPAO Bureau was asked only to review the indigent defense counsel issues in the District and Boston Municipal departments of the trial court.

For clarification these categories are referred to in this report both by their label "Indigent Defense"; which is the category that represents the revenue derived from the Indigent Defense counsel fee/revenue category noted in the preceding paragraph or just "$150 fee," and the "Indigent Legal Counsel Fee" and/or $150+ revenue; this reference regards those persons who are just marginally above indigent but still unable to bear the cost of a defense attorney. These $150+ persons are assessed a fee greater than $150 at the discretion and determination of the particular court. The category of "Total Reimburse Indigent Counsel" represents a sum of the $150 fee, and the $150+ revenue.

After examining the Trial Court Revenue Reconciliation Management Report documents for Fiscal Years, 2009, 2010, 2011, and 2012 (one month of results at the time of the HPAO Bureau's request) the HPAO Bureau found disparities in the figures.[77]

Using the Trial Court Revenue Reconciliation Management reports, the Bureau began a review of the 62 District Courts' and the eight Boston Municipal Courts indigent revenue. Upon examination, the court case loads appeared to have little or no bearing on indigent revenue collections, courts with large caseloads and lower income demographics were collecting less money for indigent revenue than mid-sized caseload courts with higher income demographics. Several courts with lower income demographics reported negative revenue for their indigent defense revenue collections (the "$150 fee"); some courts with lower income demographics reported no revenue collected from the "$150 fee"; some courts reported high collections in the "$150 fee" and low collections in the "$150+ revenue" (the marginally indigent who are assessed more than $150 fee) in FY 2009 and FY 2010, and sometimes those specific revenue reports reversed themselves and the court reviewed collects low indigent fee "$150 fee" and very high "$150+ revenue" for the marginally indigent.

The Bureau's policy is not to identify its subjects in public reports by name, only by description. The purpose of this is to address the findings (and recommendations) that the HPAO Bureau makes to the HPAO Committee and identify the areas of concern for the members.

For the purpose of discussion the courts used for these examples are identified by their position on the HPAO Bureau-created spreadsheet, using the AOTC supplied figures, attached as an

Appendix. The courts are labeled using the letter of the first column (letter A) and the number is the vertical number location of the court on the spreadsheet. The size of the court listed also for comparative example is an average of its criminal cases over three most recent available years as reported on the AOTC website. A copy of that spreadsheet is attached as **Appendix A.**

Negative Indigent Revenue

For an example of negative revenue in the "$150 fee", in FY 2009 the **A3** court with a three year average of criminal defendants of 12,360 each year reported a **negative revenue** of $-300 for its indigent defense ("$150 revenue"); the next fiscal year that "$150 fee", was reported as $0; and for FY 2011 that same **A3** court again reported a **negative revenue** collection of -$1,450 for its "$150 revenue".

In those same fiscal years but in the category of "$150+ revenue" (marginally indigent) the **A3 court reported** a revenue collection of $185,203.50 for its "$150+ revenue" (marginally indigent) in FY 2009; the following year (FY 2010) the **A3** court reported revenue in the "$150+ revenue "as $188,684.00, and in FY 2011, the **A3** court reported revenue of $165,074.00 for its "$150+ revenue" or indigent legal counsel fee.

An excerpt of the HPAO Bureau chart displays this negative (and larger $150+) revenue below. The income per capita was not available in the DOR statistics for this particular court.[78]

A3 Court – Large Criminal Case Court

3 year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
12,360	N/A	**($-300)**	$185,208.50	$0.00	$188,684.00	**($-1,450)**	$165,074.00

A similar instance of negative revenue was also found in a mid-sized court **A19** handling an average annual case load over the last three years of 7,004 criminal cases. That **A19** court reported negative revenue collected for its "$150 fee" revenue in FY 2009. Collections in this category of "$150 fee" revenue for FY 2010 were $3,945.00, and in FY 2011 that collection recorded $4,125.00 in "$150 fee" revenue.

An excerpt chart is listed below for **A19**, a mid-sized District Court.

3 year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
7,004	$17,492	**($-150)**	$306,791.44	$3,945.00	$294,518.00	$4,125.00	$341,831.00

Same Size Criminal Cases as A19; Higher Revenue

Two other District Courts, **A25** and **A9**, each have about 8,500 criminal cases annually (three year average), or just 20 percent more than District Court **A19** (7,004 criminal cases annual average). Yet, those two courts, **A25** and **A9**, report significantly more revenue from indigent defense counsel fee collection ("$150 fee"). Their income per capita statistics as reported by the state Department of Revenue are similar. **A19** income per capita is $17,492.00; **A25** per capita income is listed at $17,163, while **A9** is listed at $17,557, according to the Massachusetts Department of Revenue. The DOR most recent income per capita data is from 1999.[79]

District Court **A25** collected $16,807 in FY 2009 in "$150 fee" revenue, compared to District Court **A19's** "$150 fee" collected revenue of -$150 (negative revenue collection). The following year **A25** collected $19,470.80 in "$150 fee" revenue (indigent defense fee), while **A19** reported only $3,945.00 in the "$150 fee" category. In FY 2011, **A25** collected $19,882.00 while **A19** collected only $4,125.00 in "$150 fee" revenue.

In another District Court (**A11**) where the three year average criminal case load was about 9,500 (or about 1,000 more than District Court **A25**, and **A9**, and 25 percent more criminal cases than District Court **A19**), there was zero revenue reported from the indigent defense category "$150 fee" revenue. Also odd, the per capita income reported by DOR for the area served by District Court **A11** was $15,602; significantly less than DOR's per capita income statistic for District Court **A25** ($17,163), and District Court **A9** ($17,557),and District Court **A19** ($17,492). So there was a lower per capita income in the area of District Court **A11** but no "$150 fee" reported for the fiscal years FY 2009, FY 2010, and FY 2011. However, in the other category, the "$150+ fee" for marginally indigent defendants category, District Court **A11** reported collecting $258,463.00 (FY2009), $244,512.00 in FY 2010, and $286,922.62 in FY 2011.

The HPAO Bureau spreadsheet excerpt for **District Court A11** is listed here.

3 Year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
9,434	$15,602	$0.00	$258,463.00	$0.00	$244,512.00	$0.00	$286,922.62

- **Even the smallest criminal caseload district court (A13 with 601) reported <u>more</u> indigent fee revenue than courts much larger;**

- **A13 (601 average criminal cases) reported more "$150 fee" revenue than:**
- **A19 (11 times more criminal cases),**
- **A11 (15 times more criminal cases), or,**
- **A3 (20 times more criminal cases).**

In its review of "$150 fee" revenue collection of the district courts, the HPAO Bureau found that the district court with the smallest criminal case load as reported by the AOTC, (District Court **A13** with 601 three year averaged criminal cases) reported $5,865.00 in FY 2009 in "$150 fee" revenue, $9,140.00 in FY 2010 in "$150 fee revenue", and $5,575.00 in FY 2011 in "$150 fee" revenue. That is more "$150 fee" revenue than reported in **A19** with 7,004 three year averaged criminal cases in any year, it is more"$150 fee" revenue than district court **A11** with 9,434 three year averaged criminal cases in any year; and more"$150 fee" revenue than court **A3** with a three year average of 12,360 criminal cases reported by the AOTC in any year.

- For those three years (FY 2009 through FY 2011) District Court **A13 with a three year averaged number of 601 criminal cases** reported a total "$150 fee" revenue of $20,580.00;
- While court **A19 with a three year averaged number of 7,004 criminal cases** reported only $8,070.00 of "$150 fee" revenue for the same period of time;
- Court **A11 with a three year averaged number of 9,434 criminal cases** reported **no** "$150 fee" revenue;
- And one court, **A3, with a three year averaged number of 12,360 criminal cases** reported **<u>negative</u>** revenue ($-1,750) for FY2009 through FY2011.

AOTC Revenue Reconciliation Disparity

In an interview with the HPAO Bureau the AOTC produced a memorandum dated 22 August 1990 (Attached as Appendix D, item 2) which indicates that the indigent counsel fees should "collect and record this item separately." The memo also noted that "It is necessary to segregate the receipting process for this item and to have the ability to identify the category account for future inquiries."

In a discussion with the HPAO Bureau the AOTC stated:

> It appears that the negative balance amounts and the zero balance amounts on our monthly report are due to the court not properly recording the difference between indigent counsel fee and marginally indigent counsel fee. Although a memo was issued in 1990 (attached) instructing courts to maintain these categories separately, it seems that over time, through multiple employee changes at each court and the fact that the legislation did not require the separate tracking of these two categories, diligence in insuring the categories were kept separate waned.

The AOTC agreed that a diligent audit and oversight of the indigent defense counsel fees was necessary and appropriate and the AOTC indicated that the complete installation of MassCourts, the automated court management system, would have the capacity to accurately record and tabulate the indigent defense counsel fees both system-wide and court by court. The MassCourts installation would also correct the account receivable function throughout the system, the AOTC told the HPAO Bureau.

The AOTC also believes that although the individual categories contain mis-recorded revenue, the total revenue deposited with the state Treasury and sent to the general fund is correct.

Section 5
Indigent Defense Legal Services - Public Defender Functions

Connecticut – Maine – New Hampshire – Rhode Island - Vermont

Throughout the New England States, the rising costs of indigent defense and public defender functions coupled with significant and repetitive budget reductions are part of what public officials across the country are calling a funding crisis for the nation's judicial systems.

Connecticut – July 21, 2011 (The Boston Globe) – Public Defenders feel squeeze from budget cuts

- The state's public defenders say proposed budget cuts will push lawyer caseloads too high and make it difficult for them to meet their constitutional and ethical obligations to Connecticut's poorest citizens.

- After state employee unions rejected a $1.6 billion labor savings deal last month, the legislature told the public defenders' office that it needed to cut its two-year, $128 million budget by about $9.6 million, or 7.5 percent.

- The Office of Chief Public Defender, which handles more than 90,000 cases a year, has about 400 full-time workers, half of whom are lawyers.

- Public defenders' caseloads are already at or above state guidelines set in 1999 in response to a lawsuit that said the public defender system was so overwhelmed that it could no longer fulfill clients' constitutional rights to an adequate legal defense

- The public defenders' office has already cut 42 temporary and independent contractor jobs and is planning to eliminate 33 permanent jobs.

- The office cut all 30 of its per diem independent contractor positions, including 16 lawyers, and laid off 12 temporary employees, including seven lawyers. .

- To meet the savings mandated by the Legislature, the public defenders' office is proposing laying off 24 full-time employees and eliminating another nine jobs through attrition or retirements.

- Judicial officials have compiled budget cut plans that they worry would trample on people's constitutional rights.

- The Judicial Branch is proposing to lay off about 450 employees and closing four courthouses and a juvenile detention center. The Criminal Justice Division, which oversees prosecutors, is planning to cut 88 jobs.

Maine – January 28, 2011 (The Bangor Daily News) - Indigent legal services running out of money

- The state commission charged with paying for attorneys to defend poor people charged with crimes and facing jail time could run out of money in May.

- The executive director of the Maine Commission on Indigent Legal Services, told members of the Appropriations Committee that it not only can't cut $98,000 from its budget, but the commission needs back two-thirds of the money cut from its budget last year in order to pay its bills through June 30, the end of the fiscal year.

- When the supplemental budget was passed last year, $600,000 was cut from the budget. Based on second-quarter data, the best estimate of anticipated costs through the end of Fiscal Year 2011 is the need for an additional $400,000.

- The Executive Director appeared before the Appropriations Committee in response to a request from the Governor that $98,000 be found in savings for the rest of the year.

- The commission was established by the Legislature in 2009. Last July, the commission took over payments from the court system to attorneys who represent indigent defendants facing jail time.

- Maine was the last state to form some type of independent agency to oversee legal defense for the indigent. That role had been handled since the 1960s by the state's judicial branch, in a system that was plagued by inefficiencies and conflicts of interest.

- While the reason for creating the commission included providing independent oversight of the delivery of indigent counsel services and improving the quality of representation, a driving force was money.

- The report that recommended creating the commission concluded it was impossible for the court system to predict how much money would be needed each year to pay attorneys, creating a drain on the judiciary.

- In response, the Chairman of the Appropriations Committee said. "For Maine, this is still in many ways an experiment. There's no question about the requirement to provide representation, but I'm hoping the commission will be open to a review of their processes and be open to looking at ways to manage fiscal impact of indigent legal defense on the general fund."

New Hampshire – July 1, 2009 (The Keene Sentinel) – Grass is a bit greener for Public Defenders

- Horror stories involving overworked and under-funded public defender offices across the nation have become commonplace. The issue has reached a boiling point in at least seven states where public defender offices have refused to take on new cases for fear of being unable to provide a capable defense.

- In New Hampshire, the Office of the Public Defender is experiencing the same budget-related hardships as most other state-funded agencies, but remains relatively healthy, according to its executive director."These are pretty tough times, but we're providing an adequate defense" for indigent defendants, he said. "I don't think there's a threat to the necessity of representation for these defendants."

- Fewer than 120 public defenders working out of offices in each of the 10 counties across the state handle an estimated 28,000 cases each year. The average New Hampshire public defender is handling 65 to 75 open cases at any given time, but could sometimes have more than 90 cases.

- Caseloads are increasing annually, but the number of new public defenders being hired is not keeping pace. "We just had a 5 percent layoff statewide at the public defender office,' the executive director said. "We lost between 15 and 20 people across the board, attorneys, staff investigators, everything."

- This year the office has a $17 million budget for indigent defense, according to the executive director. "The Legislature was very responsible in preserving the essence of the program," he said. "The funding levels are going to enable us to provide the same level of service and we won't have to endure any additional layoffs."

- One former New Hampshire public defender laid off in March as part of budget cuts said he'd worked as a public defender for two years. "The director came to every office and said there was a possibility of layoffs and then one day the ax just fell," he said. "When I left it was all on good terms. I truly enjoyed my time there."

- The public defender office's training program, which encourages its lawyers to further their legal knowledge, hone trial skills and stay up to date on developments in forensics and treatment options for offenders, was also negatively affected by the state's budget cuts.

- While he foresees more troubled times ahead for the state's public defender office, the Executive Director said the breaking point is a long way off. "I think we're going to get by with what we have," he said. "Never say never, but right now things look okay."

Rhode Island – October 18, 2010 (The RI Lawyers Weekly) – Overworked and underfunded public defenders

- Lawyers in the Rhode Island Public Defender's Office are among the most overworked in the nation, and the situation is not likely to improve anytime soon.

- Confirming what those in the office already know firsthand, a study recently released by the Bureau of Justice Statistics found that Rhode Island's public defender program falls outside the mainstream in many key areas including staffing, spending and caseload when compared to the other 21 state-run programs in the nation.

- Based on data from 2007, the state's program ranked lowest in the number of full-time attorneys on staff and near the bottom in the percentage of "judiciary and legal funds" spent on public defense.

- The head of the office said he now has 48 attorneys, about two-thirds of the number he estimates is needed to properly manage the growing number of cases the office sees each year. That he has frequently turned to the governor and the Legislature to explain the dire circumstances the office is in and to get more added to the office's current $9.5 million budget, but to no avail. They understand it, but they just don't have the money.

- He said that he would like to see caseloads cut in half to levels comparable to what Massachusetts and Connecticut public defenders manage, but that requires hiring another 24 lawyers, something unlikely to happen in the near future given the state's budget difficulties.

- The state's spending for public defense was among the lowest of all the state programs studied. Rhode Island spent about 8.7 percent of the total budget allocated for judicial and legal expenses, a figure comparable to the percentage Connecticut (8.4 percent) spent, but only about half of what Massachusetts spent (15 percent).

- Rhode Island was one of only three states that did not require indigent criminal defendants to pay for some of their legal costs. Nineteen other states allowed various administrative and court fees to be collected, ranging from $10 to $200 depending on the state and the type of case.

- The head of the office said he has talked to officials in Connecticut, a state that does try to recoup some legal costs from indigent defendants, but he has not pursued a similar strategy in Rhode Island because he was warned of constant collection challenges and the likelihood of creating an adversarial relationship with the clients. Besides, he said, any money that is recouped has to go into the state's general fund where revenue from parking tickets and other fines accumulate and cannot be specifically earmarked for office services.

- He said in order to maintain level service in fiscal 2012, he has asked for $10.3 million. However, the Governor's Office has warned that he should prepare a budget that includes a 15 percent cut. A proposition that would force the layoff of 25 employees.

Vermont – January, 2011 (Office of the Defender General) – Fiscal Year 2012 Appropriation Key Budget Issues

The HPAO Bureau desired to cite a Vermont originated newspaper article for inclusion in this report, however, the Times Argus News Corp. (The Montpelier Argus & The Barre Times) offers only a subscription based archival service.

- The Governor's recommended funding for FY 2012 continues current services, and provides funding for a litigation support in response to the increased number and seriousness of crimes.

- The salaries of top level staff attorneys were reduced by five percent in FY 2009, and remain frozen in FY 2012. Most other operating line items are level funded.

- With this level of funding, the Office of the Defender General expects to continue to fund the various improvements made to the delivery of cost-effective public defense services over the last few years. If the ODG must absorb budget reductions in the future, one or more of these improvements might have to be eliminated.

- The ODG will continue the cost containment measures implemented in FY 2002.

- One of the prime measures of the demand for defense services is the number of added clients during a fiscal year. Public defenders in Vermont routinely represent significantly more clients than is recommended under guidelines developed in 1973 to assure competent representation by the National Advisory Commission on Criminal Justice Standards and Goals.

- Persistent fiscal and caseload pressures continually threaten to undermine the integrity of the criminal justice system. If this office fails to deliver on the promise of effective representation, the validity of each and every conviction obtained is subject to credible attack by those individuals deprived of their constitutional right.

- The office has had significant problem with lawyers leaving the public defense system and qualified applicants withdrawing their applications. With the fiscal uncertainty of almost quarterly budget cuts, the prospective attorney workforce has become wary of entering into state government and the office has experienced new and even high-level attorneys leaving the public defense system for opportunities in the private sector.

- Simply put, it is becoming extraordinarily difficult to hire new public defenders and to retain experienced public defenders.

Indigent Defense Legal Services - Public Defender Functions

Georgia - Iowa - Michigan - North Carolina - Oklahoma - Texas

In response to the rising costs of indigent defense and public defender functions and faced with significant and repetitive budget reductions, many states across the nation are taking varied actions in order to address the issues at hand.

Georgia – June, 2011 (Dept. of Audits & Accounts) – Public Defender Services: Indigent Determination & Costs

- In FY 2010, the state spent approximately $40 million providing legal services to indigent defendants, while counties spent an estimated $70 million.

- The review examined the processes for ensuring these resources are directed to those defendants who are truly indigent and the processes for recovering certain costs when required or allowed.

- Specifically, the audit determined the effectiveness of: practices used to screen criminal defendants for indigent defense; efforts to ensure the accuracy of defendant's self-reported information; and, efforts to recover costs associated with defending indigent defendants.

- The audit found that decisions to provide public defender services were not always adequately supported by documentation in the defendant's files and that efforts to recover a portion of defense costs were inconsistent across judicial circuits.

- The review and comparison of eligibility standards to 711 defendant applications from nine circuits found that 35 percent of the applications lacked adequate documentation to make a proper determination (e.g., missing applications, applications lacking key information or with questionable income). An additional 5 percent of the applications appeared to be noncompliant due to the defendant's income exceeding income requirements. The audit found that these issues were the result of deficiencies in the screening and verification processes.

- The review also identified weaknesses regarding the circuits' cost recovery practices. Although state law requires any person applying for legal defense services to pay a $50 application fee, the review found that almost no defendant's pay the fee upfront when applying for a public defender. And in the majority of cases reviewed, courts were either unable (by law) or unwilling to order the defendant to pay the fee at the end of the case.

- The Georgia Public Defender Standards Council, circuit personnel responsible for indigent determination and the courts must each take steps to address these issues.

Iowa – September 13, 2011 (Radio Iowa.com) - Iowa's Court System hires collection service for unpaid fines

- Iowa court officials at the state and county levels are stepping up their efforts to collect unpaid fines and fees.

- Last year, the Legislature approved new collection procedures and reinforced several existing procedures in order to improve collection of unpaid fines and court fees and to help offset shrinking state revenues.

- Iowans currently owe more than $558 million in civil and criminal court fees. Of that total, 71 percent of the past-due debt involved criminal cases – many where the debtors either were indigent or incarcerated.

- Now, a law firm that provides collection services has been hired to pursue debts that are at least one year past due. The private, third-party collection agency that was contracted for after a competitive bid process is authorized by state law to add 25 percent to the amount owed for their fees.

- The collection agency program was tested in one county last month and is now expanded into 30 more counties.

- A Judicial Branch spokesperson said that the state has also reinforced an existing collection procedure that involves county treasurers. State law requires a county treasurer to refuse to renew a vehicle registration when the vehicle owner owes unpaid fines and court fees. Once an owner pays the debt, the county treasurer will allow renewal of the registration.

- In addition to the new third-party collection agency and the expanded role of county treasurers, the spokesperson said the judicial branch is continually working to strengthen collection efforts. For example, clerks of court around the state are working to unearth old debt and add the information to the judicial branch data base. Once in the data base, the debt will trigger a number of fine collection procedures.

- The spokesman expects the new efforts to recoup money will boost state, county and city revenues. Last year, the Judicial Branch collected $163 million dollars in court fines and fees. Most of that, about $146 million, goes to the state's general fund and another $17 million went to city and county governments.

Michigan – October 14, 2011 (The Chicago Tribune) – Gov. Snyder names commission to improve legal defense

- Governor Rick Snyder issued an executive order setting up a commission to study ways to improve legal representation for low-income residents charged with a crime.

- The Governor wants the Indigent Defense Advisory Commission's 14 members to recommend a set of improvements by next July 15 that will lead to cost-effective, qualified legal counsel provided in a consistent manner around the state.

- The Michigan Campaign for Justice has been pushing for three years to improve Michigan's public defense system and welcomed Snyder's move. "This commission presents a true opportunity for needed reform," said the Executive Director.

- Michigan was a 19th century pioneer in indigent legal aid but now has one of the nation's stingiest and most fragmented public defense systems.

- A 2008 report found that $74.4 million was spent annually in Michigan on indigent defense, or $7.35 per person. That's 38 percent less than the national average and less than all but six states, the National Legal Aid & Defender Association said in "A Race to the Bottom," commissioned by Michigan lawmakers.

- Courts in each of Michigan's 83 counties set their own pay rates and hiring systems for public defenders. The state provides overall funding but the courts determine how much to spend, which lawyers to hire and how much help to give them with expert witnesses and investigations.

- The report found some courts pay lawyers on a contract basis as little as $40 an hour, or pay flat fees for them to take on as many indigent cases as come before the court in a given period. It found that many county systems are filled with conflicts of interest that make defense lawyers beholden to judges who want to keep cases moving.

- Wayne County Circuit Court Judge W. McCree, a Campaign for Justice board member. said, "It is time Michigan undertakes desperately needed and long overdue reforms to improve our broken public defense system."

North Carolina – March 1, 2011 (Commission on Indigent Defense Services) – Report to the General Assembly

- The North Carolina Commission on Indigent Defense Services has accomplished a great deal since its formation and is preparing to accomplish even more in the years to come. To improve the efficiency, cost-effectiveness, and quality of the State's indigent defense program in the long run, the Commission and IDS Office have implemented a number of initiatives and measures to slow the rate of increase in spending without compromising the quality of representation to include:

- Adopted more uniform rates of compensation and detailed billing policies in capital and non-capital cases
- Improved the collection of revenues from recoupment
- Established higher qualification standards for attorneys seeking appointment to capital cases and appeals
- Established new public defender offices in a number of counties and expanded some existing offices
- Worked with the public defender offices to develop plans for the appointment of counsel that provide for more significant oversight of the quality and efficiency of local indigent representation
- Adopted a model indigent appointment plan for non-public defender districts
- Provided judges with studies on the average amount of time and frequency distributions of times claimed by private attorneys by type of case
- Conducted a study on the cost of attorney time spent waiting in court under current scheduling systems
- Studied trends in overall court dispositions and indigent dispositions

- The Commission and IDS Office are also in the process of working on a number of other initiatives to include:

  - Studied trends in overall court dispositions and indigent dispositions
  - Conducting an analysis of budgetary trends and current indigent defense spending levels
  - Conducting a study of misdemeanors that might be appropriate for reclassification as infractions
  - Developing a pilot system for the electronic submission of fee applications
  - Developing guidelines to assist judges in improving the indigency screening process
  - Developing an objective tool to measure the quality and efficiency of indigent defense systems at the county, regional, and statewide levels.

- The Commission and staff understand that the State is continuing to face a serious budget crisis and are working hard to identify additional ways to enhance efficiencies and minimize expenditures in the coming years. Any projections for the future, however, will be affected by other changes in the criminal justice system. For example, significant changes in sentencing, criminal law or procedure, or in the conduct of district attorney offices, might increase or decrease the funds needed for indigent defense. Similarly, some changes that could control costs for indigent defense will necessarily be systemic and involve not just defense counsel, but prosecutors, judges, clerks, and other system actors.

Oklahoma – April 14, 2010 (The Daily Oklahoman) - Oklahoma Indigent Defense System struggles to survive cuts

- State agency directors are still struggling to make ends meet and bracing for another round of cuts despite optimism expressed by state leaders because of an increase in revenue collections.

- The Director of the Oklahoma Indigent Defense System, said a lean budget means his agency doesn't have enough money to move from the hall which the agency occupies on the campus of Griffin Hospital in Norman.

- The state is consolidating its operations in Norman to cut down on expenses and is closing that building. "We're kind of in a dilemma," the director said. "We don't have the funds to move. We're hoping the Legislature will appropriate the money. Otherwise we're on the horns. I don't know what we'll do."

- Finding the money to move is just one more worry for the agency that is required to represent people facing criminal charges but who can't afford an attorney.

- Like most state agencies, indigent defense saw its budget for the 2010 budget year reduced by about 7.5 percent. The department's budget went from $16 million to $14.5 million.

- After nearly seven months of declining revenue, legislators drafting the budget for next year are warning that some agencies could see their budgets cut by an additional 10 percent. "It's getting to a real critical point," the director said. "We're told our budget is going to be cut further. We really can't take any more personnel cuts. We're down to figuring out what services can be eliminated."

- The Oklahoma Indigent Defense System has 115 employees, including 61 attorneys who represent people facing the death penalty, first-degree murder charges and appeals. The average attorney handles about 400-500 cases per year. Attorneys are paid $45,000-$90,000 a year. The agency handled more than 44,000 cases last year.

- The agency also contracts with local attorneys to represent people facing other criminal charges. "We can't afford to hire anybody else. We just keep asking more and more of our employees," the director said. "We're looking at what services we're not going to provide. These people still have to be represented. The state can't prosecute people if they can't provide defense."

- The Director said he's met with legislative leaders to explain his agency's plight, but still have not heard if the agency will get additional money to begin negotiating a new lease and starting the moving process. "The goal of public safety is to identify people who are criminals and address that," the Director said. "When you have this kind of a funding problem, it's addressed based on what we have money to do, and that's very dangerous."

Texas – February 25, 2011 (National Legal Aid & Defender Assoc.) – Chief Justice speaks out on indigent defense

- On February 23, 2011, Texas Supreme Court Chief Justice Wallace B. Jefferson gave his state of the judiciary before the 82nd state legislature.

- Texas has two high courts – the Supreme Court for civil and juvenile matters, and the Court of Criminal Appeals for criminal matters. Though Justice Jefferson heads the civil high court, he nonetheless felt compelled to speak about indigent defense needs in the state.

- The Chief Justice called for action on indigent defense noting that Texas has had more prisoners exonerated by DNA evidence over the last 10 years than any other state, but that it ranks among the lowest in the nation on funds spent for indigent defense. He called upon legislators to fund programs and pass laws to ensure innocent people do not wrongfully suffer at the hands of Texas's legal system.

- Bemoaning the fact that Texas ranks among the lowest of the 50 states in right to counsel per capita expenditures, he urged the legislature not to go forward with projected cuts to the indigent defense budget.

- The right to counsel is primarily a county responsibility in Texas, with the state making limited contributions through the Texas Task Force on Indigent Defense, which provides state funding, requires local planning for indigent defense and reporting of expenditures, and provides resources for counties to improve these services.

- A cut to their budget would drain the system of resources we need to assure indigent criminal defendants get competent lawyers who make the system fair.

Note: The Texas Indigent Defense Commission replaced the Task Force on Indigent Defense on September 1, 2011.

- The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. In addition, it requires local planning for indigent defense and reporting of expenditures and provides an array of resources for counties to improve these services. In exchange for state fiscal assistance, the local judiciary is required to report its plan for delivering indigent defense services.

ENDNOTES

[1] MGL c 277 s 70C; Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, executive summary, April 2005 p. 2. The Commission is almost always referred to in shorthand as "the Rogers Report" which is the name of its chairman, former House of Representatives majority leader, John Rogers.

[2] Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005, Massachusetts General Court, P4; Pamphlet provided to HPAO quoting text and footnote of Material Prepared in Response to an Information Request From the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission February 2011, footnote Committee for Public Counsel Services, *Assigned Counsel Manual,* pages 3-4.

[3] Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005; Material prepared in response to an information request from the Civil Infraction Commission, prepared by the: Massachusetts Sentencing Commission, February 2011 (made available to HPAO Bureau upon its request).

[4] See letter: Chief Justice Boston Municipal Court, (BMC) to HPAO Chairman, 2 June 2011; various telephone conversations of District and BMC court personnel with HPAO Bureau director, June, July 2011. The AOTC's Director of Court Operations and the chief justice of the District Court advised the HPAO Committee that its "request for statistical information" was most readily available from the AOTC which would assemble and provide the statistics to the HPAO Committee through its Bureau.

[5] Email from executive director of the AOTC to the HPAO Bureau director, 7 June 2011

[6] Material Prepared in Response to an Information Request from the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, Administrative Office of the Trial Court, February 2011

[7] Email AOTC, Executive Director to HPAO Bureau Director, 7 June 2011

[8] Email from executive director of the AOTC to the HPAO Bureau director, 7 June 2011; The statistics used in this report contain references to both fiscal year and calendar year. The HPAO Bureau requested that clarification in its initial surveys. The batch of statistics supplied to the HPAO Bureau in early June noted that the data supplied was from 2010 and that this data represented a "calendar year" of statistics for misdemeanors amended to civil violations. A calendar year consists of all days of a year between the first day of January through and including the last day of December. The HPAO Bureau echoes the AOTC caution that other court statistics, both provided to it and statistics displayed on the Massachusetts Judicial Branch's website, also use fiscal year data (in Massachusetts the state's fiscal year data is assembled within 1 July through and including 30 June). This data is found in the "Trial Court Case Statistics Directory" available on the Massachusetts Court System Website. For example, the statistics provided to the HPAO Bureau in September 2011 used, in examining the AOTC, fiscal year statistics. The HPAO Bureau used the fiscal year statistics in its analysis of the AOTC revenue reconciliation management reports. Other examples periodically appear in this report. Consequently, care must be used when using the AOTC statistics to determine that the data is comparable. This issue adds an obstacle to auditing the indigency defense counsel issue.

[9] Email; AOTC executive director to HPAO Bureau director, 20 June 2011; Attachment: Material Prepared in Response to an Information Request from the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, Administrative Office of the Trial Court, February 2011

[10] Email AOTC executive director to HPAO Bureau director, 20 June 2011 with attachment: "Material Prepared in Response to an Information Request from the Civil Infraction Commission: Prepared by the: Massachusetts Sentencing Commission, February 2011, p7"

[11] Email from AOTC executive director to HPAO Bureau director, 7 June 2011, with attachment of "Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010" document

[12] MDAA letter 27, June 2011

[13] Email, AOTC Executive Director to HPAO Bureau Director, 30 June 2011

[14] Appendix F contains data supplied by the Committee on Public Counsel Services (CPCS) for the House Committee on Post Audit and Oversight for Fiscal Year 2011. The data references 188 instances that involved a single charge for which CPCS paid an attorney to represent an indigent client. Because the data was reformatted to make the appendix pages more readable, the placeholder numbers exceed the 188 single misdemeanor charges.

[15] Email from Executive Director of the AOTC to HPAO Bureau Director with attachment of report and question responses, 1 Sept. 2011. "The second document provides further analysis of the c. 277 sec. 70C cases based on a more systematic sample - i.e., 17,042 cases disposed under this provision from Jan. 2008 to June 2011. By focusing on these years, we avoid the legacy system problems which we discussed."; and, the attachment, Administrative Office of the Trial Court Further Analysis of Dispositions Pursuant to c. 277 § 70C, 1 September 2011: "Of the original 19,458 charges, 17,042 were disposed of from 2008 through June 2011. These cases represent the most systematic compilation of c. 277 s 70C dispositions because the transition from the WMS legacy system to MassCourts was complete by 2008. Therefore, the remaining analysis focuses only on those charges resolved from 2008 through June 2011."

[16] Email from executive director of the AOTC to HPAO Bureau director with attachment of report and question responses, 1 Sept. 2011. "In response to your more recent request, we also isolated the crimes of Disturbing the Peace and Disorderly Conduct and compared the number of dispositions under c. 277 sec. 70C for these crimes with the number of arraignments for these crimes. Finally, we broke down these Disturbing/Disorderly dispositions under c. 277 sec. 70C by the specific court divisions."

[17] Material Prepared in Response to an Information Request From the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, February 2011, p. 4.

[18] Civil Infraction Commission meeting minutes, July 5, 2011; Material Prepared in Response to an Information Request from the Civil Infraction Commission (pamphlet), prepared by the: Massachusetts Sentencing Commission February 2011; HPAO Bureau attendance at the regular meetings of the Massachusetts Civil Infractions Commission

[19] While all District Attorneys responded to the HPAO survey, only two district attorneys completed the HPAO survey response tool/form. The others responded to the survey in letter form. The two district attorney's offices who used the survey - Norfolk and Northwestern district - indicated that the statistics that their office kept were based upon calendar year; all other district attorneys' responses were silent on their method of statistical collection (usually either calendar or fiscal year), or stated that the office did not have statistics to quote.

[20] Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011; The MDAA responded in letter form, rather than the HPAO survey, and represented the District Attorneys of Berkshire, Bristol, the Cape and Islands, Essex, Hampden, and Plymouth. The District Attorneys of Norfolk, Middlesex, Northwest, Worcester and Suffolk responded individually either by letter or returned the HPAO Bureau's survey instrument. Several district attorneys or members of their staff also placed telephone calls to the HPAO Committee and its Bureau.

[21] Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

[22] Also "a justice, associate justice or special justice thereof, or by a clerk, assistant clerk, temporary clerk or temporary assistant clerk..." See MGL c 218 s 35A

[23] Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

[24] Suffolk District Attorney, survey letter response to HPAO Committee, dated 19 August 2011

[25] Worcester District Attorney, survey letter response to HPAO Committee, dated 5 July 2011

[26] Worcester District Attorney, letter to HPAO Committee, dated 5 July 2011. Worcester County District Court had the highest use of MGL c. 277 s 70C during the last four years. There were 6,658 cases of charges amended from criminal misdemeanor to civil infractions in Worcester District Court, according to statistics provided to the HPAO Bureau in September by the Administrative Office of the Trial Court.

[27] Office of the Middlesex District Attorney's chief legal counsel to Chairman, House Post Audit and Oversight Committee, 10 June 2011

[28] Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

[29] Office of the Middlesex District Attorney's Director of Administration and Finance to analysts, Massachusetts House and Massachusetts state Senate committees on Ways and Means, (two letters) dated 3 June 2011 and 8 April 2010. These letters were enclosed as attachments in correspondence from chief legal counsel of the Middlesex District Attorney's office to Chairman, HPAO Committee, 10 June 2011

[30] Office of the Middlesex District Attorney's Director of Administration and Finance to analysts, Massachusetts state House and Senate committees on Ways and Means, 3 June 2011

[31] Middlesex District Attorney letter dated 8 April 2010 to Senate Committee on Ways and Means and House Committee on Ways and Means; Middlesex District Attorney letter dated 3 June 2011 to Senate Committee on Ways and Means and House Committee on Ways and Means; Both Middlesex District Attorney's letter to the ways and means staff was signed by an assistant district attorney and the director of the office's administration and finance department.

[32] Letter to HPAO Chairman, from District Attorney of Suffolk County, 19 August 2011

[33] District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

[34] Black's Law Dictionary, eighth edition, Thomson West, St. Paul, MN, p. 1464. "Sua sponte": (Latin: "of one's own will"). Without prompting or suggestion; on its own motion. e.g. the court took notice sua sponte that it lacked jurisdiction over the case. Correspondence: District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

[35] Correspondence: District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

[36] District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011; Worcester District Attorney to Chairman, House Committee on Post Audit and Oversight, 5 July 2011; Massachusetts District Attorney's Association (MDAA) letter to Chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

[37] Statistics supplied to HPAO Bureau by the Administrative Office of the Trial Court; AOTC electronic mail to HPAO Director, 1 September 2011; Statistics available on the AOTC website indicate that in the fiscal years 2010-2008 there were a total of 663,970 criminal defendants in District Court and 255,911criminal maters. This number is not exactly comparable because it is a fiscal year statistical reporting and the AOTC numbers does not indicate if the report provided to the HPAO Bureau used a fiscal year or calendar year tabulation methodology.

[38] "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court; Massachusetts Governor's Website, House 1 - FY2012, Budget Recommendation [http://www.mass.gov/bb/h1/fy12h1

[39] Email and attachment; AOTC director of fiscal affairs to HPAO Bureau director, 20 October 2011.

[40] Statistics provided to the HPAO Committee by the House Ways and Means Committee.

[41] Statistics provided to the HPAO Committee by the House Ways and Means Committee.

[42] "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court, p. 6

[43] "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court, p. 6

[44] Interview with state Representative John Rogers, HPAO Bureau, Wednesday, 11 May 2011

[45] CPCS FY 2012 budget document, Response to HPAO Bureau, 29 July 2011; MGL Chapter 54 Section 2 of the Acts of 2005; also, see: website for Committee on Public counsel, CPCS Assigned Counsel Manual Chap. 5 sec. 33 available at: http://www.publiccounsel.net/Certification_Requirements/pdf/MANUALCHAP5_sec33.pdf]

[46] Governor's Budget Recommendations, FY 2012, Indigent Defense Reforms, Executive Office for Administration and Finance. Available at: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

[47] MGL c 276 s 99E; see also MGL 211D section 2

[48] HPAO Bureau letters to Massachusetts' Commissioner of the Departments of Revenue, and Commissioner of the Transitional Assistance, the Medical Director of the Massachusetts Department of Medicaid, and the Registrar of Motor Vehicles, 18 May 2011

[49] Acting General Counsel for the Commissioner, Massachusetts Department of Transitional Assistance, response letter to, Director, HPAO Bureau, 24 May 2011

[50] Medicaid Director, Office of Medicaid, Executive Office of Health and Human Services, response letter, to Director, HPAO Bureau, 6 June 2011.

[51] Letter, Registrar of Motor Vehicles, to Director, HPAO Bureau, 23 May 2011

[52] Letter from Tax Counsel, Department of Revenue, Litigation Bureau, to Director, HPAO Bureau, 24 June 2011

[53] Letter from Tax Counsel, Department of Revenue, Litigation Bureau, to Director, HPAO Bureau, 24 June 2011

[54] Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

[55] Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

[56] Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

[57] Email, Office of Commissioner of Probation to director, House Post Audit and Oversight Bureau, 18 October 2011; State House News Service, 31 December 2010

[58] Email, Office of the Commissioner of Probation to Director, House Post Audit and Oversight, 18 October 2011

[59] Email, Office of the Commissioner of Probation to Director, House Post Audit and Oversight, 18 October 2011

[60] Telephone conversation of First Deputy Commissioner of Probation with Director, HPAO Bureau, 18 October 2011

[61] Reported Indigency Figures, research department, Office of the Commissioner of Probation, 19 October 2011, report provided to HPAO Bureau

[62] Interview, Office of the Commissioner of Probation, with HPAO Bureau, 19 October 2011. The Office of the Commissioner of Probation explained that the categories of "Reduced Indigency Counsel Fee" and "Average reduced Counsel Fee" in the chart are not compatible. The collection activity for the categories of "Reduced Indigency Counsel Fee" is done by the District and BMC court clerks with the exception of the ten courts not yet using the MassCourts system. The "Average Reduced Counsel Fee" refers to only those collections in the ten courts not yet using MassCourts, where the collection of the indigent defense counsel fee continues to be performed by the Probation Department.

[63] Governor's budget Recommendations, FY 2012, Indigent Defense Reforms, Executive Office for Administration and Finance. Available at: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

[64] **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011;** Source: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm The Governor's budget was filed on Wednesday, 26 January 2011.

[65] **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011;** Chapter 68, Acts of 2011

[66] Emails from Acting Commissioner of Probation, 18 October 2011 to Director, HPAO Bureau First Deputy Commissioner of Probation, 18 October 2011 to Director, HPAO Bureau

[67] **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011;** Source: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

[68] Prosecutors, Public Defenders Question Guv's Planned Legal Agency", State House News Service, Boston, Monday, 24 January 2011

[69] Prosecutors, Public Defenders Question Guv's Planned Legal Agency, State House News Service, 24 January 2011.

[70] MGL c 261 s 27A (b)

[71] Memorandum, SJC, to Commissioner of Probation, 26 January 2011 and memo Attachment: Federal Register of January 20, 2011, Volume 76, Number 13, at pages 3637-3638.

[72] Chapter 68, s 112 subsection 2, Acts of 2011, Letter, Registrar of Motor Vehicles, from Director, HPAO Bureau, 18 May 2011; RMV letter 23 May 2011; HPAO Bureau, 23 May 2011; Interview, Office of the Commissioner of Probation, 15 July 2011

[73] Telephone interview, First Deputy Commissioner of Probation, with HPAO Director, 18 October 2011

[74] Email: HPAO Director to DTA, 3 November 2011

[75] Letter, Executive Office for Administration and Finance, Fiscal Affairs Division Director, to HPAO Bureau Director, 17 August 2011

[76] HPAO Director to DTA, 3 November 2011

[77] The source of the documents was the Administrative Office of the Trial Court (AOTC) and the HPAO Bureau requested the Trial Court Revenue Reconciliation Management Reports for fiscal years, 2009, 2010, 2011, and 2012 (one month of results at the time of the HPAO Bureau's request).

[78] Disparity Examples by County. Excel Spreadsheet analysis by HPAO Bureau, from AOTC Trial Court Revenue Reconciliation Management Report documents for fiscal years, 2009, 2010, 2011, and 2012

[79] See also DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-239, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. Government Printing Office, Washington, DC,2011.

Appendix A

Review of AOTC Revenue Reconciliation Reports for

Indigent Defense Counsel Fees:

FY 2009

FY 2010

FY 2011

District or Boston Municipal Court	[redacted]	3 year Average Criminal Defendants (AOTC statistics)	1999 Income per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011	TOTAL Reimburse Indigent Counsel 3 Fiscal Years	Average annual Reimburse Indigent Counsel 3 Fiscal Years	District or Boston Municipal Court
A3		12,360	N/A	($-300)	$185,208.50	$0.00	$188,684.00	($-1450)	$165,074.00	$353,758.00	$179,655.50	A3
A5		12,515	$15,232.00	$38,311.44	$226,004.00	$35,551.00	$191,077.36	$44,396.00	$161,217.00	$696,556.80	$232,185.60	A5
A7		4,941	$22,660.00	$178,800.00	$18,440.00	$139,139.89	$28,995.00	$31,048.16	$104,411.28	$500,834.33	$166,944.77	A7
A9		8,536	$17,557.00	$99,044.15	$310,488.07	$94,593.03	$277,846.96	$65,165.00	$236,978.76	$1,084,115.97	$361,371.99	A9
A11		9,434	$15,602.00	$0.00	$258,463.00	$0.00	$244,512.00	$0.00	$286,922.62	$789,897.62	$263,299.20	A11
A13		601	$31,314.00	$5,865.00	$650.00	$9,140.00	$785.00	$5,575.00	$50.00	$22,065.00	$7,355.00	A13
A14		1,133	$25,740.00	$425.00	$8,525.00	$0.00	$8,218.00	$1,765.00	$10,945.00	$29,878.00	$9,959.33	A14
A15		2,222	$29,553.00	$12,585.00	$50,064.00	$12,800.00	$58,560.73	$11,886.67	$61,797.51	$207,693.91	$69,231.30	A15
A17		11,355	$18,614.00	$0.00	$350,456.54	$0.00	$272,288.50	$5,605.00	$239,648.26	$867,998.30	$289,332.76	A17
A19		7,004	$17,492.00	($-150.00)	$306,791.44	$3,945.00	$294,518.00	$4,125.00	$341,831.00	$951,060.44	$317,020.14	A19
A21		3,998	$15,913.00	$0.00	$121,746.76	$0.00	$112,403.50	$0.00	$123,679.62	$357,829.88	$119,276.62	A21
A22		899	$44,327.00	$23,313.00	$3,938.00	$11,064.32	$28,116.34	$7,144.00	$37,138.68	$110,714.34	$36,904.78	A22
A23		8,803	$17,163.00	$16,807.20	$339,515.30	$19,470.80	$365,372.83	$19,882.00	$314,454.52	$1,075,502.65	$358,500.88	A23
A27		2,620	$18,830.00	$9,085.00	$86,805.00	$13,215.00	$105,268.75	$18,957.83	$104,106.74	$337,438.32	$112,479.44	A27
A28		3,183	$18,908.00	$2,261.00	$47,674.00	$2,400.00	$46,099.00	$1,100.00	$60,170.53	$159,704.53	$53,234.84	A28
A30		1,724	$22,655.00	$4,362.50	$13,605.00	$18,771.00	$5,180.00	$14,888.63	$6,156.47	$62,963.60	$20,987.87	A30

Developed by: HPAO Bureau

Appendix B

Charges Amended to Civil Complaints

under

MGL c 277 s 70C

for

Calendar Year 2010

Charges Amended to Civil Complaints under c. 277 s. 70C,
Charges Arraigned Calendar Year 2010

Offense	Number
All Charges Amended to Civil	2,932
Disorderly Conduct	838
Operate After Suspension	646
Shoplifting	450
Trespassing	293
Compulsory Insurance Violation	152
Attaching Wrong MV Plates	111
Possession Class D	76
Alcohol, Possession by Minor	57
Receiving Stolen Goods	50
Distribute Class D	37
Resisting Arrest	36
Possession Class D Marijuana	35
Prostitution	21
Littering	14
Larceny Less	12
RV On Public Way	10
Threatening	9
Failure To Return Leased Prop	9
Alcohol, Procure for Minor	9
Habitual Traffic Offender	6
Possession Class B	5
Obstruct Emergency Veh	5
Fireworks	5
MDC Rule Violation	5
Operate After Suspension 2nd	4
Identification Violation	4
Refuse ID Process	4
License Law Violation (Not MV)	3
Lewd And Lacivious	2
Alcohol, Transporting	2
False Report Of Crime	2
MV - False Report Of Theft	1
Defrauding Innkeeper	1
Vandalism	1
Tagging Property	1
Possession Class N.A.	1
Possession Class A Heroin	1
Possession Class C	1
Possession Class D 2nd	1
Possession Class D Marijuana 2nd	1
Possession Class E	1
Inhaling Toxic Vapors	1
Violation Aircraft Restriction	1
Common Night Walker	1
Indecent Exposure	1
Possess Air Rifle w/o FID Card	1
Annoying Phone Calls	1
Obstructing Justice	1
Interfere Police or Firefighter	1
False Alarm	1
City Ordinance Violation	1

Appendix C

Flow Chart

regarding

Massachusetts Indigency Verification Process

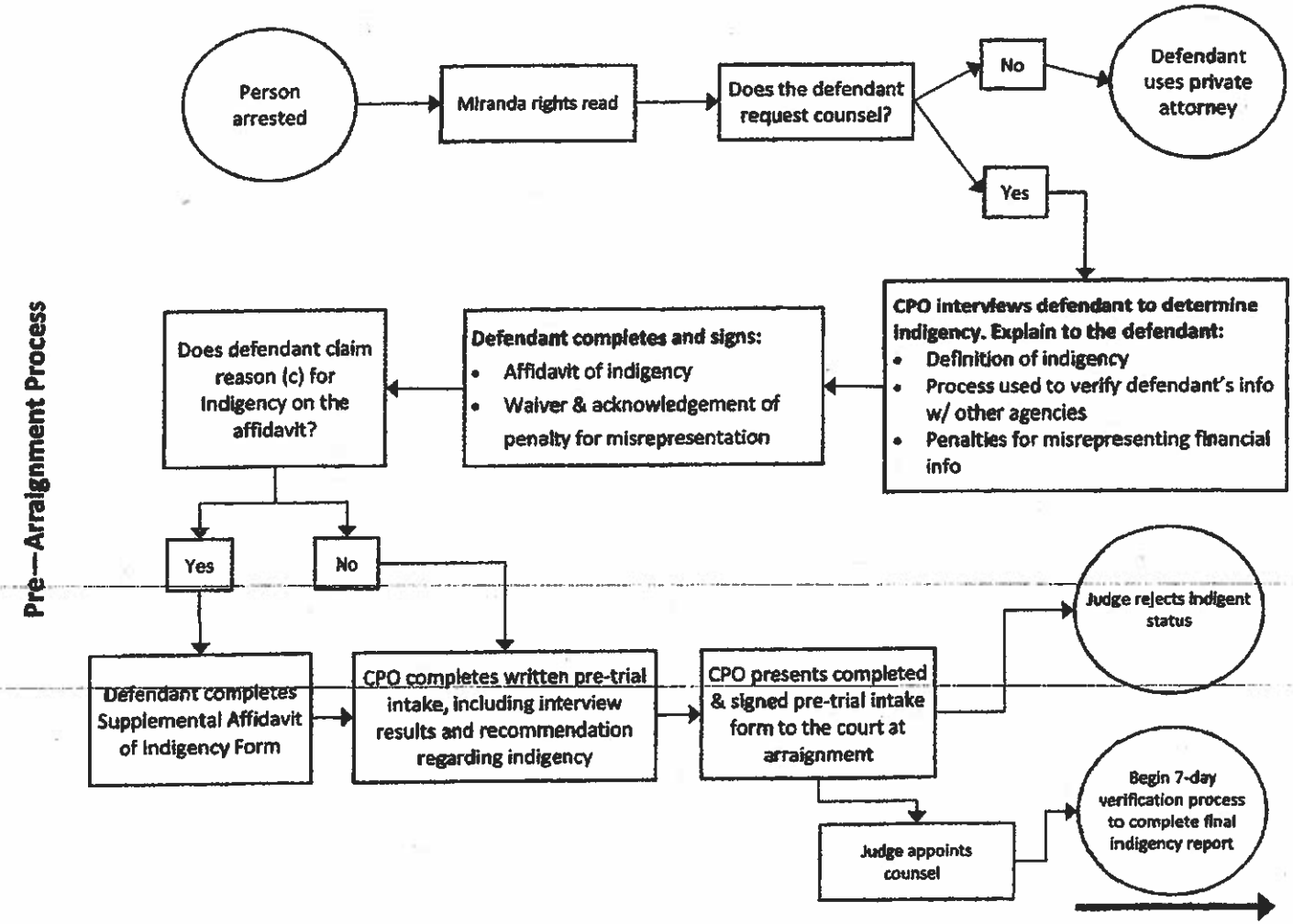
draft copy by

Kennedy School of Government

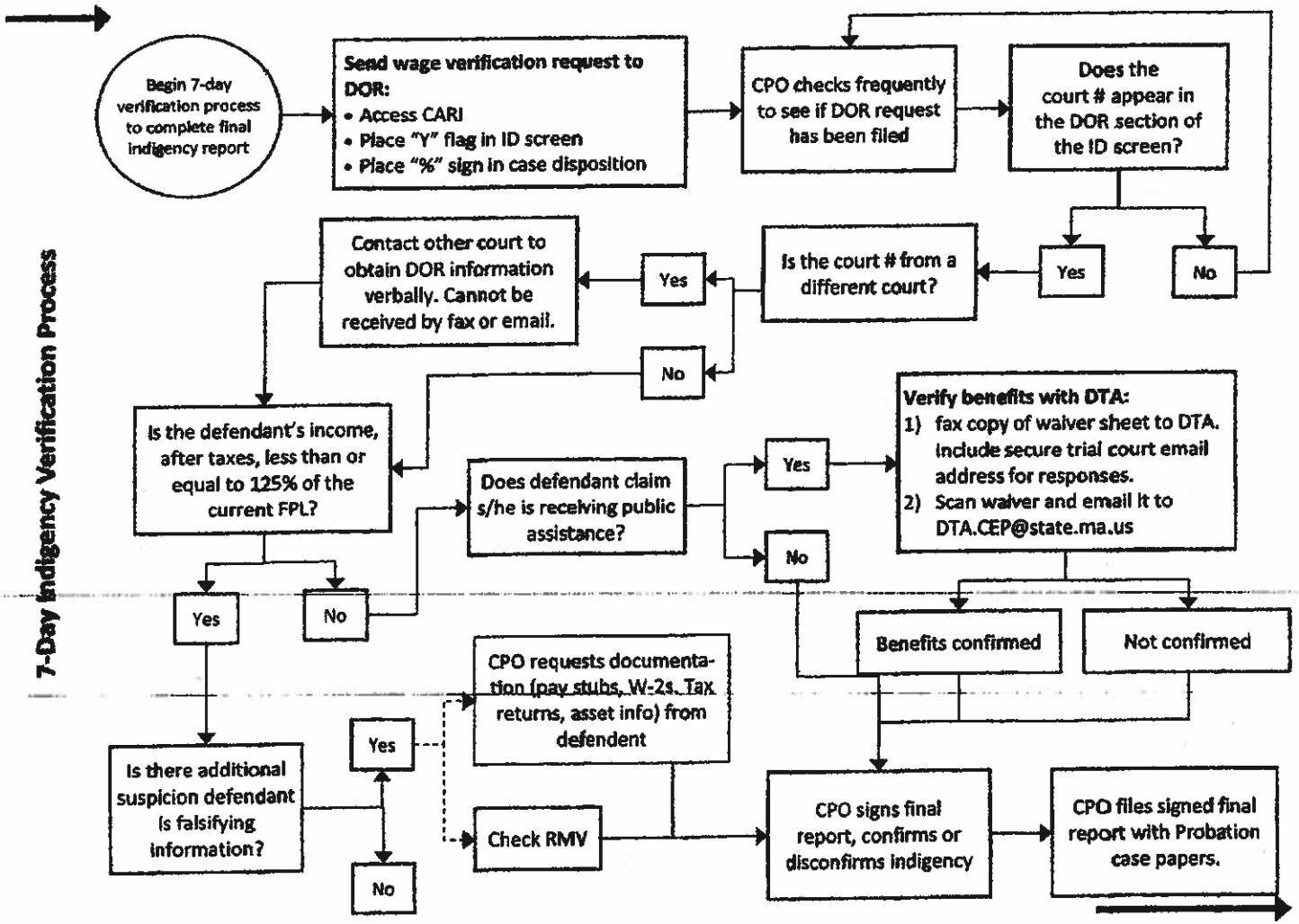
for

Office of the Commissioner of Probation

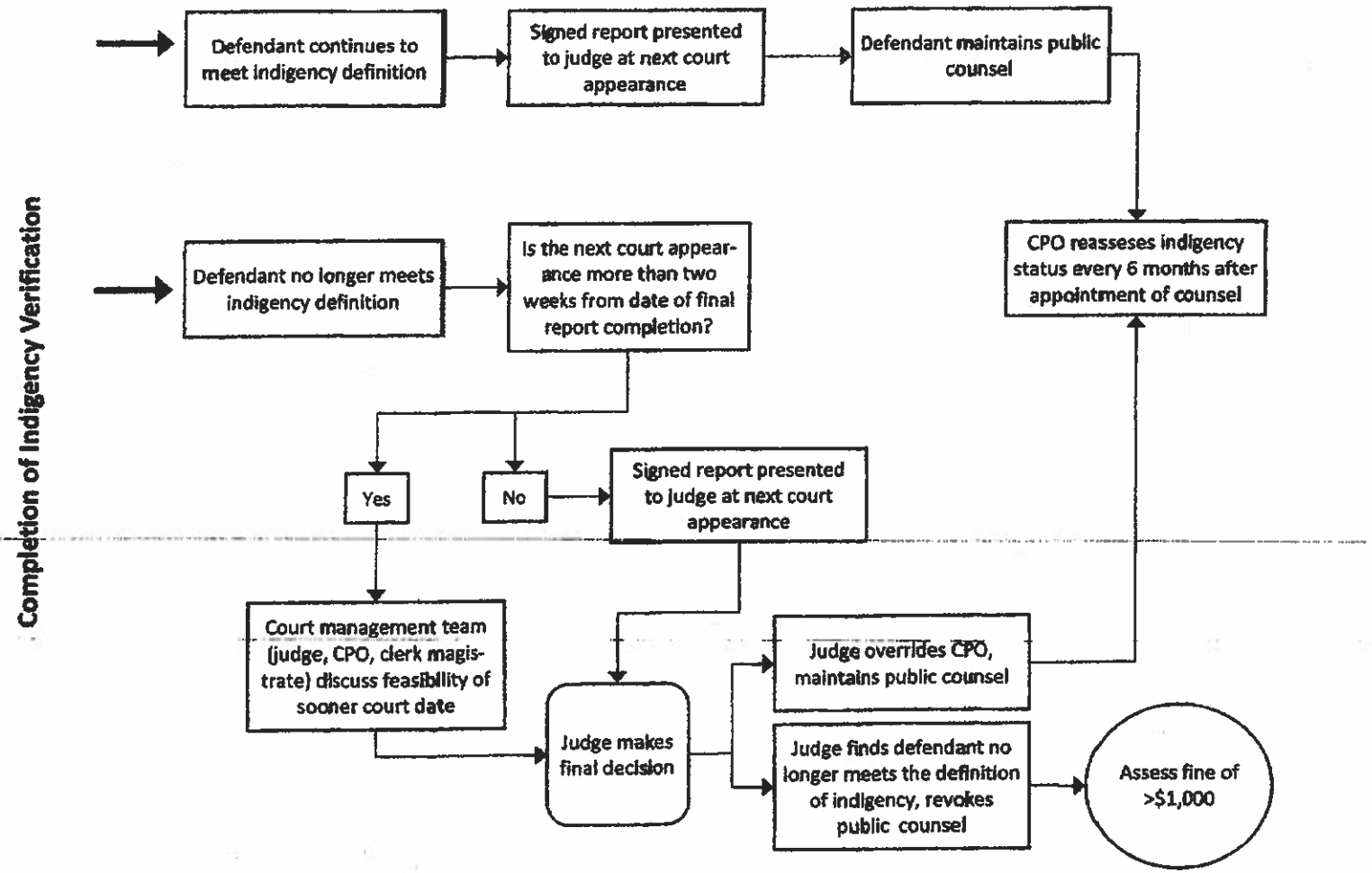
MA Indigency Verification Process--Draft



MA Indigency Verification Process—Draft



MA Indigency Verification Process—Draft



Appendix D

2004 Commissioner of Probation: Interim Indigency Verification Protocol Change

1990 AOTC on Indigency Fee Collection

Massachusetts Trial Court
Office of the Commissioner of Probation
One Ashburton Place
Boston, MA 02108-1612

JOHN J. O'BRIEN
COMMISSIONER

TEL: (617) 727-5300
FAX: (617) 727-0483

TO: **Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments**

FROM: **John J. O'Brien, Commissioner**

DATE: **August 24, 2004**

RE: **Interim Indigency Verification Protocol Change**

I would like to express my gratitude for your efforts in implementing the interim indigency verification protocol established to comply with the amended Mass. Gen. Laws. c. 211D, § 2 ½. The additional responsibility placed on the field by the protocol did not go unnoticed by this office, and I am proud of the professional manner that Chief Probation Officers have demonstrated in meeting this challenge. As my August 12th memo indicated, the protocol is the subject of an ongoing discussion between the Administrative Office of the Trial Court, the Department of Revenue, the Department of Transitional Assistance, the Department of Medical Assistance, the Registry of Motor Vehicles, and this office. A result of this conversation is a shift in the protocol regarding the need to request information from these agencies.

As of this date, a Chief Probation Officer, or his or her designee, does not have to request information from the agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim. This change does not negate the necessity of having the defendant read and sign the Definition of Indigency and Acknowledgment of Penalties for Misrepresentations Form and the Waiver Authorizing Release of Information to Verify Claim of Indigency. Probation Officers should also continue to use past methods of determining indigency when assessing the defendant's need for counsel.

Thank you for your continued patience as we adjust to the provisions of this new legislation.

THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
OFFICE OF THE CHIEF ADMINISTRATIVE JUSTICE
Two Center Plaza
Boston, Massachusetts 02108

TO: Administrative Justices of the Trial Court
First Justices of the Trial Court
Clerk/Magistrates of the Trial Court
Chief Probation Officers of the Trial Court
Commissioner of Probation

FROM: Arthur M. Mason, Chief Administrative Justice

DATE: August 22, 1990

RE: Fiscal Year 1991 - Legal Counsel Fee
Fiscal Year 1991 Memo #6

Recent legislation has created an additional revenue source for Court Divisions to collect and submit to the State Treasurer. Chapter 211D, Section 2A as amended establishes an additional assessment for deposit to the Committee for Public Counsel Services.

Chapter 211D, Section 2A as amended by St. 1990, Chapter 150, Section 330 which states that, "Any person provided counsel under the provisions of this Chapter shall be assessed a legal counsel fee of forty dollars ($40.00) which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to Section Two (2) and shall be collected in accordance with said Section".

Each division should collect and record this item separately. It is necessary to segregate the receipting process for this item and to have the ability to identify the category account for future inquiries.

The submission of this revenue will be done by using the receipt account number established for your court for the "Reimbursement for Indigent Counsel."

If you have any questions concerning this matter, please contact John J. Morrissey, Director of Fiscal Affairs, Robert E. Maguire, Manager of Fiscal Affairs/Audit & Payroll or your Fiscal Affairs Internal Auditor at 1-800-572-5027 or 1-800-222-5178

JJM/jm
maguire.45
cc: John J. Morrissey, Director of Fiscal Affairs
Robert E. Maguire, Manager of Fiscal Affairs/Audit & Payroll
Bookkeepping Personnel of the Trial Court

Appendix E

Current Law

Massachusetts General Laws c 211D s 2A & s 2B

Chapter 211D Committee for Public Counsel Services

Section 2A Legal counsel for criminal defendant charged with misdemeanor or municipal ordinance violation; fee assessment

Section 2B Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

Massachusetts General Laws c 211D s 2A & 2B

- **PART III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
  (Chapters 211 through 262)
- **TITLE I** COURTS AND JUDICIAL OFFICERS
- **CHAPTER 211D** COMMITTEE FOR PUBLIC COUNSEL SERVICES
- **Section 2A** Legal counsel for criminal defendant charged with misdemeanor or municipal ordinance violation; fee assessment

[Text of section effective until July 1, 2011. For text effective July 1, 2011, see below.]

Section 2A. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the commonwealth, the defendant, or on the court's own motion, shall not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Any person provided counsel under the provisions of this chapter shall be assessed a counsel fee of $150, which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to section two and shall be collected in accordance with said section.

The department of revenue shall be authorized to intercept said fee from tax refunds due to persons who have not paid said fee.

The department of public welfare shall be authorized to deduct said fee in weekly or monthly increments from persons who have not paid said fee.

Chapter 211D: Section 2A. Verification of claim of indigency; waiver by claimant allowing access to information; reassessments following appointment of counsel; reporting

[Text of section as recodified by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221. For text effective until July 1, 2011, see above.]

Section 2A. (a) A person claiming indigency under section 2 shall execute a waiver authorizing the court's chief probation officer, or the officer's designee, to obtain the person's wage, tax and asset information from the department of revenue, department of transitional assistance and the registry of motor vehicles that the court may find useful in verifying the person's claim of indigency. The waiver shall authorize the chief probation officer, or the officer's designee, to conduct any further reassessment required by this section.

(b) It shall be the responsibility of the chief probation officer assigned to each court to ensure that a person claiming to be indigent meets the definition of indigency under section 2. A person seeking the appointment of counsel shall be interviewed by the chief probation officer or the officer's designee prior to the appointment of counsel. The person conducting the interview shall explain to the person seeking appointment of counsel: (1) the definition of indigency; (2) the process used to verify the person's information with other state agencies; and (3) the penalties for misrepresenting financial information in applying for the appointment of counsel. The officer or the officer's designee conducting the interview shall prepare a written indigency intake report that shall record the results of the interview and state a recommendation on whether or not the person seeking appointment of counsel is indigent. The person seeking appointment of counsel and the officer or the officer's designee conducting the interview shall sign the indigency intake report. In signing the report, the person seeking appointment of counsel shall certify under the pains and penalties of perjury that the information contained therein is true and that the person has not concealed any information relevant to the person's financial status. All statements contained in the report shall be deemed material statements. The completed report shall be presented to a judge who may adopt or reject the recommendations in the report, either in whole or in part.

(c) Appointment of counsel by a court shall, at all times, be subject to verification of indigency by the chief probation officer assigned to each court. The chief probation officer or the officer's designee shall, within 7 business days of appointment of counsel, complete a final report of the financial circumstances of the person for whom counsel was appointed containing wage, tax and asset information. In preparing the final report, the chief probation officer or the officer's designee may access, through electronic sharing of information pursuant to a memorandum of understanding, wage, tax and asset information in the possession of the department of revenue and the department of transitional assistance, and any other information relevant to the verification of indigency in the possession of the registry of motor vehicles. These departments shall provide this information to the chief probation officer or the officer's designee upon request. The chief probation officer shall sign the final report, certifying that the person for whom counsel was appointed either continues to meet or no longer meets the definition of indigency. Thereafter, the report shall be filed with the case papers and shall be presented to the judge presiding at the person's next court appearance; provided, however, that if a person for whom counsel was appointed is found to not meet the definition of indigency, a court appearance shall be scheduled as soon as feasible prior to the person's next court appearance if the next court appearance is more than 2 weeks from the date the final report is completed. If, upon receipt of the report, a judge finds that the person for whom counsel was appointed no longer meets the definition of indigency, the judge shall revoke the appointment of counsel and allow such person a reasonable continuance to obtain new counsel.

Not later than 6 months after the appointment of counsel, and every 6 months thereafter, the chief probation officer or the officer's designee shall conduct a further reassessment of the financial circumstances of the person for whom counsel was appointed to ensure that the person continues to meet the definition of indigency. The chief probation officer or the officer's designee shall prepare, sign and file a written report certifying that the person either continues to meet, or no longer meets, the definition of indigency.

[Third paragraph of subsection (c) added by 2011, 142, Sec. 22 effective October 27, 2011.]

Upon request of the department of children and families, the commissioner of probation shall provide to the department a copy of a person's indigency intake form, final assessment of financial circumstances, and any report certifying that the person either continues to meet or no longer meets the definition of indigency prepared by the chief probation officer in accordance with this section. The department shall only use these forms, assessments and reports for the purpose of completing eligibility determinations under Title IV-E of the Social Security Act. The commissioner of probation and the commissioner of

children and families shall jointly determine the process by which the department of children and families shall obtain and maintain these forms, assessments and reports. The department of children and families shall not disseminate, and shall prohibit dissemination of, such information for any purpose other than those set forth in this paragraph.

(d) If a criminal defendant is charged with a second or further offense while continuing to be represented by court-appointed counsel for a previously charged offense, the court in its discretion shall determine whether any further determination of indigency, other than the bi-annual reassessments required by the defendant's representation for the first offense, need be undertaken. Upon completion of a reassessment, the chief probation officer shall prepare a written report of the officer's findings. The chief probation officer shall sign the report, certifying that the defendant either continues to meet or no longer meets the definition of indigency. The report shall be filed with the case papers and shall be presented to the judge presiding at the defendant's next court appearance. If, upon receipt of the report, a judge finds that the defendant no longer meets the definition of indigency, the judge shall revoke the appointment of counsel and allow the defendant a reasonable continuance to obtain new counsel.

(e) If the court finds that a person has materially misrepresented or omitted information concerning the person's property or assets for purposes of determining indigency and that the person does not meet the definition of indigency, the court shall immediately terminate any assignment or appointment of counsel made under this chapter and shall assess costs of not less than $1,000 against the person.

(f) A person provided counsel under this chapter shall be assessed a counsel fee of $150, which the court may waive only upon a determination from officer's data verification process that the person is unable to pay such $150 within 180 days. If, upon the biannual reassessment of the person's indigency, the court concludes that the person is able to pay the $150 counsel fee of which the person obtained a waiver, the court shall revoke the waiver and reimpose the $150 counsel fee. The fee shall be in addition to any reduced fee required pursuant to section 2.

(g) The court may authorize a person for whom counsel was appointed to perform community service in lieu of payment of the counsel fee. A person seeking to work off a counsel fee in community service shall perform 10 hours of community service, in a community service program administered by the administrative office of the trial court, for each $100 owed in legal counsel fees, which may be prorated. Notwithstanding any general or special law to the contrary, a court proceeding shall not be terminated and the person shall not be discharged if the person owes any portion of the legal counsel fee imposed by this section. The clerk shall not release any bail posted on such court proceeding until the legal counsel fee is satisfied in accordance with this chapter.

(h) The clerk of the court shall, within 60 days of appointment of counsel, report to the department of revenue, the department of transitional assistance and the registry of motor vehicles the amount of any legal counsel fee owed by the person for whom counsel was appointed under this chapter. The department of revenue shall intercept payment of such fee from tax refunds due to persons who owe all or a portion of such fee. The registry of motor vehicles shall not issue or renew a person's driver's license or motor vehicle registration for any vehicle subsequently purchased by such person until it receives notification from the clerk of the court that the fee has been collected or worked off in community service.

(i) The office of the commissioner of probation shall submit quarterly reports to the house and senate committees on ways and means that shall include, but not be limited to: (a) the number of individuals claiming indigency who are determined to be indigent; (b) the number of individuals claiming indigency who are determined not to be indigent; (c) the number of individuals found to have misrepresented wage, tax or asset information; (d) the number of individuals found to no longer qualify for appointment of

counsel upon any re-assessment of indigency required by this section; (e) the total number of times an indigent misrepresentation fee was collected and the aggregate amount of indigent misrepresentation fees collected; (f) the total number of times indigent counsel fees were collected and waived and the aggregate amount of indigent counsel fees collected and waived; (g) the average indigent counsel fee that each court division collects; (h) the total number of times an indigent but able to contribute fee was collected and waived and the aggregate amount of indigent but able to contribute fees collected and waived; (i) the highest and lowest indigent but able to contribute fee collected in each court division; (j) the number of cases in which community service in lieu of indigent counsel fees was performed; and (k) other pertinent information to ascertain the effectiveness of indigency verification procedures. The information within such reports shall be delineated by court division, and delineated further by month

- PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)
- **TITLE I** COURTS AND JUDICIAL OFFICERS
- **CHAPTER 211D** COMMITTEE FOR PUBLIC COUNSEL SERVICES
- **Section 2B** Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

Section 2B. A person charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the commonwealth, the person or on the court's own motion, shall not be appointed counsel if the judge, at arraignment, informs such person on the record that, if the person is convicted of such offense, the person's sentence shall not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Appendix F

188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost FY 2011

CHARGE DESCRIPTION	Total Cases	$ Amount Paid
TOTALS	**43,757**	**$ 17,355,893.60**

Produced for the HPAO Committee by the
Committee on Public Counsel Services (CPCS)

	B	C	D
1	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
2	ASSAULT AND BATTERY	11595	6,002,758.70
3	VIOLATION OF RESTRAINING ORDER	2331	1,158,843.20
4	OP. AFTER LIC/REG BEEN SUSP	2075	586,696.60
5	ILLEGAL POSS. OF CLASS B SUBSTANCE	1200	541,588.40
6	BAIL ONLY	8195	465,578.90
7	THREATENING TO COMMIT A CRIME	850	456,242.20
8	MENTOR CRIMINAL CASES	51	428,323.60
9	OPERATING UNDER INFL. OF LIQUOR	632	412,062.30
10	ILLEGAL POSS. OF A CLASS A SUBSTANCE	847	393,783.50
11	ClassB 32A(a) possess	442	392,103.10
12	ClassD 32C(a) int make,dist,poss	542	385,948.70
13	KNOWING FAILURE TO REG/VERIFY REG INFO	446	374,606.50
14	TRESPASS ON LAND, DWELLING, ETC	1045	257,168.60
15	BREAK & E NIGHT MV, BOAT, BUILD, INT. TO COMMIT A FEL.	427	247,869.40
16	LEAVING ACC. SCENE PROP.DAMAGE	494	236,612.90
17	LARCENY OF PROPERTY $250 OR LESS	587	233,408.50
18	Shoplifting by Asportation $100+ or 3rd OFF	640	202,508.90
19	Shoplifting by Concealing $100+ or 3rd OFF	606	187,778.40
20	GRAFFITI LAW	440	183,125.20
21	A&B+60 DISABLED W INJURY	216	164,158.10
22	OP. UNDER INFL. OF LIQ. 3RD OR +	75	145,046.10
23	ClassA 32(a) make,dist,poss w intent	162	139,508.60
24	ASSAULT	294	134,369.90
25	PROSTITUTION	406	120,207.50
26	ENT W/O BK.NIGHT DWEL. INT FEL	221	120,058.90
27	OP. UNDER INFL. OF LIQUOR, 2ND	143	115,234.90
28	HARASSMENT PREVENTION ORDER, VIOLATE	221	112,127.10
29	BAIL PETITION/APPEAL	1524	109,960.90
30	ILLEGAL POSS. OF CLASS E SUBSTANCE	258	102,563.10
31	DISORDERLY PERSON	276	102,363.90
32	BREAK & E MV, BOAT, BUILD. DAY , INT. FELONY	141	100,649.60
33	Malicious Damage to Motor Vehicle	224	100,443.40

	B	C	D
34	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
35	RECEV. STOLEN PROP., $100 OR LESS	208	95,380.40
36	HARASSMENT-CRIM-FIRST OFFENSE	130	91,839.20
37	Sex Offender Fail To Register, Level 2 or 3	110	89,693.00
38	A&B BODILY INJURY TO CHILD	55	89,205.70
39	poss firearm,rifle,shotgun,ammunition no ID card	106	86,753.10
40	DIST SCHOOL ASSEMBLY	273	84,074.50
41	REPRESENTING WITNESS	710	82,178.40
42	Lewd and Lascivious, Common Night/Street Walker, Accost or Annoy Oppos	232	80,163.40
43	ILLEGAL POSS. OF CLASS C SUBSTANCE	162	79,971.10
44	ASSAULT&BATTERY ON PUBLIC SERV.	88	77,806.90
45	ASSAULT & BATTERY ON POLICE	118	73,818.40
46	UNAUTHORIZED USE OF A M/V	185	72,071.40
47	OPER. A M/V NEGLIGENTLY ENDANGER	143	70,180.60
48	ILLEGAL POSS. CLASS B SUBSQ.	98	68,026.20
49	reckless behaviour,fail to act, injury,abuse child	58	65,008.50
50	BREAK & E MV, BOAT, BUILD. NIGHT INT. TO COMMIT MISD.	151	64,755.60
51	OPERATING UNDER THE INFL. OF DRUGS	64	58,329.90
52	MAL. DEST. OF PROP., $250 OR LESS	146	58,264.10
53	RESISTING ARREST	111	53,956.20
54	KNOWINGLY BEING PRES HEROIN KEPT	86	53,049.20
55	OP. AFTER REVOC C90 VIOLATION	129	52,582.00
56	Shoplifting by Asportation 1st and 2nd OFF	176	47,764.50
57	PROSTITUTION, PAYMENT FOR SEX	151	46,188.50
58	CRUELTY TO ANIMAL	48	42,082.20
59	IDENTITY FRAUD	54	38,776.10
60	ILLEGAL POSS. OF CLASS D SUBSTANCE	90	35,550.30
61	MAKING ANNOYING TELEPHONE CALLS	83	34,699.20
62	LEAVING ACC. SCENE PERS. INJ.	49	34,041.70
63	SELL/DELIV. ALCOH. BEV. TO MINOR	56	32,922.30
64	INDECENT EXPOSURE	77	32,253.00
65	LARCENY OF RENTED PROP	85	32,005.50
66	POSSESS CHILD PORNOGRAPHY FIRST OFFENSE	22	31,778.80

	B	C	D
67	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
68	ClassC 32B(a) poss,make,dist,intent	42	31,705.40
69	Grant of Conditional Liberty Revocation	185	31,625.40
70	MINOR TRANSPORTING/CARRYING ALCOH.	85	27,893.10
71	FALSE REPORT TO P.O.	59	27,702.20
72	Possession of Oth. Dangerous Weap. in School build./grounds	56	27,168.50
73	TAGGING	75	25,268.40
74	CONTRIBUTING TO DELINQ. OF CHILD	46	24,613.00
75	OPERATING AN UNINSURED M/V	119	23,503.50
76	ClassD 32C(b) SUBSEQ int make,dist,poss class D	27	20,041.60
77	DISTURBING THE PEACE	76	18,704.40
78	Arrestee Furnish False Name/SSN	60	18,012.50
79	Shoplifting by Concealing 1st and 2nd OFF	66	15,717.60
80	AFFRAY	39	15,205.00
81	ClassE 32D(a) poss,make,dist,int	25	15,141.20
82	ENTICING A CHILD	9	13,614.40
83	OPERATING A M/V RECKLESSLY	29	13,468.00
84	RESOURCE ATTORNEY	100	13,299.00
85	Burn pers prop or motor vehicle	12	12,951.20
86	Permit Substantial Injury to Child	7	12,823.80
87	Fugitive From Justice Without Warrant	63	11,903.60
88	LARCENY FALSE PRETENSES < 250	33	11,698.00
89	OP. UNDER INFL.OF DRUGS, 3RD OR +	10	11,559.00
90	FALSE CREDIT CARD $250 OR LESS	23	11,025.60
91	BREAK & E MV, BOAT, BUILD. DAY INT. TO COMMIT MISD.	32	10,249.20
92	ClassE 32D(b) SUBSEQ poss,make,dist,int	19	9,576.80
93	CREATING/DIST. COUNTERFEIT SUBST.	30	8,968.50
94	LICENSE REVOKED AS HTO, OPERATE MV WITH c90 23	30	8,733.00
95	OPERATING A MV WITHOUT A LICENSE	39	8,401.40
96	FAILURE TO APPEAR	32	7,887.50
97	DISORDERLY CONDUCT, SUBSQ. OFF.	17	7,402.00
98	RESISTING ARREST	21	7,140.60
99	A & B ON EMT	13	6,945.50

	B	C	D
100	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
101	Firearm Serial No., Deface or Received W/Defaced	2	6,491.00
102	OIU Drugs/Liquor & Serious Injury	3	5,760.40
103	CAUSING A FALSE FIRE ALARM	17	5,625.20
104	WANTON DEST. OF PROP., $250 OR LESS	18	5,360.20
105	LARCENY OF PROPERTY $250 OR LESS UNDATED	15	5,171.00
106	OP. UNDER THE INFL. OF DRUGS, 2ND	8	5,143.80
107	A&B On Retarded Person	4	4,990.00
108	OP. M/B UNDER INFLUENCE OF LIQ.	5	4,880.00
109	Firearms, Carry With Ammunition	6	4,871.60
110	DISTURBING THE PEACE, SUBSQ.OFF.	7	4,855.00
111	DEFRAUDING A COMMON VICTUALLER	17	4,738.60
112	EARNINGS OF PROSTITUTION	3	4,722.00
113	CONCEAL/HARBOR FLEEING CHILD	5	4,566.20
114	IMPERSONATING POLICE OFFICE	8	4,479.40
115	LARCENY OF A CREDIT CARD	13	4,210.00
116	Improper storage firearms	7	3,830.00
117	KIDNAPPING OF MINOR BY RELATIVE	5	3,463.40
118	ATTACHING PLATES TO M/V	16	3,365.00
119	A&B for purpose of intimidation	4	3,357.40
120	DEFRAUDING AN INNKEEPER	12	3,349.00
121	Electric Stun Gun, Sell, Possess	12	3,210.00
122	MAKING OBSCENE TELEPHONE CALLS	5	3,110.00
123	COUNTERFEIT MARK, DISTRIBUTE 1st, 2nd and up to $9,999	1	2,925.00
124	INHAL TOXIC SUBSTANCE, ETC.	12	2,905.00
125	DISGUISE TO OBSTRUCT JUSTICE	11	2,867.60
126	ILLEGAL POSS. OF CLASS D, SUBSQ	9	2,825.40
127	OP. AFTER LIC/REG REVOKED	9	2,802.80
128	RECEIVING STOLEN CREDIT CARD	9	2,669.00
129	Shoplifting by Price Tag Tampering $100+ or 3rd OFF	7	2,660.00
130	POSSESSING MV W/ALTERED NUMBERS	2	2,650.00
131	ILLEGAL POSS. CLASS C SUBSQ.	5	2,635.00
132	RACING A MOTOR VEHICLE	6	2,615.00

	B	C	D
133	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
134	COMMON LAW CRIMES	6	2,403.90
135	FRAUD INS. CLAIM-MV	3	2,250.00
136	CRIM CONTEMPT PROB CT	7	2,200.00
137	ENTICING TO UNLAWFUL SEX INTERCOURSE	4	2,134.40
138	FAILING TO RETURN LEASED M/V	4	1,926.20
139	ALLOWING IMPROPER PERSON OP. M/V	6	1,760.00
140	PRISONER VANDALIZE JAIL/HC PROPERTY	3	1,725.00
141	WIRETAP, UNLAWFUL OR ATTEPMT	5	1,630.00
142	OUI Liquor & Serious Injury & Negligent	2	1,610.00
143	BB GUN/AIR RIFLE, DISCHARGE ON WAY c269 12B	1	1,385.00
144	UTT STATE LOTTERY TICKET	2	1,365.00
145	HOAX DEVICE/SUBSTANCE, POSSESS/TRANSPORT/USE	3	1,320.00
146	INJURE PROPERTY AT MCI	6	1,294.60
147	SHELLFISHING CONTAM AREA NO PERMIT	1	1,285.00
148	RAILROAD TRACK, WALK/RIDE ON c160 218	4	1,281.00
149	NONSUPPORT OF ILLEGITIMATE MINOR CHILD	2	1,254.00
150	OTHER M/V VIOLATION	1	1,247.80
151	NON-PAYMENT OF WAGES	3	1,230.00
152	INPATIENT COMPT EVAL	6	1,210.60
153	FALSE/SILENT 911 CALL c269 14B	5	1,115.00
154	CORRECTIONAL INSTITUTION, DISTURB c268 30	2	1,070.00
155	INJURY TO SCHOOLHOUSE	6	1,035.00
156	DISBARRED/UNAUTHORIZED ATTORNEY SOLICIT BUSINESS	1	955.00
157	UNATUHORIZED REPRODUCTION AND TRANSFER OF SOUND RECORDINGS	2	910.00
158	BB GUN/AIR RIFLE, MINOR POSSESS OR DISCHARGE c269 12B	4	890.00
159	BREAKING GLASS IN A BUILDING	4	875.00
160	Child Endangerment While OUI	2	780.00
161	OBTAINING MV FROM LESSOR BY FRAUD	2	770.00
162	TRANSFER/ALTER/DEFACE LIQUOR ID	5	765.00
163	UNEMPLOY INSUR VIOLATION	4	764.00
164	PULL FALSE ALARM ETC.	3	700.00
165	SPEED WHILE OPER. A M/B	1	642.00

	B	C	D
166	**CHARGE DESCRIPTION**	**Total Cases**	**$ Amount Paid**
167	COMPUTER SYSTEM, UNAUTHORIZED ACCESS TO	2	600.00
168	POSSESS/SELL/EXPLODE FIREWORKS	3	590.00
169	Possession of firearm (ONLY) in school building/grounds	1	547.20
170	ARMED ent wo break, night, dwell int Fel	1	535.00
171	DRUG PARAPHERNALIA	2	525.00
172	Shoplifting by Container Switching $100+ or 3rd OFF	2	445.00
173	UNAUTHORIZED USE OF A MOTOR BOAT	2	440.00
174	ATTEMPTING TO RESCUE A PRISONER	1	420.00
175	FAILING TO STOP FOR POL OP M/V	2	415.00
176	DISRUPTION OF COURT PROCEEDING	2	405.00
177	SOLICITING FOR PROSTITUTE	5	400.00
178	CPSL From District Court	1	360.00
179	CARJACKING	2	355.00
180	OP. A MV WITHOUT LICENSE IN POSSESSION	2	330.00
181	HOUSE OF ILL FAME	1	290.00
182	suseq poss firearm,rifle,shotgun,ammuni. no ID card	1	255.00
183	FALSE REPRES. TO DPW TO SEC. SUP.	1	250.00
184	ABANDONMENT OF CHILD-CRIMINAL	2	195.00
185	OPEN CONTAINER-ALONE MINOR ONLY-OK ADULT WITH OTHER CHARGES	2	170.50
186	TAKING, ETC. LOBSTER POTS	1	125.00
187	THROWING GLASS ONTO PUBLIC WAY	1	120.00
188	INJURY BY FIRE-NEGLIGENT USE	1	95.00
189	WITHDRAWAL OF BAIL REVIEW PETITION	1	78.00
190	Rifle/Shotgun Without Serial No., Sell	1	72.00
191	INIT COMPENT EVALUATION	2	65.00
192	EVAL OF NGI OR NOT COMP. DEF	2	55.00
193	ARMED break,ent,mv, boat,build,day int Fel	1	50.00
194	**TOTALS**	**43,757**	**$ 17,355,893.60**

Appendix G

Commissioner of Probation Suggested Statutory Changes
2 February 2012

Commissioner of Probation Suggested Statutory Changes
Suggestions as to any statutory change, proposed changes to indigency legislation:

A) In Chapter 211D, amend Section 2 (A) by adding the language "the Chief Probation Officer and/or his/her designee shall sign the final report certifying that the person for whom counsel was appointed.....".

Rationale
This language change would give the Chief Probation Officers additional flexibility, especially in busy courts and/or multiple court settings to get the final reports signed.

B) Modify the language that requires reassessments be done every six months to now require that only one six month reassessment be conducted.

Rationale
This will eliminate the unnecessary and repetitive indigency verification checks which do not result in any additional cost savings.

Proposed new language

C) "There shall be a committee comprised of the following individuals" 1) Chief Counsel of the Committee on Public Counsel Services and/or his/her designee; 2) the Commissioner of Probation and/or his/her designee; 3) the Chief Justice of the Supreme Judicial Court and/or his/her designee; 4) the Chief Justice for Administration and Management and/or his/her designee; 5) the Chief Justice of the Juvenile Court and/or his/her designee whose mission shall be to establish a new practical definition of "indigency" for the purpose of verifying asset information of those individuals for whom counsel was appointed by the court."

Rationale
The current definition of indigency has not been revisited for many years had there are several components that need to be further defined and clarified which would be the mission of this Committee.

D) Add a new section (j) "There shall be a committee comprised of the Commissioner of Probation and/or his/her designee, the Secretary of Administration and Finance and/or his/her designee, the Chairman of the House Post Audit and Oversight Committee and/or his/her designee, the Chief Counsel of the Committee for Public Counsel Services and/or his/her designee, the Chief Justice of the Supreme Judicial Court and/or his/her designee, the Chairmen of the House and Senate Committees on the Judiciary and/or their designees whose responsibility it shall be to study over a six-month period of time which

state agency would be best suited and equipped to perform the indigency verification functions as mandated in M.G.L. Chapter 211D.

Rationale

Based on preliminary research, other states place the Indigency Verification responsibility in non-judicial agencies and it would be prudent to have this Committee study where best to place this responsibility in Massachusetts.

Commentary

Letter, Commissioner of Probation

Massachusetts Trial Court
Office of the Commissioner of Probation
One Ashburton Place
Boston, MA 02108-1612

RONALD P. CORBETT, JR.
ACTING COMMISSIONER

TEL: (617) 727-5300
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January 30, 2012

The Honorable David P. Linsky
Chairman
House Committee on
Post Audit and Oversight
State House, Room 146
Boston, MA 02133

Dear Chairman Linsky:

Thank you and your staff for the opportunity to meet with you recently. I thought it might be helpful to supplement our discussion with some additional material.

As you know, we recognize the serious deficiencies that have characterized our past practice in the area of indigency verification, which have been amply documented. It seems to me that the only responsible reaction to such findings is to acknowledge them and commit the organization to a thorough reform process. As the Acting Commissioner of Probation, I would submit that our organization has been focusing on a "rebooting" of this process in 2011and that we have made notable gains, but I would quickly add that our work is not over. I should stress that Jim Tansey and his staff have kindly mentioned many of these in the report and we are grateful for that acknowledgment.

The first of the attachments is a chronological list of related activities in 2011. Prominent among those are state-wide training in a new set of guidelines, consistent with the new statute, and a state-wide audit to insure those guidelines are being complied with in our local offices. I would also emphasize the completion of a 4-court pilot study to determine the degree of misrepresentation of financial standing by those applying for court-ordered counsel. The results of those two key efforts are summarized at the end of the attached "Fact Sheet".

We are pledged to complete the study with an examination of the results of the six-month re-assessment of indigency claims made by the study sample of a little over 2000 applicants. That six-month "look back" is required, as you know, by the statute. In addition, we also will work in 2012 on proposals that we hope will make the indigency verification process as cost-effective as possible.

The following attachments accompany this letter:

1. Training Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 1/18/2011 regarding "Update on Determining Indigency".

2. Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 1/28/2011 regarding new process and procedures for indigency verification.

3. Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 7/28/2011 regarding best practice guidelines on indigency verification.

4. Memo dated 8/17/2011 from Acting Commissioner Ron Corbett to John Dineen (State Auditor's office) regarding corrective action plan.

5. Memo from Acting Commissioner Ron Corbett dated 8/30/2011 to John Dineen (State Auditor's office) regarding updated corrective action plan.

6. Memo from Acting Commissioner Ron Corbett dated 10/5/2011 to John Dineen (State Auditor's office) regarding updated corrective action plan.

7. Filing letters from Acting Commissioner Ron Corbett dated 10/31/2011 to House and Senate Clerks' offices regarding filing MOU's with DTA and DOR.

8. Copy of signed Memorandum of Understanding (MOU) between the Acting Commissioner of Probation Ron Corbett and the Commissioner of the Department of Transitional Assistance dated 10/31/2011.

9. Copy of signed Memorandum of Understanding (MOU) between the Acting Commissioner of Probation Ron Corbett and the Commissioner of the Department of Revenue dated 10/31/2011.

10. Memorandum from Edward F. McDermott, Indigency Verification point person, dated 11/8/2011 to all Chief Probation Officers regarding new electronic access to benefit information on file at the Department of Transitional Assistance.

11 Memorandum from Acting Commissioner Ron Corbett dated 11/29/2011 to John Dineen (State Auditor's office) regarding update on indigency verification pilot court study.

12. Letters from Acting Commissioner of Probation Ron Corbett to the Chairs of the House and Senate Ways and Means Committees dated 12/16/2011 regarding compliance with the statutory mandate of outside section 176 of Chapter 68 of the Acts of 2011.

Finally, we appreciate your invitation to submit our thoughts and suggestions regarding changes in the statutory language of M.G.L. Chapter 211D section (2) and new funding possibilities. I expect to deliver those ideas to your office no later than Friday, February 3rd, if that is acceptable.

Sincerely,

Ronald P. Corbett, Jr.

Ronald P. Corbett, Jr.
Acting Commissioner of Probation

cc: Honorable Robert A. Mulligan, Chief Justice for Administration and Management

APPENDIX VII



Research Report

NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE, STEPHEN F. HANLON

National Public Defense Workload Study

For more information on this publication, visit **www.rand.org/t/RRA2559-1**.

The views expressed herein represent the opinions of the authors. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.

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About This Report

This report describes a collaboration between the RAND Corporation; the National Center for State Courts (NCSC); the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID); and Stephen F. Hanlon, Principal, Law Office of Lawyer Hanlon, to assist governmental bodies, attorneys, policymakers, and other stakeholders when they plan for or manage the provision of counsel to represent adults who have been accused of criminal offenses in state trial courts but who cannot afford to engage an attorney (such provision is commonly referred to as *public defense*). This work, which was funded by the philanthropic organization Arnold Ventures, is intended to facilitate the use of functional metrics known as *case weights* and *caseload standards* (which are collectively described as *workload standards*) to help in estimating the numbers of criminal defense attorneys who should be made available for appointments as the nature and size of noncapital adult criminal caseloads change over time. The metrics are also intended to identify instances when caseloads for those lawyers have risen to the point at which those lawyers may be unable to adequately discharge their professional duties. A foundational underpinning of our research is the assumption that, to comply with controlling legal authorities, public defense workload standards must always reflect attorney responsibilities mandated by the ethics rules applicable to all criminal defense counsel in every state and be consistent with other practice standards that describe prevailing norms of effective representation.

Work developing similar metrics for the provision of public defense in certain states and localities has been conducted by various governmental agencies, research entities, and stakeholder organizations. Therefore, the results of our study are primarily applicable to locations or for purposes where jurisdictionally focused workload standards have not already been produced, in situations where earlier work did not adequately consider applicable ethics rules and practice standards, or in situations where existing studies may be outdated or otherwise flawed.

This report was produced by the RAND Corporation; NCSC; ABA SCLAID; and Stephen F. Hanlon, Principal, Law Office of Lawyer Hanlon. The views expressed herein represent the opinions of the authors. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.

American Bar Association Standing Committee on Legal Aid and Indigent Defense

ABA SCLAID serves the ABA by examining issues related to the delivery of civil legal assistance and criminal defense services to the poor. It maintains close relationships with state and local bar and legal aid and defender leaders, providing information and developing policy on civil legal aid and indigent defense. The Committee also advocates for and works to ensure the availability of legal aid and defender services for indigent persons. ABA SCLAID is the ABA's oldest standing committee; it was established in 1920 under the leadership of Charles Evans Hughes. For more information on ABA SCLAID, please visit the Committee's website at www.americanbar.org/groups/legal_aid_indigent_defense.

National Center for State Courts

For more than 50 years, NCSC has shared authoritative knowledge and expertise to address current and emerging issues and trends in state court administration. NCSC's mission today—promoting the rule of law and improving the administration of justice in state courts and courts around the world—springs logically from its original purpose to gather information and produce innovations to benefit all courts. As an independent, nonprofit organization, NCSC can move swiftly to identify and respond to evolving needs, deploying resources when and where courts need them. NCSC's team of experienced researchers and consultants helps courts address issues ranging from access to justice to cybersecurity to racial justice. For more information, please visit the Center's website at www.ncsc.org.

Law Office of Lawyer Hanlon

Stephen F. Hanlon is the Principal of the Law Office of Lawyer Hanlon in St. Louis, Missouri. He has a long history of handling public interest and civil rights cases. In 1989, he founded the Community Services Team (CST) at Holland & Knight and, for the next 23 years, served as the Partner in Charge of the CST, which was the largest full-time private practice pro bono department in the country during Hanlon's tenure. In 1997, Holland & Knight received the ABA Pro Bono Publico Award. *The American Lawyer* described Holland & Knight as a "pro bono champion." In 2006, Hanlon received the Chesterfield Smith Award from Holland & Knight, the firm's highest individual recognition given to a firm partner. Since his retirement from Holland & Knight at the end of 2012, Hanlon has confined his practice to assisting and representing public defenders with excessive caseloads. As part of this work, Hanlon was ABA SCLAID's project director for seven groundbreaking state-level public defense workload studies. For more information, see www.lawyerhanlon.com or email stephen@lawyerhanlon.com.

RAND Justice Policy Program

RAND Social and Economic Well-Being is a division of the RAND Corporation that seeks to actively improve the health and social and economic well-being of populations and communities throughout the world. This research was conducted in the Justice Policy Program within RAND Social and Economic Well-Being. The program focuses on such topics as access to justice, policing, corrections, drug policy, and court system reform, as well as other policy concerns pertaining to public safety and criminal and civil justice. For more information, email justicepolicy@rand.org.

Acknowledgments

This research and report were made possible by a grant from Arnold Ventures, a philanthropic organization that supports evidence-based solutions that maximize opportunity and minimize injustice. We greatly appreciate the organization's help, and we especially thank Rebecca Silber, Director of Criminal Justice, for championing this effort from the initial idea through completion.

We would like to express our deep-felt appreciation to the 33 criminal defense attorneys from across the country who agreed to participate in this study as members of our expert panel. In addition to taking time out of their busy schedules to prepare for and travel to the Williamsburg, Virginia, conference held on April 28, 2022, the panelists gave this study the incalculable benefits of both their frank opinions and their considerable experience in defending the rights of the accused. The panel was selected from more than 100 nominations of highly regarded attorneys with outstanding competence in adult criminal defense in state trial-level courts and a track record of good practice. Those recommendations came from Gideon's Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, the National Criminal Defense College, and the National Legal Aid & Defender Association. We thank these organizations for identifying such a stellar group of defense counsel.

We express our special thanks to Brian Ostrom of NCSC for contributing his expertise. We also thank NCSC for hosting the project's expert panel session at its Williamsburg, Virginia, headquarters. Tracey Johnson, Travis Hansford, and Mark Wenger at NCSC provided invaluable logistical support.

We would like to thank the members and staff of ABA SCLAID for their support of this study. Particular thanks is owed to the late professor Norm Lefstein, the longtime special adviser to ABA SCLAID on public defense, who championed the need for caseload controls and, specifically, for new national workload standards. Lefstein was the driving force behind many of the standards and studies on which this project relied. We would also like to thank Mark Pickett and Jason Vail, counsel for ABA SCLAID, for their editorial contributions. Counsel for the ABA's Center for Professional Responsibility also reviewed this report, and we appreciate their comments and suggestions.

Dulani Woods of RAND designed the online Delphi application used in this project and acted as the chief facilitator at the expert panel conference in Williamsburg, Virginia. We are indebted to him for offering his services, expertise, and insight to this effort. Blair Smith and Babitha Balan of RAND performed a highly professional and thorough job of editing, organizing, and producing the final version of this report. Laurie Martin supervised RAND's quality assurance (QA) process for this study, and Ninna Gudgell managed the QA workflow; both executed these responsibilities in their usual competent and timely manner. Beth Seitzinger at RAND did a wonderful job of coordinating the sometimes complicated travel plans of our expert panelists.

Jon Gould, dean of the University of California Irvine's School of Social Ecology, and Stephanie Walsh, policy analyst at RAND Corporation, provided helpful criticism and contributions in their formal reviews of this report. We value their suggestions and hope that we have responded appropriately. Any errors in methodology, data collection, or conclusions are, of course, solely the authors' responsibility.

Summary

The rules of professional conduct require lawyers to limit their workloads to ensure competent representation.[1] But what should those limits be? Clear standards for public defender workloads are essential to policymakers' ability to fund and staff the defense function at appropriate levels, to public defense authorities' ability to monitor and manage caseloads, and to attorneys' ability to provide their clients with effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution.

To create such standards, we conducted a comprehensive review and analysis of the 17 state-level public defense workload studies conducted between 2005 and 2022, and then employed the Delphi method (a quantitative research technique used for the elicitation of expert opinions) to facilitate the efforts of a panel of expert criminal defense attorneys to come to a consensus on the average amount of time needed to provide reasonably effective assistance of counsel in an array of adult criminal cases. The results of this study are new national public defense workload standards, which are intended to assist governmental bodies, public defense attorneys, policymakers, and other stakeholders in evaluating defender workloads and ensuring adequate representation. Our results are primarily applicable to locations or for purposes where jurisdictionally focused workload standards have not already been produced, in situations where earlier work did not adequately consider applicable ethics rules and practice standards, or in situations where existing studies may be outdated or otherwise flawed.

These new standards build on the methods developed in, and data gleaned from, prior state-level workload studies. The standards also reflect the expert attorneys' experience with modern criminal defense practice, including the tremendous expansion of digital discovery from body-worn cameras, cell phone data, and social media data; the increasing use of forensic evidence; and the expanding scope of a criminal defense lawyer's obligations, such as advising clients on the collateral consequences that attend criminal convictions.

[1] See Model Rules 1.1 and 1.3 in American Bar Association [ABA], *Model Rules of Professional Conduct*, 2023, and American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, May 13, 2006 (hereafter ABA Formal Opinion 06-441). See also "The Demands on a Defender's Time" section in Chapter 2.

Historical Background

Recognizing the need for clear standards for public defense workloads, in the early 1970s, a group of public defense leaders came up with the following estimate of the maximum number of cases a defense attorney could handle per year:[2]

- felonies: 150 cases per year
- misdemeanors: 400 cases per year
- mental health cases: 200 cases per year
- juvenile cases: 200 cases per year
- appeals: 25 cases per year.

In 1973, these estimates were adopted and incorporated into a report by the National Advisory Commission on Criminal Justice Standards and Goals (NAC). These estimates have since been referred to as the *NAC standards*.[3]

The NAC standards have been criticized for being overly broad. They fail to differentiate among types of felonies, giving equal weight to a burglary, a sexual assault, and a homicide. They have also been criticized for being developed without a defensible methodology. Additionally, there has always been concern that the NAC standards are simply too high. As early as 1978, a study noted that "one is hard put to imagine carefully investigating every case, as is required by [prevailing standards of criminal defense practice], if the lawyers are handling 150 felony cases per year, or 400 misdemeanors per year."[4] Even assuming that the lawyer is working 40 hours per week, 52 weeks per year on cases (2,080 hours per year), caseloads at the maximum sizes allowed under the NAC standards would permit an average of only 13.9 hours to be spent by that attorney on each felony case or 5.2 hours on each misdemeanor case.

Despite these weaknesses and in the absence of any other reliable, data-driven method of understanding the number of cases a lawyer can handle, the NAC standards have remained the default maximum for public defense attorney caseloads for almost 50 years.[5]

Recognizing the shortcomings of the NAC standards, over the past few decades, individual jurisdictions have sought to improve upon them by establishing more-realistic workload limits using more structured, defensible methodologies. These more recent studies all used some form

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[2] For a complete history of the development and utilization of these standards as well as related criticism, see "The National Advisory Commission Caseload Standards" section in Chapter 2.

[3] National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, 1973, p. 276.

[4] Shelvin Singer, Beth Lynch, and Karen Smith, *Indigent Defense Systems Analysis (IDSA)*, National Legal Aid and Defender Association, 1978, p. 52. Also see "The Emergence of Public Defense Workload Standards" in Chapter 2.

[5] See "The Emergence of Public Defense Workload Standards" in Chapter 2. Specifically, despite being a product of the early 1970s (and arguably with roots that go back to the mid-1960s), the NAC standards remain the default option for many policymakers considering limits on defender caseloads. For example, the felony and misdemeanor ceilings were adopted, reaffirmed, or used as a foundation for caseload assignments by state public defense commissions, state public defender offices, state bar associations, or the judiciary in Washington (2015), Indiana (2016), Wyoming (2016), Ohio (2019), Oregon (2021), Michigan (2021), and New York (2021).

of the Delphi method to achieve a consensus among a group of experts—usually public defenders only or a mix of private and public defense attorneys—on the average amount of time needed for cases of various types.[6] Furthermore, these efforts were grounded in jurisdiction-specific conditions and took account of current criminal defense practice obligations.

Over the years, these public defense workload studies became increasingly granular, dividing attorney work into more-specific case type categories and tasks. These workload studies primarily expressed their results in the form of a case weight (i.e., average attorney time needed per case of a particular case type) rather than an annualized caseload. The use of case weights allows for easier application to mixed caseloads (i.e., a lawyer taking cases of multiple case types). It also allows for adjustment for different amounts of time available for case work; for example, for supervisors who might carry half caseloads or attorneys in rural offices who must travel to multiple courthouses.[7]

The gold standard for analyzing attorney need is a weighted caseload model.[8] The case weights are applied to the caseload in the jurisdiction to generate estimates of the number of attorneys needed to handle the jurisdiction's current or projected workload. In comparison with other budget or resource allocation models based on such factors as population or raw caseloads, weighted caseload analyses provide a more accurate and nuanced account of attorney workload that reflects variations in caseload composition across offices and over time. Many state legislative and funding bodies across the United States are already familiar with the concept of a weighted caseload; states often use weighted caseload studies to analyze the need for judges.[9] In the world of public defense, there were 17 state-level workload studies using a weighted caseload model conducted between 2005 and 2022.

Substantive law and court rules and procedures have an impact on the amount of time attorneys require to represent their clients. Because these factors can vary substantially from jurisdiction to jurisdiction, the most accurate weighted caseload model is developed specifically for an individual state or jurisdiction. For fiscal or practical reasons, most jurisdictions have not had the opportunity to conduct such research.

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[6] See the "Weighted Caseload Analyses" section in Chapter 2.

[7] See the "Case Weights and Caseload Standards" section in Chapter 2; see also Chapter 5.

[8] This statement applies only to efforts intended to help in the estimation of necessary attorney levels in a public defense delivery system, such as a statewide public defender office or a county's contract defender program. Examinations of defender practices and techniques, support staff levels, case assignment strategies, holistic defense services, attorney education and training programs, office management policies, and other important aspects of public defense would require quantitative and qualitative research approaches that are very different from those used in a weighted caseload analysis. But if the purpose of the effort is to move away from using such metrics as raw caseload counts, prosecutor office size, or population size as a means for estimating required numbers of defenders, weighted caseload studies are arguably the tools most commonly used by justice system organizations.

[9] More than 30 states use judicial weighted caseload studies. See Matthew Kleiman, Cynthia G. Lee, Brian J. Ostrom, and Richard Y. Schauffler, "Case Weighting as a Common Yardstick: A Comparative Review of Current Uses and Future Directions," *Oñati Socio-Legal Series*, Vol. 7, No. 4, 2017, p. 646.

While having a specific state or local workload study remains the ideal approach for public defense resource planning, in the absence of a jurisdiction-specific study, nationally applicable workload standards are needed to provide benchmarks and assist administrators in assessing system needs. For the past 50 years, the NAC standards have filled that void, despite their age and flaws. New nationally applicable workload standards are needed to better reflect present criminal defense practice and contemporary professional and ethical responsibilities.

The National Public Defense Workload Study Approach

In this research effort, the National Public Defense Workload Study (NPDWS), we sought to capitalize on the methods used in the state-level public defense studies to develop new national workload standards.

Drawing from our review of those state-level studies, we identified and defined a set of 11 case types and eight activity types that reflect the work that defense attorneys conduct on behalf of adults accused of crimes in a state trial court (a *case* is defined as all charges filed against a client arising out of a single event or series of events and being prosecuted together).[10]

The 11 case types are

- Felony–High–Life Without Parole (LWOP)
- Felony–High–Murder
- Felony–High–Sex
- Felony–High–Other
- Felony–Mid
- Felony–Low
- Driving Under the Influence (DUI)–High
- DUI–Low
- Misdemeanor–High
- Misdemeanor–Low
- Probation and Parole Violations.

The eight activity types are

- Client Communication and Care
- Discovery and Investigation
- Experts
- Legal Research, Motions Practice, and Other Writing
- Negotiations
- Court Preparation
- Court Time
- Sentencing and Mitigation and Postadjudication.

[10] See the "Case Type and Activity Type Categories Development" section in Chapter 3.

Death penalty prosecutions were outside the scope of the NPDWS, which meant that felonies with a potential sentence of LWOP would be the study case type with the highest severity.

We then assembled an expert panel of 33 highly regarded attorneys with extensive experience in adult criminal defense in state trial-level courts and a track record of good practice.[11] Through two online webinars and their review of NPDWS written materials, the expert panel received

- detailed information on applicable ethics rules and other professional standards
- background on case weights and caseload standards
- an overview of the methods and results of the 17 state-level public defense workload studies.[12]

Following this preparation, the panel was provided an initial response form, which asked for their preliminary best estimate of the average time needed to provide reasonably effective assistance of counsel pursuant to prevailing professional norms for each activity type within each case type.[13]

After filling out the initial response form, the expert panel met for a one-day in-person Delphi session. At the beginning of this meeting, the panelists entered their independent estimates from the initial response form into an online Delphi application that allowed panelist entries to remain anonymous. The application compiled and charted results, providing participants with the median total time estimate for each case type and a graph of response distributions.

The expert panel then engaged in a roundless (sometimes referred to as *real-time* or *continuous*) Delphi session with the goal of achieving a reasonable consensus of the group's professional judgment.[14] Panelists were free to discuss the reasons for their professional judgments or submit anonymous comments through the Delphi application to be viewed by other panelists. At any point, panelists could change their responses and view updated statistics based on the entire group's submissions. Discussion continued until the panel reached a predefined level of consensus on the total time required for all of the case types.[15]

The expert panel's consensus on hours needed to provide reasonably effective assistance of counsel pursuant to prevailing professional norms for each case type constitute the study's final

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[11] Recommendations for expert panel members came from Gideon's Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, the National Criminal Defense College, and the National Legal Aid & Defender Association. For details on the selection process, see the section titled "Expert Panel Selection" in Chapter 3. For the names of the panelists and their positions at the time of the Williamsburg conference, see Table 3.5 in Chapter 3.

[12] See the section titled "Expert Panel Preparation" in Chapter 4.

[13] See Figure 4.1 and accompanying text in Chapter 4.

[14] See the section titled "Session Procedures" in Chapter 4.

[15] For details on what constituted a consensus and the level of consensus achieved by case type, see "Session Procedures" in Chapter 4.

case weights. Table S.1 presents those results and provides an illustrative example of what a caseload standard would be for each case type. The caseload standard represents the maximum number of cases of that type that should be assigned to a public defense attorney in a year, assuming that the attorney takes only cases of that one case type. The caseload standards presented in Table S.1 assume that each attorney has 2,080 hours per year available for all case-related work. It should be noted that the calculation of an annual caseload standard requires jurisdiction-specific information about annual attorney hours available for case-related work; the values shown in the table are for illustrative purposes only.[16]

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

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

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

Using the National Public Defense Workload Standards

These case weights provide a basis for any public defense system or provider to reliably assess overall caseloads and staffing, as well as plan for anticipated future needs. Applying the

[16] The 2,080 annual hours assumption is an extremely high estimate because it does not account for work time spent on activities not related to representing clients in adult criminal cases. The calculation of annual caseload standards is based on an assumption of the average annual hours available to defenders for case-related work. That assumption will vary from jurisdiction to jurisdiction, so our use of 2,080 hours (essentially 52 weeks each year of 40 case-related work hours) is simply for illustrative purposes. If such adjustments were made to the hours assumption we use for illustrative purposes only, the annualized caseload standards would be lower.

case weights for this purpose requires additional jurisdiction- or provider-specific data on both caseloads and staffing.[17]

Hours Needed

A system or provider will need to map its annual caseload, by highest charge, to the 11 case types in this study. Mapping the caseload by case types and applying the appropriate case weights allow the system or provider to estimate the total attorney workload associated with each case type, as follows:

cases (by case type) × case weight (by case type) = total hours needed (by case type).

Assume, for example, that a public defense system had 100 new Felony–High–Sex cases in one year. Multiplying 100 cases by the Felony–High–Sex case weight of 167 hours determines the estimate of total attorney hours needed for Felony–High–Sex cases for that year, as follows:

100 cases × 167 hours per case = 16,700 hours needed per year for Felony–High–Sex cases.

A jurisdiction would perform the same calculation for all 11 case types and sum them to determine the estimate of total attorney hours needed for adult criminal cases of all types.

Hours Available

The jurisdiction or provider must also determine or estimate the total number of hours attorneys are available to work on adult criminal cases annually. This requires subtracting leave and holidays, along with work not directly attributable to the representation of a specific client (e.g., administration, supervision, professional development, travel), from each attorney's annual available hours. When attorneys handle other case types, such as juvenile delinquency or dependency matters, time spent on these cases must also be deducted from their availability for adult criminal defense work. Deductions would also be required for circumstances specific to individual attorneys, such as working on a half-time basis. When such adjustments are made, the result can be thought of as *annual case-related duty hours*. The product of that value and the number of full-time equivalent (FTE) attorneys in the jurisdiction or with the provider yields total attorney hour availability:

FTE attorneys × annual case-related duty hours per attorney = total attorney hours available annually.

Assume, for example, that a public defense system has 50 full-time attorneys. Also assume that each attorney has 40 hours per week, 52 weeks per year (2,080 hours per year) to devote to

[17] For a detailed description of how to use case weights, see Chapter 5.

case-related work. In this simplistic example of 2,080 annual case-related duty hours, we make no adjustment for time spent for vacations, professional development, supervision, administration, etc.:

50 attorneys × 2,080 annual case-related duty hours = 104,000 total attorney hours available annually.

However, if two of the FTE attorneys in this system are full-time administrators without an adult criminal defense caseload, and another five FTE attorneys are supervisors with only 50 percent of their time allocated to case-related work, annual attorney hour availability in this system is reduced:

(43 attorneys × 2,080 annual case-related duty hours) + (2 attorney administrators × 0 annual case-related duty hours) + (5 attorney supervisors × 1,040 annual case-related duty hours) = 94,640 total attorney hours available annually.

Caseload Standards Calculations

The NPDWS was focused on the development of new default national case weights and leaves the calculation of annual case-related duty hours to individual jurisdictions. A jurisdiction seeking to use the NPDWS case weights as the basis of caseload standards must first determine an appropriate annual case-related duty hours assumption based on conditions specific to the jurisdiction. Annual maximum caseload standards, which are similar in form to the NAC standards, can then be calculated using the NPDWS case weights by simply dividing the jurisdiction's estimate of annual case-related duty hours by the case weight for each case type. For example, assuming 2,080 case-related duty hours available annually, the NPDWS case weight of 33.0 hours for DUI–High cases suggests a caseload standard of 63 new cases each year (2,080 ÷ 33.0, rounded downward to the nearest whole number).

Staffing Need Analysis

Comparing the total time needed to represent the annual caseload (hours needed) with the total attorney hours available to work on cases for the year (hours available) allows a system or provider to assess whether attorney staffing levels are appropriate, as follows:

Total hours needed – total hours available = deficient or surplus hours.

If this calculation shows a deficiency, the jurisdiction can further calculate additional FTE needed:

Deficient hours ÷ annual case-related duty hours per attorney FTE = additional FTE needed.

For example, if, based on the NPDWS case weights, a provider required 20,725 attorney hours to provide reasonably effective assistance of counsel for its annual caseload and the provider's current staffing levels equated to 16,870 hours of annual attorney time for case-related work, the provider would have a deficiency of 3,945 hours. Assuming that each of the provider's FTEs has 2,080 case-related duty hours available each year, the provider can estimate that it needs roughly two additional FTEs:

20,725 total hours needed – 16,780 total hours available = 3,945 hours deficient

3,945 hours deficient ÷ 2,080 annual case-related duty hours per attorney FTE = 1.9 FTE needed.

Conclusion

Excessive caseloads are proscribed by ethics rules because they inevitably cause harm.[18] Overloaded public defense attorneys simply cannot give appropriate time and attention to each client.[19] They cannot investigate in a timely manner or fully. They cannot file the motions they should. Instead, attorneys are forced to triage cases, choosing which cases to focus attention on while allowing others to be resolved without appropriate diligence. 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.

To avoid these harms and ensure that public defense attorneys have the time needed to provide their clients with effective assistance, providers, administrators, and policymakers must have a reliable means of estimating necessary staffing levels. This study will permit stakeholders in jurisdictions across the country to review their caseloads using a more justifiable, evidence-based set of case weights than those implied by the NAC standards and allow them to better estimate and plan for the attorney time needed for adult criminal cases to avoid overload, as required under the ethics rules.[20] To use this study effectively, jurisdictions should begin by gathering basic data on their providers' caseloads and attorney hours available and then go through the process described earlier to assess whether attorney staffing levels are appropriate; and establish standards, limits, or review processes to avoid overload.

Significant evidence exists that many public defense providers are overloaded, even when judged against the 1973 NAC standards. In validating the concerns that the NAC standards are outdated, the results of this study strongly suggest that the caseloads of public defense attorneys

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[18] See the section titled "The Requirement to Limit Workloads" in Chapter 2.

[19] In 2019, *The New York Times* published a detailed profile of one public defender in Louisiana who was assigned almost 200 felony cases, noting the impact that this case overload had on his clients. See Richard A. Oppel, Jr., and Jugal K. Patel, "One Lawyer, 194 Felony Cases, and No Time," *New York Times*, January 31, 2019.

[20] ABA Formal Opinion 06-441, 2006. See also "The Requirement to Limit Workloads" in Chapter 2.

are more excessive than previously thought and that decisive action is needed to ensure that public defense clients receive the effective assistance of counsel required by the Constitution.

Contents

About This Report iii
Summary vii
Figures and Tables xix
Chapter 1. Introduction 1
Overview 1
Organization of This Report 3
Chapter 2. Background and Justification 4
Statement of the Problem 4
The Need for Updated National Guidance 31
Chapter 3. Approach 35
Overview 35
Review of Leading State-Level Studies in This Field 37
Use of the Delphi Method 47
Summary of Key Ethics Rules and Professional Guidance 53
Case Type and Activity Type Category Development 57
Expert Panel Selection 63
Chapter 4. The Williamsburg Conference 69
Expert Panel Preparation 69
The Initial Estimates 77
Session Procedures 79
Results 83
Chapter 5. Understanding and Using the Results 86
How Do the NPDWS Case Weights Compare with Those in Prior Studies? 86
Utilizing the Weights 96
Creating Caseload Standards 98
Accounting for Practice Variations and Mixed Caseloads 100
Measuring Need 101
Chapter 6. Insight into the Expert Panel's Deliberations 103
Overview 103
Evidentiary Issues 103
The Role of the Public Defense Attorney 106
Changes in Criminal Law and Process 107
Institutional Issues 108
Tension Between Investigation and Quick Resolution 109
Summary of the Panelists' Comments 109
Chapter 7. Going Forward 111
Appendix A. Expert Panel Biographies 115

Appendix B. Comparison of Prior State-Level Workload Studies 131
Appendix C. Consensus Trend Charts 148
Abbreviations 155
References 156

Figures and Tables

Figures

Figure 4.1. Initial Response Chart 78
Figure 4.2. Example of Panelist's View of the Delphi Application 81
Figure 4.3. In-Room Projected Delphi Session Display 82
Figure C.1. CoV Trends for Felony–High–LWOP 149
Figure C.2. CoV Trends for Felony–High–Murder 149
Figure C.3. CoV Trends for Felony–High–Sex 150
Figure C.4. CoV Trends for Felony–High–Other 150
Figure C.5. CoV Trends for Felony–Mid 151
Figure C.6. CoV Trends for Felony–Low 151
Figure C.7. CoV Trends for DUI–High 152
Figure C.8. CoV Trends for DUI–Low 152
Figure C.9. CoV Trends for Misdemeanor–High 153
Figure C.10. CoV Trends for Misdemeanor–Low 153
Figure C.11. CoV Trends for Probation or Parole Violations 154

Tables

Table S.1. Final Results of the Expert Panel Session with Example Caseload Standards xii
Table 2.1. State-Level Qualitatively Adjusted Public Defense Weighted Caseload Studies 29
Table 3.1. Study Case Weights in Jurisdiction and Publication Year Order 39
Table 3.2. Study Case Weights in Decreasing Case Weight Size Order 43
Table 3.3. NPDWS Case Types 58
Table 3.4. NPDWS Activity Types 61
Table 3.5. Expert Panelists for the NPDWS 66
Table 4.1. Summary of NPDWS Case Types 70
Table 4.2. Summary of NPDWS Activity Types 70
Table 4.3. Prior Study Findings Grouped by NPDWS Case Type Categories 72
Table 4.4. Distributions of Prior Study Results Grouped by NPDWS Case Type Categories 77
Table 4.5. Final Results of the Expert Panel Session 85
Table 5.1. NPDWS and Prior Study Case Weights in Decreasing Weight Size Order 86
Table 5.2. NPDWS and Prior Study Case Weights Grouped by NPDWS Case Type Categories 91
Table 5.3. Relative Case Weights Based on Misdemeanor–High 96
Table 5.4. Example of Year-to-Year Change in Weighted Caseloads 97

Table 5.5. Example of an Annual Case-Related Duty Hours Calculation 99
Table 5.6. Illustrative NPDWS Caseload Standards Based on Attorney Availability Assumptions 100
Table 7.1. Case Weights Comparison 113
Table 7.2. Caseload Standards Comparison 113
Table B.1. State-Level Public Defense Workload Studies Since 2005 132
Table B.2. Expert Panel Approaches 144

Chapter 1. Introduction

Overview

The Sixth Amendment to the U.S. Constitution gives those accused in criminal prosecutions the right to "have the Assistance of Counsel" for their defense. The Supreme Court made clear in *Gideon v. Wainwright* that in "our adversary system of criminal justice, any person [hauled] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided."[21] Moreover, the right is not satisfied merely by having a lawyer present alongside the defendant; instead, the Supreme Court has also held in *Strickland v. Washington* that counsel must render "reasonably effective assistance" under "prevailing professional norms."[22]

In response to this clear mandate, state and local governments and judicial systems have taken steps in varying degrees to provide the accused, either wholly or partially at public expense, with attorneys appointed by the court to represent those involved in criminal cases, juvenile delinquency proceedings, or other legal matters. Despite such efforts, a governmental body may nevertheless be challenged to ensure that there are enough qualified members of the bar hired, contracted with, or otherwise committed to address the never-ending stream of new arrests and criminal case filings each day. When there are shortfalls in the supply of criminal defense attorneys available to represent those in need of Sixth Amendment assistance of counsel, too often appointments continue unabated, which in turn means that the number of open cases shouldered by each such attorney rises. Ultimately, counsel with caseloads that reach excessive levels can find themselves without sufficient time to present a professionally competent defense for each of their clients.

This report documents the results of a research collaboration among the RAND Corporation;[23] the National Center for State Courts (NCSC);[24] the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID);[25] and Stephen F. Hanlon, Principal, Law Office of Lawyer Hanlon. This collaboration, which was funded by the philanthropic organization Arnold Ventures, is intended to facilitate the use of functional metrics known as *case weights* and *caseload standards*. Such metrics, collectively described as *workload standards*, can be used to estimate the numbers of criminal defense

[21] *Gideon v. Wainwright*, 372 U.S. 335, 344, 1963.

[22] *Strickland v. Washington*, 466 U.S. 668, 687-688, 1984.

[23] RAND's participation in this project was led by Nicholas M. Pace with contributions by Dulani Woods.

[24] NCSC's participation in this project was led by Cynthia G. Lee with contributions by Brian Ostrom.

[25] ABA SCLAID's participation in this project was led by Malia Brink with contributions by Mark Pickett and Jason Vail.

attorneys who should be made available for appointments as the nature and size of noncapital adult criminal caseloads change over time.[26] The standards can also be used to identify when caseloads for those lawyers have risen to the point that they may be unable to adequately discharge their ethics duties or meet professional standards.

Workload standards are used by government bodies when planning for or managing the provision of counsel in state trial courts to represent adults who have been accused of criminal offenses but who cannot afford to engage an attorney (such provision is commonly referred to as *public defense*, and the attorneys themselves are often referred to as *defenders*, although the term *public defender* is usually reserved for a defender employed by a governmental entity).[27] A foundational underpinning of our research is the assumption that, to be in compliance with controlling legal authorities, public defense workload standards must always reflect attorney responsibilities mandated by the ethics rules currently applicable to all criminal defense counsel in every state and be consistent with other practice standards that describe prevailing norms of effective representation.

To accomplish the goals we set for our National Public Defense Workload Study (NPDWS), we revisited the considerable body of research on public defense workload standards intended for use in specific states and developed a tailored approach for our work that drew from the methods and findings in these prior studies. We also reviewed the applicable ethics rules and opinions relevant to a defense attorney's duties, as well as the detailed guidelines promulgated by influential organizations that describe the basic requirements for representing clients in criminal proceedings. With the input of five major national associations whose focus is on the provision of effective assistance of counsel in criminal cases, we assembled an expert panel of 33 highly regarded practitioners with considerable experience in representing adult clients in state trial court criminal proceedings. After the panel reviewed the key findings of prior public defense workload studies and considered the practice implications of applicable ethical and professional principles, they met in Williamsburg, Virginia, in April 2022.

At the Williamsburg conference, we employed the Delphi method—a feedback technique first developed by RAND researchers to systematically coalesce expert opinion on complex questions that are otherwise difficult to answer—to assist the panelists in reaching a consensus on what their experience and insight suggested should be the *average* hours necessary to deliver reasonably effective representation as defined by prevailing professional norms in various adult criminal case type categories. The results of the Williamsburg conference were used to develop workload standards grounded in both quantitative and qualitative empirical data.

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[26] This study's scope excludes criminal proceedings where the sentence upon conviction could result in capital punishment.

[27] A commonly employed synonym for *public defense* is *indigent defense*, and attorneys who are appointed for such representations are often referred to as *indigent defenders.* We use these terms interchangeably with *public defense* and *defenders*, respectively. It should be noted that the adjective *indigent* as used here simply refers to overall eligibility for appointed counsel and not necessarily to the person's financial status.

Work developing similar metrics for the provision of public defense has been conducted previously in certain states and localities by various governmental agencies, research entities, and stakeholder organizations. Therefore, the results of the NPDWS would be primarily applicable to locations where jurisdictionally focused workload standards have not already been produced, to situations in which earlier work did not adequately consider applicable ethics rules and practice standards, or to situations in which existing studies may be outdated or otherwise flawed.

Organization of This Report

Chapter 2 provides background information on the problem of excessive public defense caseloads, on applicable ethics rules and practice standards relevant to the practice of criminal defense, on strategies for determining when attorneys are laboring under appointment volumes that may result in inadequate attention being paid to those clients, and on how workload standards are developed. The chapter also discusses why a nationally applicable set of public defense workload standards reflecting current conditions is necessary. In Chapter 3, we provide a closer look at the methods employed to produce our recommended set of national public defense workload standards. Chapter 4 describes the structure and results of the expert panel conference that took place in Williamsburg, Virginia, on April 28, 2022. In Chapter 5, we discuss how the national workload standards can be used. Chapter 6 summarizes what we heard from our expert panelists as to their rationales behind the Delphi session voting at the Williamsburg conference. Chapter 7 presents some concluding thoughts as to the future direction of public defense. Appendix A contains brief biographies for each member of the expert panel. Appendix B presents a detailed comparison of the 17 state-level public defense workload studies that informed our research approach. Finally, Appendix C contains graphical representations of the development of an expert panel consensus at the Williamsburg conference.

Chapter 2. Background and Justification

Statement of the Problem

Excessive Caseloads in Public Defense

Despite the Supreme Court's insistence that counsel must render reasonably effective assistance to criminal defendants, it is difficult to imagine any public defense attorney providing all clients with constitutionally appropriate representation if that defender's workload has reached unreasonable levels. Excessive caseloads are pervasive in public defense across the country, and reports of defenders being appointed to far more criminal defense cases than they can shoulder competently are common in the media.[28] In one widely reported instance, for example, attorneys assigned to a misdemeanor caseload at a metropolitan office providing public defense were each appointed to an average of 2,225 cases per year.[29] Assuming that 40 hours each week of the year were devoted to nothing but client representation, this caseload would allow an attorney to spend an average of about 56 minutes on each client's case. In that same office, attorneys assigned to a felony caseload were appointed to an annual average of more than 436 noncapital felonies, effectively allowing for only 4 hours and 47 minutes, on average, to defend clients facing decades in prison.[30] Under such circumstances, the assistance of counsel might consist of little more than meeting the client and immediately entering a guilty plea.

The examples given above are likely to be outliers,[31] but defenders with far fewer cases annually can also lack enough time to fully address their clients' interests. Comprehensive and consistently available data on public defense attorney annual appointments can be difficult to

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[28] See, e.g., Andrew Cohen, "Eric Holder: A 'State of Crisis' for the Right to Counsel," *The Atlantic*, March 15, 2013; Phil McCausland, "Public Defenders Nationwide Say They're Overworked and Underfunded," NBC News, December 11, 2017; Richard A. Oppel, Jr., and Jugal K. Patel, "One Lawyer, 194 Felony Cases, and No Time," *New York Times*, January 31, 2019; Nomin Ujiyediin, "Kan. Public Defender Agency 'On Fire,' Struggling to Keep Staff," Hays Post, webpage, March 12, 2020; Lisa C. Wood, Daniel T. Goyette, and Geoffrey T. Burkhart, "Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads," *Litigation*, Vol. 42, No. 2, 2016; and John Yang and Frank Carlson, "Missouri Public Defenders Are Overloaded with Hundreds of Cases While Defendants Wait in Jail," PBS NewsHour, May 2, 2018.

[29] Tonya Alanez and Missy Diaz, "Public Defenders May Begin Refusing Cases," *South Florida Sun Sentinel*, November 17, 2008.

[30] *Public Defender, Eleventh Judicial Circuit of Florida, et al., v. The State of Florida*, initial brief on the merits, cases SC09-1181 and SC10-1349, Supreme Court of Florida, filed December 27, 2011, p. 11.

[31] But see *Phillips et al., v. State of California et al.*, Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief Under Cal. Const. Art. I § 15, U.S. Const. Amds. 6 and 14, Cal. Penal Code §§ 987, 1382, 859B, case 15 CE CG 02201, Superior Court of the State of California, County of Fresno, filed July 14, 2015, p. 2, in which it was alleged that felony defenders in a California public defender office annually handled an average of 418 felony cases (612 if supervised release cases are included) and misdemeanor attorneys handled an annual average of 1,375 misdemeanor cases (1,462 including supervised release cases).

come by, but looking at some reported *active* case counts (i.e., the number of client matters that a defender has open at any single point in time) rather than total annual appointments illustrates the problem well:

- 120 open cases, on average, for defenders in a large urban Midwestern county[32]
- 265 open cases for the sole public defender serving two rural Southern counties[33]
- "more than a hundred open cases," on average, for a quarter of public defenders in a Northeastern state[34]
- more than 120 open cases for a public defender in a large Northeastern city[35]
- 169 open cases for a public defender in a large Western city[36]
- 206 open cases for a public defender in a large Northwestern city[37]
- 168 open cases for a public defender in a large Midwestern city[38]
- 300 open cases for the sole public defender in a rural Southwestern county.[39]

Not all of these active cases required expenditures of a public defense attorney's time on each day they remained open. Nevertheless, their cumulative demands on a defender's finite availability means that a type of triage would be needed. In such situations, all but the most mission-critical, time-sensitive tasks must be ignored, and effort must be minimized as much as possible on cases that appear more likely to result in an adverse outcome for the client. It is

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[32] "In Hennepin County, home to the state's biggest city, approximately 100 public defenders are currently handling 12,000 open cases" (Andy Monserud, "Minnesota Public Defenders Vote to Authorize Strike," Courthouse News Service, March 10, 2022).

[33] "'I'm the only full-time employee with the public defenders' office,' explains Rhonda Covington, the public defender for East and West Feliciana—two mostly rural parishes. Covington says she's got 265 open cases" (Debbie Elliott, "Public Defenders Hard to Come by in Louisiana," NPR, March 10, 2017).

[34] "Today a quarter of all public defenders in the state have more than a hundred open cases" (Scott Merrill, "NH Supreme Court Task Force Addresses Shortage of Public Defenders," Manchester Ink Link, webpage, November 13, 2021).

[35] According to Jocelyn Simonson, a criminal staff attorney with Bronx Defenders in New York, "I have over 120 active cases at any given time, and have represented more than 3,000 clients during my three years so far in the Bronx" (Lisa D. Williams, *Careers in Indigent Defense: A Guide to Public Defender Programs*, President and Fellows of Harvard College, 2012).

[36] "'As of today, I have 169 open cases and 1,297 closed cases,' said Kara Simmons, a Clark County deputy public defender of three and a half years" (Sean Golonka, "Lawmakers Considering Bill to Ensure Rural Counties Appoint Public Defenders Independently from the Judiciary," The Nevada Independent, webpage, May 24, 2021).

[37] "Charles Peirson, who has worked at Multnomah Defenders for the past five years, currently is working 206 open cases, some felony but most misdemeanor" (Aimee Green, "Portland Public Defenders Toil under Crushing Caseloads, Stage Work Stoppage to Draw Attention," *The Oregonian*, June 11, 2019).

[38] "On one day in September, an attorney had 168 active cases" in the public defender office for St. Louis County, Missouri (Lauren Gill, "In Missouri, Public Defenders Push to Put Poor Defendants on Wait List in Attempt to Improve Their Legal Representation," The Appeal, webpage, November 26, 2019).

[39] "In Utah's rapidly-growing St. George area, a single public defender, Edward Flint, has around 300 active cases; the county pays him a $58,000 salary with no benefits" (Leia Larsen, "With Caseloads Skyrocketing, Public Defense Lawyers Are Desperate for Reform," *Bitterroot Magazine*, August 9, 2019).

certainly possible that some of these attorneys' clients could receive an appropriate level of attention from their appointed legal counsel, but all of them certainly could not.

The causes of excessive workloads for attorneys providing public defense representation vary. In *public defender offices* (government agencies or nonprofit law firms with practices exclusively focused on public defense appointments and with attorneys who work on a salaried basis), for example, shortfalls in financial support may prevent hiring enough practitioners to handle current or expected caseloads. For private practice defenders who may contract with a court system or governmental body to receive a single payment in exchange for representing all new defendants in a jurisdiction over the course of a year (a type of *contract counsel program*), an unexpected increase in prosecutions might turn a reasonable workload into an unmanageable one. And for private counsel who are chosen for appointments as needed from a panel of prequalified attorneys (an *assigned counsel program*), the compensation received for each representation may be so low that accepting far too many cases than is reasonable might be the only way to sustain the financial viability of their legal practices.

The Demands on a Defender's Time

What defines *sufficient time* in the context of representing someone accused of a criminal offense? Looming large in the definition is the fact that lawyers, like doctors, engineers, architects, and accountants, must adhere to ethics rules and practice standards in the performance of their duties. In the United States, these rules are adopted by each jurisdiction's supreme court, as those courts possess regulatory authority over the legal profession, including in licensing and discipline. Typically, the jurisdiction's rules are based on the ABA's *Model Rules of Professional Conduct* (hereafter referred to as the Model Rules).[40] Such rules apply to all attorneys representing those accused of criminal law violations, regardless of whether the representation was the result of a court appointment or whether the client hired the attorney.[41] Ethics opinions interpreting the jurisdiction's rules or the Model Rules also provide guidance. Professional performance is also informed by influential guidance in the form of such practice standards as the ABA's *Criminal Justice Standards for the Defense Function* (hereafter referred to as Defense Function Standards),[42] *Ten Principles of a Public Defense Delivery System*,[43] *Eight Guidelines of Public Defense Related to Excessive Workloads*,[44] and *ABA Standards for*

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[40] ABA, *Model Rules of Professional Conduct*, 2023.

[41] "The Rules provide no exception for lawyers who represent indigent persons charged with crimes" (American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, May 13, 2006 (hereafter ABA Formal Opinion 06-441).

[42] Standards 4-1.1 to 4-9.6 (Chapter 4) in ABA, *Criminal Justice Standards*, 4th ed., 2017.

[43] ABA, *Ten Principles of a Public Defense Delivery System*, February 2002.

[44] ABA, *Eight Guidelines of Public Defense Related to Excessive Workloads*, August 2009.

Criminal Justice: Providing Defense Services,[45] as well as the National Legal Aid & Defender Association's (NLADA's) *Performance Guidelines for Criminal Defense Representation* and *Guidelines for Legal Defense Systems in the United States.*[46]

These ethics rules and practice standards impose substantial duties upon defenders when representing any client accused of violating the law. For example, authoritative guidance requires the attorney to meet with the client often in the early stages to establish ground rules; assess the possibility of pretrial release and take steps to obtain the least restrictive release; determine whether there is a sufficient factual basis for criminal charges; interview the client as many times as necessary; hold frank and comprehensive discussions with the client about the short- and long-term consequences of various strategies, decisions, and potential outcomes; and promptly commence and complete an investigation to explore all reasonable avenues that could lead to relevant information.[47] The attorney must also seek and review all relevant materials in the possession of the prosecution, law enforcement, and other sources; retest the prosecution's physical, forensic, and expert evidence when needed; evaluate the client's mental state at the time of the alleged offense and in regard to the client's participation in the adjudication process; analyze relevant law; and fully prepare for all court proceedings and anticipate any possible issues that might arise. Such responsibilities arise in every representation, no matter how it is resolved, and represent only foundational activities prior to disposition.

Adding to these responsibilities are the professional standards and ethics rules that come into play when cases move toward the end stage. In cases in which a plea is offered, for example, standards prohibit counsel from recommending the acceptance of an offer unless a thorough investigation and study of the matter has been completed and the prosecution has been moved to disclose any information that may negate guilt, mitigate the offense, or potentially reduce punishment. In cases that are on a path to trial, a defender's level of effort rises dramatically, and relevant professional guidelines address additional duties that arise from activities related to voir dire through closing argument and, if necessary, post-trial motions. And if sentencing becomes part of the picture, the defender is required to conduct investigations into the background of the client, any possible grounds for mitigation, any collateral consequences that could result from a conviction, the court's usual sentencing practices, and any available potential alternatives to incarceration (if possible, the attorney should also accompany the client to all probation officer interviews related to the sentencing process).

Reading across the practice standards and rules of professional conduct described above, it is clear that "sufficient time" for a defender means more than just being able to appear in court

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[45] ABA, *ABA Standards for Criminal Justice: Providing Defense Services*, 3rd ed., 1992.

[46] National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation*, 2006; National Legal Aid & Defender Association, *Guidelines for Legal Defense Systems in the United States: Report of the National Study Commission on Defense Services—Final Report*, 1976.

[47] The descriptions of defender responsibilities in this section are largely drawn from the Defense Function Standards (ABA, 2017).

when required to do so, meet with the client only just before key events, skim through the police reports, and discuss possible case resolutions with prosecutors. Importantly, it is simply not possible for a defender to adhere to all the dictates of these mandatory principles in every client matter when that attorney's desk is stacked to the ceiling with the case files of far too many active representations. In these situations, the criminal justice system becomes a zero-sum game, as time spent to fully comply with the letter and spirit of ethics rules and practice standards in one case can mean that the attorney must scale back or completely skip equally important activities in another.

The Requirement to Limit Workloads

To ensure that attorneys have sufficient time to provide each client with representation that meets the ethics rules and practice standards, the Model Rules require all lawyers to limit their workload. Specifically, Rule 1.1 of the Model Rules requires all attorneys to act with competence, while Rule 1.3 requires that all lawyers act with diligence in representing a client.[48] Competence requires not only legal knowledge and skill, but the "thoroughness and preparation reasonably necessary for the representation."[49] In other words, an essential element of competence is time to allow for adequate preparation.[50] For this reason, Comment 2 to Model Rule 1.3 notes that a "lawyer's workload must be controlled so that each matter may be handled competently."[51]

An ABA Formal Ethics Opinion makes clear that these ethics rules apply to public defense attorneys and require them to limit workloads to ensure that they can represent each client with the competence and diligence required.[52] Similarly, the Defense Function Standards state that criminal defense attorneys "should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has the potential to lead to the breach of professional obligations."[53] For this same reason, the ABA's *Ten Principles of a Public Defense*

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[48] Model Rule 1.1 is "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," while Model Rule 1.3 is "A lawyer shall act with reasonable diligence and promptness in representing a client" (ABA, 2023).

[49] Model Rule 1.1 (ABA, 2023).

[50] Model Rule 1.1, Comment 5 (ABA, 2023).

[51] Model Rule 1.3, Comment 2 (ABA, 2023).

[52] "The Rules provide no exception for lawyers who represent indigent persons charged with crimes" (ABA Formal Opinion 06-441, 2006).

[53] Defense Function Standard 4-1.8 (ABA, 2017).

Delivery System require that "[d]efense counsel's workload is controlled to permit the rendering of quality representation."[54]

When an excessive caseload forces a lawyer to choose among the interests of clients, depriving some—if not all—of them of competent and diligent defense services, the situation constitutes a conflict of interest, according to the Model Rules. Although the lawyer may be able to provide reasonably effective assistance of counsel and meet ethical obligations for some clients, doing so requires the lawyer to sacrifice duties owed and the provision of effective assistance to other clients. In this situation, "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[55]

The rules of professional conduct adopted by a jurisdiction are binding and enforceable. Failure to meet these obligations can result in damaged reputations; professional discipline, including suspension or disbarment; or court sanctions.[56] Practice standards, on the other hand, are not binding, but neither are they solely aspirational, as they have been cited by the U.S. Supreme Court as "important guides" in evaluating claims of ineffective assistance of counsel.[57] Indeed, the U.S. Supreme Court has specifically identified the Defense Function Standards as "valuable measures" of prevailing professional norms.[58] Failing to provide effective assistance of counsel can also result in lawsuits for civil damages for legal malpractice and/or the unjust punishment of a client who deserved nothing less than competent and dedicated counsel but instead received substandard representation.

Addressing Excessive Caseloads

The Model Rules, ethics opinions interpreting them, and practice standards all address what must be done when the volume of appointments rises to critical levels. ABA Ethics Opinion 06-441, for example, describes the steps an attorney must take to address an excessive caseload as follows:

> If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is

[54] Principle 5 in ABA, 2002, p. 2.

[55] Model Rule 1.7(a)(2) (ABA, 2023).

[56] See, e.g., Order, *In re Karl William Hinkebein*, No. SC96089, Mo. September 12, 2017, which suspended a public defender for missing multiple deadlines due to excessive workload, staying suspension and placing the public defender on probation for one year.

[57] *Missouri v. Frye*, 566 U.S. 134, 145, 2012.

[58] *Padilla v Kentucky*, 559 U.S. 356, 367, 2010. See also Defense Function Standard 4-1.1(b): These standards "may be relevant in judicial evaluation of constitutional claims regarding the right to counsel" (ABA, 2017).

> representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation.[59]

The Defense Function Standards similarly warn counsel to stop accepting new appointments when workloads become problematic:

> Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.[60]

And to the extent that time spent on one case reduces the time available to spend on another, the Model Rules mandate that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest," defining such conflicts to include situations in which "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[61] When concurrent conflicts of interest do arise, the lawyer is required to ask the court for leave to withdraw from the representation.[62]

Despite these clear ethical and performance mandates, relatively few public defense attorneys laboring under excessive workloads have taken the corrective steps available to them to rapidly reduce the size of their caseloads.[63] There may be many reasons for this. For example, attorneys working in legal environments in which overload has been the norm for years may not recognize those workloads as excessive or realize that there are systemic professional and ethical shortcomings in the way they have been providing public defense services to their clients. If receiving offers and urging clients to plead at first appearance before investigation has been the norm, attorneys in the system may not recognize the practice as problematic. Attorneys may also believe that there are no competent counsel who can be appointed in their stead. For example, in smaller counties, the supply of attorneys with adequate criminal defense experience who could accept appointments may be limited. Even if qualified replacement counsel might eventually be found, public defense attorneys may be hesitant to suspend appointments or withdraw when the

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[59] ABA Formal Opinion 06-441, 2006, p. 1.

[60] Defense Function Standard 4-1.8, Appropriate Workload (ABA, 2017).

[61] Model Rule 1.7(a)(2) (ABA, 2023).

[62] Model Rule 1.16(a)(1) (ABA, 2023).

[63] Stephen F. Hanlon, "Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients," *Indiana Law Review*, Vol. 51, 2018. But see also Conrad Wilson, "Oregon's Largest Public Defense Firm Stops Taking Washington County Cases as Crisis Deepens," Oregon Public Broadcasting, March 2, 2022.

impact may be increased numbers of defendants who languish in custody without the assistance of an advocate and whose case dispositions are unjustly delayed.

Regardless of the reasons why grossly overworked defenders fail to control their caseloads, such inaction runs afoul of ethics rules and professional guidelines. At the same time, efforts of individual overworked defenders to decline new appointments or to withdraw from existing ones are often analogous to applying tourniquets to injuries suffered in an automobile collision: Although the emergency aid certainly stops the bleeding during a crisis and helps keep the victim alive, the far better strategy would have been to *prevent* the accident in the first place.

In the context of public defense delivery systems,[64] a strategy to prevent excessive caseloads will succeed only if such systems have reliable means for estimating the numbers of attorneys that will be needed to provide competent and effective representation given the frequency and nature of existing and future case appointments.[65] Predicting necessary attorney levels long before actual need is required because the funds for supporting the provision of public defense counsel are governmental in origin and therefore are likely tied to rigid budget cycles that can require long-range advance planning and discourage mid–fiscal year financial and personnel augmentations. In addition, it can take months to identify appropriate candidates for positions with public defender offices or private law firms specializing in public defense, navigate the hiring process, and onboard the new attorneys; the lengthy process makes on-the-fly adjustments to office size impractical. Only by employing functional tools for making such predictions can a public defense delivery system "inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload" as required by the Defense Function Standards.[66]

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[64] We define a *public defense delivery system* as the authority or group of authorities that define the means and mechanisms of how counsel are to be appointed at full or partial public expense to represent individuals within a defined geographical or jurisdictional area, as well as the management and staff in government agencies, law firms, and solo practices that supply such counsel. An example would be a system addressing the right to counsel in the trial courts of a single county. This would include the Board of Supervisors that established and funds the public defender office charged with providing most of the county's public defense services, the public defender office itself, the courts that appoint and compensate private counsel as needed from a panel of attorneys when the county's public defender office has a conflict or is unavailable for any other reason, the county bar association that manages the conflict panel membership and assignments, and the attorneys themselves who accept appointments. All of these individuals and entities have a shared responsibility for ensuring that appointed counsels' caseloads are not excessive and for reporting when they are, although in this example, the Board of Supervisors (by determining the size of the public defender office's annual budget) and the courts (by setting the fee schedule for panel appointments) would have primary control over the system's resource availability.

[65] To be precise, the estimates would be for the number of full-time equivalent (FTE) attorneys and not simply the number of individual defenders.

[66] Defense Function Standard 4-1.8(c) (ABA, 2017).

Case Weights and Caseload Standards

The modern approach to estimating future public defense counsel needs begins with calculating *case weights*. Such weights express attorney workload in terms of the average amount of time required to represent clients in cases of a particular type, such as second-degree homicides. The averages are based on all cases regardless of disposition, including, for example, those that went to trial, those in which a plea was entered, and those that were dismissed. For example, the weight for high-severity felony cases might be 40 hours, which would be the sum of all defense attorney time likely to be needed for all high-severity felony appointments accepted over a single year divided by the number of those appointments. With such information, a public defense system can estimate how much attorney effort might be needed over the course of a year. Assume that a system projects to receive an annual caseload of 1,000 high-severity felony appointments. A case weight of 40 hours for those cases indicates a need to have enough attorneys to provide 40,000 hours (1,000 × 40) of case-related time. Similarly, if low-level misdemeanors have a weight of ten hours and a projected annual caseload of 3,000 appointments in this same system, the projected weighted caseload of 30,000 for these types of cases would still be less than that of the high-severity felonies in this example, despite having three times as many appointments.

It should be noted that the focus here is on time that is *likely to be needed* rather than *likely to be expended*, which is an important distinction in the context of public defense. Although a relatively rare practice at the state trial court level, some defenders keep detailed records of their case-related time expenditures.[67] An analysis of such information for the purpose of calculating average hours spent in distinct types of representations would be a straightforward task, but the averages that result may reflect constraints on practitioners arising from excessive workload levels. If used for personnel planning, case weights that simply mirror existing conditions could lock in imbalances between caseload demands and attorney availability for years to come. As we will discuss more fully later, one of the primary challenges of creating functional public defense case weights is to move away from simply documenting current time expenditures, and instead develop values that truly reflect time necessary to provide assistance of counsel in a manner that complies with applicable ethics rules and practice standards.

Even with sufficient attention paid to both estimating need and arranging for the necessary attorney supply, the provision of legal services is never completely predictable. Prosecutorial initiatives, changes in substantive and procedural laws, shifting law enforcement priorities and

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[67] In assigned counsel programs where panel attorneys can be compensated on an hourly basis, submitting vouchers containing information about hours expended is common, although such submissions many be required only in instances where the attorney is seeking reimbursement in excess of a presumptive fee cap. See, e.g., 94-649-301 Maine Administrative Code § 4. Even if every assigned counsel appointment produced detailed information about time expenditures, the nature of the cases to which such attorneys are typically appointed may be quite different from what others, such as attorneys in the local public defender office, in the same jurisdiction handle. Case weights are best calculated using information obtained from *all* public defense counsel in the jurisdiction of interest.

resources, and other factors can influence the number and types of new case filings over the course of a year, which, in turn, influence how many defenders need to be available to accept the appointments that result and be able to provide competent and effective representation to their clients. Moreover, the additional workloads that arise from fluctuations in new appointments are unlikely to be evenly distributed across a state, can vary greatly across defense providers within a county, and may not be balanced across individual defenders within a public defender office or private law firm. Furthermore, the supply of attorneys available to provide professional public defense services in a region or in a provider organization can change unexpectedly over time because of retirements, health absences, career shifts, law firm dissolutions, and other reasons. The result may be that a public defense delivery system that did its due diligence, realistically estimated future demands for services that met ethics rules and professional standards, and made all necessary financial and personnel arrangements in advance can still wind up with excessive caseloads systemwide, in certain regions or offices, or for individual attorneys.

For these reasons, a public defense delivery system also requires a means for determining whether current caseloads may be reaching potentially troublesome levels. A useful way to compare how the nature and frequency of representations relate to a defender's available time is through the use of *caseload standards*, which specify the maximum number of appointments recommended for a single type of case over a period of time, usually a 12-month span. The use of caseload standards is based on the premise that new cases beyond that maximum are likely to impede the delivery of representations that meet current professional and ethical guidance. Such standards may be applied to individual attorneys (e.g., no more than 46 high-severity felonies or 100 low-severity felonies or 280 misdemeanors per year) or to an entire public defender office, law firm, or other provider organization (e.g., no more than an average of 46 high-severity felonies per attorney). Although caseload standards appear simple in isolation, more-complicated analyses are required to implement them in the real world, where an attorney or a public defense organization handles many types of cases and where appointments are constantly accepted. A crude example of such an application might involve a set of standards in which the maximums limit annual appointments to 46 high-severity felonies or 100 low-severity felonies or 280 misdemeanors. Proportional application of these example standards would mean that an attorney who received a total of 23 high-severity felonies (50 percent of the annual standard for these types of cases), 20 low-severity felonies (20 percent of the standard), and 84 misdemeanors (30 percent of the standard) had reached the caseload cap.

It is important to keep in mind that caseload standards are simply one means of identifying when workload levels may be negatively affecting representations. Attorneys with particularly challenging cases and clients or attorneys with relatively modest levels of experience, for example, may be shouldering excessive workloads despite having caseload counts that are far under the recommended ceilings. Knowing when this point may have been reached requires attorneys to freely communicate their concerns to office management; in turn, such management needs to monitor staff morale, work closely with attorneys who may need additional guidance

and support, and regularly inquire as to whether staff are reducing or deferring potentially helpful activities and strategies for the simple reason that not enough time is available. It is also possible that a seasoned attorney who has a caseload consisting of relatively straightforward matters can exceed the annual standard but still be able to faithfully adhere to all prevailing professional norms in each case. The standard serves as a canary in a coal mine, a warning to supervisors to review and assess the attorney's caseload more closely. It should be noted that caseload standards are sometimes misinterpreted as a sort of case count "target" for defenders to strive for when accepting new clients. Rather, they are presumptive caps on appointments, not a measure of optimal caseload levels; they also are not tools for evaluating attorney quality, competency, or efficiency.

Together, case weights and caseload standards in the context of public defense can be thought of as examples of *workload standards* because they both involve measurements related to the amount of work (usually in terms of hours of time spent) defenders perform in the furtherance of their duties. In the following section, we describe early attempts to develop workload standards for public defense delivery systems and how such efforts have evolved over the ensuing years.

The Emergence of Public Defense Workload Standards

Early Development

Court systems appear to have been the first justice system organizations to employ the concept of case weights to assess staffing needs (here, the weights would be based on average time expenditures when judges are assigned to distinct types of cases, such as trademark disputes, personal injury torts, or bank robbery prosecutions). For example, the first studies of the federal courts that used case weights for assessing workload date back to 1946, and the Administrative Office of the U.S. Courts has relied on weighted caseload analyses for indicating when new federal district court judgeships might be needed since 1962.[68]

Use of case weighting approaches in public defense during the 1960s, 1970s, and early 1980s was far more muted, in part because, at the time, a key component of the information needed to develop case weights—reliable case-level data on attorney time expenditures—did not exist (routine defender timekeeping requirements were rare) or because collecting these data would require the expenditure of financial resources and staff time that thinly budgeted systems did not possess. Assessments of defender services were certainly conducted during this period, but the focus was usually on refining practices and procedures to make the provision of counsel more efficient and cost-effective (i.e., less expensive for the funding entity) rather than on estimating

[68] Gordon Bermant, Patricia A. Lombard, and Elizabeth C. Wiggins, "A Day in the Life: The Federal Judicial Center's 1988–1989 Bankruptcy Court Time Study," *American Bankruptcy Law Journal*, Vol. 65, 1991, pp. 495–496; Robert W. Gillespie, "Measuring the Demand for Court Services: A Critique of the Federal District Courts Case Weights," *Journal of the American Statistical Association*, Vol. 69, No. 345, 1974, p. 38.

necessary attorney levels.[69] Although there was academic discussion about how statistical techniques that had been developed for court planning could be applied to public defense, there were not many examples of actual use.[70] Even by the mid-1980s, the technical capabilities of such providers to make use of case weights were called into question by a team of experts in justice system organizations who noted that the lawyers usually in charge were "not trained as managers and administrators" and, in the team's experience, "weighted caseload formulas, complex procedures for monitoring caseload, and complicated data collection and maintenance processes are often too sophisticated for use in the typical defender agency."[71]

The National Advisory Commission Caseload Standards

Given the relative inexperience of system administrators with case weighting and other sophisticated planning tools, the publication in 1973 of a proposed set of caseload standards for defenders would have been welcomed by public defense delivery systems looking for some sort of easy-to-use guidance in controlling workloads. The National Advisory Commission on Criminal Justice Standards and Goals (NAC) was funded by the Law Enforcement Assistance Administration (LEAA), a unit of the U.S. Department of Justice at the time, to conduct a comprehensive review of the criminal justice system in the United States. The NAC's work was the combined product of 12 task forces, each of which was focused on a single subject-matter area, such as the police, corrections, drug abuse, or juvenile delinquency. One such working group (the Courts Task Force) explored a variety of issues related to criminal case processing in state and federal courts. One of the 15 chapters of its final report described the standards the Courts Task Force had adopted for publicly financed representations in criminal cases, perhaps most famously regarding a set of presumptive limits on defender caseloads:

> Standard 13.12 Workload of Public Defenders
>
> The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

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[69] For a comprehensive list of public defense delivery system studies conducted during the 1970s and early 1980s, see the annotated bibliography in Section VI, "State-by-State Listing of Technical Assistance Reports, Evaluations, and Studies of Defense Services," in Richard J. Wilson, *Indigent Defense Resources: An Annotated Bibliography of Materials on Indigent Defense Systems, Including a State-by-State Listing of Reports and Studies*, American Bar Association, undated.

[70] See, e.g., Harold S. Jacobson, *Forecasting Caseload, Workload, Costs: A Primer for Defenders*, National Center for Defense Management, 1979. This source describes judge-focused methods employed by the Federal Judicial Center, California's Administrative Office of the Courts and its Judicial Council, and the Michigan Circuit Courts, as well as some experimental applications in the public defense context.

[71] Robert L. Spangenberg, Patricia A. Smith, Nancy Ames, Ronald L. Brandt, A. David Davis, Kathleen Floyd, and Robert Rosenblum, *Maximizing Public Defender Resources: Management Report*, Abt Associates Criminal Defense Group, July 1983, pp. 2, 4.

> For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.[72]

The NAC did not independently develop these caseload limits, but instead acknowledged that it had adopted a set previously agreed to by a defender committee at a 1972 NLADA conference.[73] The specific process that yielded the caseload standards was not well documented, but however they were developed, the NAC standards were not without precedent. The Commission noted in its commentary to Standard 13.12 that there had been prior attempts to estimate maximum defender caseloads, identifying the 1966 Airlie House report that described a survey-based estimate of an upper bound of 150 annual felonies for what were characterized as "efficient appearances," while estimates for misdemeanors ranged from about 300 to 1,000 maximum cases.[74] The commentary also described the findings of a 1967 report from the Johnson Administration's President's Commission on Law Enforcement and Administration of Justice that suggested that lawyers with adequate investigational capacity could effectively represent 150 to 200 felonies per year or 300 to 400 serious misdemeanors.[75] Not mentioned in

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[72] NAC, *Courts*, 1973, p. 276.

[73] NAC, 1973, p. 277.

[74] For example,

> On the basis of a crude survey of present practice, it is estimated that a public defender (meaning someone who works full-time on the defense of criminal cases) can efficiently appear in 150 felony cases per year, although some thought that optimally this figure should be substantially lower. Estimates of the number of misdemeanor cases which a defender could handle efficiently ranged from less than 300 per year to nearly 1,000 per year depending on local circumstances (*Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 393, 1966).

[75] According to the Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Courts*, U.S. Department of Justice, 1967, pp. 55–56,

> The experience of several defender offices that restrict their caseloads to ensure thorough preparation of cases indicates that a full-time lawyer with the support of adequate investigative services could effectively represent between 150 and 200 felony defendants each year. . . . Using the Airlie House estimates as a starting point, one may assume that each year a single lawyer working full time could provide representation in 300 to 400 serious misdemeanor cases, in 1,200 social nuisance cases, or in 600 of the remaining misdemeanor cases.

The felony estimates appear to be drawn from a separate paper in Appendix D of the Task Force report:

> Limited available information on the actual caseloads of defender offices indicates that one lawyer can handle 150 felony cases a year with a fair degree of thoroughness, at least in an office located in a large city where the staff consists of several full-time lawyers. Indeed, some defender offices have case loads considerably larger than this figure (Lee Silverstein, "Manpower Requirements in

the Court Task Force's report but presumably known to those with a keen interest in public defense policy at the time were the early findings of the 1972 NLADA-led and LEAA-funded National Defender Survey. This survey collected information from 650 state court-level defender agencies and offices in such areas as attorney resources and availability, average attorney caseload size, and the opinions of chief public defenders as to "maximum effective caseloads" for full-time felony or misdemeanor defenders.[76]

It is difficult to overstate the impact that the NAC standards have had on public defense, even if decades later it remains easy to identify many delivery systems where appointed counsel have caseloads far above the recommended limits.[77] Three notable events helped cement the NAC standards into the foundation of public defense planning: their implicit approval by the NLADA-convened National Study Commission on Defense Services in 1976,[78] their citation by the ABA in 2002,[79] and their utilization by the American Council of Chief Defenders (ACCD) in its workload policy in 2007.[80] These actions not only provided an imprimatur of authority to the NAC caseload maximums but also generated some confusion about their actual origin. (References to the "NLADA standards," "ABA standards," or "ACCD standards" in regard to the 150 felony and 400 nontraffic misdemeanor annual caseload caps originally adopted by the NAC are common in public defense-related literature.)

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the Administration of Criminal Justice" in Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, 1967).

This paper was also submitted to the 1966 Conference on Legal Manpower Needs of Criminal Law convened at Airlie House in Warrenton, Virginia.

[76] The final report of the survey can be found in Laurence A. Benner and Beth Lynch-Neary, *The Other Face of Justice: A Report of the National Defender Survey Funded by the Law Enforcement Assistance Administration of the U.S. Department of Justice*, National Legal Aid and Defender Association, 1973. See also Singer, Lynch, and Smith, 1978, for selected results from the National Defender Survey.

[77] Studies suggest that many public defense delivery systems are not in compliance with NAC standards. For example, a major survey of nearly 1,000 public defense offices concluded that if the standards are used as the benchmark, 73 percent of the county-based organizations had insufficient numbers of litigating attorneys to handle the cases received in 2007 (Donald J. Farole, Jr., and Lynn Langton, *Census of Public Defender Offices, 2007: County-Based and Local Public Defender Offices, 2007*, Bureau of Justice Statistics, September 2010, pp. 8–10).

[78] According to National Legal Aid & Defender Association, 1976, Guideline 5.1, Establishing Maximum Pending Workload Levels for Individual Attorneys, "Caseloads should reflect national standards and guidelines." Given that there were no national caseload standards other than the NAC maximums at the time, this National Study Commission on Defense Services' guideline effectively constituted a de facto adoption. See also National Legal Aid & Defender Association, *Model Contract for Public Defense Services*, February 2000, Section VII.E: "It is agreed that the Agency will maintain average annual caseloads per full time attorney or full time equivalent (FTE) no greater than the following: Felony Cases 150 Misdemeanor Cases 400 . . . ."

[79] "National caseload standards should in no event be exceeded" (ABA, 2002, Principle 5, Defense Counsel's Workload is Controlled to Permit the Rendering of Quality Representation; citing the numbers in NAC Standard 13.12).

[80] "The ACCD recommends that public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year" (American Council of Chief Defenders, *American Council of Chief Defenders Statement on Caseloads and Workloads*, August 24, 2007).

The NAC standards received considerable attention following their original publication and were often adopted with minor modifications by organizations and governmental agencies involved in making public defense policy.[81] Given that there were few other authoritative statements at the time that likewise described numerical limits on caseloads, the NAC standards were welcome news in the 1970s and beyond to defenders dealing with the consequences of excessive workloads.[82] The standards also greatly simplified the mathematics of resource planning in the absence of more-nuanced information about case type–specific workload. As a first-order approximation, a public defense delivery system that projected an annual felony caseload of 3,000 appointments and that considered the NAC standards instructive could assume that at least 20 full-time attorneys would be needed for those new cases (3,000 ÷ 150 felonies per year).[83] A public defense delivery system without the resources to perform more-complex resource assessments would find the new standards to be an attractive alternative.[84]

Despite being a product of the early 1970s (and arguably with roots that go back to the mid-1960s), the NAC standards remain the default option for many policymakers considering limits on defender caseloads. Within the past decade, for example, the felony and misdemeanor ceilings were adopted, reaffirmed, or used as a foundation for caseload assignments by state public defense commissions, state public defender offices, state bar associations, or the judiciary in Washington (2015), Indiana (2016), Wyoming (2016), Ohio (2019), Oregon (2021), Michigan (2021), and New York (2021).[85] And even in states where the NAC standards have no formal

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[81] See, e.g., Appendix K, Public Defender Workload Standards, in Robert L. Spangenberg, Jennifer W. Riggs, Jennifer M. Saubermann, David J. Newhouse, and Marea L. Beeman, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, The Spangenberg Group, June 16, 2006. This appendix describes NAC-like standards adopted in Arizona, Florida, Georgia, Indiana, Louisiana, Massachusetts, Minnesota, New York City, Vermont, Washington, and Wisconsin between 1984 and 1996. Some guidelines were later dropped or revised.

[82] The 1972 National Defender Survey reported that average caseloads of full-time attorneys with exclusive felony practices in 29 percent of responding public defender offices exceeded 200 cases per year, and in 7 percent of the offices, the averages exceeded 300 annual cases. A similar survey conducted in 1975 indicated that 18 percent of the responding public defender offices reported annual averages for full-time felony attorneys exceeding 200 cases, and annual averages for full-time misdemeanor attorneys exceeded 400 cases in 29 percent of the offices (almost half of the offices reported that at least one attorney had an annual misdemeanor caseload of more than 900 cases). Singer, Lynch, and Smith, 1978, pp. 50–53.

[83] *At least* is an important modifier because resource planning that uses the upper bounds for caseloads as the target values for attorney assignments is at immediate risk of excessive workloads. A public defense delivery system with 20 attorneys shouldering an annual caseload of 3,000 felonies would already be at the NAC ceiling with no room to spare.

[84] It should be noted that there were public defense delivery systems during the 1970s and 1980s that embraced the idea of caseload standards but chose to develop their own rather than adopting a version of the NAC limits. A 1983 review of some of the homegrown standards that were in effect in 1981 led the authors of the review to conclude that where "standards do exist, many appear to be informal and based upon guesswork of the chief public defender" (Spangenberg et al., 1983, p. 67).

[85] The values shown here are for annual felony and misdemeanor limits on full-time attorneys (either for individuals or for per-attorney averages across an organization). The limits for Washington are 150 felonies or 300 or 400 misdemeanors depending on the jurisdiction (*Washington State Superior Court Criminal Rules*, Rule 3.1 Stds,

standing, media articles discussing workload pressures in public defense and statements made by public defense administrators repeatedly imply that they remain the generally accepted upper bounds defining when the number and types of cases a defender represents are clearly excessive, although as noted previously, the source of the standards is variously attributed to the NAC, NLADA, ABA, ACCD, or simply described as "national."[86] Clearly, the half-century-old NAC caseload standards are still very much in play in 2023.

Standards for Indigent Defense, Standard 3.4, 2015). For Indiana, the limits are 150 felonies or 400 misdemeanors for offices with "adequate support staff," 120 felonies or 300 misdemeanors for office without (Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, Standard J, 2016). For Wyoming, the standards are 150 felonies or 400 misdemeanors (Office of the Wyoming State Public Defender, *Office of the State Public Defender Excessive Caseload Policy*, adopted June 20, 2016). For Ohio, the standards are 150 felonies or 400 nontraffic misdemeanors (Ohio Administrative Code Rule 120-1-07, 2019). For Oregon, the limits are as follows:

> Each FTE contract attorney is obligated to take an annual caseload consistent with 115% of the 1973 ABA caseload standards, which provide that an attorney can handle 400 misdemeanors per year or 150 felonies per year, thus obligating our attorneys to provide legal services in 460 misdemeanors per year, 173 felonies per year, or some combination thereof. (Oregon Public Defense Services Commission, *Public Defense Services Commission Legislatively Adopted Budget: 2021–23 Biennium*, undated, p. 321)

For Michigan, the limits are 150 felonies or 400 nontraffic misdemeanors until more Michigan-specific standards are approved (Michigan Indigent Defense Commission, *Minimum Standards for Indigent Criminal Defense Services*, Proposed Standard 6, Indigent Defense Workloads, 2021. In New York, local workload standards shall not exceed the NAC "national workload standards" of 150 felonies or 400 misdemeanors (Committee on Mandated Representation, *2021 Revised Standards for Providing Mandated Representation*, New York State Bar Association, Standard G-2, 2021). See also *Rules of the Chief Administrative Judge* Section 127.7, 2010: 150 felonies or 400 misdemeanors for New York City defenders.

[86] Some examples are as follows: "The National Advisory Commission on Criminal Justice Standards and Goals recommends each public defender handle no more than 150 felonies per year" (Will Langhorne, "Covid, Chronic Underfunding Pose Ethical Dilemmas for Arkansas' Public Defenders," *Arkansas Democrat Gazette*, February 6, 2022); "That's above a national recommendation of 150 felony cases per year" (Titus Wu, "Kansas' Public Defenders, Already Overburdened, Adapt to Pandemic," *Topeka Capital-Journal*, October 19, 2022); "It creates another obstacle in the system's adhering to guidelines of the National Legal Aid and Defender Association, which recommends that no one attorney handle more than 150 felony cases or more than 400 misdemeanor and traffic cases in any given year" (Trevor Brown, "Law Giving More Defendants Lawyers Has Downside," Oklahoma Watch, webpage, October 28, 2019); "National standards recommend that public defenders handle no more than 150 felony cases in a year" (Deirnesa Jefferson, "Overworked and Underpaid: a Public Defender Crisis," CBS 4 News, February 12, 2019); "The [NAC] suggests each lawyer should have no more than 150 felony cases or 400 misdemeanor cases per year. Crowell said his attorneys average about 150 cases at a time" (Ashley Zavala, "KRCG 13 Investigates: Some Rural Judges Are Resistant to State Public Defender Problems," CBS 13 KRCG, May 21, 2018); "The American Bar Association recommends 150 felony cases or 400 misdemeanor cases per full-time attorney" (Danielle Ferguson, "As Murder Cases Mount, County Attorneys Struggle to Keep Up," *Argus Leader*, March 3, 2018); "The Executive Director [of the State Board of Indigent Defense Services] stated the most immediate problem is caseloads. The standard set by the [NAC] is to have no more than 150 felony cases, 400 misdemeanor cases, or 25 appeals per year per attorney. . . . The Executive Director stated in [fiscal year] 2020, the public defender offices had to turn down new cases in order to maintain a caseload of 150 felony cases per attorney per year" (Kansas Criminal Justice Reform Commission, *Report of the Kansas Criminal Justice Reform Commission to the 2021 Kansas Legislature*, November 2020); and "In 1973 the [NAC] recommended that public defender caseloads be set at no more than 150 felonies, or 400 misdemeanors. . . . [New Hampshire Public Defender] subscribes to [the ABA's] position that, while those 'national guidelines' should never be exceeded, defense counsel's workload should be controlled in such a way as to permit the rendering of quality defense." (New Hampshire Public Defender, *Proposal to Provide Statewide Public Defender Service*, March 28, 2019).

At the same time, the NAC standards have been the subject of continuing criticism, almost from the moment they were published.[87] A 1978 study of indigent defense systems in the United States, for example, suggested that the thresholds seemed high: "Indeed, one is hard put to imagine carefully investigating every case, as is required by American Bar Association Standards Relating to the Defense Function, if the lawyers are handling 150 felony cases per year, or 400 misdemeanors per year."[88] Decades later, many modern observers have also asserted, based on their own experience working in public defense, that many of the NAC caseload limitations are simply too high and permit a defender to take on an excessive workload.[89]

The NAC standards have also been criticized for dividing all public defense representations into just a handful of overly broad categories, an approach that in the context of the felony standard, for example, would presumably ignore significant differences between defending a client on a charge of aggravated homicide and a simple accusation that a motor vehicle's odometer was intentionally altered. Additionally, other common case types, such as probation violations, are not listed at all.

Besides their age, the most pertinent criticism of the NAC standards is that they lack any formally documented basis for the recommended caseload maximums, which have been variously described as the product of "educated guesses,"[90] "loosely" based on the elicitation of expert opinion,[91] and a reflection of the "wisdom of the elders."[92] It is not quite true that the standards were without any foundation; as described previously, they were informed to some unknown degree by prior estimates of recommended caseload maximums. But evidence exists that the final numbers adopted by the NAC were at least partly shaped by considerations of how

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[87] A detailed critique of the NAC standards' development can be found in Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, American Bar Association, 2011, pp. 43–49. Lefstein later explicitly recommended that "[p]ublic defender agencies and programs that furnish private lawyers to provide indigent defense representation should not rely" on the NAC standards (Norman Lefstein, *Executive Summary and Recommendations: Securing Reasonable Caseloads—Ethics and Law in Public Defense*, American Bar Association, 2012, p. 34). He also noted that "the Missouri State Auditor recently rejected as invalid the Missouri State Public Defender's caseload crisis protocol based substantially on caseload numbers recommended by the NAC" (Lefstein, 2012, p. 35). For more information about the State Auditor's decision, see Thomas A. Schweich, *Missouri State Public Defende*r, October, 2012, pp. 11–21.

[88] Singer, Lynch, and Smith, 1978, p. 52.

[89] For example, "[m]any of us don't consider [the standards] to be realistic if you expect quality representation" (John Gross, National Association of Criminal Defense Lawyers, as quoted in Jaeah Lee, Hannah Levintova, and Brett Brownell, "Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones*, May 6, 2013).

[90] State Bar of California, *Guidelines on Indigent Defense Services Delivery Systems*, Office of Legal Services, Access and Fairness Programs, 2006, p. 26.

[91] The Spangenberg Group and the Center for Justice, Law, and Society, George Mason University, *Assessment of the Washoe and Clark County, Nevada Public Defender Offices: Final Report*, July 1, 2009, p. 21.

[92] Hunter Hurst III, "Workload Measurement for Juvenile Justice System Personnel: Practices and Needs," Juvenile Accountability Incentive Block Grants Bulletin, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, November 1999, p. 4.

the standards would be accepted by the larger criminal justice community.

Marshall Hartman, one of the drafters of the section of the NAC report that contained the standards related to indigent defense and NLADA's National Director of Defender Services at the time, later described in an interview how the caseload standards came to be after the NAC Courts Task Force (with just one defender among its 15 members) indicated that it would independently decide on a set of recommended numerical limits (we have lightly edited the transcript of the following interview for clarity):[93]

> Marshall Hartman: There was some caseload standards and the [Courts Task Force] was going to vote on what the caseload standards ought to be for us. I said to the task force people . . . gentlemen, 'you've approved the concept, why are you now voting on the numbers? I'll tell you what the numbers ought to be.' They said well, how can you do that? I said well, I met with the defender committee of NLADA just a month ago and reviewed with them what the numbers of the caseload ought to be and they are nine people from all over the country and they all had some experience in the field and what I will present to you is not my figures but what the defender committee of NLADA has approved.
>
> At that point, I dictated to the task force the numbers of 150 felonies per lawyer per year as a maximum, 400 misdemeanors, 200 juvenile, 25 appeal. And that's how those went right in. I just dictated it right to the task force, they wrote it down. I think chutzpah is the word that comes to mind . . . gall.
>
> Interviewer: . . . off the top of your head at that point did you . . .
>
> MH: No, I had really, I told the truth, I had brought that to the [NLADA] defender committee a month or two before the defender committee meeting, however, I had made them up in the first place based upon some earlier things that I read. For example, there had been some conference at [Airlie House] where they had talked about 150 felonies—no empirical data for it—and 1,000 misdemeanors. I thought that was ridiculous, 1,000 misdemeanors and I thought 400 was high, plus we had figures from the [1972 NLADA National Defender Survey] that came in and that survey talked about what people did in the country and actually . . . it was pretty close, what people were doing was about 142 felonies per year per lawyer and somewhere between 300–500 misdemeanors if I remember exactly. They[94] said there ought to be . . . 100 felonies per year per lawyer and 300 misdemeanors per lawyer but I used the higher figures figuring I could justify [using the findings of the Airlie House Report] and I couldn't sell anything better. And on 25 appeals I made that up based on my experience in Cook County as head of the appeals division. Nobody could do two appeals per month in Cook County. . . . But there is [a] goal we could work for. Some other people talked about 90 appeals per lawyer per year, people who had never done it.
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> INT: Who was on the defender committee at that time?

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[93] James Neuhard, *National Equal Justice Library Oral History Collection Interview with Marshall Hartman, Parts 1 and 2*, Georgetown University Law Library, 1990.

[94] *They* likely refers to those involved in the 1972 NLADA National Defender Survey.

> MH: Jim Dougherty from Cook County, Rollie Rogers from Denver, Colorado, a very fine defense lawyer, Terry McCarthy who is a federal defender may have been on at that time. . . .
>
> INT: What year?
>
> MH: Ah '72. Because the advisory commission conference was in '73. In any event, they all approved it and so I had some basis.

As the transcript suggests, the empirical foundations of the NAC caseload standards are not compelling ones. But it should be kept in mind that the recommended case ceilings were the product of an era when only very limited information was available to policymakers and public defense administrators about the state of indigent defense in this country. In the absence of reliable, comprehensive information that would inform the development of caseload standards, and especially in the absence of any rigorously conducted standards efforts in the past to draw on, an "educated guess" approach managed by a knowledgeable and experienced leader may have been seen as an efficient and expedient means for producing a much-desired set of numerical limits. That said, continued reliance on the NAC standards is clearly misplaced in an age where more defensible approaches for measuring workload requirements exist.

Weighted Caseload Analyses

Analyses of state court trial-level public defense delivery system data that at least discussed the use of a weighted caseload approach were published in the late 1970s and 1980s, although they were generally quasi-experimental in design, were performed only for demonstration purposes, or were not intended to be used by a specific defense system for its resource planning.[95] While there may have been unreported applications of weighting models by public defense systems, perhaps the earliest published reports of workload studies clearly based on a case weighting model arose out of work led by Robert L. Spangenberg and conducted for the offices of the state public defenders in Wisconsin (1990) and Minnesota (1991),[96] as well as for the New York Legal Aid Society's Criminal Division (1989).[97] In the years that followed, the

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[95] See, e.g., William M. Rhodes, Richard Hildenbrand, Jack Hausner, and Terence Dungworth, *Case Weights for the Prosecution and Defense of Felony Cases in Los Angeles County (California)—Final Report*, Institute for Law and Social Research, 1979. That source describes an attempt to use attorney timekeeping information and data maintained in a computerized case management system to develop case weights for both prosecutors and public defenders. The values derived for the defense weights were felt to be questionable because of a lack of cooperation from the public defenders in the data collection phase. See also Joan E. Jacoby, *Case Weighting Systems for the Public Defender: A Handbook for Budget Preparation*, National Legal Aid and Defender Association, 1985, which used data from public defender agencies in Honolulu, Hawaii; Lincoln, Nebraska; and Nashville, Tennessee, to describe how weighted caseload analyses could work. Also see Paul Ligda, "Defender Workloads: The Numbers Game," *NLADA Briefcase*, Vol. 34, No. 1, 1976, pp. 23–25, which analyzed work-hour data from a county public defender office for comparison with estimates from other jurisdictions.

[96] The Spangenberg Group, *Caseload/Workload Study for the State Public Defender of Wisconsin*, 1990; The Spangenberg Group, *Weighted Caseload Study for the State of Minnesota Board of Public Defense*, 1991.

[97] Spangenberg et al., 2006, p. 2.

idea of using weights for documenting the need for defenders became more commonplace. Technical assessments of public defense delivery systems in the 1990s, which had previously focused on structural and procedural issues, such as office management organization, funding models, and attorney assignment strategies, began to also include discussions about average time expenditures in distinct types of appointments and how that information could be used to support budget requests.[98]

The key input for these weighted caseload studies was information about recent defender time expenditures. In those relatively rare public defense delivery systems where defenders routinely recorded time spent working, similar to the fashion in which private practice attorneys track their hours when billing clients, such timekeeping data would serve as the basis of the case weight calculations. More commonly, a special time study of limited duration would be conducted in which defenders would be asked or required to participate by tracking their time expenditures in all of their active cases during a defined data collection period of a few weeks or months (because some time study cases would begin or end outside the collection period, various statistical techniques would be employed for estimating unreported time information). Both continuous and temporary time data collection approaches often had the reporting defender also segment out expenditures by a set of activity type categories, such as "investigation," "client conferences," or "travel."

Public defense case weighting studies during this era essentially assumed that the primary purpose for gathering information about current or past attorney time expenditures was to ensure that the balance between attorneys and caseloads in the future would be about the same as it was at the time of the study. If current data suggested that defenders were spending an average of 15 hours on each felony representation, for example, then next year's budget should anticipate supporting enough attorneys to be able to devote an average of 15 hours per felony as well.

An important change in this assumption had its roots in judiciary-focused research. A highly influential 1996 treatise on assessing the need for judge and court staff suggested that one shortcoming of case weights was that they could "enshrine inefficiency" when used for personnel planning if they considered only current time expenditures:

> An underlying goal of case weights is to measure not just workload, but work done in an efficient manner. From this perspective, case weights should be realistic and, to a degree, aspirational. If the weights simply codify current practice, whether it be sound or not, the weights lose credibility.[99]

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[98] See, e.g., The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study: Final Draft Report*, 1999, p. 56. This report discusses how to use current weights to determine the number of cases an attorney should be assigned in a future year: "Once attorney-hours-per-disposition have been calculated, the equation to determine workload is fairly simple. First, determine the available hours the average attorney can work per year. Next, divide the total available attorney hours by the attorney-hours-per-disposition figure."

[99] Victor E. Flango and Brian J. Ostrom, *Assessing the Need for Judges and Court Support Staff*, National Center for State Courts, 1996, p. 22.

The idea that case weights should be aspirational—and not enshrine or codify bad practice—was an important foundation of a 2000 NCSC workload study of the Florida state judiciary. The stated purpose of the work was to calculate "optimum" judge caseloads, and in that light, a judicial committee directing the study defined a "reasonable" caseload as the number of "weighted cases that allow sufficient time for a judge to deal with the average case in a satisfactory and timely manner."[100]

This approach was a departure from many prior workload studies in which weighted caseload analyses were ostensibly performed with the goals of predictability and continuity in mind, which could be achieved by essentially calculating future resource needs based almost exclusively on what was needed in the past. Now the focus would move away from simply having enough judges in the courthouse so that the current pace of case dispositions could be maintained next year and beyond. Instead, the objective would be to make sure enough judges were available so that each had "sufficient" time to work on the matters before them in a manner that would be both "satisfactory" and "timely."

The challenge in the Florida judiciary study was to incorporate these normative concepts into the weight values. To do this, the researchers employed a two-pronged approach. There would be a traditional time study in which more than 100 judges would track the time they spent in each case before them, but in parallel to that data collection effort, a qualitative research technique known as the Delphi method would be used to elicit the opinions of another set of judges as to their estimates of the "typical amount of judicial time" needed to process cases of different types and complexities.[101] In the researchers' view, the time study would document the "what is" aspect of current case processing practices, while the Delphi estimates would describe the "what ought to be" in terms of judicial perceptions as to necessary time expenditures.[102] The project's design anticipated that the results of the Delphi assessment would be used to inform a reconciliation process designed to modify, if necessary, the preliminary weights derived from the time study information alone into what were characterized as "reasonable" weights to be recommended to the Supreme Court of Florida for adoption.

The NCSC study's use of the Delphi method for eliciting expert opinion (in this instance, from judges who were actively presiding over Florida state trial court civil and criminal cases) was not unprecedented. Since it was originally developed by RAND during the 1950s to forecast the effect of technology on warfare, the Delphi method has been employed in a variety of public policy research settings, covering topics as diverse as national security, health care, information

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[100] Brian J. Ostrom, Charles W. Ostrom, Daniel Hall, William E. Hewitt, and Timothy Fautsko, *Florida Delphi-Based Weighted Caseload Project: Final Report*, National Center for State Courts, 2000, p. 1.

[101] See discussion of the Delphi-based data collection in Ostrom et al., 2000, pp. 34–40.

[102] Ostrom et al., 2000, pp. 34–40.

science, education, and criminal justice.[103] The underlying principle of Delphi is that "'pooled intelligence' enhances individual judgment and captures the collective opinion of experts" in a group setting.[104] For a purpose that essentially required estimates of time that *should* have been available to judges when overseeing the cases before them, a tool like Delphi would have been a reasonable choice, given that its purpose is to address a "problem that does not lend itself to precise analytical techniques but can benefit from subjective judgments on a collective basis."[105]

The typical Delphi session involves a group (typically referred to as a *panel*) of experts answering the same questions, with the answers being sought numeric in nature, such as amounts, time durations, or values on a Likert scale.[106] The use of carefully selected experts to answer these questions rather than a sample of the general population is a defining characteristic of the Delphi method. Although the identity of the expert panel members may not always be secret, the answers themselves are submitted anonymously to avoid counterproductive group dynamics. The results of the initial responses are then shared with the panel, usually framed in terms of distributions, such as means, medians, and ranges. Depending on the session's design, the panelists may then submit anonymous written comments about why they voted as they did (which are then shared with the rest of the group), or they can engage in open discussions. The panelists are then given the choice to change any of their individual answers. The provision of

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[103] See, e.g., Norman Crolee Dalkey and Olaf Helmer-Hirschberg, *The Use of Experts for the Estimation of Bombing Requirements: A Project Delphi Experiment*, RAND Corporation, RM-0727, 1951; Harold A. Linstone and Murray Turoff, eds., *The Delphi Method: Techniques and Applications*, Addison-Wesley, 1975; Norman Crolee Dalkey, *The Delphi Method: An Experimental Study of Group Opinion*, RAND Corporation, RM-5888-PR, 1969; Marietjie R. de Villiers, Pierre J.T. de Villiers, and Athol P. Kent, "The Delphi Technique in Health Sciences Education Research," *Medical Teacher*, Vol. 27, No. 7, 2005, pp. 639–643; Dolores Gallego and Salvador Bueno, "Exploring the Application of the Delphi Method as a Forecasting Tool in Information Systems and Technologies Research," *Technology Analysis and Strategic Management*, Vol. 26, No. 9, 2014, pp. 987–999; Ravonne A. Green, "The Delphi Technique in Educational Research," *SAGE Open*, April–June 2014, pp. 1–8; Kim Loyens, Jeroen Maesschalck, and Geert Bouckaert, "Delphi in Criminal Justice Policy: A Case Study on Judgmental Forecasting," *The Qualitative Report*, Vol. 16, No. 6, 2011, pp. 1477–1495.

[104] de Villiers, de Villiers, and Kent, 2005, p. 639.

[105] Erio Ziglio, "The Delphi Method and Its Contribution to Decision-Making," in Michael Adler and Erio Ziglio, eds., *Gazing into the Oracle: The Delphi Method and Its Application to Social Policy and Public Health*, Jessica Kingsley Publishers, 1996, p. 1.

[106] As originally designed, Delphi sessions would typically begin with an initial round of open-ended questions posed to the expert panel to generate ideas about the subject of interest. The answers to those questions would be reviewed by the researchers to define a more tailored inquiry for subsequent rounds in which numeric responses were sought. For the sake of efficiency, many current Delphi applications have already determined what questions the panelists will consider throughout the process. For example,

> Instead of the traditional Delphi approach of starting the first round with open-ended questions, the first round in the present study was modified to begin with a pre-selected list of items. It has been deemed acceptable to modify the first round if it is based on literature and prior knowledge; is a common approach to the first round and may increase response rate. (Anika Wuestefeld et al., "Towards Reporting Guidelines of Research Using Whole-Body Vibration as Training or Treatment Regimen in Human Subjects—A Delphi Consensus Study," *PLoS One*, Vol. 15, No. 7, 2020, p. 4 [citations omitted])

controlled feedback to the panelists in the form of information about the group's collective opinions and the ability of panelists to modify their answers if desired are also defining characteristics of the method. The goal of the process is to reach a point where the group answers approach a satisfactory level of consensus.

Some Delphi processes have the panelists contributing without physical or virtual contact with each other; in such instances, postal or electronic mail is often used both for receiving panel input and for sharing information about responses. Other approaches use in-person or remote video sessions. Traditionally, Delphi sessions consisted of distinct rounds, each of which began with the panelists submitting their responses (or changing prior ones) during a preset period, followed by the tabulation of the entries and then the presentation of the distributions of the results to the group for its consideration prior to the start of the next round. A popular alternative method moves away from the concept of rounds and uses a computer application to permit panelists to make or change their submissions at any time during the session and receive continuous updates about how the distributions are changing,

When there is an opportunity for immediate interaction, facilitators can be employed to focus the panel's attention on questions to which there is a relative lack of agreement and attempt to encourage the group to discuss their differing perspectives in an effort to drive members toward a narrower consensus. The process continues until, depending on design, the distributions of answers submitted by the expert panel have clustered around a single value with a predetermined level of "tightness" (for example, a coefficient of variation [CoV]). Usually there are rules for terminating the session if the desired level of consensus is never achieved, such as when the answers being submitted are stable and have not changed in many rounds, when a predetermined number of rounds have taken place, or when a predetermined period has elapsed since the start of the session.

The use of the Delphi method in the development of justice system organization weights was by no means unknown prior to the Florida judiciary study. In 1979, for example, the Georgia Administrative Office of the Courts used the Delphi method for estimating the median amount of time the state's Superior Court judges actually spent on different types of cases.[107] By 1996, at least six other states were also using Delphi in a similar manner for judgeship calculations.[108] In this context, however, the procedure was used as a *substitute* for direct measurement of judicial time expenditures. Such values could conceivably have been determined with greater precision than might be possible with Delphi by, for example, the requirement for judges to engage in case-based timekeeping as a routine business practice; the launch of a short-term, self-reported time study; the use of courtroom observers to record the time judges spent on the matters before them; or the employment of some other long-established management science technique for

[107] Judicial Council of Georgia, Administrative Office of the Courts, *Seventh Annual Report Regarding the Need for Additional Superior Court Judgeships in Georgia*, 1979, pp. 30–36.

[108] Flango and Ostrom, 1996, Table 1, p. 9.

collecting personnel time data. The use of Delphi for this purpose undoubtably avoids what has been described as the "time and cost problem" of traditional time measurement approaches, which are expensive to conduct, can take a long time to complete, and, when being updated, usually require the original process to be repeated in its entirety.[109] But simply being cheaper or quicker than other data collection methods is not, in and of itself, a sufficient reason to employ Delphi, especially if practical means for obtaining information with greater reliability are available. As a noted researcher who had been involved in Delphi's earliest civilian applications described the difference, "The primary strength of Delphi is its ability to explore, coolly and objectively, issues that require judgment; a weakness of Delphi is the ease with which questions can be asked for which better techniques exist."[110]

The Florida NCSC study drew from Delphi's "primary strength" in that the qualitative research technique was used to elicit the *subjective* judgments of participating judges and facilitate a consensus about *necessary* time expenditures. The researchers avoided a Delphi "weakness" by instead employing a time study for gathering precise information about *actual* time expenditures. This idea of viewing the subject of interest (here, time spent by judges on their cases) through two different lenses (subjective and objective) to yield a more functional weight set resonated among researchers in this field. Although a 2003 NCSC study of the Minnesota state judiciary employed what it described as a "a multi-round structured Delphi process" that differed from the Florida approach, as did the manner in which a final set of weights would be derived from that information, the researchers in this later work adhered to the same basic premise of having quantitatively based weights "adjusted for quality" to incorporate normative qualities into a needs assessment:

> The preferred approach is to calculate the case weight based on current judicial practice (as determined by a time study) and then review, and potentially adjust, particular weights to ensure judges have sufficient time to handle cases in a reasonable and satisfactory manner.[111]

Given NCSC's shift toward the use of a qualitative adjustment approach when calculating case weights for judicial needs assessments, it is not surprising that a similar strategy was later adopted for its public defense work as well. Weighted caseload analyses conducted by NCSC for the statewide public defender systems in Maryland (2005), New Mexico (2007), and Virginia

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[109] Beatrice Hoffman, *Determination and Justification of Judgeship Needs in the State Courts*, Institute for Advanced Studies in Justice, Washington College of Law, American University, 1981, pp. 28–29.

[110] Theodore J. Gordon, "The Delphi Method," in Jerome C. Glenn and Theodore J. Gordon, eds., *Futures Research Methodology: Version 3.0*, The Millennium Project, 2009, p. 10.

[111] Brian J. Ostrom, Charles W. Ostrom, William E. Hewitt, Neal B. Kauder, Robert C. LaFountain, Matthew Kleiman, and Brenda Otto, *Minnesota Judicial Workload Assessment, 2002*, National Center for State Courts, 2003, pp. 12, 43.

(2010) all followed the same basic pattern:[112]

1. A self-reported time study gathered information about actual defender time expenditures broken out at the activity level (e.g., "Legal Research," "Client Contact," "Sentencing/Post-Trial Activities") for distinct categories of cases.
2. A survey of public defenders asked the respondents to estimate the relative frequency of cases within each case type category in which they felt that enough time was generally available to complete each activity (e.g., "Almost Never," "Frequently," "Almost Always").
3. A qualitative research process asked selected practitioners to consider the time study and survey information and, drawing on their own knowledge and experience, adjust the preliminary weights as needed to incorporate sufficient time for effective representation.

As would be expected given that they were conducted over a five-year period and in jurisdictions with distinct indigent defense systems and expectations, the three studies differed somewhat in their approaches. Most notably, the 2005 and 2007 studies employed structured focus groups for their qualitative data collection components, while the 2010 study used the Delphi method with expert panels meeting in person for the same purpose. In actuality, structured focus groups and the Delphi method are both examples of consensus methods, which "attempt to assess the extent of agreement (consensus measurement) and to resolve disagreement (consensus development)."[113] Although there are differences in the way the desired degree of agreement is determined, the give and take between in-person Delphi participants (versus the classical approach of relying exclusively on remote voting by anonymous panelists) can be similar to the group dynamics that characterize structured focused group discussions. Both approaches also rely on facilitators to focus decisionmaking on a narrow set of issues. But regardless of the distinguishing characteristics of either method, the important takeaway is that all three studies used *experts* (attorneys intimately familiar with the practice of criminal defense in a jurisdiction) to yield *consensus-based subjective judgments* as to the average amount of time needed for effective representations.

In the years that followed, all widely reported statewide public defense weighted caseload studies have used a variation on these methods, although for the past 12 years, the sole choice of qualitative weight adjustment has been the Delphi method. Table 2.1 lists these studies in publication year order.[114]

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[112] Brian J. Ostrom, Matthew Kleiman, and Christopher Ryan, *Maryland Attorney and Staff Workload Assessment, 2005*, National Center for State Courts, 2005; Daniel J. Hall, *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices, and the New Mexico Public Defender Department: Final Report*, National Center for State Courts, June 2007; Matthew Kleiman and Cynthia G. Lee, *Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment: Final Report*, National Center for State Courts, March 2010.

[113] Jeremy Jones and Duncan Hunter, "Consensus Methods for Medical and Health Services Research," *BMJ*, Vol. 311, No. 7001, 1995, p. 377.

[114] We include unpublished work performed by RAND researchers Nicholas M. Pace, Shamena Anwar, Dulani Woods, Thomas Bogdon, Chau Pham, and Karen C. Lui for the New York State Office of Indigent Legal Services

Table 2.1. State-Level Qualitatively Adjusted Public Defense Weighted Caseload Studies

Study State and Publication Year	Primary Research Organization	Study Bibliographic Description
Maryland, 2005	NCSC	Brian J. Ostrom, Matthew Kleiman, and Christopher Ryan, *Maryland Attorney and Staff Workload Assessment, 2005*, National Center for State Courts, 2005.
New Mexico, 2007	NCSC	Daniel J. Hall, *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices, and New Mexico Public Defender Department: Final Report*, National Center for State Courts, June 2007.
Virginia, 2010	NCSC	Matthew Kleiman and Cynthia G. Lee, *Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment: Final Report*, National Center for State Courts, March 2010.
Massachusetts, 2014	Center for Court Innovation	Melissa Labriola and Ziyad Hopkins, *Answering Gideon's Call Project (2012-DB-BX-0010) Attorney Workload Assessment*, Committee for Public Counsel Services and Center for Court Innovation, October 2014.
Missouri, 2014	ABA SCLAID	RubinBrown and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards—With a National Blueprint*, June 2014.
Texas, 2015	Public Policy Research Institute	Dottie Carmichael, Austin Clemens, Heather Caspers, Miner P. Marchbanks, and Steve Wood, *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission*, Public Policy Research Institute, Texas A&M University, January 2015.
New York (five counties), 2016	RAND	Unpublished 2016 project memorandum provided to the New York State Office of Indigent Legal Services by Nicholas M. Pace, Shamena Anwar, Dulani Woods, Thomas Bogdon, Chau Pham, and Karen C. Lui.
Colorado, 2017	ABA SCLAID	RubinBrown and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards*, August 2017.

(ILS) in 2016 as a "state-level" weighted caseload study even though the research was ostensibly focused only on defenders in five counties outside New York City. The study was conducted to address provisions in a class action settlement agreement between the State of New York and the New York Civil Liberties Union that required ILS to determine "the appropriate numerical caseload/workload standards for each provider of mandated representation, whether public defender, legal aid society, assigned counsel program, or conflict defender, in each [of the five counties], for representation in both trial- and appellate-level cases." "Stipulation and Order of Settlement," *Hurrell-Harring v. State of New York*, Supreme Court of the State of New York, County of Albany, Index No. 8867-07, executed October 21, 2014.

Nevertheless, there was wide expectation that the standards arising out of the settlement would later form the basis for an extension to the remainder of the state. See, e.g., David Carroll, "New York Caseload Standards Announced and Their Importance to Statewide Reform Explained," Sixth Amendment Center, May 8, 2017. At the end of 2017, ILS issued a legislatively mandated report, laying "out a process for the implementation of those standards in the fifty-two counties outside of New York City where the Hurrell-Harring settlement did not apply, and in New York City itself" (New York State Office of Indigent Legal Services, *Plan for Implementation of Caseload Standards in New York State*, December 1, 2017, p. 4). See also New York State Office of Indigent Legal Services, *A Determination of Caseload Standards Pursuant to § IV of the* Hurrell-Harring v. The State of New York *Settlement*, December 8, 2016.

Study State and Publication Year	Primary Research Organization	Study Bibliographic Description
Louisiana, 2017	ABA SCLAID	Postlethwaite & Netterville and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*, February 2017.
Rhode Island, 2017	ABA SCLAID	BlumShapiro, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, and the National Association of Criminal Defense Lawyers, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards*, November 2017.
Idaho, 2018	Idaho Policy Institute	Vanessa Crossgrove Fry, Sally Sargeant-Hu, Lantz McGinnis-Brown, and Greg Hill, *Idaho Public Defense Workload Study 2018*, Boise, Idaho: Idaho Policy Institute, Boise State University, 2018.
Michigan, 2019	RAND	Nicholas M. Pace, Dulani Woods, Shamena Anwar, Roberto Guevara, Chau Pham, and Karin Liu, *Caseload Standards for Indigent Defenders in Michigan: Final Project Report for the Michigan Indigent Defense Commission*, RAND Corporation, RR-2988-MIDC, 2019.
North Carolina, 2019	NCSC	Cynthia G. Lee, Lydia E. Hamblin, and Brittney Via, *North Carolina Office of Indigent Defense Services Workload Assessment*, National Center for State Courts, February 2019.
Indiana, 2020	ABA SCLAID	American Bar Association Standing Committee on Legal Aid and Indigent Defendants and Crowe LLP, *The Indiana Project: An Analysis of the Indiana Public Defense System and Attorney Workload Standards*, July 2020.
Utah, 2021	RAND	Nicholas M. Pace, Dulani Woods, Roberto Guevara, Chau Pham, and Shamena Anwar, *Provisional Caseload Standards for the Indigent Defense of Adult Criminal and Juvenile Delinquency Cases in Utah: Report for the Utah Indigent Defense Commission*, RAND Corporation, RR-A1241-1, 2021.
New Mexico, 2022	ABA SCLAID	American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP, *The New Mexico Project: An Analysis of the New Mexico Public Defense System and Attorney Workload Standards*, January 2022a.
Oregon, 2022	ABA SCLAID	American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards*, January 2022b.

Each of these 17 studies (conducted in 16 different states) produced a set of public defense case weights that were informed by the deliberations of expert practitioners with the goal of basing attorney resource planning on the assumption that clients who are unable to afford counsel nevertheless deserve constitutional representation. While challenges remain in convincing legislatures, courts, and other stakeholders of the need to provide funding that is adequate for supporting defender availability to the degree the case weights suggest, the studies constitute the best available assessments of public defense delivery system attorney requirements in the states where the research was conducted.[115]

[115] Weighted caseload studies that share many of the characteristics of those listed in Table 2.1 have been conducted at the substate level. We have not included them here because our primary interest is in describing case weight development methods that have been used for defenders in a single state, which, given the substantial expense of these efforts, is likely to be the most common scope of future research. For examples of locally focused studies, see, e.g., Melissa Labriola, Erin J. Farley, Michael Rempel, Valerie Raine, and Margaret Martin, *Indigent Defense*

The Need for Updated National Guidance

Despite representing the state of the art in public defense weighted caseload analyses, the studies listed in Table 2.1 share some important challenges. First and foremost, they are expensive to conduct in a rigorous manner. Federal grants and philanthropic generosity can offset some of the financial pain, but without such external support, the allocation of limited budget dollars for research in a system where funds for addressing excessive workloads are already in short supply can be a difficult sell to stakeholders. A related concern is that such studies can be beyond the financial reach of local systems. In many states, public defense is primarily a local responsibility in terms of funding streams, control over major decisions, or both. Economies of scale that reduce the proportionate impact of a statewide weighted caseload analysis on the system's finances may not be available to administrators contemplating a similar study for defenders in a single county or city.

The analyses can also be quite disruptive. A special self-reported time study, for example, requires attorneys to turn some of their daily attention to a task that has no direct benefit to their existing clients, even if the duration of the data collection period is relatively short. In addition, these studies are often conducted in systems that are already experiencing excessive workloads. Although the qualitative adjustments to preliminary weights that are based on current conditions help offset some of the potential for locking in existing problems, the preferred approach would be to perform the analysis during a time of relative stability, which facilitates the identification of systemic issues unrelated to budget shortfalls.

Another aspect is that the analyses are typically conducted by outside researchers. Many public defense delivery systems have developed impressive research capabilities, but ramping up for internally conducted time studies, surveys, and Delphi sessions that are needed only infrequently may not be practical. The analyses can also take considerable time to complete. Even in a rapid turnaround effort, more than a year can transpire between soliciting the assistance of external researchers and the delivery of final case weights, a lengthy wait for a system already under stress.

Finally, the analyses can be perceived as self-serving. Although engaging the services of independent, well-regarded research organizations can help, some stakeholders may dismiss the findings of a weighted caseload analysis as suspect if the public defense delivery system itself was involved in the study's funding, design, or implementation, which is almost always the case.

Many of the issues described above undoubtably contributed to the rapid acceptance of the NAC caseload standards by indigent defense systems across the country in the years following their publication in 1973. Those standards were easy to use (the mathematics were not complicated), were already available (no lengthy, disruptive, or expensive research study would

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Reforms in Brooklyn, New York: An Analysis of Mandatory Case Caps and Attorney Workload, Center for Court Innovation, April 2015; and Elizabeth Neeley, *Lancaster County Public Defender Workload Assessment*, University of Nebraska Public Policy Center, July 2008.

be required), could be applied to average defender caseloads across entire statewide public defender agencies or in a single branch office or law firm (offering universal applicability), and had the imprimatur of being embraced by well-respected national organizations (thus undercutting any potential claim of self-interest when employing them as the basis for budget requests). Such features have continued to attract public defense delivery systems that are looking for alternatives to conducting qualitatively adjusted weighted caseload studies, as evidenced by recent use of the NAC thresholds in Ohio, Oregon, Michigan, and New York.[116] But as we have already discussed, continued reliance on public defense workload standards that were created half a century ago, especially in light of the ad hoc manner in which they were developed, makes little logical or practical sense.

Despite such challenges, the gold standard for public defense resource planning related to attorney staffing levels continues to be a carefully planned, rigorously conducted weighted caseload study in which the focus is on defenders at the state or local level.[117] Nevertheless, many jurisdictions have not had the opportunity or resources to conduct such research, and, as a result, an informational vacuum clearly exists. For the past 50 years, the NAC caseload standards have filled that void, providing benchmarks—however flawed they may be—for system administrators to use when they required a simple-to-employ, high-level view for assessing whether defender workloads have become excessive. The problem is that the NAC standards reflect a criminal justice system that no longer exists and professional responsibilities that have since been greatly expanded. To the extent that the NAC annual caseload maximums continue to influence budgetary and personnel decisions for indigent defense providers in jurisdictions across the United States, the potential exists for defenders whose caseloads are under the NAC thresholds in these locations to nevertheless be operating in conditions that make it impossible to render reasonably effective assistance under prevailing professional norms to all of their clients.

Because it is not realistic to assume that qualitatively adjusted public defense weighted caseload studies are likely to be conducted in the near future in a majority of the states other than the 16 noted in Table 2.1, updated default workload standards are needed to fill the vacuum described above. Absent a compelling alternative to the NAC standards, administrators in systems without the means, time, or existing data for a rigorous assessment will have little choice but to use the 1973 thresholds or continue to rely on instinct when planning for the future.

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[116] Ohio Administrative Code Rule 120-1-07, 2019; Oregon Public Defense Services Commission, undated, p. 321; Michigan Indigent Defense Commission, 2021; Committee on Mandated Representation, 2021.

[117] This statement applies only to efforts intended to help in the estimation of necessary attorney levels in a public defense delivery system, such as a statewide public defender office or a county's contract defender program. Examinations of defender practices and techniques, support staff levels, case assignment strategies, holistic defense services, attorney education and training programs, office management policies, and other important aspects of public defense would require very different quantitative and qualitative research approaches that are not focused on a weighted caseload analysis. But if the purpose of the effort is to move away from using such metrics as raw caseload counts, prosecutor office size, or population size as a means for estimating required numbers of defenders, weighted caseload studies are arguably the tools most commonly used by justice system organizations.

Such updated workload standards that can be applied nationally should be in the form of a set of case weights for adult criminal representations that are more granular than the simple NAC felony-misdemeanor split but sufficiently generalizable to be applied to the criminal code in every state. Weights in such a form would provide a straightforward means for translating what is known or predicted for a public defense delivery system's caseload numbers and types of appointments into values that appropriately estimate the number of FTE attorneys necessary to meet that expected demand. Importantly, the weights should reflect modern expectations about defender responsibilities, incorporating sufficient time to allow counsel a realistic opportunity to meet *Strickland*'s reasonably effective assistance standard.

A default set of weights informed by prevailing professional norms can also be used to create jurisdiction-specific annual caseload standards to mirror the form in which the NAC metrics were presented. In addition to the weight itself, a value that represents the average amount of time defenders are likely to have available annually for performing case-related work is needed to calculate such caseload standards. This value (variously described in weighted caseload studies as the annual "hours allotment,"[118] annual "FTE hours,"[119] "annual case-related duty hours,"[120] "year value,"[121] or "hours/work-year"[122]) can be derived from assumptions about the average annual hours defenders within a system are expected to devote to their practices, subtracting time necessary to address non–case-specific needs, such as office administration or continuing legal education. For example, the value might be based on expectations for salaried attorneys in state government for weekly work hours, sick leave, vacation days, and holidays, as well as survey data on the allocation of time spent by defenders for different work-related activities.[123] It might be derived instead by a simple conservative assumption of 40 hours per week for 52 weeks each year (2,080 total hours).[124] Ultimately, the annual available hours assumption is a jurisdiction-dependent decision but, using 2,080 hours as an example, a case weight of ten hours for a specific type of misdemeanor offense yields a caseload standard of no more than 208 such cases annually.

Whether in the form of default national case weights or default national caseload standards,

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[118] ABA SCLAID and Moss Adams LLP, 2022b, p. 28.

[119] ABA SCLAID and Moss Adams LLP, 2022a, p. 29.

[120] Pace et al., 2021, p. 51.

[121] Lee, Hamblin, and Via, 2019, p. 24.

[122] Carmichael et al., 2015, p. 29.

[123] See, e.g., Pace et al., 2021, pp. 51–52.

[124] American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, and Crowe LLP, 2020, p. 15, fn. 80. The 2,080 annual hours assumption is extremely conservative; it does not account for time not spent working during normal business hours (such as legal holidays, vacation time, sick leave, and other absences) or for work time spent on non–case-related activities (such as travel time, training time, administrative time, and supervisory time). If such adjustments were made to the 2,080 hours assumption, additional public defense attorneys would be required in the examples shown here.

updated workload guidance could also provide useful benchmarks for federal funding decisions regarding the delivery of public defense at the state and local levels. Some limited assistance in this area already exists (e.g., the Edward Byrne Memorial Justice Assistance Grant Program), but a significant expansion of federal assistance to state and local public defense systems to reduce defender workloads will inevitably require some common metric, first for identifying the level of assistance needed, and later for measuring the degree to which resource enhancements have improved the public defense system.

Given the foregoing, we believed that an effort to develop a set of nationally applicable workload standards was necessary. Such standards should not necessarily replace those already developed in jurisdictions that have conducted their own studies to establish limits on the numbers and types of adult criminal case appointments or to perform needs assessments. When based on empirical evidence and grounded in the *Strickland* performance standard of reasonably effective assistance of counsel pursuant to prevailing professional norms, state or local workload standards can provide more-tailored benchmarks for identifying excessive workloads or for estimating future attorney needs than could any national measures. But for those jurisdictions where a state or locally focused study is not feasible at this time or an existing study is flawed or outdated, the case weights yielded from this study can serve as a major upgrade from continued use of the NAC caseload standards.

Chapter 3. Approach

Overview

The goal of this study was to produce a set of case weights for adult criminal matters in state trial courts that could serve as default workload metrics for public defense delivery systems throughout the United States. The case weights could also be used by those systems to calculate annual caseload standards when informed by localized information about annual attorney availability. Although the need to develop a realistic alternative to the NAC standards was obvious, the method for developing the case weights required consideration. Nationally representative data on current defender time expenditures for distinct types of cases were not available, and the costs of conducting a special large-scale time study to gather such data from public defender offices and private law firms across the country in a reliable and generalizable way would be beyond the resources available to this effort. Moreover, such information, if used as the sole basis of updated weights, would simply document the existing state of public defense, a world in which excessive workloads (and, as a result, depressed average time expenditures) appear too often to be the norm. An important concern for our research team was to make sure that whatever case weights emerged from this study properly took into account all relevant ethics rules and professional guidelines. Time information from a region or a law firm in which defenders typically "carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations" inherently reflects a departure from those rules and guidelines and therefore would be unsuitable for our purposes.[125]

An alternative approach would have involved gathering time data from a purposely selected set of jurisdictions for which there was general agreement within the public defense community that the defenders operating in those locations all were doing so under reasonable resource conditions and in full compliance with applicable guidance. Although there is merit in such an idea, the number of such jurisdictions was believed to be small and skewed toward environments that might not reflect caseload compositions and client needs addressed by defenders nationally.

Instead, we chose to draw on the considerable body of research conducted in the workload studies listed in Table 2.1 to be the foundation for our work. The 17 studies all relied on the elicitation of expert opinion and the utilization of their consensus judgments to develop recommended necessary average time expenditures in about 140 different adult criminal case type categories in 16 states. Those findings reflect the experiences of defenders in large urban

[125] Defense Function Standard 4-1.8 (ABA, 2017).

settings, in suburbs, and in remote rural jurisdictions. They encompass a multitude of delivery systems, including contract counsel, assigned counsel programs, and public defender offices. And they are drawn from jurisdictions with different methods of funding public defense, including those where funding is a county or local court responsibility and those where the state provides the funding, as well as hybrids of these two models. In short, the information forming the basis of these studies reflects the varied landscape of state trial court public defense throughout the United States.

We also decided that the results of those studies would be used to inform our work, but not actually be used as the basis for our final case weights. We believed that the subjective nature of the questions we would seek to answer called for the use of an expert knowledge elicitation technique, as was used in one form or another in each of the state-level studies. The experts sitting on a panel assembled for this purpose would independently exercise their respective professional judgment as to the average amount of attorney time that indigent defense systems should plan on spending for distinct categories of representations, primarily drawing from their expertise, knowledge, and insight, but also considering the results of the state-level studies. Their initial estimates would be at the activity level, describing average times for different tasks that are commonly performed in the case types of interest (the results of the state-level studies were generally reported at the case level only). Most critically, we would make sure that each panel member's familiarity with the ethics rules and professional standards applicable to criminal defense had been refreshed just prior to the group session so that their deliberations could reflect those principles.

Key aspects of the approach we adopted for this work are outlined in the list that follows and described in greater detail in the remainder of this chapter. We

- reviewed all empirically based, qualitatively adjusted state-level public defense weighted caseload studies conducted in the United States since 2005 (a detailed comparison of the studies can be found in Appendix B)
- chose the Delphi method as our group communication process
- identified, reviewed, and summarized the key ethics rules and professional standards—including controlling case law and authoritative guidelines—related to the representation of the accused in adult criminal cases proceeding in state trial-level courts
- defined a set of case type and activity type categories to use for all subsequent data collection work
- assembled an expert panel of highly regarded attorneys with expertise in adult criminal defense in state trial-level courts and a track record of good practice
- provided the expert panel with detailed information about applicable ethics rules and professional standards, background on case weights and caseload standards, and an overview of the results of the 17 studies (Information about these project activities can be found in Chapter 4.)
- convened an in-person meeting in which the expert panel would submit their initial estimates of average time and then engage in a Delphi session with the goal of achieving a reasonable convergence of the group's opinions; the results of this meeting constitute

the basis of our proposed national public defense workload standards. (Information about these project activities can be found in Chapter 4.)

Review of Leading State-Level Studies in This Field

Scope and Purpose

Our review of the 17 state-level workload studies was performed for three main purposes.[126] First, it provided our research team with information about prior approaches for categorizing case types and case-related activities for adult criminal representations in state trial-level courts. Second, it described the models that have been employed in the past for eliciting expert opinion for the purpose of estimating average attorney time needed to provide reasonably effective representations pursuant to prevailing professional norms. And, finally, it served as the basis for a cross-jurisdictional comparison of those average time per case type estimates.

Although additional research partners have been involved in some of these efforts, it is helpful to group them by the lead organization for each: ABA SCLAID (Chicago, Illinois; seven studies), the Center for Court Innovation (New York, New York; one study), the Idaho Policy Institute (Boise, Idaho; one study); NCSC (Williamsburg, Virginia; four studies), the Public Policy Research Institute (College Station, Texas; one study), and RAND (Santa Monica, California; three studies). Selected members of our research team were involved with most of the ABA SCLAID, NCSC, and RAND projects. Table B.1 in Appendix B presents an overview of the key features in all 17 studies. It should be noted that there are many references in the table to decisions made by various actors as to what might be a *sufficient* or *adequate* or *necessary* amount of time that should be spent or was needed to achieve a particular goal. Each study defined that goal in a slightly different manner, such as "providing reasonably effective representation,"[127] rendering "reasonably effective assistance of counsel pursuant to prevailing professional norms,"[128] providing "a client adequate and effective defense,"[129] ensuring "the effective representation of counsel,"[130] performing "the duty effectively,"[131] completing the task

[126] It should be noted that inclusion in this review does not necessarily constitute an endorsement of these studies or their methods by any of the authors or the organizations they represent.

[127] RubinBrown and ABA SCLAID, 2017, p. 18.

[128] Postlethwaite & Netterville and ABA SCLAID, 2017, p. 17. See also BlumShapiro, ABA SCLAID, and the National Association of Criminal Defense Lawyers, 2017, p. 20 ("provide reasonably effective assistance of counsel pursuant to prevailing professional norms").

[129] Fry et al., 2018, p. 15.

[130] Ostrom, Kleiman, and Ryan, 2005, p. 27. See also Carmichael et al., 2015, p. 19 ("ensure effective assistance of counsel").

[131] Labriola and Hopkins, 2014, p. 16.

"with reasonable effectiveness,"[132] providing "reasonably effective assistance of counsel,"[133] or ensuring "effective representation."[134] Despite variation in the language used, ultimately all of the states' standards-setting efforts shared a common goal of creating functional case weights that were not simply a mirror of current time expenditures.

Our research approach, summarized in the introduction to this chapter, drew from common themes found in the earlier studies, as will be apparent from a review of Appendix B. That said, we adapted those methods as needed to address the challenges of developing recommended default national case weights rather than ones intended for a specific state. We also took steps to enhance our approach in two areas that were sometimes given reduced attention in the past. One involved the selection of the expert panel. In some studies, the identification of the experts was largely left to the discretion of the administrators of the public defense systems that were the subjects of the research. As will be described subsequently in this chapter, we reached out to five national organizations that we believed were well situated to identify a pool of potential panelists who were regarded for their skills and experience in defending adult defendants. Another area we addressed was transparency. The studies varied in the degree to which the "black box" of the process was described. In contrast, we decided to use this report for documenting, in fine detail, our methods, the information provided to the panelists, the nature of the Delphi process, the manner in which a consensus was reached, the process by which those results were translated into recommended default national case weights, and how those weights compare with similar work done at the state level. Because the findings of the earlier studies were a key aspect of our current work, we briefly describe them in the section that follows.

Case Weights Recommended by the State-Level Studies

The tables in this section present the final case weights in hours for adult criminal case types from each of the state-level studies. In addition, we have included an illustrative caseload standard based on a simple annual case-related duty hours assumption of 2,080 hours (40-hour workweek and 52 workweeks per year) to facilitate cross-study comparisons, while being mindful of the fact that the value we chose was simply for the purpose of providing an example. Most studies did not calculate a caseload standard, presumably leaving the task of converting recommended case weights into annual maximums to the policymakers within the state being studied, given that annual case-related duty hours assumptions require localized information about state personnel practices and public defense provider expectations. The studies that did report a recommended caseload standard may have used annual case-related duty hours

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[132] RubinBrown and ABA SCLAID, 2014, p. 16; Carmichael et al., 2015, Appendix H, p. 1.

[133] RubinBrown and ABA SCLAID, 2014, p. 17.

[134] Hall, 2007, p. 35. See also Kleiman and Lee, 2010, p. 18 (avoiding insufficient time for "effective representation").

assumptions that differ from the ones underlying the tables and, if so, their published standards will differ from the values shown here.

It should be noted that the relative differences in calculated caseload maximums across the 17 studies remain constant no matter what annual case-related duty hours assumption was chosen for the tables. Assume, for example, that when 2,080 hours is used as the assumption, the table describes an annual maximum of 88 felonies for state A and 44 felonies for state B. If 1,040 annual hours was instead used for the assumption, the maximums for states A and B would be 44 and 22 felonies, respectively. Under either assumption, the caseload maximums for state A are twice the value calculated for state B.

In addition, we used the weights as published in each study's final project report and rounded the values to the tenth of an hour prior to performing any further calculations for our work generally and this report specifically. In addition, our calculated annual caseload maximums are rounded down to the nearest integer. The combined effect of the two conventions may also result in values that differ somewhat from those found in the original study reports.

Table 3.1 presents the studies' adult criminal results ordered alphabetically by jurisdiction and study publication year, with case types within each jurisdiction ordered by decreasing weight size. Table 3.2 is ordered by decreasing case weight size across all studies and also contains entries for the 1973 NAC annual felony and misdemeanor recommendations for comparison.

Table 3.1. Study Case Weights in Jurisdiction and Publication Year Order

Study	Case Type	Effective Case Weight in Hours	Annual Caseload Standard Using 2,080 Hours
Colorado, 2017	Class 1 felony	427.3	4
	Class 2 felony	134.5	15
	Sexual assault felony, Class 2, 3, 4, 5, or 6	98.9	21
	Violent felony, Class 3 or 4	87.1	23
	Nonviolent felony, Class 3 or 4	47.0	44
	Misdemeanor sex offense	33.8	61
	Driving under the influence (DUI) felony, Class 4	29.9	69
	Drug felony, Class 1, 2, 3, or 4	28.6	72
	Class 5 or 6 felony	28.3	73
	Misdemeanor Class 1	16.3	127
	Misdemeanor DUI	15.5	134
	Misdemeanor Class 2 or 3	11.4	182
	Felony probation revocation	7.4	281
	Misdemeanor traffic or other	6.9	301
	Misdemeanor probation revocation	4.3	483

Study	Case Type	Effective Case Weight in Hours	Annual Caseload Standard Using 2,080 Hours
Idaho, 2018	Felony	67.2	30
	Misdemeanor	22.0	94
	Contempt	15.5	133
	Probation violation	10.4	200
	Other matter	9.7	215
Indiana, 2020	Noncapital murder (life without parole [LWOP])	311.3	6
	Noncapital murder (non-LWOP)	232.1	8
	High-level felony (levels 1–2)	68.2	30
	Mid-level felony (levels 3–4)	42.6	48
	Low-level felony (levels 5–6)	22.0	94
	Misdemeanor	12.6	165
	Probation or community corrections revocation	8.5	244
Louisiana, 2017	Felony, LWOP	200.7	10
	High-level felony	69.8	29
	Mid-level felony	41.1	50
	Low-level felony	22.0	94
	Enhanceable misdemeanor	12.1	172
	Revocation	8.5	245
	Misdemeanor or city parish ordinance	7.9	261
Maryland, 2005	Capital (death notice filed)	1,464.0	1
	Capital (death notice not filed)	429.0	4
	Homicide (average)	107.0	19
	Violent felony (average)	25.3	82
	Drug treatment court (urban)	15.2	136
	Nonviolent felony (average)	14.0	148
	Misdemeanor jury trial demand or appeal (average)	3.6	575
	District court criminal (average)	2.3	910
	Modifications or sentence reviews, circuit (average)	1.6	1,273
	District court traffic (average)	1.6	1,341
	Violations of probation, circuit	1.5	1,386
	Modifications or sentence review, district (average)	1.1	1,835
	Violations of probation, district	0.8	2,773
	Preliminary hearings, district (average)	0.2	12,480
Massachusetts, 2014	Superior nonconcurrent felony–chapter 265 crime against person	76.4	27
	Superior nonconcurrent felony–not chapter 265 crime against person	42.3	49
	District concurrent felony–crime against person	24.1	86

Study	Case Type	Effective Case Weight in Hours	Annual Caseload Standard Using 2,080 Hours
	Operating under the influence	19.7	105
	District concurrent felony–not crime against person	19.1	108
	Misdemeanor	16.8	123
	Superior court probation	9.2	226
	District court probation	8.3	251
	District court bail only	2.2	949
Michigan, 2019	Murder or manslaughter	120.0	17
	Criminal sexual conduct (1, 2, or 3)	80.0	26
	Other Class A felony	50.0	41
	Class B, C, D felony	40.0	52
	Class E, F, G, H felony or two-year misdemeanor	25.0	83
	One-year misdemeanor	8.0	260
	93-day misdemeanor	7.0	297
	Probation violation	3.5	594
	Other matter	3.0	693
Missouri, 2014	Murder or homicide	106.6	19
	Sex felony	63.8	32
	A/B felony	47.6	43
	C/D felony	25.0	83
	Misdemeanor	11.7	177
	Probation violation	9.8	212
New Mexico, 2007	Capital offense	492.4	4
	Murder	202.6	10
	Violent felony	29.6	70
	Drug court	14.4	144
	Nonviolent felony	8.5	245
	Driving while intoxicated	7.3	284
	Misdemeanor	3.8	554
	Probation violation	2.2	967
	Extradition	1.0	2,151
New Mexico, 2022	Murder including child abuse resulting in death (CARD)	391.0	5
	Child pornography with actual victim	177.4	11
	Child abuse or child sex crime (not including CARD or child pornography)	126.5	16
	Crime against person (adult victim)	50.7	41
	Drug crime, property crime, or status offense	32.5	63
	Driving while intoxicated	21.7	95
	Traffic or other minor crime	7.6	273

Study	Case Type	Effective Case Weight in Hours	Annual Caseload Standard Using 2,080 Hours
	Probation violation	5.2	402
New York (five counties), 2016	Violent felony	75.0	27
	Nonviolent felony	50.0	41
	Misdemeanor	21.0	99
	Probation revocation	15.0	138
	Postdisposition matter (other than probation revocation)	15.0	138
	Violation (sentence not more than 15 days)	10.0	208
North Carolina, 2016	First-degree murder (includes capital)	136.5	15
	Felony A, B1, and B2	75.3	27
	Felony C, D, E, and F	26.0	80
	Specialized court (any)	10.3	201
	Driving while impaired	8.8	236
	Felony G, H, and I	8.7	238
	Misdemeanor (includes traffic)	4.1	507
	Probation violation	3.2	660
	Other criminal	2.5	826
Oregon, 2022	Homicide or sex case	552.5	3
	High-level felony	149.0	13
	Mid-level felony	47.7	43
	Low-level felony	39.8	52
	Complex misdemeanor	37.0	56
	Low-level misdemeanor	22.3	93
	Probation violation	8.3	249
Rhode Island, 2017	Murder	181.6	11
	Nonmurder with possible life sentence	108.1	19
	Felony, more than ten years imprisonment	51.9	40
	Felony, up to ten years imprisonment	28.3	73
	Probation violation	16.9	123
	Misdemeanor	12.7	163
Texas, 2015	Felony, first degree	27.1	76
	Felony, second degree	19.9	104
	Felony, third degree	14.5	143
	State jail felony	12.0	173
	Class A misdemeanor	9.7	214
	Class B misdemeanor	8.9	233
Utah, 2021	Noncapital murder	300.0	6
	Mandatory sex or kidnap registration felony	150.0	13

Study	Case Type	Effective Case Weight in Hours	Annual Caseload Standard Using 2,080 Hours
	Other non-DUI felony	37.0	56
	Felony DUIs	25.0	83
	Class A misdemeanor	25.0	83
	Misdemeanor DUI	20.0	104
	Class B & C misdemeanor	12.0	173
	Probation violation, felony	6.0	346
	Probation violation, misdemeanor	5.0	416
Virginia, 2010	Capital crime	1,135.2	1
	Murder or homicide (noncapital)	41.2	50
	Violent felony	12.8	162
	Nonviolent felony	7.2	288
	Driving while intoxicated	3.2	653
	Probation violation, felony	2.5	826
	Misdemeanor	2.5	848
	Probation violation, misdemeanor	0.9	2,311

Table 3.2. Study Case Weights in Decreasing Case Weight Size Order

Study	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Maryland, 2005	Capital (death notice filed)	1,464.0	1
Virginia, 2010	Capital crime	1,135.2	1
Oregon, 2022	Homicide or sex case	552.5	3
New Mexico, 2007	Capital offense	492.4	4
Maryland, 2005	Capital (death notice not filed)	429.0	4
Colorado, 2017	Class 1 felony	427.3	4
New Mexico, 2022	Murder including CARD	391.0	5
Indiana, 2020	Noncapital murder (LWOP)	311.3	6
Utah, 2021	Noncapital murder	300.0	6
Indiana, 2020	Noncapital murder (non-LWOP)	232.1	8
New Mexico, 2007	Murder	202.6	10
Louisiana, 2017	Felony–LWOP	200.7	10
Rhode Island, 2017	Murder	181.6	11
New Mexico, 2022	Child pornography with actual victim	177.4	11
Utah, 2021	Mandatory sex or kidnap registration felony	150.0	13
Oregon, 2022	High-level felony	149.0	13
North Carolina, 2016	First-degree murder (includes capital)	136.5	15
Colorado, 2017	Class 2 felony	134.5	15

Study	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
New Mexico, 2022	Child abuse or child sex crime (not including CARD or child pornography)	126.5	16
Michigan, 2019	Murder or manslaughter	120.0	17
Rhode Island, 2017	Nonmurder with possible life sentence	108.1	19
Maryland, 2005	Homicide (average)	107.0	19
Missouri, 2014	Murder or homicide	106.6	19
Colorado, 2017	Sexual assault felony, Class 2, 3, 4, 5, or 6	98.9	21
Colorado, 2017	Violent felony, Class 3 or 4	87.1	23
Michigan, 2019	Criminal sexual conduct (1, 2, or 3)	80.0	26
Massachusetts, 2014	Superior nonconcurrent felony-chapter 265 crime against person	76.4	27
North Carolina, 2016	Felony A, B1, and B2	75.3	27
New York (five counties), 2016	Violent felony	75.0	27
Louisiana, 2017	High-level felony	69.8	29
Indiana, 2020	High-level felony (levels 1–2)	68.2	30
Idaho, 2018	Felony	67.2	30
Missouri, 2014	Sex felony	63.8	32
Rhode Island, 2017	Felony, more than ten years imprisonment	51.9	40
New Mexico, 2022	Crime against person (adult victim)	50.7	41
Michigan, 2019	Other Class A felony	50.0	41
New York (five counties), 2016	Nonviolent felony	50.0	41
Oregon, 2022	Mid-level felony	47.7	43
Missouri, 2014	A/B felony	47.6	43
Colorado, 2017	Nonviolent felony, Class 3 or 4	47.0	44
Indiana, 2020	Mid-level felony (levels 3–4)	42.6	48
Massachusetts, 2014	Superior nonconcurrent felony–not chapter 265 crime against person	42.3	49
Virginia, 2010	Murder or homicide (noncapital)	41.2	50
Louisiana, 2017	Mid-level felony	41.1	50
Michigan, 2019	Class B, C, D felony	40.0	52
Oregon, 2022	Low-level felony	39.8	52
Oregon, 2022	Complex misdemeanor	37.0	56
Utah, 2021	Other non-DUI felony	37.0	56
Colorado, 2017	Misdemeanor sex offense	33.8	61
New Mexico, 2022	Drug crime, property crime, or status offense	32.5	63
Colorado, 2017	DUI felony, Class 4	29.9	69
New Mexico, 2007	Violent felony	29.6	70
Colorado, 2017	Drug felony Class 1, 2, 3, or 4	28.6	72
Rhode Island, 2017	Felony, up to ten years imprisonment	28.3	73

Study	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Colorado, 2017	Class 5 or 6 felony	28.3	73
Texas, 2015	Felony, first degree	27.1	76
North Carolina, 2016	Felony C, D, E, and F	26.0	80
Maryland, 2005	Violent felony (average)	25.3	82
Michigan, 2019	Class E, F, G, H felony or two-year misdemeanor	25.0	83
Missouri, 2014	C/D felony	25.0	83
Utah, 2021	Class A misdemeanor	25.0	83
Utah, 2021	Felony DUIs	25.0	83
Massachusetts, 2014	District concurrent felony–crime against person	24.1	86
Oregon, 2022	Low-level misdemeanor	22.3	93
Idaho, 2018	Misdemeanor	22.0	94
Indiana, 2020	Low-level felony (levels 5–6)	22.0	94
Louisiana, 2017	Low-level felony	22.0	94
New Mexico, 2022	Driving while intoxicated	21.7	95
New York (five counties), 2016	Misdemeanor	21.0	99
Utah, 2021	Misdemeanor DUI	20.0	104
Texas, 2015	Felony, second degree	19.9	104
Massachusetts, 2014	Operating under the influence	19.7	105
Massachusetts, 2014	District concurrent felony–not crime against person	19.1	108
Rhode Island, 2017	Probation violation	16.9	123
Massachusetts, 2014	Misdemeanor	16.8	123
Colorado, 2017	Misdemeanor Class 1	16.3	127
Idaho, 2018	Contempt	15.5	133
Colorado, 2017	Misdemeanor DUI	15.5	134
Maryland, 2005	Drug treatment court (urban)	15.2	136
New York (five counties), 2016	Postdisposition matter (other than probation revocation)	15.0	138
New York (five counties), 2016	Probation revocation	15.0	138
Texas, 2015	Felony, third degree	14.5	143
New Mexico, 2007	Drug court	14.4	144
Maryland, 2005	Nonviolent felony (average)	14.0	148
NAC	Felonies	13.9	150
Virginia, 2010	Violent felony	12.8	162
Rhode Island, 2017	Misdemeanor	12.7	163
Indiana, 2020	Misdemeanor	12.6	165
Louisiana, 2017	Enhanceable misdemeanor	12.1	172
Texas, 2015	State jail felony	12.0	173
Utah, 2021	Class B and C misdemeanor	12.0	173
Missouri, 2014	Misdemeanor	11.7	177

Study	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Colorado, 2017	Misdemeanor Class 2 or 3	11.4	182
Idaho, 2018	Probation violation	10.4	200
North Carolina, 2016	Specialized court (any)	10.3	201
New York (five counties), 2016	Violation (sentence not more than 15 days)	10.0	208
Missouri, 2014	Probation violation	9.8	212
Idaho, 2018	Other matter	9.7	215
Texas, 2015	Class A misdemeanor	9.7	214
Massachusetts, 2014	Superior court probation	9.2	226
Texas, 2015	Class B misdemeanor	8.9	233
North Carolina, 2016	Driving while impaired	8.8	236
North Carolina, 2016	Felony G, H, and I	8.7	238
Indiana, 2020	Probation or community corrections revocation	8.5	244
Louisiana, 2017	Revocation	8.5	245
New Mexico, 2007	Nonviolent felony	8.5	245
Massachusetts, 2014	District court probation	8.3	251
Oregon, 2022	Probation violation	8.3	249
Michigan, 2019	One-year misdemeanor	8.0	260
Louisiana, 2017	Misdemeanor or city parish ordinance	7.9	261
New Mexico, 2022	Traffic or other minor crime	7.6	273
Colorado, 2017	Felony probation revocation	7.4	281
New Mexico, 2007	Driving while intoxicated	7.3	284
Virginia, 2010	Nonviolent felony	7.2	288
Michigan, 2019	93-day misdemeanor	7.0	297
Colorado, 2017	Misdemeanor traffic or other	6.9	301
Utah, 2021	Probation violation, felony	6.0	346
NAC	Misdemeanors	5.2	400
New Mexico, 2022	Probation violation	5.2	402
Utah, 2021	Probation violation, misdemeanor	5.0	416
Colorado, 2017	Misdemeanor probation revocation	4.3	483
North Carolina, 2016	Misdemeanor (includes traffic)	4.1	507
New Mexico, 2007	Misdemeanor	3.8	554
Maryland, 2005	Misdemeanor jury trial demand or appeal (average)	3.6	575
Michigan, 2019	Probation violation	3.5	594
North Carolina, 2016	Probation violation	3.2	660
Virginia, 2010	Driving while intoxicated	3.2	653
Michigan, 2019	Other matter	3.0	693
North Carolina, 2016	Other criminal	2.5	826
Virginia, 2010	Misdemeanor	2.5	848
Virginia, 2010	Probation violation, felony	2.5	826

Study	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Maryland, 2005	District court criminal (average)	2.3	910
Massachusetts, 2014	District court bail only	2.2	949
New Mexico, 2007	Probation violation	2.2	967
Maryland, 2005	District court traffic (average)	1.6	1,341
Maryland, 2005	Modifications or sentence reviews, circuit (average)	1.6	1,273
Maryland, 2005	Violations of probation, circuit	1.5	1,386
Maryland, 2005	Modifications or sentence review, district (average)	1.1	1,835
New Mexico, 2007	Extradition	1.0	2,151
Virginia, 2010	Probation violation, misdemeanor	0.9	2,311
Maryland, 2005	Violations of probation, district	0.8	2,773
Maryland, 2005	Preliminary hearings, district (average)	0.2	12,480

Use of the Delphi Method

As noted previously, a key decision for this study was to use the consensus judgments of a group of experts in adult criminal defense as the basis for recommended necessary average attorney time expenditures in different types of cases. Our first task following that decision was to identify the manner in which we would elicit the experts' opinions and synthesize the results into a usable form.

Although such qualitative research methods as structured focus groups, nominal group technique, consensus development conferences, and brainstorming can be used for the elicitation of expert opinion in a group setting, we concluded that the Delphi method offered the most appropriate vehicle for measuring collective agreement among our panel members and for developing a consensus on recommended average time expenditures in distinct types of cases. Such recommendations require the consideration of a wide variety of normative principles (a Delphi strength), such as "reasonably effective assistance," "prevailing professional norms," "quality representation," "ethical obligations" and the like, but the judgments themselves would take the form of numerical values, which lends itself to the way a consensus is typically measured with Delphi. Choosing a Delphi-based approach for this task made sense, given that the technique is considered to be "practical in problematic areas where either statistical model-based evidence is not available, knowledge is uncertain and incomplete, and human expert judgment is better than individual opinion."[135] The previous chapter provided a summary of commonly employed features of the Delphi method, and later in this report we describe specific details of how we used Delphi at the Williamsburg conference, but it is important to

[135] Prashant Nasa, Ravi Jain, and Deven Juneja, "Delphi Methodology in Healthcare Research: How to Decide Its Appropriateness," *World Journal of Methodology*, Vol. 11, No. 4, 2021, p. 118.

acknowledge here that this qualitative research technique needs to be employed with care. There certainly are instances in which Delphi may not be the most appropriate tool for eliciting and coalescing group opinions, even when the questions are subjective in nature. For example, Delphi might not be appropriate if the information sought is available through other means after reasonable expenditures of time and resources. In this case, however, we did not believe that a practical alternative approach to answering our research questions existed.

It should also be noted that some researchers have called into question various aspects of the Delphi method, including the manner in which the experts are identified and the associated potential for selection bias; an inability to provide the experts with complete anonymity when cloaking the identity of fellow panel members and their submissions is thought to be necessary to facilitate open and truthful responses; the potential for experts to drop out of the process if it is extended over too long a period; and instances where researchers have modified Delphi's original design to suit their specific project needs without adequately considering the consequences of such changes.[136] Such concerns are important considerations, but all expert elicitation methods, and indeed, all quantitative research techniques, have their own sets of strengths and weaknesses. The challenge for researchers is not to identify the "best" elicitation method of all (if indeed one exists), but instead to choose the one that makes the most sense given the specific needs of the study and to shape the process so that known concerns are minimized.

We felt that our research team's considerable experience both in the use of Delphi generally and in its specific application to public defense workload standards development would help ensure the stability and success of the process and address some of the criticism of the research technique. For example, we took steps to prevent individual responses from being associated with the identity of the submitting party, although we actively encouraged panel members to openly discuss the reasoning behind their thinking if they felt comfortable doing so. We believed that panel member dropout would not be an issue during an in-person session taking place in a single day. And the process we employed adhered to the foundational principles of the Delphi method that have been in place for seven decades, even if some modern adaptations (such as the use of a web-based tool for collecting panel decisions and for sharing aggregate response information with the panel) were used.

As indicated at the outset of this chapter, we assembled a Delphi panel composed of well-regarded and experienced criminal defense attorneys. We discuss panelist selection more fully in a subsequent section, but a potential for bias exists as a function of the nomination process (organizations with varying degrees of interest in supporting the work of defenders were asked for panelist recommendations) and in the manner in which panel membership was determined

[136] For useful overviews of such criticisms, see Sinead Keeney, Felicity Hasson, and Hugh P. McKenna, "A Critical Review of the Delphi Technique as a Research Methodology for Nursing," *International Journal of Nursing Studies*, Vol. 38, No. 2, 2001; and Chia-Chien Hsu and Brian A. Sandford, "Delphi Technique," in Neil J. Salkind, ed., *Encyclopedia of Research Design*, SAGE Publications, Inc., 2010.

(nominees were free to accept or decline our invitation). One way we could have reduced the risk of bias would have been to select panelists on a random basis (perhaps using a sampling frame of attorneys who were members of the criminal law sections of their state bars and stratifying for geography and practice type), but we believed that assembling an expert panel with a set of knowledgeable and experienced defenders who were respected by their peers was our first priority.

The use of a panel composed entirely of experienced criminal defense attorneys can also raise questions of potential bias. One set of potential biases relates to the exclusive use of criminal defense attorneys. The second set relates to the attorneys' experience levels. First, such attorneys might have an incentive to inflate their estimates of the amount of time required to represent clients because the attorneys would directly benefit from reduced caseloads and increased funding for public defense. On the other hand, defense attorneys might be reluctant to acknowledge inadequacies in current practice, biasing their time estimates downward. Second, highly experienced attorneys, particularly private defense counsel, might ground their time estimates in an unreasonably high standard of practice, again inflating those estimates. On the other hand, experienced attorneys might also be more efficient, which would bias their estimates of the amount of time required by the average attorney downward.

One potential solution to the perceived incentive problem would be to include other criminal justice professionals, such as judges and prosecutors, in the panel, whether as full participants or in an advisory role without the power to enter time estimates. We chose to limit the panel to practicing criminal defense attorneys for multiple reasons. Most important, much of a defense attorney's work takes place outside the courtroom, is largely invisible to other participants in the proceedings, and has no direct analog on the prosecution side. Examples of such work include communicating with and supporting clients and their families; finding program placements to support alternative disposition plans; waiting to see clients in jail; investigating the client's social, educational, and health history; addressing collateral consequences; and preparing mitigation information. Prosecutors and judges do not possess the knowledge to weigh in on how much of this work is required to provide a constitutionally adequate defense, nor on how long it should take. Additionally, including prosecutors and judges in the Delphi process as advisory members or discussants might also have a chilling effect on the discussion, especially on conversations regarding practices that may not always be constitutionally adequate as a result of resource constraints. The decision to include in the Delphi panels only persons who do the type of work under discussion is in line with decisions made in previous public defender and judicial workload studies. All 17 previous state-level public defense workload studies conducted by six different organizations used current or former defense attorneys exclusively for an initial qualitative adjustment process involving Delphi panels or focus groups. Similarly, modern state-level judicial workload studies use judges and judicial officers exclusively for making similar adjustments.

With regard to the countervailing biases that may be introduced by including only experienced criminal defense attorneys with a reputation for high performance, it should be noted that many of the selected attorneys had experience training and supervising junior attorneys, giving them a close familiarity with both the activities performed and the time required by attorneys of a variety of experience levels. Indeed, during the Delphi panel discussions, panelists noted the need to not assume their own level of experience in formulating their time estimates but also to consider the time needs of attorneys of average experience. The instruction for panelists to ground their time estimates in a reasonable interpretation of the relevant professional standards rather than an ideal world in which time and resources were unlimited was also designed to counter any potential biases.

An issue sometimes raised about the Delphi method concerns reliability, and it is often framed in two distinct ways: (1) whether the accuracy of the consensus opinions elicited from the expert panels can be assessed and (2) whether the results of the process can be replicated if repeated. While these are legitimate concerns, they are less relevant when considering a research technique designed to answer questions for which hard data are unavailable or impractical to obtain and in which professional judgment is at the heart of the inquiry. As one observer noted:

> Sackman (1975), in his critical review of the method, notes that Delphi studies are often oblivious to reliability measurements and scientific validation of the findings. Because the technique is intended to correct for lack of conclusive data by drawing on, and sharing, the knowledge and experience of experts (Fink et al. 1991), it should not be open to the same validation criteria as hard science. Murphy et al. (1998) note that the Delphi technique and other consensus development methods should not be viewed as a scientific method for creating new knowledge, but rather as processes for making the best use of available information, be that scientific data or the collective wisdom of participants. As Pill (1971, p. 62) suggested:
>
> > It is the questions of intuitive judgements, the marshalling of subconscious processes, dredging of half-formed ideas from the group memory that Delphi is most useful and as such, one cannot judge it on the same basis as a concrete measurement.[137]

For example, one notable use of Delphi has been for forecasting, often by calling on leading experts in a particular field to contemplate the likelihood of events or developments taking place in the future. Although it is certainly possible to assess the accuracy of such findings by waiting an appropriate length of time to determine the percentage of predictions that actually come true, the reality is that when the forecasts were made there likely was not a more practical means than Delphi (or a similar group communication process) for utilizing the best information available (in this instance, expert knowledge and insight) to contemplate what the future might hold. An analogous situation exists in the context of public defense workload standard development. No

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[137] Catherine Powell, "The Delphi Technique: Myths and Realities," *Journal of Advanced Nursing*, Vol. 41, No. 4, 2003, p. 380.

purely objective measurement currently exists for determining the exact number of witness interviews an attorney should conduct to provide effective assistance of counsel. In the absence of such information, a reasonable way to move forward to develop these critically necessary workload standards is by eliciting the group judgments reached by highly experienced practitioners who are well informed of controlling ethical and professional considerations. One of Delphi's most common applications is in needs assessment, which is the very type of question this study proposed to answer.[138]

As for replicability, repeating a Delphi session using a different set of panelists can yield results that differ to some extent from those produced in an earlier session conducted in the same manner. The purpose of Delphi is to coalesce group opinion, and if the composition of the group changes, then changes in the group consensus are certainly possible. Research suggests that larger panel sizes reduce replicability concerns somewhat.[139] Larger panel sizes also allow greater heterogeneity across panel members, which in turn makes "the results more meaningful to a more varied population."[140] While one source has estimated that there were about 250,000 criminal defense attorneys employed in the United States in 2022, our pool of target participants was far smaller.[141] As will be described subsequently (see the section titled "Expert Panel Selection" later in this chapter), the pool constituted the set of 105 attorneys recommended to us by five national organizations concerned with issues related to criminal defense in general and public defense in particular. The 33 panelists who participated in the Williamsburg conference made up about a third of that pool, a proportion that would help address replicability concerns, but they were self-selected, not randomly chosen. Essentially all recommended attorneys were invited, but the 33 were the only ones who accepted the invitation and were available to travel and attend the April 2022 conference (to be precise, a total of 55 recommended candidates accepted our invitation, although 22 later withdrew because of scheduling or health conflicts or were dropped for technical reasons).

We believe, however, that utilizing the national organizations' insight and knowledge of the backgrounds of all potential participants provided us with external objective evidence of the necessary expertise of all pool members, regardless of whether they volunteered or not. Separate from the question of expertise is the issue of whether the volunteers from the pool differed from

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[138] See, e.g., Chia-Chien Hsu and Brian A. Sandford, "The Delphi Technique: Making Sense of Consensus," *Practical Assessment, Research, and Evaluation*, Vol. 12, No. 10, 2007; Harriett S. Chaney, "Needs Assessment: A Delphi Approach," *Journal of Nursing Staff Development*, April 1987.

[139] According to Wuestefeld et al., 2020, p. 20,

> Small panel sizes and response rates may distort validity of the results of a Delphi study. There is little data on panel size and its effect on validity of reaching consensus. Yet, the reliability is thought to increase with panel size, while differences may be small with a panel of more than 12 experts. (citations omitted)

[140] Jane Chalmers and Mike Armour, "The Delphi Technique," in Pranee Liamputtong, ed., *Handbook of Research Methods in Health Social Sciences*, Springer, 2019.

[141] Zippia, Inc., "Defense Attorney Demographics and Statistics in the US," webpage, September 9, 2022.

those who declined our invitation in ways that could interject bias into the results. Because we know little about the decliners other than that they had been recommended by the five national organizations, we are not in a position to assess this issue. The obvious need here is for the researchers to carefully choose the membership of the panel so that the experts included represent experienced thinking about the subject and are highly regarded by others in the same field. We believe we took such steps in our panel membership identification and recruitment stage.

One repeated criticism found in the literature regarding Delphi focuses not on the method itself but instead on researchers who have used the technique for their work and have failed to document their approach or appear to have addressed important design issues during the study on an ad hoc basis. A recent review of 34 Delphi studies seeking consensus recommendations from medical practitioners regarding pathophysiology, infection transmission or control, and management of coronavirus disease 2019 (COVID-19) during the early days of the pandemic (when quality information on such subjects was lacking and Delphi was an obvious choice for eliciting the opinions of these experts) concluded that all of the published reports were deficient in some way. The shortcomings noted included a lack of reported details on expert panel selection, measures used for gauging a consensus, and the criteria employed for signaling the end of the session.[142]

Although we more fully describe some important aspects of our chosen Delphi process later in this chapter (see the "Expert Panel Selection" section) and in the next (see "Expert Panel Preparation and Session Procedures" in Chapter 4), the list that follows uses the quality assessment evaluation criteria employed in the COVID-19 study review as a framework for determining the appropriateness of our approach.[143]

1. **Was the problem area to be studied explicitly defined and communicated to the panel members?** The panelists received written materials and participated in videoconferences providing background on the research and the key issues in play.
2. **Was the selection of panelists based on objective and predefined criteria and related to the problem under study?** We developed a selection strategy that asked national organizations for recommendations of attorneys skilled in adult criminal defense, the subject matter of this study. Only attorneys so recommended would receive an invitation to participate. Although the specific criteria for membership were predefined, some subjective considerations were included in our request to the national organizations.
3. **Did the Delphi session include iterative discussions among panelists, provide controlled feedback of response statistics to the panel, and maintain strict anonymity of the panel members and their responses?** We used a roundless Delphi approach and an in-person session. Panelist discussions were continuous and largely unstructured, although they were eventually focused on case types in which measures of consensus were less favorable. Participants received real-time updates of multiple

[142] Nasa, Jain, and Juneja, 2021.

[143] Nasa, Jain, and Juneja, 2021, pp. 118–121.

summary statistics for submitted responses as values changed. Anonymity of responses was complete (neither the panelists nor the research team knew who submitted each estimate), but as is true for all in-person Delphi sessions, the identities of the panelists was not a secret. Although any open discussion would not be anonymous, the panelists could submit text comments and questions anonymously that would be immediately displayed to the group.

4. **Were the criteria for stopping the Delphi rounds based on consensus or stability and identified *a priori*? Were there alternative plans or methods to drop items if consensus was used as a stopping criterion of Delphi rounds?** In advance of the Delphi session, we chose the CoV for the distribution of recommended attorney hours for each study case type as both the consensus measure and the stability statistic. Group discussions would be focused on case types with consensus measures exceeding 0.5. Submissions of recommended average hours for case types would not be halted until the overall session itself was ended, although in actuality there were few submissions once a case type's consensus measure dropped below 0.5. Session end was defined as the earlier of either the predetermined cutoff time (5:00 p.m. Eastern) or when there were no meaning changes across all case types' stability statistics.

Summary of Key Ethics Rules and Professional Guidance

The purpose of this study is to produce a reliable professional consensus of the amount of time it should take, on average, for a lawyer to meet the *Strickland* standard for criminal defense services in different types of cases. In preparing the expert panel, we emphasized that "reasonably effective assistance of counsel" does not mean ideal or unlimited assistance, nor does it require pursuing every legal theory or every investigatory lead imaginable no matter how improbable. Rather, the panel should simply draw on the "prevailing professional norms" of practice and applicable ethics rules for understanding what a criminal defense attorney needs to do for each and every client.

Throughout the progeny of *Strickland*, the Supreme Court has repeatedly looked to various ABA practice standards as indicators of what those norms are. In *Padilla v. Kentucky*, for example, the Court noted,

> We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation. . . .[144]

Strickland specifically referred to the ABA's Defense Function Standards as an example of such guidance.[145] Another source for prevailing norms is the ABA's Model Rules, which have been adopted outright by most states and with minor modifications in all others. Accordingly,

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[144] *Padilla v. Kentucky*, 559 U.S. 356, 366–67, 2010 (citations omitted).

[145] *Strickland v. Washington*, 466 U.S. 688, 1984.

our study uses both the Model Rules and the Defense Function Standards as our key sources for defining prevailing professional norms for determining reasonably effective assistance of counsel.[146]

Our research team asked the panelists to refer to these key sources as they considered the attorney work needed and the time it would take to perform such work in each activity type and case type. Panelists participated in a webinar review of the applicable guidance in this area and received a written summary of those sources of prevailing professional norms to be referenced while completing the initial response chart and throughout the Delphi session.[147] In this way, authoritative ethics rules and practice standards anchor this study. In the next section, we briefly summarize the guidance presented to the panelists.

ABA Model Rules of Professional Conduct

The Model Rules address both the responsibilities of lawyers in representing a particular client and also situations in which a lawyer is not permitted to represent a client or must withdraw. The Model Rules are direct and straightforward, and, when adopted at a jurisdictional level, they apply with equal weight to both public defense providers and criminal defense attorneys who have paying clients.[148] The Model Rules have important implications for public defenders facing excessive caseloads.

The Model Rules require lawyers to provide competent representation, exercise diligence, and communicate with the client concerning the subject of the representation, as follows:

- Rule 1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- Rule 1.3 Diligence: A lawyer shall not neglect a legal matter entrusted to the lawyer.[149]

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[146] As noted earlier, the Model Rules used in this inquiry have been adopted in some form in all 50 states, and the U.S. Supreme Court has held that the Defense Function Standards are "valuable measures" for determining what is reasonably effective assistance of counsel pursuant to prevailing professional norms. These two bodies of law, therefore, are appropriate sources of prevailing professional norms to determine workload standards to be applicable in every state in the country.

[147] The specific materials provided to panelists are on file with the authors and are available on request. They can also be found at ABA SCLAID, "National Public Defense Workloads Standards," webpage, July 20, 2023. As of July 24, 2023: https://www.americanbar.org/content/aba-cms-dotorg/en/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/natl-pub-def-standards/

[148] "The Rules provide no exception for lawyers who represent indigent persons charged with crimes" (ABA Formal Opinion 06-441, 2006).

[149] The Defense Function Standards similarly provide that

> Defense counsel should act with diligence and promptness in representing a client . . . [b]ut defense counsel should not act with such haste that quality representation is compromised. Defense counsel and publicly funded defense entities should be organized and supported with adequate staff and facilities to enable them to represent clients effective and efficiently" (Defense Function Standard 4-1.9(a) [ABA, 2017]).

- Rule 1.4 Client-Lawyer Relationship: (a) A lawyer shall . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information . . . (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[150]

Additionally, the Model Rules create clear obligations for attorneys, including

> the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area.[151]

Excessive workloads create conflicts for lawyers in violation of their ethical obligations. Model Rule 1.7(a)(2) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. According to the rule, a concurrent conflict exists when there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. That is exactly what happens when a lawyer represents more clients than he or she can competently represent. Model Rule 1.16(a) requires a lawyer to withdraw from the representation of a client if the representation will result in a violation of the rules of professional conduct.

Model Rule 5.1 provides that a lawyer with supervisory or managerial authority in the organization is responsible for another lawyer's violation of the Rules of Professional Conduct if he or she orders, or with knowledge of the specific conduct, ratifies the conduct involved, or if he or she knows of the conduct at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action. Accordingly, the responsibility for violations of Model Rule 1.16(a) and 1.7(a)(2) caused by excessive caseloads may fall squarely on the shoulders of the supervising or lead attorney within the public defense provider.

ABA Criminal Justice Standards

The ABA Standards for Criminal Justice (otherwise known as the Criminal Justice Standards) are the preeminent substantive practice standards on all aspects of criminal law and the operations of the criminal justice system. These standards "are the result of the considered judgment of prosecutors, defense lawyers, judges and academics who have been deeply involved in the process."[152] The Criminal Justice Standards have been cited by federal courts in more than

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[150] ABA, 2023.

[151] ABA Formal Opinion 06-441, 2006, p. 3.

[152] Martin Marcus, "The Making of the ABA Criminal Justice Standards," *Criminal Justice*, Vol. 23, No. 4, 2009, p. 15.

700 opinions.[153] They cover every aspect of criminal justice, including separate volumes on criminal appeals, the defense function, discovery, DNA evidence, guilty pleas, mental health, pretrial release, the provision of public defense services, the prosecution function, prosecutorial investigations, sentencing, speedy trial issues, and the treatment of prisoners, among others.

The Defense Function Standards are the sections of the ABA Criminal Justice Standards that comprehensively address the duties of a criminal defense lawyer. The Defense Function Standards are the result of a lengthy process that began in 1964 and culminated with the approval and publication of a fourth edition of the standards by the ABA in 2015.[154] They are the most relevant standards to reference in reaching a professional consensus about what a criminal defense lawyer should do to provide reasonably effective assistance of counsel.

As noted above, prior to the in-person meeting in Williamsburg, each study participant was asked to review a summary of the applicable ethics rules and Defense Function Standards and attend a webinar presentation at which the rules and standards would be discussed.[155] Both the written summary and the review focused on rules and standards governing fundamental aspects of defense lawyer practice, including

- communications with clients[156]
- pretrial release determinations[157]
- discovery and investigations[158]
- clients with mental disorders[159]
- activities required before recommending a plea to a client[160]
- hearings and trials[161]
- sentencing.[162]

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[153] Marcus, 2009, p. 2.

[154] Rory K. Little, "ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions," *Hastings Law Journal*, Vol. 62, 2011.

[155] The discussion focused on the Defense Function Standards but also included discussion of relevant portions of other Criminal Justice Standards, including the Standards on Mental Health, Discovery, Guilty Pleas, and Pretrial Release.

[156] See, e.g., Defense Function Standard 4-3.1, 4-3.3, 4-3.9, 4-5.1(b), and 4-5.2(b) (ABA, 2017).

[157] See, e.g., Defense Function Standard 4-3.2 (ABA, 2017).

[158] See, e.g., Defense Function Standard 4-3.7(b), 4-4.1, and 4-4.5 (ABA, 2017).

[159] See, e.g., ABA Criminal Justice Standards on Mental Health 7-1.4 (ABA, *Criminal Justice Standards on Mental Health*, August 8, 2016).

[160] See, e.g., Defense Function Standard 4-6.1 (ABA, 2017); ABA Criminal Justice Standards on Guilty Pleas Standard 14-3.2(b) (ABA, 2016).

[161] See, e.g., Defense Function Standard 4-4.6 (ABA, 2017).

[162] See, e.g., Defense Function Standard 4-8.3 (ABA, 2017).

Because more than 90 percent of state court criminal cases resolve prior to trial,[163] we placed particular emphasis on standards that are applicable before recommending a plea to a client. For example, defense counsel has a duty to explore disposition without trial and to "promptly communicate to the client every plea offer."[164] In addressing pleas with clients, defense counsel must be candid; "not intentionally understat[ing] or overstat[ing] the risks, hazards, or prospects of the case or exert[ing] undue influence on the client's decisions regarding a plea." For this reason, the Defense Function Standards directly address the duties a defense lawyer must fulfil prior to a plea being recommended. Standard 4-6.1(b) provides as follows:

> In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client and should not recommend to a client acceptance of a disposition offer [plea] *unless and until appropriate investigation and study of the matter has been completed*. Such study should include discussion with the client and analysis of the relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.[165]

The Defense Function Standards further state that defense counsel "should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment."[166]

Case Type and Activity Type Category Development

Case Types

Drawing from similar work conducted in the state-level workload studies, we developed a set of case type categories that capture the bulk of public defense representations in adult criminal

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[163] An NCSC analysis of 91 state court jurisdictions in 21 states (nearly all of which were located within the 300 most populous counties in the country) found that just 8 percent of misdemeanor cases and 5 percent of felony cases reached the trial stage (Brian J. Ostrom, Lydia E. Hamblin, Richard Y. Schauffler, and Nial Raaen, *Timely Justice in Criminal Cases: What the Data Tells Us*, National Center for State Courts, August 2020, p. 24).

[164] Defense Function Standard 4-6.1(a) and 4-5.1(c) (ABA, 2017).

[165] Defense Function Standard 4-6.1(b) (emphasis added) (ABA, 2017). Also see the following: "The court should not accept the plea where it appears the defendant has not had the effective assistance of counsel" (ABA Criminal Justice Standards, Guilty Pleas, Standard 14-1.4[d]); ABA Criminal Justice Standard 14-2.1, which notes that a defendant should be permitted to withdraw a plea if the defendant was denied the effective assistance of counsel; and "To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed" (ABA Criminal Justice Standard 14-3.2[b]) (ABA, 2017).

[166] Defense Function Standard 4-6.2(d) (ABA, 2017).

cases at the state trial-court level. These categories were the ones used by our expert panel as they considered questions related to average attorney hour estimates in different types of cases. In the development of these categories, we were mindful of three needs: (1) the categories must be defined in a way that would translate into various state criminal codes in a straightforward manner, (2) they must reflect reasonable assumptions about relative differences between necessary average attorney time expenditures, and (3) they must make intuitive sense to experienced defenders when asked to consider their own caseloads without requiring them to refer to a detailed list of statute citations. The case types chosen for this study encompass representations arising out of probation and parole violation proceedings, DUIs, non-DUI misdemeanor prosecutions with a potential for incarceration, and noncapital/non-DUI felony prosecutions (Table 3.3).

Using the combined experiences of our research team members in conducting public defense weighted caseload studies, we believe that defenders with extensive backgrounds in representing clients in a variety of state trial-level court cases would be able to divide their felony representations into three relative severity groups (High, Mid, and Low), misdemeanors into two groups (High and Low), and DUIs (including both those charged as felonies and those charged as misdemeanors) into two groups (High and Low). The Felony–High categories were further divided by carving out offenses with a potential for LWOP, intentional homicide offenses, and sex offenses, distinguishing those specific subcategories from a catchall Felony–High–Other grouping.

Table 3.3. NPDWS Case Types

Case Type	Description	Sentencing Range	Examples
01: Felony–High–LWOP	Felonies with possible sentences of LWOP	LWOP	
02: Felony–High–Murder	Non-LWOP felonies involving intentional killing of a person	Up to life with possibility of parole	First-degree murder, malice murder, second-degree murder, felony murder
03: Felony–High–Sex	Non-LWOP felonies involving serious sex offenses	More than 15 years (including life with possibility of parole)	Rape, aggravated sexual assault, child sex abuse, child pornography with victim
04: Felony–High–Other	Non-LWOP felonies (including DUIs resulting in death) other than charges falling into the high felony categories for murder or serious sex offenses	More than 15 years (including life with possibility of parole)	Negligent homicide, manslaughter, aggravated assault, assault with a deadly weapon, kidnapping
05: Felony–Mid	Felonies (including DUIs resulting in death) including serious property crimes, serious drug distribution crimes, and less serious violent crimes	Possible sentences of 3 to 15 years	Arson, armed robbery, grand theft, breaking and entering, drug distribution or manufacturing, battery

Case Type	Description	Sentencing Range	Examples
06: Felony–Low	Felonies (including DUIs resulting in death) including less serious property crimes, less serious drug felonies, and minor crimes of violence	Possible sentences of up to 2 years	Theft, larceny, burglary, simple assault
07: DUI–High	Repeat DUIs, serious DUIs, and DUIs causing nonfatal injuries (can be a felony or misdemeanor)	Possible sentences of more than 2 years	
08: DUI–Low	First or successive DUIs (typically misdemeanors)	Possible sentences of up to 2 years	
09: Misdemeanor–High	Serious misdemeanors (other than DUIs) involving enhanceable misdemeanors (such as misdemeanors triggering repeat offender sentencing), sex misdemeanors, or violent misdemeanors	Any	Domestic violence, misdemeanor assault, misdemeanor animal cruelty, exposure
10: Misdemeanor–Low	Less serious misdemeanors (other than DUIs or those falling into the high misdemeanor category)	Any	Petty theft, drug possession, drug paraphernalia, trespass, status offenses, criminal traffic offenses
11: Probation or **Parole Violations**	Probation or parole violations derived from either felony or misdemeanor offenses	Any	

The "Sentencing Range" and "Examples" columns in Table 3.3 are intended to illustrate relative differences between categories within the felony and misdemeanor divisions. Many states use indeterminate sentencing, which means that workload standards categories based solely on potential sentence length at the time of arrest or when the charging document is filed would present challenges to administrators trying to map the case types to specific sections of a state's criminal code. A related problem would even apply in states with determinate sentencing because there are no universally accepted rules for defining, for example, high-, medium-, and low-severity felonies on the basis of potential jail or prison time. The ranges provided in Table 3.3 are simply a way to help panelists think about the high, mid, and low types in terms of those involving the highest-severity sentences, those with the lowest, and a middle group with "typical" consequences for a felony conviction. The same applies to the examples shown in the table. Misdemeanor animal cruelty is commonly punishable by up to one year in jail, and we included it in the table to illustrate what might constitute a Misdemeanor–High "serious misdemeanor" case. But there certainly are states where a first conviction would be limited to about three months imprisonment, which would likely be considered a low-level misdemeanor by defenders practicing in those jurisdictions. Our intent was for panelists to focus on relative severity rather than on the examples provided, which may or may not be a good fit as applied to their practice states' legal regimes. This further allows for flexibility to account for jurisdictional differences when applying these case types.

Mandatory sentencing enhancements, three-strikes laws, and multiple counts can turn an ostensibly low-level criminal case (as defined in our case type table) into a prosecution with decades of imprisonment on the line. We asked the panelists to focus only on the most serious charge in a case for the purpose of case type assignment. For example, if they have had Felony–Low cases with life sentences as potential consequences because of some sort of enhancement, they were instructed to nevertheless include such representations in their estimates for the Felony–Low category proportional to the relative frequency in which such situations were actually encountered.

We did not include capital crimes, in part because defendants in such matters are often represented by specialized counsel, private law firms, or units within public defender offices that have funding streams and compensation policies that are distinct from those applicable to traditional public defense providers. Another reason for carving out capital cases is that this specialized practice has long been the subject of close scrutiny by researchers, public defense administrators, advocacy organizations, and policymakers, thus reducing (although certainly not eliminating) concerns over excessive caseloads and resource shortfalls when compared with the situation arising from the far greater numbers of misdemeanor and noncapital felony prosecutions in this country.[167]

It should also be noted that public defense counsel routinely represent adult clients in matters that fall outside the 11 categories listed in Table 3.3. Such matters can include, for example, extradition hearings, the seeking of postconviction relief, contempt proceedings, sentence modifications and reviews, witness representations, and civil commitments. We did not include these types of representations because of the significant diversity between states in the procedural and substantive law applicable to such proceedings and because local public defense delivery system policies differ markedly as to whether defenders would be appointed to represent clients in matters not directly related to a current prosecution.

The members of the expert panel were asked to consider a case as involving all charges filed against a client arising out of a single event or series of events and being prosecuted together. They were further asked to remember that the classification of that case for the purposes of this exercise would be by highest charge. Thus, if any charge in a case involved a felony with a possible sentence of LWOP, then the case would be classified as a Felony–High–LWOP regardless of what the other charges were; if no Felony–High–LWOP charges were present but the prosecution involved an allegation of intentionally killing a person, the case would be classified as a Felony–High–Murder regardless of what the other charges were, and so on. This sort of hierarchy based on both sentence severity and offense subject matter for the purpose of assigning a single case type designation to multicharge appointments is common in case management systems used by courts and indigent defense providers.

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[167] See, e.g., ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, February 2003.

Activity Types

As was done in the majority of the public defense workload studies we reviewed, we developed a set of eight activity type categories to capture panelists' estimates at the task level (Table 3.4). We kept the total number of categories to a minimum to reduce any burden on the panelists when developing their estimates. We instructed the panelists to consider only attorney time. For example, they were asked not to include time a staff member or outside investigator spends investigating one of their cases, but they would include the time an attorney spends supervising and meeting with the investigator, going over the investigator's work, and any additional follow-up work conducted directly by the attorney. In addition, only time directly spent on individual cases was sought, which would exclude time spent, for example, in general team or office meetings, professional training, travel, or waiting.

Table 3.4. NPDWS Activity Types

Activity Type	Definition	Includes	Excludes
Client communication and care	Time spent communicating with client or arranging care, support, or other personal and social services for the client	• All out-of-court communication with clients (mail, phone, video call, in person, etc.) as well as communication with client family members related to the criminal case • Client care and support activities performed by the trial attorney, including working with social services, treatment providers, or outside agencies on behalf of clients, as well as handling medical, family, or other issues affecting the client during a criminal case	• Meetings or communications to prepare client or family members for court hearings, which falls under Court Preparation • Arranging services exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation • Time spent traveling or waiting to meet with client.
Discovery and investigation	Time spent on investigation of the case and exchange of discovery with the prosecution	• Requesting and reviewing discovery materials and other case-related documents, materials, recordings, or other evidence • Case-related investigation activities conducted by the attorney, such as viewing the scene and physical evidence, canvassing for witnesses, preparing for witness interviews, and interviewing witnesses, preparing subpoenas, taking photos or videos, and working with and supervising investigators • Reviewing, analyzing, and organizing case-related materials and evidence; case file documentation • Drafting memos or notes related to discovery and investigation	
Experts	Time spent hiring and working with pretrial and trial experts (but	• Locating, interviewing, corresponding with, consulting with, and reviewing reports of experts for the defense, including experts related to competency	• Experts exclusively related to Sentencing and Mitigation, which

Activity Type	Definition	Includes	Excludes
	excluding experts exclusively related to sentencing)	and other pretrial matters, as well as trial experts	falls under Sentencing and Mitigation
Legal research, motions practice, other writing	Time spent on legal research and writing	• Research; drafting of motions, pleadings, briefs, etc. related to pretrial, motions, or trial, including any written submission to the prosecutor related to negotiations	• Research or writing exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation
Negotiations	Time spent on resolving the matter or any part of the matter by agreement	• Discussions with a prosecutor or officer to dismiss a case or resolve by plea bargain	
Court preparation	Time spent preparing for any and all pretrial hearings, as well as trial	• Preparing for factual and legal arguments at hearings • Preparing for direct examinations, cross-examinations, voir dire, etc. • Client and\or family preparation for hearing and trial • Subpoenaing and preparing witnesses • Preparing materials for court, including exhibits and presentations • Defense team meetings or other consultation with colleagues specifically in preparation for hearing or trial • Moot arguments and mock examinations	• Preparation for hearings exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation
Court time	Time spent in court for pretrial hearing and trial	• Attending pretrial hearings, such as initial appearance, bail hearings, status hearings, competency proceedings, motions hearings, etc. • Trial (bench or jury)	• Travel time and waiting time • Court time related to Sentencing and Mitigation, which falls under Sentencing and Mitigation
Sentencing and mitigation and post-adjudication	Time spent preparing for sentencing, attending sentencing hearing(s), and on any postadjudication activities	• Developing or collecting evidence to be used in sentencing • Witness preparation for sentencing hearings • Consulting with sentencing and mitigation experts • Preparing for sentencing, including review and rebuttal of prosecutorial sentencing materials • Preparing for and attending sentencing hearings • Addressing fines, fees, and restitution • Filing postadjudication motions or notices, e.g., notice of intent to appeal or waiver of appeal, motion or request for appellate counsel, motion for DNA expungement • Preparing and filing any required documentation for appeal, e.g., statement of issues • Preparing file for appeal or transition to appellate attorney • Communication with appellate attorney	

Expert Panel Selection

When using the Delphi method to structure a group communication process, "choosing the appropriate subjects [to serve as experts] is the most important step in the entire process because it directly relates to the quality of the results generated."[168] To help us in our expert panel selection, we reached out to five major national organizations with a focus on the provision of effective assistance of counsel in criminal cases: Gideon's Promise,[169] the National Association for Public Defense (NAPD),[170] the National Association of Criminal Defense Lawyers (NACDL),[171] the National Criminal Defense College (NCDC),[172] and NLADA.[173] All five organizations were asked to nominate several attorneys with expertise in adult criminal defense in state trial-level courts and a track record of good practice. The research team requested that each group identify a diverse group of criminal defense lawyers, in terms of gender identity, race, and ethnicity, as well as geography and practice type (e.g., public defenders, appointed private counsel, private counsel with contracts to provide indigent defense, and private counsel who primarily or exclusively represent paying clients). We further asked that the nominated attorneys have significant experience in misdemeanor cases, in felony cases, or in a mix of both. Importantly, we asked the organizations to identify attorneys "to whom you would send a beloved family member if he/she/they found themselves in the unfortunate circumstance of being charged with a crime."

We discouraged the nomination of expert panelists who primarily or exclusively handle white-collar crimes (not a particular focus for indigent defenders) or case types outside the scope of this project (e.g., appeals, juvenile, or death penalty prosecutions). We further discouraged the nomination of those who primarily serve as public defense system administrators or supervisors

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[168] Hsu and Sandford, 2007, p. 3.

[169] Gideon's Promise describes itself as "a nonprofit public defender organization whose mission is to transform the criminal justice system by building a movement of public defenders who provide equal justice for marginalized communities" (Gideon's Promise, "What We Do" webpage, undated).

[170] NAPD's stated purpose is to engage "all public defense professionals into a clear and focused voice to address the systemic failure to provide the constitutional right to counsel, and to collaborate with diverse partners for solutions that bring meaningful access to justice for poor people" (NAPD, "Statement of Purpose ," webpage, undated.)

[171] NACDL's self-described mission "is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level" (NACDL, homepage, undated).

[172] NCDC indicates that it has provided "over 9,000 defense attorneys with transformative trial-skills training through its comprehensive Trial Practice Institute and shorter weekend programs on specific trial skills topics, all staffed by faculty who are talented and successful courtroom lawyers, trainers and coaches" (NCDC, "History of NCDC," webpage, undated).

[173] NLADA states that it "leads a broad network of advocates on the frontlines to advance justice and expand opportunity for all by promoting excellence in the delivery of legal services for people who cannot afford counsel" (NLADA, "About NLADA," webpage, undated).

unless they also retain a significant trial caseload. And we emphasized the importance of significant experience in the state courts rather than federal courts only.

In total, we received 119 nominations from the five organizations identifying 105 attorneys (some nominees had been recommended by more than one organization). We then drafted a letter to the nominees explaining the study's purpose and approach and informing them that they had been nominated to participate as an expert panelist. We explained that we anticipated that the expert panel conference would be held in person and that the project would cover reasonable travel expenses. The inclusion of an assurance to cover nearly all travel expenses was an important part of our outreach. We were aiming for a diverse panel of experts from across the country, including rural and urban jurisdictions. Covering travel expenses ensured that no individual was precluded from participation based on financial resources or remoteness of practice.

Because the study was still underway during what we hoped to be the waning days of the coronavirus pandemic, we required proof of COVID-19 vaccination as a condition of participation, along with the wearing of masks if required:

> It should be also noted that at the present time, we anticipate that the Delphi panelists will meet in an all day, in-person session at the National Center for State Courts in Williamsburg, VA on February 3, 2022. . . . **In addition, panelists will be required to provide proof of full vaccination against COVID- 19 before admission to the in-person session and, if NCSC or local health authorities require them to do so, wear masks at all times indoors during the session unless actively eating or drinking.** Please note that should public health considerations or other factors make an in-person session impractical, the Delphi session will still take place on February 2–4, 2022, but as a virtual event instead.

In addition, we required certain commitments from the candidates if they wished to be considered for panel membership:

> This study will require the participant to: (1) review background materials provided by the project team on criminal defense and ethical standards, as well as summary data regarding existing public defense workload studies; (2) virtually attend background webinars (up to 2); and (3) attend an in-person session in Williamsburg, VA on February 3, 2022 (air travel is likely to take place on February 2 and 4) with proof of full vaccination against COVID-19 and agree to wear masks if asked to do so. Will you be willing to participate in this study if selected, including traveling to Williamsburg for the in-person session as described as well as reviewing project materials and viewing the webinars?

A total of 54 attorneys agreed to the above requirements. We then assessed the degree to which each of the candidates possessed extensive state trial-level court criminal defense experience, excluding those whose career was primarily based in the federal courts, specialty courts, or in organizational leadership (the candidate's current position, such as working for a federal defender office or in an advocacy organization, would not serve as a basis for exclusion

as long as the requisite state court defense experience was present). Six candidates were excluded as a result of that review.

Reported uses of the Delphi method have described panels as small as seven members and some exceeding 1,000 members. According to the experiences of our research team in using Delphi for expert opinion elicitation, we believed that having between 30 and 40 panelists would strike a reasonable balance between enhanced expert diversity, stability of the results, and the logistical and organizational challenges of having many people in a single room trying to engage in meaningful discussions.[174] Accordingly, we divided the 49 potential panelists into two groups, one set of candidates to whom we would immediately offer panel membership, and another group that would be kept in reserve in the event that any of the initial set withdrew or were removed because of a failure to comply with the mandatory requirements set forth above. Nearly all who received our initial offer to join the panel accepted, although we later deemed two invitees to be ineligible because of noncompliance with project requirements.

By the end of December, however, the delta variant of COVID-19 was grabbing headlines and causing major disruptions in air travel. A virtual conference was initially considered as a possible alternative, but we continued to believe that an in-person session would offer the best opportunity for facilitating group consensus on our research questions. Out of an abundance of caution, we moved the February 3 event to April 28, 2022, but kept all other aspects of panel requirements and activities the same. Unfortunately, the change in date caused several of our original panelists to withdraw because of work conflicts. Thankfully, we had our reserve of equally qualified candidates on which to draw and eventually received 35 commitments to the new date from both the original invitees and from the reserve candidates who agreed to participate. With two last-minute withdrawals because of injury or workload pressures, 33 panelists ultimately made up our expert panel. (Table 3.5 lists the final panelists and their positions at the time of the conference.) Short biographies for these panelists can be found in Appendix A.

[174] See discussion of the relationship between sample size and stability in Anthony F. Jorm, "Using the Delphi Expert Consensus Method in Mental Health Research," *Australian and New Zealand Journal of Psychiatry*, Vol. 49, No. 10, 2015, p. 891.

Table 3.5. Expert Panelists for the NPDWS

Panelist Name	Title and Organization
Jenny P. Andrews	Director of Training, Indigent Defense Improvement Division, Office of the State Public Defender, Oakland, California
Tamar R. Birckhead	Attorney, Parrett Porto Parese and Coldwell PC, Hamden, Connecticut
Alison Bloomquist	Vice President of Strategic Alliances and Innovation, National Legal Aid and Defender Association, Washington, D.C.
Carmen Brooks	Assistant Federal Defender, Federal Defender Program, Inc. (Northern District, Georgia), Atlanta, Georgia
Jason H. Broth	Assistant Public Defender, DeKalb County Public Defenders, Atlanta, Georgia
Thomas Carver	Attorney, Carver & Associates, Springfield, Missouri
Eric J. Davis	Chief of the Felony Trial Division, Harris County Public Defender's Office, Houston, Texas
C. Dawn Deaner	Attorney & Executive Director, Choosing Justice Initiative, Nashville, Tennessee
Damaris Del Valle	Deputy Chief of Felonies, Law Offices of the Public Defender, Carlos J. Martinez, Miami, Florida
Carrie Ellis	Misdemeanor Chief and Training Director, Harris County Office of Managed Assigned Counsel, Houston, Texas
Karl Fenske	Deputy Public Defender IV, Los Angeles County Public Defender's Office, Los Angeles, California
Carey Haughwout	Public Defender for Palm Beach County, Office of the Public Defender, 15th Judicial District, West Palm Beach, Florida
Aaron Hawbaker	Supervisor, Iowa Adult Public Defender Office, Waterloo, Iowa
Gemayel Haynes	Team Lead, Senior Litigator, Harris County Public Defender's Office, Houston, Texas
Bryan Kennedy	Senior Assistant Public Defender, Office of the Public Defender, Fairfax, Virginia
Andrea Konow	Senior Trial Attorney, Defender Association of Philadelphia, Philadelphia, Pennsylvania
Rick Kroeger	Associate Attorney, Simmons Hanly Conroy, LLC, Alton, Illinois
La Mer Kyle-Griffiths	Assistant Public Defender, Santa Barbara County Office of the Public Defender, Santa Barbara, California
Elizabeth Lashley-Haynes	Deputy Public Defender IV, Los Angeles County Office of the Public Defender, Los Angeles, California
Corrie-Ann Mainville	Public Defender, Connecticut Division of Public Defender Services, Litchfield, Connecticut
Alexzandria Poole	Director of Defender Initiatives, Zealous, Detroit, Michigan
Diane DePietropaolo Price	Assistant Deputy Public Defender, New Jersey Office of the Public Defender, Camden, New Jersey
Heather Rogers	Public Defender, Santa Cruz County Office of the Public Defender, Santa Cruz, California
Jamie C. Schickler	Managing Attorney of the Behavioral Health Division and Co-Director of the Intern/Extern Program, Law Office of the DeKalb County Public Defender, Atlanta, Georgia
Georgia L. Sims	Assistant Deputy Public Defender, Public Defender of Metropolitan Nashville & Davidson County, Nashville, Tennessee
S. Christie Smith IV	Senior Partner, Smith Advocates LLC, Leesville, Louisiana

Panelist Name	Title and Organization
Ryan Swingle	Attorney, Ryan J. Swingle Attorney at Law, Athens, Georgia
Amber L. Tucker	Owner/Principal, The Law Office of Amber L. Tucker, LLC, Portland, Maine
Colette Tvedt	Attorney, Law Firm of Colette Tvedt LLC, Denver, Colorado
Andre Vitale	First Assistant Deputy Public Defender, Trial Chief, New Jersey Office of the Public Defender, Jersey City, New Jersey
Nanzella Whitfield	Managing Director, Northern Region, Public Defender Division, Massachusetts Committee for Public Counsel Services, Boston, Massachusetts
Glover Wright	Assistant Public Defender, Law Office of the Shelby County Public Defender, Memphis, Tennessee
Lorinda Youngcourt	Trial Attorney, Federal Defenders of Eastern Washington and Idaho, Spokane, Washington

Our original target for the size of the panel was about 35 members, but with a pool of 105 recommended attorneys at the start of the selection process that was reduced to just the 54 who accepted our invitation to participate, we had few options for selecting a panel that could be stratified along gender, racial, ethnic, age, state, urban versus rural, or practice type lines to better represent the demographics of defenders in the United States. We did not collect information from the final panelists as to their gender, race, or ethnicity. We do know that there was at least one panelist from 19 different states, with California, Texas, and Tennessee contributing a total of 11 panelists. State breakdowns are as follows: California: five panelists, Colorado: one, Connecticut: two, District of Columbia: one, Florida: two, Georgia: four, Iowa: one, Illinois: one, Louisiana: one, Massachusetts: one, Maine: one, Michigan: one, Missouri: one, New Jersey: two, Pennsylvania: one, Tennessee: three, Texas: three, Virginia: one, Washington: one.[175] The state identification reflected here may not correspond to the location where a panelist spent the majority of his or her career as a state trial court-level defense attorney.

It is important to note that taking into account organizational or institutional affiliations and recommendations by third parties when selecting experts is a commonly employed procedure in Delphi studies.[176] Our use of Gideon's Promise, NAPD, NACDL, NCDC, and NLADA for the identification of the initial pool of potential panelists was intended to remove the project team as the primary decisionmaker in the expert selection phase of our work and to capitalize on these organizations' national reach and far greater familiarity with individual members of the criminal defense bar across the country. But as a review of the mission statements of the referring organizations noted earlier suggests, these organizations are not disinterested observers of the

[175] Building a panel that accurately reflects state-level populations and where each state contributes at least one panelist would not have been practical. If, for example, a single panelist represented the population in Wyoming, the least populated state in the country, 67 panelists would be needed from California alone.

[176] Marlen Niederberger and Julia Spranger, "Delphi Technique in Health Sciences: A Map," *Frontiers in Public Health*, Vol. 8, No. 457, September 2020, p. 5.

criminal justice system; they are instead advocates for system improvement related to criminal defense specifically and the criminal justice system more broadly. This suggests at least the possibility that the nominations we received reflected certain organization biases that may have affected the final composition of the expert panel. We have no evidence that this was indeed the case and only note the possibility here as a factor to be used when interpreting the results.

Chapter 4. The Williamsburg Conference

Expert Panel Preparation

As described previously, each of the 33 panelists present in Williamsburg, Virginia, for the in-person conference was a highly regarded criminal defense attorney with considerable experience representing clients in state courts. Although we were confident that the panelists were extremely well versed in applicable law and procedures, as well as litigation strategy and courtroom tactics, we took steps in advance of the Delphi session to ensure that all participants understood what was required to properly fulfill the mandate of the Sixth Amendment as articulated by the Supreme Court in *Strickland v. Washington*.

We held a mandatory online video seminar to review ethical and practice standards as to prevailing professional norms for the purposes of defining *reasonably effective assistance of counsel*. The key sources referenced, both during the seminar and later at the Williamsburg conference, were the ABA's Model Rules and Defense Function Standards.[177] In addition, a document was provided to each panelist summarizing defense counsel's duties toward their clients in such areas as client communications, pretrial release determinations, discovery and investigations, and sentencing, as well as what is required before an attorney can recommend a proposed plea agreement.

We held a second mandatory videoconference to review the findings of prior public defense workload studies. This session also explained some of the concepts involved in the development of workload standards for counsel providing public defense services, including how case weights and annual caseload standards are used to determine attorney staffing needs based on expected caseloads and to identify instances where a public defense provider may have more cases than can be handled appropriately. As with the prior session, written materials providing additional detail about the topics covered in the videoconference were then sent to participants for their review prior to the in-person session.

The third pillar of our presession preparation for the expert panel conference was a set of instructions to the panelists describing the procedures for the Williamsburg meeting and what they should consider when addressing the core question of the average amount of attorney time required to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.[178] The instructions asked them to consider that question in the context of the 11 study

[177] As discussed previously, the discussion centered on the Defense Function Standards but also included relevant portions of other Criminal Justice Standards, including the Standards on Mental Health, Discovery, Guilty Pleas, and Pretrial Release. See ABA Criminal Justice Standards (ABA, 1992; ABA, 2016; ABA, 2023).

[178] As noted previously, the materials presented to the panelists are on file with the authors and are available on request. They can also be found at ABA SCLAID, 2023.

case types described in Chapter 3. For ease of reference, Table 4.1 summarizes those categories (complete definitions for these case types can be found in Table 3.3).

Table 4.1. Summary of NPDWS Case Types

Case Type
01: Felony–High–LWOP
02: Felony–High–Murder
03: Felony–High–Sex
04: Felony–High–Other
05: Felony–Mid
06: Felony–Low
07: DUI–High
08: DUI–Low
09: Misdemeanor–High
10: Misdemeanor–Low
11: Probation and Parole Violations

In addition, the panelists were instructed to further divide their average attorney time recommendations for each of the case types into eight activity type (or case task) categories, which are also described in Chapter 3. Again, for ease of reference, Table 4.2 summarizes those categories (complete definitions for these activity types can be found in Table 3.4).

Table 4.2. Summary of NPDWS Activity Types

Activity Type
1. Client Communication and Care
2. Discovery and Investigation
3. Experts
4. Legal Research, Motions Practice, Other Writing
5. Negotiations
6. Court Preparation
7. Court Time
8. Sentencing and Mitigation and Postadjudication

We explained to the panelists that the recommended averages at the activity type level, like the averages for entire cases, should reflect the frequency with which the activity would take place. For example, the "Court Time" activity type for "Felony–Low" case types would include time spent in trial in such cases, but only to the extent that trials actually take place. The sum of a panelist's recommended averages for each activity type for a particular case type should equal the panelist's recommended average for all attorney time expenditures in cases of that case type.

The panelists were asked to review the full set of results from the 17 prior studies as presented in Table 3.1 and Table 3.2 for the purpose of seeing the results that other research efforts have produced, albeit for specific states rather than for a default set of case weights that are not jurisdiction-specific. To provide the panelists with some sense of what we were asking them to do in this study, we attempted to map, to the extent possible, the case weights developed in those 17 studies into the 11 study case type categories. The mapping presented significant difficulties because many of the prior studies described their chosen case types in ways that were either more detailed (e.g., "superior nonconcurrent felony-chapter 265 crime against person") or less detailed (e.g., "misdemeanor") than our definitions. In addition, the prior studies combined various offenses to create each of their case type categories in a way that would not be repeated if a public defense delivery system administrator wished to use the workload standards arising out of our effort. Some of the past studies included case types that were overinclusive when compared with the case types chosen for the national study. For example, the Colorado study created a case type category in which all Class 2, 3, 4, 5, and 6 felony sexual assault cases would be grouped together. In our case type scheme, Class 2 sexual assault felonies, which are punishable by up to 24 years of imprisonment, would likely be placed in the Felony–High–Sex category, while Class 3, 4, and 5 sexual assault felonies (punishable by up to 12, six, and three years, respectively) would likely be mapped into the Felony–Mid category and Class 6 sexual assault felonies (punishable by up to 18 months) would likely be placed into our Felony–Low category.[179] Deciding where the combined 2-3-4-5-6 cluster should be placed in our matrix thus required a judgment call. Our solution was to simply place the Colorado study category into our Felony–High–Other group to split the difference. Table 4.3 presents the results while considering the limitations of this effort (only 110 of the possible 140 prior study results were able to be mapped, and we do not have high confidence about all of our assignment decisions). A version of this table was provided to the panelists for their review.[180] Table 4.3 also includes two additional case types (shaded in gray in the table) to capture the results of prior studies that used a generic Felony or Misdemeanor category. These two categories were not part of the Delphi session for our work, but instead were included as additional data points for the panelists to consider.

[179] The maximum sentences described here represent the normal presumptive range under Colorado law. But if the offense was found to constitute an act of violence under Colorado Revised Statutes Section 18-1.3-406, Class 3 and 4 sexual assaults would be placed in the Felony–High–Sex category, Class 5 sexual assaults would remain in Felony–Mid, and Class 6 sexual assaults would move into Felony–Mid.

[180] After the conclusion of the Williamsburg conference, it was discovered that the findings for the 2017 Colorado study as reported in versions of Table 3.1, Table 3.2, Table 4.3, and Table 4.4 provided to our panelists differed somewhat from the actual results produced by that study. Those values have been corrected for this report. We do not believe that the panelists' key takeaways from their review of prior studies results would have been meaningfully affected by the error.

Table 4.3. Prior Study Findings Grouped by NPDWS Case Type Categories

Current Categories	Prior Study and Year	Case Type	Recommended Average Attorney Hours
01: Felony–High–LWOP	Indiana, 2020	Noncapital murder (LWOP)	311.3
	Louisiana, 2017	Felony–LWOP	200.7
02: Felony–High–Murder	Oregon, 2022	Homicide or sex case	552.5
	New Mexico, 2022	Murder including CARD	391.0
	Utah, 2021	Noncapital murder	300.0
	Indiana, 2020	Noncapital murder (non-LWOP)	232.1
	New Mexico, 2007	Murder	202.6
	Rhode Island, 2017	Murder	181.6
03: Felony–High–Sex	New Mexico, 2022	Child pornography with actual victim	177.4
	Utah, 2021	Mandatory sex or kidnap registration felony	150.0
	New Mexico, 2022	Child abuse or child sex crime (not including CARD or child pornography)	126.5
04: Felony–High–Other	Oregon, 2022	High-level felony	149.0
	Colorado, 2017	Class 2 felony	134.5
	Michigan, 2019	Murder/manslaughter[a]	120.0
	Rhode Island, 2017	Nonmurder with possible life sentence	108.1
	Maryland, 2005	Homicide (average)[a]	107.0
	Missouri, 2014	Murder/homicide[a]	106.6
	Colorado, 2017	Sexual assault felony, Class 2, 3, 4, 5, or 6[b]	98.9
	Michigan, 2019	Criminal sexual conduct (1, 2, or 3)[c]	80.0
	Massachusetts, 2014	Superior nonconcurrent felony-chapter 265 crime against person	76.4
	North Carolina, 2016	Felony A, B1, and B2	75.3
	New York (five counties), 2016	Violent felony	75.0
	Louisiana, 2017	High-level felony	69.8
	Indiana, 2020	High-level felony (levels 1–2)	68.2

Current Categories	Prior Study and Year	Case Type	Recommended Average Attorney Hours
	Missouri, 2014	Sex felony[d]	63.8
	Michigan, 2019	Other Class A felony	50.0
	Missouri, 2014	A/B felony	47.6
	Virginia, 2010	Murder or homicide (noncapital)[a]	41.2
	Texas, 2015	Felony, first degree	27.1
	Texas, 2015	Felony, second degree	19.9
Felony–Unspecified	Idaho, 2018	Felony	67.2
05: Felony–Mid	Colorado, 2017	Violent felony, Class 3 or 4	87.1
	Rhode Island, 2017	Felony, more than ten years imprisonment	51.9
	New Mexico, 2022	Crime against person (adult victim)	50.7
	Oregon, 2022	Mid-level felony	47.7
	Indiana, 2020	Mid-level felony (levels 3–4)	42.6
	Massachusetts, 2014	Superior nonconcurrent felony–not chapter 265 crime against person	42.3
	Louisiana, 2017	Mid-level felony	41.1
	Michigan, 2019	Class B, C, D felony	40.0
	New Mexico, 2007	Violent felony	29.6
	Rhode Island, 2017	Felony, up to ten years imprisonment	28.3
	North Carolina, 2016	Felony C, D, E, and F	26.0
	Maryland, 2005	Violent felony (average)	25.3
	Texas, 2015	Felony, third degree	14.5
	Virginia, 2010	Violent felony	12.8
06: Felony–Low	New York (five counties), 2016	Nonviolent felony	50.0
	Colorado, 2017	Nonviolent felony, Class 3 or 4	47.0
	Oregon, 2022	Low-level felony	39.8
	Utah, 2021	Other non-DUI felony	37.0
	New Mexico, 2022	Drug crime, property crime, or status offense	32.5
	Colorado, 2017	Drug felony Class 1, 2, 3, or 4	28.6

Current Categories	Prior Study and Year	Case Type	Recommended Average Attorney Hours
	Colorado, 2017	Class 5 or 6 felony	28.3
	Michigan, 2019	Class E, F, G, H felony or two-year misdemeanor	25.0
	Missouri, 2014	C/D felony	25.0
	Massachusetts, 2014	District concurrent felony–crime against person	24.1
	Indiana, 2020	Low-level felony (levels 5–6)	22.0
	Louisiana, 2017	Low-level felony	22.0
	Massachusetts, 2014	District concurrent felony–not crime against person	19.1
	Maryland, 2005	Nonviolent felony (average)	14.0
	Texas, 2015	State jail felony	12.0
	North Carolina, 2016	Felony G, H, and I	8.7
	New Mexico, 2007	Nonviolent felony	8.5
	Virginia, 2010	Nonviolent felony	7.2
07: DUI–High	Colorado, 2017	DUI felony, Class 4	29.9
	Utah, 2021	Felony DUIs	25.0
	New Mexico, 2022	DWI	21.7
08: DUI–Low	Utah, 2021	Misdemeanor DUI	20.0
	Massachusetts, 2014	Operating under the influence	19.7
	Colorado, 2017	Misdemeanor DUI	15.5
	North Carolina, 2016	Driving while impaired	8.8
	New Mexico, 2007	Driving while intoxicated	7.3
	Virginia, 2010	Driving while intoxicated	3.2
09: Misdemeanor–High	Oregon, 2022	Complex misdemeanor	37.0
	Colorado, 2017	Misdemeanor sex offense	33.8
	Utah, 2021	Class A misdemeanor	25.0
	Colorado, 2017	Misdemeanor Class 1	16.3
	Louisiana, 2017	Enhanceable misdemeanor	12.1
	Texas, 2015	Class A misdemeanor	9.7

Current Categories	Prior Study and Year	Case Type	Recommended Average Attorney Hours
Misdemeanor–Unspecified	Idaho, 2018	Misdemeanor	22.0
	New York (five counties), 2016	Misdemeanor	21.0
	Massachusetts, 2014	Misdemeanor	16.8
	Rhode Island, 2017	Misdemeanor	12.7
	Indiana, 2020	Misdemeanor	12.6
	Missouri, 2014	Misdemeanor	11.7
	North Carolina, 2016	Misdemeanor (includes traffic)	4.1
	New Mexico, 2007	Misdemeanor	3.8
	Maryland, 2005	Misdemeanor jury trial demand or appeal (average)	3.6
	Virginia, 2010	Misdemeanor	2.5
10: Misdemeanor–Low	Oregon, 2022	Low-level misdemeanor	22.3
	Utah, 2021	Class B and C misdemeanor	12.0
	Colorado, 2017	Misdemeanor Class 2 or 3	11.4
	New York (five counties), 2016	Violation (sentence not more than 15 days)	10.0
	Texas, 2015	Class B misdemeanor	8.9
	Michigan, 2019	One-year misdemeanor	8.0
	Louisiana, 2017	Misdemeanor or city parish ordinance	7.9
	New Mexico, 2022	Traffic or other minor crime	7.6
	Michigan, 2019	93-day misdemeanor	7.0
	Colorado, 2017	Misdemeanor traffic and other	6.9
	Maryland, 2005	District court criminal (average)	2.3
	Maryland, 2005	District court traffic (average)	1.6
11: Probation and Parole Violations	Rhode Island, 2017	Probation violation	16.9
	New York (five counties), 2016	Probation revocation	15.0
	Idaho, 2018	Probation violation	10.4
	Missouri, 2014	Probation violation	9.8

Current Categories	Prior Study and Year	Case Type	Recommended Average Attorney Hours
	Massachusetts, 2014	Superior court probation	9.2
	Indiana, 2020	Probation and community corrections revocation	8.5
	Louisiana, 2017	Revocation	8.5
	Oregon, 2022	Probation violation	8.3
	Massachusetts, 2014	District court probation	8.3
	Colorado, 2017	Felony probation revocation	7.4
	Utah, 2021	Probation violation, felony	6.0
	New Mexico, 2022	Probation violation	5.2
	Utah, 2021	Probation violation, misdemeanor	5.0
	Colorado, 2017	Misdemeanor probation revocation	4.3
	Michigan, 2019	Probation violation	3.5
	North Carolina, 2016	Probation violation	3.2
	Virginia, 2010	Probation violation, felony	2.5
	New Mexico, 2007	Probation violation	2.2
	Maryland, 2005	Violations of probation, circuit	1.5
	Virginia, 2010	Probation violation, misdemeanor	0.9
	Maryland, 2005	Violations of probation, district	0.8

[a] Category appears to include involuntary manslaughter and other nonintentional homicides. Treated as Felony–High–Other rather than Felony–High–Murder.
[b] Class 6 sex crimes in Colorado punishable up to 18 months, Class 5 up to three years, Class 4 up to six years, Class 3 up to 12 years, and Class 2 up to 24 years. Treated as Felony–High–Other rather than Felony–High–Sex.
[c] Criminal Sexual Conduct degrees 2 and 3 in Michigan are punishable for up to 15 years, although first degree carries a 25-year mandatory. Treated as Felony–High–Other rather than Felony–High–Sex.
[d] Class E sex crimes in Missouri are punishable up to four years, Class D up to seven years, Class C up to ten years, Class B only up to 15 years, though Class A is 10 to 30 years. Treated as Felony–High–Other rather than Felony–High–Sex.

Another way to view prior study results in the context of the NPDWS is to examine the distributions within each case type category. The small counts of prior study findings in some of the case type categories is problematic; for example, we have only two case weight results that were clearly and solely focused on felonies in which LWOP was a potential sentence, only three case weights involving serious felony sex crimes, and just three high DUIs. The concern here is that what was observed in the studies that did separate such prosecutions from all others may not be generalizable to other jurisdictions in which workload analyses were also conducted.

In Table 4.4, we present prior study case weight distributions within our current categorization scheme, presenting information on the number of prior results, the median result, a mean, and, when there were more than three entries, a form of trimmed mean in which we simply dropped the lowest and highest values before calculating an average. As in the previous table, we include shaded entries for the generic groupings for unspecified felony and misdemeanor case types found in the prior studies.

Table 4.4. Distributions of Prior Study Results Grouped by NPDWS Case Type Categories

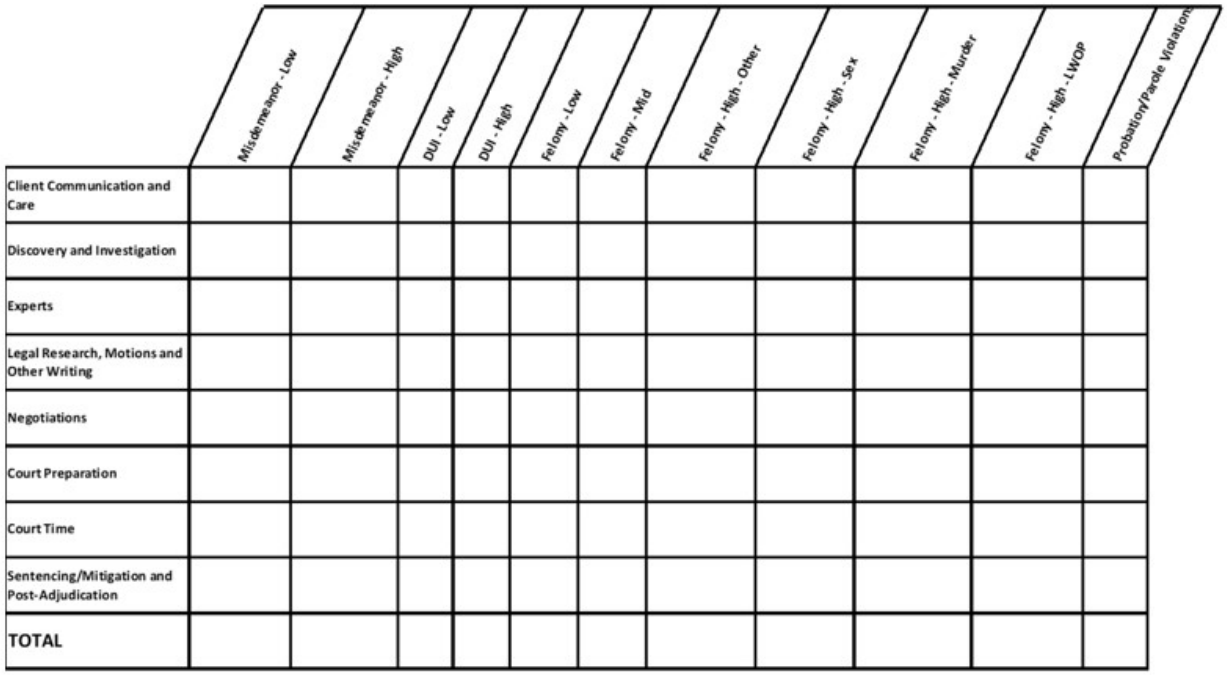
Current Categories	Prior Study Case Type Count	Highest Hours	Lowest Hours	Median	Mean	Trimmed Mean
01: Felony–High–LWOP	2	311.3	200.7	256.0	256.0	N/A
02: Felony–High–Murder	6	552.5	181.6	266.1	310.0	281.4
03: Felony–High–Sex	3	177.4	126.5	150.0	151.3	N/A
04: Felony–High–Other	19	149.0	19.9	75.3	79.9	79.4
05: Felony–Mid	1	67.2	67.2	67.2	67.2	N/A
Felony–Unspecified	14	87.1	12.8	40.6	38.6	36.7
06: Felony–Low	18	50.0	7.2	24.6	25.0	24.6
07: DUI–High	3	29.9	21.7	25.0	25.5	N/A
08: DUI–Low	6	20.0	3.2	12.1	12.4	12.8
09: Misdemeanor–High	6	37.0	9.7	20.7	22.3	21.8
Misdemeanor–Unspecified	10	22.0	2.5	9.5	11.1	10.8
10: Misdemeanor–Low	12	22.3	1.6	8.0	8.8	8.2
11: Probation and Parole Violations	21	16.9	0.8	6.0	6.5	3.1

The Initial Estimates

Prior to the expert panel meeting in Williamsburg, we asked the panelists to complete an initial response chart and bring it to the in-person session (Figure 4.1). The chart documented each panelist's first estimates of the average time needed (in hours and tenths of hours) for each activity type within each case type to provide reasonably effective assistance of counsel pursuant to prevailing professional norms. Having the experts record their initial estimates in advance gave the panelists as much time as they felt necessary to consider the guidance provided over the

previous weeks as well as their own practice experiences when producing their first recommendations. Having this activity take place before the meeting also freed up considerable additional in-session time for discussions among panel members.

Figure 4.1. Initial Response Chart



To give the panelists a frame of reference for making these estimates, the guidance they were provided pointed out that the estimates are similar to the sorts of calculations of expected time expenditures that a supervising attorney must make to balance the incoming workload among staff attorneys. Experienced counsel are fully aware that every case presents unique challenges, no matter what charges or potential sentences are involved. However, for the purpose of estimating whether one has the time needed to take on a new client matter, prior representations of a particular case type provide a sense of the average amount of time required. The estimates, we explained, would be based on similar information.

The panelists were advised to consider only attorney time for case-related activities and not include time spent by others (e.g., investigators, social workers, paralegals) in the same office in support of the panelist's cases. They were asked to make their estimates assuming existing support staff levels in their own practices, to factor in trials and highly complex cases but only in relation to their likelihood, and to think about hundreds of cases of a particular type taken together rather than focusing on very brief or very lengthy representations. Importantly, we attempted to make clear that their recommendations should pertain to *all* state trial court adult

criminal case representations and not just those involving appointments to represent clients who are financially eligible for assistance of counsel at public expense.

We did not have information about the size of each panelist's current workload (or the workloads they faced in the past if they were no longer practicing state-level criminal defense), nor did we have information about whether the panelists were always in close compliance with their jurisdiction's ethics rules or were being guided by the Defense Function Standards when representing adult clients in state trial court criminal matters. Presumably, a panelist whose workload demands and practice resources provide a meaningful opportunity to adhere to prevailing professional norms in every case could simply draw on their own experiences and recommend an average time that mirrored their own average time expenditures. To address situations where that was not the case, we advised the panelists that, when they were making their individual estimates, to first think about how much time they currently spend, on average, for cases within each category. They were then to consider whether there were shortcomings in their representations or circumstances that negatively affect their ability to provide reasonably effective assistance. If they felt that such shortcomings existed, they were to estimate how much additional time would be needed, on average, to address such shortcomings and comply with applicable standards. They were told that the sum of their current average time expenditures and the additional average time they believed was required should be incorporated into recommended estimates. As an example, if a panelist was generally unable to meet with "a criminally accused person for consultation at or before any appearance before a judicial officer, including the first appearance" per Defense Function Standard 4-2.3, they could add an appropriate amount of time to their estimates for doing so.[181]

Finally, we cautioned the panelists not to artificially adjust their estimates to account for, for example, attorneys who may lack the panelist's level of expertise, offices with greater or lesser support staff or other resources, potential budget negotiations with state or local governments or other funding sources, offices in regions of a state that were different from where a panelist practices, or current and hopefully transitory problems related to court and office shutdowns and absences triggered by the COVID-19 pandemic.

Session Procedures

The Williamsburg conference began with a presentation by the project team that summarized the reasons for developing updated national workload standards for public defense counsel, the uses for such standards, and some key issues to consider when estimating necessary average times. It was emphasized that the estimates should be based solely on a constitutionally appropriate level of professional assistance to a client involved in adult criminal cases, i.e., reasonably effective assistance, and that they should refrain from veering into the realm of the

[181] ABA, 2017.

unrealistic ideal. There was also a recap of the pertinent professional standards that should be considered during the day's deliberation, with a particular focus on Defense Function Standard 4-6.1(b)'s mandate: "Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced."[182]

The panelists were then introduced to a RAND-developed web-based application to collect their estimates, which they could enter into their laptops, tablets, or other mobile computing devices. The use of the web application and the distribution of randomized credentials for the login process allowed the panelists to make their entries anonymously, and, if they chose to do so, add anonymous explanatory comments to their submissions. Importantly, options were provided for the experts to skip over a case type if they were uncomfortable with making a recommendation for that category, perhaps because of a lack of recent or extensive experience representing adult clients with such charges.

At this point, the panelists were asked to take the values from their initial response charts and enter them into the application. The process for doing so involved selecting a case type and then entering estimates for recommended average time at the activity type level for that case type. The application automatically summed a panelist's individual activity type entries to produce a case type–level estimate. Figure 4.2 provides an example of what a panelist would have viewed on the application display if the Felony–High–Sex category had been selected.

After the panelists entered their first set of recommendations, a statistical summary of their responses at the case type level was projected onto a screen in the meeting room. The display presented, for each of the 11 NPDWS case types, the number of panelists submitting entries for that case type, the minimum and maximum values entered by the panelists, and the median of all panelist entries (see Figure 4.3). The application on their computing devices provided similar information in the form of a dashboard display. The application also included a graphical representation of the distribution of all panelist estimates for each case type, along with a line indicating where the panelist's own estimate fit within that distribution (Figure 4.2). Providing the panelists with feedback about the group's estimates as they evolve is a defining feature of a Delphi session; doing so encourages the panelists to reassess their own submissions and, if desired, modify those estimates.

A member of the research team then took on the role of facilitator. A roundless (sometimes referred to as a *real-time* or *continuous*) Delphi session began at that point, one in which panelists were permitted to modify their responses on average time needed for any activity type within any case type and to do so at any point during the discussion. The facilitator encouraged the panelists to either openly discuss the reasoning behind their estimates or to submit anonymous comments that would be shared through the application. The panelists were also periodically reminded that they were free to change their estimates as often as they felt

[182] ABA, 2017.

appropriate, but that they were also free to make no changes at all. The data summaries projected onto the meeting room's screen and on panelist dashboards were updated periodically as new responses were submitted.

Figure 4.2. Example of Panelist's View of the Delphi Application

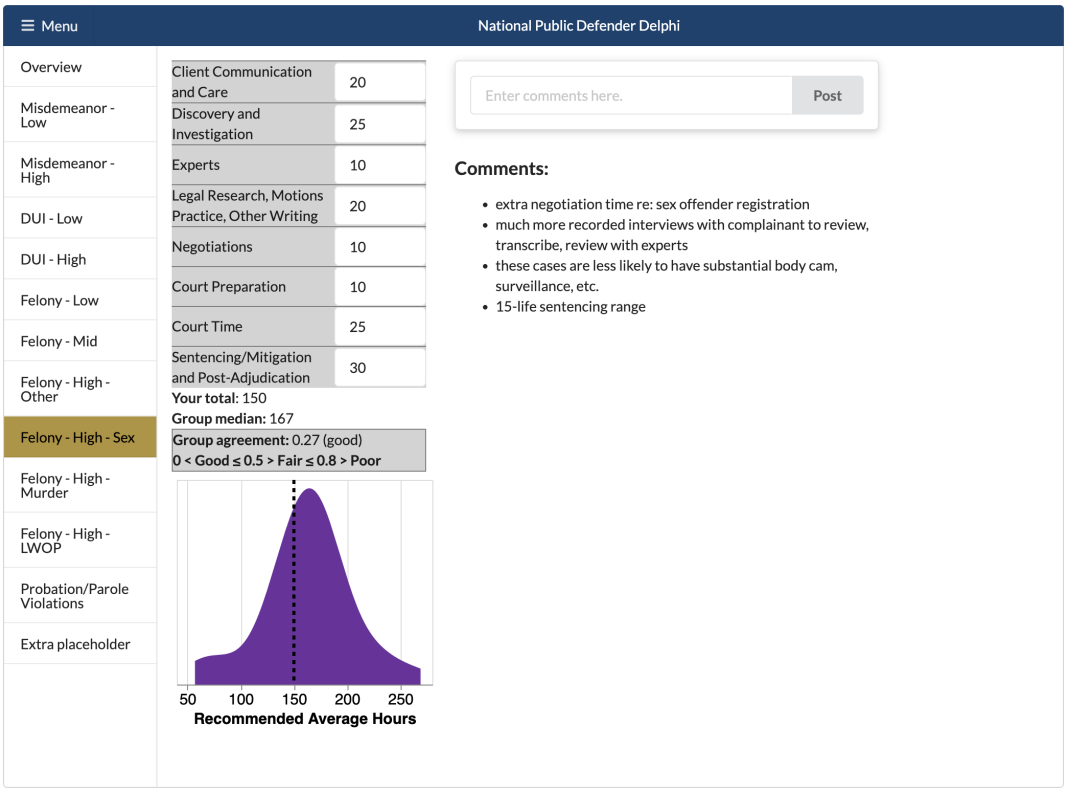
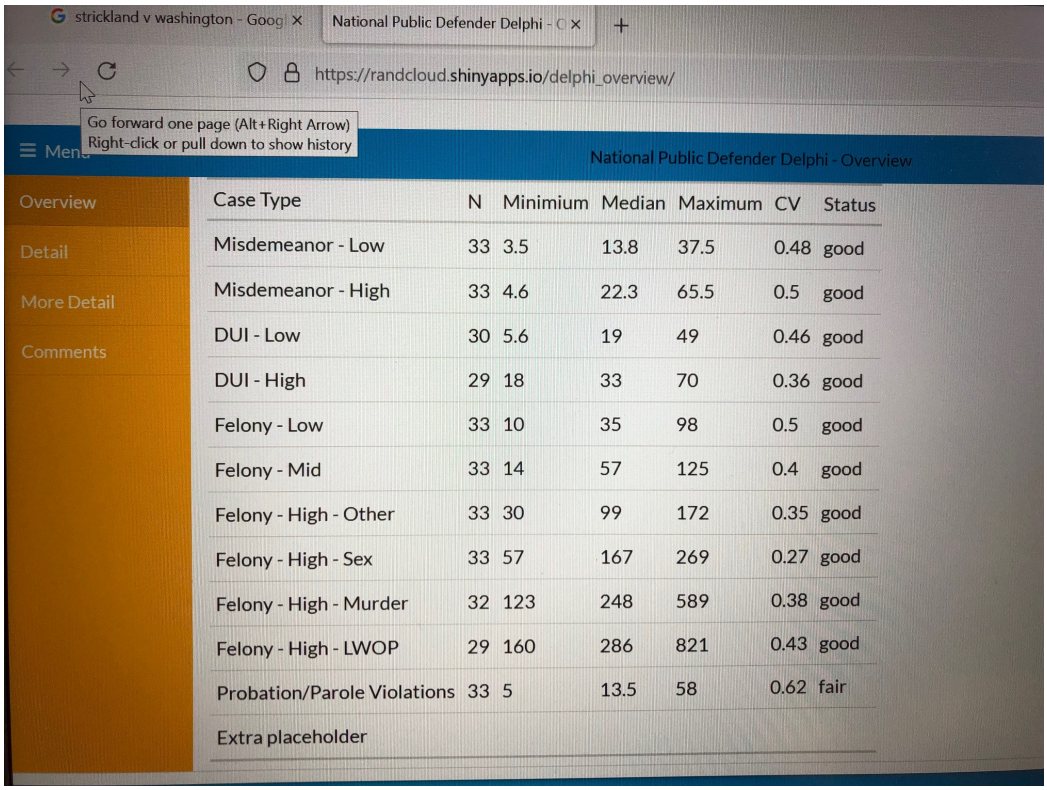


Figure 4.3. In-Room Projected Delphi Session Display



Two other items of information were included in the projected display and the individual computing device dashboard. The CoV (i.e., standard deviation divided by the mean) for the distribution of recommended attorney hours for each study case type had been chosen as both the consensus measure (i.e., how similar the panelists' estimates are at a specific point in time) and the stability statistic (i.e., when a reasonable cutoff point for further voting has been reached) for the Delphi session. We adopted a rule common in many research projects employing a Delphi strategy, in which a CoV of less than or equal to 0.5 indicated a good degree of consensus, making further discussion about the case type in question unnecessary.[183] CoVs exceeding 0.5 but less than or equal to 0.8 would be considered less satisfactory, and additional discussion would be recommended for the purpose of enhancing a consensus as much as possible. CoVs at the lower part of this range could be considered acceptable if it was clear that no further discussion would be useful. CoVs exceeding 0.8 would indicate a poor degree of consensus, and, unless the range of results could be tightened, the case type would need to be dropped from the standards-setting process. The summary statistics presented to the panelists included the CoVs

[183] These guidelines were originally described in J. Morley English and Gerard L. Kernan, "The Prediction of Air Travel and Aircraft Technology to the Year 2000 Using the Delphi Method," *Transportation Research*, Vol. 10, No. 1, 1976, and based on input from Delphi pioneer Norman Crolee Dalkey. The guidelines became a popular choice for Delphi researchers in subsequent years.

for each case type and a label describing the relative degree of consensus: “poor” (CoV greater than 0.8), “fair” (CoV greater than 0.5 and less than or equal to 0.8), and “good” (CoV less than or equal to 0.5).

As noted earlier, each panelist could change their activity type–level answers at any time until the day’s deliberations ended (which we had defined in advance as either the point at which the stability statistics for all case types showed no significant movement or 5:00 p.m. Eastern at the latest), even for case types with CoVs that had moved below the 0.5 mark. Therefore, entries could be made while discussions were taking place, when results were being displayed, and even during session coffee breaks. The facilitator typically focused the group dialogue on those case types with CoVs greater than 0.5, in part by seeking panelists to voice arguments for the low and high ends of the range for each case type. Another approach used by the facilitator was to steer the discussion toward activity types with the greatest spread in their estimates for those case types that had a fair or poor consensus at the case type level. Although the distributions of activity type estimates were not displayed to the panel as a group or in the individual panelists’ dashboards, that information was always available to the facilitator.

Results

Our project team consisted of representatives of organizations that have participated in 14 of the 17 major state-focused studies undertaken since 2005 to determine functional case weights (and, in some instances, appropriate caseload standards) for public defense appointments. One of our project team members also directed or participated in workload studies involving other justice system organizations, such as the judiciary and prosecuting attorney offices. In nearly all these studies, a key component involved the elicitation of expert judgments for the purpose of recommending time expenditures or adjusting estimates previously made by others. The elicitation was often accomplished using a Delphi session similar to the one employed here, although focus groups were also used on occasion. No matter what tool was used, our experience has generally (though not always) been that early in the process there is a very wide spread in the time estimates submitted by the experts for just about every case type category; narrowing that spread to the point where an appropriate degree of consensus has been reached can take many hours of debate and discussion.

A very different pattern was observed in the expert panel session held as part of the NPDWS. The initial panelist entries for some of the felony case types yielded CoVs that were already close to the 0.5 value used to indicate a good degree of consensus, even though some of the less severe case types (in terms of potential consequences) followed a more typical pattern of starting off in the poor range and not achieving a satisfactory degree of consensus until much later in the session. As can be seen in graphical representations of the movement toward consensus during the expert panel session shown in Appendix C, the four high-severity felony categories had CoVs at the start of the actual deliberations (i.e., after the initial data entry period) at about 0.6,

and, notably, Felony–High–Sex was just under 0.5. The consensus measures at the start for mid-level felonies was closer to 0.7, but low-level felonies and both misdemeanor categories began near or in the poor range of 0.8 and higher. After considerable discussion among panelists about the relative challenges of the various case types in terms of representation complexity and time demands, ten of the 11 case types eventually reached the good consensus threshold of 0.5, although that mark was hit last for low-level misdemeanors.

The Parole and Probations Violations category was associated with the lowest level of consensus of any of our case types, meriting only a fair rating (CoV = 0.62). The group discussion about this particular case category suggested that there were significant differences between states in exactly what is at stake in these proceedings, the ability of counsel to present a robust defense that would put the prosecution's assertions to the test, and the complexity of the issues in play. Because there was little movement in the CoV for probation and parole representations throughout much of the day and, in the facilitator's view, further discussion would not result in a meaningful change in that case type's consensus level even though all other case types were already at or under 0.5, we locked down all the results and ended all further deliberations. No other category in our study elicited quite the same level of asserted diversity of experiences and expectations on the part of panel members (save the situation where discovery is automatically available to defense counsel in misdemeanor cases in some states but not in others, as noted later). This indicates that our result for the probation and parole category should be taken as suggestive rather than as having the same confidence as our other ten case type groupings.

The comments offered by the panelists during both the deliberation period and a group discussion that took place after the end of the formal session may provide some insight as to the patterns observed for the consensus process (see Chapter 6). One interpretation of those conversations is that interstate differences in criminal defense practice at the most serious felony levels are far less pronounced than what takes place in misdemeanor courts. It is possible that the substantive and procedural laws concerning, for example, homicides, offenses requiring sex offender registration upon conviction, and serious violent crimes have a higher degree of uniformity across states than would be true for matters that might result in less than a year in jail. One example cited during the discussions related to misdemeanor case types was a rule in one jurisdiction that restricts discovery in many misdemeanor cases, which could affect the time spent by counsel for investigation compared with similar cases in other jurisdictions. This comment elicited considerable surprise from many panelists who practice in states where discovery would always be available in criminal proceedings.[184]

[184] Examples of cross-state differences in criminal procedures do not undercut the utility of a set of updated default national workload standards. All such standards, whether in the form of case weights or annual caseload maximums, should be carefully examined and adjusted as necessary by a jurisdiction before they are adopted. For example, in the jurisdiction mentioned earlier that restricts discovery in misdemeanor cases, additional time might be needed for the more difficult and time-consuming investigation required to provide adequate representation to each client in the

Table 4.5 presents the number of expert panelists submitting estimates for each of the study case types (*N*), the final CoV values for the distributions of panelists' estimates, and, as expressed in hours, the 25th percentile, median, and 75th percentile for those estimates. The median was chosen as the measure of central tendency statistic to report the group's consensus estimate as to average times because the median has the advantage over the mean of not being affected by extreme values that might be preferred by a small number of panelists.[185] Each of the median hour values shown in the table constitute our recommended case weight for the associated case type.

Table 4.5. Final Results of the Expert Panel Session

			Hours		
Case Type	***N***	**CoV**	**25th Percentile**	**Median**	**75th Percentile**
Felony–High–LWOP	29	0.43	251.0	**286.0**	427.4
Felony–High–Murder	32	0.38	193.3	**248.0**	331.0
Felony–High–Sex	33	0.27	145.0	**167.0**	180.0
Felony–High–Other	33	0.35	77.0	**99.0**	118.0
Felony–Mid	33	0.40	47.0	**57.0**	74.0
Felony–Low	33	0.50	27.5	**35.0**	52.0
DUI–High	29	0.36	27.2	**33.0**	44.0
DUI–Low	30	0.46	15.5	**19.0**	30.7
Misdemeanor–High	33	0.50	18.0	**22.3**	30.0
Misdemeanor–Low	33	0.48	10.0	**13.8**	18.5
Probation and Parole Violations	33	0.62	11.0	**13.5**	17.0

absence of discovery. Conversely, in the jurisdictions that provide open file discovery, a downward adjustment could be made to the time required for discovery.

[185] It should be kept in mind that, although the panelists were providing their estimates of *average* (mean) attorney hours, each value entered into the Delphi application was simply a number, and so the choice of statistic to use to report a typical result need not be limited to the mean. Although means, medians, and modes are commonly employed measures of central tendency in Delphi studies, medians and modes are favored as more-robust measures (Hsu and Sandford, 2007, p. 4). An interesting question is whether the CoV—the commonly used parametric statistical method for measuring stability and consensus in Delphi sessions involving 30 or more experts—would be the optimal choice for our purposes given that the median responses for each case type would determine our final results (CoV is related to the mean, not the median, of our expert panel's submissions). Quantile-based measures of relative dispersion have been employed in Delphi, but the CoV has both a long history of usage and the advantage of being associated with a set of widely accepted standards for determining when a consensus has been reached.

Chapter 5. Understanding and Using the Results

How Do the NPDWS Case Weights Compare with Those in Prior Studies?

Table 5.1 presents the final NPDWS case weights in hours for adult criminal representations (shaded in gray) against the backdrop of the 17 state-level workload studies results. Again, we include an example caseload standard based on a 2,080-hour work year for every case weight in the table (essentially just the case weight divided into 2,080, with the result rounded down to an integer value representing the recommended maximum cases per year). We believe that the key takeaway here is that the recommended national workload standards as expressed as case weights can be considered unremarkable. The weights for felonies involving the possibility of life imprisonment without parole or those including murder charges sit squarely within a collection of results from other studies for similar sorts of cases. The high-level felony sex case weight is shouldered on each side by particularly serious sex crime categories that were used in two different state studies. This pattern, in which an NPDWS result does not represent either the largest or the smallest case weight for a set of ostensibly similar case type categories used in prior studies is repeated throughout Table 5.1.

Table 5.1. NPDWS and Prior Study Case Weights in Decreasing Weight Size Order

Study and Year	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Maryland, 2005	Capital (death notice filed)	1,464.0	1
Virginia, 2010	Capital crime	1,135.2	1
Oregon, 2022	Homicide or sex case	552.5	3
New Mexico, 2007	Capital offense	492.4	4
Maryland, 2005	Capital (death notice not filed)	429.0	4
Colorado, 2017	Class 1 felony	427.3	4
New Mexico, 2022	Murder including CARD	391.0	5
Indiana, 2020	Noncapital murder (LWOP)	311.3	6
Utah, 2021	Noncapital murder	300.0	6
NPDWS, 2023	Felony–High–LWOP	286.0	7
NPDWS, 2023	Felony–High–Murder	248.0	8
Indiana, 2020	Noncapital murder (non-LWOP)	232.1	8
New Mexico, 2007	Murder	202.6	10
Louisiana, 2017	Felony–LWOP	200.7	10
Rhode Island, 2017	Murder	181.6	11
New Mexico, 2022	Child pornography with actual victim	177.4	11
NPDWS, 2023	Felony–High–Sex	167.0	12

Study and Year	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Utah, 2021	Mandatory sex or kidnap registration felony	150.0	13
Oregon, 2022	High-level felony	149.0	13
North Carolina, 2016	First-degree murder (includes capital)	136.5	15
Colorado, 2017	Class 2 felony	134.5	15
New Mexico, 2022	Child abuse or child sex crime (not including CARD or child pornography)	126.5	16
Michigan, 2019	Murder or manslaughter	120.0	17
Rhode Island, 2017	Nonmurder with possible life sentence	108.1	19
Maryland, 2005	Homicide (average)	107.0	19
Missouri, 2014	Murder or homicide	106.6	19
NPDWS, 2023	Felony–High–Other	99.0	21
Colorado, 2017	Sexual assault felony, Class 2, 3, 4, 5, or 6	98.9	21
Colorado, 2017	Violent felony, Class 3 or 4	87.1	23
Michigan, 2019	Criminal sexual conduct (1, 2, or 3)	80.0	26
Massachusetts, 2014	Superior nonconcurrent felony-chapter 265 crime against person	76.4	27
North Carolina, 2016	Felony A, B1, and B2	75.3	27
New York (five counties), 2016	Violent felony	75.0	27
Louisiana, 2017	High-level felony	69.8	29
Indiana, 2020	High-level felony (levels 1–2)	68.2	30
Idaho, 2018	Felony	67.2	30
Missouri, 2014	Sex felony	63.8	32
NPDWS, 2023	Felony–Mid	57.0	36
Rhode Island, 2017	Felony, more than ten years imprisonment	51.9	40
New Mexico, 2022	Crime against person (adult victim)	50.7	41
Michigan, 2019	Other Class A felony	50.0	41
New York (five counties), 2016	Nonviolent felony	50.0	41
Oregon, 2022	Mid-level felony	47.7	43
Missouri, 2014	A/B felony	47.6	43
Colorado, 2017	Nonviolent felony, Class 3 or 4	47.0	44
Indiana, 2020	Mid-level felony (levels 3–4)	42.6	48
Massachusetts, 2014	Superior nonconcurrent felony–not chapter 265 crime against person	42.3	49
Virginia, 2010	Murder or homicide (noncapital)	41.2	50
Louisiana, 2017	Mid-level felony	41.1	50
Michigan, 2019	Class B, C, D felony	40.0	52
Oregon, 2022	Low-level felony	39.8	52
Oregon, 2022	Complex misdemeanor	37.0	56
Utah, 2021	Other non-DUI felony	37.0	56
NPDWS, 2023	Felony–Low	35.0	59
Colorado, 2017	Misdemeanor sex offense	33.8	61

Study and Year	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
NPDWS, 2023	DUI–High	33.0	63
New Mexico, 2022	Drug crime, property crime, or status offense	32.5	63
Colorado, 2017	DUI felony, Class 4	29.9	69
New Mexico, 2007	Violent felony	29.6	70
Colorado, 2017	Drug felony Class 1, 2, 3, or 4	28.6	72
Rhode Island, 2017	Felony, up to ten years imprisonment	28.3	73
Colorado, 2017	Class 5 or 6 felony	28.3	73
Texas, 2015	Felony, first degree	27.1	76
North Carolina, 2016	Felony C, D, E, and F	26.0	80
Maryland, 2005	Violent felony (average)	25.3	82
Michigan, 2019	Class E, F, G, H felony or two-year misdemeanor	25.0	83
Missouri, 2014	C/D felony	25.0	83
Utah, 2021	Class A misdemeanor	25.0	83
Utah, 2021	Felony DUIs	25.0	83
Massachusetts, 2014	District concurrent felony–crime against person	24.1	86
Oregon, 2022	Low-level misdemeanor	22.3	93
NPDWS, 2023	Misdemeanor–High	22.3	93
Idaho, 2018	Misdemeanor	22.0	94
Indiana, 2020	Low-level felony (levels 5–6)	22.0	94
Louisiana, 2017	Low-level felony	22.0	94
New Mexico, 2022	Driving while intoxicated	21.7	95
New York (five counties), 2016	Misdemeanor	21.0	99
Utah, 2021	Misdemeanor DUI	20.0	104
Texas, 2015	Felony, second degree	19.9	104
Massachusetts, 2014	Operating under the influence	19.7	105
Massachusetts, 2014	District concurrent felony–not crime against person	19.1	108
NPDWS, 2023	DUI–Low	19.0	109
Rhode Island, 2017	Probation violation	16.9	123
Massachusetts, 2014	Misdemeanor	16.8	123
Colorado, 2017	Misdemeanor Class 1	16.3	127
Idaho, 2018	Contempt	15.5	133
Colorado, 2017	Misdemeanor DUI	15.5	134
Maryland, 2005	Drug treatment court (urban)	15.2	136
New York (five counties), 2016	Postdisposition matter (other than probation revocation)	15.0	138
New York (five counties), 2016	Probation revocation	15.0	138
Texas, 2015	Felony, third degree	14.5	143
New Mexico, 2007	Drug court	14.4	144
Maryland, 2005	Nonviolent felony (average)	14.0	148

Study and Year	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
NPDWS, 2023	Misdemeanor–Low	13.8	150
NPDWS, 2023	Probation or Parole Violations	13.5	154
Virginia, 2010	Violent felony	12.8	162
Rhode Island, 2017	Misdemeanor	12.7	163
Indiana, 2020	Misdemeanor	12.6	165
Louisiana, 2017	Enhanceable misdemeanor	12.1	172
Texas, 2015	State jail felony	12.0	173
Utah, 2021	Class B and C misdemeanor	12.0	173
Missouri, 2014	Misdemeanor	11.7	177
Colorado, 2017	Misdemeanor Class 2 or 3	11.4	182
Idaho, 2018	Probation violation	10.4	200
North Carolina, 2016	Specialized court (any)	10.3	201
New York (five counties), 2016	Violation (sentence not more than 15 days)	10.0	208
Missouri, 2014	Probation violation	9.8	212
Idaho, 2018	Other matter	9.7	215
Texas, 2015	Class A misdemeanor	9.7	214
Massachusetts, 2014	Superior court probation	9.2	226
Texas, 2015	Class B misdemeanor	8.9	233
North Carolina, 2016	Driving while impaired	8.8	236
North Carolina, 2016	Felony G, H, and I	8.7	238
Indiana, 2020	Probation or community corrections revocation	8.5	244
Louisiana, 2017	Revocation	8.5	245
New Mexico, 2007	Nonviolent felony	8.5	245
Massachusetts, 2014	District court probation	8.3	251
Oregon, 2022	Probation violation	8.3	249
Michigan, 2019	One-year misdemeanor	8.0	260
Louisiana, 2017	Misdemeanor or city parish ordinance	7.9	261
New Mexico, 2022	Traffic or other minor crime	7.6	273
Colorado, 2017	Felony probation revocation	7.4	281
New Mexico, 2007	Driving while intoxicated	7.3	284
Virginia, 2010	Nonviolent felony	7.2	288
Michigan, 2019	93-day misdemeanor	7.0	297
Colorado, 2017	Misdemeanor traffic or other	6.9	301
Utah, 2021	Probation violation, felony	6.0	346
New Mexico, 2022	Probation violation	5.2	402
Utah, 2021	Probation violation, misdemeanor	5.0	416
Colorado, 2017	Misdemeanor probation revocation	4.3	483
North Carolina, 2016	Misdemeanor (includes traffic)	4.1	507
New Mexico, 2007	Misdemeanor	3.8	554

Study and Year	Case Type	Effective Case Weight in Hours	Annual Standard Using 2,080 Hours
Maryland, 2005	Misdemeanor jury trial demand or appeal (average)	3.6	575
Michigan, 2019	Probation violation	3.5	594
North Carolina, 2016	Probation violation	3.2	660
Virginia, 2010	Driving while intoxicated	3.2	653
Michigan, 2019	Other matter	3.0	693
North Carolina, 2016	Other criminal	2.5	826
Virginia, 2010	Misdemeanor	2.5	848
Virginia, 2010	Probation violation, felony	2.5	826
Maryland, 2005	District court criminal (average)	2.3	910
Massachusetts, 2014	District court bail only	2.2	949
New Mexico, 2007	Probation violation	2.2	967
Maryland, 2005	District court traffic (average)	1.6	1,341
Maryland, 2005	Modifications or sentence review, circuit (average)	1.6	1,273
Maryland, 2005	Violations of probation, circuit	1.5	1,386
Maryland, 2005	Modifications or sentence review, district (average)	1.1	1,835
New Mexico, 2007	Extradition	1.0	2,151
Virginia, 2010	Probation violation, misdemeanor	0.9	2,311
Maryland, 2005	Violations of probation, district	0.8	2,773
Maryland, 2005	Preliminary hearings, district (average)	0.2	12,480

Notwithstanding the methodological challenges already described that relate to our earlier attempt to map categories used in the prior studies into the 11 NPDWS case types, we believe that there is value in examining where the new weights compare with those groupings. Table 5.2 shows the NPDWS results in that context and suggests that the new weights mostly fall in the middle of each pack, except for Felony–Mid, DUI–High, and Probation or Parole Violations.

Table 5.2. NPDWS and Prior Study Case Weights Grouped by NPDWS Case Type Categories

Current Categories	Prior Study	Case Type	Recommended Average Attorney Hours
01: Felony–High–LWOP	Indiana, 2020	Noncapital murder (LWOP)	311.3
	NPDWS, 2023	Felony–High–LWOP	286.0
	Louisiana, 2017	Felony–LWOP	200.7
02: Felony–High–Murder	Oregon, 2022	Homicide or sex case	552.5
	New Mexico, 2022	Murder including CARD	391.0
	Utah, 2021	Noncapital murder	300.0
	NPDWS, 2023	Felony–High–Murder	248.0
	Indiana, 2020	Noncapital murder (non-LWOP)	232.1
	New Mexico, 2007	Murder	202.6
	Rhode Island, 2017	Murder	181.6
03: Felony–High–Sex	New Mexico, 2022	Child pornography with actual victim	177.4
	NPDWS, 2023	Felony–High–Sex	167.0
	Utah, 2021	Mandatory sex or kidnap registration felony	150.0
	New Mexico, 2022	Child abuse or child sex crime (not including CARD or child pornography)	126.5
04: Felony–High–Other	Oregon, 2022	High-level felony	149.0
	Colorado, 2017	Class 2 felony	134.5
	Michigan, 2019	Murder or manslaughter[a]	120.0
	Rhode Island, 2017	Nonmurder with possible life sentence	108.1
	Maryland, 2005	Homicide (average)[a]	107.0
	Missouri, 2014	Murder or homicide[a]	106.6
	NPDWS, 2023	Felony–High–Other	99.0
	Colorado, 2017	Sexual assault felony: Class 2, 3, 4, 5, or 6[b]	98.9
	Michigan, 2019	Criminal sexual conduct (1, 2, or 3)[c]	80.0
	Massachusetts, 2014	Superior nonconcurrent felony-chapter 265 crime against person	76.4
	North Carolina, 2016	Felony A, B1, and B2	75.3

Current Categories	Prior Study	Case Type	Recommended Average Attorney Hours
	New York (five counties), 2016	Violent felony	75.0
	Louisiana, 2017	High-level felony	69.8
	Indiana, 2020	High-level felony (levels 1–2)	68.2
	Missouri, 2014	Sex felony[d]	63.8
	Michigan, 2019	Other Class A felony	50.0
	Missouri, 2014	A/B felony	47.6
	Virginia, 2010	Murder or homicide (noncapital)[a]	41.2
	Texas, 2015	Felony, first degree	27.1
	Texas, 2015	Felony, second degree	19.9
05: Felony–Mid	Colorado, 2017	Violent felony, Class 3 or 4	87.1
	NPDWS, 2023	Felony–Mid	57.0
	Rhode Island, 2017	Felony, more than ten years imprisonment	51.9
	New Mexico, 2022	Crime against person (adult victim)	50.7
	Oregon, 2022	Mid-level felony	47.7
	Indiana, 2020	Mid-level felony (levels 3–4)	42.6
	Massachusetts, 2014	Superior nonconcurrent felony–not chapter 265 crime against person	42.3
	Louisiana, 2017	Mid-level felony	41.1
	Michigan, 2019	Class B, C, D felony	40.0
	New Mexico, 2007	Violent felony	29.6
	Rhode Island, 2017	Felony, up to ten years imprisonment	28.3
	North Carolina, 2016	Felony C, D, E, and F	26.0
	Maryland, 2005	Violent felony (average)	25.3
	Texas, 2015	Felony, third degree	14.5
	Virginia, 2010	Violent felony	12.8
06: Felony–Low	New York (five counties), 2016	Nonviolent felony	50.0
	Colorado, 2017	Nonviolent felony, Class 3 or 4	47.0
	Oregon, 2022	Low-level felony	39.8

Current Categories	Prior Study	Case Type	Recommended Average Attorney Hours
	Utah, 2021	Other non-DUI felony	37.0
	NPDWS, 2023	Felony–Low	35.0
	New Mexico, 2022	Drug crime, property crime, or status offense	32.5
	Colorado, 2017	Drug felony Class 1, 2, 3, or 4	28.6
	Colorado, 2017	Class 5 or 6 felony	28.3
	Michigan, 2019	Class E, F, G, H felony or two-year misdemeanor	25.0
	Missouri, 2014	C/D felony	25.0
	Massachusetts, 2014	District concurrent felony–crime against person	24.1
	Indiana, 2020	Low-level felony (levels 5–6)	22.0
	Louisiana, 2017	Low-level felony	22.0
	Massachusetts, 2014	District concurrent felony–not crime against person	19.1
	Maryland, 2005	Nonviolent felony (average)	14.0
	Texas, 2015	State jail felony	12.0
	North Carolina, 2016	Felony G, H, and I	8.7
	New Mexico, 2007	Nonviolent felony	8.5
	Virginia, 2010	Nonviolent felony	7.2
07: DUI–High	NPDWS, 2023	DUI–High	33.0
	Colorado, 2017	DUI felony, Class 4	29.9
	Utah, 2021	Felony DUIs	25.0
	New Mexico, 2022	DWI	21.7
08: DUI–Low	Utah, 2021	Misdemeanor DUI	20.0
	Massachusetts, 2014	Operating under the influence	19.7
	NPDWS, 2023	DUI–Low	19.0
	Colorado, 2017	Misdemeanor DUI	15.5
	North Carolina, 2016	Driving while impaired	8.8
	New Mexico, 2007	Driving while intoxicated	7.3
	Virginia, 2010	Driving while intoxicated	3.2
09: Misdemeanor–High	Oregon, 2022	Complex misdemeanor	37.0

Current Categories	Prior Study	Case Type	Recommended Average Attorney Hours
	Colorado, 2017	Misdemeanor sex offense	33.8
	Utah, 2021	Class A misdemeanor	25.0
	NPDWS, 2023	Misdemeanor–High	22.3
	Colorado, 2017	Misdemeanor Class 1	16.3
	Louisiana, 2017	Enhanceable misdemeanor	12.1
	Texas, 2015	Class A misdemeanor	9.7
10: Misdemeanor–Low	Oregon, 2022	Low-level misdemeanor	22.3
	NPDWS, 2023	Misdemeanor–Low	13.8
	Utah, 2021	Class B and C misdemeanor	12.0
	Colorado, 2017	Misdemeanor Class 2 or 3	11.4
	New York (five counties), 2016	Violation (sentence not more than 15 days)	10.0
	Texas, 2015	Class B misdemeanor	8.9
	Michigan, 2019	One-year misdemeanor	8.0
	Louisiana, 2017	Misdemeanor or city parish ordinance	7.9
	New Mexico, 2022	Traffic or other minor crime	7.6
	Michigan, 2019	93-day misdemeanor	7.0
	Colorado, 2017	Misdemeanor traffic or other	6.9
	Maryland, 2005	District court criminal (average)	2.3
	Maryland, 2005	District court traffic (average)	1.6
11: Probation or Parole Violations	Rhode Island, 2017	Probation violation	16.9
	New York (five counties), 2016	Probation revocation	15.0
	NPDWS, 2023	Probation or parole violations	13.5
	Idaho, 2018	Probation violation	10.4
	Missouri, 2014	Probation violation	9.8
	Massachusetts, 2014	Superior court probation	9.2
	Indiana, 2020	Probation or community corrections revocation	8.5
	Louisiana, 2017	Revocation	8.5
	Oregon, 2022	Probation violation	8.3

Current Categories	Prior Study	Case Type	Recommended Average Attorney Hours
	Massachusetts, 2014	District court probation	8.3
	Colorado, 2017	Felony probation revocation	7.4
	Utah, 2021	Probation violation, felony	6.0
	New Mexico, 2022	Probation violation	5.2
	Utah, 2021	Probation violation, misdemeanor	5.0
	Colorado, 2017	Misdemeanor probation revocation	4.3
	Michigan, 2019	Probation violation	3.5
	North Carolina, 2016	Probation violation	3.2
	Virginia, 2010	Probation violation, felony	2.5
	New Mexico, 2007	Probation violation	2.2
	Maryland, 2005	Violations of probation, circuit	1.5
	Virginia, 2010	Probation violation, misdemeanor	0.9
	Maryland, 2005	Violations of probation, district	0.8

[a] Category appears to include involuntary manslaughter and other nonintentional homicides. Treated as Felony–High–Other rather than Felony–High–Murder.
[b] Class 6 sex crimes in Colorado punishable up to 18 months, Class 5 up to three years, Class 4 up to six years, Class 3 up to 12 years, and Class 2 up to 24 years. Treated as Felony–High–Other rather than Felony–High–Sex.
[c] Criminal Sexual Conduct degrees 2 and 3 in Michigan are punishable for up to 15 years, although first degree does carry a 25-year mandatory. Treated as Felony–High–Other rather than Felony–High–Sex.
[d] Class E sex crimes in Missouri are punishable up to four years, Class D up to seven years, Class C up to ten years, Class B only up to 15 years, although Class A is ten to 30 years. Treated as Felony–High–Other rather than Felony–High–Sex.

Utilizing the Weights

The median value from the expert panel recommendations in each of the study case types constitutes an *absolute case weight*, essentially the average amount of attorney time (reported in hours) that should be planned for when estimating resource requirements in light of expected numbers and types of adult criminal defense representations. If the incoming annual caseload is predicted to consist of 500 new mid-level felony prosecutions, for example, a public defense delivery system should take steps to ensure sufficient attorney availability to provide 28,500 hours of legal services (500 × the 57.0 hour NPDWS case weight for this case type) to deliver reasonably effective representations pursuant to prevailing professional norms. It is likely that more than 57 hours would be expended in many of these 500 cases, and it is equally likely that less than 57 hours would be expended in many others. The case weight, as articulated above, is simply an average. But taking the results of the expert panel at face value, a public defense system that fails to plan for the provision of 28,500 attorney hours for these cases runs an elevated risk of forcing available staff to operate under workloads that prevent adherence to ethics rules, practice standards, and other professional guidance in every client matter.

Another way to employ these results is by the use of *relative case weights*. Here, the products of the expert panel's deliberations are normalized to a standard value, which presents information from weight-based workload calculations in a more intuitive form. One approach for calculating a set of relative case weights involves choosing a case type considered the typical appointed representation for the jurisdiction. A misdemeanor case type is a common choice, because in terms of raw case counts, misdemeanors often dominate the annual caseloads of public defense delivery systems. Arbitrarily selecting Misdemeanor–High as an example, its 22.3 hours absolute weight would become the reference point or basis for the other ten case types. As indicated in Table 5.3, Misdemeanor–High would receive a relative weight of 1.00, while Felony–Low cases would be associated with a relative weight of 1.57, which indicates that about 60 percent more attorney hours should be planned for Felony–Low representations than Misdemeanor–High appointments.

Table 5.3. Relative Case Weights Based on Misdemeanor–High

Case Type	Absolute Weight	Relative Weight
Felony–High–LWOP	286.0	12.83
Felony–High–Murder	248.0	11.12
Felony–High–Sex	167.0	7.49
Felony–High–Other	99.0	4.44
Felony–Mid	57.0	2.56
Felony–Low	35.0	1.57
DUI–High	33.0	1.48

Case Type	Absolute Weight	Relative Weight
DUI–Low	19.0	0.85
Misdemeanor–High	**22.3**	**1.00**
Misdemeanor–Low	13.8	0.62
Probation or Parole Violations	13.5	0.61

Absolute and relative weights are two different ways of communicating the same information and lead to the same calculations of attorney need. But relative weights are sometimes considered a more intuitive means for presenting how changes in annual caseload distributions can affect expected workload. Table 5.4 presents an example of a state's public defense appointments over a two-year period. In Year 1, appointments based on raw (i.e., unadjusted) counts totaled 158,750 but dropped to 151,135 in Year 2. A weighted caseload analysis in which Misdemeanor–High weights are the baseline value suggests a different story, one in which the weighted caseload total in Year 1 was 142,695 and rose to 145,109 in Year 2, indicating that a 2-percent increase in attorney hours should be planned for in Year 2 despite a 5-percent drop in raw case counts. The same story is essentially told by the two rightmost columns in Table 5.4, which present Year 1 and Year 2 weighted caseloads based on the absolute weights and again suggests a 2-percent increase. It may be easier, however, to convey the impact of the second year by describing it as the equivalent of adding 2,414 Misdemeanor–High cases (using relative weights) to the workload of the state's public defense attorneys rather than as a jump from 3.18 million hours to 3.24 million hours (using absolute weights).

Table 5.4. Example of Year-to-Year Change in Weighted Caseloads

Case Type	Year 1 Raw Counts	Year 2 Raw Counts	Year 1 Relative Weighted Caseload	Year 2 Relative Weighted Caseload	Year 1 Absolute Weighted Caseload	Year 2 Absolute Weighted Caseload
Felony–High–LWOP	50	75	641	962	14,300	21,450
Felony–High–Murder	100	110	1,112	1,223	24,800	27,280
Felony–High–Sex	1,000	1,200	7,489	8,987	167,000	200,400
Felony–High–Other	2,000	2,500	8,879	11,099	198,000	247,500
Felony–Mid	5,000	6,000	12,780	15,336	285,000	342,000
Felony–Low	10,000	12,000	15,695	18,834	350,000	420,000
DUI–High	600	650	888	962	19,800	21,450
DUI–Low	6,000	5,700	5,112	4,857	114,000	108,300
Misdemeanor–High	**19,000**	**18,000**	**19,000**	**18,000**	**423,700**	**401,400**
Misdemeanor–Low	110,000	100,000	68,072	61,883	1,518,000	1,380,000
Probation and Parole Violations	5,000	4,900	3,027	2,966	67,500	66,150
Total	158,750	151,135	142,695	145,109	3,182,100	3,235,930

Creating Caseload Standards

As suggested in Chapter 2, using case weights to develop caseload standards (sometimes described as *annual caseload maximums*) requires deciding on a value that represents the amount of time an attorney providing public defense services would typically have available annually to handle case-related work. That value can vary from year to year, law firm to law firm, location to location, and even attorney to attorney.

For the purpose of calculating annual caseload maximums, several important but sometimes difficult assumptions are made, including (1) the hours public defense attorneys are expected or likely to work each week, on average; (2) the number of likely absence days, such as vacation time, sick leave days, and holidays; and (3) the amount of time an attorney is likely to spend at work that does not involve directly providing services related to representing adult clients in criminal justice matters (for example, professional development time, general meeting time, travel time, time spent working on nonadult criminal cases). Such assumptions can involve issues related to labor laws, collective bargaining agreements, local practices and traditions, labor market demands, and other factors that do not lend themselves to generalizations with national application.

Table 5.5 provides an example of one prior workload study's approach to calculating an annual case-related duty hours assumption.[186] The first component of the calculation is a value representing the hours a defender would be expected to work each week, on average. Drawing on consultation with public defense system administrators and survey results for median hours worked reported by responding defenders in the state, the researchers in the study used an assumption of 45 hours per week, based on five workdays at nine hours per day. A second assumption involved what might be characterized as absence days, which were based on benefits roughly equivalent to those available to state employees. This included 12 days of vacation (four vacation hours accrual for each 80 work hours per period and 26 pay periods per year, less two weeks not worked), 13 business days of sick leave or personal leave (four sick leave hours accrual for each pay period and 26 pay periods per year), and an 11-day annual holiday schedule. A final assumption arose from the fact that not all business time can be spent handling client matters. The researchers used the results of an attorney survey in which participants reported spending an average of 11.8 percent of their work week in the practice of law but not working on specific cases. When these assumptions were plugged into the formula represented in Table 5.5, a total of 1,785.2 hours were estimated to be available to defenders, on average, for representing clients in that state's public defense cases.

[186] Pace et al., 2021, pp. 51–52.

Table 5.5. Example of an Annual Case-Related Duty Hours Calculation

Description	Number	Category	Basis
Days per year (leap-year adjusted)	365.25	A	
Days per week	7	B	
Workweeks per year	52.2	C	(= A ÷ B)
Workdays per week	5	D	
Total workdays per year	260.9	E	(= C × D)
Vacation days per year	12	F	
Personal leave days per year	13	G	
Holidays per year	11	H	
Total leave days per year	36	I	(= F + G + H)
Duty days per year	224.9	J	(= E – I)
Work hours per day	9	K1	
Average work hours per week	45	K2	(= D × K1)
Total duty hours per year	2,024.0	L	(= J × K1)
Average reported non–case-related percentage of work week	11.8	M	Attorney survey
Non–case-related duty hours	238.8	N	(= L × M)
Annual case-related duty hours	**1,785.2**	O	(= L – N)

Other state-level workload standards studies have used annual case-related duty hour assumptions of, for example, 1,742 hours, 1,856 hours, 2,080 hours, and 2,087 hours, but it is beyond the scope of our work to develop a national value.[187] Rather, each jurisdiction seeking to use these case weights as the basis of caseload standards must determine an appropriate annual case duty hours assumption based on conditions specific to the jurisdiction. Using 2,080 available hours as an example (40 work hours per week for 52 weeks per year), a case weight of 33.0 hours for DUI–High cases suggests that an attorney working exclusively on such cases

[187] Judicial workload studies similarly use a unit of time available for case-related work per year, often called a *judicial year value*. In most judicial workload studies, this year value is reduced to allow for vacation time and sick leave, as well as training, administrative, and other non–case-related work. The judicial year value typically ranges from 1,100 hours to 1,400 hours per year for case-related work. See, e.g., Suzanne Tallarico and Alicia Davis, *Oregon Circuit Court Judicial Officer Workload Assessment Study, 2016*, National Center for State Courts, May 2016, p. 8 and Appendix E, Line 28 (annual available time for case-related work is calculated at 1,240–1,300 hours per year); Suzanne Tallarico, John Douglas, and Erika Friess, *Iowa District Court Judicial Workload Assessment Study,* National Center for State Courts, November 2008, pp. 9–12 (annual time available for case-related work calculated at between 1,037 and 1,325 hours per year); Brian J. Ostrom and Matthew Kleiman, *Minnesota Judicial Workload Assessment: Final Report*, National Center for State Courts, July 2010, p. 13 (annual available time for case-related work calculated at 1,108–1,262 hours per year); and Suzanne Tallarico, Erika Friess, Jane Macoubrie, and Brian Ostrom, *Tennessee Trial Courts Judicial Weighted Caseload Study, 2007*, National Center for State Courts, October 2007, pp. 14–19 (annual available time for case-related work calculated at 1,009–1,241 hours per year).

should not be assigned more than 63 new cases each year (2,080 ÷ 33.0, rounded downward to the nearest whole number), absent compelling additional information that would suggest otherwise about the individual cases, specific clients, prosecutorial policies, attorney experience and competency, and other factors. Table 5.6 presents examples of what caseload standards based on the NPDWS case weights might look like as a function of various assumptions used in some of the 17 prior studies for annual case-related duty hours.

Table 5.6. Illustrative NPDWS Caseload Standards Based on Attorney Availability Assumptions

	NPDWS	Annual Case-Related Duty Hour Assumption								
Case Type	Weight	1,742	1,785.2	1,800	1,856	1,900	1,950	2,000	2,080	2,087
Felony–High–LWOP	286	6	6	6	6	6	6	6	7	7
Felony–High–Murder	248	7	7	7	7	7	7	8	8	8
Felony–High–Sex	167	10	10	10	11	11	11	11	12	12
Felony–High–Other	99	17	18	18	18	19	19	20	21	21
Felony–Mid	57	30	31	31	32	33	34	35	36	36
Felony–Low	35	49	51	51	53	54	55	57	59	59
DUI–High	33	52	54	54	56	57	59	60	63	63
DUI–Low	19	91	93	94	97	100	102	105	109	109
Misdemeanor–High	22.3	78	80	80	83	85	87	89	93	93
Misdemeanor–Low	13.8	126	129	130	134	137	141	144	150	151
Probation and Parole Violations	13.5	129	132	133	137	140	144	148	154	154

Accounting for Practice Variations and Mixed Caseloads

Few attorneys exclusively represent clients who are facing prosecutions in only one of the 11 NPDWS case types. A more likely situation is that defenders handle a mix of client matters, which requires applying multiple case weights or caseload standards to assess overall workload. Assume that a solo practitioner who works only on adult criminal appointments receives a contract to represent clients in 60 Misdemeanor–High cases over the course of a year. For planning purposes, it might be expected that the attorney will spend 1,338 hours handling these cases (60 cases × an absolute weight of 22.3 hours). Using an illustrative assumption of 2,080 annual case-related duty hours, this leaves the attorney 742 hours theoretically available that year for all other client-related matters. That residual could consist of, for example, 21 Felony–Low cases (742 ÷ 35-hour case weight), or seven Felony–High–Other cases (742 ÷ 99-hour case weight), or 22 Misdemeanor–Low cases *and* 32 Probation and Parole Violations cases ([22 × 13.8-hour case weight] + [32 × 13.5-hour case weight] = 735.6 expected hours).

What about a situation in which an attorney devotes less than full time to handling adult criminal matters? Let us assume that the solo practitioner with the 60 Misdemeanor–High case contract described above had certified to local public defense that 90 percent of the practitioner's work time would be devoted to adult criminal matters (it does not matter whether these are appointments or retained clients, nor does it matter what the attorney is doing during the other 10 percent of the work week). That means that only 90 percent of the 2,080 annual case-related duty hours in our example would be available for clients and their legal needs. So, rather than 742 hours remaining for additional representations beyond the contracted Misdemeanor–High cases, only 534 hours would be available ([2,080 annual case-related duty hours × 0.90 FTE] ─ [60 cases × an absolute weight of 22.3 hours]). Therefore, instead of as many as 21 Felony–Low cases potentially added to the solo practitioner's caseload, just 15 of such cases could be represented (534 ÷ 35-hour case weight). Similar adjustments would be needed for attorneys working only part time on the practice of law, having reduced availability because of health reasons, spending a fixed portion of their days in an administrative or managerial capacity, or having caseloads that involve client matters outside the focus of their public defense appointments (such as personal injury cases or criminal appeals).

Measuring Need

Annual case-related duty hour assumptions can also be used for estimating required staff levels. Assume a projection that, over the next year, an office with attorneys working full-time on adult criminal appointments will be called on to handle 30 Felony–High–Murder cases, 40 Felony–High–Sex cases, 50 Felony–High–Other cases, 60 Felony–Mid cases, and 70 Felony–Low cases. The estimated number of total hours necessary for this work would be 24,290 when each of the projected case counts is multiplied by the absolute weight for its type. Dividing that estimate by the annual client-related duty hours value we are using solely for illustrative purposes (2,080) suggests that about 12 attorney FTEs will be needed by this office.

Another way to view attorney need calculations is to compare the total time needed to represent the annual caseload (hours needed) with the total attorney hours available to work on cases for the year (hours available). Doing so allows a system or provider to assess whether additional attorney resources are likely to be required, as follows:

Total hours needed – total hours available = deficient or surplus hours.

If this calculation shows a deficiency, the jurisdiction can further calculate additional FTE needed:

Deficient hours ÷ annual case-related duty hours per attorney FTE = additional FTE needed.

So, for example, if, based on the NPDWS case weights, a provider required 20,725 attorney hours to provide reasonably effective assistance of counsel for its annual caseload, while the provider's current staffing levels equated to 16,870 hours of annual attorney time for case-related work, the provider would have a deficiency of 3,945 hours. Assuming that each of the provider's FTE attorneys has 2,080 case-related duty hours available each year, the provider can estimate that it needs roughly two additional FTEs:

20,725 total hours needed – 16,780 total hours available = 3,945 hours deficient

3,945 hours deficient ÷ 2,080 annual case-related duty hours per attorney FTE = 1.9 FTE needed.

It should be noted that the use of absolute case weights for calculating attorney need provides estimates only for the case types contemplated by those weights. As indicated previously, the case types selected for this study together represent the vast majority of the adult criminal client matters that are believed to consume most of a defender's workday, but there were some exceptions. For example, extraditions, matters that involve the provision of advice unrelated to a prosecution, certain mental health proceedings, and expungements would not have informed the caseload standards and, therefore, any related absolute weights. Therefore, case weight–based estimates for attorney need should be viewed as minimum requirements and must be adjusted appropriately based on expectations about such supplemental duties.

Chapter 6. Insight into the Expert Panel's Deliberations

Overview

At the conclusion of the Delphi session, the research team conducted a focus group session with the participants. The session lasted approximately 90 minutes. The facilitator posed open-ended questions to stimulate group discussion on the activities and time needs of criminal defense attorneys and obtain insight as to what might have influenced the panelists' submissions during the Delphi session. Key questions posed to the group were as follows:

- Based on your experience, what are the most time-consuming aspects of representing defendants in the majority of adult criminal cases?
- Based on your experience, what types of cases require the greatest investment of attorney time, and what are the most time-consuming aspects in those cases?
- What changes, if any, have you observed in the practice of criminal defense during your career?
- What changes, if any, are you aware of in the practice of criminal defense over the past ten or 20 years?
- What types of challenges have you faced, if any, in adhering to ethical and professional standards during the practice of adult criminal defense, and what are the causes of any such challenges?

Qualitative analysis of the panelists' comments during the session suggest that five topic areas were of greatest concern:

- evidentiary issues
- the role of the public defense attorney
- aspects of criminal procedure and substantive law
- institutional issues
- the consideration of a plea offer.

A summary of the group dialogue in each of these areas follows. It should be noted that the discussion in this chapter is intended only to present commonly made assertions of the panelists and does not necessarily reflect the opinions of the authors, reflect the opinions of all panelists, or constitute factual statements.

Evidentiary Issues

There was near-universal agreement that the biggest change in criminal defense practice in recent years is also the most time-consuming aspect of defense practice. Media, technological, and scientific evidentiary issues, we were told, now dominate many criminal cases. A common refrain was that today's public defense attorney must not only identify whether such evidence

might exist but also understand how such material is created, authenticated, and challenged. As one participant lamented, “We have to become experts in everything.”

Media, Communication, and Other Technological Evidence

Panelists noted that, in many cases, criminal defense lawyers receive enormous amounts of evidence related to social media, communication, computers, and other technologically based sources. From the social media, text, and cell phone data of clients to traffic and doorbell camera footage, discovery in criminal cases today can sometimes be measured in terabytes rather than pages. For example, if the location of the accused is at issue in the criminal case, a public defense attorney must now not only consider who might have seen the accused but also whether there is video from traffic, store, or doorbell cameras or data from virtual home assistants (e.g., Alexa), car GPS, or cell phone towers that might identify the defendant’s movements. Social media posts would also be an area needing investigation. Understanding the evidentiary value of these data requires not only reviewing its substance, it was claimed, but also understanding its creation process (including analysis of metadata) to determine its reliability and the need for verification.

Focus group participants described seeking or receiving digital discovery in all types of cases, from misdemeanors to murder prosecutions. One participant noted that many misdemeanor cases, particularly domestic violence misdemeanors, have a considerable volume of social media evidence from such applications as Facebook, Twitter, and Instagram; text messages and chats; Alexa and other similar device data; and home security camera footage.

Several participants mentioned that tracking down and reviewing media evidence is essential to effective defense representation because it often results in helpful or even exculpatory evidence (“So much of the media stuff is good for our clients”). But many also noted that properly reviewing media evidence is time-consuming. One participant remarked that time is not spent only in reviewing the material; it is also spent in first figuring out how to transfer or upload it and deciding what software is needed to review it because media and digital evidence are produced in myriad formats. Time is also said to be consumed when manipulating technological evidence to better understand it.

Police and Jail Audio and Video Evidence

Panelists noted that in many of their jurisdictions, nearly all police interactions are now recorded. One participant remarked that defenders get “body-worn and dashcam [video] in . . . almost every case.” Interrogation-room cameras were described as another source of video evidence. Police video evidence is not just of a stop or arrest, it was asserted, but now has essentially replaced written documentation and reports as the primary evidence format involving searches, witness interviews, scene information, etc. As one participant stated, we get “recorded witness statements in every case with a human victim.”

Participants reported receiving police video evidence in most criminal cases and that there are often multiple police videos of the same event. For example, if five officers respond to a scene or incident, criminal defense lawyers receive five videos, all from different angles and perhaps talking to different people. To be effective, participants indicated, attorneys must watch and listen to all of the raw video to determine what, if anything, might be useful or harmful to the client's case. They may need to review portions of it several times to understand what is being said and who is saying it or watch portions of an incident over and over.

Much of the time spent reviewing police video may seem wasted in that there is nothing on the video of import, but most participants agreed that they still must review the video to determine its value. As one participant observed, the police may put the client in an interrogation room and leave the client there for 12 or even 24 hours:

> You have to watch and listen to the whole video. Maybe someone comes in to talk to them and they say something important or maybe you watch hours upon hours of video of them sitting alone not talking to anyone. But if that client has a mental health issue, you may see it while they are sitting in that room.

There was some debate among participants as to whether the defense attorney should be required to watch all police video evidence. One participant observed that if there are three officers standing around, then for at least two of them, it would be better to have a paralegal watch to confirm that there is nothing unusual. Several others disagreed, stating that they feel an obligation to review all available video evidence personally, particularly if the client is facing jail time. One noted that only by watching the video can an attorney catch a *Miranda* violation or some relevant side comment. Many other participants stated that they do not have the paraprofessional resources to assign to such work, even if it were appropriate to do so. Several participants also stressed the importance of reviewing any important video evidence with the client, although several noted that clients are often unwilling or unable to devote the time needed to do so.

Many participants noted that jail call audio recordings are produced for every client who is or was detained, regardless of charge, and that reviewing these calls to understand what, if anything, they said about their arrest and charges is critical. Participants also noted that jail call audio recordings often require audio manipulation because of poor recording quality. Some recordings require translation by a person who understands not only the language but also the dialect and slang of a particular region or group.

Scientific Evidence

A participant who has practiced criminal law for multiple decades noted that "science has advanced so far." These advancements have opened new avenues of investigation and new means of challenging existing evidence, but they have also expanded the workload for criminal defense attorneys. Participants mentioned an extraordinary list of scientific evidence that they must pursue or review in their criminal defense practice, including

- forensics, such as DNA and ballistics
- medicine, including shaken baby syndrome and fetal alcohol syndrome
- technology, such as geolocation and ShotSpotter data
- psychology, including false confessions and identification procedures.

Almost all participants agreed that the number of cases utilizing scientific evidence has expanded enormously. Multiple participants highlighted that DNA is no longer used only for identification in rape and homicide cases but is now relevant in lower-level prosecutions, such as gun possessions and robberies. Furthermore, the depth of knowledge needed in each of these disciplines has grown. One participant noted that criminal defense lawyers must not only understand the basics of DNA, but the differences between STR, Y-STR, and mitochondrial DNA testing, not to mention probabilistic genotyping and familial DNA results. Others noted the breadth of forensic disciplines that they must understand, covering evidence from bite marks, tire marks, and tool marks to arson forensics on accelerants and initiation points. When such evidence is at issue, they must research and investigate error rates, if any, for methods used by the prosecution so that they can challenge the introduction and reliability of evidence as appropriate.

Participants noted that some statewide and large city public defender offices have created specialized forensic units to litigate whether scientific evidence is reliable and to train defenders on how to approach such evidence. But most agreed that, in most offices, individual lawyers must independently acquire whatever expertise may be applicable to their cases.

Additionally, the need for expertise in psychology and brain science has expanded tremendously. Participants repeatedly observed that they must identify mental health, substance use, cognitive disabilities, and other influences on brain development (e.g., toxin exposure) and understand how these factors affect issues related to competency, culpability, or mitigation. One participant observed that these issues affect all criminal cases, noting that a significant portion of the population charged with low-level misdemeanors needs forensic and competency evaluations.

The Role of the Public Defense Attorney

The increased understanding of psychological and brain disorders and their impact on clients was said to have led to a concomitant increase in the role of criminal defense attorneys in helping clients address these issues as just one aspect of their overall criminal case. Panelists noted that if a client has a substance use disorder or mental health issue, the defense attorney must not only seek consulting expertise to diagnose it but also try to identify treatment placements and supports as part of arguing for release, diversion, or mitigation. Participants also mentioned

- trying to find housing for unhoused clients to facilitate release from detention
- seeking treatment placement or programs as part of mitigation or diversion
- identifying programs that will accept dual-diagnosis clients

- working with treatment providers and placements to show progress.

Participant examples suggested that even clients with no diagnosis sometimes require help navigating different systems to resolve issues that could lead to ongoing criminal justice involvement. Participants described unhoused clients needing not only housing but also help signing up for benefits, including food assistance, income assistance, and health care. Similarly, in many jurisdictions, an inordinate number of clients have suspended drivers' licenses from failure to pay fines, outstanding tickets, etc. We were told that, to avoid clients picking up pretrial release and probation violations from license issues, as well as additional charges, defenders often must help clients navigate the process for reinstating their drivers' licenses. Some public defenders' offices have hired social workers to assist with this type of work, but in many offices, this burden continues to fall primarily on the attorneys. Even in offices with social worker support, participants noted that the support level is often insufficient and that working with the social worker takes time.

Changes in Criminal Law and Process

Participants also cited several changes in criminal law and process that have increased the time that defense attorneys need to provide reasonably effective assistance of counsel:

- **Client Communication:** Many participants remarked that they spend more time establishing a relationship of trust with the client than in the past. One participant noted that the heightened awareness of cultural competency and the barriers to trust mean that they spend more time building rapport. Another participant noted that clients are generally younger than when they started as a criminal defense lawyer and that dealing with youthful clients requires more time and often requires parental involvement.
- **Discovery:** Multiple participants cited the need to pursue discovery as a time-consuming aspect of defense practice. One participant noted that their office needs to "fight tooth and nail" to ensure that they receive all of the discovery to which they are entitled.
- **Alternative Court Programs:** Several participants noted that clients in diversion, probation, and other court programs with supervision obligations require significant support to navigate program requirements. Multiple participants mentioned that problem-solving courts (e.g., drug courts, veterans' courts, homeless courts)[188] require far more attorney time than a typical criminal case involving similar charges. The programs often take a year or more to complete, and there are regular status or check-in hearings with clients during that period.
- **Trial and Motion Displays:** Advances in technology have entered the courtroom and changed the nature of courtroom presentations. One participant noted that she used to be able to write major points on a whiteboard during an opening, closing, or evidentiary hearing, but now, juries and judges expect video compilations and PowerPoint presentations.

[188] These courts are sometimes called *accountability courts*.

- **Sentencing:** Many participants noted that sentencing laws and practices have changed dramatically in the past 20 or even ten years. From mandatory minimums to sentencing guidelines, clients are facing far more time for the same crime than clients in the past with similar charges. Even when clients are not at risk of significant incarceration, the collateral consequences of conviction can have serious impacts, such as possible deportation and other immigration consequences; professional consequences, including licensing issues; and personal consequences, including loss of housing and other benefits. As a result, preparing for sentencing, whether through mitigation work or simply argument, takes far more time than in the past. As one participant noted, "Penalties have more than doubled in my years of practice for the exact same actions. More at risk for the client, more stress and strain on us."

Institutional Issues

Changes in the culture of the courtroom, as well as issues with retention of both defense attorneys and prosecutors, were also reported to add to the amount of time needed to defend cases.

Lack of Collegiality

Several participants mentioned that a general decline in civility and collegiality between prosecutors and defense attorneys creates extra work and decreases efficiency. This includes the need to file discovery motions to ensure that material required by law is produced, but also extends to other areas that result in wasted time, for example, prosecutors listing several cases for trial on the same day knowing that only one can proceed. Some participants stated that prosecutors refuse to make reasonable plea offers or will wait to make such offers until the day of trial. As a result, cases are proceeding far longer than might otherwise be necessary. One participant even asserted that they cannot recall the last time an offer from a prosecutor was accepted because they know the defense could do better with the judges.

Inexperienced Attorneys

Participants also asserted that both public defenders' and prosecutors' offices are finding it increasingly difficult to retain experienced attorneys, leading attorneys on both sides to take on more and more complex cases with less and less experience. New attorneys still developing critical lawyering skills require more time to handle every aspect of a case, as well as close attention from supervisors. Inexperienced prosecutors are often required to consult closely with their supervisors during the plea-bargaining process, drawing out negotiations. "We are lacking institutional knowledge," explained one attorney. "Public defenders and [prosecutors] are leaving at a rate we've never seen before. It benefits no one to have someone on the other side who doesn't know what's reasonable or doesn't know the law."

Tension Between Investigation and Quick Resolution

A recurring theme of the panelists' discussion during the expert panel deliberations and the focus group session was the frequent tension between a client's desire for a swift resolution and the attorney's need to gather the information necessary to allow the client to make an informed plea decision. The defense attorney's ethical obligation is to investigate the facts of the case before advising the client on a plea, enabling the client to assess the strength of the prosecution's evidence, the likely defenses, and the risk of trial before entering a plea. This applies even for clients contemplating diversion programs. Because diversion can be burdensome and costly for participants, a client should understand the strength of the case, including whether the case should more appropriately be dismissed, before agreeing to diversion.

Yet we were told that many clients do not have the time or desire to wait for their attorneys to conduct the type of investigation that would lead to a fully informed plea or diversion decision. A client with a low-level misdemeanor charge may not want to miss work for multiple court appearances and risk losing their job; a client who cannot make bond may prefer to accept a guilty plea with time served just to get home. Even clients who are not detained may have trouble arranging transportation, time off work, or child care to meet with their attorneys, or may simply be unwilling to do so. As a result, it was asserted, attorneys frequently meet a client for the first time on the court date, conduct a brief client interview in the hallway, and advise the client on a plea based on the limited information available.

Although client-centered lawyering demands that attorneys respect their clients' preferences, several focus group participants expressed concern that clients' preferences are being distorted by observing the substandard representation afforded by an underfunded public defense system. "A lot of clients are saying they want diversion or to plead because they don't have faith in the system," asserted one attorney. "If they saw lawyers standing up and getting cases dismissed because the bodycam doesn't look good for the officer, then clients might say they wanted different things than they do now." In other words, if defense attorneys had more time for fact investigation, clients would observe the fruit of those investigations in other cases and might be more willing to delay accepting a plea offer until the investigation in their own case was complete.

Summary of the Panelists' Comments

The panelists reported that many factors have led to the overall increase in the number of attorney hours needed to provide reasonably effective assistance of counsel in adult criminal cases. The most noteworthy change, according to our focus group, is the volume of technological and forensic evidence defense lawyers must address in even simple cases. Today's public defender must possess the skills and time to review police and public camera video, social media and cell phone data, and forensic evidence from DNA to chemical drug analysis. This increased complexity extends not only to the evidence they must investigate, understand, and question but

also to the law and criminal process. They must consider not only the potential for incarceration or probation but also a multitude of diversion and specialty court program options, as well as myriad collateral consequences of a guilty plea. They must evaluate the role of mental health and substance abuse issues in their clients' cases. And they must navigate these issues through a perceived decline in collegiality among officers of the court and a growing perception that the client community views them as too poorly resourced, trained, or skilled to be effective. Given panelists' concerns in all of these areas, the stark difference between the caseload limits as exemplified by the 50-year-old NAC standards and the results of our Delphi session becomes easier to understand.

Chapter 7. Going Forward

The goal of this study is to establish new national public defense workload standards by utilizing the Delphi method with a panel of expert criminal defense attorneys and by building on approaches used by the 17 state-level public defense workload studies conducted between 2005 and 2022. The case weights resulting from the NPDWS Delphi session represent a significant departure from the 1973 NAC standards. Compare, for example, the NAC felony standard—150 felonies per year or 13.9 hours per felony case with an illustrative 2,080 annual case-related duty hours assumption[189]—with the Felony–Low case weight from this study: 35 hours per case or 59 cases per year. The NPDWS suggests that the NAC standards underestimate the time needed for Felony-Low cases by more than 20 hours per case. Put another way, an attorney representing only clients with Felony-Low cases and shouldering an annual caseload at the NAC maximum for felonies may have more than 2.5 times as many cases as this study suggests can reasonably be handled. Similarly, if one compares the 1973 NAC standard for misdemeanors—400 per year or 5.2 hours per case (based on 2,080 annual hours)—with the Misdemeanor–Low case weight from this study (13.8 hours or 150 cases per year), the hypothetical attorney working right at the NAC upper limits may have more than 2.6 times as many cases as likely would allow enough time to provide reasonably effective representation pursuant to prevailing professional norms. The differentials are even greater for the other case types.[190]

At the same time, as observed in Chapter 5, these results should not come as a surprise. When compared with the case weights from the 17 state-level workload studies conducted between 2005 and 2022, the case weights are unremarkable, often sitting squarely within a collection of results from similar case types.[191] Rather, this study further confirms what the state-level public defense workload studies have been suggesting for more than 15 years: The 1973 NAC standards are outdated and should not be applied to determine appropriate public defense workloads in 2023.

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[189] Assuming an attorney has 40 hours per week, 52 weeks per year available for case-related work, the total case-related work hours available per attorney is 2,080 hours. With a 150-felony-case annual maximum as described in the NAC standards, there would be 13.9 hours, on average, to devote to each case under that annual case-related work hour assumption (2,080 hours ÷ 150 cases = 13.9 average hours per case).

[190] Comparing the NAC standards with the NPDWS standards by case type, NAC standards consistently allow significantly greater caseloads. The NAC felony standard permits 20 times as many cases annually as the NPDWS Felony–High–LWOP standard does, 17.8 times as many Felony–High–Murder cases; 12 times as many Felony–High–Sex cases, seven times as many Felony–High–Other cases, four times as many Felony–Mid cases, and 2.5 times as many Felony–Low cases. In addition, the NAC misdemeanor standard permits four times as many cases annually as the NPDWS Misdemeanor–High standard does. All calculations compare NPDWS case weights with NAC standards after those standards are translated to case weights based on an assumption that an attorney would have 2,080 hours available for case-related work each year.

[191] See Table 5.1 in Chapter 5.

The two tables that follow compare the NAC standards with both the median results of the 17 state-level workload studies (see Table 4.4 in Chapter 4) and the results of the Delphi session conducted as part of this study.[192] Table 7.1 uses case weights as the comparison measure, calculating an example case weight for the NAC standards based on an illustrative assumption that an attorney with an annual caseload at the NAC limits has 2,080 hours available to devote to case-related work (the 1973 NAC standards did not include any discussion of an associated case weight). Table 7.2 examines how the maximum annual caseload standards compare, again using 2,080 simply as an example annual case-related duty hour assumption, but in this instance applying it to the case weights that resulted from the NPDWS Delphi session and to the median values observed in prior state-level workload studies that used case type designations approximating those in the NPDWS. It should be noted that the NPDWS did not produce any recommendations for annual caseload maximums because of the need for localized information about annual attorney availability. Therefore, the rightmost column in Table 7.2 presents illustrative examples of what caseload standards derived from the NPDWS case weights might look like if 2,080 hours was used as the availability assumption.[193]

[192] Two caveats should be mentioned here. First, the reader is urged to review the discussion accompanying Table 4.3 and Table 4.4 regarding the challenges we faced when trying to map the case types in the 17 studies with those in this effort. Second, the NPDWS result for probation and parole violations received only a fair level of consensus among the panelists (CoV = 0.62) and, therefore, we have less confidence in that category's recommended case weight compared with those of the other ten study case types.

[193] Similarly, the column in Table 7.2 for the state-level studies also presents illustrative examples of caseload standards based on a 2,080-annual-hour assumption.

Table 7.1. Case Weights Comparison

NPDWS Case Type	NAC Standard (illustrative hours)[a]	State-Level Study Medians (hours)[b]	NPDWS Results (hours)
Felony–High–LWOP	13.9 (all felonies)	256.0	286.0
Felony–High–Murder		266.1	248.0
Felony–High–Sex		150.0	167.0
Felony–High–Other		75.3	99.0
Felony–Mid		67.2	57.0
Felony–Low		24.6	35.0
DUI–High	N/A	25.0	33.0
DUI–Low		12.1	19.0
Misdemeanor–High	5.2 (all misdemeanors)	20.7	22.3
Misdemeanor–Low		8.0	13.8
Probation and Parole Violations	N/A	6.0	13.5

[a] Effective case weight based on 2,080 annual case-related duty hours assumption.
[b] Categorizations of the case types used in the 17 state-level workload studies for the purpose of comparison with the NPDWS case types are subject to the limitations described in the discussion accompanying Table 4.3 and Table 4.4.

Table 7.2. Caseload Standards Comparison

Case Type	NAC Standards (maximum cases per year)	State-Level Study Medians (illustrative maximum cases per year)[a, b]	NPDWS Results (illustrative maximum cases per year)[a]
Felony–High–LWOP	150 (all felonies)	8	7
Felony–High–Murder		7	8
Felony–High–Sex		13	12
Felony–High–Other		27	21
Felony–Mid		30	36
Felony–Low		84	59
DUI–High	N/A	83	63
DUI–Low		171	109
Misdemeanor–High	400 (all misdemeanors)	100	93
Misdemeanor–Low		260	150
Probation and Parole Violations	N/A	346	154

[a] Effective caseload standard based on 2,080 annual case-related duty hours assumption and result rounded down to the nearest whole number.
[b] Categorizations of the case types used in the 17 state-level workload studies for the purpose of comparison with the NPDWS case types are subject to the limitations described in the discussion accompanying Table 4.3 and Table 4.4.

Excessive caseloads are pervasive in public defense, even when judged against the 1973 NAC standards. In December 2022, the public defender office in St. Clair County, Illinois, reported caseloads of 350 felony cases per attorney per year.[194] In Luzerne County, Pennsylvania, public defenders are "juggling more than 300 felonies annually, or double the [NAC] recommended standards of 150 per year."[195] In validating the concerns raised over the past several decades that the NAC standards are outdated, the results of this study (as well as those of prior state-level weighted caseload research efforts) strongly suggest that these caseloads—along with those of countless other public defense providers across the county—are more excessive than previously thought.

Excessive caseloads are proscribed by legal ethics rules because they inevitably cause harm. Overloaded attorneys simply cannot give appropriate time and attention to each client.[196] They cannot investigate fully or in a timely manner. They cannot file the motions they should. Cases are delayed, and evidence and witnesses are lost. Almost no cases go to trial. They must triage, choosing which cases on which to focus, while allowing others to be resolved without appropriate diligence. Such difficult decisions not only negatively affect public defense clients and their families, they also negatively affect victims by contributing to delay and uncertainty in the process. Furthermore, systems burdened by triage risk unreliability, denying all people who rely on them efficient, equal, and accurate justice.

This study will permit public defense providers and jurisdictions across the country to review their caseloads against a more justifiable, data-driven set of standards and should allow them to better avoid overload, as required under the ethics rules.[197]

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[194] Dana Rieck and Steph Kukuljan, "St. Clair County Public Defenders Seek to Withdraw from New Cases, Citing Massive Caseloads," *St. Louis Post-Dispatch*, December 2, 2022. For more examples, see the section titled "Excessive Caseloads in Public Defense" in Chapter 1.

[195] Jennifer Learn-Andes, "ACLU Calls on Luzerne County to Address Public Defender's Office Staffing Shortages," *Times Leader*, December 5, 2022.

[196] In 2019, the *New York Times* published a detailed profile on one public defender in Louisiana who was assigned almost 200 felony cases, noting the impact that this case overload had on his clients. See Oppel and Patel, 2019.

[197] ABA Formal Opinion 06-441, 2006.

Appendix A. Expert Panel Biographies

The biographies that follow were submitted by the individual panelists and have been lightly edited for consistency.

Jenny P. Andrews

Director of Training, Indigent Defense Improvement Division, Office of the State Public Defender, Oakland, California

Jenny Andrews is the Director of Training at the Indigent Defense Improvement Division (IDID) of the Office of the State Public Defender in Oakland, California. Andrews is a graduate of Cornell University and Harvard Law School. Prior to joining IDID in 2022, she litigated trial cases for 23 years in the public defense offices in Alameda, Sonoma, and Santa Barbara Counties in California. Since 1996, she has worked on the front lines of California's criminal trial courts and has consistently and aggressively litigated trial cases, including misdemeanor, felony, three strikes, LWOP, juvenile, civil commitment (mentally disordered offender and sexually violent predator), mental competency, homicide, and multijurisdiction (and multijury) trials. She has carried specialized caseloads of complex, forensic, and capital litigation and has held a wide variety of positions, including Forensic Resource Counsel and Felony Team Leader in Sonoma County and Director of Training and Senior Deputy in Santa Barbara. She has taught on the faculty of Gideon's Promise; the NAPD; the NCDC; the Trial Advocacy Workshop at Harvard Law School; the California Public Defenders Association; and in public defense training programs in New York, New Jersey, Montana, Mississippi, Louisiana, Kentucky, Kansas, Tennessee, and Georgia. She has designed and presented training for public defenders working at all levels, from intern to leadership, and from basic trial skills to capital litigation, as well as in specialized areas, such as mentorship, challenging forensic evidence, and sustaining well-being.

Tamar R. Birckhead

Attorney, Parrett Porto Parese and Coldwell PC, Hamden, Connecticut

For more than 26 years, Tamar Birckhead has represented individuals charged with criminal offenses in the state and federal court systems at both the trial and appellate levels. Licensed to practice in Connecticut, Massachusetts, New York, and North Carolina, Birckhead has defended clients in a wide variety of criminal cases—from serious felonies in state court to alleged acts of terrorism in federal court. Among her clients was Richard Reid, the attempted Shoe Bomber prosecuted in the District of Massachusetts under the Patriot Act. In her Connecticut practice,

Birckhead regularly defends clients facing serious criminal charges in Connecticut's Superior Courts (both GA and Part A) located in Bridgeport, Manchester, Meriden, Middletown, Milford, New Britain, New Haven, New London, Norwalk, and Waterbury, although she has handled cases throughout the state. She also defends the rights of clients prosecuted in federal court in the Districts of Connecticut and Massachusetts.

Birckhead graduated *cum laude* from Yale University and Harvard Law School. After a decade as a public defender in Massachusetts, she taught criminal and juvenile defense as a tenured law professor at the University of North Carolina at Chapel Hill School of Law, where she also served as Director of Clinical Programs. Birckhead is the author of more than a dozen law review articles on topics related to criminal defense and an editor and contributor to several juvenile justice–related books.

Alison Bloomquist

Vice President of Strategic Alliances and Innovation, National Legal Aid & Defender Association, Washington, D.C.

Alison Bloomquist is an experienced and dedicated public defender. Bloomquist has been trying public defense cases in New England for nearly 20 years. She served for more than ten years as a staff public defender in greater Boston, two of them as Attorney-in-Charge of the Norfolk Superior Court office at the Committee for Public Counsel Services. She spent the next six years trying complex cases in Connecticut as the Director of Training and Education for the Office of Chief Public Defender. Now, in addition to taking special public defender appointments in Connecticut, Bloomquist serves as Vice President of Strategic Alliances and Innovation for NLADA. In this role, she directs and supervises NLADA's defender initiatives, including the provision of training and technical assistance to defenders and defender organizations across the country. She teaches nationally, including as faculty at the NCDC and has authored several trial skills publications. Bloomquist is a graduate of Northeastern University School of Law and Boston University College of Arts and Sciences. She lives in West Hartford with her wife, three children, and their silver Lab, Cooper.

Carmen Brooks

Assistant Federal Defender, Federal Defender Program, Inc. (Northern District, Georgia), Atlanta, Georgia

Carmen Brooks earned her B.A. and M.A. at Washington University in St. Louis. She fell in love with indigent defense during her criminal law clinic at Georgetown University Law Center. A member of the Gideon's Promise class of 2012, after graduating from law school, Brooks worked in the Nashville Public Defender's Office for a year before moving home to Denver,

Colorado. Following two years as a paralegal in death penalty postconviction matters, Brooks landed at a three-attorney firm committed to indigent clients. While at this firm, Brooks carried adult and juvenile conflict contracts with the Office of Alternate Defense Counsel and Office of Respondent Parents' Counsel. In May 2019, she returned to full-time indigent defense as a Deputy Public Defender for the Colorado Springs Office of the Colorado Office of the State Public Defender (COSPD). During her time at the COSPD, in addition to her caseload, Brooks was a faculty member for the statewide mandatory public defender trial advocacy program. Currently, she is an Assistant Federal Defender with the Federal Defender Program, Inc., in Atlanta, Georgia. She is also Alumni Faculty with Gideon's Promise and has taught for other systems, such as the Kentucky Office of Public Advocacy and the Davidson County Public Defender's Office in Nashville, Tennessee.

Jason H. Broth

Assistant Public Defender, DeKalb County Public Defenders, Atlanta, Georgia

Jason Broth has worked as a licensed attorney in California and Georgia for more than 25 years. His experience includes judicial clerkship, private litigation practice, and public defense. As a public defender in two different offices in Georgia, he has litigated thousands of felony and misdemeanor cases through trial. In addition, he has been first chair counsel for multiple murder trials during his tenure. Currently he is the DUI specialist for the DeKalb County Public Defender's Office. His duties include both the litigation of misdemeanor and felony DUI matters, including vehicular homicide, and the training and supervision of attorneys in the handling of all DUI cases in DeKalb County.

Thomas Carver

Attorney, Carver & Associates, Springfield, Missouri

Thomas Carver will soon enter his 50th year of practicing law in the state and federal courts of Missouri. His portfolio includes representation of more than 300 clients in federal cases and thousands of clients in Missouri state courts. He has faced the ultimate challenge in serious and life-changing cases on many occasions, including the representation and trial of individuals accused of capital murder in federal court. Aside from representing litigants in thousands of state court cases, he received the Robert Duncan Award for Appellate Excellence from the Missouri Association of Criminal Defense Lawyers. Recently, he was awarded the Bernard Edelman Tradition Award for mentoring young lawyers with an interest in criminal defense and is a past president of the Missouri Association of Criminal Defense Lawyers. Carver is admitted to practice in all Missouri courts and has been a member of the U.S. Supreme Court Bar since 1993.

He is also a member of the federal bars for the U.S. Eastern and Western Districts and the U.S. Eighth and Tenth Circuit Courts of Appeal.

Eric J. Davis

Chief of the Felony Trial Division, Harris County Public Defender's Office, Houston, Texas

Eric Davis has been the Chief of the Felony Trial Division of the Harris County Public Defender's Office since 2016. He is also a former prosecutor, having served in a child sex abuse unit and tried many violent offenses during his time prosecuting. As Chief of the Felony Trial Division, Davis supervises more than 75 lawyers, 13 investigators, and several other administrative employees. He oversees training in the division and still regularly defends and tries criminal cases, sitting first chair in multiple jury trials each year. As a defense lawyer, he has tried more than 100 cases to juries on charges including capital murder, federal Medicare fraud conspiracies, and misdemeanors. He graduated from Howard University with honors in 1991 and from Tulane University Law School with honors in 1994. He is also a graduate of Gerry Spence's Trial Lawyer's College, where he honed his trial skills by learning from some of the best trial lawyers in the country. Following graduation, Davis was asked to join the staff of the college, and he currently helps train lawyers from across the country. In 2021, he received the President's Award from the Texas Criminal Defense Lawyers Association. In 2020, he received the Mentor of the Year Award from the Harris County Criminal Lawyers Association for his efforts in mentoring and training lawyers. He received that same award from the Harris County Criminal Lawyers Association in 2016 as well. Davis regularly presents at Continuing Legal Education (CLE) courses and is routinely a top-rated speaker at those CLEs. In 2006, Davis received the Unsung Hero Award from the Harris County Criminal Lawyers Association and the Man of the Year Award from the Houston Business and Professional Women's Association.

C. Dawn Deaner

Attorney and Executive Director, Choosing Justice Initiative, Nashville, Tennessee

Dawn Deaner is the Executive Director of Choosing Justice Initiative (CJI), a nonprofit law firm in Nashville that provides free client-centered legal representation to people facing criminal charges who are seeking justice and fair treatment and cannot afford to hire a lawyer. Before launching CJI in 2018, Deaner was Nashville's elected Public Defender for ten years, and she was an Assistant Public Defender in Nashville for 11 years before that. During those years, Deaner represented thousands of people in General Sessions Court, Criminal Court, and in Tennessee's appellate courts, serving as lead counsel in approximately 50 felony jury trials. At

CJI, Deaner continues to represent people in criminal cases at all levels of court, using a holistic service model and offering people in need of appointed counsel the opportunity to obtain a lawyer of their choice. Deaner received her undergraduate degree from Columbia College and her law degree from George Washington University Law School.

Damaris Del Valle

Deputy Chief of Felonies, Law Offices of the Public Defender, Carlos J. Martinez, Miami, Florida

Damaris Del Valle is board certified in Criminal Trial Law by the Florida Bar and serves as the Deputy Chief of Felonies at the Law Offices of the Public Defender, Carlos J. Martinez. After graduating in 2009 from the University of Cincinnati with both a J.D. and an M.A. in women's studies, she began her legal career as an Assistant Public Defender in Miami-Dade County. Over the course of her tenure at the office, Del Valle has tried a wide array of cases, from cocaine possession to first-degree murder.

Carrie Ellis

Misdemeanor Chief and Training Director, Harris County Office of Managed Assigned Counsel, Houston, Texas

Carrie Ellis is the Misdemeanor Chief and Training Director at the Harris County Office of Managed Assigned Counsel (MAC). Prior to joining the MAC, she worked as the Training Director at the Orleans Public Defenders, where she started as a staff attorney in 2008. Following graduation from law school, Ellis served as an E. Barrett Prettyman Fellow at Georgetown Law. Ellis received her B.S. in mathematics and B.A. in Russian literature from the University of Texas at Austin, her J.D. from Columbia University, and an LL.M. in Advocacy from Georgetown Law.

Karl Fenske

Deputy Public Defender IV, Los Angeles County Public Defender's Office, Los Angeles, California

Karl Fenske has worked for the Office of the Los Angeles County Public Defender for more than 20 years. During that time, he has tried more than 100 adult criminal trials and dozens of juvenile adjudications and mental health–related jury trials. He is currently the Second Vice President on the board of the Los Angeles County Public Defender Union Local 148 and the lead steward. He has dedicated his work to serving the community by defending their constitutional rights in criminal court proceedings.

Carey Haughwout

Public Defender for Palm Beach County, Office of the Public Defender, 15th Judicial District, West Palm Beach, Florida

Carey Haughwout has been the Public Defender for Palm Beach County since 2001 and has practiced criminal defense since 1983. She is also the immediate past president of the Florida Association of Public Defenders. As part of her duties, Haughwout works with the legislature on criminal justice policy. She is a board-certified criminal trial lawyer and a fellow of the American College of Trial Lawyers. Haughwout's efforts have been recognized with the American Civil Liberty Union's Harriet S. Glasner Freedom Award, The Lord's Place Ending Homelessness Award, the Voter's Coalition of Palm Beach County, the March of Dimes Women of Distinction Award, the Palm Beach County Bar Association's Professionalism Award, and the Judge Barry M. Cohen Champion of Justice Award. She is a past president of the Florida Association of Criminal Defense Lawyers, served on the Board of Legal Specialization and Education, the Florida Bar Criminal Rules Committee, and on a variety of local committees dedicated to the improvement of the system of justice. She established and chairs the Reentry Task Force for the Palm Beach County Criminal Justice Commission, which has been credited with establishing services for ex-offenders to reduce recidivism. Besides the administrative duties of managing a 200-person law office, Haughwout maintains an active trial practice of serious cases and death penalty cases.

Aaron Hawbaker

Supervisor, Iowa Adult Public Defender Office, Waterloo, Iowa

Aaron Hawbaker graduated from Iowa Law School in 1994. He was in private practice until 2004 when he joined the State Public Defender and was first hired to work in the Waterloo Office. Hawbaker became the supervisor of the Marshalltown office in 2008 and the supervisor of the Waterloo Adult Office in 2010, where he remains. He has handled every type and level of offense in Iowa, from traffic tickets to Class A felonies, and has tried many cases involving every type and level of offense in Iowa to both juries and the court. He served several years as the president of the Public Defender Association of Iowa. He is a past member of the Iowa Bar Association Jury Instruction Committee. He is a member of the Iowa Supreme Court Advisory Committee for Criminal Procedure and a member of the Iowa Supreme Court Criminal Procedure Task Force. He is also a member of the Iowa Supreme Court Rules of Evidence Substantive Review Task Force. Hawbaker is a past Public Defender of the Year honoree and a recipient of the John Adams Award presented by the Iowa Association of Criminal Defense Lawyers.

Gemayel Haynes

Team Lead, Senior Litigator, Harris County Public Defender's Office, Houston, Texas

After graduating from law school, Gemayel Haynes became a prosecutor for the Harris County District Attorney's (DA's) Office, working in the Justice of the Peace, Misdemeanor, Juvenile, and Felony Trial Divisions. After leaving the DA's office, Haynes was in private practice for approximately five years, representing juvenile and adult clients charged with misdemeanors and felonies. He is currently an Assistant Public Defender serving as Senior Litigator and Team Lead in the Felony Trial Division of the Harris County Public Defender's Office. Haynes supervises and trains a team of eight lawyers, mentors other lawyers in the division, and represents indigent clients charged with first- and second-degree felonies. He is in trial, either as first chair on his own clients' cases or a second chair with younger lawyers, several times per year on everything from state jail felonies to first-degree murder and sex cases. He gives trainings to criminal lawyers locally and across the state on topics including bail, pretrial investigation, search and seizure, probation issues, trial preparation and strategy, and sentencing issues.

Bryan Kennedy

Senior Assistant Public Defender, Office of the Public Defender, Fairfax, Virginia

Bryan Kennedy has worked at the Office of the Public Defender in Fairfax, Virginia, since 2012. He has represented clients in all types of criminal cases and has tried cases from driving without a license to first-degree murder and serious sexual assault. He is a frequent lecturer at Continuing Legal Education programs at the local, state, and national levels. Kennedy serves as a supervisor in the office, where he is in charge of training new lawyers and overseeing their development as they practice in misdemeanor court. He has also represented clients on appeal to the Court of Appeals and Supreme Court of Virginia. Prior to joining the Public Defender's Office, Kennedy graduated from Georgetown University Law Center and was a clerk on the Superior Court for the District of Columbia.

Andrea Konow

Senior Trial Attorney, Defender Association of Philadelphia, Philadelphia, Pennsylvania

Andrea Konow is a Senior Trial Attorney at the Defender Association of Philadelphia. She is currently in the Homicide Unit, where she has spent the past 21 years handling a caseload that includes capital and noncapital homicides. Along with trial work, she is the forensics lead in her office. Konow has been a public defender since 1985 in several jurisdictions, including Philadelphia, Harrisburg, and Pittsburgh, Pennsylvania; and San Diego, California, and was on

the faculty of the Trial Lawyers College in Dubois, Wyoming, from 2000 to 2007. Konow is a graduate of Dickinson School of Law and holds an M.A. degree from California State University, Northridge, and a B.S. degree from Oregon State University. She lives in Philadelphia with her partner and two children.

Rick Kroeger

Associate Attorney, Simmons Hanly Conroy, LLC, Alton, Illinois

Rick Kroeger is an Associate Attorney at Simmons Hanly Conroy where he works on behalf of municipalities around the country in litigation against manufacturers, distributors, and pharmacies that flooded the country with opioids, as well as for victims of clergy sexual abuse. In addition to his current civil practice, he remains a special public defender in Missouri, where he was a full-time public defender with the Missouri State Public Defender for a decade in St. Louis. As a public defender, Kroeger handled trials at all levels, from misdemeanor charges to first-degree murder charges. Early in his career, he initiated procedures in St. Louis through which his office was able to identify police officers who had engaged in presenting false search warrant affidavits to the prosecutors and courts, which led to numerous cases being dismissed, as well as several police officers being removed from the force. In addition to handling cases from arrest to trial before judges and juries, Kroeger handled appeals and writs on behalf of his clients. During his last five years with the Missouri State Public Defender, Kroeger was at the St. Louis City Trial Office, where he was one of two managing attorneys responsible for training and overseeing 31 trial attorneys while handling his own clients' cases.

La Mer Kyle-Griffiths

Assistant Public Defender, Santa Barbara County Office of the Public Defender, Santa Barbara, California

La Mer Kyle-Griffiths is the recently appointed Assistant Public Defender of the Santa Barbara Public Defender's Office. Before that, she was the Director of Training and Complex Litigation with Still She Rises in Tulsa, Oklahoma. She has been a lifelong public defender amplifying the voices of the poor in Kentucky, Massachusetts, Oklahoma, Washington, and now California. In Seattle, she was responsible for designing, organizing, and facilitating training for the more than 400 team members of the Department of Public Defense. There, she gained an appreciation of the need for defense teams to actively engage with their own implicit bias. She became certified with King County to teach and facilitate issues of diversity, equity, and inclusion.

Earlier in her career, Kyle-Griffiths practiced for more than 17 years as a public defender in both Kentucky and Boston, Massachusetts. In Kentucky, she was part of the Capital Defense

Unit and litigated several death penalty cases. She has sat on many case reviews on death penalty cases and continues to teach nationally and at various state programs on capital litigation, voir dire, and mitigation. She has taught investigators, attorneys, mitigation specialists, and law students across the country in the areas of capital litigation, litigation with a racial and gender lens, investigation, sentencing, trial skills, and forensics. She has litigated juvenile, felony, and misdemeanor cases and has argued two cases before the Kentucky Supreme Court. She has been an adjunct professor at the Seattle University College of Law, the Iowa University of Law, and Boston College. Kyle-Griffiths currently teaches at the Darrow Baldus Death Penalty College, the NCDC, Gideon's Promise, and Harvard Law School's Trial Advocacy Workshop. She has taught in various organizations in the areas of diversity, equity, inclusion, and belonging, as well as leadership and supervision with an inclusive lens. A graduate of the University of Dayton School of Law, Kyle-Griffiths has been a lifelong advocate and is looking forward to her continuing adventure with Tom, her Chucks-wearing, crusading, capital defender husband and three young women who all learned to crow "acquittal" early!

Elizabeth Lashley-Haynes

Deputy Public Defender IV, Los Angeles County Office of the Public Defender, Los Angeles, California

Elizabeth Lashley-Haynes graduated from Syracuse University with degrees in sociology and African American studies and from Case Western Reserve University School of Law. After graduating from law school, she moved to Los Angeles to begin working for the Los Angeles County Public Defender's Office, where she has been employed for the past 20 years. There she has worked various assignments, including the Felony Trial Division, Juvenile Resource Attorney, and the Racial Justice Act Unit. She is the President of the Women's Defender Association, served on the Racial Justice Committee and on the National Legal Aid & Defenders Association's Defender Council. Lashley-Haynes is very active in the community, serving on the governing board of her church, in positions in her children's schools, and with the Lawyer Moms of Southern CA, where she hosts a holiday gift drive for hundreds of unaccompanied migrant children.

Corrie-Ann Mainville

Public Defender, Connecticut Division of Public Defender Services, Litchfield, Connecticut

Corrie-Ann Mainville earned her J.D. in 2005 from Western New England School of Law and after law school performed pro bono work for the Capital Defense Unit of the Connecticut Division of Public Defender Services, helping challenge the constitutionality of the state's lethal

injection protocol. In 2007, she was hired as a temporary attorney with the public defenders, achieving permanent status the following year. She has had a meteoric career trajectory as a public defender, starting off handling low-level misdemeanors and advancing to the most serious felony cases, including capital felonies. Mainville has worked in urban and rural jurisdictions across the state of Connecticut and has extensive litigation experience, including as co-counsel in the last capital case after the death penalty was abolished in the state. In 2016, Mainville was appointed as the head Public Defender of the Litchfield Judicial District, where she supervises an office that handles both low-level misdemeanors and serious felony cases while carrying a full caseload of her own. In 2018, the Connecticut Criminal Defense Lawyer's Association, which is made up of both public defenders and private criminal defense attorneys, recognized Mainville with the Diane "Cookie" Polan award, an annual recognition bestowed upon a rising female attorney fighting for civil rights in the spirit of legendary civil rights and criminal defense attorney Cookie Polan.

Alexzandria Poole

Director of Defender Initiatives, Zealous, Detroit, Michigan

Alexzandria Poole has spent her legal career serving as a public defender in New York City and Detroit. During her time as a public defender, she also played an integral role in several projects outside the courtroom, which include "Know Your Rights" training for both New York immigrant communities and for Detroit youth, educating on Certificates of Relief from Civil Disabilities for those directly affected, advocating for discovery reform in Albany, New York, and promoting data integrity in public defender office settings. As Director of Defender Initiatives for Zealous, Poole serves as the point person for public defender offices across the country to assist in establishing internal processes, policies, and training on nontraditional forms of advocacy. She also collaborates with the organization's communications practice to amplify public defender voices, codevelops and coteaches law school curriculum, and supervises law school clinical projects. She is currently based in Detroit, Michigan.

Diane DePietropaolo Price

Assistant Deputy Public Defender, New Jersey Office of the Public Defender, Camden, New Jersey

Diane DePietropaolo Price has been a trial attorney for the New Jersey State Office of the Public Defender in Camden, New Jersey, since 2017. Prior to her position in New Jersey, Price was an assistant public defender in Charlotte, North Carolina, from 2008 to 2014 and worked for the NACDL from 2014 to 2017. Price has extensive experience in misdemeanor and felony

courts, having represented hundreds of clients in criminal proceedings, including bench trials and jury trials.

Heather Rogers

Public Defender, Santa Cruz County Office of the Public Defender, Santa Cruz, California

Heather Rogers has been a public defender for more than 18 years in the state and federal courts. She has handled thousands of cases at every stage of litigation, from arraignment through trial and appeal. Rogers has represented clients accused of offenses from delinquency to homicide; defended detainees incarcerated at Naval Station Guantanamo Bay, Cuba; and argued cases in the Ninth Circuit Court of Appeals. Rogers is honored to serve as the first Public Defender of Santa Cruz County, her birthplace and home. Before her appointment, Rogers served as a public defender at Biggam, Christensen & Minsloff, the defense firm that provided public defense services for Santa Cruz County. Rogers is a faculty member of the NCDC; a lecturer in Legal Studies at the University of California, Santa Cruz; a frequent trainer at regional and national trial skills programs; and has taught at California Western School of Law and Monterey College of Law. She serves on the Board of Directors of the Housing for Health Partnership Policy Board, Community Corrections Partnership, Criminal Justice Council, Juvenile Justice Coordinating Council, Santa Cruz County Trial Lawyers Association, and Santa Cruz County Defense Bar. Rogers clerked for the Honorable M. Margaret McKeown on the Ninth Circuit Court of Appeals before starting her career in public defense at Federal Defenders of San Diego, Inc. She also served as a public defender in Monterey County and at the Federal Public Defender for the Northern District of California before coming home to Santa Cruz. Rogers has an A.B. in English language and literature from the University of Chicago and a J.D. from Stanford Law School. She lives in the Aptos mountains with her husband, children, and numerous pets.

Jamie C. Schickler

Managing Attorney of the Behavioral Health Division and Co-Director of the Intern/Extern Program, Law Office of the DeKalb County Public Defender, Atlanta, Georgia

Jamie Schickler is a Managing Attorney of the Behavioral Health Division and codirector of the Intern/Extern Program at the Law Office of the Public Defender in DeKalb County, Georgia. Prior to joining the Behavioral Health Division, Schickler spent nine years in trial work, including more than six years trying felony cases in Superior Court at the state level in Georgia. She also occasionally guest lectures in “crimmigration” law and is a member of the faculty of

Emory Law's annual Trial Techniques program. She attended Northwestern University, where she obtained her undergraduate degree, later graduating from Emory University School of Law in 2013 with honors. Schickler then became a public defender and has never looked back. She recognizes how her own life has been affected by privilege and strives to use her time, energy, and talent to confront the systems of oppression she sees every day in the world of public defense and beyond. She believes in the inherent dignity and worth of every human being, regardless of what he or she might have done. As a wife and a mom to both biological and foster children, Jamie spends most of her free time chasing people (and the dog) around the house.

Georgia L. Sims

Assistant Deputy Public Defender, Public Defender of Metropolitan Nashville & Davidson County, Nashville, Tennessee

Georgia Sims attended Vanderbilt University Law School, where she served as Executive Director of the Vanderbilt Legal Aid Society and as an editor for the Vanderbilt Law Review. She received the 2008–09 Damali A. Booker Award in recognition of her commitment to public service. Sims joined the Nashville Defenders upon her graduation from Vanderbilt in 2009 as an Assistant Public Defender. She has tried cases from DUIs to first-degree murder and served as a supervising attorney for one of the office's felony trial teams from 2014 to 2018. In 2018, she became the Training Director for the office, and in 2019 was sworn in as the Assistant Deputy Public Defender. She continues to directly represent clients and to serve as the office's Training Director in this role, and especially enjoys working with new lawyers on their trial cases. Sims is a graduate of the Gideon's Promise (formerly Southern Public Defender Training Center) Core 101 program and serves as a member of the Gideon's Promise faculty.

S. Christie Smith IV

Senior Partner, Smith Advocates LLC, Leesville, Louisiana

Christie Smith is the senior partner of SmithBush, LLP, a regional Louisiana law firm originally established in 1911 to represent laborers—and, too often, their widows and children—who were harmed by the burgeoning and unregulated timber industry in the rural South. Smith's work today is the modern extension of that century-old practice, in a broader, litigation-based platform. He defends individuals in the most serious types of criminal charges or in cases where their constitutional rights have been intentionally or systemically abridged. He has tried cases across the Gulf South, from personal injury and damage claims to first-degree murder and narcotics trafficking. He is one of the few lawyers dually board-certified in both civil and criminal trial advocacy by the National Board of Legal Specialty Certification, has been recognized in the Top 50 Louisiana SuperLawyers List, holds an AV—Preeminent rating (the

highest rating available from the Martindale-Hubbell Directory of Attorneys), and is listed in Best Lawyers in America. He is widely published and frequently lectures on emerging issues in trial and constitutional law.

Ryan Swingle

Attorney, Ryan J. Swingle Attorney at Law, Athens, Georgia

Ryan Swingle is a criminal defense attorney based in Athens, Georgia, who practices in both federal and state courts. He is a former state public defender and state capital defender. Swingle began his legal career in 2001 as an Athens public defender, and for 12 years dedicated himself to defending indigent defendants in cases from disorderly conduct to murder. During his five years as lead attorney for the Northeast Georgia Capital Defender Office, none of the office's clients were sentenced to death. Swingle's current private practice focuses 100 percent on criminal defense, and as experienced trial lawyer, he has tried all manner of misdemeanor and felony cases. Swingle is also a faculty member of the NCDC's Trial Practice Institute.

Amber L. Tucker

Owner/Principal, The Law Office of Amber L. Tucker, LLC, Portland, Maine

Amber Tucker is a Florida State University College of Law graduate and has actively represented the indigent accused since 2005. Initially, she practiced at the Hillsborough County Public Defender's Office in Tampa, Florida, and continued to do so for four years. Following her time at the Public Defender's Office, Tucker returned to her home state of Maine, where she spent several years as a prosecutor litigating felony drug crimes and then transitioned into private practice, where she has remained since 2012. She is the current President of the Maine Association of Criminal Defense Lawyers. In addition to her retained work, she represents the indigent accused through assignments from the Maine Commission of Indigent Legal Services and is a Criminal Justice Act panel attorney for appointed criminal matters in federal court. Tucker has represented thousands of defendants, litigated state and federal crimes from misdemeanors to life felonies (including murder), and has tried nearly 40 criminal jury trials to verdict.

Colette Tvedt

Attorney, Law Firm of Colette Tvedt LLC, Denver, Colorado

Colette Tvedt is the founder and owner of Tvedt Law, where she represents individuals in state and federal court charged with misdemeanors to first-degree murder. Prior to starting her law firm in Denver, she served as the Director of Public Defense Training and Reform for the

NACDL. In that capacity, she developed and delivered premier training programs for public defense providers nationwide, focusing on racism in the criminal justice system, police misconduct, pretrial detention, challenging forensic evidence, and trial skills. Tvedt also published reports regarding public defender workload studies, constitutional deficiencies in municipal courts, effective assistance of counsel and the right to counsel, and bail reform manuals. She has devoted her career over the past 25 years to representing poor people accused of crimes, spending 18 of those years as a public defender in Massachusetts and Washington State and seven years in private practice as a partner with the Seattle law firm Schroeter, Goldmark & Bender. She has organized training programs for thousands of defense lawyers and served for several years as a Clinical Professor of Law at Suffolk University Law School in Boston. She was also an adjunct professor at the University of Washington School of Law and at Seattle University Law School. She is a faculty member and board member of the NCDC, the Colorado National Representative for the federal Criminal Justice Act (CJA) Panel, and a member of the District of Colorado CJA Standing Committee. Tvedt is an honors graduate of Rutgers University, where she also attended law school.

Andre Vitale

First Assistant Deputy Public Defender, Trial Chief, New Jersey Office of the Public Defender, Jersey City, New Jersey

Andre Vitale has served as a public defense lawyer for more than 23 years as a trial lawyer, training director, educator, and mentor. He has extensive trial experience (taking more than 99 cases to verdict) while handling some of the most complex matters. He has developed an expertise in defending homicide and sex cases, with a proficiency in contesting forensic and other technical evidence, including DNA, fingerprints, child sexual abuse accommodation syndrome, and eyewitness identification. He is now Trial Chief for the Hudson County Office of the New Jersey Office of the Public Defender. He also designed a Defending a Child Sex Case advanced trial skills program that has been used by State Public Defender Offices in Montana, Missouri, and New Jersey. Because of his passion and commitment to client-centered representation, Vitale has received the Kevin Andersen Award from the New York State Defender's Association and the Denison Ray Award from the New York State Bar Association.

Nanzella Whitfield

Managing Director, Northern Region, Public Defender Division, Massachusetts Committee for Public Counsel Services, Boston, Massachusetts

Nan Whitfield is a career public defender who has earned a solid reputation as a brilliant trial lawyer. Serving as a trial lawyer in the office of the Los Angeles County Public Defender for

more than 30 years, Whitfield is now the Managing Director of the Northern region for Massachusetts' Committee for Public Counsel Services. She has been the lead trial lawyer in hundreds of jury trials, including more than 40 homicide jury trials. Throughout her career, she has received numerous accolades for her work, including recognition as Defense Attorney of the Year by the Los Angeles County Bar Association in 2011 and one of the Top 75 Female Litigators in the State of California in 2008. Whitfield has served as faculty at countless training programs for the NACDL, where she served as First Vice President and as Executive Officer on the Executive Committee. Recently, she was the chair for the Race Matters IV committee and has given several presentations highlighting the relevance of issues involving race in the criminal legal system. She has presented for the California Attorneys for Criminal Justice and for the Neighborhood Defender Service (the public defender agency in Detroit, Michigan), and it is her goal to elevate the standards of practice within the criminal defense bar. Whitfield earned her undergraduate degrees from the University of Illinois at Urbana-Champaign and her law degree from Northern Illinois University College of Law.

Glover Wright

Assistant Public Defender, Law Office of the Shelby County Public Defender, Memphis, Tennessee

Glover Wright is an assistant public defender at the Law Office of the Shelby County Public Defender in Memphis, Tennessee, where he represents clients charged with felonies. A graduate of Columbia College and Columbia Law School, he is originally from Humboldt, Tennessee. Wright is an alumni faculty member of Gideon's Promise, a nationwide public defender training program; sits on the Amicus Committee of the National Association for Public Defense; and is a former board member of the Tennessee Association of Criminal Defense Lawyers.

Lorinda Youngcourt

Trial Attorney, Federal Defenders of Eastern Washington and Idaho, Spokane, Washington

Lorinda Youngcourt has represented capital and noncapital clients in trial, direct appeal, state postconviction, and federal habeas corpus as a public defender and in private practice. She also serves as faculty at various trial programs around the country. She is the current Treasurer of the NAPD and a past chair of the Indiana Public Defender Council. Youngcourt was the first appointed King County (Seattle, Washington) Public Defender from 2015 to 2018, overseeing the unification of four nonprofit agencies into a single county department. She was also the first Lawrence County Indiana Public Defender from 2010 to 2014, creating a state- and county-funded agency to replace a contractual public defender system. In late 2018, Youngcourt

returned to her roots as a trial lawyer and is now practicing with the Federal Defenders of Eastern Washington and Idaho community defenders' program in Spokane, Washington.

Appendix B. Comparison of Prior State-Level Workload Studies

Overview

A detailed summary of the 17 state-level, qualitatively adjusted weighted caseload studies published since 2005 that we reviewed as part of our work is presented in Table B.1. The discussions that follow describe each of the study features described in the table's columns and present additional background on the methods that were employed to produce appropriate metrics for estimating attorney requirements.[198] Some of these studies were conducted in states where trial-level public defense is primarily provided through a statewide public defender agency, while others were conducted in states where defenders consist of a mix that includes both members of the private criminal bar (often working in relatively small firms and solo practices) and attorneys working in locally based public defender offices. In addition, some jurisdictions studied had extensive attorney time expenditure and case management data readily available to the researchers, while in others, there was a lack of even basic information, such as how many attorneys were appointed as counsel in the past year and what case types were the subjects in those appointments. Such considerations can affect study design, so the use of one approach over another should be viewed as the result of a conscious decision to employ methods that are most appropriate for the challenges being faced by the researchers at that time rather than any sort of strict adherence to a singular strategy.

Quoted passages contained within Table B.1 are taken from the final report for the study being described.

[198] Some of the descriptions of prior studies presented in this appendix have been drawn from Pace et al., 2019, pp. 7–18.

Table B.1. State-Level Public Defense Workload Studies Since 2005

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Colorado ABA SCLAID, 2017 (RubinBrown and ABA SCLAID, 2017)	All attorneys providing public defense services in state	15 adult criminal, 3 juvenile delinquency	Mandatory time study over 16 weeks involving statewide public defender system; results not shared with expert panel	Yes, using 26 task types	None	"Criminal defense experts (private, as well as public defense practitioners)"	(1) Time needed to complete each task within each case type; (2) percentage of cases within each case type where that task should take place
Idaho Idaho Policy Institute, 2018 (Fry et al., 2018)	All attorneys providing public defense services in state	5 adult criminal, 1 juvenile delinquency, 1 appeal, 1 dependency	Voluntary time study over 12 weeks	Yes, using 13 task types	(1) Average amount of time that should be spent on cases within each case type; (2) average time needed to complete each task within each case type	Between 12 and 16 attorneys, depending on the round	(1) Time needed to complete each task in a case within each case type; (2) percentage of cases within each case type where that task should take place
Indiana ABA SCLAID, 2020 (ABA SCLAID and Crowe LLP, 2020)	All attorneys providing public defense services in state	7 adult criminal, 6 juvenile delinquency, 7 appeals, 3 dependency	None	Yes, using 11 to 13 task types depending on case type	None	Experienced public defenders and private defense attorneys; for adult criminal, 27 attorneys completed the first round and 15 attorneys participated in the final session	For each case type: (1) percentages that should go to trial versus other resolution; (2) percentages in which each case task should be performed by disposition; and (3) cumulative time that should be spent on each case task by disposition

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Louisiana ABA SCLAID, 2017 (Postlethwaite & Netterville and ABA SCLAID, 2017)	All attorneys providing public defense services in state	7 adult criminal, 1 juvenile delinquency, 2 dependency	Six-month time study of public defenders in four volunteer pilot districts; results not shared with expert panel	Yes, using 11 task types	None	Private defense attorneys, as well as public defense practitioners; 62 attorneys participated in the first round, 23 attorneys in final session	(1) Time needed to complete each task in a case within each case type; (2) percentage of cases within each case type where that task should take place
Maryland NCSC, 2005 (Ostrom, Kleiman, and Ryan, 2005)	Statewide public defender system attorneys	District offices: 15 adult criminal, 2 juvenile delinquency Statewide divisions: 7 adult criminal, 3 appeals, 2 dependency	Voluntary time study over four to six weeks	Yes, using 15 task types at start, collapsed to 8 at end	Likert scale to indicate frequency in which attorney generally had enough time for each task across all cases	Three attorney focus groups, one each for urban, suburban, and rural cases Advisory Committee comprising statewide system management attorneys and attorney representatives from defender regions	Focus groups adjusted average time for each task within each case type upward when more time was believed to be necessary. Advisory Committee reviewed focus group adjustments and accepted, rejected, or made further changes.
Massachusetts Center for Court Innovation, 2014 (Labriola and Hopkins, 2014)	All attorneys providing public defense services in state	10 adult criminal, 4 juvenile delinquency, 2 dependency	Used existing billing data from private bar for 1 year of closed cases	No; some task data collected by survey but not basis of expert decisions	Likert scale to indicate frequency in which attorney generally had enough time for specified job duties within broad practice area	Five Delphi groups, each considering a broad practice area, made up of "purposively selected seasoned attorneys."	For each case type, Delphi groups specified both the amount of additional time needed per case and the percentage of cases in which this additional time was required.

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Michigan RAND, 2019 (Pace et al., 2019)	All attorneys providing public defense services in state	9 adult criminal	Voluntary time study over eight weeks	No	Average amount of time that should be spent on cases within each case type	29 panelists consisting of "16 private criminal practitioners, nine public defenders, two appellate attorneys, and two federal public defenders)"	Average amount of time that should be spent on cases within each case type
Missouri ABA SCLAID, 2014 (RubinBrown and ABA SCLAID, 2014)	All attorneys providing public defense services in state	6 adult criminal, 1 juvenile delinquency, 1 appeals	Used existing timekeeping data from statewide public defender system covering 25 weeks; results not shared with expert panel	Yes, using 11 task types	For each task within each case type: (1) percentage category of cases where sufficient time was available to accomplish task; (2) amount of time typically sufficient to accomplish each task; results not shared with expert panel	"Criminal defense experts (private, as well as public defense practitioners)"	(1) Time needed to complete each task within each case type; (2) percentage of cases within each case type that each task should take place
New Mexico NCSC, 2007 (Hall, 2007)	Statewide public defender system attorneys	District offices: 9 adult criminal, 1 juvenile delinquency, 1 appeals Statewide units: 2 adult criminal, 2 appeals	Voluntary time study over six weeks	Yes, using 51 task types	Likert scale to indicate frequency in which attorney generally had enough time for each task across all cases	Focus group: "seasoned experts from representative" state public defender offices Advisory committee: "judges, prosecutors and defense attorneys"	Focus group adjusted average time for each task in a case within each case type upward when more time was believed to be necessary. Advisory committee reviewed focus group adjustments and accepted, rejected, or made further changes.

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
New Mexico ABA SCLAID, 2022 (ABA SCLAID and Moss Adams LLP, 2022a)	All attorneys providing public defense services in state	8 adult criminal, 5 juvenile delinquency, 7 appeals	Time data gathered from statewide public defender system; limited use; results not shared with expert panel	Yes, 9 to 12 task types depending on case type	None	A "mix of public defenders, contract attorneys and private practitioners;" for adult criminal, 60 attorneys participated in the first round and 29 participated in the final session	For each case type: (1) percentages that should go to trial versus other resolution; (2) percentages in which each case task should be performed by disposition, and (3) cumulative time that should be spent on each case task by disposition
New York (five counties) RAND, 2016 (Unpublished 2016 memorandum by Pace et al., provided to the New York State Office of Indigent Legal Services)	All attorneys providing public defense services in 5 counties	6 adult criminal, 2 appeals	Voluntary time study over eight weeks	No; some task data collected by survey but not basis of expert decisions	Average amount of time that should be spent on cases within each case type (selected information at the task level was collected as well)	28 panelists representing "a diverse mix of indigent defense attorneys and retained client-only attorneys"	Average amount of time that should be spent on cases within each case type
North Carolina NCSC, 2019 (Lee, Hamblin, and Via, 2019)	Statewide public defender system attorneys	12 adult criminal, 3 juvenile delinquency, 3 dependency	Mandatory time study over seven weeks	Yes, using 35 task types	Whether additional time was needed for performing each task within each case type	Four attorney panels, each focusing on a subset of case types (adult felonies, adult misdemeanors, juvenile, and parent representations) and drawn from "a representative variety of offices across the state."	When more time spent on a task within a case type was believed to be necessary, indicated (1) the percentage of additional time needed to complete task, and (2) the percentage of cases within case type where additional time was needed.

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Oregon ABA SCLAID, 2022 (ABA SCLAID and Moss Adams LLP, 2022b)	All attorneys providing public defense services in state	7 adult criminal, 5 juvenile delinquency, dependency	None	Yes, 9 to 12 task types, depending on case type	None	A "mix of attorneys from a variety of contractor types, as well as private practice attorneys;" for adult criminal, 65 attorneys completed the first round and 30 attorneys participated in the final session.	For each case type: (1) percentages that should go to trial versus other resolution; (2) percentages in which each case task should be performed by disposition; and (3) cumulative time that should be spent on each case task by disposition
Rhode Island ABA SCLAID, 2017 (BlumShapiro, ABA SCLAID, and NACDL, 2017)	All attorneys providing public defense services in state	6 adult criminal, 2 juvenile delinquency, 1 dependency	Six-month mandatory time study of public defenders; results not shared with expert panel	Yes, using 12 task types	None	22 private practice attorneys and 21 public defenders completed the first round; 15 public defenders and 8 private attorneys participated in the final session	(1) Time needed to complete each task in a case within each case type; (2) percentage of cases within each case type where each task should take place

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Texas Public Policy Research Institute, 2015 (Carmichael et al., 2015)	All attorneys providing public defense services in state	6 adult criminal	Voluntary time study over 12 weeks	Yes, using nine task types	For each task within each of three collapsed case types: (1) percentage of cases where task should be performed; (2) average hours per case when task is performed	"18 highly experienced criminal defense practitioners"	(1) Time needed to complete each task in a case within each case type; (2) percentage of cases within each case type where each task should take place; (3) percentage of cases within each case type that should go to trial NOTE: Results later split into cases going to trial and those resolved by other means.
Utah RAND, 2021 (Pace et al., 2021)	All attorneys providing public defense services in state	9 adult criminal, 5 juvenile delinquency	Used existing local public defender timekeeping data covering five months	No	Average amount of time that should be spent on cases within each case type	38 panelists consisting of "experienced adult criminal and juvenile delinquency" and "contract counsel, assigned counsel, and public defenders"	Average amount of time that should be spent on cases within each case type

Jurisdiction, Primary Research Organization, Year, and Source	Scopes	Case Types	Current Time Analysis	Task-Based Approach	Time Sufficiency Survey Inquiry	Expert Panels	Expert Decisions or Adjustments
Virginia NCSC, 2010 (Kleiman and Lee, 2010)	Statewide public defender system attorneys	Local offices: 8 adult criminal, 2 juvenile delinquency, 1 appeals Division offices: 1 adult criminal, 1 appeals	Mandatory time study over eight weeks	Yes, using 56 task types	Likert scale to indicate frequency in which attorney generally had enough time for each task across all cases	Delphi groups: Three attorney groups drawn from defender field offices, capital defender offices, and the appellate defender office Advisory committee: "chief Public Defenders and senior support staff from a representative set of offices across the state"	Delphi groups: When more or less time spent on a task within a case type believed to be necessary, (1) amount of time to be added or subtracted for the task; (2) percentage of cases within case type where adjustment should be applied Advisory committee reviewed Delphi group adjustments and accepted, rejected, or made further changes.

NOTE: As defined in this table, *adult criminal case types* in the above-referenced studies include all representations that do not clearly involve juvenile delinquency, appeals, or dependency matters (which can include related proceedings, such as terminations of parental rights, child in need of assistance matters, child welfare care and protection matters, and abuse or neglect adjudications).

Key Features

Scope

For what defender populations are the standards being developed? Most states have a mix of public defender offices, assigned counsel programs, and contract defender programs to address the needs of indigent defendants. In four of the 17 studies, a single statewide public defender system was the sole subject of the research, as well as any workload standards that resulted from the work, while in the 13 others, the standards were developed for both public defenders and private attorneys accepting indigent defense appointments.[199] In one of the 13 studies in which all types of defenders were included, the focus was on attorneys in only five counties.

Case Types

What case type categories were used to group client matters represented by the defender population? Generally, the entity that commissioned the research had already identified what broad types of representation would be the subject of the research, such as adult criminal cases, appeals, juvenile delinquency proceedings, such specialized matters as terminations of parental rights, or a combination of the same. More-granular categories (such as violent felonies) may also be predetermined, although generally, those performing the research have input in the final decision. In other studies, a focus group of defense attorneys was used to determine appropriate case types. In some instances, the choice is largely driven by existing categorization schemes used by local case management systems (both those operating within the courts and within provider organizations) because of the benefits of being able to integrate the results of the workload standards efforts with accurate information about current caseloads.

Current Time Analysis

Was information about current attorney time expenditures acquired for this study? In 15 studies, the researchers took steps to collect information about current attorney time expenditures in the case types of interest. Methods used by these studies for measuring such expenditures included analyzing timekeeping data already collected by public defender offices, conducting temporary time studies in which defenders are asked to keep track of their hours over a predetermined span of time, and examining vouchers submitted by private counsel seeking

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[199] Even in states that are characterized as relying exclusively on a network of public defender offices for delivering defender services, assigned counsel and contract defenders are often required for representing clients when the public defender has a legal or resource conflict or when specialized services are needed. Studies that focused on a single statewide public defender system may not have included those conflict attorneys in the data collections or analyses, although the standards that are produced may have been intended to apply to any attorney who accepts appointments.

compensation for services arising from court appointments. The data could be used for enhancing the general understanding of the current public defense environment, estimating necessary attorney levels if new workload standards were implemented, and informing other data collection tasks performed in the research, but in ten of the 15 data collections, supporting the panelists' deliberations was the key reason for the effort.

When time data are desired, the ideal source is an existing timekeeping process that has been in use for an extended period before the need for the data exists. When that practice is already in place, attorney time information felt necessary for caseload standards-setting can be quickly and inexpensively extracted from the provider's case management system. In addition, complete time information is available from appointment through case conclusion in all but the most recently commenced cases. But when timekeeping is not a routine practice systemwide, the usual alternative is to conduct a costly and often disruptive temporary time study in which defenders are asked to quickly learn new procedures for recording their time and then be faithful about those duties throughout the finite collection period.

The challenges involved in collecting time expenditure data required the researchers in the 15 studies that sought such information to make difficult choices. In four of the 15 studies, the scope of the standards-setting effort was limited to attorneys operating within a statewide public defender system, which made data collection relatively easier because the subjects are essentially state employees. Public defender office supervisors typically support the goals of the study and can encourage staff to participate (or, in some instances, order them to do so). Identification of and contact with public defenders during the project are relatively straightforward tasks (in contrast, many private indigent defenders are solo practitioners, some of whom are known only to the local courts that appoint them). In two of the four statewide public defender system studies, the researchers were able to make participation mandatory, although in the other two, public defenders were free to decline the invitation.

But in 11 of the 15 such studies, the standards arising out of the effort were intended to apply to all defenders accepting appointments in the state and not just a single statewide public defender system. No state requires all defenders within its borders to track their time as an ordinary business practice, so comprehensive existing information about both private counsel and public defender attorney time expenditures is not available. Moreover, no authority exists in any state that could require the participation of all defenders in any special time study, no matter how limited its duration. In four of the 11 studies applicable to all defenders, a voluntary time study was launched, which can be a hard sell to any attorney not already used to recording activities by client matter each and every day. Recruitment of an attorney pool that is large enough to produce results that can be generalizable to the larger population is only one hurdle to clear in a voluntary study. The other need is to maintain adequate participation levels over the course of the data collection period, which can be especially difficult in regard to the private attorney segment.

In light of such difficulties, the remaining seven studies seeking attorney time information chose to focus their efforts on specific types or specific locations of defenders despite the "all defenders in the state" scope of their standards-setting efforts, essentially using the information collected as proxies for the larger populations. Two of the seven studies conducted a mandatory time study, but involving only attorneys who were employees of a statewide public defender system. Existing timekeeping information available from statewide public defender systems was analyzed in two of the seven studies. One of the seven examined existing data in two of the three local public defender offices in the state, another conducted a voluntary time study in public defender offices in four counties, and the last of the seven examined invoices submitted by private attorneys in assigned counsel programs for hour-based compensation. None of these proxies was likely to have been viewed by the researchers involved as the ideal information source, but they may have been the most practical option at the time.

Task-Based Approach

Did the study obtain or use information about attorney time expenditures at the individual task level? An important distinction between the studies involved was whether the inquiry considered how much time attorneys were or should be spending performing specific activities (or tasks), such as client communication, fact investigation and discovery, and court time when representing clients in different types of cases. To be precise, all of the studies collected information about current time expenditures for different activities, conducted surveys designed to elicit attorney opinions about task-level effort, asked an expert panel to provide input for developing estimates of necessary average time expenditures at the task level (the estimates would then be aggregated to produce case-level values), or performed some combination of the foregoing. A true task-based approach, however, would also focus the expert panel's deliberations on a discrete set of task types. Thirteen of the 17 studies would satisfy that criterion, some utilizing more than 25 separate activity categories for this purpose. The remaining four studies chose to ask the panel to consider only average necessary time expenditures for cases within a case type category rather than individual tasks within those cases. We discuss the rationales behind each approach in a later section.

Attorney Time Sufficiency Survey Inquiry

Were members of the bar surveyed to obtain information to directly inform the calculation or consideration of standards? Eleven of the 17 studies included an attorney survey, although the main purpose of those surveys differed.[200] In the four studies with surveys

[200] The focus here is on questions presented to a sample of attorneys throughout the state that seek input as to whether sufficient time is available in their representations. But these surveys can also be used to gather important information about defender caseloads, characteristics, and practices, information that was often previously unavailable to policymakers at the state level.

that did not ask their expert panels to make task-level estimates, the key inquiry involved having the participant estimate the average amount of attorney time that should be spent on cases within each case type (two of these studies collected some task-level information as part of their surveys, although the primary interest was in the respondents' case-level estimates). In those four studies, the survey respondent was usually made aware of the time study results prior to making those estimates and was typically given the option to agree with the time study value or modify it as desired.

In the seven task-based studies with attorney surveys, one of two lines of inquiry was employed. Four of the studies asked how often the survey respondent had sufficient time to complete each task. This information might be captured by asking (1) for an estimate of the percentage of cases when sufficient time was available, (2) to check the appropriate box that indicates a desired range of percentages (such as 20–39 percent of your caseload), or (3) to select the appropriate expression of relative frequency from a Likert scale (such as Always, Sometimes, or Almost Never).

The other task-based approach (three studies) asked the respondent to estimate the average time needed to complete each task, with a frequently included companion question that sought an estimate of the percentage of cases in which the task should be performed (one of these three studies did not provide the results of its survey to the expert panel). For example, for a particular case type, such as a low-level felony, a participant would be asked about the percentage of low-level felony cases for which experts should be consulted. And then, when they consult such experts, how much time would be needed, on average, to do so. The time needed and frequency were subsequently combined to determine the overall time needed for expert consultation in an average case.

Task-based studies also varied as to whether such questions were specific to each case type category level (so, for example, individual estimates of average time needed would be required for each task category within each case type) or whether the questions simply sought information about the participant's generalized experience for each task across all case types. Some of the studies used the information from these surveys to reduce the scope of inquiry presented to the expert panel. For example, participant responses indicating that sufficient time was generally available for a particular task might have resulted in that task being removed from the expert panel's deliberations.

Expert Panel Composition

Who will serve as experts or knowledgeable actors on panels or committees for the purpose of setting standards and/or reviewing and adjusting the results of earlier data collections? Although the precise title used varied (e.g., experts, focus group participants, Delphi panelists, luminaries, advisers, committee members), all 17 studies selected individuals external to the project team to make key decisions that directly contributed to the development of caseload standards. Depending on the study, these panels were created solely by the sponsor of

the study, by the sponsor in conjunction with the researchers, or by a selection process informed by an independent group of local experts.

The panels generally contained a mix of attorneys with a heavy concentration of defenders, although there usually were some panelists who were attorneys in private practice with paying clients exclusively. A casual review of panel membership suggests that there was a strong bias toward the inclusion of public defenders, even in states where the majority of defenders appeared to receive their appointments through contract or assigned counsel programs. It should be noted that, while public defenders may be outnumbered by private defenders, the heavy caseloads of the former group and their typical concentration in larger cities may make public defender offices the primary providers in the state in terms of total representations. Some panels have included indigent defense provider supervisors and managers who do not represent clients themselves; academics, such as law professors; criminal law practitioners who are not part of the subject population (e.g., those who handle appeals even though the standards will apply only to trial court–level matters); representatives from the sponsor of the research (such as members of the commission overseeing indigent defense services in the state); representatives from the state bar or other legal associations; members of the judiciary; or representatives of community or advocacy organizations.

In most studies, panel membership reflected a heavy bias toward attorneys with extensive contemporary experience in the subject matter of the needs assessment (e.g., state trial-court representations if the focus is on trial court–level defense work) and minimal participation on the part of administrators and others who have less firsthand knowledge of current criminal defense conditions.

In some instances, a second body (often referred to as an *advisory committee*) was used to review the decisions of the initial expert panel, and, if desired, change them in some way. When this oversight mechanism was used, the makeup of the second group could reflect a smaller proportion of active criminal defense attorneys than the first group and include such parties as chief public defenders and judges. It should be noted that, regardless of whether a second deliberative group was used to review the expert panel's results, the standards that arose out of all of these development processes were often characterized as "recommended," "interim," or "provisional." It is not until some sort of policymaking body (e.g., the state legislature, a state commission with oversight of all indigent defense services, the state Supreme Court) considers and adopts the proposed standards (sometimes after making additional adjustments) that the case weights or annual caseload maximums have the force of authority.

Expert Decisions or Adjustments

What roles do the panels or committees play in the development of the standards? The Delphi method was the primary group communication method employed for expert opinion solicitation, although, as mentioned previously, a Delphi-like structured focus group was used in some of the earliest qualitatively adjusted public defense workload studies. Although some of the

studies that followed those early efforts involved Delphi deliberations that were conducted asynchronously and anonymously, contemporary workload studies typically rely on real-time, face-to-face or video deliberations that incorporate facilitated discussion about the reasoning behind the panelists' estimates.

The ultimate goal in all of these studies was the development of estimates of the average amount of time required for cases within each case type, but there were distinct differences in the information provided to the expert panel and what questions were asked. The discussion that follows describes three key characteristics of the process by which the final estimates were decided on, and Table B.2 reflects the fact that different research organizations leading the 17 studies had individualized preferences in their chosen approaches.

Table B.2. Expert Panel Approaches

Time Data Shared With Panel?	Task-Based?	Deliberation Method	Primary Research Organization	Study State and Publication Year
No	Yes	Estimated without explicit consideration of current time expenditures	ABA SCLAID	Colorado, 2017; Indiana, 2020; Louisiana, 2017; Missouri, 2014; New Mexico, 2022; Oregon, 2022; Rhode Island, 2017
		Identified case-related tasks needing additional time, then estimated amount and frequency of need (result added later to known time expenditures)	NCSC	North Carolina, 2019
Yes	Case-level only	Made adjustments to existing time expenditure information	Center for Court Innovation	Massachusetts, 2014
	Yes		NCSC	Maryland, 2005; New Mexico, 2007; Virginia, 2010
	Case-level only	Asked to estimate without explicit consideration of current time expenditures (panelists could refer to prior results if desired)	RAND	Michigan, 2019; New York (five counties), 2016; Utah, 2021
	Yes		Idaho Policy Institute	Idaho, 2018
			Public Policy Research Institute	Texas, 2015

One important distinction among the studies involved the *disclosure of data on current attorney time expenditures*. In nine of the 17 studies, the researchers had collected time expenditure information in the case types of interest for the primary purpose of providing the results of that work to the expert panel. A different approach was taken in the other eight studies. In six of these eight studies, at least some information regarding current attorney time expenditures was collected and used for various purposes (e.g., projecting additional attorneys needed if standards are implemented), but the results were not shared with the expert panel. In

the remaining two studies, no time data were sought and, therefore, none was available for the panel's consideration.

Seven of the eight studies in which no time data were provided to the panel were conducted by ABA SCLAID, and the remaining study was conducted by NCSC. ABA SCLAID's reasons behind this approach were discussed in its 2020 state-level workload standards report. While the authors acknowledged that "when possible, the analysis should include timekeeping data showing how current public defense attorneys are expending their time," they also noted that timekeeping "with sufficient accuracy and consistency to allow for reliable comparisons has proven difficult in several jurisdictions."[201] Finally, they noted that even if it were available, time expenditure data are "never shown to a Delphi panel under the research methodology" used by ABA SCLAID and its research partners.[202] The rationale for not doing so was that "applicable law and standards, not current practices evidenced by timekeeping, [should be] the principal grounding or 'anchor' for the consensus professional judgment of the Delphi panel."[203] A similar concern was voiced by NCSC in its most recent public defense workload study: "To avoid anchoring, a cognitive bias in which the decision-maker relies too heavily upon an initial piece of information, the panels were not presented with the preliminary case weights from the time study."[204]

In contrast, most studies conducted by NCSC, RAND, and others provided their expert panels with varying degrees of information about existing time expenditures and, when available, perceptions from the criminal defense bar as to whether defenders believe that sufficient time is available, and, if not, how much additional time is necessary, on average. Noting concerns voiced by ABA SCLAID in this regard, the authors of a RAND study asserted their belief "that the findings of the time studies and attorney surveys play an important role in informing the provisional standards, one that outweighs the risks of anchoring," and that steps could be taken to minimize undesired influences on an expert panel.[205]

Another distinction among the studies was whether the panels' deliberations were task-based. As indicated previously, in 13 studies, the focus of the panelists' deliberations was at the task or

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[201] ABA SCLAID and Crowe LLP, 2020, p. 15 and footnote 79. In an ABA SCLAID's review of its approach to conducting workload studies, the authors observed that time studies are rarely of sufficient duration to cover a case from opening to closing and asserted that the use of multipliers to estimate total case time is often inaccurate because of the different levels of attorney time needed at different points during a case (e.g., while awaiting discovery production versus immediately prior to trial). Furthermore, because most time studies rely on volunteers or have variable levels of compliance, the authors felt that the resulting time may be based on an inaccurate sample (Stephen F. Hanlon, Malia N. Brink, and Norman Lefstein, *Use of Delphi Method in ABA SCLAID Public Defense Workload Studies: A Report on Lessons Learned*, American Bar Association Standing Committee on Legal Aid and Indigent Defense, 2021, pp. 22–23).

[202] ABA SCLAID and Crowe LLP, 2020, p. 15, footnote 79.

[203] ABA SCLAID and Crowe LLP, 2020, p. 15, footnote 79.

[204] Lee, Hamblin, and Via, 2019, p. 18.

[205] Pace et al., 2021, p. 17.

activity level rather than for cases as a whole. Most (11) of these task-focused inquiries also sought panelist input into the percentage of cases in which a task would need to be performed. The summed products of the time values and percentages would yield the overall average for each case type.[206] In four of those studies, the panelists provided separate information about task time and percentages for cases that went to trial and for cases that were disposed of by other means (the panelists in these studies also weighed in on the question of how often cases within each type should reach trial).[207] In contrast to these 13 task-focused approaches, four studies sought panel input only at the case level.

One reason for adopting an approach that involves estimating or adjusting time expenditures at the task level rather than at the case level is that doing so allows for addressing specific areas known to be problematic for overworked defenders, such as insufficient time to conduct investigations, visit with clients in person, or discuss collateral consequences. But perhaps the common reason for employing a task-based approach is the assumption that by deconstructing an attorney's time expenditures into various task categories, a more accurate picture of overall expenditures at the case level can be obtained. There is evidence to support the proposition that bias in recalling the length of time of an event can be reduced by "unpacking" what took place into individual components and making estimates for each prior to aggregation, although the reduction was "not due to there being less bias in the individual segments, but rather due to bias across the different segments canceling each other out when combined into a sum."[208]

But there are challenges to drilling down to individual events, particularly if a special temporary time study is used to gather baseline information about current time expenditures. Considerably more effort is involved for an attorney participating in a time study if timekeeping requires deconstructing the workday to the case and task level. This can lead to withdrawals from voluntary time studies or overuse of a generic "other" task category to avoid having to make more-detailed entries. Burnout could also affect expert panelists. A study with ten case types and 15 activity categories in which the experts were asked to estimate average time expenditures in

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[206] For example, for a case type in which the only possible activities are *client communication*, *fact investigation and discovery*, and *court time*, and where the expert consensus on average times and frequency percentages for each activity type are 2 hours and 90 percent, 3 hours and 95 percent, and 1 hour and 85 percent, respectively, the overall time estimate for the case type would be 5.5 hours ([*task1 time* × *task1 percent*] + [*task2 time* × *task2 percent*] + [*task3 time* × *task3 percent*]).

[207] Building on the example in the previous footnote, a task-based approach that uses panelists' recommendations for trial frequency within each case type would calculate the overall time estimate for a case type using the following formula:

> (*trial percent* × ([*trial task1 time* × *trial task1 percent*] + [*trial task2 time* × *trial task2 percent*] + [*trial task3 time* × *trial task3 percent*])) +
> (*non-trial percent* × ([(*non-trial task1 time* × *non-trial task1 percent*] + [*non-trial task2 time* × *non-trial task2 percent*] + [*non-trial task3 time* × *non-trial task3 percent*)])).

[208] Holly L. Gasper, Michael M. Roy, and Heather D. Flowe, "Improving Time Estimation in Witness Memory," *Frontiers in Psychology*, Vol. 10, June 2019.

each task type would require 300 separate submissions. Nevertheless, task-based estimates made by the expert panelists are the most common approach used in the 17 studies.

The studies could also differ in the process by which the experts' estimates were derived. In four studies, data on attorney time expenditures served as the explicit numerical foundation for the final case weights. The expert panel was charged with "adjusting" preliminary versions of those weights (essentially values derived from time studies) to allow attorneys sufficient time to discharge their professional responsibilities. Three of the four studies were task-based, and, as a result, panelists were first asked to identify specific activities that would require more (or infrequently, less) time than what prior time study data indicated and then come to a consensus on the recommended change in the time value. A similar adjustment would be needed for the percentage of cases in which each activity should be performed. The recommended adjustments were made to the time study case weights to produce the final case weights. The key assumption behind this design is that a time study or analysis of existing records, if properly conducted, is the most accurate way to quantify the work attorneys currently do, so the expert panel need only estimate the additional time required for work that is not already being performed.

In the other 13 public defender workload studies, the expert panel was charged with determining the total amount of attorney time required to deliver effective assistance of counsel in each case type without explicit reference to the results of any earlier data collection. That said, in five of these 13 studies, the panelists were able to review and consider time expenditure data if they chose to do so. In the remaining eight studies, existing data on time expenditures were not shown to the panel (although sometimes it had been collected as part of the research effort). Seven of those eight studies asked the panel for estimates that would directly yield the recommended case weight. The eighth study asked the panelists to identify specific activities for which more or less time than was currently spent would be required to provide effective assistance of counsel (as indicated, the panel did not know what the current expenditures were). Once the activities were identified, the panel would seek a consensus on the percentage of cases for which additional time was required and the amount of time required in each case. The product of that information was later added to the averages reported by the time study to yield the final case weight.

Appendix C. Consensus Trend Charts

The figures that follow show how the *CoV* for the attorney time estimates for each case type changed during the expert panel session deliberations, although in these figures, the proxy for time is each instance when the Delphi application performed a routine update of information displayed on the computing device dashboards and on the in-room projection by examining the panelists' entries and calculating summary statistics, such as medians and CoVs. Each iteration of this update cycle is simply when the application refreshed the data being displayed, not when a panelist made an entry. For the purpose of this discussion, we consider the start of the deliberations to be about the 250th to 300th iteration of the update cycle, which accounts for the fact that the panelists took a bit of time to become familiar with the application and then had to hand enter 88 values (eight estimates of recommended averages at the activity type level for each of the 11 case types) into the application, using their initial response charts as a reference. There was no group discussion during this prestart period (the yellow shaded areas in Figure C.1 through Figure C.11), and CoVs would have varied wildly depending on when any particular panelist began to enter values into the application for each case type. The trend lines to the right of the shaded areas of the figures represent when the Delphi session was in full swing. When comparing the trend lines across case types, note that the scale for the y-axis in these figures varies and that every 500 iterations shown on these charts represent about 44 minutes of deliberation time. In these figures, the y-axis represents the CoVs for the group's time estimates for each case type, and the x-axis represents the iterations of the update cycle of the Delphi application.

Figure C.1. CoV Trends for Felony–High–LWOP

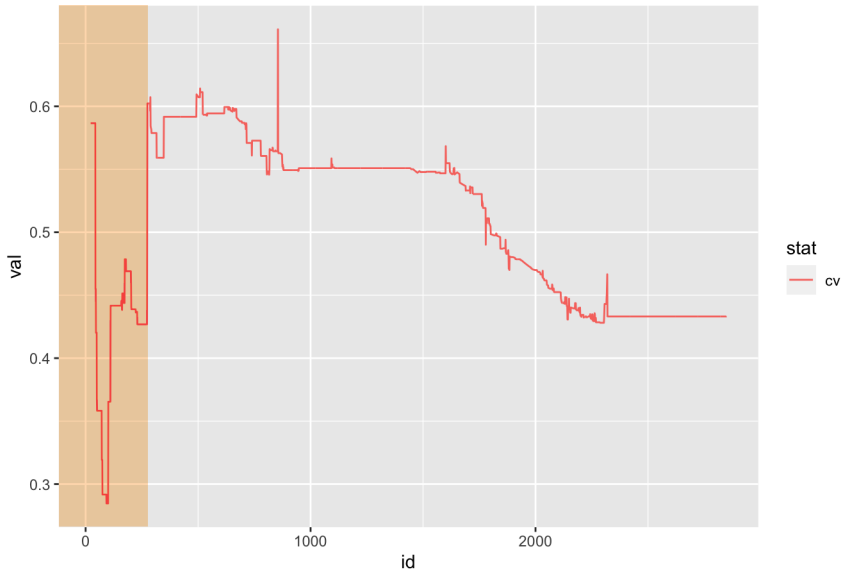


Figure C.2. CoV Trends for Felony–High–Murder

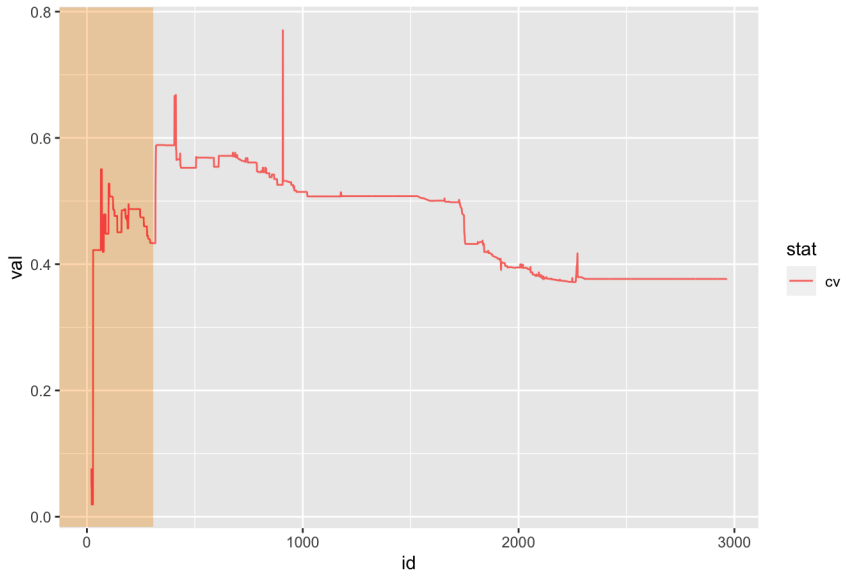


Figure C.3. CoV Trends for Felony–High–Sex

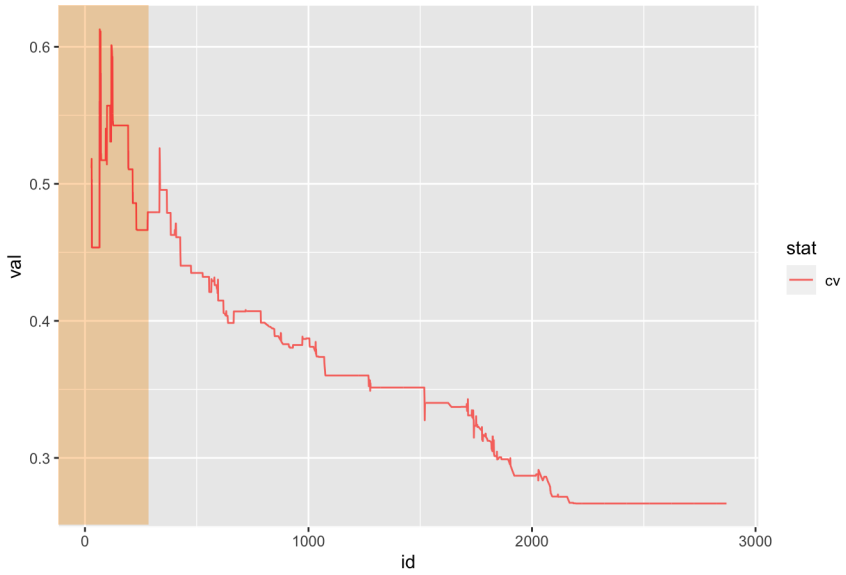


Figure C.4. CoV Trends for Felony–High–Other

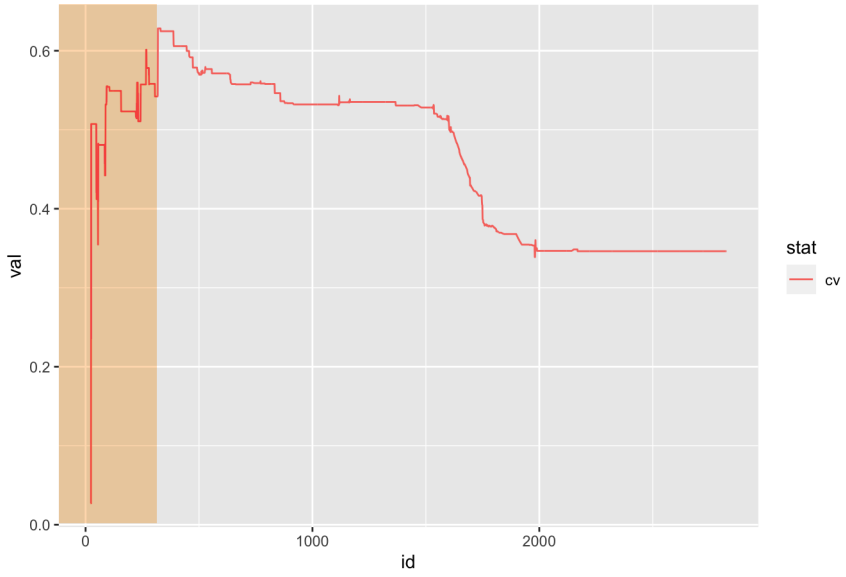


Figure C.5. CoV Trends for Felony–Mid

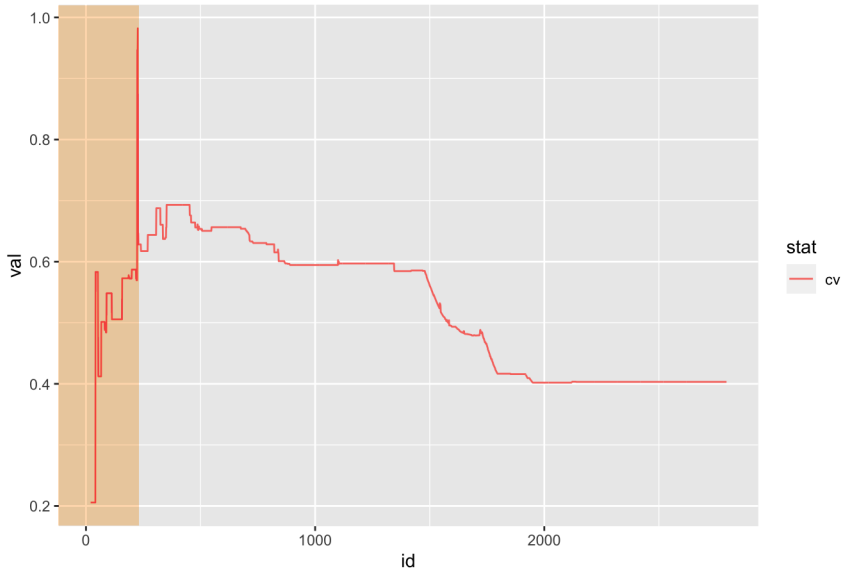


Figure C.6. CoV Trends for Felony–Low

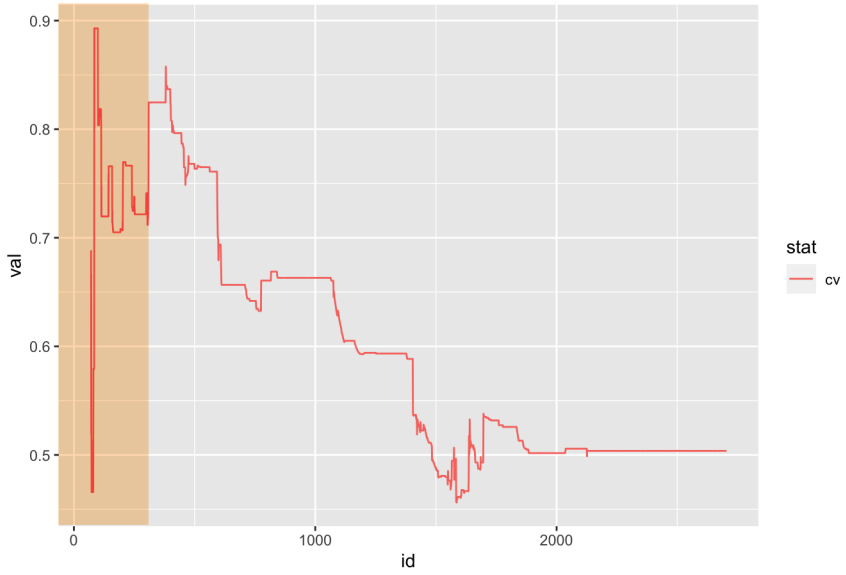


Figure C.7. CoV Trends for DUI–High

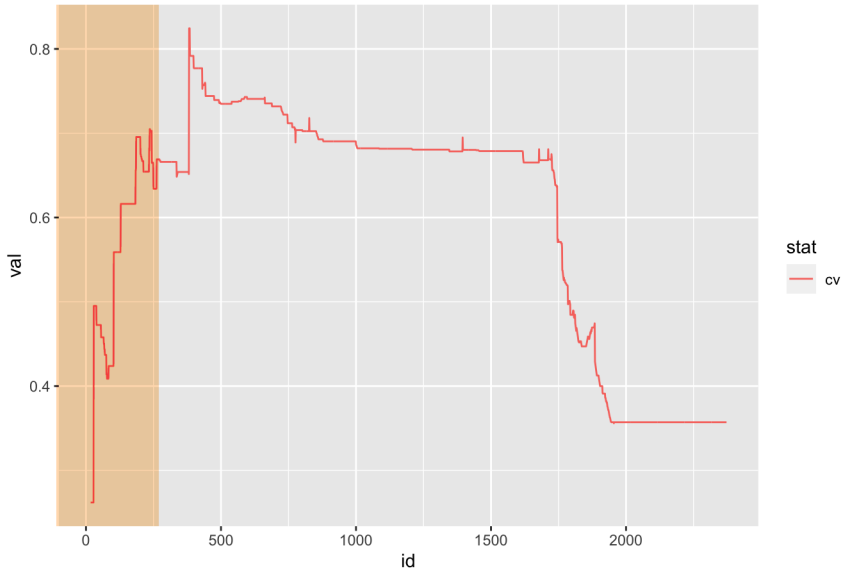


Figure C.8. CoV Trends for DUI–Low

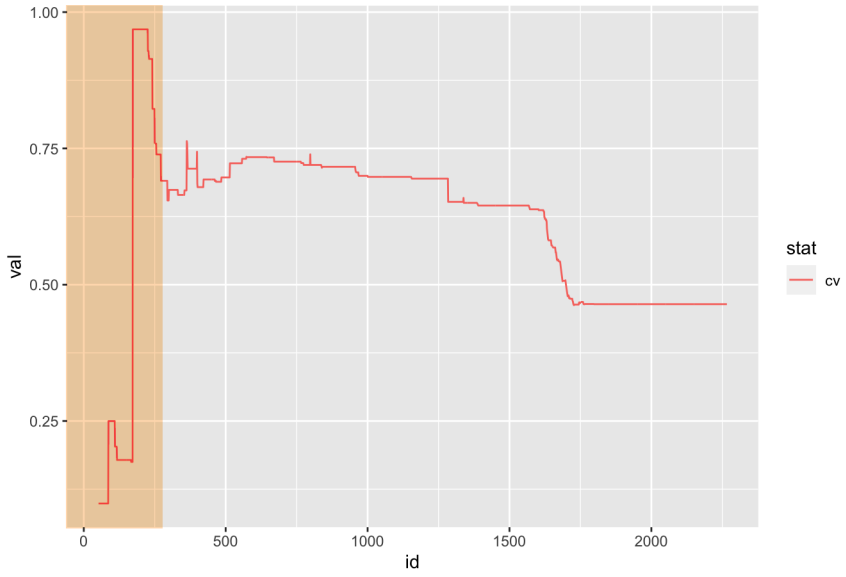


Figure C.9. CoV Trends for Misdemeanor–High

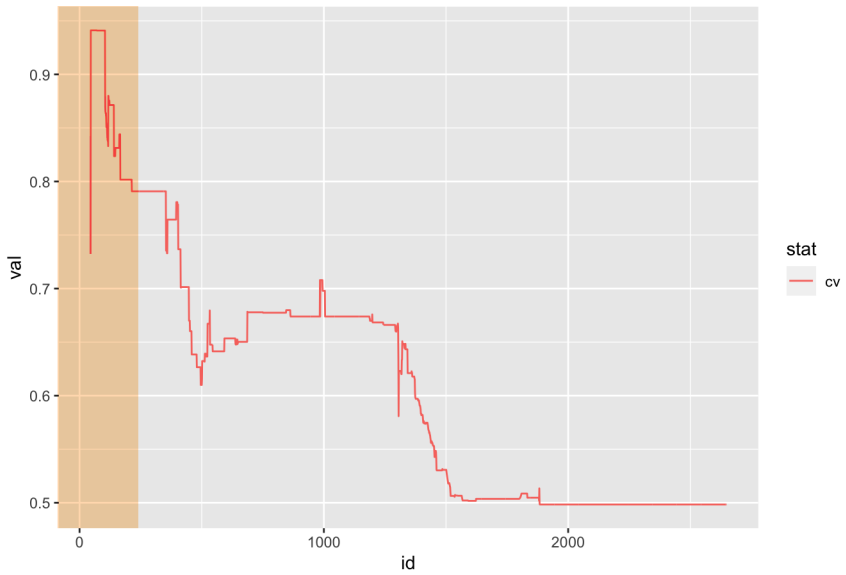


Figure C.10. CoV Trends for Misdemeanor–Low

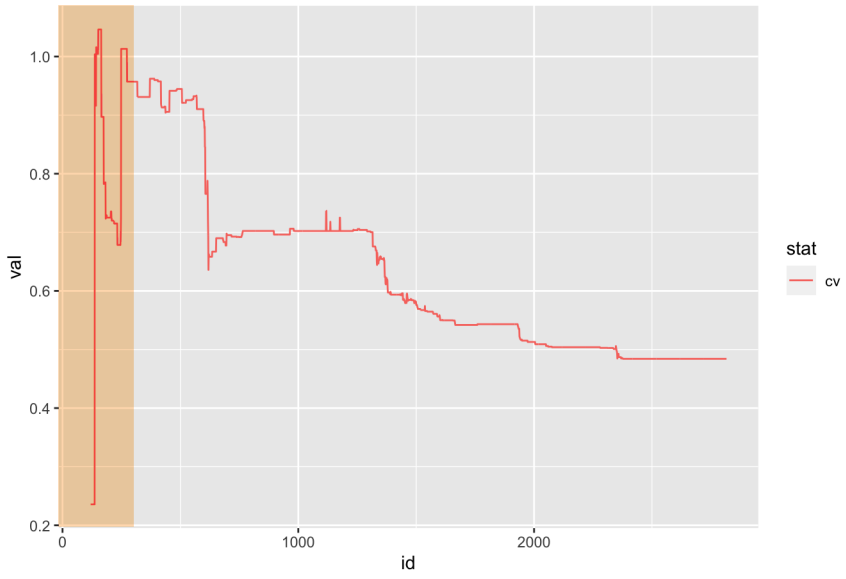
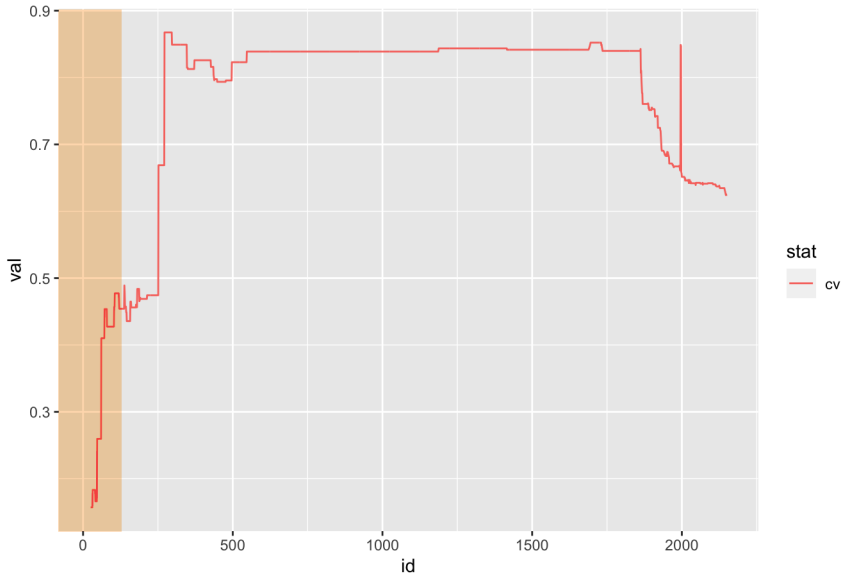


Figure C.11. CoV Trends for Probation or Parole Violations



Abbreviations

ABA	American Bar Association
ABA SCLAID	American Bar Association Standing Committee on Legal Aid and Indigent Defense (prior to 2020, this committee was known as the American Bar Association Standing Committee on Legal Aid and Indigent Defendants)
ACCD	American Council of Chief Defenders
CARD	child abuse resulting in death
CoV	coefficient of variation
COVID-19	coronavirus disease 2019
DUI	driving under the influence (sometimes referred to as *driving while intoxicated or impaired*)
FTE	full-time equivalent
ILS	New York State Office of Indigent Legal Services
LEAA	Law Enforcement Assistance Administration
LWOP	life without parole
NAC	National Advisory Commission on Criminal Justice Standards and Goals
NACDL	National Association of Criminal Defense Lawyers
NAPD	National Association for Public Defense
NCDC	National Criminal Defense College
NCSC	National Center for State Courts
NLADA	National Legal Aid & Defender Association
NPDWS	National Public Defense Workload Study

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