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**Preliminary Report – Subject to Change**

# ACKNOWLEDGMENTS

The principal authors of this report are Colton Brown, Celia Givens, Terence Jones and Jacqueline Winton, Systemic Justice Project Clinic at Temple University James E. Beasley School of Law’s Sheller Center for Social Justice, under the supervision of Professor Shanda Sibley. Professors Jules Epstein and Lauren Ouziel provided thorough review and feedback. Erica Maier and Roshonda Scipio provided instrumental additional support in the production of this report.

**METHODOLOGY**

The Board of Commissioners of Montgomery County, Pennsylvania, contracted with Temple University James E. Beasley School of Law to provide specific guidance and recommendations to implement best practices for the governance and operation of the county’s Public Defender Office. Work on this report was undertaken by the Systemic Justice Project at the Law School’s Sheller Center for Social Justice. To produce this report, the Project examined the external legal regime and organizational structures influencing the Public Defender Office, as well as the office’s internal structure and culture.

In order to reach the findings and recommendations outlined in this report, the Project employed a mixed-methods approach. This included conducting a legal analysis of relevant statutes and rules, and any limits they impose on potential reorganization; reviewing the literature (both academic and practitioner-oriented) on best practices for public defender officers; reviewing the office’s annual budget, how the budget is determined, and whether it is adequate; engaging in a comparative analysis of organizational structures of other defender offices, both within Pennsylvania and across other states, including comparative analysis of other defender office restructurings; and conducting structured interviews of current employees of the office.

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# INTRODUCTION

Public Defenders are core to the guarantee of equal justice. They are one of the few voices in government that directly advocate for those most in need and most disadvantaged; they strive to ensure that the law will be adhered to and criminal justice reforms will reflect the needs of, and be responsive to, the broader community; and they fulfill the Constitution’s mandate of the right to counsel.

Public defenders nationwide constantly strive to provide competent, quality, and zealous representation to all indigent clients. Montgomery County is no exception. In recent years, the Montgomery County Office of the Public Defender has made numerous improvements to better serve Montgomery County’s indigent community. For example, with the support of the County Commission, it has doubled its funding across the ten most recent budget cycles; added vital positions to the staff, including a Chief of Mental Health and of Pre-Trial Services; diversified services for its clients by adding a Social Services Unit; and increased the variety and amount of training that it offers to staff.

The March 2020 dismissal of the Defender Office leadership brought to the fore issues of how to best continue this progress, improve indigent defense representation, limit the potential for political interference or its appearance, and ensure that the County is not at risk of legal challenges based on the adequacy of the provision of indigent representation or the manner in which the Office operates. This Report is intended to address and provide solutions for each of these concerns.

# EXECUTIVE SUMMARY

The purpose of this Report is to provide the Montgomery County Board of Commissioners with recommendations on how it can continue to develop and improve best practices for the governance and operation of its Office of the Public Defender. Following from this directive, this Report focuses on the areas where the operation of the Office of the Public Defender intersects with the duties and practices of the Board of Commissioners, pursuant to the Commission’s statutory and legal responsibilities.

Currently, the Commission’s duties and responsibilities are linked to the work of the Office of the Public Defender in four distinct ways: (1) the Commission has a statutory responsibility to hire (and dismiss, where appropriate) the Chief Public Defender; (2) the Commission has been used as a vehicle through which internal and external criticisms regarding the Office are raised and addressed; (3) the Commission is responsible for reviewing and approving the Office’s annual budget; and (4) the Commission, as the executive of Montgomery County, is potentially liable for any lawsuit that may be brought against the Office.

Each of these points of intersection provides an opportunity to contemplate adjustments to current practices that can produce better outcomes for the Office, the Commission, and the community. Because of the current legal landscape in the Commonwealth, the Commission’s relationship with the Office will necessarily involve a push-and-pull: in order to achieve optimal governance of the Office, the Commission will need to grant the Office more independence, while at the same time instituting structures that will ensure appropriate oversight of Office operations.

Balancing the Office’s independence with the County’s oversight role is, therefore, a central challenge and the primary focus of this Report. The Report then proceeds by addressing the Commission’s role in funding the Office. Next, the Report discusses how the County can prophylactically mitigate risk arising from potential lawsuits against the Office. The Report concludes with specific recommendations in each of these areas, as summarized below.

ENSURING INDEPENDENCE

1. Montgomery County should create an independent Oversight Board to manage its indigent defense services. Because Pennsylvania places the burden of overseeing and funding indigent defense services on its counties, public defender offices are more susceptible to judicial and political influence than they would be in a statewide defender system. Montgomery County can protect its public defender office from undue outside influence by creating an Oversight Board to help select the Chief Public Defender and provide advice and counsel regarding the Office’s operations and policy initiatives.
2. Montgomery County should delegate the selection process of the Chief Public Defender to an Oversight Board. While the Commission has the statutory responsibility to appoint the Chief Public Defender, it can and should delegate part of the recommendation and selection process for the Chief Defender to an Oversight Board. The Commission should also consult with the Oversight Board on any decisions regarding the Chief Defender’s removal.
3. The Montgomery County Office of the Public Defender should have a dedicated Human Resources professional. Currently, the office has no internal Human Resources Department or dedicated HR professional, which means that attorneys wishing to discuss a work issue must utilize the county’s Human Resources team or speak with the Board of Commissioners, neither of which is ideal. The Report also recommends that the Office create and distribute a human resources policy that establishes a clear reporting structure for HR complaints.
4. The Montgomery County Office of the Public Defender should reassess its current case assignment system. Staff attorneys in the Office are currently grouped in trial teams assigned to a particular judge for extended periods of time. This system may create the actuality or appearance of pressure to not displease or cross a judge in a particular case because of what may then result in subsequent cases. The Office should consider modifying the system to rotate lawyers more frequently, have teams based on subject matter specialization, or other assignment regimens that assure quality representation and the least amount of pressure to conform.

FUNDING CONSIDERATIONS

1. Montgomery County should continue to increase funding to the Office of the Public Defender to respond to the needs of indigent defense provision**.** Pennsylvania stands nearly alone in the nation in providing no state funding for indigent defense, placing the full burden of funding the Office of the Public Defender on Montgomery County. In recent years, Montgomery County has increased the budget of the Office. We recommend that the county continue this trend, which would allow the Office to provide even more robust training and hire more staff, at both the attorney and paraprofessional levels.
2. Montgomery County should continue toward full pay parity between defenders and prosecutors. Montgomery County has made great effort to address the issue of pay parity by participating in a salary study and instituting pay increases. Yet, the Office of the Public Defender still lacks pay parity with the county’s District Attorney’s office for at least some of its attorneys. We recommend that the Board continue to revisit the issue of increased pay parity on an annual basis. Greater financial incentives and upward pay mobility are necessary to acquire and retain requisite talent long-term.

LITIGATION AND RISK MITIGATION

1. The Montgomery County Office of the Public Defender should create internal policy documents outlining expectations, promotion standards, and guidelines on case assignment and management. Although much of this information may be shared through informal channels in the Office, creating formal written office policies will contribute to increasing a culture of consistency, accountability, and transparency. Published standards are also important for risk management and quality control.
2. The Montgomery County Office of the Public Defender should consider reducing the direct caseloads of supervising attorneys in order to give them more time to mentor and support the attorneys they supervise. Team Leaders in Montgomery County are currently responsible for as many (or more) cases than the attorneys who they supervise. We recommend lightening their caseloads, which would free bandwidth for them to dedicate more time to mentoring and supervising the attorneys in their charge. Additionally, this Report recommends instituting a regular meeting schedule for staff as well as a formal case management system.
3. The Office of the Public Defender should formally adopt the ABA and NAPD Principles for public defense. We recommend that the Office formally adopt both the American Bar Association (“ABA”) and the National Association for Public Defense (“NAPD”) Principles for public defense systems. We also recommend that the Office integrate these principles into their public mission statement and their internal operational documents. These sets of principles will serve as guidance for the Office’s delivery of indigent defense services on both the individual and systemic levels

# BACKGROUND

The right to counsel is embedded in the Sixth Amendment, which mandates that in “all criminal prosecutions, the accused shall enjoy the right to have… the Assistance of Counsel for his defense.”[[1]](#endnote-2) The United States Supreme Court held in *Gideon v. Wainwright* that all defendants in criminal cases, regardless of their means, are entitled to legal representation at all critical stages of the proceedings against them.[[2]](#endnote-3)

The Court’s ruling in *Gideon* is generally regarded as having “consolidated a right to counsel at trial in the Sixth Amendment,”[[3]](#endnote-4) whether the defendant is being tried in state or federal court,[[4]](#endnote-5) on a felony or misdemeanor,[[5]](#endnote-6) or whether counsel is retained or appointed.[[6]](#endnote-7) While criminal defendants may retain private defense counsel if they can afford to do so, *Gideon* mandates that all indigent persons facing criminal prosecution and possible imprisonment be provided an attorney under the rationale that, “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”[[7]](#endnote-8)

The right to counsel attaches “at or after the time that judicial proceedings have been initiated against [the criminal defendant], ‘whether by formal charge, preliminary hearing, indictment, information, or arraignment.’”[[8]](#endnote-9) From this point on, assistance of counsel is required “at every step in the proceedings” against the defendant, whether informal or formal.[[9]](#endnote-10) This right includes “pretrial confrontations” such as arraignment.[[10]](#endnote-11) It exists throughout the adversarial process against the defendant and extends beyond the initial trial to sentencing and any direct appeal as of right.[[11]](#endnote-12)

The right to counsel has been expanded and further defined since *Gideon*’s mandate. Attorneys providing indigent defense services must provide representation that is both “adequate” and “independent.”[[12]](#endnote-13) Thus, the right to counsel is not merely the formal right to have an attorney assigned to each indigent defendant’s case. Instead, the right to counsel is the right to receive the effective assistance of competent counsel.[[13]](#endnote-14) In this way, a denial of counsel is not merely interpreted to mean the physical absence of counsel — a constructive denial can occur when counsel is present but, due to systemic issues or deficiencies, cannot provide meaningful or adequate representation.[[14]](#endnote-15)

Beyond individual client representation, the right to counsel is also evaluated from a systemic lens. In 2016, the Pennsylvania Supreme Court confirmed this in *Kuren v. Luzerne County*, holding that a class of indigent defendants may sue a county for prospective, systemic violations of the Sixth Amendment right to counsel on the grounds that the county has not adequately funded its public defender office. What we can take from reading *Gideon* and its progeny, alongside *Kuren,* is that indigent defendants are entitled not just to an individual attorney who meets prevailing professional norms, but also an indigent defense system that meets those norms as well.

Constitutional doctrine, however, does not guide states or local governments on *how* to implement these requirements. Thus, states across the nation have taken a variety of approaches in determining how they provide defense counsel for indigent defendants.

National Public Defense Standards

All lawyers in the United States are bound by the United States Constitution, as well as the laws and ethical rules that govern the jurisdiction in which they practice. Public defenders are also advised by national standards and professionally accepted norms created by leading professional legal organizations, which provide additional guidance for states and local governments on how to model their public defense systems.[[15]](#endnote-16)

The “Model Rules of Professional Conduct” (or “MRPC”) serve as the prototypical ethical rules for most jurisdictions in the United States.[[16]](#endnote-17) Pennsylvania’s Rules of Professional Conduct (the “PaRPC”), which were derived from the MRPC, outline what public defenders throughout Pennsylvania need to do to uphold the constitutional requirements pertaining to indigent defense. Pennsylvania lawyers must abide by the PaRPC as a matter of professional ethics. Model Rules 1.1 (Competence[[17]](#endnote-18)), 1.3 (Diligence[[18]](#endnote-19)), 1.4 (Communication[[19]](#endnote-20)), and 5.1 (Responsibilities of a Partner or Supervisory Lawyer[[20]](#endnote-21)) are frequently referred to by public defense practitioners and the organizations to which they belong.

In addition to ethical obligations, there are also aspirational national standards for public defender organizations. The American Bar Association’s *Ten Principles of a Public Defense Delivery System* (the “Ten Principles”) lays out necessary criteria for public defense systems to be able to provide effective legal representation to their clients.[[21]](#endnote-22) Most of the ABA’s Ten Principles address (either expressly or implicitly) how public defense systems should act in compliance with ethical rules and constitutionally mandated requirements. For the purposes of this report, the most relevant ABA principles are those that address: (i) Independence (Principle 1); (ii) Funding and Resource Parity (Principle 8); (iii) Office Culture and Training (Principles 6 and 9); and (iv) Compliance with Ethical and Constitutional Requirements (Principles 1, 3, 4, 5 and 10).

The National Association for Public Defense (the “NAPD”), founded in 2013, is a professional organization with a membership of over 21,000 public defense practitioner members[[22]](#endnote-23) that operates as a resource and policy hub for public defenders across the country.[[23]](#endnote-24) NAPD is the largest formal coalition of public defenders nationwide, and as such, they are uniquely positioned to inform policymakers about ongoing issues in the representation of indigent clients and the operation of public defense systems generally.

The NAPD has also released reports and policy statements for the improved operation of public defender systems. In May of 2020, NAPD published a policy statement on the independence of public defenders which stressed the urgency of removing judicial and political influences from indigent defense systems. In addition, the NAPD has provided public defender offices with guidance on the structure and organization of public defense services (Principles 1-4); the quality of public defense services (Principles 5-9); and the treatment of accused persons (Principles 10-15).[[24]](#endnote-25)

While attorneys are required to follow ethical rules, national standards such as those published by the ABA and NAPD are aspirational. They are intended to help local and state governments contemplate improvements to their public defender systems. Such standards may be incorporated into a defender office’s bylaws, mission statements, or similar documents.

The Legal Landscape in Pennsylvania

The Pennsylvania Public Defender Act, 16 P.S. § 9960 *et seq.* (the “Act” or “PDA”), is the only statute directly regulating public defense in the Commonwealth.[[25]](#endnote-26) The Act assigns all responsibility for indigent defense to the counties, mandating that each county (with the exception of Philadelphia County[[26]](#endnote-27)) create a public defender office, and that the county’s commissioners appoint the office’s Chief Public Defender.[[27]](#endnote-28) Termination powers are not explicitly mentioned.[[28]](#endnote-29) The Act does not provide any statewide standards for the operations of public defender offices, and each individual county has responsibility for, and complete discretion over, the funding of its office.[[29]](#endnote-30) Generally, funding for indigent defense is raised through local property taxes.[[30]](#endnote-31)

The Chief Public Defender and assistant public defenders are required to be attorneys admitted to practice in the Commonwealth.[[31]](#endnote-32) With approval of the “appointive body” (i.e., a county commission), the Chief Public Defender may build a defender office by hiring full- or part-time assistant public defenders, clerks, investigators, support staff, and other staff members the office needs to carry out its duties.[[32]](#endnote-33)

The Act requires indigent representation in ten specific areas, including juvenile delinquency proceedings, critical pretrial identification procedures, all stages of criminal adjudication (from preliminary hearings through appellate and habeas challenges), along with any other situation in which legal representation is “constitutionally required”.[[33]](#endnote-34)

In addition, the Pennsylvania Rules of Criminal Procedure state that defense counsel for an indigent defendant must be appointed in all summary cases with a likelihood of imprisonment, in all court cases prior to the preliminary hearing, and in every case “when the interests of justice require it.[[34]](#endnote-35) An appointment must remain in place until the final judgment against a defendant, including any direct appeal as of right.[[35]](#endnote-36)

County commissions are responsible for providing suitable office space, furniture, equipment, and other needed supplies so that the office can properly conduct its business.[[36]](#endnote-37) Further, the county imposing a defendant’s sentence is responsible for reimbursing the public defender office of another county for “reasonable expenses incurred” during the representation of that defendant during parole revocation proceedings and appeals.[[37]](#endnote-38)

In addition to the Pennsylvania Rules of Professional Conduct discussed above, Montgomery County also maintains its own County Ethics Policy for all county employees.[[38]](#endnote-39) The policy includes rules specific to attorneys, and adopts the above-mentioned Pennsylvania Rules of Professional Conduct.[[39]](#endnote-40) However, the policy contains no specific provisions for criminal justice proceedings or public defense services.

A Closer Look at Montgomery County

Pennsylvania organizes its counties by class, as determined by size of the county’s population.[[40]](#endnote-41) The classes range from Class 1 to Class 8, with Class 1 encompassing those counties with the highest populations, down to Class 8, which includes those having the lowest.[[41]](#endnote-42) Philadelphia County is the only Class 1 County in the state.[[42]](#endnote-43)

Montgomery County is designated as Class 2A, which includes counties with populations between 500,000 and 800,000.[[43]](#endnote-44)

|  |  |
| --- | --- |
| *Montgomery County Demographics* | |
| ***Current Population*** | 830,915 |
| ***Municipalities/Townships*** | 62 |
| ***Median Age*** | 41.2 |
| ***Median Household Income*** | $88,166 |
| ***Per Capita Income*** | $46,776 |
| ***% of People Living in Poverty*** | 5.9% |
| ***Ethnicity Breakdown*** | * White: 75% * Black or African American: 10% * Asian (Non-Hispanic): 8.1% * Hispanic or Latino: 5.4% * Two or More Races: 2.3% * Native Hawaiian/Pacific Islander: 0.1% * Native American: 0.2% |
| ***Education*** | * 94.2%: high school graduate or higher (ages 25+) * 48.7%: Bachelor’s Degree or higher (ages 25+) |
| ***Employment*** | 514,853 persons |

Delaware and Bucks counties, which are “collar counties” of Philadelphia,[[44]](#endnote-45) are also Class 2A counties and are, along many dimensions, comparable to Montgomery county.[[45]](#endnote-46) Chester county, the fourth collar county, is designated as Class 3. As the table below shows, each of these counties allocate significantly more of their budgets to the District Attorney than to indigent defense. Bucks, Chester, and Montgomery counties have some of the widest disparities between prosecution and defense budgets.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ***Budget Allocations of Surrounding Counties [[46]](#endnote-47)*** | | | | |
| ***County*** | ***District Attorney*** | ***Public Defense*** | ***Ratio of PD to DA Funding [[47]](#endnote-48)*** | ***Population*** |
| **Allegheny** | $20,358,719 | $10,527,967 | 2:1 | 1,216,045 |
| **Bucks** | $13,042,500 | $4,470,000 | 3:1 | 628,270 |
| **Chester** | $11,509,783 | $4,130,386 | 3:1 | 524,989 |
| **Dauphin** | $5,987,514 | $4,398,875 | 1.5:1 | 278,299 |
| **Delaware** | $6,363,000 | $4,615,000 | 1.5:1 | 566,747 |
| **Lehigh** | $6,751,094 | $2,901,169 | 2.5:1 | 369,318 |
| **Montgomery** | $17,756,942 | $5,816,907 | 3:1 | 830,915 |
| **Philadelphia** | $53,611,142 | $49,600,000 | 1:1 | 1,584,064 |

The Role of Montgomery County Board of Commissioners

Montgomery County describes the role of the Board of Commissioners (also referred to hereinafter as the “Commission”) as the “legislative and executive arm of the Montgomery County government.”[[48]](#endnote-49)

The Commission is composed of three Commissioners who are each elected to four-year terms by Montgomery County residents.[[49]](#endnote-50) One of the three commissioners is selected to serve as chairperson.[[50]](#endnote-51) The Commission is responsible for appointing the county’s Chief Public Defender, as well as all department heads and other members of boards, authorities, and committees in the county.[[51]](#endnote-52) The Commission also appoints the heads of all county offices and establishes the salaries of all employees, in collaboration with the county’s controller.[[52]](#endnote-53) Lastly, the Commission has the critical responsibility of planning and executing the county’s budgets and financing each year.[[53]](#endnote-54)

The Montgomery County Budget

The following table provides a high level summary of Montgomery County’s projected budget for 2020, including allocations for the District Attorney and the expense breakdown for the Public Defender Office. This budget is largely derived from local real estate taxes, which make up 50% of county resources.[[54]](#endnote-55) Another 36% of the budget comes from federal and state grants, and 14% is derived from departmental revenues and “other” sources.[[55]](#endnote-56)

|  |  |
| --- | --- |
| ***Montgomery County Budget*** | |
| ***Total Budget*** | $428,458,787 |
| ***District Attorney Budget (2020)*** | $17,756,942 (22.5% of judicial administration budget) |
| ***Public Defender Budget (2020)*** | $5,816,907 (10% of county administration budget) |
| ***Public Defender Budget (2019)*** | $5,729,033 |
| ***Public Defender Budget (2018)*** | $5,134,840 |
| ***Public Defender Expenses*** | * $3,807,087 in salary/wages total * $3,671,160 full-time * $94,468 other payroll * $41,450 part-time * $1,430,156 in benefits * $275,000 in contracted SRV/ provider SRV * $167,894 in maintenance * $61,200 in general supplies * $53,000 in travel and training * $15,460 in utilities * $7,100 in general expenses |

The allocation for Office of the Public Defender has been steadily increasing over recent budget cycles, from $5,134,840 in 2018 to $5,729,033 in 2019.[[56]](#endnote-57) The proposed 2021 budget for the Office is $6,527,981.[[57]](#endnote-58)

The Montgomery County Office of the Public Defender

The Montgomery County Office of the Public Defender has approximately sixty-six full-time employees, including supervisors, staff attorneys, paralegals, administrative staff, and investigators.[[58]](#endnote-59) The Office has an Adult Criminal Division – within which are Pretrial, Trial, and Homicide Units – and a Juvenile Advocacy Division.[[59]](#endnote-60) The Office also has a Social Services Unit.[[60]](#endnote-61) The Office, as a whole, is involved in community efforts such as the Criminal Record Expungement Clinic, Youth Sentencing and Re-entry Project, and Participatory Defense outreach.

Legal staff at the Office are required to undergo various internal training programs. There is a one-week orientation given to new staff members, which provides an overview of the Office of the Public Defender as well as the Montgomery County criminal legal system.[[61]](#endnote-62) Additionally, each new attorney is required to join the Office’s young lawyers group that meets twice per month to give attorneys an opportunity to discuss cases, effective trial strategies, and techniques.[[62]](#endnote-63) The Office also hosts monthly brown bag lunches to facilitate brainstorming between new and experienced attorneys.[[63]](#endnote-64) Further, attorneys are periodically required to submit a case for review to a committee composed of “seasoned attorneys.”[[64]](#endnote-65)

In addition to completing CLE credits required by the Commonwealth, the Office has offered a one-week skills training to teach various trial skills.[[65]](#endnote-66) Lastly, the Public Defender Office provides an opportunity for some attorneys to attend the new attorney training with the Gideon’s Promise Partnership, a three-year training curriculum “designed to provide new public defenders the skills and knowledge necessary to become excellent advocates for those they represent.”[[66]](#endnote-67)

Line attorneys in the Office are assigned to “trial teams,” each of which is supervised by a “team leader.” Each trial team is assigned to a particular judge’s courtroom for a specified term (typically two years). Attorneys on the team take on representation of all indigent defendants assigned to their particular courtroom, regardless of the nature of the charges. The team leader delegates the cases among all team members, while also doing direct client representation as part of the team.

We were not provided any internal organizational documents that outline the method of case distribution and, from our interviews, it appeared that the methods that team leaders use to assign cases to line attorneys vary from team to team. The Office also does not appear to use an office-wide case management system.

While there are many senior attorneys in the Office (i.e., those who have been at the Office for 10 years or more) and many junior attorneys (i.e., those who have been at the Office for less than 5 years), there are disproportionately fewer mid-level attorneys (i.e., those who have been at the Office between 5 and 10 years) working in the Office.

To our knowledge, there are no written performance review standards distributed to attorneys. And while job descriptions for team leaders and supervisory attorneys are circulated when an open position becomes available, it is not clear that the office otherwise disseminates documents discussing promotion standards or timelines.

# DISCUSSION OF CONSIDERATIONS

As stated in the Introduction to this Report, the primary ways in which the Commission’s duties intersect with the work of the Office of the Public Defender are that: (1) the Commission has a statutory responsibility to hire the Chief Public Defender; (2) the Commission is often used as a vehicle through with internal and external criticisms regarding the Office are brought forward; (3) the Commission is responsible for reviewing and approving the Office’s annual budget; and (4) the Commission, as the executive of Montgomery County, is potentially liable for any lawsuit that may be brought against the Office.

This Discussion will track those categories. In the following sections, we will examine each of the listed considerations to describe options, and provide examples, that governments may choose from to best structure their indigent defense systems.

ENSURING INDEPENDENCE

At the institutional level, independence refers to a public defender office’s ability to operate without undue pressure or influence from other institutions or institutional actors (namely, the judiciary, lawmakers, and executive actors such as the overseeing county commission).[[67]](#endnote-68) Without institutional independence, outside influences can unduly impact the hiring, funding, and operations of indigent defense systems.[[68]](#endnote-69) How a public defender’s office is structured – with respect to internal organization, oversight, and relations with external institutions – in large part determines its degree of institutional independence.

At the individual level, independence refers to a defense attorney’s ability “to be able to make decisions based on what is right for their clients to whom they are ethically responsible without fear of adverse personal or program consequences.”[[69]](#endnote-70) The Supreme Court recognized in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence” of the indigent defense attorneys and offices with whom they engage.[[70]](#endnote-71)

Both institutional and individual independence is crucial for the meaningful representation of clients and for assuring that the adversarial legal system works reliably and produces valid results.[[71]](#endnote-72) Independence is especially critical for public defense professionals and their offices because the “essence of their work” is to represent clients against the very government that employs and funds them.[[72]](#endnote-73)

In this Report, we focus on the two areas of potential external influence that present the greatest risk to the independence of the Montgomery County Office of the Public Defender: from the County Executive (which we will call “political influence”), and from the judiciary (“judicial influence”). In this section, we will discuss how the Office’s external oversight structure and some internal practices contribute to the risk of external influence, and suggest restructuring reforms that can mitigate that risk.

Political Influence

Pennsylvania’s statutory scheme for the administration and funding of indigent defense services places county executives into a dual role. As executives, they are charged with ensuring enforcement of the penal laws, and to that end oversee and fund the county’s district attorney’s office. Yet they also oversee and fund that office’s adversary, the public defender.[[73]](#endnote-74) This dual role creates the risk of political influence (or its appearance) on county decisions regarding funding and oversight of the public defender’s office.

With respect to funding, the risk of undue influence is particularly prevalent in states like Pennsylvania that use a *county-funding model*, in which local elected officials have the sole authority to fund indigent defense services.[[74]](#endnote-75) Local officials could therefore potentially use their authority over budgets to influence the operations of indigent defense services.[[75]](#endnote-76) The ABA recommends that if funding powers reside with the executive or legislative branch, they should not be used in a manner that interferes with, or retaliates against, professional judgments made during the delivery of indigent defense services.[[76]](#endnote-77)

With respect to oversight, the risk of undue political influence is particularly acute when, as in Pennsylvania, chief defenders are appointed by a local elected official.[[77]](#endnote-78) In such jurisdictions, political actors can choose to suspend or remove chief defenders from their appointments without cause or process.[[78]](#endnote-79) Chief defenders who are appointed by and serve at the pleasure of elected officials can feel pressure to take political objectives into consideration in their decision-making, which may be in tension with their professional responsibilities.[[79]](#endnote-80) For example, chief defenders may be reluctant to support a relevant criminal legal reform policy that is perceived to be contrary to that of the executive, or to make an issue of the inadequacy of their budget for fear of political repercussions.[[80]](#endnote-81) As a result, a chief defender may feel pressure to bow to political pressures originating from their appointing authority, which might ultimately not be in absolute alignment with their charge to elevate the needs of indigent defendant clients.[[81]](#endnote-82)

Finally, the absence of a dedicated human resources professional in a defender’s office can exacerbate the potential for external influence. When there are no structures in place to facilitate internal communication around employment concerns at public defense offices, employees are left with the sole option of bringing those concerns to someone outside of the organization. This threatens client confidentiality, because a human resources complaint may require a public defender to discuss case details. In addition, external involvement in employment concerns can create tensions both for the public defender organization and the outside entity that is designated (or feels a responsibility) to address those concerns. This impedes both office independence and the cultivation of a transparent, positive workplace culture.

Judicial Influence

The judicial branch is tasked with being a “neutral arbiter” in judicial proceedings, interpreting the laws and regulations of the jurisdiction, and ensuring that all parties are afforded due process.[[82]](#endnote-83) This position of neutrality requires the judicial branch to equally weigh the needs of those prosecuting indigent defendants with those of defenders representing indigent defendants.[[83]](#endnote-84) Defender systems subject to undue judicial influence “often follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services for each and every defendant.”[[84]](#endnote-85)

While undue judicial influence is a greater risk in jurisdictions that use judicially-assigned counsel or contract attorney systems for indigent defense,[[85]](#endnote-86) or in systems in which judges appoint (or have influence over the appointment of) chief defenders,[[86]](#endnote-87)[[87]](#endnote-88)[[88]](#endnote-89) it can also arise in other situations — for example, when judges are in contact with the chief public defender about the performance or behavior of individual attorneys; or when individual judges and individual counsel are “repeat players,” causing counsel to consider how their actions in a current case might influence their standing in future cases before the same judge.

Michigan serves as an example of a state that has enacted rules in an attempt to ensure that the inability to pay for counsel does not dictate whether a defendant receives representation that is free from judicial influence. Michigan Indigent Defense Commission (MIDC) promulgated standards to “ensure[ ] that public defense attorneys are subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution….”[[89]](#endnote-90) Michigan State Court Administrator Tom Boyd explained that, “the requirement that public defense attorneys and the judiciary operate independent of one another will serve the court’s role in protecting the constitutional right to counsel and enhance the ability of appointed counsel to advocate with vigor and innovation, making for a more just and equitable system.”[[90]](#endnote-91) 

The Landscape in Montgomery County

To learn more about the culture and practices of the Montgomery County Office of the Public Defender, and in particular how Office employees see the Office’s relationship with the County and the judiciary, we interviewed several attorneys from the office, including those at staff attorney, team leader, and director levels.[[91]](#endnote-92) We inquired about any issues relating to the independence of the Office of the Public Defender and whether they have experienced any outside influences that interfere with the office’s operations.

While several attorneys felt that the Office operates with a high level of independence notwithstanding its position under county supervision, others stated that the office is, in some ways, “beholden” to the county government and judiciary. For some of those we interviewed, concern about the Office’s independence was heightened by the 2020 dismissals of the Office’s leadership. A repeated theme that emerged in our interviews was a sense by defenders that the county’s interests were sometimes fundamentally at odds with those of the Office. As one attorney put it: “Fighting for the rights of marginalized people is politically unpopular.” Notwithstanding those sentiments, we did not hear a widespread desire for the Office to become an independent non-profit corporation, or to otherwise separate from county administration.

The Montgomery Country Office of the Public Defender currently has no dedicated internal Human Resources department, so the Office must use the county’s Human Resources team.[[92]](#endnote-93) While most interviewees expressed no concern about this, others mentioned that employees of the Office sometimes bring their human resources concerns directly to the Commission or other employees in the executive branch.[[93]](#endnote-94)

In Montgomery County, attorneys are divided into several “trial teams” that are assigned to a particular courtroom.[[94]](#endnote-95) Some attorneys expressed a belief that it was a positive that public defenders are assigned to specific judges because they were able to “get to know how that judge thinks” to better “maneuver those cases” for their clients. However, other attorneys felt that judges have too much influence within the Public Defender Office. For instance, one attorney reported that judges have in the past reached out to Office leadership to complain about assistant defenders assigned to their courtroom and have them reassigned or even fired; another reported that there was significant judicial pushback to leadership when line attorneys aggressively challenged bail conditions; still another expressed that they “felt their legitimacy was being undermined,” and were looked at as being “unreasonable” if they challenged judges' decisions too often. One attorney summed up the inherent tensions within the current courtroom-based team structure in this way: “Attorneys want credibility with the judge, and you don’t want to seem difficult all the time.”

Structures That Can Mitigate External Influence

While there are a variety of approaches for mitigating political pressures on defenders’ offices, the Pennsylvania Public Defenders Act limits the options available in Pennsylvania. Accordingly, we focus here on what we believe to be the only viable option for mitigating the political pressures created by the Pennsylvania statutory structure in a way that comports with that structure: the creation of an independent oversight board to supervise the provision of indigent defense services.

In addition, we discuss two internal structures that can mitigate external influence: the assignment of a dedicated human resources professional to the Office, and a reassessment of the case assignment system.

External Structures: Oversight Boards

Both the ABA and NAPD recommend the creation of oversight boards in order to provide public defender offices with independence from the political branches of government. The first ABA Principle states that public defender systems must be independent from outside influences in the selection, funding, and payment of defense counsel.[[95]](#endnote-96) A public defender system should be independent from political influence,[[96]](#endnote-97) and should only be subject to the same level of judicial supervision as retained or private counsel: “the mediator between two adversaries cannot be permitted to make policy for one of the adversaries.”[[97]](#endnote-98) Independence of public defense systems is crucial for public defenders to be able to make decisions based only on loyalty to their clients, which is required by Rule 1.7 of the MRPC.[[98]](#endnote-99) In order to conform with the principle of independence, the ABA recommends that a non-partisan board should be appointed to oversee public defense systems.[[99]](#endnote-100)

The NAPD also recommends that the policy-making function, choice of Chief Defender, and oversight of public defense systems should be vested in an independent Oversight Board or board of trustees selected.[[100]](#endnote-101) This recommendation derives from NAPD’s Second Principle, which requires that public defense systems remain independent of political control and influence, [[101]](#endnote-102) as well as its 14th Principle, which states that the expertise and experience of public defenders makes their voices indispensable in the formulation of criminal legal policies and reforms.[[102]](#endnote-103) To lend their voices, public defenders must be assured they can speak freely.

New Mexico’s approach is a model here. In 2011, the Governor of New Mexico terminated the State’s Chief Defender after the Defender during a legislation session accused the government of underfunding. The following year, the Citizens of New Mexico voted in a referendum to move oversight of the Public Defender’s Office to a newly created Public Defender Commission.[[103]](#endnote-104) The next year, the “Public Defender Commission formed and appointed the first Chief Public Defender under a new independent format.”[[104]](#endnote-105)

Types of Public Defense Oversight Boards

Oversight Boards may take several forms. Some states have centralized, statewide oversight mechanisms; other have limited, hybrid, or local oversight; and still others (like Pennsylvania) have no consistent oversight mechanisms at all. Regardless of the form, the most important function of an Oversight Board is authority with respect to the appointment and removal of the Chief Public Defender of their jurisdiction.[[105]](#endnote-106)

Statewide Oversight

Statewide oversight refers to a form of oversight in which states maintain one or more Oversight Boards to “oversee indigent defense services for all case-types” throughout the state.[[106]](#endnote-107) Having oversight at the state level can ensure that indigent defense services throughout the entire state are consistent in quality, efficiency, effectiveness, and held to the same standards.[[107]](#endnote-108)

Although it is structured to operate independently, a state Oversight Board must still be technically housed under a particular branch of the state government.[[108]](#endnote-109) For example, the Massachusetts Committee for Public Counsel Services, utilizing a statewide funding and oversight model, is housed in the state’s judicial branch.[[109]](#endnote-110) Other states using a statewide approach opt to house the statewide Oversight Board in the executive rather than the judicial branch. For example, Alaska’s Public Defender Agency oversees all public defense operations throughout the state and sits within the executive branch.[[110]](#endnote-111) Housing the Oversight Board within the executive branch helps alleviate the concern of judicial influence, while housing the Oversight Board within the judicial branch is thought to keep the defense function separate from the control of its adversary.[[111]](#endnote-112)

Limited or Local Oversight

“Limited oversight” refers to a form of oversight in which state or local governments maintain an Oversight Board which only has control over either particular types of cases or a particular region of the state.[[112]](#endnote-113) In other words, these are Oversight Boards that “oversee some, but not all, case-types; or oversee some, but not all, regions of the state.”[[113]](#endnote-114) The theory behind this form of oversight is that this hybrid approach can encourage best practices for indigent defense services while still allowing for local autonomy.[[114]](#endnote-115)

An example of limited oversight can be seen in Texas, where the state’s public defenders are overseen by the Texas Indigent Defense Commission (TIDC).[[115]](#endnote-116) “Texas’ 254 counties are responsible for providing the right to counsel, with limited support from the state. In short, the trial level judges in each county who preside over criminal cases have almost complete authority over the systems of providing the right to counsel to indigent adult defendants.”[[116]](#endnote-117) “The TIDC does not provide direct representation of indigent defendants. [They] also [do] not have the power to force counties or judges to comply with any law, rule, standard, or policy relating to the provision of indigent defense services; all it can do is withhold state grant funds.”[[117]](#endnote-118)

This example shows that limited Oversight Boards must be adequately funded in order to be effective. And they must have the power and the willingness to withhold funding from local governments that are non-compliant with performance standards or rules promulgated by the Oversight Board.[[118]](#endnote-119) Without some power over the purse strings, limited Oversight Boards are unlikely to be able to sufficiently mitigate potential local political influence.[[119]](#endnote-120)

Notably, another primary drawback of this model is that, because limited oversight boards may be based on either case-type or geography, the independence and quality of defense services can have high variance from place to place throughout states adopting this model.[[120]](#endnote-121)

No Oversight

The final option that governments have selected is to have no independent oversight at all — under this model, state or local governments opt to not have an Oversight Board oversee any aspect of their indigent defense services.[[121]](#endnote-122) Within this category, some states, like Arizona, establish statewide associations that provide some level of training and support, but do not mandate local public defense providers to participate; nor do they impose any system of statewide oversight.[[122]](#endnote-123)

Without any mechanism to safeguard independence or ensure the efficiency, uniformity, and quality of indigent defense services, jurisdictions with no oversight are more susceptible to outside judicial and political influences than those that adopt even limited oversight.[[123]](#endnote-124) In state or local governments that deliver indigent defense services without any form of oversight, there is also a significant risk of “unjustified variations” in the quality of those services from place to place.[[124]](#endnote-125)

As something of a half-measure, some states without independent Oversight Boards have adopted “advisory boards” to provide suggestions and feedback to local governments regarding issues of indigent defense. Alabama is an example of this structure, where “each circuit’s five-person advisory board is composed of: the presiding circuit court judge; the president of the local circuit bar association; and three lawyers selected by the circuit bar association.”[[125]](#endnote-126)

In sum, a state or local government may create a non-partisan and independent Oversight Board to safeguard the independence of the public defender, and to promote the efficiency, uniformity, and quality of indigent defense services.[[126]](#endnote-127) Optimally, the Oversight Board is organized so that it is reasonably independent from judicial and political influences.[[127]](#endnote-128)

Below is a table created by the Sixth Amendment Center to show how the states are divided by Oversight Board model:

|  |  |  |
| --- | --- | --- |
| State Oversight Models of Public Defense Functions[[128]](#endnote-129) | | |
| ***Statewide Commission***  **21 States**  **42%** | ***Independent Commissions*** | ***Non-Independent*** |
| Connecticut Minnesota  Kentucky Montana  Louisiana New Hampshire  Maine New Mexico  Maryland North Dakota  Massachusetts Utah  Michigan Virginia | Arkansas  Colorado  Hawaii  Missouri  Oregon  West Virginia  Wisconsin |
| ***Limited Commission***  **13 States**  **26%** | ***Independent Commissions*** | ***Non-Independent*** |
| Idaho Ohio  Indiana South Carolina  Nebraska Tennessee  New York Texas  North Carolina | Georgia  Illinois  Kansas  Oklahoma |
| ***No Commission***  **16 States**  **32%** | Alabama Florida  Alaska Iowa  Arizona Mississippi  California Nevada  Delaware New Jersey | Pennsylvania  Rhode Island  South Dakota  Vermont  Washington  Wyoming |

Structuring an Independent Oversight Board

The NAPD recommends that an Oversight Board be structured in such a way that its existence will “authentically advance independence.”[[129]](#endnote-130) It therefore recommends that an Oversight Board: be nonpartisan; primarily “function to support and protect the independence” of indigent defense services; be empowered to “establish general policy for the operation” of indigent defense services; “be precluded from interfering” in the individual representation of clients; and have the authority to “appoint a chief defender” to serve a renewable term of years who is not “removable except for cause with process.”[[130]](#endnote-131) The Constitution Project additionally suggests that an effective Oversight Board include “strong leadership, effective oversight, adequate staff, and the collection of accurate and reliable data.”[[131]](#endnote-132) All members on the Oversight Board, regardless of any other criteria for membership, should be devoted to improving indigent defense services.[[132]](#endnote-133)

To function as a fully independent body, the authority to determine the composition of an Oversight Board should ideally be shared among all three branches of government and a diverse set of outside legal stakeholders.[[133]](#endnote-134) This structure can help create an Oversight Board that is “neither beholden to nor apt to do the bidding” of any single entity.[[134]](#endnote-135)

When states have adopted Oversight Boards that have failed to disperse power, the independence of the Oversight Board has been potentially compromised. In Oregon, for example, “the seven members of the Public Defense Services Commission (PDSC) are all appointed by the Chief Justice, who serves as a nonvoting, ex officio member.”[[135]](#endnote-136) Within the commission, the chief justice also chooses who will serve as the chairperson and vice chairperson, as well as how long they will serve for.[[136]](#endnote-137) While the Office of Public Defense Services handled the day-to-day management of the indigent defense system, the PDSC who appointed their executive director.[[137]](#endnote-138) The Sixth Amendment Center has concluded that this structure — of a single appointing body who has ultimate control over the head of the office and the head of the Oversight Board — contributes to a lack of commission independence.[[138]](#endnote-139)

Another crucial component of ensuring the independence of an Oversight Board is to create diversity within the Board’s composition.[[139]](#endnote-140) Members of the governing boards should be non-partisan, and should have staggered terms made by multiple appointing authorities.[[140]](#endnote-141) To achieve full independence, governing boards must not include active prosecutors or judges.[[141]](#endnote-142) Membership criteria can include, amongst other things, geographical location, political affiliation, and race or ethnicity of members, or positions may be reserved for non-attorney members, advocates for underrepresented groups, or representatives of special interest groups.[[142]](#endnote-143)

A good example of diversified Oversight Board composition can be seen in Texas’ Travis County, which has a seven-member oversight board comprised of “an academic, a private defense attorney, a former public defender, individuals directly impacted by the criminal legal system (e.g., family members of incarcerated or formerly incarcerated persons), community advocates, a retired judge, and a commissioner’s court representative who is selected from recommendations solicited from the community.”[[143]](#endnote-144) This diversity provides the public defender office with actual and perceived independence from county politics.

Selecting the Chief Public Defender

An Oversight Board’s primary charge should be ensuring the independence of the Chief Public Defender.[[144]](#endnote-145) Chief Defenders should be hired on their merits, as is the longstanding national standard,[[145]](#endnote-146) and neither the Chief Defender nor any other staff should be removed except upon a showing of good cause.[[146]](#endnote-147) Chief Defenders should be appointed for a fixed term of years, which is renewable.[[147]](#endnote-148) Selection of the Chief Defender and staff should not be based on any political considerations or any other outside factors unrelated to the ability of persons to discharge their employment obligations,[[148]](#endnote-149) and selections by judges should be prohibited entirely.[[149]](#endnote-150)

Finally, the ABA adds that the selection of a Chief Defender should not be based on judicial or political considerations or any other factors unrelated to their ability to discharge their employment obligations."[[150]](#endnote-151)

Other Functions

An independent Oversight Board can also serve the function as a conduit through which the judiciary and other outside stakeholders can raise any concerns about the operations of a public defender. This is not to imply that all external, non-client related communication with a public defender office should be funneled through an Oversight Board; a properly functioning public defender office requires that defenders keep open lines of communication with the executive branch and the judiciary. It is only to highlight that the Oversight Board can provide another avenue for communication about defender office practices that is independent and non-partisan.

An Oversight Board can also cover other functions, such as serving as a liaison between the Public Defender Office, the political branches, and other stakeholders; monitoring office-wide compliance with national standards; and, if the jurisdiction so desires, coordinating the provision of indigent defense services from attorneys who do not work for the Public Defender (such as conflict counsel).[[151]](#endnote-152)

When structuring an Oversight Board under Pennsylvania law, consideration must also be given to compliance with the provisions of the Commonwealth’s Open Meeting Law (the “Sunshine Act”), 65 Pa.C.S. §§ 701 *et seq*. Whether and to what extent the Sunshine Act applies will be determined, largely, by the responsibilities the Board is assigned and to whom it reports. Crucially, the Sunshine Act applies primarily to any committee that, *inter alia*, “renders advice” to a government “body.”[[152]](#endnote-153) There is support in Pennsylvania law for treating an Oversight Board for the Public Defender’s Office as an “ad hoc” committee not subject to open meeting requirements.[[153]](#endnote-154)

In addition, many of the mission-critical issues an Oversight Board would focus on would likely be deemed “executive actions” which may be addressed without public attendance.[[154]](#endnote-155) This would include discussions of:

* issues of appointment, employment and termination of employees (e.g. the Chief Defender);
* “information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed[;]” and
* “agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.”[[155]](#endnote-156)

Importantly, though, it would not necessarily be detrimental if the contemplated Oversight Board is deemed subject to the Sunshine Act and its open meeting requirements. Public observation of and input into criminal justice and indigent defense discussions can increase both accuracy and legitimacy, and confidentiality can be maintained where required by law.

Political Considerations

Implementing an Oversight Board may pose certain political challenges. Governments taking this approach have faced a “lack of political resolve” and the refusal of judicial and political actors to cede control.[[156]](#endnote-157) The latter challenge is particularly prominent in states that opt to fund indigent defense services through county or hybrid funding models. If a state is unwilling to provide, at the very least, a majority of the funding needed for indigent defense services, any requirements imposed by an Oversight Board are “likely to be viewed as unfunded mandates.”[[157]](#endnote-158) Tensions naturally arise when local governments are expected to bear the brunt of funding indigent defense services, but are nonetheless asked to willingly cede control of how those services are provided.[[158]](#endnote-159) Ceding control to an independent Oversight Board also means local governments cannot structure indigent defense services in a manner that prioritizes containing costs, thereby creating a “tug of war” between their fiscal interests and an Oversight Board’s indigent defense interests.[[159]](#endnote-160)

Internal Structures: Human Resources and Case Assignment Assessment

Assigning a Human Resources professional to a public defender office can increase both the real and perceived independence of a public defender office – it can provide the opportunity for the organization to maintain control over internal practices, at least at the initial stages; it can help the organization secure confidential information; it can resolve tensions and conflicts within the organization; and it can cultivate an internal culture of transparency. Transparency, in this context, refers to structures that allow for information to be shared freely within the organization without fear that the information will be disclosed outside of it. Transparency helps build trust between attorneys, staff, and management, creating a stronger organizational culture. It also helps define relationships and draw healthy boundaries between the public defender office and other branches of government.

Diversifying the ways in which public defenders are assigned to cases and courtrooms can also increase independence. There are many benefits to trial team systems, such as the one currently used by the Montgomery County Office of the Public Defender.[[160]](#endnote-161) But while familiarity and repetition can often be an advantage in courtroom settings – for instance, by streamlining interactions that may otherwise be more time consuming – these same features can also be deleterious to attorney independence.[[161]](#endnote-162) Courtroom-based case assignment can threaten to calcify courtroom roles, practices, and customs, in a way that may unintentionally limit an attorney’s ability to zealously represent their client.

Alternative methods for assigning attorney casework are by subject specialization, which the Office has utilized in certain circumstances (e.g., drug court and Mental Health); seniority or professional development (in which cases are assigned by matching case complexity with attorney experience or needs for attorney’s professional development); or some combination of these approaches.

Conclusion

Independence is the primary principle needed for public defense systems to fulfill their ethically and constitutionally mandated duties.[[162]](#endnote-163) The United States Supreme Court, the ABA, and NAPD have all acknowledged that public defense systems cannot meet their legal and ethical obligations unless they are sufficiently independent from outside influences. In order to comply with the mandated standard of independence required of their public defense system, Montgomery County must implement some form of safeguards to protect the independence of its public defenders. These can include external safeguards, in the form of an independent oversight board, and internal safeguards, in the form of dedicated Human Resources and a reassessment of the case assignment system.

FUNDING CONSIDERATIONS

Funding is among the most important considerations for states seeking to fulfill their constitutional responsibility for indigent defense services, at least in part because it is a threshold consideration. Effective assistance of counsel requires “significant and reliable financial resources.”[[163]](#endnote-164) Without a baseline of adequate funding, it is close to impossible to provide sufficient coverage of all indigent cases, not to mention effective assistance in those cases. Research confirms this notion, as the “sufficiency of funding” is regarded as one of the primary factors that determine the quality of indigent defense services.[[164]](#endnote-165)

The ABA’s *Ten Principles* identifies funding as a consideration in two places: the First Principle specifically references the funding of the public indigent defense function,[[165]](#endnote-166) while the Eighth Principle envisions sufficient funding to ensure indigent defense services are an “equal partner in the justice system.”[[166]](#endnote-167) The NAPD similarly identifies funding as a consideration in two ways: the organization’s Fourth Foundational Principle declares the duty to fund the criminal legal system to be a “fundamental governmental obligation,”[[167]](#endnote-168) and the Eleventh Foundational Principle deems adequate funding and proper resources to be essential for indigent defense providers.[[168]](#endnote-169)

Inadequate funding is considered the “greatest factor adversely affecting quality of representation.”[[169]](#endnote-170) Many of the problems experienced by indigent defense services can be traced back to inadequate funding. Without sufficient funding, indigent defense services cannot hire enough attorneys to represent indigent defendants.[[170]](#endnote-171) Those attorneys who are hired may be undercompensated for their services, and overburdened by excessive caseloads.[[171]](#endnote-172) In turn, the efficacy of the representation of indigent defendants could be affected, putting pressure on those attorneys to engage in “hurried plea bargains and rushed trials” for their clients.[[172]](#endnote-173) These are just a few examples of how underfunding can result in a diminished provision of services for indigent defendants.[[173]](#endnote-174)

This section will briefly discuss types of funding models and indigent defense systems, and then offer considerations on funding the Montgomery County Public Defender’s Office.

Types of Funding Models and Indigent Defense Systems

The methods that have been utilized by states to fund their indigent defense services can be classified into three distinct funding models: the statewide funding model, the county funding model, and the hybrid model. In the statewide funding model, states assume all responsibility for the operation of their public defense systems.[[174]](#endnote-175) In the county funding model, counties or similarly structured local governments assume complete responsibility for the costs for operating their public defense systems.[[175]](#endnote-176) In the hybrid funding model, states and counties share the costs for operating public defense systems.[[176]](#endnote-177) Pennsylvania is one of just three states that relies entirely on local governments to fund indigent defense.[[177]](#endnote-178)

This county funding often originates from local property taxes[[178]](#endnote-179) and local fines, both of which may “ebb and flow” at different times throughout the year and in diverse economic environments.[[179]](#endnote-180) The availability of financial resources can differ greatly from county to county, making states that utilize the county funding model highly susceptible to inconsistencies in funding levels.[[180]](#endnote-181) These inconsistencies in funding levels can potentially cause a disparity in the quality of representation for indigent defendants.[[181]](#endnote-182)

Funding is typically the primary factor for determining what type of indigent defense system a state or local government chooses to adopt.[[182]](#endnote-183) Today, there are three types of indigent defense systems that states employ: the assigned counsel model, the contract attorney model, and the public defender model.[[183]](#endnote-184) Pennsylvania, of course, uses the public defender model.

National studies generally report outcomes for indigent clients represented through a public defender system that are as favorable, or more favorable, than retaining private counsel.[[184]](#endnote-185) With adequate funding and staffing, public defender systems can devote all their efforts to legal representation for indigent defendants, thereby developing “unusual expertise in handling various kinds of criminal cases.”[[185]](#endnote-186) Public defender systems are generally thought “to be more cost-effective [than competing systems], to improve the reliability of indigent defense services, and to create an institutional resource that is valuable to the bench, the bar, county officials, and the community.”[[186]](#endnote-187)

Although public defender systems tend to require more funding up front, they may ultimately lower costs by sharing expenses and pooling resources.[[187]](#endnote-188) The size and structure of public defender systems make them “better able to marshal" resources and ensure that indigent defendants receive “zealous representation.”[[188]](#endnote-189)

When a public defender is unable to represent an indigent defendant due to a conflict of interest, courts appoint or contract counsel to represent the defendant.[[189]](#endnote-190) Conflicts of interest most commonly occur when a case involves codefendants who require separate representation or when a victim or witness is a former or current client of the public defender representing the accused.[[190]](#endnote-191) Because of conflicts of interest, no single jurisdiction can operate indigent defense services solely through a public defender system.[[191]](#endnote-192)

Funding Parity between Defenders and Prosecutors

An important consideration for governments funding indigent defense services is parity between defenders and prosecutors. The concept of parity includes compensation for attorneys, the maintenance of staffing levels, and all related resources — including support, investigative, and expert services.[[192]](#endnote-193)

America’s adversarial system is fairest when resources of indigent defense providers and prosecutors are balanced.[[193]](#endnote-194) In 1972, Chief Justice Warren Burger stated that “society’s goal should be ‘that the system for providing the counsel and facilities for the defense should be as good as the system which society provides for the prosecution.’”[[194]](#endnote-195) These words reflect a “venerable idea” that the defense function is just as important to society as the prosecution function.[[195]](#endnote-196)

However, parity between prosecutors and defenders with respect to pay and resources “is not the current reality in criminal justice funding.”[[196]](#endnote-197) To the contrary, prosecutor’s offices generally pay higher salaries and have greater access to resources than do public defender offices, which oftentimes leads to better retention of attorneys.[[197]](#endnote-198) In contrast, indigent defense providers can experience difficulties attracting and retaining attorneys.[[198]](#endnote-199) Those defenders who choose to pursue their calling despite the comparatively low pay oftentimes must work without the resources necessary to effectively represent their clients.[[199]](#endnote-200) In this way, funding asymmetry can lead to imbalances in the quality of legal representation as between prosecutors and public defenders.

Pay Parity

Pay parity between public defenders and prosecutors is an important step towards achieving a fair and just criminal system. And, while “[nationwide] surveys indicate that salary parity is the norm rather than the exception for the largest public defender offices,”[[200]](#endnote-201) unfortunately there are still many jurisdictions that pay defenders less than prosecutors.

Public defenders receive annual salaries determined by their funding source.[[201]](#endnote-202) Prosecutors, meanwhile, frequently receive federal, state, and/or local funding in addition to general funding.[[202]](#endnote-203) Salaries for both defenders and prosecutors fluctuate significantly based on certain factors, like geographical location or level of experience.[[203]](#endnote-204) The result is that defenders nationwide are often paid far less than prosecutors.[[204]](#endnote-205) By way of example, district attorneys’ salaries in Westchester County, New York, were approximately $6,000 to $21,000 higher than public defenders’ salaries when reviewed in 2006;[[205]](#endnote-206) in Missouri, in 2009, public defender salaries ranged from $34,000 to $54,000, while prosecutors’ salaries started at $40,000 and could go as high as $100,000 or more;[[206]](#endnote-207) and until recently New Orleans paid defenders only about 35 percent of what prosecutors earned.[[207]](#endnote-208)

Most national standards explicitly call for pay parity between defenders and prosecutors.[[208]](#endnote-209) The Eighth ABA Principle states that there should be parity between public defenders and prosecutors with respect to salary, workload, and other resources.[[209]](#endnote-210) Other resources include employment benefits, technology, facilities, legal research, support staff/paralegals, investigators, and access to forensic services and experts.[[210]](#endnote-211)

Indigent defense and prosecution require “broadly similar skills” – familiarity with court procedures and practice, expert grasp of pertinent statutes and precedents, and skills in advocacy and negotiation.[[211]](#endnote-212) Because the skill sets are, if not identical, at least equal, there is little abstract justification for large variances in pay between prosecutors and defenders.

Pay disparity can occur in many ways. It can be set at the point of initial hire and then intensify throughout the course of employment. For example, an entry-level prosecutor may earn a higher salary than an entry-level defender in the same area, and this disparity may persist even as both the prosecutor and defender gain experience and seniority in their offices.[[212]](#endnote-213) It can also develop over time. Entry-level prosecutors and defenders may be hired at the same pay level, but if prosecutors receive larger raises or cost-of-living increases over time, or if top pay for defenders is capped at a lower amount, then the disparity can reveal itself as attorneys in both offices gain seniority. [[213]](#endnote-214)

This structural disparity can have a long-term impact on a public defender office’s ability to retain attorneys. While some people may be amenable to accepting a lower salary to be a public defender, public defender offices can struggle to retain experienced attorneys who receive salaries that are dwarfed by their prosecutor adversaries.[[214]](#endnote-215) Public defender salaries can even be so inadequate as to prompt defense attorneys into seeking secondary employment to pay their outstanding debts and living expenses.[[215]](#endnote-216)

States and local governments have taken many paths to achieve greater pay parity between defenders and prosecutors. Some have chosen to pay both defenders and prosecutors using the same pay scale, thereby achieving full parity.[[216]](#endnote-217) Other governments have chosen to use commensurate starting salaries for entry-level defenders and prosecutors.[[217]](#endnote-218) Even others, like that in New Orleans, have decided to fund the public defender office at a set percentage of the District Attorney’s office “equal to the proportion of criminal cases the public defender’s estimate they handle in the city.”[[218]](#endnote-219)

Resource Parity

Governments should also consider the need for parity of resources between defenders and prosecutors. For indigent defense providers to deliver effective representation, they must have access to adequate support resources, which include independent investigators, social workers, paralegals, administrative staff, and expert witnesses.[[219]](#endnote-220) Effective representation may be impacted by non-personnel resources too, like access to technologies and physical facilities.[[220]](#endnote-221) It is an unfortunate but real possibility that the outcome of a criminal case may hinge on something as simple as a defender’s ability to have access to necessary resources.[[221]](#endnote-222)

Support and non-personnel resources can benefit indigent defense providers in a variety of ways. The job of an independent investigator is to interview witnesses and collect physical evidence.[[222]](#endnote-223) Because indigent defense attorneys may not have the time or ability to track down witnesses, travel to distant locations, or survey crime scenes, investigative staff can be critical in assisting defense attorneys gather the pertinent facts of any assigned case.[[223]](#endnote-224) One 2007 survey found that “40 percent of all county-based offices and 87 percent of small offices (those receiving less than 1,000 cases per year) employed no investigators whatsoever.”[[224]](#endnote-225) In fact the survey showed that, “only 7 percent of county-based offices nationwide met the accepted professional guidelines for investigator-to-attorney ratio — a statistic that understates the scope of the problem given the widespread understaffing of attorneys.”[[225]](#endnote-226)

Defenders offices can also lack sufficient funds to hire social workers and paraprofessionals. Social workers can help indigent defense attorneys develop sentences and resolutions that reflect a client’s treatment needs, like a rehabilitation plan.[[226]](#endnote-227) Sufficient paralegal and administrative staffing may prevent defense attorneys from being asked to devote their time to clerical tasks instead of legal work, something that can impede the quality of their representation.[[227]](#endnote-228)

There can also be a technology gap between prosecutor’s offices and the public defender. Access to technology can assist defenders with important back-end functions like communication, legal research, and case management.[[228]](#endnote-229) But technology has also become increasingly central in presenting cases at trial and appeal, as well.

National standards recommend resource parity between defenders and prosecutors, which would include equal access to investigators, social workers, paralegals, administrative staff, expert witnesses, technologies, facilities, and forensic services.[[229]](#endnote-230) Prosecutors typically have access to a wealth of government resources, including police investigations, forensic labs, and employees capable of testifying as expert witnesses.[[230]](#endnote-231) These government resources can be, and frequently are, directed toward conducting follow-up investigations that can help strengthen a prosecutor’s case.[[231]](#endnote-232) Defenders, meanwhile, may not have access to these types of resources with the same ease as prosecutors, and may even be required to demonstrate a need for them to a court.[[232]](#endnote-233)

One important caveat with respect to parity is that defenders and prosecutors may not necessarily work on the same types of cases, nor may they necessarily perform comparable work on each case.[[233]](#endnote-234) Prosecutors may, for example, be expected to handle cases where defendants choose to represent themselves, or where they are represented by private attorneys not subject to the structures and potential limitations of indigent defense providers.[[234]](#endnote-235) Outside of handling cases, prosecutors may devote their time to deciding whether to decline to pursue charges or divert a particular matter from the criminal legal system before it has an opportunity to come before a defense attorney.[[235]](#endnote-236) Finally, prosecutors may need to have resources available for providing support to crime victims, something that has no real analogue in indigent defense providers.[[236]](#endnote-237)

States and local governments can create meaningful parity by requiring that indigent defense providers receive funding equivalent to a certain percentage of that budgeted for prosecutor’s offices.[[237]](#endnote-238) Alternatively, local governments can simply budget for the hiring of more support staff and fund additional resources for defenders.[[238]](#endnote-239)

Other Funding Considerations

There are other important funding considerations relevant to *Gideon*’s constitutional mandate to provide indigent defense services. In *Douglas v. California*, the Supreme Court recognized that criminal defendants have a constitutional right to effective appellate counsel on their first appeals as of right.[[239]](#endnote-240) Funding of indigent defense services must thus necessarily cover both trial and appellate level services.

Some states employ different systems to address their obligations for trial level representation and appellate level representation.[[240]](#endnote-241) Any number of permutations are possible. States that use a statewide funding model may use general state fund appropriations for both indigent trial-level services and indigent appellate-level services statewide.[[241]](#endnote-242) State or local governments that use a public defender system for trial-level services may use a contract system for appellate representation.[[242]](#endnote-243) States that use a hybrid funding model may also utilize both state and local government contributions for indigent appellate-level services.[[243]](#endnote-244) Another option, regardless of the funding model utilized for indigent trial-level services, is for a state to exclusively allocate state funding for indigent appellate-level services.[[244]](#endnote-245) As an example, in New Jersey the state oversees and funds felony and delinquency cases, while the counties oversee and fund misdemeanor cases.[[245]](#endnote-246)

The Landscape in Montgomery County

Montgomery County currently employs a public defender model for the representation of indigent defendants. Conflict counsel are available when the Defender is unable to handle a particular case, as in the instance of codefendant prosecutions.

The Office of the Public Defender is fully funded by Montgomery County through an annual appropriation from the County Commission. As discussed in this Report’s “Background” section, the amount of funding granted to the office has steadily increased over the last decade and is on track to continue to increase in the upcoming budget cycle. The continued commitment to funding the Office has allowed the Office to hire additional attorneys and support staff (including investigators and social workers); acquire new technology; and restructure certain practices within the offices, such as creating a Chief of Pretrial Services and Chief of Mental Health position.

Both the Office and the Commission have taken also steps to investigate the question of pay parity. In 2018, the Office completed a salary study to determine whether public defender salaries in the county were competitive with district attorney salaries in the county.[[246]](#endnote-247) The study also compared Montgomery County public defender salaries with salaries in other counties. This work resulted in pay increases for employees.[[247]](#endnote-248) However, there is still an apparent disparity between the funding levels allocated to the District Attorney’s Office and the Public Defender Office. (Whether the disparity is justified based on differences in workload, as noted above, requires further study.)

In our interviews with current employees, we received almost universal feedback that additional funding would provide the support necessary for their role in the justice system. Some employees stated that additional funding is needed for training, some stated that the employees deserve to be paid more, and others stated that more funding should be put toward use of experts.[[248]](#endnote-249) Some employees expressed concern that public defender salaries are not on par with district attorney salaries beyond the entry-level attorney positions and felt that there was a lack of financial incentive for defense attorneys to stay with the Office long-term.[[249]](#endnote-250)

No attorneys expressed concerns about being funded for auxiliary services such as expert witnesses or access to specialized technology. The process for receiving funds for auxiliary services is internal to the Office; any attorney making such a request does so to the Chief Defender, who has the authority to approve the requests without consultation with the judiciary or the executive.

Conclusion

Montgomery County has taken great steps to fund the Office of the Public Defender at a level that allows the Office to provide quality indigent defense representation throughout the county. The County is aware of, and has been responsive to, issues of parity regarding both pay and resources. Nevertheless, apparent disparities in funding as between the defender’s office and the district attorney’s office warrant continued attention.

LITIGATION AND RISK MITIGATION

In the last decade, public defender systems throughout the nation have faced civil lawsuits alleging that their practices violate the Constitutional rights of their clients under the Sixth and Fourteenth Amendments. The general aim of these lawsuits is to reform practices within public defender systems that client advocates claim fall below the minimum standards for adequate representation; the specific aim is often to force state and local governments to allocate additional funding to those systems.

Litigation Overview

In recent years, lawsuits have been brought in both federal and state courts raising systemic challenges to public defender offices. The essence of the claims has been that the offices failed to provide constitutionally adequate representation.[[250]](#endnote-251)

In *Bender v. Washington* (2019), a dozen named plaintiffs who had been represented in criminal proceedings by the Wisconsin State Public Defender’s Office alleged the State had violated their rights by, among other things, not providing adequate training and compensation to defense attorneys. [[251]](#endnote-252) Plaintiffs requested a declaratory judgment that their rights had been violated, monetary damages, and several forms of injunctive relief.

Because of the procedural posture of the case, the court did not make factual findings regarding the practices of the public defender office; however, it did present a litany of alleged failings, including structural problems in the system which sometimes left defendants unrepresented during parts of their proceeding. The court highlighted allegations that some PDs were “not provided adequate training and mentorship,” and that low compensation to appointed counsel limited “counsel’s ability to engage in discovery, fact investigation, expert discovery, and trial preparation.”

State and local governments often respond to federal suits alleging Constitutional violations arising from the failure to provide adequate indigent representation by imploring the courts to invoke the *Younger* abstention doctrine. In *Younger v. Harris*, the Supreme Court held that federal courts should not enjoin state criminal proceedings, except in cases involving irreparable injury. [[252]](#endnote-253) The idea of abstention is grounded in the principles of federalism, and based on the notion that federal courts should not normally interfere with state courts, and that offering injunctive relief in these cases would necessarily interfere with ongoing and future criminal prosecutions. [[253]](#endnote-254)

Predictably, the court in *Bender* based its dismissal of the case on *Younger* abstention grounds. But in justifying its decision, the court in *Bender* emphasized that “judicial intervention into the… public defender system would be particularly imprudent given the state’s current and active efforts to reform the system.”[[254]](#endnote-255) It then proceeded to detail the ways in which the State of Wisconsin had already begun actively engaging in reforming and improving its public defender system. These already initiated efforts at reform were unmistakably a consideration in the court’s determination that dismissal would be appropriate.

In *Yarls v. Bunton* (2017), plaintiffs claimed the Orleans Public Defender Office (which covers New Orleans, Louisiana) violated their rights through the practice of placing defendants on a wait-list for representation when the office was overburdened with cases. [[255]](#endnote-256) The plaintiffs in *Yarls* requested both declaratory and injunctive relief, under which the court would “monitor and enforce compliance” with reporting obligations regarding wait-listed defendants.

*Yarls* was eventually deemed “moot” because the court found that the state had taken significant steps to remedy the alleged deficiencies.[[256]](#endnote-257) In other words, Louisiana solved both the problem of admittedly violating defendants’ rights, and the problem of responding to ongoing litigation, by simply taking steps to improve their provision of indigent services.

The theories of relief embodied in *Bender* and *Yarls* are relatively recent and novel; courts are therefore still wrestling with properly applying abstention doctrine to these cases. But even assuming that abstention doctrine was correctly applied in *Bender* and *Yarls*, plaintiffs in future cases could avoid abstention-based dismissals simply by framing their claims as seeking only a declaratory judgment and monetary relief (as opposed to injunctive relief).[[257]](#endnote-258)

While *Bender* and *Yarls* involved claims under the federal constitution, plaintiffs can and have brought claims under state constitutions as well. In *Kuren v. Luzerne County* (2016), plaintiffs who had been indigent criminal defendants brought a class action lawsuit against Pennsylvania’s Luzerne County, alleging that the county’s inadequate funding of its public defender office deprived defendants of right to counsel.[[258]](#endnote-259)  Relying on information produced by the Chief Public Defender, plaintiffs alleged that the public defender office had the following deficiencies: caseloads for attorneys exceeded national standards, and there were not enough attorneys; the office lacked sufficient support staff (including social workers, paralegals, assistants, clerical workers); untrained trial attorneys were being made to litigate appeals; the facilities were unsuitable for their purposes; and the office has “inadequate information technology.”[[259]](#endnote-260) Plaintiffs alleged a violation of Article I, Section 9 of the Pennsylvania Constitution; and sought a writ of mandamus and injunctive relief.[[260]](#endnote-261)

While denying plaintiffs the writ of mandamus, the *Kuren* court held that a cause of action exists for “defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office.”[[261]](#endnote-262) Notably, the U.S. Department of Justice, which filed an amicus brief in *Kuren*, also took the position (at that time) that “a civil claim for constructive denial of counsel is cognizable under the Sixth Amendment,” and that such a claim is “both legitimate and rooted in U.S. Supreme Court case law.”[[262]](#endnote-263)

State and local governments can take several lessons from recent cases alleging systemic deprivations of the right to adequate assistance of indigent defense counsel: *first*, plaintiffs in Pennsylvania likely have a cognizable cause of action in state court for both current and prospective violations of the right to counsel; *second*, plaintiffs may have a cause of action for declaratory and monetary relief in federal court for current violations; *third*, public defender systems can effectively forestall such claims if they identify deficiencies early and endeavor to correct them; and *fourth*, courts take a public defender office’s improvement efforts into consideration — even if those efforts do not completely remedy the deficiency — when considering how to adjudicate these claims.

Risk Mitigation

State and local governments should contemplate what systems, policies, and practices that they can put into effect in their public defender offices to reduce the risk of becoming subject to litigation. In the face of potential litigation, county governments can point to systems that they have put in place to ensure that indigent defendants are receiving competent representation, both individually and systemically.

Examining the cases above reveals several areas where public defender offices may be vulnerable to scrutiny. In this Report, we will focus on the following areas: caseload management; attorney training; attorney supervision; structure of attorney representation; and compliance with national public defense standards. While these issues all implicate adequacy of funding, as discussed earlier in this section, they can also be examined through the lens of internal office structures and policies.

Caseload Management

To ensure optimal attorney performance, the caseloads of defense attorneys should be effectively managed and kept to reasonable levels. An attorney’s caseload is defined as all cases that they are expected to handle in a year, [[263]](#endnote-264) and should factor in both the number of cases and their complexity.[[264]](#endnote-265) Indigent defense attorneys also have duties that extend beyond their caseloads.[[265]](#endnote-266) An attorney’s workload additionally factors in duties like performing administrative tasks, attending training, or fulfilling supervisory responsibilities.[[266]](#endnote-267) As the American prison population has “grown more than tenfold” since *Gideon*, both the caseloads and workloads of indigent defense attorneys have also dramatically increased.[[267]](#endnote-268)

An attorney’s caseload and workload must be controlled to ensure that they can deliver quality representation for their clients.[[268]](#endnote-269) Caseloads may be classified as excessive when they reach the level where they may be expected to materially interfere with the attorney’s ability to provide assistance to existing clients.[[269]](#endnote-270) When attorneys have excessive caseloads, they may be forced to prioritize certain clients over others and may be prevented from performing essential tasks like conducting interviews, requesting support services, or adequately preparing for hearings and trials.[[270]](#endnote-271) The ABA states that an attorney’s caseload should never be allowed to become so large as to interfere with their ability to render quality representation.[[271]](#endnote-272) The NAPD counsels that defense attorneys have reasonable workloads that enable them to provide competent and effective assistance of counsel.[[272]](#endnote-273)

Caseload maximums can be used to ensure that public defenders can provide optimal representation to all clients.[[273]](#endnote-274) Caseload maximums can guarantee that defense attorneys have the ability to properly develop relationships with their clients, which can allow clients to participate more fully in their cases.[[274]](#endnote-275) Maximums can also afford defense attorneys more time to conduct comprehensive investigations of their cases, thereby improving their ability to prepare for trial and resolve cases in an ideal manner.[[275]](#endnote-276) This system also removes some of the pressure that attorneys may feel to resolve cases expediently.[[276]](#endnote-277)

In 1973, the U.S. Department of Justice’s National Advisory Commission on Criminal Justice Standards and Goals (NAC) established caseload maximum standards, recommending that even under the best conditions, single defense attorney caseloads should not exceed 150 felonies per year, 400 misdemeanors per year, or 200 juvenile cases per year.[[277]](#endnote-278) Nearly forty years after their establishment, many believe the NAC standards to be too high and outdated, principally because they were never empirically based[[278]](#endnote-279) and were established during a time when criminal cases “were a lot less complex.”[[279]](#endnote-280) An indigent defense attorney would, on average, need to dedicate a year and a half’s worth of hours to complete a single year worth of cases under the NAC standards.[[280]](#endnote-281)

Some governing bodies have chosen to adopt the NAC standards or other similarly objective standards to define caseload maximums.[[281]](#endnote-282) Others have opted to develop a weighted caseload formula, based on the number of cases disposed each year, the average amount of time required to handle cases over the life of the case, and the amount of time each attorney has available for case-related work in a single year.[[282]](#endnote-283) Still other, like Michigan, have decided to take a hybrid approach — imposing objective standards as an interim measure, while conducting a weighed caseload study.[[283]](#endnote-284)

Still, many public defender offices effectively have no caseload control at all. For example, “a 2009 report found that defenders in New Orleans Parish were handling the equivalent of 19,000 misdemeanor cases per attorney annually. That means an average of about seven minutes per case.”[[284]](#endnote-285) In cities like “Chicago, Miami, and Atlanta, defenders had more than 2,000 misdemeanor cases a year,” which still far exceeded the recommended maximum.[[285]](#endnote-286)

A best practice is for a defender office to monitor and document attorney caseload and periodically have it reviewed to ensure that it permits competent representation and complies with national standards.

Sufficiency of Training

Initial training and ongoing education are crucial to ensuring that defense attorneys are capable of providing quality representation for their clients.[[286]](#endnote-287) Law school “marks the beginning” of an attorney’s professional education, with little practical training or specialization offered.[[287]](#endnote-288) Public defenders are thus expected to receive criminal defense-specific training while “on-the-job” and through continuing legal education.[[288]](#endnote-289) Both types of training are important to the effective delivery of indigent defense services, as the practice of criminal law is a “complex field necessitating continuous and comprehensive training.”[[289]](#endnote-290) A robust training program can provide both initial exposure to criminal law and procedure as well regular updates to keep defense attorneys current on both the law and new developments in criminal practice.[[290]](#endnote-291)

The Sixth and Ninth ABA Principles discuss the training of lawyers in public defense systems, which is integral to the culture of any public defender office. The Sixth ABA Principle requires public defenders to be adequately trained for the complexity of the cases they are handling.[[291]](#endnote-292) The Ninth ABA Principle states that public defenders be provided with (and required to attend) mandatory continuing legal training.[[292]](#endnote-293) Public defense practitioners (including both attorney and non-attorney staff) should have “systematic and comprehensive training” in their area of practice that is “at least equal” to what is received by prosecutors.[[293]](#endnote-294)

States and local governments may dedicate a portion of their indigent defense funding toward providing effective training, professional development, and continuing education to defense attorneys and other staff.[[294]](#endnote-295) Training may be delivered statewide or at a local level; it can also be internal to the organization or provided externally. Defense attorneys may also choose to create an educational and resource sharing forum to fill any gaps in available training.[[295]](#endnote-296) Providing mandatory entry-level and continuing training fosters an “atmosphere of learning and innovation,” helps disperse the flow of information throughout a public defender office, and gives senior attorneys an opportunity to share their wisdom and experience with more junior attorneys.[[296]](#endnote-297)

Attorney Supervision

To ensure that attorneys are providing competent representation, all attorneys in a public defender office should be supervised and periodically provided a performance evaluation. Supervision and accountability are “essential to the successful functioning” of any job, but may be especially critical to public defenders, as such supervision can inform defense attorneys about whether their job performance meets professional expectations and standards.[[297]](#endnote-298)

Under MPC Rule 5.1, lawyers in managerial or supervisory positions must make “reasonable efforts” to ensure their organization has measures in effect that would reasonably assure that all lawyers in the organization conform to the ethical rules of their jurisdiction.[[298]](#endnote-299) A supervising attorney can be held responsible for another lawyer’s ethical violation if the supervisor knows of the conduct “at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”[[299]](#endnote-300) Under Rule 5.1, public defense organizations must have some safeguards or systems in place to ensure their attorneys are meeting their ethical obligations under the law.

Public defender offices may choose to implement a supervision system that allows for the systematic review of the quality and efficiency of their indigent defense providers.[[300]](#endnote-301) These reviews should be based on practice standards — provided to all attorneys — that prescribe the basic duties of attorneys at various stages of individual cases.[[301]](#endnote-302)

Supervision can also include the continuous monitoring of caseloads.[[302]](#endnote-303) It is only through such monitoring that a supervisor can even begin to determine whether an attorney’s workload is appropriate or excessive, allowing them to take any steps necessary to assist that attorney.[[303]](#endnote-304) These steps may include transferring non-representational duties to another attorneys, transferring cases to other attorneys, or providing additional resources and support.[[304]](#endnote-305)

Public defender offices should also have a case management system, or some other method that allows the office to track information about client progress, case dispositions, and time spent during representation.[[305]](#endnote-306) Having such a system will facilitate supervisors’ and management’s ability to provide regular evaluations of all defense attorneys and support staff.[[306]](#endnote-307)

Supervisory capacity can be compromised when supervising attorneys have heavy individual caseloads. For example, a defender in a Florida office “noted that, officially, there were two senior attorneys assigned to supervise the approximately 30 misdemeanor attorneys in the office. However, the supervising attorneys had active felony caseloads. If a misdemeanor lawyer wanted assistance, he or she had to seek out a senior attorney and ask for assistance.”[[307]](#endnote-308) Similarly, in an office in Montana, a chief public defender “carrie[d] the largest case load in her office, which preclude[d] her from providing any meaningful supervision to subordinates.”[[308]](#endnote-309) Having a caseload of this size prevented this supervisor from “conducting in-court observations, reviewing case files, discussing theories of the case, directing training, and monitoring the overall work of the lawyers.”[[309]](#endnote-310) For this reason, the caseloads of supervising attorneys should be set in a way that recognizes that these attorneys also benefit their offices by dedicating ample time to supervisory duties.

Many of the practices described in this section may be occurring informally in public defender officers, even when there are no formal policies of mechanisms guiding the practice. However, codifying these practices can create an office culture that has a “clear vision” and a “shared investment” in improving the office-wide systems with an eye toward ensuring a universally high quality of indigent representation.[[310]](#endnote-311)

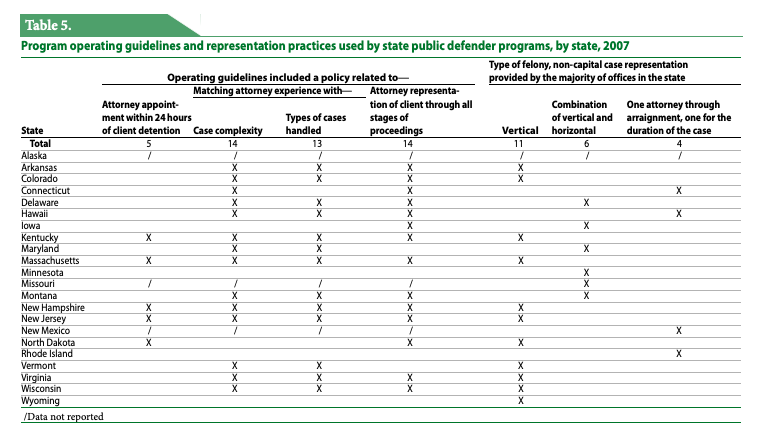
Structure of Client Representation

Public defender offices must decide how they will structure the provision of services to (1) guarantee that indigent defendants have the assistance of counsel at all constitutionally-mandates stages of a proceeding, and (2) that public defenders are not being expected to perform tasks for which they do not have adequate training or experience.

An initial issue an office must determine is whether a particular assigned attorney will represent a client at only a certain stage of proceedings, or whether the same attorneys will represent their clients from pre-trial through appeal.[[311]](#endnote-312) The first approach, called *horizontal representation*, can save time and money for an indigent defense provider, but may come at the cost of establishing deeper attorney-client relationships.[[312]](#endnote-313) A relatively extreme example of horizontal representation could once be seen in Riverside, California, where, “at a minimum, [a] client received representation from three different lawyers, and if a lawyer were to be added at the first arraignment, there would be four lawyers,” involved at the trial level.[[313]](#endnote-314) After an organizational audit, the county changed this practice to create more continuity in the relationships between lawyer and client. [[314]](#endnote-315)

The second approach, called *vertical representation*, may allow defenders to develop more client-centered advocacy by building trust and open communication between attorneys and clients. A 2007 report by the Bureau of Justice Statistics found that “nearly three-quarters of reporting state public defender programs had a written policy encouraging vertical representation.”[[315]](#endnote-316) Because vertical representation can help prevent serious errors and ineffective representation,[[316]](#endnote-317) that is the structure recommended by the ABA.[[317]](#endnote-318)

The following table illustrates representation practices by state, as of 2007[[318]](#endnote-319):



In addition to the approach to representation chosen by an office, public defender organizations also have to decide how to prioritize cases and matters. Every high-volume public defender office should determine how it will instruct attorneys to prioritize matters in their open cases. Some providers may ask defense attorneys to “triage” decisions about which client matters they devote their attention to first, which client matters they give their attention at all, and everything in between.[[319]](#endnote-320)

Resource-rationing guidelines for indigent defense services categorize these triage decisions into three forms.[[320]](#endnote-321) The first form, “messenger representation,” asks defense attorneys to convey plea offers and other legal facts to their indigent defendants without also offering any analysis or counseling beyond that communication.[[321]](#endnote-322) The second form, “pattern representation,” asks defense attorneys to quickly categorize cases “legally, factually, strategically, and predictively” by finding recurring patterns from their training and prior experiences.[[322]](#endnote-323) The third form, “focus representation,” encourages defense attorneys to think about “pushing the rules” and “creating deeper narratives” to improve how they advocate for individual clients.[[323]](#endnote-324) Regardless of the form of “triage” that an office recommends, it should provide clear guidance to attorneys around those expectations of client representation.

There are also different basic models for how public defenders can choose to represent clients. The first model – the traditional model – is “lawyer-driven and case-oriented,” with defense attorneys focused principally on removing or reducing the imminent threat of incarceration for their indigent clients.[[324]](#endnote-325) This traditional model reflects a widespread reliance on both messenger and pattern client representation.

The second model – the holistic model – is “client-focused, interdisciplinary, and community-based,” embracing a system where defense attorneys are given the space to listen to and attempt to address the individual needs of their clients.[[325]](#endnote-326) The holistic model embraces the use of focus representation, which helps defense attorneys recognize the client’s authority, ability, and right to decide the direction of their case after they have been advised of all available options for proceeding.[[326]](#endnote-327) This type of client-centered representation can also allow defense attorneys to address the impacts of any “underlying criminogenic factors” of a client’s case and ultimately enhance the lives of clients, reduce recidivism rates, and improve public safety.[[327]](#endnote-328)

There are an increasing number of public defender offices that have been able to implement a more holistic approach. One example can be seen in the Knox County Public Defender’s Community Law Office (CLO), located in Knoxville, Tennessee.[[328]](#endnote-329) “The office initially operated from 1990 to 2003 under a traditional representation model until the district public defender recognized that the high incidence of recidivism called for a different approach.”[[329]](#endnote-330) The revised mission of the CLO is “to provide holistic, client-centered legal representation to clients, advocate for a fair and just process within the criminal justice system, increase self-sufficiency and integration of clients into the community, and positively affect the quality of life in Knox County.”[[330]](#endnote-331)

A very well-known example of holistic representation can be found at the Bronx Defenders in New York.[[331]](#endnote-332) “Robin Steinberg, the founder of the Bronx Defenders, defined four pillars of holistic defense: (1) seamless access to legal and nonlegal services that meet client needs; (2) dynamic, interdisciplinary communication; (3) advocates with an interdisciplinary skill set; and (4) a robust understanding of, and connection to, the community served.”[[332]](#endnote-333) These principles became known to be “foundational principles of the holistic defense model”.[[333]](#endnote-334) Not only have holistic approaches proven to be beneficial for clients, but there is also evidence of this model being financially advantageous as well. “Informal evaluations of the Rhode Island Public Defender Office’s Defender Community Advocacy Program (DCAP) also concluded that the program saved taxpayers millions of dollars in prison costs”[[334]](#endnote-335)

Regardless of the approach that a public defender office favors, it is important for office management to make expectations clear to all attorneys and paraprofessionals on staff. A consistent and transparent office culture cannot be created until one is clearly articulated.

Compliance with National Standards

Adopting and complying with national standards for public defense is another important component of risk management. As seen throughout this Report, national public defense standards provide guidance to help shape an “effective, efficient, high quality, ethical, conflict-free” indigent defense system.[[335]](#endnote-336) Research has shown that “compliance with nationally recognized standards for the delivery of indigent defense services” is one of two primary factors that determine the quality of indigent services, along with the “sufficiency of funding.”[[336]](#endnote-337)

The ABA’s *Ten Principles* have been widely accepted throughout the country because they serve as an “excellent blueprint” for fashioning an effective indigent defense system.[[337]](#endnote-338) The Supreme Court has considered these principles, along with other ABA standards, to be “guides to determining what is reasonable” for indigent defense providers.[[338]](#endnote-339) These Principles are designed to not only guide defense attorneys, but to assist criminal justice policymakers in improving defense services, potentially by adopting their own standards for indigent defense.[[339]](#endnote-340)

While the ABA’s *Ten Principles* are obviously not binding,[[340]](#endnote-341) local governments may nonetheless choose to formally adopt them directly as guiding principles for their indigent defense providers or use them as a template for their own local standards.[[341]](#endnote-342) For example, New York’s Indigent Defense Organization Oversight Committee adopted general requirements for all member defense providers.[[342]](#endnote-343) “The principle underlying the drafting of these ‘General Requirements’ is that defense organizations must provide quality representation to indigent criminal defendants.”[[343]](#endnote-344) In order to determine the standards for quality representation, the committee looked to “the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA), and similar specific guidelines adopted in other jurisdictions”[[344]](#endnote-345)

States and local governments may choose to incentivize compliance with standards in a variety of ways.[[345]](#endnote-346) Standards may be directly linked to funding support, such that compliance results in reimbursement for some or all of the costs of providing indigent defense.[[346]](#endnote-347) For example, “Indiana's indigent defense standards are written at the state level, by an independent commission [...]. Counties that choose to comply… are eligible to have a portion of their indigent defense costs reimbursed by the state.”[[347]](#endnote-348)

States can also choose to promulgate statewide public defense standards. In Idaho, the State Public Defense Commission (ISPDC) “is authorized to promulgate standards related to attorney performance, attorney workload, and attorney supervision, among others.”[[348]](#endnote-349) All counties in Idaho are required to comply with standards, regardless of whether they receive state financial assistance.[[349]](#endnote-350)

Standards can also be incorporated into contracts for indigent defense services, allowing for “more finely and frequently calibrated” control over attorney caseloads.[[350]](#endnote-351) An example of this can be seen in Oregon which incorporates standards into its state contracts with local service providers.[[351]](#endnote-352)

Finally, state and local governments may use an Oversight Board to promulgate and enforce standards, if one exists in their particular jurisdiction.[[352]](#endnote-353)

Implementation and Monitoring

Requesting that a public defender office adopt internal office policies cannot alone shape how public defense systems mitigate risk; instead, there must be some mechanism established to monitor compliance. There are at least four distinct ways that local governments have attempted to implement and monitor standards for public defense:[[353]](#endnote-354)

1. Voluntary Standards**:** Standards that are purely voluntary depend on the good will of funding and oversight bodies, and are more likely to bring about incremental reforms instead of “broad-scale systemic change.”[[354]](#endnote-355)
2. **Funding Conditioned Upon Standards Compliance**: Some jurisdictions make the degree of their funding support contingent upon compliance with national public defense standards.[[355]](#endnote-356)
3. Statutory Statewide Standards: Statewide public defense systems (as opposed to county funded systems like Pennsylvania) are generally more likely to adopt national standards, and are “significantly more likely to adopt standards in the areas of independence, training and attorney performance.”[[356]](#endnote-357)
4. Standards as Contract Requirements: Standards are directly incorporated into contracts for public defense services.[[357]](#endnote-358)

The statutory codification of standards produces the “highest degree of accountability and compliance with basic agency-management standards such as workload, performance, training, procedures and service quality.”[[358]](#endnote-359) The implementation of national standards in public defense systems is also highly dependent on funding structure of the system, because “virtually all standards-driven public defense systems are subject to the uncertainties of legislative appropriations.”[[359]](#endnote-360)

An Oversight Board may also be given the authority to promulgate, oversee, or enforce standards.[[360]](#endnote-361) Oversight Boards can be granted authority over any number of administrative issues related the public defender; for instance, drafting performance standards or mandating the availability of sufficient support services.[[361]](#endnote-362) An Oversight Board may additionally be empowered to monitor or control the caseloads of public defenders, or to collect data to monitor compliance with any imposed guidelines.[[362]](#endnote-363)

For example, in 2014, Idaho created the Idaho State Public Defense Commission (ISPDC), which it “authorized to promulgate standards related to attorney performance, attorney workload, and attorney supervision, among others.”[[363]](#endnote-364) In Idaho, all counties are required to comply with these standards, regardless of whether they receive state financial assistance.[[364]](#endnote-365) The Sixth Amendment Center reports that if a county in Idaho,

“willfully and materially” fails to comply with ISPDC standards, and if the ISPDC and county are unable to resolve the issue through mediation, the ISPDC is authorized to step in and remedy the specific deficiencies, including taking over all services, and charge the county for the cost.[[365]](#endnote-366)

Texas law also gives its Oversight Board, the Texas Indigent Defense Commission, the power to “develop policies & standards for indigent defense services” and to “develop a plan for counties to report indigent defense information.”[[366]](#endnote-367)

The Landscape in Montgomery County

In Montgomery County, attorneys are divided into several “trial teams” that are assigned to a particular courtroom.[[367]](#endnote-368) Each has a leader who is responsible for overseeing the team and assigning each team member’s cases as well as maintaining their own caseloads.[[368]](#endnote-369) This leaves the team leaders with discretion in assigning cases, and there is no formalized approach to assigning cases to staff attorneys.[[369]](#endnote-370) The teams are currently not formed according to different specializations or types of offenses, although some individual attorneys in the Office have developed a specialization and so often represent clients in those areas.[[370]](#endnote-371) Finally, the Chief Public Defenders also have their own caseloads.[[371]](#endnote-372)

Staff attorneys do not receive formal performance reviews, nor do they receive any document outlining performance expectations. While team leaders often meet with their own teams to discuss current cases, there are no set periodic meetings among team leaders or among team leaders and chiefs.

The office does not use a case management system, leaving staff attorneys with the responsibility to create systems to manage their own caseloads. Team leaders periodically review case files with attorneys under their supervision, but there is no automated way for supervising attorneys to “check in” on cases electronically.

The employees we interviewed voiced mixed feelings on the topic of adequate training. Some employees felt they had not received any formal onboarding training.[[372]](#endnote-373) Many noted that the offering of training had improved over the years, but others still felt that the ongoing training offered was not sufficient.[[373]](#endnote-374) It was also expressed that investigators receive very little relevant training to their positions.[[374]](#endnote-375) Finally, some employees indicated that increased funding is needed to form a more robust training program.[[375]](#endnote-376)

The Office has very few formalized documents or policies for attorneys. This includes the absence of written policies regarding the prioritizing of cases or matters; the form of representation preferred by the Office; or the Office’s position on attorneys pursuing systemic reforms in addition to performing direct client representation.[[376]](#endnote-377)

The Pennsylvania Public Defense Act does not codify any minimum standards that county public defender offices are required to meet.[[377]](#endnote-378) Montgomery County has not yet formally adopted the ABA, NAPD, or other national standards pertaining to public defense.[[378]](#endnote-379) Moreover, Montgomery County does not have any feedback mechanisms in place to raise an alert to any systemic deficiencies interfering with the quality of defense representation provided.[[379]](#endnote-380)

Conclusion

State and local governments risk being on the receiving end of lawsuits implicating the effectiveness of their indigent defense systems. Responding to these suits requires the government to allocate significant time and financial resources which could otherwise be directed toward other municipal services or functions.

The most effective way to mitigate the risk of a lawsuit is to put systems in place to make sure that public defender offices are implementing internal policies that are in line with national advisory standards. When such policies are instituted and standards are adopted, both clients and the community will observe a public defender system that is independent, professional, and well-managed, conveying to them that the jurisdiction values the public defense function and instilling increased confidence in the system. The local government will benefit both by having provided exceptional services to their constituents, but also by having mitigated the risk of legal liability.

# RECOMMENDATIONS

We believe that the Montgomery County’s Office of the Public Defender consistently strives to provide high-quality representation to its clients. Attorneys in the office have shown an admirable level of dedication to the profession and have made great efforts to ensure that the office provides exceptional services to their clients and the community. Furthermore, the Office’s current leadership has risen to the challenge of taking on new roles during a pandemic that has made serving clients considerably more difficult.

The Montgomery County Board of Commissioners has supported the Office’s efforts to ensure the sustained functioning of a first-rate public defender system. The Commission has significantly increased funding to the Office over the past several budget cycles, demonstrating its commitment to indigent defense through its steady investment.[[380]](#endnote-381)

This funding has made it possible for the Office to hire additional attorneys, paralegals, and support staff members in the juvenile dependency and delinquency units — reflecting an overall increase from fifty-one full- and part-time employees in 2011 to sixty-six all full-time employees at the end of 2020.[[381]](#endnote-382) In addition to hiring additional staff, the increased funding has also made it possible for the Office to make impressive strides in creating new positions and units for the benefit of its clients.

In the last several years, the Office has also been able to double its number of investigators, and hire two staff members who are dedicated to interviewing persons newly admitted to the Montgomery County Correctional Facility within two to three business days of admission.[[382]](#endnote-383) It also expanded the Social Services Unit, which now consists of social services advocates and a policy director.[[383]](#endnote-384) It has also created new dedicated attorney positions in specialized practice areas and problem-solving courts.

Both the Office and the Commission have also taken steps to investigate the question of pay parity. In 2018, the Office completed a salary study to determine whether public defender salaries in the county were competitive with district attorney salaries in the county.[[384]](#endnote-385) The study also compared Montgomery County public defender salaries with salaries in other counties. This work resulted in pay increases for employees.[[385]](#endnote-386)

There are, of course, always improvements that can be made to any organization. The recommendations herein reflect our view of adjustments that could be made to the Office – both internally and externally – to clarify the relationship of the Office with the judicial and executive branches of county government, to improve the work environment for attorneys, and to mitigate any exposure to risk arising from potential litigation.

ENSURING INDEPENDENCE

We Recommend the Creation of an Independent Oversight Board to Advise and Guide the County’s Public Defender Office

Currently, Montgomery County has no structural mechanism in place to ensure the Office of the Public Defender is independent from external influence. The Public Defense Act places the responsibility of public defense on county governments and, as such, the Montgomery County Board of Commissioners is responsible for appointing the Chief Public Defender.[[386]](#endnote-387) While we have no reason to believe that the appointment of the Chief Defender is a “political appointment” as such, the appointing structure (and, by extension, the structure for removing the Chief Defender) creates the risk of political influence or its appearance.

Public defender offices operate most efficiently when they have an optimal level of independence – both actual and perceived – from judicial and political influence. Achieving such independence can take many forms, but in light of the statutory constraints in Pennsylvania, the best approach is for Montgomery County to create an independent, nonpartisan Oversight Board, which can serve as a firewall between the Office and county government. In addition to ensuring that the Office is insulated from the executive, the creation of an oversight board will also relieve the Board of Commissioners from its duty as (informal or formal) monitor of the Office, thereby insulating the Commission from criticism regarding the actions of the Public Defender.[[387]](#endnote-388)

Over time, the mandate of the Oversight Board could be expanded to cover include additional functions such as serving as a liaison among the Public Defender Office, the political branches, and other stakeholders; monitoring office-wide compliance with national standards; and supporting the provision of indigent defense services from attorneys who do not work for the Public Defender.[[388]](#endnote-389)

Creation of the Oversight Board

Neither the Public Defender Act nor any other Pennsylvania law precludes the use of independent governing boards in agency operations. Indeed, the Board proposed by this Report is like many this county has already established to give advice to the Commissioners and guide county agencies.[[389]](#endnote-390) Therefore, the Board of Commissioners is authorized to form an Oversight Board to oversee the provision of indigent defense services in the county.

In establishing the Oversight Board, the Commission would need to set forth a mission statement and bylaws establishing the contours of the Oversight Board’s authority. The Commission would also set the size of the Oversight Board and the term limits of board members.

While the Commission must initially be involved in the formation of the Oversight Board, it should not be responsible for the selection of board members. The Commission should delegate the responsibility of nominating and selecting board members to multiple appointing authorities so that no organization or “single branch of government has a majority of appointments” on the Oversight Board.[[390]](#endnote-391) The Commission may choose to consult with the Montgomery County Bar Association to determine the best organizations to nominate Oversight board members.

Board Composition

The Oversight Board should be nonpartisan to remove potential political influence.[[391]](#endnote-392) For similar reasons, it should not include any current members of county government or political officeholders. To prevent any real or perceived conflicts of interest, there should be no active prosecutors or judges included in the membership.[[392]](#endnote-393)

The Oversight Board should include a diverse group of people who are devoted to the continuous improvement of indigent defense representation.[[393]](#endnote-394) The majority of board members should be attorneys licensed to practice in Montgomery County. The Oversight Board should also include other relevant public defense stakeholders, including representatives from local community organizations; people who have had past interactions with the criminal legal system and/or their family members; deans or academic professionals from area law schools; as well as former public defenders who have had firsthand experience in the unique challenges of public defense.[[394]](#endnote-395)

To ensure a continuous variety of representation and encourage new voices, Oversight Board members should have staggered term limits.[[395]](#endnote-396)

We Recommend that Montgomery County Delegate the Selection Process of the Chief Public Defender to the Oversight Board

The Oversight Board should play the central role in appointing the Chief Public Defender. While Pennsylvania’s legal framework requires the Board of Commissioners to appoint the Chief Public Defender, we recommend that the Commission delegate part of the selection process to the newly-created Oversight Board. [[396]](#endnote-397) The Oversight Board, following its own internal selection processes – consistent with its bylaws and mission statement – would then provide the Board of Commissioners with (1) a ranked list of candidates for Chief Defender, with the expectation that the Commission would appoint the highest ranked candidate absent exceptional circumstances; or (2) a slate of unranked candidates from which the Commission would make a final appointment. Under the unusual circumstance that the Commission rejected all proposed candidates, the Oversight Board would be tasked with the responsibility of providing a new list of candidates to the Commission within a set time.

The Oversight Board should also be consulted in any decision regarding the proposed removal of the Chief Defender. In addition to any other requirements currently in place, the Commission should be required to submit a detailed statement outlining just cause for termination to the Oversight Board and, before taking any termination action, permit the Board to weigh-in on the decision.[[397]](#endnote-398)

Potential Additional Functions

Montgomery County currently has no oversight system in place to assist the office in implementing national public defense standards.[[398]](#endnote-399) The Oversight Board could fill that gap, providing public defenders with the support necessary to adopt such standards and monitor compliance. The Commission may choose to give the Oversight Board some control over funding (or “bonus” funding) in order to incentivize compliance with national standards for public defense.

As well, the Oversight Board could serve as a resource hub and informational clearinghouse for all attorneys in the county who have an indigent defense practice. This could help ensure that all attorneys representing indigent clients meet the same practice standards and provide the same high-level of representation that defendants receive from the Public Defender.

**We Recommend that the Public Defender’s Office Hire a Dedicated Human Resources Professional**

A dedicated Human Resources professional is an important internal structural contribution to the independence of the office, in that it will relieve the County from involvement in internal office issues. A human resources professional can also play a key role in disseminating internal office policies; monitoring compliance with workload limits; coordinating performance reviews; and organizing onboarding and ongoing training efforts. In these ways, a dedicated human resources professional is critical to effectuating some of the risk mitigation strategies we recommend below. We also recommend that the human resources professional create and disseminate a human resources policy that creates a clear reporting structure for HR complaints.

**We Recommend that the Public Defender’s Office Reassess its Use of the Courtroom-Based Assignment System**

Courtroom-based case assignment can threaten to calcify courtroom roles, practices, and customs, in a way that may unintentionally limit an attorney’s ability to zealously represent their client. In particular, a defense attorney may hesitate to take positions or actions that risk angering a judge before whom the attorney appears in all of their other cases. We therefore recommend the Office undertake an assessment of its assignment system, and consider alternatives including but not limited to shorter courtroom assignment terms, or assignment by subject specialization, seniority, professional development needs, or some combination of these or other approaches.

FUNDING CONSIDERATIONS

**We Recommend That Montgomery County Continue to Increase Funding to the Office to Respond to the Needs of Indigent Defense Provision**

Over the last decade, Montgomery County has shown a consistent and increasing investment in providing quality indigent defense.[[399]](#endnote-400) We recommend that Montgomery County continue to increase funding to the Office of the Public Defender to respond to the needs of indigent defense provision. With continued and consistent increases in funding levels, the Office will be able to continue to hire appropriately; expand the subject area specialties in which the Office has expertise; and continue to increase the Office’s physical resources, an example of which can be seen in the Office’s recent acquisition of dedicated A/V technology, which is increasingly becoming more crucial to defense work.

Continued increased funding will also allow the Office to increase its training budget so that the office can provide more comprehensive onboarding, initial, and continued training – for attorneys, paraprofessionals, and other staff – and develop more internal shared resources.

Dedicating money to help position Montgomery County public defenders to provide trainings to others can also be an investment in the Office’s future. Trainings attended by outside attorneys can be used by the Office as a revenue stream, which can help defray the cost of sending staff to outside trainings and CLEs.[[400]](#endnote-401) Training Montgomery County defenders on how to give trainings will provide a forum for defenders to share their expertise, boosting office morale and giving an opportunity to defenders to be recognized for their expertise in their areas of specialization throughout the state, and potentially nationwide.

Finally, increased funding will allow the Office to expand its practice in holistic client representation, consistent with the national principles, attorney ethical obligations, and the stated preferences of many attorneys within the Office.

**We Recommend That Montgomery County Set a Goal to Achieve Pay and Resource Parity Between Defenders and Prosecutors**

Because indigent defense and prosecution require “broadly similar skills,” significant disparities in pay between defenders and prosecutors should be scrutinized.[[401]](#endnote-402) The County clearly appreciates this; in recent years, it has made strides to address the issue of pay parity by partaking in a salary study and instituting pay increases for all attorneys. In particular, it has committed to starting salary pay parity.

We recommend that the Board continue to address the issue of pay parity, perhaps annually, as it applies for middle and senior rank attorneys at the Office of the Public Defender. Current attorneys should receive pay increases based on clear, and clearly-communicated, promotion standards. Greater financial incentives and upward pay mobility are essential to acquire and retain attorneys long-term.

Resource parity remains a potential issue. As of 2020, the Montgomery County District Attorney’s Office had a budget more than 300% higher than the budget of the Montgomery County Office of the Public Defender. While there is not an exact match between the work performed by public defenders and prosecutors, this funding incongruence highlights the need for further study. We recommend the County undertake an assessment of these funding differentials, and come up with clear metrics for evaluating funding parity (for instance, metrics that incorporate workload and expenditure differentials between the two offices).

LITIGATION AND RISK MITIGATION

**We Recommend that the Office Create Internal Policy Documents Outlining Expectations, Promotion Standards, and Guidelines on Case Assignment**

“Vision is an absolute prerequisite to any change in culture.”[[402]](#endnote-403) As such, it would be helpful for the Office to clearly set forward the vision and mission of the Office in a policy document that is distributed to all current employees and new hires. Ideally, a mission statement would explicitly include the adoption of both the ABA and NAPD principles, define the Office’s mission regarding individual client representation, and outline the Office’s position regarding systemic reforms and challenges.

While there appear to be many systems in place that influence how the Office is run, there are few internal documents or memos that memorialize how these systems work. We recommend that the Office create more internal documents so that they can formalize and standardize the procedures and systems that are already in place. These documents should address, among other topics, the criteria for prioritizing cases and matters; the preferred approach to client representation, the requirements for taking on systemic matters (i.e., non-individual client representation), reporting protocols for both HR and professional practice concerns; expectations around client communication; and workload guidelines.

We further recommend that the Montgomery County Board of Commissioners provide funding for the development of an internal case management system at the Public Defenders’ office. It would be helpful to both staff attorneys and supervisors to have a centralized database where attorneys can upload and find information about their cases, clients and assignments.[[403]](#endnote-404) Currently, it appears that attorneys are largely left on their own to figure out how to prioritize assignments and deadlines, and a centralized internal information system could help them organize their assigned cases to meet their professional responsibilities.[[404]](#endnote-405)

In terms of training resources, we recommend that the Office create an office-wide shared drive for training materials. Public defenders have a large advantage over solo practitioners in that they can rely on the collective office’s wealth of shared knowledge and resources. Instead of attorneys having to conduct their own research, or figure out on their own who to talk to when faced with a problem, we are recommending that the office pool their resources in a more streamlined and organized way. A shared drive would serve as an “educational and resource sharing forum to fill in any gaps in the training” attorneys already have and would be an invaluable resource for the office as a whole.[[405]](#endnote-406)

**We Recommend that Team Leaders Have Their Direct Caseloads Reduced in Order to Give Them More Time to Mentor and Support the Attorneys They Supervise**

Currently, the expectation within the Office is that attorneys who have supervisory responsibilities will also carry full caseloads. Supervisors cannot be expected to do a full-time job litigating cases[[406]](#endnote-407) (which are likely to be more complex based on their level of experience), only to be asked to do another full-time job of supervising junior attorneys. We recommend that the caseloads of supervising attorneys (whether team leaders or chiefs) be reduced to provide them with adequate time to dedicate to supervisory and related administrative duties.

Giving supervisors time to have regular meetings with their subordinates and other staff members; regularly review attorney cases through the case management system; coordinate approaches at the supervisory level; and complete performance reviews, will be of benefit to the entire office, but especially to newer and more junior attorneys. Placing an increased emphasis on supervision and communication is fundamental, especially during a time in history when employees are decentralized because of a global pandemic.

We further recommend that the Office hold regularly-scheduled, periodic office-wide meetings for all attorneys and staff[[407]](#endnote-408) where management can update the Office about general matters as well as any strategic measures the Office may be engaged in going forward. This should also be a forum for staff members to bring up any questions or concerns that they may have that they want to communicate with management as a group.

Lastly, we recommend that supervising attorneys should be selected based on performance and on “who best supports the new cultural values of the office,”[[408]](#endnote-409) as opposed to who has the most seniority in the office. In furtherance of this, the Office should create and distribute performance and promotion standards.

“Getting staff to buy into the new office culture requires a conscious effort to change the priorities of the office by rewarding and encouraging new and different kinds of lawyering.”[[409]](#endnote-410) That is why we are also recommending that management begin sending out monthly emails that highlight client success stories and staff accomplishments. All staff in the office should have an opportunity to submit “success stories” for themselves or for their peers, because “the public acknowledgment of client-centered triumphs goes a long way toward setting the tone of the office, and it makes everyone feel good.”[[410]](#endnote-411)

**We Recommend that Montgomery County and the Office of the Public Defender Formally Adopt the ABA and NAPD Standards**

Neither Montgomery County nor the Office of the Public Defender itself has formally adopted either the ABA or NAPD standards relating to public defense.[[411]](#endnote-412) Compliance with nationally recognized standards is a proven way to provide quality and ethical indigent defense representation.[[412]](#endnote-413) However, mechanisms must be in place to ensure that any adopted standards are being followed.

There are a variety of ways to introduce national standards into a public defense system. Standards can be adopted voluntarily and overseen by oversight bodies, such as a statewide or local Oversight Board.[[413]](#endnote-414) Standards may also be statutorily prescribed, an option that would require statewide legislative change.[[414]](#endnote-415) In addition, many governments condition funding on compliance with standards.[[415]](#endnote-416) While statutorily prescribed standards are proven to be the best way to enforce compliance with such standards,[[416]](#endnote-417) voluntary adoption of standards is the most realistically option for Montgomery County given Pennsylvania’s legal landscape.

We therefore recommend that the County and the Office formally adopt both the ABA and NAPD Principles to serve as the official guidance for all operations of the Office of the Public Defender. Because there is an absence of standards from the Commonwealth, these professionally accepted standards can provide clear guidance for a locality to implement an effective and independent public defense system.[[417]](#endnote-418)

However, mere adoption of standards is not enough—there must be a mechanism in place to enforce them. As discussed previously, we recommend that the newly created Oversight Board be responsible for monitoring compliance with these standards.

We present these recommendations not as criticism, but in the belief that they can be realistically implemented in a county-funded model. We believe that implementing these recommendations will not only benefit indigent defendants, but also improve the daily work lives of county government officials and the attorneys and staff at the Office of the Public Defender. Montgomery County has taken commendable steps so far to establish a quality public defense system and improve upon it. We provide these recommendations to further safeguard independence of the defense function; achieve adequate funding and resources needed to provide defense representation; and assist the Office in complying with nationally recognized defense standards and practices. With these recommendations, Montgomery County has the opportunity to establish a leading local indigent defense model.

# CONCLUSION

Public defenders are critical to the guarantee of equal justice for all. They ensure that the poor and needy, the disenfranchised, the impaired and ill, all have access to the courts. A public defender office and its members are also critical voices and resources for system improvement. Our review of the Montgomery County Public Defender has shown that over the years the County Commissioners have provided important financial and administrative support for that Office, and that the Office has embraced professionalism, community outreach, aspects of holistic defense, and an awareness of the need for system reform.

This report was drafted in that context, but also with awareness of the need to find new structures and internal systems to assure Defender independence, support the County administration, and move beyond the friction that arose following the dismissal of the Office leadership in March 2020. The reforms proposed – most particularly the creation of an Oversight Board, the development of internal operating procedures, continued funding increases, use of a case management system and a computerized resource database, rethinking attorney assignments, and assigning a Human Resources professional to the Office – will permit the Defender to continue to improve its representation of indigent defendants, serve the County well, and reduce the risk of any legal challenges to the manner in which indigent defense representation is provided in Montgomery County.

We are also cognizant of the fact that this is a burden that should be that of the Commonwealth and not the county. Montgomery County oversees and funds all of the trial- and appellate-level indigent defense services in the county, with no assistance from the state government.[[418]](#endnote-419) The Pennsylvania legislature has decided to displace all indigent defense responsibility, including funding and oversight, with the counties.[[419]](#endnote-420) For lack of better words, Montgomery County is “stuck” with the system that has been statutorily created.

*Gideon’s* mandate places public defense responsibility on the *state*.[[420]](#endnote-421) That public defense is a state responsibility, and therefore the state should be involved in both funding and oversight of the services provided, is well-recognized throughout the professional community.[[421]](#endnote-422) Therefore, our final recommendation is that Montgomery County join the chorus of voices throughout the state advocating for Pennsylvania’s adoption of an official statewide model.

Housing indigent defense at the state level helps to ensure that there are no disparities in representation provided from county to county.[[422]](#endnote-423) The state would provide centralized administration to ensure “services are consistent in quality, efficiency, effectiveness, and that the same standards are applied in all subdivisions throughout the state.”[[423]](#endnote-424) Additionally, the state would take direct responsibility for complying with *Gideon* rather than relying on the counties to do so.

Moving to a statewide model would help insulate indigent defense operations from local political influence.[[424]](#endnote-425) This model would help alleviate the great financial burden of funding indigent defense operations. Further, shifting the responsibility from the county to the state would reduce the workloads of the Board of Commissioners and protect them from any criticism and legal action regarding public defense activities. While this is not possible under Pennsylvania’s current legal framework, advocating for legislative change is in the best interest of Montgomery County’s indigent accused population, county government, and broader community.

Ideally, such legislation should also provide for creation of an independent statewide Oversight Board with the authority to promulgate, monitor compliance with, and enforce quality and ethical standards. The legislation should also codify the minimum standards that all offices must follow.

Until such a change occurs, the recommendations offered in this Report are feasible, minimally costly, and will permit Montgomery County to meet its constitutional duty to provide quality and ethical defense representation to the indigent members of its community.

# APPENDICES

- APPENDIX 1 -

ABA Ten Principles

Of A Public Defense Delivery System

*B l a c k L e t t e r*

|  |  |
| --- | --- |
| **1The public defense function, including the selection, funding, and payment of defense counsel, is independent.**  **2Where the caseload is sufficiently high, the public defense delivery system consists of both a defender**  **office and the active participation of the private bar.**  **3Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.**  **4Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**  **5Defense counsel’s workload is controlled to permit the rendering of quality representation.** | **6Defense counsel’s ability, training, and experience match the complexity of the case.**  **7The same attorney continuously represents the client until completion of the case.**  **8There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.**  **9Defense counsel is provided with and required to attend continuing legal education.**  **10Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** |

- APPENDIX 2 -

**NAPD Principles Related to the structure and Organization for Providing Public Defense Services**  
  
  
**Principle 1:  Competent and Effective Public Defense Lawyers Must Be Provided for the Fair Administration of Justice**

The fair administration of juvenile and criminal justice requires competent and effective “public defense lawyers” (hereafter sometimes referred to as “lawyers”) for all juveniles charged with delinquency and adults in criminal cases unable to afford a reasonable attorney’s fee.  Similarly, competent and effective lawyers should be provided in all other proceedings in which lawyers are commonly provided, such as dependency, children in need of supervision, sexually violent predator, and civil commitment cases.  For juveniles charged with delinquency, the right to counsel should be non-waivable, and in criminal cases no waiver of counsel should be permitted unless the accused is first provided the opportunity to speak to a lawyer.  Waivers of lawyers by adult criminal defendants should occur rarely and only if a judge has addressed the defendant personally on the record, and the waiver of counsel is made knowingly, intelligently, voluntarily, and is in writing.  All adults in criminal cases and juveniles charged with delinquency taken into custody should be brought before a judicial officer no later than 48 hours after custody begins and, prior to such appearance, all persons charged should be interviewed promptly by a lawyer or person working on behalf of the lawyer, who is prepared to address the person’s release from custody at first appearance.

**Principle 2:  Public Defense Must Be Independent of Judicial and Political Control**

The fair administration of justice requires that representation by lawyers be free from real or perceived inappropriate influence.  Representation should be without political influence and subject to judicial supervision only in the same manner and to the same extent as are prosecutors and attorneys in private practice.  The selection and payment of lawyers should be independent of the judiciary.  The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by administrators of defender, assigned-counsel or contract-for-service programs.  Except in jurisdictions in which public defenders are locally elected, the policy-making function, choice of the chief public defender, and oversight of defense programs should be vested in a commission or board of trustees selected by diverse authorities, including but not limited to, officials from executive and legislative branches of government, heads of bar associations and law school deans.  All persons chosen for a board or commission should be committed to high quality public defense and members should include one or more persons who previously were represented by a public defense lawyer.  Commissions or boards should not include active public defense practitioners, judicial office holders, and active law enforcement officials of any kind such as prosecutors, police, sheriffs, or their staffs.  All systems for defense representation should include both full-time public defenders and private public defense lawyers serving as assigned counsel or pursuant to contracts.

**Principle 3:  The Public Defense Function Must be Administered and Overseen Statewide**  
  
Except in jurisdictions in which public defenders are locally elected, each state should have a public defense provider (hereafter “provider”) with responsibility for all components of public defense services which is overseen by a board or commission as described in Principle 2.   The provider should have responsibility for establishing qualifications of counsel, determining eligibility standards for appointment of counsel, setting workload and caseload standards, providing for training and other administrative support, and representing the public defense function to policy makers and stakeholders.  The need for the provider to exist at a state level is to ensure that services are consistent in quality, efficiency, effectiveness, and that the same standards are applied in all subdivisions throughout the state.  Where local delivery of public defense services is prevalent without oversight and centralized administration there is significant risk of unjustified variations in the quality of services in the state’s various jurisdictions.  Oversight and consistent administration throughout each state provides a necessary mechanism to evaluate and improve service delivery.

**Principle 4:  The Expense of the Criminal Justice System Is a Government Obligation That Must Not Be Imposed on Defendants**

The duty to fund the criminal justice system is a fundamental government obligation.  Accordingly, the criminal justice system must end its pervasive use of predatory costs, fines, and user fees that are disproportionately borne by those who can least afford it.  Persons encountering the criminal justice system invariably face fines, fees, and costs at every step of the process, including at the pretrial stage.  There are fees for applying for public defense counsel; fees for supervision while on pretrial release; fees for filing pleadings; fees for requesting a jury; and fees for vehicle interlocks or impounded vehicle costs, all before ever having been found guilty of an offense.  This fee based, user pay system leads to destructive outcomes since the overwhelming majority of persons charged in the criminal justice system are impoverished.  The inability to pay leads to arrests, loss of employment, liberty, housing, and driving privileges.  Ultimately, the various revenue generating mechanisms of the criminal justice system, many of which have proliferated in recent years, undermine public confidence in the purpose and fairness of the courts and the rule of law.

**PRINCIPLES RELATED TO THE QUALITY OF PUBLIC DEFENSE SERVICES**

**Principle 5:  Workloads of Defense Attorneys Must Always Be Reasonable**

Lawyers who defend adults in criminal cases and juveniles in delinquency proceedings must have reasonable workloads, which enable them to provide conflict-free representation of their clients consistent with their duty to furnish competent and effective assistance of counsel pursuant to rules of professional conduct and prevailing professional norms.  To provide such representation requires initial and ongoing training, adequate support services, including access to investigators, social workers, paralegals, and expert witnesses, as well as ongoing supervision of the representation provided.  When lawyers and/or providers determine that workloads are preventing or are about to prevent the delivery of defense services consistent with ethical and constitutional duties to clients, the lawyers and/or provider should be authorized to refer cases to another public defense provider participating in the jurisdiction’s plan for representation.  Alternatively, lawyers and/or the provider must take appropriate steps pursuant to their state’s rules of professional conduct either to refuse additional cases and/or seek to withdraw from existing cases.  Reasonable workloads for lawyers should be determined through time studies utilizing Delphi methodology.  Permanent timekeeping by defense lawyers should be used to facilitate periodic workload studies, for management purposes, and to demonstrate the transparency and responsibility of providers.

**Principle 6:  Training and Continuing Education are Essential for Providing Competent and Effective Defense Representation**

To be competent and effective, lawyers and other public defense professionals must be well trained and providers must make available quality training and education as required.  Regardless of their size, structure, or delivery system, the training and education provided by providers should extend to all lawyers, as well as investigators, mitigation specialists, social workers, administrators, and all others who support the defense function.  Training and education should be provided on a regular basis at no cost to attendees and all providers should have a dedicated budget allocated for ongoing training and education.

**Principle 7:  Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential**

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

**Principle 8:  Public Defense Representation Should Be Client Centered and Holistic**

Client-centered representation should be practiced by public defense lawyers and other defense professionals in satisfying the constitutional right to counsel.  Client-centered representation means that the lawyers and other defense professionals recognize and respect the client’s authority, ability, and right to decide the direction that the client’s case should take after being fully advised of all available options.  Holistic representation (sometimes called “comprehensive representation”) complements client-centered representation because it is the most effective approach in seeking the full range of best outcomes desired by and on behalf of clients.  By addressing underlying criminogenic factors through broad based representation more favorable outcomes are achieved, thereby enhancing the lives of clients, reducing recidivism, and improving public safety.  Public defense lawyers and other defense professionals should collaborate with civil practitioners, civil legal services organizations, social service program providers and other non-lawyer professionals who serve, or assist in serving, clients with civil legal and non-legal problems impacting housing, health care, education, and food security.  Lawyers and providers of defense services should retain such additional professionals as permanent staff or as necessary on a case-by-case basis.

**Principle 9: The Duty of Public Defense Lawyers Is to Provide Clients Quality Legal Representation Consistent with Rules of Professional Conduct and Prevailing Professional Norms**

Public Defense lawyers must always provide their clients competent and diligent representation, as well as representation that is reasonably effective assistance pursuant to prevailing professional norms.  This includes empowering clients to exercise their constitutional and statutory rights, including the right to jury trial, and to litigate fully all appropriate motions to facilitate the best outcomes for their clients.  Effective representation includes ensuring that all cases are fully investigated and prepared for trial, and that clients are fully informed of their right to a jury trial.  Public defense lawyers should not advise clients to plead guilty until all defenses have been carefully investigated, reviewed, considered and explained to clients.  Although the jury trial decision is always to be made by clients, public defense lawyers should provide clients with the necessary information to make informed decisions about whether to have a trial or accept a plea agreement.

**PRINCIPLES RELATED TO CRIMINAL AND JUVENILE JUSTICE SYSTEMS AND THE TREATMENT OF ACCUSED PERSONS**

**Principle 10:  Public Defense Providers Must Seek to Change the Pervasive Cultural Prejudice that Stigmatizes and Marginalizes Poor People**

The overwhelming majority of persons charged with criminal offenses and juvenile delinquency are poor, which often contributes to greater poverty for the accused and their families due to fines and/or incarceration.  This reality leads to pervasive cultural prejudice against the poor in our justice systems, which is particularly acute towards persons of color.  In response, public defense service providers must seek to de-stigmatize poverty with every client they represent.  Appropriate steps may include challenging the imposition of fines and fees, engaging in comprehensive intake interviews, pre-trial advocacy, mitigation and sentencing advocacy, and, if appropriate, presenting the client’s unique struggle in poverty in relationship to the offense(s) with which the defendant or juvenile is charged.  Public defense programs must also seek systemic reforms to counter the stigma that the poor endure and limit their marginalization after contact with criminal and juvenile justice systems.  Appropriate steps may include seeking non-discriminatory policing and enforcement policies, bail reform, fines and fees litigation, pre-trial programs, diversion and treatment courts, alternative sentencing opportunities, increased access to needed social service programs, and advocacy to eliminate collateral consequences that attach to arrests and convictions.

**Principle 11:  Competent and Effective Defense Representation Is Necessary to Eliminate Mass Incarceration**

Well-funded and properly resourced public defense providers are essential in order to eliminate mass incarceration.  Adherence to Principle 1, which calls for lawyers to interview defendants prior to their first court appearance and for waivers of counsel to be rare, will help eliminate “slow-counsel” and “no-counsel courts,” reduce incarceration by providing advocacy in support of pretrial release for accused persons, and challenge the use of jails and prisons as predatory collection vehicles for costs, fees, and fines.  Decisions to incarcerate defendants should be individualized and grounded upon evidence-based risk assessments.  Properly resourced providers and lawyers can advocate successfully for the placement of convicted defendants in alternative programs that are less costly and more effective than incarceration and also urge that certain non-serious misdemeanors be reclassified and subject only to fines, thereby contributing to a reduction in mass incarceration.

**Principle 12:  Public Defense Providers Must Address Disparate Treatment of Racial and Ethnic Minorities in the Justice Systems**

Racial and ethnic bias persists in our criminal justice systems and leads to disparate outcomes at every stage of the process, impacting persons who are stopped, arrested, released pretrial, sentenced to probation, paroled, and who receive the death penalty or life without parole.  Racial and ethnic bias also is present throughout juvenile justice systems, impacting persons transferred to adult court, placed in diversion programs, and committed to custody.  These outcome differences undermine fairness in our criminal and juvenile justice systems and prevent the achievement of equal justice under law.  Justice systems must openly embrace gathering data on racial and ethnic bias and take bold and continuous steps to address the problem.  Public defense providers and lawyers, as well as other defense professionals, must examine their own practices and outcomes to ensure that effects of race and ethnicity, including implicit bias, are eliminated.  To eradicate racial disparities, providers require the capacity and funding to challenge systemically racial and ethnic bias in criminal and juvenile justice systems.

**Principle 13:**  **The Use of Punitive Measures Against Persons Who Have Mental Disorders or Other Types of Cognitive Impairments Must End**

The criminalization and punishment of persons with mental disorders, cognitive disabilities or trauma is never justified.  The appropriate space for the protection of people with mental disorders is a facility intended and equipped for mental health treatment.  Public defense providers should oppose the use of incarceration where treatment is a more appropriate placement.  Lawyers must make special efforts to prevent mental torture imposed on persons in the name of protection or shelter, such as the use of solitary confinement to "protect" a vulnerable person.

**Principle 14:  Public Defense Lawyers and Public Defense Professionals are Essential Participants in Achieving Justice Reforms**

Public defense lawyers and other defense professionals are experts in providing defense services.  As advocates for criminal defendants, public defense lawyers and defense professionals spend significant time in court, in detention centers and jails, and in the client community.  They have the most credible information about the needs, opportunities and challenges facing defendants and juveniles and must be treated as equal and respected partners together with all justice agencies and programs.  Their observations and recommendations must be included in any effort to improve criminal and juvenile justice systems.  Reform initiatives that do not include the perspective of public defense lawyers and other defense professionals necessarily compromises efforts to achieve meaningful and enduring justice reforms.

**Principle 15:  Unity and Collaboration of Public Defenders and Public Defense Professionals Are Essential in Achieving Defense Reforms**

The strong voice of public defense providers and defense professionals nationwide are essential in achieving transformational defense reforms.  To achieve necessary and long overdue reforms, public defense providers and defense professionals must be unified and organized.  Conversely, isolation among defense providers and professionals hampers national, statewide, and local reform efforts, thereby undermining the goal to achieve the constitutional protections of due process and equal access to justice in every U.S. jurisdiction.

*NOTES*

1. U.S. Const. amend. VI. [↑](#endnote-ref-2)
2. Gideon v. Wainwright, 372 U.S. 335 (1963). [↑](#endnote-ref-3)
3. *See* Const. Anotated, Amdt 6.7.2.3, *When the Right to Counsel Applies*, <https://constitution.congress.gov/browse/essay/amdt6_7_2_3/> (last accessed Dec. 1, 2020). [↑](#endnote-ref-4)
4. *Id*. The right to counsel under the Sixth Amendment attaches in state proceedings because of Supreme Court decisions that applied due process analysis under the Fourteenth Amendment to state proceedings. *See*, CONST. ANNOTATED, Amdt 6.7.2.3, *When the Right to Counsel Applies*, <https://constitution.congress.gov/browse/essay/amdt6_7_2_3/> (last accessed Dec. 1, 2020). [↑](#endnote-ref-5)
5. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972). [↑](#endnote-ref-6)
6. Even preliminary hearings where no prosecutor is present can trigger the right to counsel under the Sixth Amendment. (*See*, Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (right to appointed counsel attaches even if no public prosecutor is aware of that initial proceeding or involved in its conduct)). [↑](#endnote-ref-7)
7. Gideon, 372 U.S. at 344. [↑](#endnote-ref-8)
8. Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). [↑](#endnote-ref-9)
9. Powell v. State of Alabama, 287 U.S. 45, 69 (1932). [↑](#endnote-ref-10)
10. Coleman v. Alabama, 399 U.S. 1, 7 (1970). [↑](#endnote-ref-11)
11. Evitts v. Lucey, 469 U.S. 387 (1985) (holding there is a right to counsel on first appeal). [↑](#endnote-ref-12)
12. *See* Advisory Comm. On Servs. To Indigent Criminal Defendants, A Constitutional Default: Services To Indigent Criminal Defendants In Pennsylvania 115 (2011) (concluding that Pennsylvania does not fulfill its obligations in providing adequate or independent indigent defense). [↑](#endnote-ref-13)
13. *See* Strickland v. Washington, 466 U.S. 668 (1984). [↑](#endnote-ref-14)
14. United States v. Cronic, 466 U.S. 648 (1983); *see also* Kuren v. Luzerne Cty., 146 A.3d 715 (Pa. 2016) (finding ineffective assistance of counsel due to systemic underfunding and high caseloads of public defender office). [↑](#endnote-ref-15)
15. *See*, NAT’L ASS’N FOR PUB. DEFS., *NAPD Policy Statement on Independence*, (May 27, 2020), <https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Independence.pdf>; NAT’L ASS’N FOR PUB. DEFS., *Our Urgent Call to Action*, (May 27, 2020), <https://www.publicdefenders.us/files/NAPD_Call%20to%20Action%20re%20Policy%20Statement%20on%20Independence.pdf> .. [↑](#endnote-ref-16)
16. AMERICAN BAR ASS’N, Model Rules of Professional Conduct—About the Model Rules, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/> (last accessed Dec. 4, 2020). Pennsylvania’s Rules of Professional Conduct (“PaRPC”), which govern the state’s ethical rules, were derived from the MRPC. the MRPC and the PaRPC rules pertinent to the issues facing Montgomery County public defenders use nearly identical language. [↑](#endnote-ref-17)
17. *See*, e.g., Pa.R.P.C. 1.1 (2020) & Model Rules of Prof'l Conduct R. 1.1. (2019): (“A lawyer shall provide competent representation to a client[, which] includes the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); Pa. R.P.C.1.3 (2020) & Model Rules of Prof'l Conduct R. 1.3 (2019) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). [↑](#endnote-ref-18)
18. *See also*, Pa.R.P.C. 1.3 (2020). [↑](#endnote-ref-19)
19. *See also* *id*. at 1.4. [↑](#endnote-ref-20)
20. *See also id.* at 5.1. [↑](#endnote-ref-21)
21. Founded in 1878, the ABA is one of the largest voluntary professional membership organizations for attorneys in the country with over 356,000 members from every state. The ABA has over 35 members groups, including the ABA Ethics Committee and the Criminal Justice Section, which has nearly 60 different sub-committees that each specialize in a particular area of criminal defense law. The ABA Ethics Committee is responsible for publishing formal ethics opinions on lawyer and judicial conduct, and will, upon request, assist courts in developing professional rules and interpreting ethical standards. ABA Standing Comm. On Legal Aid And Indigent Defendants, *ABA Ten Principles Of A Public Defense Delivery System - Introduction*, (February 2002), <https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf>. [↑](#endnote-ref-22)
22. NAPD also has members who are non-attorney staff at public defender’s offices (e.g paralegals, social workers, investigators). *See*, Nat’l Ass’n For Pub. Defs., *Statement Of Purpose*, <https://www.publicdefenders.us/stateofpurpose> (last accessed Dec. 4, 2020). [↑](#endnote-ref-23)
23. “NAPD members across all 50 states share their education materials, outreach plans, communications, technical assistance, amicus/litigation resources, policy positions, leadership skills, and research and analysis methods in order to leverage the tools for change for the people in the places that need them most.” NAT’L ASS’N FOR PUB. DEFS., *Statement of Purpose*, <https://www.publicdefenders.us/stateofpurpose> (last accessed Dec. 4, 2020). [↑](#endnote-ref-24)
24. NAPD, *National Association For Public Defense Foundational Principles - Introduction*, (March 2017), <https://www.publicdefenders.us/files/NAPD%20Foundational%20Principles_FINAL_March%2016%202017(1).pdf> [↑](#endnote-ref-25)
25. *See* 16 Pa. Stat. and Cons. Stat. Ann. §§ 9960.1–9960.13 (West 2020). [↑](#endnote-ref-26)
26. *See id*. at § 9960.3. Philadelphia County utilizes a nonprofit organization, the Defender Association of Philadelphia (DAP), which has been recognized as one of the best public defender offices in the nation. Report To The Task Force And Advisory Committee On Services To Indigent Criminal Defendants, A Constitutional Default: Services To Indigent Criminal Defendants In Pennsylvania 62 (2011). [↑](#endnote-ref-27)
27. 16 Pa. Stat. and Cons. Stat. Ann. § 9960.4 (West 2020). [↑](#endnote-ref-28)
28. *Id*. [↑](#endnote-ref-29)
29. Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants, *supra* note 26, at 6. [↑](#endnote-ref-30)
30. *Id*. [↑](#endnote-ref-31)
31. 16 Pa. Stat. and Cons. Stat. Ann. § 9960.5(c) (West 2020). [↑](#endnote-ref-32)
32. *Id*. at § 9960.5(a). [↑](#endnote-ref-33)
33. *See id*. at § 9960.6. [↑](#endnote-ref-34)
34. Pa. R. Crim. P. 122(A)(1)–(2) (West 2020). [↑](#endnote-ref-35)
35. Pa. R. Crim. P. 122(B)(2) (West 2020). The Rules note that, in an ideal state, defense counsel should be appointed to represent indigent defendants “immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases.” Pa. R. Crim. P. 122 cmt. (West 2020). [↑](#endnote-ref-36)
36. 16 Pa. Stat. and Cons. Stat. Ann. § 9960.9. [↑](#endnote-ref-37)
37. *Id*. at § 9960.10a . [↑](#endnote-ref-38)
38. *See* Montgomery County., Pa., Employee Code of Ethics, <https://www.montcopa.org/DocumentCenter/View/2381/Ethics_Draft_FINAL?bidId=> (last accessed 12/29/20). [↑](#endnote-ref-39)
39. *See Id.* at 7–8. [↑](#endnote-ref-40)
40. *See* 16 Pa. Stat. and Cons. Stat. Ann. § 210. [↑](#endnote-ref-41)
41. *Id.* [↑](#endnote-ref-42)
42. Cty. Commissioners Ass’n of Pa., *Counties by Class*, https://www.pacounties.org/PAsCounties/Pages/Counties-by-Class.aspx (last accessed Nov. 11, 2020). Class 1 is designates for counties with populations of 1.5 million and higher. [↑](#endnote-ref-43)
43. United States Census Bureau, QuickFacts: Montgomery County, Pennsylvania (July 1, 2019), <https://www.census.gov/quickfacts/montgomerycountypennsylvania>. [↑](#endnote-ref-44)
44. “Collar counties” refers to the four suburban Philadelphia counties, which share contiguous borders with the city – Bucks, Montgomery, Delaware and Chester. [↑](#endnote-ref-45)
45. Cty. Commissioners Ass’n of Pa., *supra* note 42. [↑](#endnote-ref-46)
46. Original research based on data from municipal budgets and the Public Defender Association (notes on file, *Temple University Beasley School of Law*). [↑](#endnote-ref-47)
47. Rounded to the nearest 0.5 for ease of reference. [↑](#endnote-ref-48)
48. Montgomery Cty., Pa., *County Commissioners*, https://www.montcopa.org/95/County-Commissioners (last accessed Nov. 11, 2020). [↑](#endnote-ref-49)
49. *Id.* [↑](#endnote-ref-50)
50. *Id.* [↑](#endnote-ref-51)
51. *Id.* [↑](#endnote-ref-52)
52. *Id.* [↑](#endnote-ref-53)
53. *Id.* [↑](#endnote-ref-54)
54. Montgomery Cty., Pa., Proposed 2020 Budget (2019). [↑](#endnote-ref-55)
55. *Id.* [↑](#endnote-ref-56)
56. *Id.*; Montgomery Cty., Pa., Proposed 2019 Budget and Capital Improvement Program 2019-2023 (2018). [↑](#endnote-ref-57)
57. Montgomery Cty, Pa., Montgomery County Pennsylvania Proposed 2020 Budget (Nov. 21, 2019), <https://www.montcopa.org/DocumentCenter/View/26034/Proposed-2020-Budget> (last accessed Dec. 12, 2020) [↑](#endnote-ref-58)
58. Montgomery Cty. Office of Pub. Def.; Montgomery Cty., Pa., *Public Defender: Staff Directory*, https://www.montcopa.org/Directory.aspx?did=86 (last accessed Nov. 11, 2020). [↑](#endnote-ref-59)
59. *See* Montgomery Cty., Pa., *Public Defender*, https://www.montcopa.org/201/Public-Defender (last accessed Nov. 11, 2020). [↑](#endnote-ref-60)
60. *See Id.* [↑](#endnote-ref-61)
61. Montgomery Cty., Pa., *Training*, https://www.montcopa.org/2817/Training (last accessed Nov. 11, 2020). [↑](#endnote-ref-62)
62. *Id.* [↑](#endnote-ref-63)
63. *Id.* [↑](#endnote-ref-64)
64. *Id.* [↑](#endnote-ref-65)
65. *Id.* [↑](#endnote-ref-66)
66. *Id.* [↑](#endnote-ref-67)
67. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031, 1069 (2006). [↑](#endnote-ref-68)
68. *See* ABA Standing Committee on Legal Aid and Indigent Defendants, *supra* note 21, at 2. [↑](#endnote-ref-69)
69. Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15, at 2. [↑](#endnote-ref-70)
70. Polk County v. Dodson, 454 U.S. 312, 313 (1981). [↑](#endnote-ref-71)
71. Nat’l Ass’n of Pub. Defs.,Policy Statement on Independence, *supra* note 15, at 1. [↑](#endnote-ref-72)
72. *Id.* at 5 (May 2020). [↑](#endnote-ref-73)
73. Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 Iowa L. Rev. 113 (2020). [↑](#endnote-ref-74)
74. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 55. [↑](#endnote-ref-75)
75. *Id.* [↑](#endnote-ref-76)
76. ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice 20 (2004), <https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf>. [↑](#endnote-ref-77)
77. Ronald F. Wright, *Public Defender Elections and Popular Control Over Criminal Justice*, 75 Mo. L. Rev. 803, 812-13 (2010). [↑](#endnote-ref-78)
78. Nat’l Ass’n of Pub. Defs., Policy Statement on Independence, *supra* note 15, at 4. [↑](#endnote-ref-79)
79. Millan Das, *Impediments to Independence: How the Workplace Culture of Public Defender Offices Negatively Affects the Representation of Indigent Defendants*, 32 Geo. J. Legal Ethics 469, 475 (2019). [↑](#endnote-ref-80)
80. Nat’l Ass’n of Pub. Defs., Policy Statement on Independence, *supra* note 15, at 4. [↑](#endnote-ref-81)
81. *Id.* [↑](#endnote-ref-82)
82. Joe, *supra* note 73, at 19. [↑](#endnote-ref-83)
83. *Id.* at 19-20. [↑](#endnote-ref-84)
84. The Sixth Amendment Center, *Understanding judicial interference with the defense function – ABA Principle 1*, <https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/understanding-judicial-interference-with-the-defense-function-aba-principle-1/#:~:text=Although%20no%20two%20indigent%20defense>). [↑](#endnote-ref-85)
85. *See* Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 55; Const. Proj., Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel 81 (2009). [↑](#endnote-ref-86)
86. Das, *supra* note 79, at 475. [↑](#endnote-ref-87)
87. [↑](#endnote-ref-88)
88. [↑](#endnote-ref-89)
89. LARA Director Signs New Indigent Defense Minimum Standard, Protects the Fundamental Constitutional Right to Counsel, <https://docs.google.com/document/d/1TqHTaDKIQ0ELBcRqFaJDUhtkoYPbKQXjDHpcibcD5l0/edit>. [↑](#endnote-ref-90)
90. *Id.* [↑](#endnote-ref-91)
91. Interviews with Montgomery County Office of the Public Defender attorneys (conducted December 7 – 9, 2020)(notes on file, *Temple University Beasley School of Law*). Please note that the office currently has sixty-six employees and the eleven individuals we spoke with may not be representative of the entire office. [↑](#endnote-ref-92)
92. *Id*. [↑](#endnote-ref-93)
93. *Id.* [↑](#endnote-ref-94)
94. *Id.* [↑](#endnote-ref-95)
95. ABA Standing Committee on Legal Aid and Indigent Defendants, *supra* note 21, at 1. [↑](#endnote-ref-96)
96. *See*, e.g., National Advisory Commission on Criminal Justice Standards and Goals, Chapter 13, TheDefense Standards 13.8, 13.9 (1973); National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States Guidelines 2.8, 2.18, 5.13 (1976); ABA Standards for Criminal Justice, Providing Defense Services Standards 5-1.3, 5-1.6, 5-4.1 (3rd ed. 1992); Standards for the Administration of Assigned Counsel Systems Standard 2.2 (NLADA 1989);NLADA, Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services Guidelines II-1, 2 (1984); National Conference of Commissioners on Uniform State Laws, Model Public Defender Act § 10(d) (1970); Institute for Judicial Administration / ABA, Juvenile Justice Standards Relating to Counsel for Private Parties Standard 2.1(D) (1979). [↑](#endnote-ref-97)
97. Scott Wallace & David Carroll, The Implementation and Impact of Indigent Defense Standards 12 (December 2003), (citing National Advisory Commission on Criminal Justice Standards and Goals, *supra* note 96, Commentary to Standard 13.9). [↑](#endnote-ref-98)
98. Model Rules of Prof'l Conduct R. 1.7 cmt. 1 (2019). [↑](#endnote-ref-99)
99. ABA Standing Comm. On Legal Aid and Indigent Defendants, *supra* note 21, at 2. [↑](#endnote-ref-100)
100. Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 2. Members of these independent commissions can include: “officials from executive and legislative branches of government, heads of bar associations and law school deans.” In addition, “[a]ll persons chosen for a board or commission should be committed to high quality public defense and members should include one or more persons who previously were represented by a public defense lawyer. Commissions or boards should not include active public defense practitioners, judicial office holders, and active law enforcement officials of any kind such as prosecutors, police, sheriffs, or their staffs.” [↑](#endnote-ref-101)
101. *Id.* [↑](#endnote-ref-102)
102. *Id.* [↑](#endnote-ref-103)
103. Law Offices of the Public Defender, New Mexico, Greetings from the Land Of Enchantment <http://www.lopdnm.us/aboutus/> [↑](#endnote-ref-104)
104. *Id.* [↑](#endnote-ref-105)
105. Const. Proj., Justice Denied, *supra* note 85, at164. [↑](#endnote-ref-106)
106. David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, Sixth Amend. Ctr. (Mar. 2017), https://www.in.gov/publicdefender/files/Right%20to%20Counsel%20Services%

     20in%20the%2050%20States.pdf. [↑](#endnote-ref-107)
107. Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 2. [↑](#endnote-ref-108)
108. Joe, *supra* note 73, at 17. [↑](#endnote-ref-109)
109. Sixth Amendment Ctr., Massachusetts, How the right to counsel is administered and structured, <https://sixthamendment.org/know-your-state/massachusetts/> (last accessed Nov. 8, 2020). Similarly, Colorado’s public defense system is housed in the judicial branch—both the Colorado Public Defender Commission, for primary services, and the Alternate Defense Commission for conflict representation. Sixth Amendment Ctr., Colorado, How the right to counsel is administered and structured, <https://sixthamendment.org/know-your-state/colorado/> (last accessed Nov. 8, 2020). [↑](#endnote-ref-110)
110. Sixth Amendment Ctr., Alaska, How the right to counsel is administered and structured, https://sixthamendment.org/know-your-state/alaska/ (last accessed Nov. 8, 2020). Similarly, Arkansas’s Public Defender Commission sits in the executive branch and decides how to implement public defense services throughout the state. All major funding is provided by the state, with the counties contributing minor funds for office space and utilities. Sixth Amendment Ctr., Arkansas, How the right to counsel is administered and structured, https://sixthamendment.org/know-your-state/arkansas/ (last accessed Nov. 8, 2020). [↑](#endnote-ref-111)
111. Joe, *supra* note 73. [↑](#endnote-ref-112)
112. Carroll, *supra* note 106. [↑](#endnote-ref-113)
113. *Id.* [↑](#endnote-ref-114)
114. Const. Proj., Justice Denied, *supra* note 85, at 170. [↑](#endnote-ref-115)
115. Carrol, *supra* note 106. [↑](#endnote-ref-116)
116. Sixth Amendment Ctr., Texas, The right to counsel in Texas, <https://sixthamendment.org/know-your-state/texas/>. [↑](#endnote-ref-117)
117. *Id.* [↑](#endnote-ref-118)
118. Const. Proj., Justice Denied, *supra* note 85, at 172. [↑](#endnote-ref-119)
119. Robert C. Boruchowitz, The Right to Counsel in Wayne County, Michigan: Evaluation of the State Defender Office of the Metropolitan Justice Center of Southeast Michigan 4 (2018) (the Michigan Indigent Defense Commission, a fifteen-member executive agency, promulgates standards for effective representation and awards funding grants to counties for compliance with its standards.) [↑](#endnote-ref-120)
120. Const. Proj., Justice Denied, *supra* note 85, at173. [↑](#endnote-ref-121)
121. Carroll, *supra* note 106. [↑](#endnote-ref-122)
122. Sixth Amendment Ctr., Arizona, How the right to counsel is administered and structured, <https://sixthamendment.org/know-your-state/arizona/> (last accessed Nov. 8, 2020). [↑](#endnote-ref-123)
123. *See* Const. Proj., Justice Denied, *supra* note 85, at 169. [↑](#endnote-ref-124)
124. Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 2. [↑](#endnote-ref-125)
125. Carroll, *supra* note 106. [↑](#endnote-ref-126)
126. Nat’l Ass’n of Pub. Defs., Policy Statement on Independence, *supra* note 15, at 2. [↑](#endnote-ref-127)
127. Const. Proj., Justice Denied, *supra* note 85, at 148. [↑](#endnote-ref-128)
128. Carroll, *supra* note 106. [↑](#endnote-ref-129)
129. Nat’l Ass’n of Pub. Defs., Policy Statement on Independence, *supra* note 15 at 10. [↑](#endnote-ref-130)
130. *Id.* at 14. [↑](#endnote-ref-131)
131. Const. Proj., Justice Denied, *supra* note 85, at 174. [↑](#endnote-ref-132)
132. *Id.* at 160. [↑](#endnote-ref-133)
133. *Id.* at 158. [↑](#endnote-ref-134)
134. *Id.* at 159. [↑](#endnote-ref-135)
135. Sixth Amendment Ctr., Oregon, The right to counsel in Oregon, <https://sixthamendment.org/know-your-state/oregon/> [↑](#endnote-ref-136)
136. *Id.* [↑](#endnote-ref-137)
137. *Id.* [↑](#endnote-ref-138)
138. Understanding Political Interference with the Defense Function – ABA Principle 1, Sixth Amend. Ctr., [https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/the-preeminent-need-for-independence-of-the-defense-function-aba-principle-1/#](https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/the-preeminent-need-for-independence-of-the-defense-function-aba-principle-1/) (last accessed Jan. 25, 2020). [↑](#endnote-ref-139)
139. Carroll, *supra* note 106, at 129. The ABA Principles cite to the National Study Commission on Defense Services’ (NSC) Guidelines for Legal Defense Systems in the United States (1976). The Guidelines were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC Guideline 2.10 (The Defender Commission) states in part: “A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission.” [↑](#endnote-ref-140)
140. Nat’l Ass’n for Pub. Defs., Policy statement of Independence, *supra* note 15, at 13. [↑](#endnote-ref-141)
141. *Id.* at 10 (citing ABA Standards for Criminal Justice, *supra* note 96, at Standard 5-1.3, which states: “Members of governing boards should not include prosecutors and judges. This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar.”) [↑](#endnote-ref-142)
142. Const. Proj., Justice Denied, *supra* note 85, at 159. [↑](#endnote-ref-143)
143. Univ. Pa. Quattrone Ctr., Recommendations for Montgomery County to Achieve Greater Independence in Indigent Defense Provision (2020). [↑](#endnote-ref-144)
144. Nat’l Ass’n for Pub. Defs., Policy statement of Independence, *supra* note 15, at 8 (citing National Study Commission on Defense Services, *supra* note 96, at Guideline 2.10). [↑](#endnote-ref-145)
145. *See* National Study Commission on Defense Services, *supra* note 96, at Guideline 2.10 (The Defender Commission) states that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.” NSC Guideline 2.11 states that the “primary function of the Defender Commission should be to select the State Defender Director.” [↑](#endnote-ref-146)
146. Nat’l Ass’n for Pub. Defs., Policy statement of Independence, *supra* note 15, at 9. [↑](#endnote-ref-147)
147. *Id.* (citing ABA Standards for Criminal Justice, *supra* note 96, at Standards 5-4.1, Chief Defender and Staff.) [↑](#endnote-ref-148)
148. *Id.* [↑](#endnote-ref-149)
149. *Id.* [↑](#endnote-ref-150)
150. ABA Standards for Criminal Justice, *supra* note 96, at 54. [↑](#endnote-ref-151)
151. *See* Nat’l Ass’n Pub. Defs., Policy statement of Independence, *supra* note 15. [↑](#endnote-ref-152)
152. 65 Pa. Stat. and Cons. Stat. Ann. § 703 (West). [↑](#endnote-ref-153)
153. FOP Lodge No. 5 v. Phila., 500 A.2d 900, 905 (1985)(holding that a commission appointed to investigate the MOVE incident was not subject to the Sunshine Act because the commission was a limited-purpose advisory board without authority to make binding recommendations). [↑](#endnote-ref-154)
154. 65 Pa.C.S. §§ 707-708. [↑](#endnote-ref-155)
155. Id. at § 708(a). [↑](#endnote-ref-156)
156. Const. Proj., Justice Denied, *supra* note 85, at 154. [↑](#endnote-ref-157)
157. *Id.* at 156. [↑](#endnote-ref-158)
158. *Id.* [↑](#endnote-ref-159)
159. *Id.* [↑](#endnote-ref-160)
160. A significant benefit of which is simply logistical. However, because of the physical proximity of the Office to the courtrooms, we believe that moving away from the trial team system will not raise significant logistical drawbacks. [↑](#endnote-ref-161)
161. *See*, *e.g.,* Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense,* 9 Loy. J. Pub. Int. L 177, 187–88 (2008)(“Tethered to a courtroom, “the public defender's workload and time devoted to [that] work is driven primarily by the judge in their [courtroom] ... they come in when the judge does and leave when court is finished for the day… Thus, the public defender in essence becomes part of the judge's courtroom team. In this way, the Board minimized the likelihood that a lawyer would practice in a manner inconsistent with the judge's wishes.”). [↑](#endnote-ref-162)
162. Nat’l Ass’n Pub. Defs., Policy statement of Independence, *supra* note 15 at 7. [↑](#endnote-ref-163)
163. Joe, *supra* note 73, *at* 20. [↑](#endnote-ref-164)
164. Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. Crim. L. & Criminology 1479, 1486 (2006). [↑](#endnote-ref-165)
165. ABA Comm. on Legal Aid and Indigent Defendants, *supra* note 21, at 1. [↑](#endnote-ref-166)
166. *Id.* at Principle 5. [↑](#endnote-ref-167)
167. Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 3. [↑](#endnote-ref-168)
168. *Id.* at Principle 5. [↑](#endnote-ref-169)
169. DeSimone, *supra* note 164, at 1485. [↑](#endnote-ref-170)
170. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*,” 40 Conn. L. Rev. 85, 92 (2007). [↑](#endnote-ref-171)
171. Backus & Marcus, *supra* note 67, at 1579. [↑](#endnote-ref-172)
172. Gershowitz, *supra* note 166, at 92. [↑](#endnote-ref-173)
173. *See* Backus & Marcus, *supra* note 67, at 1579. [↑](#endnote-ref-174)
174. Carroll, *supra* note 106. [↑](#endnote-ref-175)
175. *Id.* [↑](#endnote-ref-176)
176. *Id.* [↑](#endnote-ref-177)
177. Backus & Marcus, *supra* note 67. Utah was also in this category until very recently, but has established a state-funded Indigent Defense Commission and moved to a statewide funding model. [↑](#endnote-ref-178)
178. Nat’l Legal Aid & Defender Ass’n, An Assessment of Indigent Defense Services in Montana 4 (Aug. 4, 2004), <https://leg.mt.gov/content/Committees/Interim/2015-2016/Public-Defender/Committee-Topics/assessment-in-montana.pdf>. (last accessed Dec. 1, 2020). [↑](#endnote-ref-179)
179. Joe, *supra* note 73, at 26; *see also* David A. Simon, *Equal Before the Law: Toward a Restoration of Gideon’s Promise*, 43 Harv. C.R.-C.L. L. Rev. 581, 594 (2008) (describing how in in counties with a disproportionately greater number of indigent residents, making funding schemes for public defender systems dependent on property tax revenues will lead to a diminishing number of indigent defendants who receive adequate representation). [↑](#endnote-ref-180)
180. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 76, at 9; *see also* Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 2-3. [↑](#endnote-ref-181)
181. Bryan Furst, Brennan Ctr. for Just., A Fair Fight: Achieving Indigent Defense Resource Parity 6 (2019). [↑](#endnote-ref-182)
182. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemp. Probs. 31, 32 (1995). [↑](#endnote-ref-183)
183. Furst, *supra* note 181, at 5. [↑](#endnote-ref-184)
184. Mich. Indigent Def. Comm’n, Delivery System Reform Models: Planning Improvements in Public Defense 4 (2016), <https://michiganidc.gov/wp-content/uploads/2015/04/Delivery-System-Reform-Models-Final-Dec-2016.pdf>. [↑](#endnote-ref-185)
185. ABA Standards for Criminal Justice, *supra* note 96, at 7. [↑](#endnote-ref-186)
186. Michigan Indigent Defense Commission, *supra* note 180.   [↑](#endnote-ref-187)
187. Furst, *supra* note 181, at 5. [↑](#endnote-ref-188)
188. Eve Hanan, *Big Law, Public Defender Style: Aggregating Resources to Ensure Uniform Quality of Representation*, 74 Wash. & Lee. L. Rev. Online 420, 432 (2018). [↑](#endnote-ref-189)
189. *See* Spangenberg & Beeman, *supra* note 182, at *33*-34. [↑](#endnote-ref-190)
190. Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. Rev. 1, 4 (1996). [↑](#endnote-ref-191)
191. Spangenberg & Beeman, *supra* note 182, at 36. [↑](#endnote-ref-192)
192. Wallace & Carroll, *supra* note 97, at 13. [↑](#endnote-ref-193)
193. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 76, at 13. [↑](#endnote-ref-194)
194. Argersinger v. Hamlin, 407 U.S. 25, 43 (concurring opinion). [↑](#endnote-ref-195)
195. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 Iowa L. Rev. 219, 225 (2004). [↑](#endnote-ref-196)
196. *Id.* at 222. [↑](#endnote-ref-197)
197. *Id.* at 230-31. [↑](#endnote-ref-198)
198. Const. Proj., Justice Denied, *supra* note 85, at 63. [↑](#endnote-ref-199)
199. Backus & Marcus, *supra* note 67, at 1096. [↑](#endnote-ref-200)
200. Wright, *supra* note 195, at 232.(The federal system pays the federal public defenders on the same scale as Assistant United States Attorneys. Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming have pay parity on a statewide basis, as do some jurisdictions operating under a county funding models, including Orange County, California and Maricopa County, Arizona.). [↑](#endnote-ref-201)
201. *See* Backus & Marcus, *supra* note 67, at 1062. [↑](#endnote-ref-202)
202. Const. Proj., Justice Denied, *supra* note 85, at 61. [↑](#endnote-ref-203)
203. *See* Backus & Marcus, *supra* note 67, at 1062. [↑](#endnote-ref-204)
204. *See also*, Newsletter, *The high costs of low pay for public defenders*, The Appeal (Nov. 2018), <https://theappeal.org/the-high-costs-of-low-pay-for-public-defenders> (accessed 1/26/2021); Roberto Roldan, *Bill to Increase Pay Parity Among VA Prosecutors and Public Defenders Dies, but Fight Continues*, VPM NPR News (Mar. 5, 2020), <https://vpm.org/news/articles/11229/bill-to-increase-pay-parity-among-va-prosecutors-and-public-defenders-dies-but> (accessed 1/26/2021); Noah Goldberg, *NYC public defenders to get pay parity with city lawyers*, Brooklyn Daily Eagle (June 14, 2019), <https://brooklyneagle.com/articles/2019/06/14/citys-public-defenders-to-get-pay-parity-with-city-lawyers/> (accessed 1/26/2021). [↑](#endnote-ref-205)
205. Const. Proj., Justice Denied, *supra* note 85, at 63. [↑](#endnote-ref-206)
206. *Id.* [↑](#endnote-ref-207)
207. Nicholas Chrastil, *City Council Passes Ordinance Bringing Public Defender Budget Closer to DA’s Office*, The Lens (Aug. 20, 2020), <https://thelensnola.org/2020/08/20/city-council-passes-ordinance-bringing-public-defender-budget-closer-to-das-office/> [↑](#endnote-ref-208)
208. Wright, *supra* note 195, at 232. [↑](#endnote-ref-209)
209. ABA Standing Comm. On Legal Aid and Indigent Defendants, *supra* note 21, at 3. [↑](#endnote-ref-210)
210. *Id.* [↑](#endnote-ref-211)
211. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 88-89. [↑](#endnote-ref-212)
212. *See* Wright, *supra* note 195, at 230. [↑](#endnote-ref-213)
213. Backus & Marcus, *supra* note 67, at 1062. [↑](#endnote-ref-214)
214. *See* Wright, *supra* note 195, at 230. [↑](#endnote-ref-215)
215. Const. Proj., Justice Denied, *supra* note 85, at 63. [↑](#endnote-ref-216)
216. Wright, *supra* note 195, at 233. [↑](#endnote-ref-217)
217. *See* Backus & Marcus, *supra* note 67, at 1062. [↑](#endnote-ref-218)
218. Chrastil, *supra* note 207. [↑](#endnote-ref-219)
219. *See, e.g.*, Furst, *supra* note 181, at 9; Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 91. [↑](#endnote-ref-220)
220. Wallace & Carroll, *supra* note 97, at 13. [↑](#endnote-ref-221)
221. Const. Proj., Justice Denied: *supra* note 85, at 93. [↑](#endnote-ref-222)
222. *Id.* at 93-94 (2009). [↑](#endnote-ref-223)
223. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 91. [↑](#endnote-ref-224)
224. Furst, *supra* note 181, at 8. [↑](#endnote-ref-225)
225. *Id.* [↑](#endnote-ref-226)
226. Joseph J. Senna, *Social Workers in Public Defender Programs*, 20 Soc. Work 271, 272 (1975). [↑](#endnote-ref-227)
227. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra*  note 12, at 93. [↑](#endnote-ref-228)
228. *Id.* [↑](#endnote-ref-229)
229. *See* ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 21, at 3. [↑](#endnote-ref-230)
230. Furst, *supra* note 181, at 9. [↑](#endnote-ref-231)
231. *See* Wright, *supra* note 195, at 231. [↑](#endnote-ref-232)
232. American Bar Ass’n Standing Comm. on Legal Aid and Indigent Defendants, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice 14 (2004). [↑](#endnote-ref-233)
233. Wright, *supra* note 195, at 236. [↑](#endnote-ref-234)
234. *Id.* [↑](#endnote-ref-235)
235. *Id.* [↑](#endnote-ref-236)
236. *Id.* [↑](#endnote-ref-237)
237. *See*  *Id.* [↑](#endnote-ref-238)
238. *See* Furst, *supra* note 181, at 9. [↑](#endnote-ref-239)
239. Douglas v. California, 372 U.S. 353, 355 (1963). [↑](#endnote-ref-240)
240. Joe, *supra* note 73, at 24. [↑](#endnote-ref-241)
241. Spangenberg & Beeman, *supra* note 182, at 44. [↑](#endnote-ref-242)
242. *See Id.* at 45. [↑](#endnote-ref-243)
243. *Id.* at 46. [↑](#endnote-ref-244)
244. *See Id.* at 45. [↑](#endnote-ref-245)
245. Sixth Amendment Ctr., New Jersey, How the right to counsel is administered and structured, <https://sixthamendment.org/know-your-state/new-jersey/> (last accessed Nov. 8, 2020). [↑](#endnote-ref-246)
246. Interviews, *supra* note 91. [↑](#endnote-ref-247)
247. *Id.* [↑](#endnote-ref-248)
248. *Id.* [↑](#endnote-ref-249)
249. *Id.* [↑](#endnote-ref-250)
250. Bender v. Wisconsin, No. 19-CV-29-WMC, 2019 WL 4466973, at \*1 (W.D. Wis. Sept. 18, 2019). [↑](#endnote-ref-251)
251. *Id.* [↑](#endnote-ref-252)
252. Sprint Communications, Inc. v. Jacobs, 134 S. Ct. 584 (2013) . [↑](#endnote-ref-253)
253. *Id.* [↑](#endnote-ref-254)
254. Bender, 2019 WL 4466973, at \*4. [↑](#endnote-ref-255)
255. Yarls v. Bunton, 905 F.3d 905, 912 (5th Cir. 2018). [↑](#endnote-ref-256)
256. *Id.* [↑](#endnote-ref-257)
257. This was, in fact, the argument raised by the *Yarls* plaintiffs in their application for appeal. The question was not resolved in the court’s denial of the application, as the court leaned on the alternative ground of Article III non-justiciability to justify denying the appeal. *See Id*. [↑](#endnote-ref-258)
258. Kuren, 146 A.3d at 719. [↑](#endnote-ref-259)
259. *Id.* [↑](#endnote-ref-260)
260. The suit also listed a cause of action under 42 U.S.C. §1983. [↑](#endnote-ref-261)
261. Kuren at 146 A.3d at 718. [↑](#endnote-ref-262)
262. *Id.* at 730. [↑](#endnote-ref-263)
263. Wallace & Carroll, *supra* note 97, at 19. [↑](#endnote-ref-264)
264. Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 Judicature 87, 87 (2010). [↑](#endnote-ref-265)
265. Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 Ind. Int’l & Comp. L. Rev. 237, 247 (2015). [↑](#endnote-ref-266)
266. *Id.* at 247-48. [↑](#endnote-ref-267)
267. *Id.* at 246. [↑](#endnote-ref-268)
268. Farole, Jr. & Langton, *supra* note 264, at 87. [↑](#endnote-ref-269)
269. Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 St. Thomas L. Rev. 104, 106 (2009). [↑](#endnote-ref-270)
270. Const. Proj., Justice Denied, *supra* note 85, at 65. [↑](#endnote-ref-271)
271. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 21, at 2. [↑](#endnote-ref-272)
272. *See* Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 3. [↑](#endnote-ref-273)
273. Furst, *supra* note 181, at 7. [↑](#endnote-ref-274)
274. Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America,* 31 Quinnipiac L. Rev. 713, 732 (2013). [↑](#endnote-ref-275)
275. *Id.* [↑](#endnote-ref-276)
276. *Id.* [↑](#endnote-ref-277)
277. Susan Herlofsky & Geoffrey Isaacman, *Minnesota’s Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source*, 37 Wm. Mitchell L Rev. 559, 581 (2011). [↑](#endnote-ref-278)
278. Const. Proj., Justice Denied, *supra* note 85, at 66. [↑](#endnote-ref-279)
279. Samantha Jaffe, *“It’s Not You, It’s Your Caseload”: Using* Cronic *to Solve Indigent Defense Underfunding*, 116 Mich. L. Rev. 1465, 1477 (2018). Modern cases increasingly rely on developments in science and technology, which require specialized training and more time to develop an effective defense; Advisory Comm. on Servs. to Indigent Criminal Defendants, A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania 70 (2011). [↑](#endnote-ref-280)
280. Jaffe, *supra* note 274, at 1477. [↑](#endnote-ref-281)
281. Heidi Reamer Anderson, *Funding* Gideon*’s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 Hastings Cont. L.Q. 421, 427 (2012). [↑](#endnote-ref-282)
282. Cynthia G. Lee et al., Nat. Ctr. State Courts, North Carolina Office of Indigent Defense Services Workload Assessment 3 (2019). [↑](#endnote-ref-283)
283. Mich. Indigent Def. Comm’n, Minimum Standards for Indigent Criminal Defense Services 7 (Nov. 18, 2020), <https://michiganidc.gov/wp-content/uploads/2020/10/MIDC-Standards-November-2020-complete.pdf>. [↑](#endnote-ref-284)
284. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense,* Minn. L. Rev. 1771 (2016) <https://www.minnesotalawreview.org/wp-content/uploads/2016/06/Primus_Online.pdf> [↑](#endnote-ref-285)
285. *Id.* [↑](#endnote-ref-286)
286. Backus & Marcus, *supra* note 67, at 1090. [↑](#endnote-ref-287)
287. F. Randall Karfonta, *Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers*, 71 Mich. B.J. 164, 165 (1992). [↑](#endnote-ref-288)
288. *Id.* [↑](#endnote-ref-289)
289. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 76, at 11. [↑](#endnote-ref-290)
290. Karfonta, *supra* note 287, at 168. [↑](#endnote-ref-291)
291. ABA Standing Comm. On Legal Aid and Indigent Defendants, *supra* note 21, at 3. [↑](#endnote-ref-292)
292. *Id.* [↑](#endnote-ref-293)
293. *Id.* [↑](#endnote-ref-294)
294. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 76, at 11; *see also* Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 3. [↑](#endnote-ref-295)
295. Karfonta, *supra* note 287, at 166. For example, the National Association of Criminal Defense Lawyers offers free public defense training programs for indigent defense providers whose training may be considered “grossly inadequate.” Nat’l Assoc. Criminal Def. Lawyers, Public Defense Training Programs, <https://www.nacdl.org/Content/PublicDefenseTrainingPrograms> (last accessed Dec. 5, 2020). [↑](#endnote-ref-296)
296. Thompson, *supra* note 274, at 730-31. [↑](#endnote-ref-297)
297. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 96. [↑](#endnote-ref-298)
298. Model Rules of Prof'l Conduct R. 5.1 (2019). [↑](#endnote-ref-299)
299. *Id.* at R. 5.1(c). [↑](#endnote-ref-300)
300. ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 21, at 3. [↑](#endnote-ref-301)
301. Backus & Marcus, *supra* note 67, at 1090. [↑](#endnote-ref-302)
302. Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 4. [↑](#endnote-ref-303)
303. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action,* Champion, Dec. 2006, at 10, 14. [↑](#endnote-ref-304)
304. *Id.* [↑](#endnote-ref-305)
305. Mich. Indigent Def. Comm’n, *supra* note 180, at 15. [↑](#endnote-ref-306)
306. *Id.* [↑](#endnote-ref-307)
307. Robert C. Boruchowitz, Malia N. Brink, & Maureen Dimino, *Minor Crimes, Massive Waste The Terrible Toll of America’s Broken Misdemeanor Courts*, National Association of Criminal Defense Lawyers 40 (2009) <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [↑](#endnote-ref-308)
308. Backus & Marcus, *supra* note 67, at 1092. [↑](#endnote-ref-309)
309. *Id.* [↑](#endnote-ref-310)
310. Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, 29 N.Y.U. Rev. L. & Soc. Change 123, 125 (2004). [↑](#endnote-ref-311)
311. Wallace & Carroll, *supra* note 97, at 13-14. [↑](#endnote-ref-312)
312. *Id.* [↑](#endnote-ref-313)
313. *Id.* at 47. [↑](#endnote-ref-314)
314. *Id.* [↑](#endnote-ref-315)
315. Lynn Langton & Donald Farole, Jr., Ph.D., *State Public Defender Programs, 2007*, U.S. Dep’t Just. NCJ 228229, at 8 (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> [↑](#endnote-ref-316)
316. Irene Oritsweyinmi Joe, *Systematizing Public Defender Rationing*, 93 Denv. L. Rev. 389, 414 (2016). [↑](#endnote-ref-317)
317. *See* ABA Standing Comm. on Legal Aid and Indigent Defendants, supra note 21, at 7. [↑](#endnote-ref-318)
318. Langton & Farole, Jr., *supra* note 315, at 8. [↑](#endnote-ref-319)
319. Joe, *supra* note 316, at 392. [↑](#endnote-ref-320)
320. *Id.* [↑](#endnote-ref-321)
321. *Id.* at 396. “Messenger representation, if it lacks substantial counseling on the benefits and consequences of accepting or rejecting a plea offer, is likely deficient and can lead to systemic and individual case challenges to the representation. [↑](#endnote-ref-322)
322. *Id.* [↑](#endnote-ref-323)
323. *Id.* [↑](#endnote-ref-324)
324. Steinberg & Feige, *supra* note 310, at 123-24. [↑](#endnote-ref-325)
325. *Id.* at 124-25. [↑](#endnote-ref-326)
326. *See* Nat’l Ass’n of Pub. Defs., *supra* note 24, at Principle 4. [↑](#endnote-ref-327)
327. *Id.* [↑](#endnote-ref-328)
328. Sarah Buchanan and Roger Nooe, *Defining Social Work within Holistic Public Defense: Challenges and Implications for Practice*, National Association of Social Workers Volume 62, Number 4, 335 (Oct, 2017). [↑](#endnote-ref-329)
329. *Id.* [↑](#endnote-ref-330)
330. *Id.* [↑](#endnote-ref-331)
331. James Anderson, Maya Buenaventura, and Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (2019). [↑](#endnote-ref-332)
332. *Id.* [↑](#endnote-ref-333)
333. *Id.* [↑](#endnote-ref-334)
334. *Id.* [↑](#endnote-ref-335)
335. *See* ABA Standing Committee on Legal Aid and Indigent Defendants, *supra* note 21, at Introduction. [↑](#endnote-ref-336)
336. DeSimone, *supra* note 164, at 1486. [↑](#endnote-ref-337)
337. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 53. [↑](#endnote-ref-338)
338. Padilla, 559 U.S. at 366. [↑](#endnote-ref-339)
339. Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 Hastings L.J. 835, 906 (2004). [↑](#endnote-ref-340)
340. Const. Proj., Justice Denied, *supra* note 85, at 91. [↑](#endnote-ref-341)
341. *See* Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 9. [↑](#endnote-ref-342)
342. New York State, First Judicial Department Indigent Defense Organization Oversight Committee, General Requirements For All Organized Providers Of Defense Services To Indigent Defendants, Indigent Defense Organization Oversight Committee, 1 (July 1, 1996, as amended May 2011) <http://www.courts.state.ny.us/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20_requirements.pdf> [↑](#endnote-ref-343)
343. *Id.* at 4. [↑](#endnote-ref-344)
344. *Id.* [↑](#endnote-ref-345)
345. Wallace & Carroll, *supra* note 97, at iii. [↑](#endnote-ref-346)
346. *Id.* [↑](#endnote-ref-347)
347. *Id.* at 30. [↑](#endnote-ref-348)
348. Carroll, *supra* note 106. [↑](#endnote-ref-349)
349. *Id.* [↑](#endnote-ref-350)
350. Wallace & Carroll, *supra* note 97, at iv. [↑](#endnote-ref-351)
351. *Id.* [↑](#endnote-ref-352)
352. *See* Const. Proj., Justice Denied, *supra* note 85. [↑](#endnote-ref-353)
353. Wallace & Carroll, *supra* note 97, at 8. [↑](#endnote-ref-354)
354. *Id.* [↑](#endnote-ref-355)
355. *Id.* [↑](#endnote-ref-356)
356. *Id.* at 9 (emphasis added). [↑](#endnote-ref-357)
357. *Id.* [↑](#endnote-ref-358)
358. *Id.* [↑](#endnote-ref-359)
359. *Id.* [↑](#endnote-ref-360)
360. Const. Proj., Justice Denied, *supra* note 85, at 162. [↑](#endnote-ref-361)
361. *Id.* [↑](#endnote-ref-362)
362. *Id.* at 163-64. [↑](#endnote-ref-363)
363. Carroll, *supra* note 106. [↑](#endnote-ref-364)
364. *Id.* [↑](#endnote-ref-365)
365. *Id.* [↑](#endnote-ref-366)
366. Sixth Amendment Ctr., *Texas*, <https://sixthamendment.org/know-your-state/texas/> [↑](#endnote-ref-367)
367. Interviews, *supra* note 91. [↑](#endnote-ref-368)
368. *Id.* [↑](#endnote-ref-369)
369. *Id.* [↑](#endnote-ref-370)
370. *Id.* [↑](#endnote-ref-371)
371. *Id.* [↑](#endnote-ref-372)
372. *Id.* [↑](#endnote-ref-373)
373. *Id.* [↑](#endnote-ref-374)
374. *Id.* [↑](#endnote-ref-375)
375. *Id.* [↑](#endnote-ref-376)
376. Examples of formal policies adopted by public defender offices include those setting forth guidance regarding equal employment and diversity; confidentiality; maintenance and form of case files; caseload management; political activity; expenditures for expert services; performance standards and evaluations; ineffective assistance of counsel responses; general code of conduct; ethical adherence; promotions and salary increases; complaint channels and procedures; adverse action/discrimination claims; time off and leave; client correspondence and decisionmaking; CLE compliance and training expectations; etc. [↑](#endnote-ref-377)
377. *See* 16 Pa. Stat. and Cons. Stat. Ann. § 9960 (West 2020). [↑](#endnote-ref-378)
378. Interviews, *supra* note 91. [↑](#endnote-ref-379)
379. *Id.* [↑](#endnote-ref-380)
380. *Id.* [↑](#endnote-ref-381)
381. *Id.* [↑](#endnote-ref-382)
382. *Id.* [↑](#endnote-ref-383)
383. *Id.* [↑](#endnote-ref-384)
384. *Id.* [↑](#endnote-ref-385)
385. *Id.* [↑](#endnote-ref-386)
386. *See* 16 Pa. Stat. and Cons. Stat. Ann. §§ 9960.1–9960.13. [↑](#endnote-ref-387)
387. [↑](#endnote-ref-388)
388. *See* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15. [↑](#endnote-ref-389)
389. *See* Montgomery County website, Boards & Commissions,[*https://www.montcopa.org/94/Boards-Commissions*](https://www.montcopa.org/94/Boards-Commissions)(last accessed 01/27/2021). [↑](#endnote-ref-390)
390. Sixth Amendment Ctr., Oregon, *supra* note 135. [↑](#endnote-ref-391)
391. *See* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15. [↑](#endnote-ref-392)
392. It is critical that there is no implication that public defenders are subject to control of their adversaries. *See* American Bar Association Standards For Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standard 5-1.3; *see also* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15. [↑](#endnote-ref-393)
393. Const. Proj., Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel 160 (2009). [↑](#endnote-ref-394)
394. *See* Univ. Pa. Quattrone Ctr., Legal Landscape (2020) (describing the Travis County, TX local commission comprising academic, private defense attorney, former public defender, individuals impacted by the criminal justice system, community advocates, a retired judge, and a commissioner’s court representative). [↑](#endnote-ref-395)
395. *See* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15. (stating that an independent commission “should have appointees who have staggered term limits made by multiple appointing authorities”). [↑](#endnote-ref-396)
396. *See* 16 Pa. Stat. and Cons. Stat. Ann. §§ 9960.1–9960.13 (West 2020).  [↑](#endnote-ref-397)
397. *See* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15 (advocating for removal of the Chief Public Defender for good cause only and after being given due process). [↑](#endnote-ref-398)
398. Interviews, *supra* note 91. [↑](#endnote-ref-399)
399. *Id.* [↑](#endnote-ref-400)
400. Interviews, *supra* note 91. [↑](#endnote-ref-401)
401. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 88-89. [↑](#endnote-ref-402)
402. Steinberg & Feige, *supra* note 310, at 124. [↑](#endnote-ref-403)
403. To maintain a positive office culture within indigent defense services and ensure the quality of indigent representation, the caseloads of defense attorneys should be effectively managed and kept to reasonable levels. *See*, Wallace & Carroll, *supra* note 97, at 19. [↑](#endnote-ref-404)
404. Professional rules of conduct and model systems require that an attorney’s caseload and workload be controlled to ensure that they can deliver quality representation for their indigent defendants. *See* Farole, Jr. & Langton, *supra* note 264. [↑](#endnote-ref-405)
405. F. Randall Karfonta, *Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers*, 71 Mich. B.J. 164, 166 (1992). For example, the National Association of Criminal Defense Lawyers offers free public defense training programs for indigent defense providers whose training may be considered “grossly inadequate.” Nat’l Assoc. Criminal Def. Lawyers, Public Defense Training Programs, https://www.nacdl.org/Content/PublicDefenseTrainingPrograms (last accessed Dec. 5, 2020). [↑](#endnote-ref-406)
406. Brennan, *supra* note 265, at 247. [↑](#endnote-ref-407)
407. Including non-attorney staff, such as administrators, paralegals, social workers, investigators and legal interns. [↑](#endnote-ref-408)
408. Steinberg & Feige, *supra* note 310, at 127. [↑](#endnote-ref-409)
409. *Id.* at 126. [↑](#endnote-ref-410)
410. *Id.* [↑](#endnote-ref-411)
411. Montgomery Cty. Office of Pub. Def. [↑](#endnote-ref-412)
412. DeSimone, *supra* note 164, at 1486. [↑](#endnote-ref-413)
413. Wallace & Carroll, *supra* note 97, at 8. [↑](#endnote-ref-414)
414. *Id.* [↑](#endnote-ref-415)
415. *Id.* [↑](#endnote-ref-416)
416. *Id.* [↑](#endnote-ref-417)
417. *See* Nat’l Ass’n of Pub. Defs. Policy Statement on Independence *supra* note 15 (describing how adopting nationally recognized standards can be useful guides in implementing public defense). [↑](#endnote-ref-418)
418. *See* 16 Pa. Stat. and Cons. Stat. Ann. § 9960. [↑](#endnote-ref-419)
419. *See Id.* [↑](#endnote-ref-420)
420. *See* Gideon, 372 U.S. 335. [↑](#endnote-ref-421)
421. *See* Nat’l Ass’n of Pub. Defs., *supra* note 24; ABA Standing Committee on Legal Aid and Indigent Defendants, *supra* note 21, at 2. [↑](#endnote-ref-422)
422. *See* ABA Standing Committee on Legal Aid and Indigent Defendants, *supra* note 21 (“The responsibility to provide public defense rests with the state...there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”). [↑](#endnote-ref-423)
423. Nat’l Ass’n of Pub. Defs., *supra* note 24. [↑](#endnote-ref-424)
424. Advisory Comm. on Servs. to Indigent Criminal Defendants, *supra* note 12, at 13. [↑](#endnote-ref-425)