

THINK

Using Data to Sustain and Improve  
Public Defense Programs

INSPIRE

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on behalf of

The American Bar Association  
Standing Committee on Legal Aid and Indigent Defendants

CHANGE

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## INTRODUCTION

At the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants 7<sup>th</sup> Annual Summit on Indigent Defense, held in February, 2012, panels addressed a broad array of topics including: recent developments in state indigent defense systems, pending indigent defense litigation, caseloads and ethics, and the role of the private bar in securing improvements to indigent defense. After listening to the many esteemed panelists, Jim Bethke, a member of SCLAID’s Indigent Defense Advisory Group, was asked if he could summarize the day. “My key takeaway for the day,” Bethke said, “is the critical importance data plays to improve indigent defense.” Indeed, in every panel, numbers were cited as the protagonists in pushing indigent defense systems toward improvement.

Despite the value that data have for improving indigent defense, relatively little is known nationally about the types of data typically collected by defenders, how these data are managed and analyzed, and how best to use data. Data are important for all types of indigent defense programs – including assigned counsel and contract programs - in advocating for themselves and their clients, but this paper addresses the critical importance of good data to public defender organizations in particular. It will explain why data are so important, first, internally, in monitoring and allocating workload amongst staff, and second, externally, through persuasive budget preparation, analysis of case trends, in support of systemic litigation, and to be able to justify temporary declination of additional cases. It will offer examples of innovative data collection and use, such as the work done by the North Carolina Office of Indigent Defense Services, in Harris County, Texas and in King County, Washington, and discuss limits of some standards and guidelines. Responses to a survey sent by The Justice Management Institute (JMI) to members of the National Legal Aid and Defender Association’s American Council of Chief Defenders about their uses of data illustrate points throughout the paper.

This paper is not intended to be the last word on defender organization data collection, analysis and use. The topic of “good data” is extremely broad and pertains to numerous applications. The paper intends to provoke thought among chief defenders and their management staff, including IT professionals, about what data they are currently capturing, how they are using it, and whether there might be additional undertakings in which good data could form the basis for securing improved resources for their office, or responsiveness of the criminal justice system to their clients. The importance of telling your story and making your case through evidence is second nature to public defenders. This paper seeks to convey the notion that outside the courtroom, defense agencies need that same foundation of solid evidence, framed through persuasive advocacy, to make and sustain improvement for their offices.

## BACKGROUND

The scope of indigent defense services in the United States is prescribed largely by a body of case law that sets out the types of cases and proceedings in which indigent adults and juveniles are entitled to court-appointed counsel under the Sixth Amendment's right to counsel guarantee.<sup>1</sup> Case law also clarifies that representation for indigent defendants must be "meaningful and effective." Further, *all* lawyers have a duty to furnish "competent" and "diligent" service under rules of professional conduct.

There is enormous demand for indigent defense representation in the United States: researchers estimate that 60 to 90 percent of all criminal cases involve indigent defendants. There are an estimated 10 million misdemeanor cases per year in the U.S., or one for every 35 or so residents. Public defender, contract and court-appointed counsel are often under extreme pressure to do more, and often to do more with less. However, the indigent defense field has been slow to establish, through research and social science, metrics which define "meaningful and effective" representation, and to therefore clearly signal to funders the limits beyond which defense lawyers cannot deliver on constitutional requirements and professional obligations to their clients. Time-strapped, budget-minded legislators with little understanding of criminal defense practice look to clear indicators and data on which to assess indigent defense system needs. The absence of such metrics affects public defenders disproportionately, as they handle the lion's share of indigent defendant cases in the United States.

Although the indigent defense field has been somewhat slow to embrace empirical and evidence-based measures to define its work, much has been done by national, state and local bodies to explain what are necessary components of effective representation.<sup>2</sup> Such practice components are

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<sup>1</sup>The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence." Until the 1960s, case law acknowledged the right to counsel in state courts only in capital cases. *Powell v. Alabama*, 287 U.S. 45 (1932). Starting in 1963, case law sometimes referred to as "*Gideon* and its progeny" expanded the right to counsel for indigents to include state felony cases, *Gideon v. Wainwright*, 372 U.S. 335 (1963), misdemeanors, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and juvenile delinquency cases, *In Re Gault*, 387 U.S. 1 (1967). For a full sketch of the development of the right to counsel through case law, see Chapter 1 of *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, (The Constitution Project 2009).

<sup>2</sup> For example, Guideline 1 of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads (August 2009) provides: "The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. In determining whether these objectives are being achieved, the Provider considers whether the performance obligations of lawyers who represent indigent clients are being fulfilled, such as:

- whether sufficient time is devoted to interviewing and counseling clients;
- whether prompt interviews are conducted of detained clients and of those who are released from custody;
- whether pretrial release of incarcerated clients is sought;
- whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;
- whether necessary investigations are conducted;

quantifiable through numerical counts and other information tracking. With the proliferation of performance standards and guidelines being adopted as indicators of an indigent defense system's effectiveness, it has become essential for defender organizations to have case information systems capable of tracking compliance with the standards and guidelines. Even in jurisdictions without formal standards and guidelines, or in jurisdictions that do not enforce compliance, the collection and use of accurate, accessible data can have a number of significant benefits for defender programs.

First, data can help identify deficiencies in an indigent defense system in terms of the quality of representation and the operation of the system itself. Second, increasingly funders of defense systems expect budgets to be based on quantitative data (i.e., performance-based budgeting). Data on the number of clients, cases, workload, case processing times, court appearances, cost of expert witnesses, etc. can help support routine budget requests. Third, data can be used to explain and justify a request that a court cease case appointments due to excessive attorney caseloads. Fourth, with so much emphasis nationally on data-driven policy and practice development, good data can be used to help study trends in indigent defense and develop the most effective strategies for dealing with emerging or endemic problems. In a nutshell, data can be used affirmatively to problem solve and innovate, helping to advance indigent defense systems within individual jurisdictions and states as well as nationally.

The paper is divided into two broad sections. The first section addresses internal considerations concerning what information defender agencies should collect and review, and ways to do so. The second section concentrates on external applications of data to promote and protect effective indigent defense practice.

## **I. INTERNAL CONSIDERATIONS: WHAT TO TRACK, WAYS TO TRACK**

"Data" is a small word with many meanings. The Merriam Webster online definition of data is "factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation." A primary task for defender agencies when determining what information to track is to first understand what the information will be used for, what types of data are needed to support these uses, and what are the best strategies for collecting the data.

As mentioned earlier, defender agencies have a number of internal and external uses for data. Some of the internal uses of data include:

- Conduct intake and perform conflict checks
- Continuously monitor and manage workload across staff
- Track outcomes: acquittals, sentences, deferrals, etc.

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whether formal and informal discovery from the prosecution is pursued;  
whether sufficient legal research is undertaken;  
whether sufficient preparations are made for pretrial hearings and trials; and  
whether sufficient preparations are made for hearings at which clients are sentenced."

- Document exactly what is done for clients – contacts made, motions filed, use of experts, etc. – to protect the record in case of appeal
- Develop and apply workload standards and case weights
- Track attorney time, as well as that of other case-handlers, including investigators and social workers
- Manage with clear expectations and performance measures.

Externally, defense agencies need data to demonstrate the need for and value of their services to funders and to respond to legislation or other proposed initiatives that could affect the quality or availability of representation. More on external uses of data will be covered in the second section of this paper, but it is important to recognize that the same data are relied on for both internal and external purposes, just with different emphasis and presentation. Thinking through as many of those applications as possible in advance will help in designing systems that capture information that is available when it is needed or desired.

### **WHAT TO TRACK: INSIGHT FROM THE FIELD**

The National Legal Aid and Defender Association’s American Council of Chief Defenders (ACCD) includes the heads of dozens of local and state public defender programs throughout the U.S., effectively representing the voice of America's indigent defense leadership. In the course of preparing this paper, JMI sent an electronic survey to ACCD members inquiring about their uses of data. A small sample, 23 chief defenders, responded to the survey.<sup>3</sup> When asked what type(s) of data respondents considered most important to track, not surprisingly, the number one item mentioned was “caseload,” but responses emphasized that the number of cases alone cannot tell the complete story of a defender office. Context counts and public defenders need different types of data and information to satisfy inquiries from different audiences. Certainly, though, there are some basics every program should have at its fingertips to respond to those various audiences. ACCD respondents offered the following:

- Budget presentations, which often must track performance metrics, rely on basic case processing information including date file opened, date case tried/brief filed, and date case closed to report on average case processing time.
- Characteristics of the clients served, such as age, gender, race, mental health status and immigration status, are useful for government and non-governmental funders.
- For evaluation of the program and future planning, data on case numbers, charges, dispositions, time, case activities, client demographics and client satisfaction are all important.

One chief defender’s summary was, “number of cases that attorneys, investigators, social workers are assigned, have open; types of cases; length the staff has had the case; client contacts, time

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<sup>3</sup> Clearly the views of just 23 respondents are not representative of chief defenders nationwide, but the sample is likely reflective of chief defenders who are currently grappling with data uses. Their responses are used to illustrate points throughout the paper.

of initial contact with client, when and what motions, investigations in the case; number of trials; disposition data; budget information on fiscal costs by case.”

Cost per case is a commonly used metric and in jurisdictions using a mixed system of public defender and private court-appointed or contract attorneys, legislators are interested in the comparative cost of a case handled by a public defender versus a private or contract attorney. Increasingly, though, the simple indicator of cost per case is accompanied by further qualification, such as case outcomes and time spent. And as more jurisdictions adopt evidence based decision making practices, which seek to address underlying drivers of criminal behavior, client recidivism rates will be more commonly assessed in connection with cost.

### WHAT TO TRACK: ONE OFFICE’S EXPERIENCE

In February 2011, Harris County, Texas opened its first public defender office and phased in the types of cases it accepts, starting out handling mentally ill defendants facing misdemeanor charges and appeals cases for the indigent, and later bringing on its juvenile and felony divisions. Although starting a defender office from scratch is a labor-intensive undertaking, there are certain advantages to starting out with a clean slate, including the opportunity to build a case management system that will truly serve the needs of the office. Alex Bunin, Chief Public Defender in Harris County, Texas, is using his case management system to track multiple measures that can be shared with multiple audiences about the office’s performance. Working with the Council for State Governments Justice Center in Austin, Bunin has been fine-tuning what are the most important measures to track to assess performance of the young office.

The office’s detailed Personnel Manual serves as a road map for the data metrics tracked. The Manual sets out clear expectations of what constitutes effective case handling through all phases of a case, from initial attorney-client contact, through sentencing and on appeal. Bunin says it is crucial to think through what should be counted, to be sure that it is valuable. “There is no point to counting for the sake of counting.” The office has worked to identify those measures truly related to quality, such as attorney-client meetings, or case investigation, and the time in which they are performed. The office uses the defenderData® case management system and requires all attorneys, investigators and social workers to track their time by case and activity. Bunin says defenderData® has proved very flexible, capable of adding check boxes and drop-down screens to easily capture descriptive information on clients, such as immigration status, or non-English speaker, that may impact case handling. The system has been designed to capture time put into case activities at all case stages, including case preparation, the decision to enter a plea, trial preparation, and sentencing practices. In addition to tracking information pertaining to the office’s internal performance expectations, they track and report on requirements of the state’s Fair Defense Act, enacted in 2001 and administered through the Texas Indigent Defense Commission to enhance the delivery of indigent defense services across the state’s 254 counties.

Bunin found that certain metrics have little value, such as tracking office “successes” when success is defined only as acquittal. Also, different audiences view data differently, so even with solid

statistics, it is important to compliment them with anecdotal information, such as interviews with judges and local lawyers. County commissioners, the local defense bar, the state indigent defense oversight commission and a public defender division chief will not find the same information interesting or useful for their purposes, so flexibility in presenting information is key. He has also found that reaching out to other established defender organizations is valuable. He turns to various programs, including the Colorado State Public Defender, Washington, DC Public Defender Service, the North Carolina Office of Indigent Defense Services, the San Mateo, California Private Defender Program, as well the American Association of Chief Defenders for ideas and best practices.

### **YOU CAN'T ALWAYS GET WHAT YOU WANT**

When asked what type of information they wish they had ready access to but do not, respondents to the ACCD survey mentioned “outcomes” several times. Additional answers included the following, which are indicative of the data limitations facing public defender programs nationally (all are verbatim responses):

- Comparison data on productivity/efficiency/quality of a public defender versus a private contract attorney. We also have limited access to time spent on a case for public defender employees. Would like to be able to coordinate our data with all state courts data to determine how much of the criminal caseload is handled by some court appointed attorney.
- Court and prosecutor data on number of case types filed, average days to disposition, these percentages of cases handled, clients open and substitution rates for each indigent provider in a comparative format.
- Actual time devoted to trials.
- Data on race and ethnicity compared to case outcome.
- Data electronically transferred from courts and corrections.
- Early conflict identification.
- Accurate dispositional information.

While the value of good data is well understood by defender organizations, it is difficult to get without a good case management system. The next section discusses features of effective case tracking systems.

### **WAYS TO TRACK: YOUR CASE MANAGEMENT SYSTEM**

A reliable case management system (CMS) is a necessity for every defender office in order to, at a minimum, monitor workload internally and to prepare persuasive and justifiable budget requests for funders. Case management systems help with calendaring, client/relationship tracking, administrative tracking, performance monitoring, human resource management, and document management. Good case management systems can also produce data to identify patterns of practice that will help improve office effectiveness/efficiency and problems within the criminal justice system. Of course, any case

management system is only as good as the data entered into it. All users, whether intake clerks or attorneys, must be trained in consistently entering accurate data.

When picking a new CMS, defender managers can choose from various options ranging from a tailor-made CMS that is designed and maintained in-house, to an off-the-shelf package with templates that are adapted to the specific needs of an office. The ideal solution is an integrated CMS, with shared data used by the police, courts, prosecution and probation. Case management system integration reduces data entry costs and improves accuracy and consistency of information across a jurisdiction's criminal justice system. Unfortunately, as sensible as it sounds to share and track common data, integrated case management systems have not been widely adopted.

One way to think of a CMS is to consider it the repository of various buckets of information, or various functions. Categories for a public defender trial office include:

- Client Information: data and documentation.
- Other Parties and Contacts/Resources: witnesses, investigators, mental health professionals, experts, and forensic labs.
- Discovery: evidence and supporting documentation.
- Events Calendar: meetings with clients; depositions; preliminary, motions and plea hearings; and trials.
- Trial Management: contains the master case file, plea bargaining records as well as rich data on bench and jury trials, orders and verdicts/sentencing.
- Post-Trial Management: could track client fines, costs and restitution.
- Management Information: tracks hours and time spent by client, by type of case, as well as other performance criteria.

Another category of information to track addresses activities of other criminal justice system actors to assess systemic patterns. Information on sentencing patterns among judges, information on individual police officers and police agencies' practices, and information on expert witnesses fit into this category.

The primary type of CMS used by respondents to the ACCD survey is a system developed in-house (used by 59% of 23 respondents). The following figure provides responses to the survey question regarding type of case management system being used.

### What type of case management system (CMS) do you use?

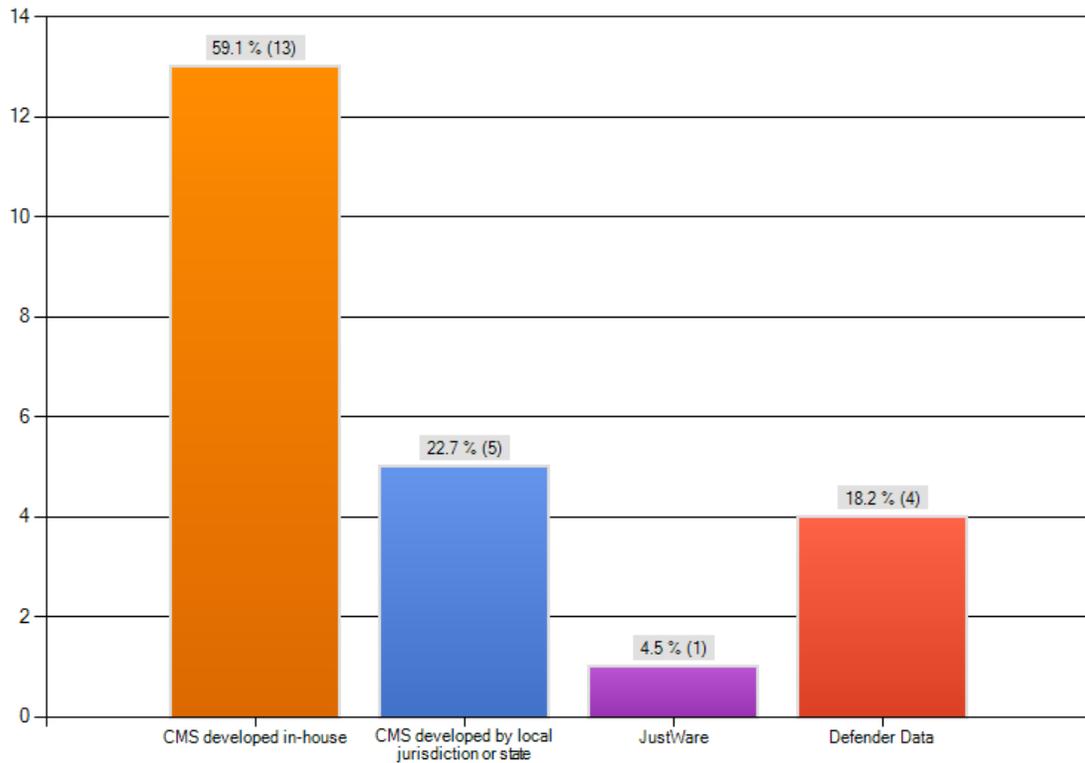


Figure 1

Additional responses mentioned but not captured in the figure include Time Matters, ProLaw and the New York State Defenders Association's New York Public Defender Case Management System.

When it is time for a new CMS, public defenders should think about the level of development and support that are available – perhaps for free - from their jurisdiction. If resources are ample, an in-house program could well be the best solution. Another possibility is a vendor that tailors its basic program to an individual office, and provides ongoing data back-up, data retention, and system security. Providers offering “hosted solutions” maintain the data off-site on their own high band-width servers. Data are encrypted and stored in a climate controlled environment, and are regularly backed-up according to industry standards. This approach offers remote access to attorneys, freeing them up to access file information from their laptops when they are not in the office. If that laptop is lost, the data is not, as it resides elsewhere and is only accessible through passwords.

**Hosted solution** – The software vendor or third party stores most or all of the data contained in a case management system at a remote location, and handles security, backup and certain database management functions.

**Self-hosted solution** – The defender agency or governing entity (court, county or state IT department) stores most or all of the data contained in a case management system, and handles security, backup and certain database management functions.

Commercial case management systems designed for use by defender agencies should be distinguished from software packages developed primarily for private criminal practice. Public defender CMS software programs have improved considerably over the years. JustWare, developed by New Dawn Technologies, and defenderData®, developed by Justice Works, are two examples of CMS programs that have proven to be customizable and responsive to the types of reports that defender agencies need to produce to effectively administer their offices. For example, using its JustWare | Defender CMS, the public defender office in Clark County, Nevada has tracked certain legal issues, such as how discovery takes place across the entire judicial system. It was able to build a case around certain discovery violations that occurred across the board and were not just isolated incidents. The Clark County Public Defender also relies on its CMS to document case work performed for use in appeals or in response to other attorneys or clients themselves. The CMS tracks what was done on cases and what contacts were made with clients.

Whatever the type of system employed, it should be user friendly. Vendor support should be available to train new staff in accurate data entry. The importance of timely, accurate, and complete entry of data should be stressed to all users, whether data entry staff or attorneys. While justice-system-wide integrated case management systems are still relatively uncommon, public defender offices should devise their own protocols to track data systematically, with less potential for entry error or inconsistency.

As much as possible, a CMS should capture data without the lawyers' needing to provide it. Internal systems can be designed to capture data in the mail room, at electronic gateways, from document production on the CMS, and from support staff, sparing the most highly paid staff members the time and tedium of data input or file management. For example, a good CMS will support document assembly. A motion for bond reduction can be prepared drawing from a motion bank that provides templates for form and structure. The CMS can then populate all the client information, such as case numbers, name, charges; produce copies for the court, prosecutor, file and client; and, finally, address the envelopes and either send electronically or print.

Chief defenders should be familiar with the capacity of the CMS to produce reports. The system should be able to produce linear reports of performance over time, for example, a rise in workload and decline in measurable events, such as motions filed, client visits, trials, investigation, social worker write-ups, appeals, etc. It is not uncommon for defenders to purchase relatively robust databases and fail to maximize their capacity to produce various types of reports. Most public defender managers will benefit from partnering with an in-house IT staff member who can develop and run the types of meaningful reports defender managers may yearn for yet lack the ability to produce on their own.

Whether an outside vendor or in-house system is used, it will always be important for the agency to “own its own data” and to articulate the types of reports that should be produced from it. Even if data are stored off-site, the vendor should permit access to the raw data.

### *Check-List: What to Look for in a CMS*

#### Capacity:

- Calendaring
- Activity tracking: client contact and case work
- Document management
- Time tracking
- Customizable, fixed field boxes versus text entry fields
- Multiple filter options, e.g., by defendant, case number, pretrial detention status, attorney, etc.
- Extensive reporting (including identifying patterns)
- Integrated CMS that shares data across systems (e.g., police, courts, prosecution and probation)

#### Support:

- Timeline and costs associated with development and data transfer
- Level of technical support
- “Hosted solutions” that are web-based; mobile access
- Customizable over time
- User-friendly

## COUNTING CASES

An essential consideration for case tracking is the way in which cases are counted. David Newhouse, a lawyer and expert in extracting data from public defender databases for program evaluation, recommends that defender agencies develop a common definition of a case, ideally the same one used by all members of the local criminal justice system. So, how to count? The National Center for State Courts defines a case as “all charges against an individual defendant arising out of a single incident.”

**Case** - Generally, in a criminal or delinquency proceeding, a single charge or set of charges, arising out of a single incident involving the same victim(s), concerning a single defendant in one court proceeding.

**Incident** - All criminal activity occurring in a twenty-four hour period, committed by a single defendant.

Many jurisdictions provide exceptions to the general definition. For example:

“Worthless check cases shall be defined as all worthless checks filed by the same affiant against the same defendant within a twenty-four (24) period with each check as a separate charge under one docket number.” Rules of the Supreme Court of the State of Tennessee, Rule 11, Sect. II.c(3)

“A charge or set of charges contained in a charging instrument or petition against a single accused arising out of one or more events, transactions, or occurrences, which are joined, or which may be joined... ” La. RS 15:145.1(A)

“A case is any one charge or series of related charges filed against one defendant/respondent in a single charging document or in the case of misdemeanors a series of charges under several charging documents, set for one court hearing that will ultimately lead to one disposition” – King County, Washington<sup>4</sup>

When criminal justice agencies in the same jurisdiction count cases in different ways, that complicates workload comparisons for funders and policy-makers. Take for example, a defendant arrested on suspicion of three sexual assaults occurring over one month. One indictment is filed with three counts of sexual assault. For purposes of case tracking, the public defender office might count this as one case, with a charge or case type of sexual assault. However, if the prosecutor counts the matter as three separate cases, a straight, case-by-case- workload comparison will be misleading, appearing as though the prosecutor is handling three times the workload the public defender is.

A good CMS should have flexibility to capture the number of charges, type(s) of charge, and the incident from which the charge(s) derive. Public defenders should know the case charging and counting practices of their local prosecutor. Are 10 bad checks written over a period of one week charged as one case? What if the checks were written over a period of two months? A flexible CMS will allow defender managers to produce staffing forecasts across different counting scenarios.

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<sup>4</sup> Legal Glossary – NLADA, YAD, NJDC Case Management Systems Workshop

An ideal forum to develop jurisdictional case counting uniformity is a state or local criminal justice coordinating council (CJCC). A CJCC can encourage all agencies to track cases similarly using a common charge table and tie court cases to the corresponding criminal code section. Such a method would reliably track, for example, what level of felony a case is (Felony 1, 2, 3 or A, B, C) as well as the UCR grouping it relates to (Part I or Part II offense). If agencies will not agree to count cases using uniform definitions, defender agencies must at least understand the counting methods other entities use when making their budget requests.

### USING CASELOAD STANDARDS TO MANAGE WORKLOAD

Public defenders do not control the number of cases assigned to them; case assignments are driven by case filings and indigency eligibility determination. Defense counsel have a professional and ethical obligation to not accept more cases than they can reasonably handle in a competent manner and a legal responsibility to provide each client with the constitutionally mandated effective assistance of counsel. Therefore, a fundamental metric any defender organization must know is how many cases an attorney can adequately handle at any given time (pending caseload) and over the course of a year. That rudimentary information determines the size of staff needed and the allocation of workload among staff. It also signals to a chief defender when pending caseloads make it necessary to request that new appointments to the office be suspended temporarily. However, while various national and local standards have been developed, in many jurisdictions appropriate public defender caseload remains an unresolved and sometimes contentious area.

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals (NAC) published attorney caseload standards intended to apply to any public defender program in the country. The NAC standards recommend that the caseload of a public defender office should not exceed - per attorney, per year - the following:

- felonies: not more than 150;
- misdemeanors (excluding traffic): not more than 400;
- juvenile court cases: not more than 200;
- Mental Health Act cases: not more than 200;
- appeals: not more than 25.<sup>5</sup>

Almost 40 years later, the NAC standards continue to have significant influence in the public defense field, despite documented shortcomings. The NAC commentary itself notes that the standards

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<sup>5</sup> Standard 13.12, National Advisory Commission on Criminal Justice Standards and Goals: Courts 43 (1973). The NAC was funded by the U.S. Department of Justice and members were drawn from the three branches of state and local governments. Including its Report on Courts, the NAC produced six reports.

The standards apply to full-time public defenders. It is unusual for the private caseloads of assigned lawyers or contract lawyers to be taken into consideration when assessing whether indigent or private-pay caseloads might interfere with the provision of quality legal representation. But see WASH REV. CODE § 10.1-01.050 (2008): "Each individual or organization that contracts to perform public defense services for a county or city shall report...hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases."

were not the result of any study, empirical or otherwise, rather they were based on work by the Defender Committee of the National Legal Aid and Defender Association. Although the Defender Committee acknowledged “the dangers of proposing any national guidelines,” the NAC “accepted” the work of the NLADA committee with “the caveat that local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction.”<sup>6</sup>

Further shortcomings of the standards include:

- They do not reflect additional work required to handle complex practice areas or to address the collateral consequences of convictions that have emerged since 1973;
- A national standard cannot take into account substantial practice variation peculiar to some local jurisdictions;
- They apply to a public defender office, and not necessarily to individual attorneys in the office;
- They do not take attorney experience and training into consideration;
- There is no differentiation among the severity level of various felonies ;
- They do not address certain case types, including sexually-violent predator commitment cases, probation violations, or post-conviction cases; and
- There is no mention of the need for support staff.

Both the ABA and NLADA have endorsed the NAC standards as a useful starting point on defender caseload, but imply they are not the final word. A Resolution of the American Council of Chief Defenders on Caseloads and Workloads recommends that the public defender and assigned counsel caseloads not exceed the NAC standards but in commentary sets out numerous factors, including those mentioned above, that affect quality of representation and thus should be heeded when determining maximum caseloads.<sup>7</sup> Meanwhile the primary standards and guidelines of the ABA pertaining to indigent defense support the NAC standards, but the more recent documents addressing the topic offer more nuanced support than do earlier documents.<sup>8</sup> For instance, a May, 2006 ethical advisory opinion concerning ethical obligations of defenders who face excessive caseloads, states, “Although [National] standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.”<sup>9</sup> Finally, the ABA Eight Guidelines of Public Defense Related to Excessive

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<sup>6</sup> This history is drawn from Professor Norman Lefstein’s book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, 43-9 (American Bar Association 2011). [www.indigentdefense.org](http://www.indigentdefense.org). Lefstein, a nationally renowned expert in indigent defense who has testified in numerous lawsuits challenging aspects of state and local indigent defense systems, has concluded that the NAC standards cannot be relied upon for determining maximum caseloads for defense programs throughout the country.

<sup>7</sup> 2007 American Council of Chief Defenders Statement on Caseloads and Workloads

<sup>8</sup> See *supra* note 6 for Norman Lefstein’s discussion of the evolution of ABA thought on the NAC standards. pp. 45-46. Relevant ABA documents are found *infra* note 27.

<sup>9</sup> See, ABA Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseload Interferes with Competent and Diligent Representation, May 13, 2006.

Workloads (August 2009), which contains the most recent thinking of the ABA on the subject of the NAC standards, expressly rejects specific numerical caseload standards.<sup>10</sup>

In the absence of any other national standard, a number of public defender programs have adopted the NAC standards, and in some cases made modifications to better reflect local practice.

### WORKLOAD AND WEIGHTED CASELOAD STANDARDS

A better approach to establishing reasonable case handling expectations is to consider attorney workload rather than apply generic caseload figures. The ABA Ten Principles of a Public Defender Delivery System note that “National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.” In the 1990s and 2000s, a series of weighted caseload studies were conducted for public defender organizations by The Spangenberg Group and the National Center for State Courts, resulting in empirical, weighted caseload standards tailored to individual programs.<sup>11</sup>

The crux of any weighted caseload standard study is to carefully track the average amount of time it takes defenders to handle various case types over a period of time, and then develop a target, or standard, of how many such cases a full-time attorney can effectively manage in a given year. Time is recorded and coded according to the types of activities being performed and the type of case. Necessary non-case-related time, such as administrative duties and travel to court and jail, is tracked along with case-related work. Cognizant of the danger of institutionalizing bad practice by tracking time spent by overloaded attorneys, each of these studies applies expert judgment to determine if adjustments to the reported time are needed to allow for adequate representation. Consideration is also given to whether the programs operate with adequate support staff to attorney ratios.<sup>12</sup> The end result is tailored to local practice. In Tennessee, for example a 1999 time study yielded three separate felony caseload standards

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<sup>10</sup> Commentary to Guideline 4 states: “Consistent with prior ABA policy, these Guidelines do not endorse specific numerical caseload standards, except to reiterate a statement contained in the commentary to existing principles approved by the ABA: “National caseload standards should in no event be exceeded.” This statement refers to numerical annual caseload limits published in a 1973 national report. As noted by the ABA Standing Committee on Ethics and Professional Responsibility, while these standards “may be considered, they are not the sole factor in determining whether a workload is excessive. Such a determination depends not only the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.” Thus, while the ABA has not endorsed specific caseload numbers, except to the limited extent discussed above, the routine failure to fulfill performance obligations like those listed in Guideline 1, usually indicates that lawyers have excessive workloads.”

<sup>11</sup> The Spangenberg Group conducted weighted caseload studies for statewide public defender programs in Colorado, Minnesota, Tennessee and Wisconsin, and county programs in Arizona, Indiana, Nevada, New York and Washington state. The National Center for State Courts conducted similar studies in New Mexico, Maryland and Virginia.

<sup>12</sup> For a more detailed explanation of weighted caseload methodology, see *Securing Reasonable Caseloads*, p. 142.

(55 Felony A, 148 Felony B or 302 Felony C, D or E cases) and slightly different annual standards for attorneys working in rural offices, where travel time is substantial, versus urban offices.<sup>13</sup>

More than 72% (16) of the respondents to the survey of ACCD members reported that they employ caseload standards. Of those respondents who specified the origin of their caseload standards, seven use NAC standards, seven use standards developed particularly for their offices, such as through a case-weighting study, and four use standards set by statute. Other mentions were made of standards set by case law, court rule and settlement agreement.

Some public defenders rejoice that without paying clients, they are freed from the burden of tracking time to justify billable hours. However, time tracking is just as important for defender agencies as it is for private law firms. Time records provide a rich source of information that can help chief public defenders assess work performed by individual attorneys, justify and illustrate work performed to funders, and spot issues where practice could be more effective. For instance, if time records show certain courtrooms routinely leave public defenders waiting until the end of the docket for their cases to be called, that might lead to discussion with the court administrator or judges about changes to docket management.<sup>14</sup> Of course, time tracking is essential for a jurisdiction that uses caseload standards based on a time study.

Nine, or 41%, of respondents to our chief defender survey reported that their attorneys track their time. Technology makes it easier than ever for attorneys and other staff to track time. CMS packages allow for time tracking by case and activity and smartphone apps are available for defenders to use when out of the office to track travel or in-court time.

## II. EXTERNAL CONSIDERATIONS: IMPROVE AND PROTECT THE INDIGENT DEFENSE FUNCTION

Just as there are multiple ways in which data will assist a defender office internally, data has the power to protect, defend and improve a defender office in the context of the broader criminal justice system. Some of the ways in which data support a defender office externally include:

- Reporting on performance and justifying budget/resource requests
- Assessing comparability of agency resource allocation, e.g., prosecutors and defenders
- Justifying value of innovative practices, such as holistic defense
- Supporting litigation asserting systemic deficiencies such as overwhelming caseloads and inadequate resources

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<sup>13</sup> Tennessee Public Defender Case-Weighting Study Final Draft Report (April 1999) , The Spangenberg Group, <http://www.comptroller1.state.tn.us/repository/RE/publdef.pdf>

<sup>14</sup> See *supra* note 6 at 155 for a list of ways in which time keeping can benefit public defender offices.

- Building partnerships with academic institutions, Criminal Justice Coordinating Councils, and other justice system agencies to analyze and improve the criminal justice system.

The following sections highlight applications of data to help defender organizations thrive in the context of the broader criminal justice system.

### **IN-HOUSE RESEARCH: NORTH CAROLINA INDIGENT DEFENSE SERVICES**

In 2000, the North Carolina legislature enacted the Indigent Defense Services Act, creating the North Carolina Office of Indigent Defense Services (IDS) and charging it with overseeing the provision of legal representation to indigent defendants statewide. Indigent defense is delivered across North Carolina's 100 counties and 43 judicial districts through a combination of public defender offices and private assigned counsel. With just five positions initially created to fulfill the Office's mandate, a decision was made to devote some of that staff time to research. Since 2001, Margaret Gressens has been the Office's Research Director, applying her background in social and economic research, policy analysis and program evaluation to assist with the program's start-up and maturation. Gressens and her small staff have conducted a series of studies that have proven critical to IDS' capacity to grow, weather attack, and survive the fiscal downturn that affected all state agencies in recent years, all with an eye toward advancing high quality indigent defense services.

Studies conducted by IDS have examined, among other things, comparative resources available to prosecution and indigent defense, the time required to resolve criminal cases by type of attorney (public defender, private assigned counsel and retained); the impact on public safety and indigent defense costs of reclassifying minor misdemeanor offenses that rarely or never result in jail sentences, and an annual comparative review of public defender and private assigned counsel costs.<sup>15</sup>

IDS has conducted its public defender and private assigned counsel cost study each year since 2002 to analyze whether the existing public defender offices, which now serve 26 of 100 counties, provide cost savings over private assigned counsel or vice versa. Methodology for conducting the study has been refined over the years to include factors other than indigent defense expenditures alone. The February 2011 report studied the impact on jail costs after one jurisdiction, New Hanover County, shifted from using private assigned counsel to a public defender office in 2008.<sup>16</sup> Due to their increased case handling efficiency, the use of public defenders was found to reduce the average daily jail population from 550 to 429. With a daily bed cost of \$80, that translated into \$3,446,080 in jail cost savings annually, as seen in the table below.

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<sup>15</sup> IDS research reports are available on its website: [www.ncids.org](http://www.ncids.org)

<sup>16</sup> See *FY10 North Carolina Office of Indigent Defense Services Public Defender & Private Assigned Counsel Cost Analysis*

[http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY10PublicDefender\\_PAC\\_CostAnalysis.pdf](http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY10PublicDefender_PAC_CostAnalysis.pdf)

**Table 1: New Hanover County, North Carolina Pre-and Post- Public Defender Jail Costs**

	<b>Avg. Daily Jail Population<sup>8</sup></b>	<b>Annual Jail Cost @ \$80 per Inmate per Day<sup>9</sup></b>
Pre-PD Office (2008)	550	\$15,664,000
Post-PD Office (2011)	429	\$12,217,920
PD Office County Jail Cost Savings	121	\$3,446,080

IDS has been able to use its studies to not only highlight costs-savings but also to justify funding. IDS attributes its success in securing steady budget increases over its first nine years, even when other public safety agencies (prosecution, courts and corrections) had to take reductions, to its research capacity. In fact, in FY 2011 when, along with other state agencies, it was forced to take a mandatory 15 percent budget reduction, IDS was able to use its research capacity to determine where it could absorb the cuts while doing the least harm to clients. The decision was made to selectively reduce certain rates of pay for private assigned counsel to prevent attrition of experienced attorneys. The rate for assigned counsel in district court cases was reduced to \$55/hour from \$75/hour, while the rate for serious felonies was kept at \$75/hour.

### **FENDING OFF ATTACK**

Access to in-house research capacity helped IDS counter assertions by prosecutors that indigent defense in North Carolina was over-resourced. In 2011, North Carolina prosecutors asserted to state lawmakers that prosecution is “outspent and outfunded every day in court” by the state’s indigent defense system. Representatives of the Conference of District Attorneys (CDA) presented a budget comparison suggesting that district attorneys handled 100% of the state’s criminal cases on a \$92 million appropriation while indigent defense handled 50% of all criminal cases with a budget of \$132 million. As a remedy, the Conference suggested that legislators reduce funding for the indigent defense system. The CDA shared a PowerPoint slide with the following table:

**Table 2: Conference of District Attorneys Budget Comparison, 2009-2010**

<b>District Attorneys</b>	<b>Indigent Defense</b>
* 100% Criminal Cases	* 50% Criminal Cases
* Budget: \$92 million	* Budget: \$132 million

In response, the North Carolina Office of Indigent Defense Services undertook its own side by side comparison of prosecution and indigent defense resources and found that CDA’s estimate was inaccurate and misleading, omitting the vast amount of resources available to prosecutors located outside of its general fund appropriations, and misrepresenting the nature of cases handled by prosecution and indigent defense. The IDS Commission’s side by side line comparison found \$285 million in resources available to district attorneys compared to \$102.6 million available *for comparable work* conducted by indigent defense. The IDS summary looked like:

**Table 3: Indigent Defense Services Budget Comparison, 2009-2010**

<b>District Attorneys</b>	<b>Indigent Criminal Defense</b>
* DA Budget for Indigent Criminal Cases: \$55M	* Appropriation for Indigent Criminal Cases: \$90.6M
* Additional State Bureau of Investigation (SBI) Resources: \$30M	* Budgeted Recoupment Receipts: \$12M
* Additional Police Resources: \$200M	
* Additional Unquantifiable Resources (e.g., local crime labs, State Highway Patrol)	
<b>Total Resources: More than \$285 million</b>	<b>Total Resources: \$102.6 million</b>

The IDS report highlights inaccuracies and omissions such as:

- All investigator costs for indigent defense are included in its overall \$132 million budget, while prosecutor investigative resources are attributable to a variety of agencies in addition to DA offices, including the Attorney General, State Bureau of Investigation, State Highway Patrol, state Medical Examiner and local law enforcement, some of which are unquantifiable.
- District attorneys do not handle some types of cases handled by IDS, including direct appeals and most capital post-conviction litigation; civil cases such as abuse, neglect, or dependency, termination of parental rights, civil commitment, competency, and child support contempt; and specialized programs like Prisoner Legal Services and the Office of Sentencing Services.

After the IDS report<sup>17</sup> was released, the Conference of District Attorneys stopped alleging prosecutors were out-resourced by indigent defense and the legislature did not reduce funding for IDS.

The report by IDS illustrates the value to defender organizations of building in-house research capacity. Merely collecting the data on which to base analysis can be challenging; information is often buried in reports of various agencies. Equally important is accurate analysis and framing of the data. The ABA Ten Principles of a Public Defender Delivery System calls for parity in resources between prosecutors and public defenders.<sup>18</sup> IDS highlighted a large unevenness in resources available to indigent defense and prosecution. Still, it is unlikely that IDS would need another \$182.4 million, the difference in IDS’s comparison of prosecution and defense resources, to perform its work. Further, prosecutors, just like defenders, can be underfunded. Identifying actual parity would require additional analysis of the criminal justice system’s needs.

<sup>17</sup> North Carolina’s Criminal Justice System: A Comparison of Prosecution and Indigent Defense Resources, April 2011, <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/ProsecutionOfIndigentDefense.pdf>

<sup>18</sup> See Principle 8, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)

## SHARING KNOWLEDGE: THE SYSTEMS EVALUATION PROJECT

IDS is one of the few indigent defense agencies in the country with its own in-house research department that undertakes primary research and policy analysis for the indigent defense system. Without effective program evaluation capacity, indigent defense systems can suffer from poor quality services, inefficient resource allocation, and wasted taxpayer dollars. IDS is in the process of sharing the knowledge base of its research department with indigent defense organizations throughout the country.

In 2005, IDS created its **Systems Evaluation Project (SEP)** to develop performance measures that would evaluate system outcomes and cost-effectiveness and enable IDS to assess, with empirical data, how well an indigent defense system meets the needs of its clients, the criminal justice system, and the community. With input from an advisory board of indigent defense practitioners from around the country, SEP is defining the goals and objectives of a high quality indigent defense system and developing statistical indicators to measure how well a given indigent defense system achieves these goals and objectives. SEP's aim is to develop an evaluation tool that measures client outcomes and assesses system performance. The evaluation will examine patterns in:

- a. Case outcomes
- b. Pretrial incarceration
- c. Access to attorneys (e.g., percentage of defendants who waive counsel and plead guilty at first appearance before an offer of counsel is even made)

IDS is developing the evaluation protocol in North Carolina and will select two additional pilot sites to implement the same study. Eventually the methodology will be available to any defender organization wishing to replicate the study.

With support from the Open Society Foundation's Strategic Opportunities Fund, SEP is in the process of creating several tool kits that promote expansion of in-house research capacity among indigent defense organizations. The first tool kits focuses on what defenders should look for when hiring a researcher for the first time: what software and hardware will be needed, suggested interview questions to ask prospective researchers, and skills to look for. A second tool kit will focus on basic studies and reports defender organizations should be creating, setting out the "who, what, where, why" questions defender researchers should be able to answer about their organizations. The tool kit will include templates and excel spreadsheets for basic reports public defenders need. Acknowledging that the indigent defense field is just beginning to understand and apply empirical research, SEP will develop a data dictionary to explain research terms such as input, output, outcome, indicator, goal, objective, and performance measure. In addition, IDS research staff are teaming with the National Legal Aid and Defender Association to provide training workshops in research and systems evaluation for defenders at the organization's annual conference.

Over time, as defender research capacity becomes more sophisticated, Gressens expects to see the value of indigent defense programs measured and framed in different, more creative ways than in

the past. An effective indigent defense system benefits not just indigent defense practitioners and clients, but the justice system and community as well, and those ripple effects can be measured and quantified. A primary example is the objective of keeping defendants out of jail while awaiting trial if they pose no public safety or flight risk. Out on bond, defendants can continue to work, provide child care and maintain housing. There is a net effect on social service resources, through reductions in reliance on unemployment benefits, foster care, or public housing subsidies and on jail costs, by reducing costs of pre-trial detention and overcrowding.

The work in North Carolina tracks other innovative attempts to use data to assess how well the overall criminal justice system is serving users. One, the “Justice Index,” being developed by the non-profit organization, Measures for Justice, is described as “a warehouse of data on the lower criminal courts that has been organized to show how well or poorly the courts are providing basic legal services.” Measures for Justice cites the example of a data set on how many defendants plead guilty without a lawyer in any given month or year as a good indicator of how well a court is meting out justice. Multiple indicators are being developed to measure justice in the nation’s criminal courts. When introduced in counties across the country, the Justice Index will flag counties whose numbers indicate possible problems and focus attention on the need to address them.<sup>19</sup>

### **PARTNERSHIPS CAN EXPAND RESEARCH CAPACITY**

With a basic case tracking system, public defender offices should be able to monitor workflow and produce budget requests based on workload and performance. There are times, though, when more in-depth analysis is desirable—for example to investigate a particular trend, such as changes in intake patterns, or to review the impact of a particular innovation, such as the use of social workers. Building an in-house research component is beyond the means of some public defenders, at least in the short-term. However, it is possible to partner with other organizations to undertake more involved projects, such as the systems evaluation work being done in North Carolina.

Local defender offices may be able to ask for assistance from a statewide indigent defense commission or administrative office that has greater research capacity. Another possible source of help is pairing with an academic institution, particularly a sociology department or criminal justice policy center. Student researchers are often thrilled for the opportunity to model and measure a pilot project, such as the impact of the use of social workers on case outcomes, or the effect of an early representation unit on pre-trial incarceration costs and case outcomes.

Sometimes the best approach is partnering with other criminal justice agencies, particularly when there are shared goals regarding improved efficiency or effectiveness of the criminal justice system. If a public defender program seeks to investigate a particular issue for which it does not collect adequate data, it is possible that another agency has that information and will share it. Courts, for example, might have information available on the number of continuances by judge, courtroom or case type to help assess suspected case delay. Cross-agency problem-solving can break down institutional

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<sup>19</sup> For more information on the Justice Index see [www.measuresforjustice.org](http://www.measuresforjustice.org)

barriers and lead to overall justice system improvements. What starts as simple data sharing may build inter-agency trust and lead to more substantial systemic cooperation.

## **BEING PROACTIVE AND BUILDING EVIDENCE-BASED POLICIES AND PRACTICES**

Defender organizations have historically reacted to developments outside of their control, such as new crime measures or expansions in the right to counsel, by scrambling to keep up with increasing workloads. Defenders are well positioned to see, firsthand, the toll the criminal justice system takes on poor clients and their families. Defenders see their clients' repeated trips through the criminal justice system with no attempt to address the underlying causes of criminal behavior. They see the impact of pre-trial detention on a defendant, both through disruptions to their lives through loss of employment or child care, and from bias through the eyes of the adjudicator. They know the value of a trained investigator to a defendant's case. What they may not know is how to document issues and to quantify their impact on clients and the community. It is a learned skill. The capacity to conduct evidence-based system analysis will enable indigent defense organizations to engage in criminal justice policy discussions with law makers and others from a better informed position and will enhance agency credibility.

Other examples of issues defender organizations can identify and address through collection and analysis of data include the following:

- Many public defender offices experience a small but steady cohort of defendants who are represented by a public defender but fire their lawyer mid-stream, proceeding pro se. The situation sets off unanticipated challenges for the defendant, such as: who is going to serve subpoenas for him, how is investigation going to be carried out (a particularly thorny issue if the defendant is detained pre-trial and the judge won't appoint an investigator for him), and should the public defender office still serve as stand-by counsel? This is the type of issue lending itself to analysis of any patterns, such as of which case types this occurs in, at what stage in the proceedings it occurs, and how many defendants seek re-appointment of a public defender. With information on patterns, interventions can be developed to reduce the frequency of the situation.
- A review of all of the so-called "wins" of an office, including not just acquittals but all cases that were resolved in some way other than a conviction to the charged offense, whether through a plea to a reduced charge, a dismissal, diversion, or other disposition, can lead to interesting findings about the local justice system. For instance, such an analysis might suggest that prosecutors are routinely over-charging. Access to similar case outcome data for cases handled by assigned counsel or retained counsel might raise questions about performance by type of counsel.

- Examine consistency in bond amounts to determine if there are patterns among judges or for particular clients in which higher bond amounts are set by running a query of client bail amount by case type and court.

## IMPACT LITIGATION

Data collected by public defender programs become essential in the event litigation is brought to challenge caseload or any other facet of a program. New York City is home to some of the nation's most respected defender organizations, including the New York Legal Aid Society, the Bronx Defenders and Brooklyn Defender Services. Outside the city, however, many of the county-funded indigent defense systems have been documented to be "severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York."<sup>20</sup> Conditions in these "upstate counties" are the subject of the class action lawsuit, *Hurrell-Harring et. al. v. State of New York*,<sup>21</sup> which seeks to remedy New York State's failure to create and support an indigent defense system that ensures all indigent criminal defendants receive meaningful and effective assistance of counsel. Filed in 2007, the case has survived procedural hurdles and is on track to demonstrate in a court of law what lead counsel Corey Stoughton says, "everybody knows: that the system is broken." But a chief challenge facing systemic challenges such as *Hurrell* and others like it, is assembling the data that convincingly demonstrate through evidence, not just anecdote, the system's shortcomings.

Systemic litigation such as in New York or Michigan, where a similar systemic challenge case is currently pending, is enormously time consuming and costly. Indigent defense experts regard it as a last resort, a tactic pursued only when all other avenues have been attempted and failed.<sup>22</sup>

When a system has been neglected for decades, such is the case in New York and Michigan, the data infrastructure necessary to document failure is often non-existent. Data on factors such as attorney caseload, frequency and nature of attorney-client contact, motion practice, or use of investigators may be missing altogether, as they were never tracked, or complicated to piece together from various sources, such as court files, court reports, county budgets, and indigent defense providers. Lawsuits often amplify the institutionalized problem of inadequate data usage by defender organizations. If the agencies had been routinely collecting data and reporting on problems, it is unlikely conditions could degenerate so precipitously to merit a lawsuit.

In Connecticut, the statewide Division of Public Defender Services was the subject of a class action lawsuit in the 1990s after buckling under years of extreme under-funding.<sup>23</sup> Despite inadequate

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<sup>20</sup> Final Report to the Chief Judge of the State of New York. Commission on The Future of Indigent Defense Services (2006) [http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf)

<sup>21</sup> 930 N.E.2d 217 (N.Y. 2010)

<sup>22</sup> See *Securing Reasonable Caseloads*, supra note 6 and *Justice Denied*, supra note 1 for more on the uses of litigation to improve indigent defense representation.

resources, the agency had consistently collected data including individual attorney caseload figures, which proved helpful in the ensuing settlement agreement's requirement that the Public Defender Commission establish caseload goals. Chief Public Defender Susan O. Storey feels the goals, while not mandatory and including higher mixed caseloads than recommended by NAC standards, helped protect funding advances for the agency in ensuing years.

Recent litigation in Missouri reinforces the value of formal caseload standards to keep a public defender system's attorney caseloads reasonable.<sup>24</sup> In July 2012, the Missouri Supreme Court ordered a trial court to heed the Missouri Public Defender Commission's administrative rule that permits a local public defender office to refuse new appointments if, for three consecutive months, its caseload exceeds maximum caseload standards established by the Commission. A caseload standard protocol was first adopted by the Commission in 2007 after the Missouri State Public Defender conducted an internal case weighting study, patterned roughly after studies conducted by the National Center for State Courts and The Spangenberg Group.<sup>25</sup> The administrative rule instructs a public defender office that meets certain criteria to notify the appropriate court of its approaching need to seek "limited availability" status, thereby allowing local stakeholders time to develop a temporary system to ensure "that cases assigned to the Missouri state public defender system result in representation that effectively protects the constitutional and statutory rights of the accused."<sup>26</sup>

The indigent defense system in Missouri has struggled with inadequate resources for decades, as documented in multiple sources including studies by outside consultants and academics, the Public Defender Commission's own reports and even in Missouri Supreme Court Chief Justice Ray Price's 2010 State of the Judiciary Address to the state legislature. In the summer of 2010, a trial court refused to limit appointments to a local public defender office when, after receiving notice from the office it was nearing the point where it would seek limited availability status, meetings of the judge, local prosecutor and representatives from the state and local public defender office failed to produce a process for public defender caseload reduction. After being appointed to a felony case in violation of its caseload protocol, the Missouri State Public Defender sought a writ of prohibition in the state's Supreme Court.

The Court found that the Missouri Public Defender Commission's authority to develop administrative rules to carry out its duties of overseeing provision of public defender representation was not in question, nor was the rule itself improper or invalid. Indeed, the Court found that the Commission's caseload crisis protocol was entitled to a presumption of validity, as the protocol was made pursuant to the Commission's legislatively authorized rule-making authority. The Court ruled that Missouri trial judges must use their inherent authority to manage their own dockets by taking an active

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<sup>23</sup> *Rivera v. Rowland et al*, NO. CV95 - 545629 (1999)

<sup>24</sup> *State ex. Rel. Missouri Public Defender Commission v. Waters* (SC91150), July 31, 2012

<sup>25</sup> Missouri State Public Defender Commission Caseload Crisis Protocol, adopted November 2, 2007, as amended: April 30, 2010,

[http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2012/02/annual\\_summit\\_onindigentdefenseimprovement/ls\\_sclaid\\_litigation\\_hanlon\\_caseload.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/02/annual_summit_onindigentdefenseimprovement/ls_sclaid_litigation_hanlon_caseload.authcheckdam.pdf)

<sup>26</sup> Title 18 of the Missouri Code of State Regulations, Division 10, Chapter 4.010

and productive role in the effort to avoid or limit the need to certify a public defender office as having limited availability. Further, the court found that it is incumbent on judges, prosecutors and public defenders to work cooperatively to develop solutions to managing excessive public defender workload. “Simply put, a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant. Effective, not just *pro forma*, representation is required by the Missouri and federal constitutions.” The Court rested its opinion both on the Sixth Amendment and the duty of counsel to furnish "competent" representation under the Missouri Rules of Professional Conduct.

While the opinion offers encouragement to overburdened public defenders, the Missouri Supreme Court invited a declaratory judgment action to determine the validity of the caseload crisis protocol, making additional litigation concerning limits on caseloads of Missouri public defenders likely.

### *If You're Doing Something Innovative, Measure It to Protect It*

There is growing interest among public defenders across the country to apply holistic practice methods to appropriate criminal cases. Defender offices that provide holistic defense, such as the Bronx Defenders and the Knox County Public Defender Community Law Office, use interdisciplinary teams that can include criminal and civil lawyers, family defense lawyers, social workers, parent advocates, investigators, and community organizers to work with clients and their families. Through assessment and referral to appropriate social services, the teams seek to identify and address the root drivers of a client's involvement in the criminal justice system, such as addiction, mental illness, education deficiency, or joblessness. They also seek to mitigate the collateral consequences of a client's criminal case. The goals of holistic representation are to:

- Reduce recidivism
- Empower individuals and families to move toward maximum self-sufficiency as contributing members of the community
- Identify appropriate sentencing options that serve both the client and community
- Prevent crime and juvenile delinquency
- Provide community education about social services and criminal justice.

Innovation in criminal justice often provokes pushback from individuals more accustomed to traditional practice. Documentation of effect of any innovative program, such as holistic defense, is essential. Funders, whether foundations or government agencies, expect empirically-based evidence documenting the "success" of the program. In addition to typical defender metrics on caseload and cost per case, measures of holistic defense programs could include:

- Client demographics
- Referral sources
- Treatment requested/provided
- Actions taken by social services agencies
- Recidivism data
- Client portraits.

### **STANDARDS AND GUIDELINES**

Efforts to improve access to quality indigent defense services throughout the country have been substantially aided by development and adoption of performance standards and guidelines. National standards, such as those developed by the American Bar Association and the National Legal Aid and Defender Association, have been expanded upon and adopted by numerous states and local

jurisdictions.<sup>27</sup> Respondents to the ACCD survey make active use of various outside standards in their budget requests, as shown in the following figure:

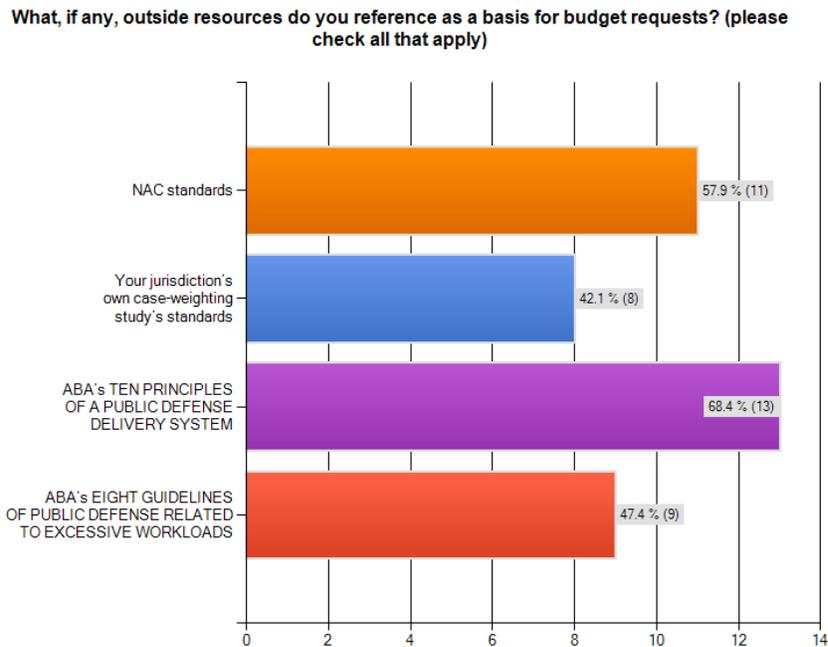


Figure 2

A host of resources in addition to the four prompted by the survey were mentioned in open-ended responses to the survey.<sup>28</sup>

<sup>27</sup> Key national level standards and guidelines include: ABA Ten Principles of a Public Defense Delivery System (2002); ABAs Eight Guidelines of Public Defense Related to Excessive Workloads (2009); ABA Standards for Criminal Justice, Defense Function (ABA 3d ed. 1993); ABA Commission on Ethics and Professional Responsibility, Formal Opinion 06-441 (2006) concerning excessive public defender caseloads; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003); NLADA Performance Guidelines for Criminal Defense Representation (1995); NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1988); and National Advisory Commission on Criminal Justice Standards and Goals - Courts, Chapter 13, The Defense (1973).

<sup>28</sup>Verbatim responses included:

- Anything with recommendations supported by NLADA; ABA's Securing Reasonable Caseloads - Ethics and Law in Public Defense/ Standing Committee on Legal Aid & Indigent Defendants; US DOJ Bureau of Justice Indigent Defense Series publications;
- An analysis of how our office would compare if we were to utilize each of the standards used by different Public Defender Offices around the country, including NAC, Florida Governor's Commission, Florida Public Defender Association, ABA Criminal Justice Section, Minnesota State Board of Public Defense, Wisconsin State Public Defender, King County Office of Public Defender, NLADA, and Minnesota State Guidelines.
- ABA Ethics Opinions; NLADA Best Practice Standards; ABA Standards for the Defense Function
- A staffing comparison of numbers of prosecutor staff in each office compared to numbers of PD staff and the percentage of all criminal cases that are handled by public defenders in each court.
- Caseload, cost and other management information system data.
- Our Collective Bargaining Agreement, historical records in the office, caseload projections and staffing requests by the prosecutor to the county commission.

## TYING PERFORMANCE STANDARDS TO FUNDING: KING COUNTY, WASHINGTON

Washington state is a leader in the movement to incorporate performance guidelines and standards, including caseload limits, into contracts and funding for indigent defense providers. Standards initially developed by the Washington Defender Association and endorsed by the Washington State Bar Association are in use to various extents across the state. Tying funding to standards and guidelines makes it essential to have case information systems capable of tracking compliance with the standards and guidelines.

In King County, Washington, the state's largest county, indigent defense services are provided by four non-profit agencies working under contract with a central administrative agency, the Office of Public Defense (OPD). OPD bases its contracts on standards and guidelines intended to keep workloads reasonable, support services adequate and quality of representation high. One of the sets of standards used is workload standards developed in 2010 through a Spangenberg Project case-weighting study. The case-weighting system replaced a case credit system previously used as the basis of payment for the four agencies. While each defender agency must make budget requests according to standardized county requirements, the offices maintain their own case management systems.

One of the four King County defender agencies, the Northwest Defenders Association (NDA), has used the JustWare | Defender case management system for many years. NDA historically elected to forego JustWare system upgrades to minimize disruption to its operations, but eventually the time came when upgrades had to be made in order for NDA to receive ongoing technical support. Over time, the data needs of NDA have evolved, so the upgrade provided a perfect opportunity to re-think how it uses its CMS. JMI, with support from SCLAID, spent the summer of 2012 helping NDA envision what sorts of capacity it wanted to build into the JustWare upgrade. NDA wanted a faster, more efficient, and ultimately more useful case management system. In particular, NDA sought additional information to address key management decisions related to work performed by non-attorneys, including investigators, social workers, paralegals, and bail, or jail intake, interviewers.<sup>29</sup>

The upgraded system being introduced in 2012 is a web-based, hosted application with the capacity to customize user interfaces by role (e.g., attorney, social worker, investigator). A system of alerts will remind users of key upcoming dates and deadlines. There are plans to leverage the web-based nature of the CMS to allow for more contemporaneous entry of time and case data, transforming JustWare into a system that not only tracks time but also facilitates communication among users. Finally, with substantive changes being made to the way in which work is classified in the CMS, the database will increase capacity for outcomes analysis and evaluation in the future.

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•1) Washington State Bar Association Standards for Indigent Defense; 2) Washington Criminal Court Rule 3.1; 3) Revised Code of Washington 10.101.03.

•Surrounding 7 state data; national studies.

<sup>29</sup> See JMI's report, *Good Data, Good Practice, Good Outcomes: Recommendations to the Northwest Defender Association for Enhancing its Case Management System and Other Information Practices* (August 2012).

## CONCLUSION

The capacity of public defenders to capture and apply data to advocate for their programs is steadily growing through greater access to technology as well as to training and information on what to track and how to use it to tell a story. The road ahead is well summarized by Josh Dohan, Director of the Youth Advocacy Division at the Massachusetts Committee for Public Counsel Services, in response to the ACCD survey question: *what data/information do you wish you could readily get but can't as of now?*

The most important unavailable data has to do with details of inputs, outputs and outcomes. Simply knowing caseloads is not a great way to measure the effectiveness of our practices. Being able to study whether the litigation strategies we believe to be effective really are effective would help us as managers and as policy/budget advocates. We need to be able to show that spending time with clients, aggressive motions practice, substantial investigations, effective referrals for community based resources and services, etc. all lead to better legal outcomes. If we could also show that our work leads to better life outcomes and improved public safety (it does), all the better. We should also be able to engage in process, outcome, and cost benefit evaluations of our programs.

At some point in the near future, all public defenders will have tools in place to produce the type of information described by Dohan. North Carolina's Indigent Defense Services Systems Evaluation Project is blazing a trail and creating tools to help others follow in this path. Programs not yet at that point should not get discouraged, as there are intermediary steps they can take to enhance their research capacity. All chief defenders can:

- Invest in a flexible case management system and take the time to identify meaningful measures to track and report on.
- Find partners with whom to collaborate, such as academic institutions and criminal justice coordinating councils.
- Get the training and information needed to understand research basics: what are meaningful "inputs, outputs and outcomes"? If possible, invest in research staff; their work can sometimes pay for itself through programmatic savings achieved.
- Reach out to other public defender agencies that are farther down the road to learn from their experience.

## RESOURCES MENTIONED

defenderData<sup>®</sup> , Justice Works  
[www.justiceworks.com](http://www.justiceworks.com)

JustWare, New Dawn Technologies  
[www.newdawn.com](http://www.newdawn.com)

David Newhouse  
503-527-9666

North Carolina Office of Indigent Defense Services  
[www.ncids.org](http://www.ncids.org)  
919-560-3380