A REPORT ON THE STATUS OF PUBLIC DEFENSE IN KANSAS

September 2020

The Board of Indigents' Defense Services

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BIDS Facts

85%	Eighty-five percent of adults charged with felonies in Kansas are indigent and qualify for appointed attorneys. BIDS provides all of those attorneys through one of two ways: public defenders or appointed private counsel.
26,237	In FY 2020, BIDS attorneys completed 26,237 criminal cases.[1] Our public defenders completed 11,456 of those cases. The rest were handled by private appointed counsel.
$175	In FY 2020, it cost, on average, $175 dollars more per case for our appointed private counsel to handle cases than for our public defenders to handle the same case.[2] Public defenders are consistently the most effective and cost-efficient manner of providing public defense.
150	The 1973 National Advisory Commission on Criminal Justice Standards and Goals for the Defense set defense attorneys workloads at **no more than 150 felonies per year**, no more than 400 misdemeanors per year, and no more than 25 appeals per year.[3]
8	In FY 2020, out of our 11 non-capital trial public defender offices, 8 offices substantially exceeded 150 felonies per attorney, per year.
4	In FY 2020, we had four public defender offices that refused new cases for over 35% of the calendar year due to turnover issues and high caseloads.[4]
10 Hours	In FY 2020, our trial level public defenders only had, on average, 10 hours per case to spend defending their clients.[5]

[1] In FY 2020 our public defenders completed 11,456 cases and our assigned counsel completed 14,781 cases.
[2] In FY 2020, the average cost of a public defender cases was $818 while the average cost of an assigned counsel case was $993.
[3] See NAC Standard 13.12.
[4] In FY 2020, the Third Judicial District Public Defender Office in Topeka refused new cases for 172 days (47% of the year); the Northeast Kansas Conflicts Public Defender Office in Topeka refused new cases for 188 days (51.5% of the year); the Sedgwick County Conflicts Public Defender Office in Wichita refused new cases for 133 days (36.4% of the year); the Salina Regional Public Defender Office in Salina refused new cases for 201 days (55% of the year).
[5] Average caseload per trial attorney in FY 2020 was 204 cases. At 40 hours per week, 52 weeks per year, that leaves them 10 hours per case per year to work on an individual case.

Introduction

One particular exchange with a legislator stuck with me after our agency budget hearings last spring.

I had just testified that while making a recent visit to one of our regional trial level public defender offices, an attorney in that office had reported to me that she and her coworkers were suffering from such ethically concerning and overwhelming caseloads that she was concerned that she might lose her license to practice law.

At the time, caseloads for several attorneys in that office were so high that an attorney only had, on average, 1.6 hours per month to work on each assigned felony case, including work on off-grid and other high severity level cases with life sentences.[6] While the national workload standards call for an absolute maximum of 150 felonies per attorney, per year, this office had numerous attorneys who were each handling over 100 felony cases at the time of my visit.[7]

I explained to the subcommittee that I shared that attorney's legitimate concerns. High caseloads are not just a service issue for our clients, they are an ethical problem for our law licensed employees. They have also been one of the driving factors in our chronically high employee turnover rates over the last several years. While the legislators on the hearing committee began discussing our suggested interim solution to these issues (a special budget request our Board made in late December 2019) one legislator was quite frank in his response.

He said that he no longer wanted to see our agency come to our budget committees with Band-Aid solutions that consistently failed to solve our fundamental underlying problems. I agreed. That discussion ultimately led to the legislature's language in SB 66 requiring us to submit this report detailing the status of our vacancies and retention issues and detailing a strategy to address these staffing concerns.

What follows is a stark assessment of our agency's problems that have driven our chronic staffing issues. Following that is the roadmap for a three phase plan showing

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[6] At the time, our Sedgwick County Public Defender Office was reporting that many attorneys were carrying 100 felonies at a time. With only 160 hours per month to work those 100 cases, that left those attorneys with 1.6 hours of work time per month, per case. These caseloads were reported at the time to include everything from probation revocations up to and including multiple off grid or severity level one crimes.

[7] In 2015, because of significant changes in criminal defense standards since the 150 felonies per year, per attorney standards were enacted by the NAC in 1973, the National Association for Public Defense (NAPD) issued a Workload Position Paper, calling for public defense organizations to consider the old NAC standards as the "absolute maximum" workload ethically allowed.

how we believe we can effectively and permanently begin addressing these problems. I look forward to discussing this report and those plans in detail with you soon.

Obviously, this is a difficult time to have a productive conversation about our agency's real needs in light of the also very real budget shortfalls the state is currently facing. However, the constitutional right to counsel applies to all impoverished people who are charged with adult felony crimes in Kansas, regardless of the state's fiscal outlook or a once-in-a-century pandemic's impact on state revenues.

Ironically, it is precisely at this moment when public defense is most desperately needed in Kansas. Our client's statutory speedy trial rights have been indefinitely suspended, their constitutional right to confront witnesses against them has been largely curtailed in light of public gathering restrictions in our courthouses, and they are being confined in jails where COVID-19 is running rampant not because they are too dangerous to be granted pretrial release but simply because they are too poor to post bail. Who is left to defend the constitutional and human rights of these impoverished people against these extraordinary conditions?

Only us—the public defenders and appointed private counsel assigned to defend their rights.

It is precisely at this moment, during this pandemic and its related budget crisis, that the system of how Kansas provides public defense is most critical. And the decision that is most critical to how that public defense is provided is how well, or alternatively, how little, this body chooses to fund those defense services.

We believe that the information contained in the beginning of this report will convince you that additional investments in public defense in Kansas are critically needed.

We hope that the roadmap that we've provided at the end of this report in our three-phase plan will satisfy you that those investments will have a fiscally responsible impact on the state's budget.

We know that that while these will be fiscally difficult decisions, they will have an overwhelmingly positive impact on our larger Kansas criminal legal system.

We welcome additional discussions about our client's needs and our agency's plans for the future of public defense in Kansas.

Heather Cessna
Executive Director
Kansas State Board of Indigents' Defense Services

Executive Summary

Reading the Report

This report is broken down into two main sections. First is the report on the current staffing issues in our public defense system and their impact on our agency's operations. The second section is The Three Phase Plan for reforming public defense in Kansas.

The Three Phase Plan sets out for the Legislative Budget Committee the proactive measures that the Board of Indigents Defense Services is taking or is going to considering taking in order to address the current crisis in our system. Phase I covers the requests that BIDS has already submitted as part of its FY 2022 budget request. Phases II and III will be discussed and potentially voted on by BIDS in advance of future budget requests over the next several years.[8]

This report and plan for reform is meant to clearly lay out for you the issues we have been struggling with and present to you our plan for how to alleviate those problems in a way that, while requiring additional investments in public defense, will result in significant positive outcomes for all stakeholders involved.

The Bottom Line on our Staffing Issues

The good news is that there are a large number of dedicated individuals who believe in our mission and the vital importance of the work that we do. These people come to our agency, ready to do good work and make a positive impact on our client's lives.

The bad news is that we are driving those dedicated individuals away from public defense, to the severe detriment of our clients, and potentially in violation

[8] Phases II and III may eventually be amended as our agency circumstances change and dependent upon budget allocations.

of our constitutional and statutory obligations to provide effective and efficient representation under the state and federal constitutions.

This isn't rocket science: at its most basic level, our staffing issues are clearly the result of dangerously high caseloads (and the compassion fatigue and burnout that results from those caseloads), long suppressed compensation, and a historic lack of resources. Thankfully, these problems are very fixable. By implementing a client-centered, holistic defense model we are confident that these problems are correctable in ways that should have down-the-line positive impacts not just for our clients and our agency, but also for the Judiciary, the Department of Corrections, and the state as a whole.

But to do so, we will need to take proactive measures to keep our current employees and attract new applicants by adjusting compensation in order to give our employees parity with other colleagues in the criminal legal system and other state government agencies. We will also need to add a substantial number of staff—approximately an additional 216 attorneys, plus the corresponding investigators, legal assistants, administrative staff, social workers, etc.—in order to effectively and ethically handle our caseloads and to allow our public defense system to operate as efficiently as it was intended. In short, we need to continue to plan for the future proactively rather than wait until our house has half burned down before we stop to call 9-1-1.

Most importantly, we need a commitment from the Governor, from our state's prosecutors, from the judiciary, and from the legislature to take seriously Kansas' constitutional obligation to make the provision of quality public defense services a priority and to support its needs accordingly.

The Next Steps

After you've read our report and reviewed our plan, there are several steps we would encourage you to take.

- Reach out to your local Chief Public Defender and talk to them about the issues our agency is facing in your particular district.

- If you live in an area where there is no public defender office, reach out to your local district court and ask about the panel of appointed attorneys and how that process works.

- Talk to your local prosecutors and defense bar about the parity of resources between the county or district attorney offices and the local defense bar.

- If you live in Saline County, Shawnee County, or Sedgwick County, reach out to your local judges and ask them about the practical impacts of public defender office turnover issues or the refusal of cases due to caseloads and the impact that has on local district court proceedings.

- Contact a person who has been through our public defense system. If you don't personally know of someone, contact your local community leaders and criminal justice activists and ask them to put you contact with someone who has experienced our system.[9]

- Then ask yourself some questions:

    - If you were charged with a felony offense that went to trial, how much time would *you* expect your attorney to spend with you talking about your case?

    - How much time would you expect your attorney to spend researching the issues in your case and preparing motions on your behalf?

[9] The Paul E. Wilson Project for Innocence and Post-Conviction Remedies can be contacted through Director of the Project, Professor Jean Phillips, by calling 785-864-5571 or emailing her at phillips@ku.edu. See http://law.ku.edu/project-innocence ; The Midwest Innocence Project can be contacted through its Director, Tricia Rojo Bushnell by calling 816-221-2166 or by email her at office@themip.org , See https://themip.org/

    - How much time do you think it would take for you to feel like your attorney was effective at his or her job defending you if you were facing the possibility of an even small amount of prison time? What if you were facing a life sentence? What if you were facing the death penalty?

    - How prepared do you expect your attorney to be when defending your liberty before a court of law?

- Finally, contact us.

Between now and the budget hearings beginning in January, if you have questions, want more information, or would like us to come talk to you in more detail about the issues we are facing, our budget requests, or our plans to correct these issues going forward, just let us know.

A Report On The Status of Public Defense Services In Kansas

September 2020

The Board of Indigents' Defense Services

The Constitutional and Statutory Right to Counsel and its Provision in Kansas

The statutory purpose of the Board of Indigents' Defense Services (BIDS) is to "Provide, supervise and coordinate, in the most efficient and economical manner possible, the constitutionally and statutorily required counsel and related services for each indigent person accused of a felony and for such other indigent persons as prescribed by statute."[10]

This statutory mission is firmly rooted in the combination of the constitutional requirements of the Sixth Amendment of the United States Constitution, as held in *Gideon v. Wainwright*, 372 U.S. 335 (1963); Sections 5 and 10 of the Kansas Constitution Bill of Rights; and K.S.A. 22-4503(a).[11] [12] Those constitutional and statutory rules require that all adults accused of felonies in Kansas that cannot afford an attorney have the right to an effective appointed attorney. The Board fulfills this core mission through two different types of delivery systems: public defenders and assigned private counsel.

The Delivery of Defense Services in Kansas

BIDS administers 17 regional public defender offices.[13] Those offices include 11 noncapital trial level regional defender offices, a trial level capital defender office with a second satellite office, 1 state-wide appellate defender office, two capital appellate offices, and one capital habeas office. Public defenders and public defense staff are state employees who are directly employed by BIDS and who are subject to the internal oversight and quality control procedures instituted by BIDS through its regional public defender offices. Public defender offices, when sufficiently staffed and able to consistently accept new cases have

[10] See K.S.A. 22-4522.

[11] Oral Arguments from the *Gideon v. Wainwright* 1962 United States Supreme Court hearing can be listened to here: https://www.oyez.org/cases/1962/155

[12] K.S.A. 22-4503(a) reads, "A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant and a defendant in an extradition proceeding, or a habeas corpus proceeding pursuant to K.S.A. 22-2710, and amendments thereto, is entitled to have assistance of counsel at such proceeding.

[13] An organizational chart listing the various offices BIDS administers is included as an attachment to this report.

traditionally been the most effective and fiscally efficient way to provide counsel to our clients.[14]

However, there are not enough public defender offices to cover each of the 31 judicial districts that prosecute criminal cases in Kansas. As a result, BIDS also administers an assigned private counsel program. This program consists of two groups: contract counsel, and non-contract counsel.

Contract counsel are typically private attorneys or firms that contract with the Board to accept appointed cases at rates reduced from market value where the public defender has a conflict or is unable to otherwise handle the case, or where there is no public defender office in place. Contract counsel are private attorneys and their performance and their caseloads are not directly supervised by BIDS. BIDS does audit contract counsel claim forms when submitted and facilitates payments to counsel for the cases they handle.

Non-contract assigned counsel are private attorneys who meet established regulatory criteria and who voluntarily serve on appointments panels in each judicial district. They are appointed to cases directly by the district court judges who oversee the appointment panels in their respective jurisdictions. These attorneys currently receive an eighty dollar ($80) per hour statutory rate to handle cases where the public defender is conflicted from representing a client or is otherwise unable to accept the appointment, and where contract counsel are otherwise unavailable.[15] Non-contract assigned counsel are private attorneys and are not directly supervised by BIDS. Instead, BIDS audits assigned counsel claim forms when submitted and facilitates payments to those counsel for cases handled after the case has been completed.

The impact that our agency's services have on Kansas' criminal legal system is huge. On average eighty-five percent (85%) of adults charged with felonies in

[14] In 2019, the average cost of a public defender case was $659 per case while the average cost of an assigned counsel case was $941. In 2019, assigned counsel cases cost, on average $282 more per case than a case handled by a public defender. In 2020, the average cost of a public defender case was $818 while the average cost of an assigned counsel case was $993. So, in 2020, assigned counsel cases cost, on average, $175 more per case than a case handled by a public defender.

[15] K.S.A. 22-4507(c).

Kansas qualify for appointed counsel.[16] BIDS provides those attorneys through one of the two systems detailed above.

In FY 2020, BIDS handled a grand total of 26,237 cases: 11,456 through the public defender system, and 14,781 through the assigned counsel program. As is clear from these statistics, the relative health of the Kansas public defense system has a substantial impact on the ability of our criminal courts to work a large percentage of their criminal dockets throughout Kansas.

A strong public defense system is a value to the Kansas criminal legal system as a whole. A strong public defense system not only protects our clients' legal rights and satisfies the constitutional requirements of the Sixth Amendment, it also protects our Kansas citizens' liberties as a whole, increases the effectiveness of the court system, and is essential to maintaining the legitimacy of the entire judicial process.[17]

Recent BIDS Difficulties

It has been no secret that, over the last several years, our agency has seen its fair share of problems. These have included on-going high employee turnover rates, low pay for public defenders that has negatively affected our recruitment and retention efforts, and chronically high and ethically concerning caseloads.[18]

In FY 2020, our agency turnover rate was calculated at 15%. While 15% turnover is still better than the 1 in 4 public defenders that were leaving their positions in the spring of 2019, it is slightly worse than the 13% turnover rate we reported in the fall of 2019. Because of the recent history of high turnover rates, that current 15% turnover rate still represents a significant impact on our ability

[16] Statistic provided by the Kansas Sentencing Commission, February 2020.

[17] Fabelo, Tony, "What Policy Makers Need to Know To Improve Public Defense Systems", *Bureau of Justice Assistance*, U.S. Dept. of Justice, December 2001, https://www.ncjrs.gov/pdffiles1/bja/190725.pdf

[18] Ujiyediin, Nomin, *One In Four Kansas Public Defenders Quit Last Year, Leaving Agency 'In Crisis,'* KCUR, published April 8, 2019. https://www.kcur.org/government/2019-04-08/one-in-four-kansas-public-defenders-quit-last-year-leaving-agency-in-crisis ; Ujiyediin, Nomin, *Kansas Public Defender Agency Still 'On Fire', Struggling to Keep staff*, KCUR, published March 11, 2020. https://www.kcur.org/government/2020-03-11/kansas-public-defender-agency-still-on-fire-struggling-to-keep-staff

to consistently keep our public defender offices fully staffed with highly experienced attorneys and support staff.

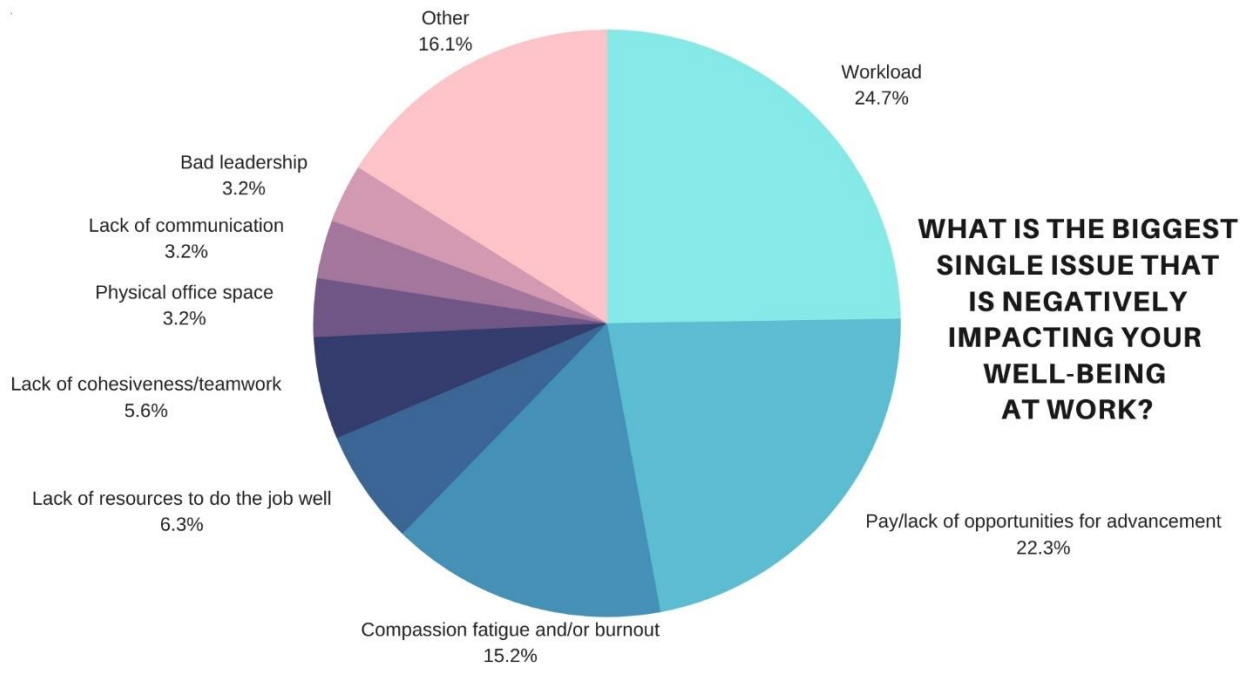
Our turnover has been in large part, driven by our caseload and compensation issues. After all, it is not hard to understand why having too many cases and too few people to effectively work those cases would drive many of our employees to leave our agency for other employment. This is particularly true for our attorneys, as high caseloads present significant ethical issues that can endanger our attorneys' law licenses and their ability to continue practicing law.

Even if these caseload issues weren't enough on their own to drive turnover (which they are), those caseloads, combined with our compensation issues (lack of reliable raises, lack of opportunity for promotions, parity issues, and comparably low salaries), simply add to those retention and recruitment problems. It is very unsurprising that we have trouble keeping and recruiting employees when they can do similar work with the federal public defenders or the local prosecutor's office for better pay, with lower caseloads, and with better institutional support.

Employee Feedback

A recent agency-wide employee survey by the BIDS Well-Being Committee confirmed these findings. Specifically, employees were asked to name the single biggest issue that negatively impacts their well-being at work. The top two responses to that question were workload (24.7%) and poor pay and/or lack of raises/promotions (22.3%).[19] Compassion fatigue and/or burnout came in close to those at 15.2%. Arguably, compassion fatigue and burnout are highly related to chronic high caseloads.

[19] The August 2020 BIDS Employee Well-Being Survey is attached at the back of this report for your reference.



Most importantly, the BIDS Well-Being survey found that although eighty one percent (81%) of the respondents reported that they believe in the work we do and listed that as the reason they began working in a public defender office in the first place, fifty-five percent (55%) of those same employees reported that they have considered leaving their public defender offices *within the past year*.

Out of those who reported having considered leaving in the last year, sixty-four percent (64%) reported their reason for thinking of leaving was due to pay/lack of opportunities for advancement, forty-six percent (46%) reported compassion fatigue and/or burnout, and forty-three percent (43%) reported workload issues.[20] Again, compassion fatigue and burnout are interrelated to chronic workload issues.

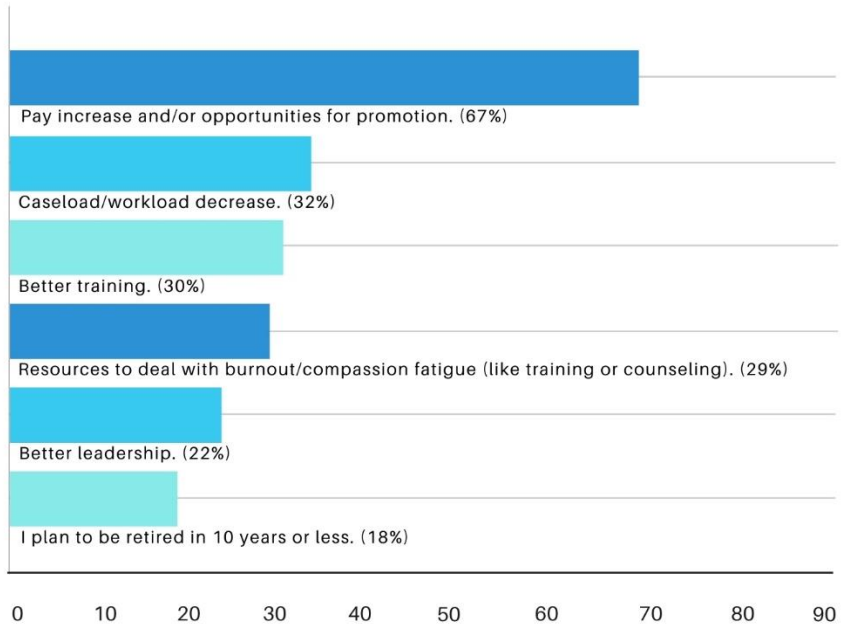
When asked if they saw themselves working in a Kansas public defender office in ten years, twenty-eight percent (28%) reported that they did not. Fifty-nine percent (59%) reported that they were unsure if they see themselves working in a Kansas public defender office in ten years. This means that fully eighty-seven percent (87%) of our employees who responded to our survey were

[20] For this question, respondents were allowed to choose multiple answers to support their rationale for why they were thinking of leaving public defense.

unsure of or did not see themselves working in a Kansas public defender office in ten years.

This is a highly concerning statistic. Eighty-one percent (81%) of these employees reported that they came to this work because they believe in the mission of what we do. But then eighty-seven percent (87%) reported that they did not see themselves or were unsure of seeing themselves working in a Kansas public defender office in ten years. We are literally driving away mission-driven employees. We needed to find out why. So we asked.

When those respondents were asked what would have to change to make them want to stay, sixty-seven percent (67%) responded that pay increases and/or opportunities for promotion would make them want to stay. Thirty-two percent (32%) listed caseload/work decreases as a reason to consider staying. Thirty percent (30%) listed better training, and twenty-nine percent (29%) listed better resources to deal with burnout/compassion fatigue as reasons to consider staying.[21]



What would have to change to make you want to stay?

[21] For this question, respondents were allowed to choose multiple answer to support their decision on what would make them consider staying.

The answers were clear. Addressing our caseload problems, compensation issues, providing better training and better institutional support to assist with compassion fatigue and burnout issues are clearly identified paths to better employee satisfaction and to curb our historic, chronic turnover rates.

High Caseloads

Caseloads are not just an employee retention issue. They are also an issue directly related to the quality of services we provide our clients and an issue directly related to the ability of our employees to provide effective and ethical assistance of counsel.

Background on Applicable Caseload Standards:

The National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense Representation indicates that "before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter." See Guideline 1.3.

The 1973 National Advisory Commission on Criminal Justice Standards and Goals for the Defense set defense attorney workloads at **no more than 150 felonies per year**, no more than 400 misdemeanors per year, and no more than 25 appeals per year. See NAC Standard 13.12.

However, the NAC standards were developed almost 50 years ago and do not take into account the increased complexity of criminal law, criminal procedure, and sentencing laws since those standards were first issued.[22] The fact is that taking a criminal felony case to a plea or a jury trial in 2020 is substantially more burdensome now than it was in 1973. And yet, across the board, our

[22] The modern defense industry standard for conducting caseload analysis is to use an evidence based Delphi study method to determine acceptable, state-specific workload standards. While BIDS is working towards conducting such a study, that is a time consuming process that will likely not be completed for several years. As a result, we are currently using the admittedly outdated NAC standards to illustrate our caseload issues for the purposes of this report.

attorneys are carrying higher caseloads than even these outdated 1973 standards ethically allow.

More recently, in 2015, the National Association for Public Defense (NAPD) issued a Workload Position Paper, calling for public defense organizations to consider the old NAC standards as the "absolute maximum" workload allowed.[23] The American Bar Association, Ten Principles of a Public Defense Delivery System explicitly calls for defense counsel's workload to be "controlled to permit the rendering of quality representation."

The American Bar Association (ABA) Criminal Justice Standards for the Defense Function specifies in Standard 4-1.8 the importance of appropriate workloads. That standard says:

> Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.

This cannot be said often enough: **Caseloads are an ethical issue**. It is well recognized that excessive caseloads, by their very nature, interfere with an attorney's competency and diligence in representing their clients. See American Bar Association Formal Ethics Opinion 06-441. See also, KPRC Rule 226, 1.1 Competence ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."); See also Kansas Professional Rules of Conduct, Rule 226, 1.3 Diligence, comment 1 ("A lawyer's workload should be controlled so that each matter can be handled adequately.")

[23] This workload position paper is included as an attachment to this report.

Defender Organizations that fail to sufficiently control attorney caseloads open their employees, their supervisors, and their attorney agency leadership up to professional ethics complaints which may ultimately endanger their employees' licenses to continue practicing law.

Additionally, any caseload related professionally deficient or unethical performance on these cases opens up BIDS, and thereby the State of Kansas, to a variety of expensive post-trial litigation, including viable claims of ineffective assistance of counsel, wrongful conviction lawsuits, potential legal malpractice claims, and protracted litigation over the constitutional adequacy of the public defense system as a whole.

For some perspective that may hit a little closer to home, consider that just three Kansas wrongful conviction claims in the cases of Richard Jones ($1.1 million), Floyd Bledsoe ($1.03 million), and Lamonte McIntyre ($1.5 million), have already cost the state $3.63 million dollars.[24] Even if just one or two cases a year were to rise to the level of a wrongful conviction (out of the roughly 25,000-30,000 cases BIDS handles each year), it's not hard to see how quickly such litigation can add up. An adequately resourced public defense system with sufficiently monitored and controlled caseloads is the best, most economical strategy to avoiding wrongful conviction claims such as these.

Similarly, one only has to look across our state line to Missouri to see how litigation over insufficient funding and high caseloads and its impacts on the constitutional provision of public defense can last for years. Moreover, that litigation costs the state the very financial resources that, if put directly into the public defense system, would have arguably ameliorated some of the inadequacies of the system.[25]

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[24] Bates, Josiah, "A Wrongfully Convicted Kansas Man Who Spent 23 Years in Prison Is Awarded $1.5 Million," *Time Magazine*, February 25, 2020, https://time.com/5790335/kansas-man-wrongfully-convicted-financial-award/; Hedgman, Roxana, "Kansas Has Paid 2 of 5 Claims for Wrongful Incarceration," *AP News*, May 26, 2019, https://apnews.com/fee472c2f95747b9a41437866008eef4

[25] Ford, Matt, "A 'Constitutional Crisis' in Missouri," *The Atlantic*, March 14, 2017, https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/; Margolies, Dan, "Federal Judge Refuses to Approve Deal Reducing Missouri Public Defender Workloads," *KCUR*, January 28, 2020, https://www.kcur.org/government/2020-01-28/federal-judge-refuses-to-approve-deal-reducing-missouri-public-defender-workloads

But most importantly, too high of caseloads impede our ability to provide our core agency mission: to our give our clients an effective criminal defense. Our lack of sufficient staffing to adequately handle the caseloads we experience on a daily basis results in a fundamental failure to serve our clients and our core mission.

Applying the NAC Standards to our Kansas Caseloads:

When discussing caseloads it's important to remember that our public defenders and assigned counsel have no control over the number of criminal cases that come through our Kansas criminal legal system.

It is entirely within the control of the legislature as to what acts are designated as crimes, and more specifically, what acts are designated as felonies, triggering the constitutionally required appointment of counsel. Similarly, it is entirely within the discretion of local prosecutors as to which incidents they choose to charge and frequently whether those charges will constitute misdemeanors or rise to the level, based on the prosecutor's interpretation of the facts, to felony charges. It is also entirely within the prosecutor's discretion as to how many cases he or she will support sending into diversion programs.

It is also important to keep in mind that, across the board, our caseloads took a sudden nosedive during the last quarter of FY 2020 due to the state-wide court shutdown as a result of COVID-19. That, combined with the chronic closings of many of our public defender offices to new cases throughout FY 2020 due to turnover and caseload issues resulted in lower than normal caseloads for FY 2020. So when evaluating our FY 2020 caseloads, and examining the resulting staffing needs we've calculated based on those caseloads, be aware that those caseloads are lower than our typical caseloads in a more normal year by around ten to twenty percent.

When assessing our FY 2020 caseloads for our trial public defender offices, we looked at a number of factors: the number of active attorneys taking cases in the office, the number of chronically open positions in an office, the number of

cases completed in FY 2020, and the number of cases still active and open right at the end of FY 2020 and beginning of FY 2021 to get an accurate picture of how many cases our attorneys are handling in a given year. Using these factors, we calculated out the total average number of cases handled per active attorney, per office during the year. The breakdown of those figures is included on the next table.

Average Number of Cases Handled by Trial Public Defenders in FY 2020

TRIAL OFFICE	NUMBER OF ACTIVE ATTORNEYS	ACTUAL FY 2020 CASES CLOSED	CASES STILL ACTIVE 7/1/2020	TOTAL Cases Closed & Cases Active	TOTAL AVG CASES HANDLED PER ATTY FY 2020
TOPEKA	9	963	390	1353	150.33
NEKCO Topeka	5	614	236	850	170
SALINA	4[26]	757	292	1049	262.25
JUNCTION CITY	11	1168	420	1588	144.36
OLATHE	16	2324	952	3276	204.75
HUTCHINSON	5	681	279	960	192
WICHITA	19[27]	3630	1655	5285	278.16
SCCO Wichita	5	404	311	715	143
GARDEN CITY	2	230	159	389	194.5
CHANUTE	3	387	332	719	239.67
INDEPENDENCE	2	298	135	433	216.5
TOTAL	**81**	**11,456**	**5,161**	**16,617**	**205.15**

[26] Salina has 8 positions, but only 4 of those were consistently filled during FY 2020.
[27] Our main Wichita Office had 23 attorneys positions, but only 19 of those were consistently filled during FY 2020.

As you can see from the previous chart, only three offices, our main Topeka public defender office (Third Judicial District Public Defender), our Wichita Conflicts office (Sedgwick County Conflicts Public Defender Office), and our Junction City office (Northwest Regional Public Defender Office) maintained average caseloads right at or just below the NAC maximum caseload standards of 150 felony cases per attorney, per year.

For some perspective on just what those caseload numbers mean, consider our Sedgwick County Public Defender Office in Wichita. Based on the number of cases they closed in FY 2020, the active cases they still had on hand at the end of FY 2020, and the number of consistently active public defender positions they had filled in their office during FY 2020, we determined that their average caseload came out to be approximately 278 cases per attorney, per year in FY 2020.

An attorney who works 40 hours a week for 52 weeks out of the year would have 2,080 hours in that year to dedicate to their cases which include high severity level cases and off grid felony cases with life sentences. With an average of 278 cases to work in that time frame, that attorney would only have approximately 7.5 hours to dedicate to their clients per case, *per year.*

That is unacceptable under any measure of professional standards.

By comparison, a 2017 study of Louisiana Public Defender caseloads found that a lawyer should spend approximately 22 hours working on low-level felony cases for reasonably effective assistance of counsel, while a lawyer should spend 200 hours on a felony case carrying a sentence of life without parole.[28]

In a somewhat Sisyphean effort to better control these overwhelming caseloads, we've had to make extensive use of one of the only mechanisms available to us to stop the influx of cases to our public defenders: refusing new cases.

[28] https://www.abajournal.com/news/article/louisianas_public_defender_system_is_understaffed_by_about_1400_lawyers_aba

Public Defender Refusals of New Cases

When our public defender offices do not have enough experienced attorneys to handle those cases, or the attorneys that we have are simply too overloaded with cases to take on more, our public defender offices, after consultation with the director, notify their local district court that they will be refusing to accept new cases for a designated period of time.[29]

These "shutdowns" of our public defender offices to new cases are an extreme but necessary measure at controlling overwhelming caseloads. Most concerning is that this measure is being used with increasing frequency as a result of both staff turnover, the lower number of experienced attorneys in our system, and the unending influx of new cases.

In FY 2020, our public defender offices had to shut down to new cases a total of 26 times. Although these shutdowns involved most of our offices at one point during the year or another, our offices in Topeka, Salina, and Wichita had the most frequent refusals to take new cases primarily due to turnover issues and overwhelming caseloads.

For example, our Third Judicial District Public Defender Office in Topeka closed to new cases during five periods of time in FY 2020:

Closed	7/15/19 - 8/5/19	Turnover/caseloads	22 days
Closed	8/28/19 - 9/16/19	Turnover/caseloads	20 days
Closed	12/3/19 - 12/31/19	Turnover/caseloads	29 days
Closed	1/24/20 - 3/9/20	Turnover/caseloads	46 days
Closed	5/7/20 – 7/1/20	Turnover/caseloads	55 Days

That office was refusing cases (partially or totally) for a grand total of 172 days out of 365, or 47% of the year. Notably, the Third Judicial District Public Defender Office was one of only three of our 11 trial offices in FY 2020 that

[29] K.A.R. 105-21-3(b) "The public defender may refuse to accept court-appointed cases when it is determined jointly by the public defender and the director that the current active caseload would preclude the public defender from providing adequate representation to new clients," ; K.A.R. 105-21-3(c) "When a decision is made to withdraw from a case or to not accept cases due to current caseloads, the public defender shall communicate this decision to the administrative judge of the district, who shall appoint attorneys, in sequence, from the panel for a period established by the director." See also, K.S.A. 22-4501, K.S.A. 22-4522.

managed to stay at or just under the NAC maximum caseload standard average of 150 felonies per attorney, per year.

In other words, it took our main Topeka public defender office closing for almost half the year in order to maintain their caseloads around 150 felonies per attorney, per year -- the absolute maximum caseloads allowable.

Contrast that with our main public defender office in Wichita, the Sedgwick County Public Defender Office. That office refused to accept new cases twice during FY 2020:

Closed	12/2/19 – 12/13/19	Turnover/caseloads	12 days
Closed	2/3/20 – 3/16/20	Turnover/caseloads	43 days

That office refused cases (partially or totally) for only 55 days out of 365, or 15% of the year. However, that office also suffered from the worst average caseload, handling an average of 278 cases per attorney in FY 2020, well above the NAC maximum caseloads allowable of 150 felony cases per attorney, per year. Unsurprisingly, our Sedgwick County Public Defender Office also suffered from some of the highest turnover in our agency and had four chronically unfilled attorney positions during the vast majority of FY 2020.

Increased Assigned Counsel Caseloads

Of course, those cases, when not able to be accepted by the public defender offices, have to go somewhere. Those cases end up being defended by private attorneys in our assigned counsel program.

This is important because our assigned counsel typically cost more per case than our public defenders. For example, **in FY 2020, our assigned attorneys cost us, on average, an additional $175 per case more than what our public defenders would cost to handle the same case.** In FY 2019 (when public defender offices had fewer shutdowns to new cases related to their caseload issues), that additional cost difference was as much as $282 dollars more per case for assigned counsel than when the public defender office handled the same case.

In FY 2019, our agency handled 29,325 cases. Of those, our public defenders handed 14,007 cases at $659 per case while our assigned counsel handled 15,318 cases at a cost of $941 per case. This means that the extra 1,311 cases that the assigned counsel program handled over and above our public defenders in FY 2019 likely cost the state an additional $369,702.

In FY 2020, our agency handled 26,237 cases. Of those, our public defenders handled 11,456 cases at $818 per case and our assigned counsel handled 14,781 cases at a cost of $993 per case.[30] This means that the additional 3,325 more cases that the assigned counsel handled over the public defender offices likely cost the state an additional $581,785.

If, based on our FY 2020 numbers and cost per case rates, the state public defender system could take back even just half of the total assigned counsel cases (7,390 cases), that could have saved the state over 1.3 million dollars over the course of one year.[31]

But there are also non-financial reasons to want to avoid offloading so many cases to our assigned counsel program. The fact is that once a case goes to our assigned counsel, it is as though it falls into a black box. Private counsel are on their own to handle the case the way they see fit and BIDS has very little practical control over the individual quality of specific private counsel's representation or the choices they make regarding their own caseloads. While there are certainly plenty of our assigned counsel who do great work and provide quality representation, the fact is that all too often if one of our assigned counsel is not living up to their professional and ethical obligations, it is difficult for BIDS to discover those failings until very late in the process.

Assigned counsel programs are a vital and necessary part of any public defense model, but when the state is spending its financial resources on public defense, it makes sense to invest those moneys in the part of the system where the state also has far more immediate quality controls.

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[30] The higher cost per case in FY 2020 for our public defenders was primarily related to the increased number of days our public defender offices had to refuse new cases in order to control their caseloads and cope with their turnover rates.

[31] 7,390 cases at $993 per case would cost our assigned counsel $7,338,270. Whereas 7,390 cases for the public defenders at $818 per case would cost $6,045,020, a savings of $1,293,250.

Low Compensation For Our Assigned Counsel Attorneys

It is also important to note that our increased reliance on our assigned counsel program has also put a spotlight on our unconscionably low assigned counsel hourly rate. Our current $80 per hour assigned counsel rate was implemented in 2006.[32] That rate was substantially below the going market rate for attorney services even at the time it was implemented and it is even more substantially below the current market rate for attorney services now, fourteen years later.[33] Specifically, in 2006 when that $80 per hour rate was established by the legislature, the average market rate for attorney services in Kansas was around $150 per hour. When that rate was established in 2006, our BIDS rate of $80 per hour was only fifty-three percent (53%) of the going market rate.

In the 14 years since that rate was set, the overhead costs of operating a law office, along with the average market rate of private counsel has increased. In 2017, the average hourly market rate in Kansas was around $225 per hour. Our statutory rate remains $80 per hour. Based on those figures, our current hourly rate is now roughly thirty-six percent (36%) of the market rate for private counsel.

It is important to note that in 1987, the Kansas Supreme Court explicitly held that the responsibility to provide the Sixth Amendment right to counsel is a public responsibility that is not to be borne entirely by the private bar and that attorneys' services are property, and thus are subject to Fifth Amendment takings protections. *State ex rel. Stephan v. Smith*, 242 Kan. 336, Syl. ¶¶6,11, 747 P.2d 816 (1987). [34]

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[32] That rate is capped at $80 per hour by K.S.A. 22-4507(c).

[33] A Flash Report on the 2017 Economics of Law Practice Survey in Kansas, By Kansas Bar Association, September 2017, pg. 7. https://cdn.ymaws.com/www.ksbar.org/resource/collection/D6AEF056-5088-4555-B207-2685976B9173/2017EconomicSurvey.pdf

[34] In *Stephan v. Smith*, the Court found that the indigents' defense system at that time that required panel attorneys to shoulder the burden of indigent criminal defense while being paid fees that averaged less than their office overhead while most attorneys were not required to participate or contribute to the indigent defense system violated federal equal protection clause protections. 242 Kan. at 375-76.

A Looming Appointed Panel Crisis

The pressures of more cases going to our assigned counsel combined with that increasingly unaffordable low hourly rate, are causing difficulties for our district courts to sufficiently fill their appointment panels. This is particularly problematic when it comes to attorneys qualified to handle high severity level cases, which can require appointed counsel work hundreds of hours far below market rate. Our BIDS administrative office fields phone calls from judges across the state each week looking for help locating additional qualified counsel to appoint to cases in their jurisdictions.

In short, our recruitment and retention problems are not just limited to our public defender offices, these are also problems that involve our appointed panels.

Unfortunately, without a substantial investment in our public defender offices, and with the on-going need to continue closing public defender offices to new cases due to turnover and caseload concerns, we anticipate the need to continue offloading additional cases to the assigned counsel program will continue to increase, as will the additional costs associated with those cases. We then anticipate facing a looming crisis of counsel on our appointment panels as we continue to struggle to find sufficient numbers of attorneys to accept the increasingly high number of appointments on low paying criminal cases.

In short, our failure to sufficiently fund our staffing needs in our public defender offices upfront is not only a driving factor in our recruitment and retention problems in our public defender offices—it also has a direct impact on the cost effectiveness of our public defender offices, the rising number of cases being handled by the assigned counsel program, the associated rising costs of those assigned counsel cases, and, ultimately on the continued availability of enough private counsel to handle all of our appointed cases.

Compensation Issues

Compensation issues are at the top of the list of concerns of both our current employees and our employees who ultimately choose to the leave the

agency. Those compensation concerns come as a result of several on-going agency problems.

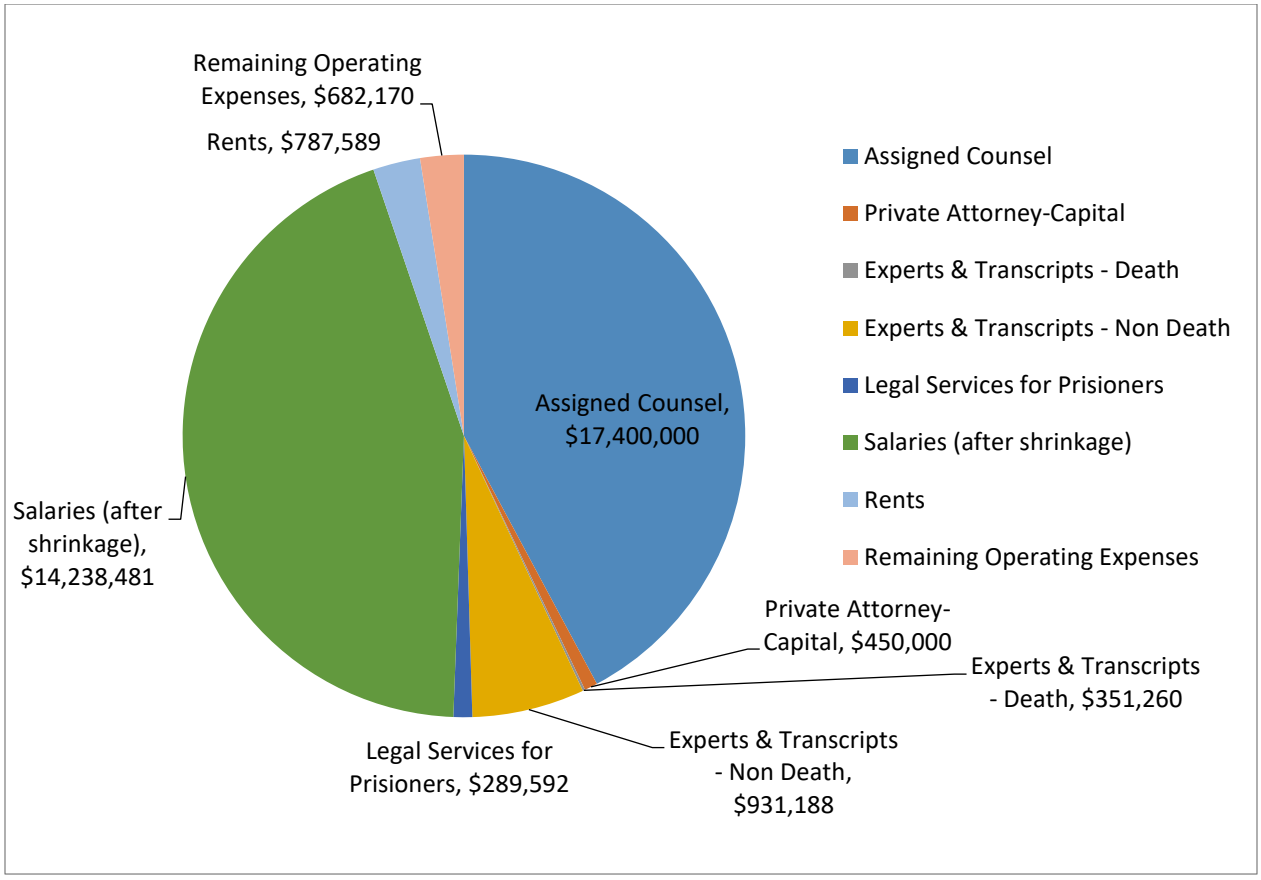
Over the years our efforts to give consistent raises have frequently been underfunded. However, consistent raises are necessary to keep up with increasing cost of living expenses, increasing competitive market base salary rates, and the increasing demands of heavy student loan debts most of our new graduate attorneys have upon entering the public defense system. Our agency operations budget is so slim that merit raises are highly inconsistent or completely non-existent most years. Additionally, a lack of sufficient funding has meant the agency must choose between supporting our current employees with experience raises to incentivize staying with the agency or increasing salaries on open positions to attract experienced attorneys back into our system. We cannot afford to do both at the same time. There are few opportunities for promotions, as Deputy and Chief Public Defender positions are few and far in between. And yet, promotions are the only reliable method of obtaining any kind of significant salary increase in our agency.

These compensation issues, combined with our caseload pressures, lead our employees to look for other employment. And because of a decreasing number of law school graduates over the last ten years, the competition for experienced employees is fierce. Frequently, our employees find other better paid employment for comparable work either with our colleagues across the aisle in the consistently better funded county and district attorneys' offices, or with other state and federal agencies such as the Department of Revenue, the Judiciary, or the Federal Public Defender.

The problem is that we cannot afford to continue losing experienced employees. In the spring of 2019, we were losing 1 in 4 public defenders. Those tended to be the more experienced attorneys whose salaries were no longer competitive with other employers' offers given their level of experience. But because we could not afford to maintain that experience, when we hired to replace those employees, we ended up hiring dedicated but generally less experienced employees who were willing to accept our lower salaries in part because of their lack of experience.

As a result, our agency lost a substantial amount of institutional experience. Now BIDS has a public defender employee base where approximately sixty percent (60%) of our public defenders have five years of experience or less as attorneys, and almost thirty-eight percent (38%) have two years of experience or less. We cannot continue to lose what few experienced employees we have left.

FY2021 Agency Appropriation



This chart reflects the distribution of agency appropriations and fee funds for FY2021. Remaining Operating funds of $682,170 cover the needs of eighteen offices and two hundred full time equivalent staff. These funds provide for postage, telephone, freight, printing, state fee assessments, travel and vehicle expenses, professional liability and automobile insurance, Westlaw, utilities, office supplies, record storage, and professional materials such as K.A.R.'s and P.I.K.'s.

Pay Parity With Prosecutors

The American Bar Association's Ten Principles of a Public Defense Delivery System, explicitly calls for parity between defense counsel and the prosecution with respect to resources, and that defense counsel be included as an equal partner in the criminal legal system. There is nothing more fundamental to that principle than that public defenders be paid comparatively to their similarly experienced colleagues across the aisle in the county attorney's office.

Our recent survey of Kansas prosecutor salaries has found that our public defenders are consistently lagging significantly behind their prosecutor colleagues' comparable salaries. Even where starting salaries between our public defenders and new assistant county attorneys tend to be similar, once an attorney in those positions gains any significant amount of experience, the salary differences become substantially stark. The salaries for experienced attorneys in prosecutors' offices are consistently higher than our current comparable BIDS salaries.

These findings are unsurprising, as it well-known throughout the criminal legal community that an attorney can leave almost any public defender's office in the state and go work for the opposing prosecutor's office frequently for considerably more money than he or she was making as defense counsel on the exact same cases. This factor has long been a significant contribution to our attorney turnover rates in almost every geographic area where we have a trial public defender office.

Recent requests for information about prosecutor salaries across Kansas resulted in a variety of responses including the following information provided regarding 2018 prosecutor salary comparisons.[35]

[35] Table below created from information collected and provided by Thomas Drees, Ellis County Attorney

County	No. Asst.	Salary Ranges
Johnson Co. District Attorney	34	63,400 – 165,365
Sedgwick Co. District Attorney	55	54,300 – 126,915
Shawnee Co. District Attorney	23	55,000 – 99,000[36]

Compare that table with this one, detailing public defender salaries in those same counties.

County	No. Attorneys	Salary Ranges
10th Jud. Dist. PD Johnson County	16	55,683 – 84,272
Sedgwick County PD	21	55,683 – 84,000
Sedgwick County Conflicts PD	5	62,998 – 83,734
3rd Jud. Dist. PD Shawnee County	10	55,683 – 92,430
Northeast KS Conflicts PD Shawnee County	5	55,683 – 79,872

[36] By January 2020, Shawnee County District Attorney Michael Kagay reported the top salary in his office at $120,00 per year.

Pay Parity With Other Government Salaries

In addition to a lack of pay parity with prosecutors, we frequently lose dedicated public defenders and public defense staff to other state and federal government agencies in Kansas because other agencies are able to consistently pay better for the level of legal or support staff experience our employees have than we can. Pay issues contribute significantly to our turnover problem and exacerbate the difficulties in recruiting new employees to our agency.

For example, another competitor for our talent that has offices in several of the same geographic areas as our public defender offices is the Federal Defender of Kansas. Here is a breakdown of their FY 2020 Salary Charts:[37]

2020 AFD Starting Salary Charts for Federal Defender of Kansas

AD-21	0-3 years of experience	$64,660 - $98,607
AD-23	3-5 years of experience	$69,473 - $105,948
AD-25	5-6 years of experience	$74,647 - $113,836
AD-26	6-7 years of experience	$80,204 - $122,312
AD-27	7-8 years of experience	$92,592 - $131,420
AD-28	8-9 years of experience	$92,592 - $141,204
AD-29	9+ years of experience	$99,486 - $151,716

Even just these starting salaries are substantially higher than our in-state public defender system. And, of course, the Federal Public Defender has the benefit of being in many of the same communities and general regional areas as

[37] Salary information provided by email 2/4/20 by Erin Thompson, General Counsel and Administrative Officer, Federal Public Defender of the District of Kansas.

many of our state public defender offices, which makes it all that much easier for an experienced defender to switch from our state system to the federal system without uprooting his or her family or living situation.

But that's not even the full story when looking at the Federal Public Defender salaries. Within a calendar year, a defender may receive an increase in salary when he or she "substantially exceeds expectations." The following is a chart showing how high a Federal Defender's salary may rise.

2020 AFD APR Increase Chart for Federal Defender of Kansas
"substantially exceeds expectations"

AD-21	0-3 years experience	$89,297 - $109,922
AD-23	3-5 years experience	$93,790 - $118,106
AD-25	5-6 years of experience	$100,773 - $126,899
AD-26	6-7 years of experience	$108,276 - $136,348
AD-27	7-8 years of experience	$116,338 - $146,500
AD-28	8-9 years of experience	$125,000 - $157,407
AD-29	9+ years of experience	$134,306 - $169,126

Once a public defender has gained any significant amount of experience in state district court, it is extremely difficult to compete with the Federal Public Defender to keep those defenders in our state system given the disparities between our salary ranges for comparable years of experience.

By way of comparison, our two top paid public defenders, both with decades of experience and in positions as the Chief Public Defenders of their respective offices, are still both paid under $100,000 a year. An assistant federal

defender with 3-5 years of experience can make more money under these pay scales than our two top paid public defenders in the entire state. A new assistant federal defender with 0-3 years of experience who "exceeds expectations" can make more than our most senior Chief Defenders. Likewise, those two top paid public defenders could go to any one of the Johnson County, Sedgwick County, or Shawnee County District Attorneys' offices and also be paid substantially more than their top salaries in our public defender system.

Comparing Pay with Neighboring Public Defender Systems

Even compared with other state public defender systems, our salary structure lags behind. For example, here is a breakdown of Colorado public defender salaries:

Colorado Public Defender Salaries FY 2020

Deputy State Public Defender	Entry-Level attorney	$5,355 - $7,872 per month ($64,260 - $94,464 per year)
Senior Deputy State Public Defender	Advanced skill set, complex litigation Mentors, trainers	$6,482 - $9,529 per month ($77,784 - $114,348 per year)
Lead Deputy State Public Defender	Most complex litigators, Master level practice,	$7,802 - $11,703 per month ($93,624 - $140,436 per year)
Supervising Deputy State Public Defender	Formal Supervisor Position Office Management Team	$9,272 - $13,908 per month ($111,264 - $166,896 per year).

Managing Deputy State Public Defender	Head of Office, Lead attorney in each regional office	$10,934 - $15,591 per month ($131,208 - $187,092 per year)

Although not broken out specifically by years of experience, it is clear that from start to finish, the Colorado Public Defender system pays its attorneys substantially higher salaries than Kansas does for comparable work. While, generally, the cost of living in the urban areas of Colorado is considerably higher than many places in Kansas, Colorado also has its fair share of rural public defender offices in its less populated and generally less expensive areas of the state that are far more comparable to our Kansas public defender offices. Even in those offices, Colorado public defenders still make substantially more money than our public defender employees.

In short, our employee's complaints about comparable pay and our lack of ability to give significant and consistent raises, coupled with the shortage of opportunities for promotion are all valid and justified complaints backed up by empirical research. In order to continue to compete for a percentage of a limited number of law school graduates who are interested in doing criminal law and to keep the experienced attorneys that we have, BIDS has to be able to effectively compete with the other potential employers from our criminal legal system.

Lack of Training and Sufficient Agency Institutional Support

BIDS Has No Training Division Within Its Agency Structure

One of the most surprising things about BIDS as an agency is that we are one of a handful of state public defender programs in the nation that lack a formal training division within our agency structure. An internal training division with dedicated training staff focused on addressing the wide variety of on-going defense specific continuing legal education for our attorneys, paralegals, investigators, and other support staff is absolutely vital to keeping our employees competent and

effective in the always evolving legal landscape of criminal law, forensics, and social sciences that impact every court appearance our clients make.

BIDS does not have even one single employee dedicated exclusively to the Herculean task of keeping 200 public defense employees and over 400 assigned counsel, investigators, and assigned counsel support staff sufficiently up to date on all aspects of criminal defense on a regular basis.

The only regular training that BIDS itself officially offers as an agency to our employees and assigned counsel is a twice a year, six hour long continuing legal education course that is frequently conducted entirely by in-house public defenders and support staff. Other than that, some public defender offices conduct their own ad hoc trainings on particular topics, but that is largely dependent upon who in their office has the time and interest in taking on an additional training on top of their high caseloads.

Although BIDS has recently become an organizational member of groups like the National Association for Public Defense (NAPD) in order to give our public defender office employees access to some of those organization's training materials, that is far from sufficient to cover our obligation to all of our dependent attorneys and support staff.

As with caseloads, **training also goes to the heart of our ethical obligations to support the attorneys who represent our clients on a daily basis.** Kansas Rules of Professional Conduct 1.1 Competence requires that every lawyer must provide competent representation to their client. The rules goes on to explicitly state that competent representation requires the lawyer to have "the legal knowledge, skill, thoroughness, and preparation necessary for the representation" of their client. Comment 1 to that rule points out that the lawyer's training and experience in the subject matter in question is one of the key factors in determining an attorneys' competence.

The ABA Criminal Justice Standards for the Defense Function Standard 4-1.12 explicitly discusses the importance of training for those providing public defense services, stating:

Standard 4-1.12 Training Programs

(a) The community of criminal defense attorneys, including public defense offices and State and local Bar Associations, should develop and maintain programs of training and continuing education for both new and experienced defense counsel. Defense offices, as well as the organized Bar or courts, should require that current and aspiring criminal defense counsel attend a reasonable number of hours of such training and education.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a core training curriculum for criminal defense counsel should seek to address: investigation, negotiation and litigation skills; knowledge of the development, use, and testing of forensic evidence; available sentencing structures including non-conviction and non-imprisonment alternatives and collateral consequences; professional responsibility, civility, and a commitment to professionalism; relevant office, court, and prosecution policies and procedures and their proper application; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the criminal defense community, such as prosecutors, law enforcement agencies, court staff, and members of the judiciary.

(c) A public defense office's training program should include periodic review of the office's policies and procedures, which should be amended when necessary. Counsel defending in specialized subject areas should receive training in those specialized areas. Individuals who will supervise attorneys or staff should receive training in how effectively to supervise.

(d) A public criminal defense organization should also make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.

(e) Adequate funding for continuing training and education programs, within and outside of public defense offices, should be requested and provided by funding sources.

There is no question that BIDS must do more as an agency in order to support our attorneys, staff, and assigned counsel and help them maintain their competence in court. This is why, in our phased plan that follows, we've included a plan to establish a formal BIDS Training Division within our agency to address these unmet needs.

Other Unmet Agency Infrastructure Needs

One of the biggest difficulties we have as an agency in making any major changes in how we support our public defender offices and our assigned counsel program is a lack of administrative infrastructure to do all of the things that need to be done.

We lack the informational technology infrastructure to meet the demands that modern criminal cases require both directly in the courtroom but also behind the scenes in the agency. We have historically lacked the basic tools that our public defenders needed to do their jobs effectively, having only recently obtained portable laptops with web cameras and VPN access for our employees who desperately needed that equipment in order to comply with pandemic required remote working, court demands for remote hearing appearances, and client needs for remote, non-contact client interactions.

Even after obtaining that equipment, our agency struggled to then distribute that equipment in a timely manner, having only two IT support staff to handle 18 of our offices spread out from Garden City to Independence to Johnson County to Salina and everywhere in between on top of all of those offices' normal IT security needs and the roll out of our new equipment.

This same situation plays itself out in almost every aspect of our agency structure. We lack the funding to purchase and support a modern and efficient case management system to maintain our case information, intake information,

evidence, notes, calendars, client letters and notices, etc. Instead we rely on old, inefficient methods and programs to patch together outlook calendars, overloaded access databases, and archaic electronic archiving methods in order to meet our employees' daily needs. We also still rely on a labor intensive almost entirely non-electronic paper voucher system to pay thousands of claims every year for our assigned counsel program.

We lack the sufficient support staff to make the necessary changes to our agency to provide more effective and more efficient delivery of our defense services. For example, BIDS currently runs the entire state-wide thirty-five million dollar public defense system comprised of 200 agency employees, over 350 assigned counsel, and hundreds of experts, witnesses, and private investigators with a grand total of 11 administrative support staff, only 7 of whom are full time employees. Of those full time employees, we have one state director, one chief financial officer, one human resources employee, two information technology specialists, and two full time accountants.

While state government is always on an endless quest to cut down in overhead bureaucracy in an effort to save money, there is a point at which a lack of necessary administrative staffing actually ends up costing state government more money because of inefficiencies created by an inability to modernize and sufficiently administer all of the agency's necessary functions.

BIDS not only needs some additional infrastructure support such as a modern case management system, an electronic voucher system, and additional information technology hardware and software. We also need additional administrative support staffing to institute a real training division, to better collect, analyze, and use data to maximize our agency's cost effectiveness, and to better support our public defenders and our assigned counsel program. We've detailed and prioritized those additional staffing needs in our phased plan at the end of this report.

Impact of COVID-19

We need to talk about the elephant in the corner of the room: the COVID-19 pandemic and its financial toll on our state revenues.

As mentioned in the introductory statement at the beginning of this report, we have to acknowledge that during the pre-pandemic times when the requests for us to come back to the legislature with a real plan to address our agency's problems were being discussed, we had no idea that we would be here, six months later, having this discussion in the middle of a shockingly different financial landscape.

But, also as mentioned earlier in this report, COVID-19 has not only put a greater strain on our agency's already precarious situation, it has also highlighted the fact that during times of great societal difficulties, the criminal legal system, and in turn, public defense, is almost always on the front lines of these struggles. Whether it is the renewed focus on racial justice and equality in the eyes of the law, or the fallout from the on-going pandemic, the people who work in public defense are feeling those increased pressures acutely.

The chronic and historic problems we have detailed above have only been further exacerbated in recent months as a result of the COVID-19 pandemic. During the last quarter of FY 2020 and into the first quarter of FY 2021, our Kansas court system has ground to a slow crawl, saddling our already overloaded public defenders and assigned counsel with a steady influx of new cases while largely preventing much movement on their older pending cases, thereby creating a bottleneck in our system.

The ongoing daily dangers our employees face while attempting to do their jobs zealously and ethically representing their clients in a meaningful way during pandemic-related outbreaks in the county jails and KDOC prison system, along with the difficulties reopening our courts safely have only added to the chronic stress felt by everyone throughout our system.[38]

Of course, since BIDS was ordered to come back to the Legislature with a plan to address these issues, the pandemic has not only made our problems considerably worse, it has also blown an approximate $650 million dollar hole in

[38] Nozicka, Luke, *Kansas City Region is home to two of the biggest coronavirus clusters in the U.S.*, The Kansas City Star, published May 12, 2020. https://www.kansascity.com/news/local/article242681591.html; *Department of Correctional locks down Hutchinson Correctional Facility unit due to COVID-19 outbreak*, KMBC 9 News, Published August 12, 2020. https://www.kmbc.com/article/kansas-department-of-corrections-locks-down-hutchinson-correctional-facility-unit-due-to-covid-19-outbreak/33587499; Stavola, Michael, *First results in on massive inmate COVID-19 testing at Sedgwick County Jail*, The Wichita Eagle, Published August 13, 2020, https://www.kansas.com/news/coronavirus/article244936407.html

the State's revenues.[39] It is obvious to all, including to the Board of Indigents' Defense Services, that this loss of state revenues will have a huge and concerning impact on the state general fund revenues that we, along with so many others depend. Nonetheless, we've also been asked, albeit at a particularly difficult time, to take a hard look at our current needs, to assess those needs, and to present to the Legislature a plan to address those needs.

There is no way to sugar coat the hard reality that any plan to address our chronic staffing issues, substantial caseload problems, and other issues contributing to our recruitment and retention issues is going to require an additional significant financial investment in our agency above and beyond our currently allotted budget in order to see any long-term cost savings and to solve our chronic problems.

We recognize the bad timing of this discussion about our agency needs. However, this report is an attempt to both address our very real needs while simultaneously acknowledging the difficulty of the current dire fiscal reality that we are now forced to operate within.

We hope that by being up front about the depth and severity of the difficulties that we are already facing, even prior to the pandemic, that this information will aid the Legislature and other stakeholders in making critical decisions about the immediate future of our agency. Our goal here is to give all stakeholders a clear picture of the full consequences those decisions will have on the future of our agency's most basic core function of providing constitutionally required criminal counsel to all impoverished Kansans who need our assistance.

FY 2020 Reduced Resources Budget

Finally, we wanted to take the opportunity to address the possibility of the state imposing a proposed ten percent (10%) reduced resources budget on our agency based on the request from the division of budget for a reduced resources budget submission. For fiscal year 2022, that proposed reduced resources budget

[39] Koranda, Stephen, *Kansas Has Lost A Greater Share of Revenue Than Many States Due to COVID-19*, NPR, Published August 3, 2020. https://www.npr.org/2020/08/03/895379131/kansas-has-lost-a-greater-share-of-revenue-than-many-states-due-to-covid-19

for BIDS equates to a potential loss of $3,485,966 from our already underfunded and struggling agency.

As you have seen from reviewing our previous sections of this report, given our current state, a reduction of resources of that magnitude would be catastrophic to our core mission. As a result, we've requested an exemption from the reduced resources budget as part of our FY 2022 budget submission. However, in anticipation that budget discussions during the upcoming legislative session will nonetheless be full of similarly difficult fiscal decisions involving other agencies in need, we wanted to explicitly address this issue here.

Unfortunately, because our agency budget is so heavy on salary and wages and assigned counsel costs, any cuts to our budget to absorb that almost 3.5 million dollar reduction of resources is necessarily going to involve cuts that directly impact agency personnel either through sweeping away desperately needed but unfilled positions, rolling furloughs (if possible), or potentially layoffs of public defenders and support staff. On the assigned counsel side, things are not much easier, with the substantial likelihood that, to absorb a portion of the proposed cuts there, we would likely be forced to hold payments on attorney and expert payment claims for weeks, if not months to absorb these cuts.

Given the state of our current system, it is highly likely that such a reduction of resources, if fully implemented, would result in continued unethically high caseloads, increased turnover rates of employees, higher numbers of wrongful conviction claims, claims of ineffective assistance of counsel, and potential malpractice claims.

The inevitable additional offloading of cases from our public defender offices due to the impact of such a reduction of resources to our more expensive assigned counsel program, would then also increase the likelihood of, if forced to hold claims for our assigned counsel due to lack of funding, extensive violations of the prompt payment act as well as an exodus of private counsel from our assigned counsel panels.

Ultimately, if our public defender offices are forced to refuse new cases in greater numbers due to the impact of such a budget cut and our assigned counsel leave our panels due to our inability to promptly and adequately pay them, there

will be poor people accused of crimes in Kansas with no available and adequately resourced attorneys willing or able to take those cases.

Make no mistake about it. BIDS is already struggling to meet our constitutional obligations to provide counsel. A budget cut of such magnitude as this would have such catastrophic consequences on our agency that would almost certainly constitute a fundamental failure to meet our constitutional obligations under the Sixth Amendment.

In short, such a reduction of resources would likely substantially increase the possibility of extensive and expensive litigation in our state and federal courts regarding the constitutionality of our entire public defense funding system.

Whatever small, temporary, and immediate fiscal savings a 10% BIDS reduced resources FY 2022 budget would have on the state's overall budget outlook would likely be far outweighed by the far-reaching negative consequences of that decision.

Conclusion

Obviously, this is a difficult time to have a productive conversation about our agency's very real needs in light of the very real budget shortfalls the state is facing. However, the constitutional right to counsel applies to all poor Kansans who are charged with crimes, regardless of the State's fiscal outlook or a once-in-a-century pandemic's impact on revenues.

We've taken a long, hard look at our agency's struggles, received feedback from a variety of sources including from our own employees, and will now propose a phased plan to address our fundamental needs and to move our Kansas public defense system toward a more effective and cost-efficient, client-centered holistic defense model.

Our intent is to fundamentally transform our public defense system to better serve our client's needs, better support our employees and assigned counsel, and to provide better case outcomes that will thereby improve the larger criminal legal system and provide more long-term cost efficiencies. We look forward to sharing this plan with you.

The Board of Indigents' Defense Services

Three Phase Plan for Public Defense Reform in Kansas

September 2020

Introduction

In response to BIDS' chronic caseload issues and historic turnover problems, the Legislature ordered BIDS to create a report on our current staffing issues and our plans to address those issues. In response to that request, we've provided the preceding report on the status of public defense in Kansas and created this proposed Phased Plan for Public Defense Reform in Kansas primarily aimed at proactively addressing our recruitment and retention issues.[40] Our plan is broken down into three main phases.

Phase I

Phase I is aimed at addressing our most immediate and emergency needs. These needs include staffing adjustments aimed at addressing unethically high caseloads based on national standards and our current FY 2020 caseloads.[41] It also includes a pay scale adjustment directed towards bringing public defender pay into parity with prosecutors and other comparable government personnel in an effort to alleviate some of our compensation related recruitment and retention issues.

Phase I also includes an increased hourly rate for our assigned counsel in recognition of their currently unconscionably low hourly rates as well as the increased costs of providing an effective defense in modern criminal cases, while still remaining well below the going market rate. It also includes a number of targeted infrastructure funding requests aimed at shoring up our most problematic basic infrastructure needs that impact our ability to efficiently administer both our public defender and assigned counsel programs and directly address our ongoing recruitment and retention issues.

The vast majority of our budget enhancement requests for FY 2022 are directly related to these Phase I requests, born directly out of the Legislature's explicit request for a long-term plan to shore up our public defense system.

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[40] Phase I of this plan has been submitted as part of BIDS FY 2022 Budget request. Phases II and III are still in the discussion stages and BIDS Board Members will not vote on the specifics of these phases of the plan until their possible corresponding budget enhancements are proposed in FY 2023 and FY 2024 and beyond.

[41] As stated above, it should be noted that the FY 2020 caseload numbers are generally off by a statistically significant percent due to the impacts of the COVID-19 pandemic on court operations in the spring, summer, and fall of 2020.

Phase II

Phase II of the BIDS Phased Plan for Public Defense Reform in Kansas will likely substantially impact our enhancement budget requests in FY 2023.

That Phase will continue to add staffing adjustments based on ethical caseload concerns and more normal caseload projections for post-pandemic operations as well as other agency needs. That phase will include additional pay scale adjustments aimed at supporting regular cost of living adjustments, increased experience levels of our current attorneys, and support merit raises where appropriate.

Phase II will also include an additional adjustment to our assigned counsel hourly rate, if our Board ultimately supports that increase as part of the FY 2023 budget request. It will also include assessments and possible funding for needed expansions of our public defender system into areas where the high number of appointed cases would make the implementation of a public defender office more economical than a sole reliance on appointed counsel. It will also include additional infrastructure requests in order to better serve our public defenders, our assigned counsel, and our clients.

Phase III

Finally, Phase III of the BIDS Phased Plan for Public Defense Reform in Kansas will impact our enhancement budget requests in FY 2024.

This phase will include ongoing pay adjustments, programs and infrastructure to support our ongoing retention and recruitment efforts, as well as a final hourly rate adjustment (if supported by the Board for our FY 2024 budget request) to make our rate more attractive to a larger number of potential assigned counsel while still remaining well below the average per hour rate of most private counsel in Kansas.

That Phase will also include additional staffing adjustments and infrastructure plans intended to move our Kansas public defense system into a far

more cost-effective and public safety friendly client-centered holistic defense model of providing public defense services.[42]

The Fiscal Benefits of Client-Centered Holistic Defense Programs

A recent ten year study of several Bronx area Public Defender and Legal Aid Society holistic defense models by the Rand Corporation in conjunction with the University Of Pennsylvania School Of Law found that these holistic public defense programs were able to both reduce incarceration and save taxpayer money without harming public safety.[43]

Specifically, the ten year Rand Study found that the Bronx Defender and Legal Aid Society of New York, through their holistic defense programs, were able to provide the following results attributed specifically to their holistic defense model:

- Prevent more than 1 million days of incarceration,
- Reduced the likelihood of a prison sentence by 16%
- Reduced actual prison-sentence length by 24%,
- Saved taxpayers $160 million in inmate housing costs alone,
- Despite higher pre and post-trial release rates, ten years after case resolution, defendants who received holistic representation committed no more crime than those who were incarcerated for longer periods.

This recent Rand study only puts into hard data what public defense attorneys have intuitively known for years: that treating a specific case is less effective than treating the actual person you are representing. In short, holistic defense models are based on the idea that to be truly effective client-centered advocates, defense attorneys have to approach their cases with a more broad understanding of their work.

[42] Holistic Representation: An Innovative Approach to Defending Poor Clients Can Reduce Incarceration and Save Taxpayer Dollars—Without Harm to Public Safety, published January 2019, by the Rand Corporation. https://www.rand.org/pubs/research_briefs/RB10050.html

[43] See Rand Corporation study above.

In other words, addressing the case a client is charged with itself is never going to be as effective as addressing as many of the underlying factors that have led to the client's involvement in the criminal legal system to start with. Holistic representation uses an interdisciplinary team that includes lawyers, investigators, paralegals, social workers, and support from civil, family, and immigration lawyers, as well as non-lawyer advocates, all working collectively with each other, to improve case outcomes in a way that does not compromise public safety.

But most importantly for the legislature, the Rand study determined that this model of holistic defense saved a significant amount of tax payer money through reduced days of incarceration, reduced sentence lengths, and reduced inmate housing costs without harming public safety.

This third phase of our plan to reform public defense in Kansas will build upon the foundations established in phases I and II to move BIDS closer to that cost-efficient, client-centered, holistic defense model.

Our Goals

What we are ultimately aiming for with the reforms laid out in our phased plan is not just to address our most immediate and pressing problems, but to also make a reasonable and cost efficient plan for our agency's future.

Even if the state were to potentially *triple* the funding for our Kansas public defense system, our cost per case would still be under $4,000 per case—for everything from probation revocations up to and including death penalty cases.[44] It costs more than that to hire a private attorney to handle a DUI.

In short, even at triple our current budget, the state would still be getting its entire plethora of state-wide public defense services for bargain basement prices compared to the going market rate for private criminal defense.

This three-phase plan is intended to be a basic roadmap to fundamentally improve our public defense system: to inoculate us against constitutional challenges, to improve our client's outcomes and avoid costly post-trial litigation,

[44] $105,000,000 budget divided by a non-pandemic year "normal" caseload of roughly 29,000 cases equals a cost per case of $3,620.69.

and to ultimately do so in a way that, with a holistic defense model, should be a fiscally efficient use of taxpayer money without harming public safety.

We hope that by presenting this Phased Plan to Reform Public Defense in Kansas, the legislature will appreciate that our intent is not just to solve our most immediate problems, but to intentionally plan for our future as well.

We look forward to discussing this plan with you soon.

Phase I

BIDS Plan for Public Defense Reform in Kansas

Phase I Introduction

Phase I of the BIDS Phased Plan for Public Defense Reform in Kansas is intended to primarily address our most dire and most immediate problems. For this reason, Phase I focuses on five primary areas:

- Providing adequate staffing to address potentially unethical caseloads and a lack of institutional agency support,
- A plan to address our most immediate compensation concerns to help hold down our turnover rate and improve our current employee retention as well as improve new employee recruitment,
- The development of a BIDS Training Division to provide better agency support to our public defenders and our assigned counsel program,
- The first phase of increasing our assigned counsel hourly rate to address increasing overhead issues and cost of services in an effort to address recruitment and retention issues among our assigned counsel,
- Infrastructure requests that will serve as the fundamental building blocks to future improvement of agency services and a holistic defense model.

Below is the breakdown of those specific plans. The intent of these targeted measures is to address our ethical caseload concerns, to improve our services for our clients, and to address some of the most immediate identified factors that are contributing to our recruitment and retention problems with the understanding that the fiscal outlook for this upcoming budget year is problematic due to the pandemic.

Phase 1.1: Caseload Staffing

As discussed earlier in this report, even based on our suppressed FY 2020 caseloads, our public defender trial offices are currently suffering from severe understaffing, resulting in unethically high caseloads.

Current Attorneys Compared to Needed Attorneys, NAC Caseload Standards

TRIAL OFFICE	NUMBER OF ACTIVE ATTORNEYS (# of Open Positions)	TOTAL Cases Closed & Cases Active FY 2020	TOTAL AVG CASES HANDLED PER ATTY FY 2020	ADDTL ATTY NEEDED NAC Standards (150 Felonies/yr)
TOPEKA	9	1353	150.33	0
NEKSCO Topeka	5	850	170	+1
SALINA	4 (3)	1049	262.25	0
JUNCTION CITY	11	1588	144.36	0
OLATHE	16	3276	204.75	+6
HUTCHINSON	5	960	192	+2
WICHITA	19 (4)	5285	278.15	+13
SCCO Wichita	5	715	143	0
GARDEN CITY	2	389	194.5	+1
CHANUTE	3	719	239.67	+2
INDEPENDENCE	2	433	216.5	+1
TOTAL	**81 (7)**	**16,572**	**204**	**+26**

Based on our FY 2020 caseload numbers, in order to bring our trial public defender offices under the NAC's "absolute maximum" standard of 150 felonies per attorney, per year, we have calculated that two things would need to happen. First we would need to fill all currently vacant trial level public defender positions (approximately 7 in total). Second we will need to add an additional 26 trial level public defenders to our agency. [45]

Because our agency is currently so heavy on less experienced attorneys and we are desperately in need of more experienced attorneys, those 26 new public defender positions must necessarily be funded at an experienced defender level salary. The cost breakdown of adding 26 new experienced defenders to our system is as follows:

Additional Defenders based on COVID 2020 caseload		Agency Cost
Public Defender III*	$80,000 + 35% ($28,000) + (8074)= (Base) + (Fringe) + (Overhead)	$116,074.00
	# Needed to meet NAC 150 standards	X 26
	Public Def Sub Total =	**$3,017,924.00**

Based on the staffing levels detailed in the National Association for Public Defense (NAPD) Statement on Public Defender Staffing, BIDS is also severely lacking in support staffing in all of our offices, which also goes directly to our attorneys' ability to appropriately and ethically handle their caseloads. The NAPD recommendations include:

1 Investigator for every 3 Attorneys

1 Legal Assistant for every 4 Attorneys

1 Administrative Assistant for every 4 Attorneys

1 Social Worker for every for every 3 Attorneys

In Phase I, BIDS is adjusting our staffing of our investigative staff, our legal assistants, and our administrative assistants. Based on our calculations, we will

[45] Our Phase I budget request submitted 9/15/20 to the Division of Budget included a request for 25 public defenders and consisted of $2,901,850.00. That estimate is now 26 based on revised final FY 2020 caseload numbers, which is reflected above.

need an additional 15 legal assistants, 35 additional investigators, and 13 additional administrative assistants. Those cost breakdowns look like this:

Additional Legal Assistants based on COVID 2020 caseload		Agency Cost
Legal Assistants	$50,000 + 35% ($17,500) + (8074)= (Base) + (Fringe) + (Overhead)	$75,574.00
# Needed to meet NAPD standards 1:4 atty		
Current BIDS Staffing: 123.5 PDs, 23 Legal Asst.		
Additional 26 PDs =149.5 PD/ 4= 38 Legal Asst.-23= 15		x15
	Legal Asst. Sub Total =	**$1,133,610.00**

Additional investigators based on COVID 2020 caseload numbers		Agency Cost
Investigators	$45,000 + 35% ($15,750) + (8074)= (Base) + (Fringe) + (Overhead)	$ 68,824.00
# Needed to meet NAPD standards 1:3 atty		
Current: 123.5 PDs, 15 Investigators		
Add 26 PDs =149.5 PD/3 = 50 Invest -15= 35		x35
	Investigator Sub Total =	**$2,408,840.00**

Additional support staff based on COVID 2020 caseload		Agency Cost
Administrative Asst.	$35,000 + 35% ($12,250) + (8074)= (Base) + (Fringe) + (Overhead)	$ 55,324.00
# Needed to meet NAPD standards 1:4 atty		
Current: 123.5 PDs, 25 Admin Asst.		
Add 26 PDs =149.5 PD/4 = 38-25= 13		x13
	Admin Asst. Sub Total =	**$ 719,212.00**

Finally, the NAPD Staffing Policy Statement also drives home the importance of having sufficient support staff in a public defender agency administrative office to provide oversight and support to the regional offices throughout the system. Although this does not directly impact caseloads in our trial public defender offices, it does go towards providing the support those offices in order to effectively manage their caseloads while providing a zealous defense to our clients.

Based on our most urgently determined staffing needs in our BIDS administrative office, we intend to add six additional full time administrative staff members in Phase I. These include:

Add Admin Staffing (Base + Fringe + Overhead)		Agency Cost
Training Director*	$85,000 + 35% ($29,750) + (8,074)=	$122,824.00
In House Counsel*	$90,000 + 35% ($31,500) + (8074) =	$ 129,574.00
Database Analyst	$65,000 + 35% ($22,750) + (8074)=	$ 95,824.00
Research Analyst	$60,000 + 35% ($21,000) + (8074)=	$ 89,074.00
Tech Support Conslt	$50,000 + 35% ($17,500) + (8074)=	$ 75,574.00
Tech Support Conslt	$50,000 + 35% ($17,500) + (8074)=	$ 75,574.00
	Admin Staff Sub Total =	**$664,018.00**

*Both of these positions require highly experienced attorneys with a specialized skill set.

The total cost for these caseload staffing adjustments, including base salaries, fringe, and overhead costs breaks down as follows:

Total Phase I Staffing Request:

+26	**Public Def Sub Total =**	**$3,017,924**
+15	**Legal Asst. Sub Total =**	**$1,133,610**
+35	**Investigator Sub Total =**	**$2,408,840**
+13	**Admin Asst. Sub Total =**	**$ 719,212**
+ 6	**Admin Staff Sub Total =**	**$ 664,018**

Grand Total for Phase I Staffing : +95 $7,943,604[46]

[46] This figure is slightly different than contained in our 9/15/20 budget request due to adjusted FY 2020 caseload numbers that required adding one more additional public defender to our calculations.

Phase 1.2 : Recruitment and Retention Compensation Adjustments

As discussed in our report on the status of public defense in Kansas, one of the top issues listed as contributing to turnover and to our current employees' consideration of leaving our system is our compensation issues. A lack of consistent raises over the years, inadequate compensation for years of service, a lack of pay parity within the system as compared to prosecutors and other federal and state employees, as well as compared to other public defender systems has left us with the need to make a substantial initial adjustment to our pay scales.

At our August 2020 Board meeting, the Board directed BIDS administrative staff to prepare adjusted pay scales for our employees in preparation for the FY 2022 Budget. Those pay scales were then created based largely on our research regarding comparable prosecutor salaries, comparable state and federal government salaries and after a review of other pay scales in neighboring public defender systems.

At BIDS' September 2020 Board meeting, a set of proposed pay scales were submitted to the BIDS Board Members.[47] The Board voted to approve the set of employee pay scales which will go into effect on July 1, 2022, dependent on legislative funding of the calculated conversion to those pay scales.

BIDS Administrative staff then calculated a conversation of every current BIDS employee from their current salaries to the newly adopted pay scales. An enhancement funding request for FY 2022 based on the cost of that conversation is included in our FY 2022 BIDS budget request. That conversion cost breakdown is as follows:

Non-Attorney Staff Pay Parity Pay Scale Conversion FY 2022:	$ 649,605.35
Attorney Prosecutor Pay Parity Pay Scale Conversion FY 2022:	$3,442,869.98
Total Money Needed for Pay Scale Conversion:	**$4,092,475.33**

[47] Those pay scales are available upon request.

Phase 1.3 : Establishment of a BIDS Training Division

The industry standard in public defense systems is to have some level of dedicated staff for training purposes. Currently, BIDS has no staff dedicated exclusively to training our 200 public defense employees and our 400+ assigned counsel and their support staff. In order to ensure that BIDS is able to meet the ethical training needs of our public defense employees and assigned counsel we require a training division dedicated to year-round active training of these employees.

Most importantly, our employees have repeatedly reported that they feel unprepared and undertrained to handle their caseloads and other related issues. This feeling that they are unsupported by our agency goes directly to our recruitment and retention concerns. An employee who feels adequately supported by their agency is far less likely to leave the agency than an employee who feels that they are expected to do their job without sufficient training.

To that end, we looked at comparably sized public defender programs in other states. Ultimately, we've based our request for our BIDS Training Division based on the Montana public defense system's training division because of the comparable size of their system and their similarly wide spread physical distribution of their public defender offices and their assigned counsel.

The new BIDS Training Division would consist of:

3 FTEs Exclusively Dedicated to Year-Round Training: total cost $307,772

Training Director*	$85,000 + fringe + overhead =	$122,824
Training Asst. Director*	$75,000 + fringe + overhead =	$109,324
Training Support Staff	$50,000 + fringe + overhead =	$ 75,574

*Position requires experienced public defender with additional education in training.

Rent/Office Space: $15,000

Programs:

- Annual Agency 2 day Conference for attorneys, investigators, legal assistants: $50,000
- New Public Defender Intensive Training Program: $14,000
- Annual Internal Leadership and Management Training Summit: $11,000
- Capital Trainings: $7,000
- Support Staff Trainings: $10,000
- Annual NAPD Membership: $4,525 per year (includes member trainings and constantly updated resources)
- BIDS Public Defender Annual Bar Licensing Fees: $52,500

Total BIDS Training Division Budget: $471,797

In our FY 2022 Budget request, the Training Director position was included as part of our enhanced staffing request. The Assistant Training Director position and administrative staff position for the training division will be included in a Phase II/ FY 2023 Budget request. The rest of the rent, programing, NAPD membership dues, and public defender annual bar fees were included as part of the FY 2022 BIDS Budget request under a recruitment and retention enhancement plan, totaling $164,025.

Phase 1.4 : Increased Assigned Counsel Hourly Rate

As discussed earlier in our report, our current statutory rate for our assigned counsel program is set at $80 per hour, an unconscionably low rate of pay for this type of work. This low hourly rate discourages well qualified counsel from volunteering to serve on our assigned counsel appointment panels. Our increasingly heavy reliance on those panel attorneys due to our public defender heavy caseloads and the resulting refusals of those offices to continue accepting new cases means that its more important than ever that we maintain robust assigned counsel panels. An increase to the hourly rate is an integral part of the plan to continue supporting those robust panels.

At its September 2020 Board meeting, the Board of Indigent Defense voted to approve of a $20 per hour increase to the BIDS assigned counsel statutory rate, increasing that rate from $80 per hour to $100 dollars per hour, dependent on the legislature's allocation of funding to support that increased rate for FY 2022 and

upon the necessary statutory changes to the $80 per hour cap on that rate currently contained in K.S.A. 22-4507 (c).

The cost breakdown for this $20 raise to the hourly rate breaks down as follows:

Current projected FY 2021 hours:	178,458 hours of assigned counsel time.
At our current $80 per hour rate:	$14,276,640.
$20 per hour extra to $100 per hour:	$17,845,800.
The difference:	**$3,569,160**

An enhancement request for the BIDS FY 2022 Budget includes a request for this additional $3,569,160 to support raising the BIDS statutory rate to $100 per hour.

Phase 1.5 : Basic Immediate Infrastructure Needs

As part of our efforts to provide better support to our public defenders and assigned counsel programs, our BIDS Administration identified several key areas of infrastructure needs where we require immediate investments in order for us to be able to comply with state IT Security requirements, and to sufficiently support our employees so that they can do their jobs. Those needs include a number of IT Security enhancements as well as funding for a modern case management system.

IT Security Package

In 2019, BIDS was subjected to an LGA IT Security Audit which found several areas that required immediate improvements to our IT Security infrastructure. Based on those findings, in FY 2021 BIDS submitted a request for IT Security funding projects, which the legislature approved for our FY 2021 budget.

However, as a result of the sudden reduction of state revenues due to COVID-19, BIDS was immediately notified at the beginning of FY 2021 that the

funding we received to support those identified IT Security needs was being immediately rescinded. As a result, we have been unable to fund the following necessary IT Security updates based on those 2019 audit findings:

1. Replacement of servers that are years beyond their life expectancy: 12 servers, total cost of $96,541
2. Construction of office walls to provide a lobby for clients to allow full access to their attorneys while securing IT from unauthorized access: Topeka, Chanute, and Wichita, conservative estimated total cost $3,600.
3. Purchase and installation of push button door locks: Appellate, Habeas, NEKCO, Wichita, Wichita Conflicts, Hutchinson and Garden City, conservative estimated cost of $27,000.
4. Purchase of dry fire extinguisher for data center, estimate $10,000.
5. Purchase of identifiable entry log access card system for data center, estimate $10,000.

Total cost of this IT Security portion of our infrastructure needs requested in FY 2022 Budget: $147,141.

A Modern Case Management System

Data-informed decision-making should be a fundamental component of smart public defender management. While the industry standard for quite some time has been for public defender agencies to use modern case management systems, BIDS has lagged behind that movement. We still operate on a clunky combination of slow, outdated, and overloaded Access database systems, outlook calendars that are not integrated with our database and not fully available remotely, and data collection tools and policies based on those outdated components that are simply insufficient for the data we need to be collecting in order to do better performance-based budgeting. [48]

Additionally, an updated case management system is directly related to our efforts to better manage our attorney workloads. In 2015, the National

[48] "Basic Data Every Defender Programs Needs to Track," NLADA, October 27, 2014, http://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf

Association for Public Defense (NAPD) issued a Workload Position Paper, calling for public defense organizations to consider the old NAC standards as the "absolute maximum" workload allowed. NAPD further called for all Public Defense organizations to implement evidence based standards, such as a Delphi study, to determine state-specific evidence-based workload standards. A Delphi caseload study necessarily requires time keeping as well as extensive data collection to be effective—neither of which we are able to currently accomplish in a reasonably effective manner with our current infrastructure (or lack thereof).

While a Delphi study is essentially the modern evidenced-based process for determining caseloads, BIDS is not yet at a place where we can effectively begin such a study. This is because we don't currently have the required time keeping software, case management system, or study funding in place to conduct an immediate caseload study of that kind. A Delphi study is certainly a goal that we should be working toward, and our budgets will reflect an effort to get the tools in place to be able to conduct such a study down the line.

The first step in that process is putting an updated case management system into place. We have therefore requested this fundamental building block in our FY 2022 budget request so that our Phase II and Phase III efforts to better manage our caseloads can begin using the data we will be managing and collecting with this updated system. With this system, we should be better able to assess our effectiveness and efficiency, and better able to address the issues that we may find need to be addressed in order for our employees to more effectively and efficiently represent their clients.

There are a variety of case management systems available to public defender agencies.[49] Based on some nation-wide polling of heads of a variety of public defender agencies across the country of their reviews of various case management systems, we requested a quote from Defender Data by Justice Works.

Based on that quote, we requested $200,000 for a new case management system in FY 2022. The one time up front cost would include $150,000 for the custom build of a system for our agency and for the integration of our historical

[49] https://www.publicdefenders.us/files/NAPD_CMS_comparison.pdf

data. The estimated yearly fee, based on the number of new cases we anticipate entering into the system, would be around $50,000 per year.

The total cost for this case management system for FY 2022 would be $200,000. The ongoing yearly cost would be around $50,000, depending on caseloads.

Phase 1.6 : Phase I Cost Breakdown

1.1	Caseloads Staffing Adjustment	$7,943,604.00
1.2	Recruitment & Retention Compensation Adjustment	$4,092,475.33
1.3	Establishment of BIDS Training Division	$ 164,025.00
1.4	Increase Assigned Counsel Rate to $100 an hour	$3,569,160.00
1.5	Basic Immediate Infrastructure Needs	$ 347,141.00
	Total Cost Phase I:	**$16,116,405.33**

Phase II

BIDS Plan for Public Defense Reform in Kansas

Phase II Introduction

Phase II of the BIDS Phased Plan for Public Defense Reform in Kansas is intended to build upon the progress made addressing our most immediate agency problems in Phase I. Phase II is focused on continuing to provide staffing adjustments for projected "normal" (non-pandemic) yearly caseloads, including staffing adjustments for our appellate and capital programs. Phase II also begins the transition into our ultimate goal of a more cost-efficient, client-centered holistic defense model. For this reason, Phase II focuses on five primary areas:

- Providing adequate staffing for our trial offices based on normal projected caseloads, addressing adequate staffing in our appellate, capital, and administrative offices.
- A plan to continue addressing our compensation concerns to help hold down our turnover rate and improve our current employee retention as well as improve new employee recruitment,
- The Development of a targeted set of programs aimed specifically at recruitment and retention issues and the well-being of our agency employees and our assigned counsel attorneys,
- The second phase of increasing our assigned counsel hourly rate to address increasing overhead issues and cost of services in an effort to address recruitment and retention issues among our assigned counsel,
- Infrastructure requests that will serve as the second phase of building blocks to future improvement of agency services and a holistic defense model.

Below is the breakdown of those specific plans. The intent of these targeted measures is to address our ongoing ethical caseload concerns, to improve our services for our clients, and to continue addressing some of the identified factors that are contributing to our recruitment and retention problems while continuing to move our system into a cost-efficient, client-centered holistic defense model.

As you read through the various sections of Phase II of our Plan to Reform Public Defense in Kansas, keep in mind that all programs in Phase II and their associated budget requests would require specific approval by our Board in advance of the FY 2023 Budget in order to provide the necessary funding for most of these programs. Since our FY 2023 Budget will not be submitted until

September 2022, Board votes on these specific funding needs will not be held until closer to that budget request.

Phase 2.1 : Non-Pandemic Suppressed Caseload Adjustments

In Phase I we adjusted staffing based on our FY 2020 caseloads. However those caseloads, as a result of both excessive closings of our public defender offices to new cases throughout FY 2020, and the fourth quarter shutdown of our court system due to COVID-19, were off from projected "normal year" caseloads by 10 to 20%. As a result, in Phase II, we intended to adjust our staffing by taking into account more typical, non-pandemic caseloads, using our FY 2019 numbers to aid in those projections. Our goal in this section is still based on the NAC "maximum" allowable caseloads of 150 felonies per year, per attorney.

To get these staffing projections, we used our FY 2019 caseloads to give us a baseline for a more typical, non-pandemic caseload for each office. We then continued to use the snapshot of active open cases at the end of FY 2020 in order to stand in for our projections of how many cases each office might typically have still actively open and carried over into the next fiscal year to help give us an accurate picture of the total number of cases each office actively handles in a typical year. We then again divided that total caseload number by the number of active attorneys in each office to give us a breakdown, by each office, of the average number of cases each attorney in each office would handle based on those caseloads.

The table showing our calculations for these trial public defender office staffing adjustments follows on the next page.

Approximate Number of Needed Attorneys
Based on Projections Using FY 2019 Caseload Numbers

TRIAL OFFICE	NUMBER OF ACTIVE ATTORNEYS (# of Open Positions)	ACTUAL FY 2019 TOTAL CASES CLOSED	CASES STILL ACTIVE 7/1/2020	TOTAL Cases Closed & Cases Active Projected	TOTAL AVG CASES HANDLED PER ATTY Projected	ADDTL ATTY NEEDED NAC Standards
TOPEKA	9	1180	390	1570	174.44	+2
NEKSCO Topeka	5	598	236	834	166.8	+1
SALINA	4 (3)	1019	292	1311	327.75	+2
JUNCTION CITY	11	1253	420	1673	152.09	+1
OLATHE	16	2778	952	3730	233.13	+9
HUTCHINSON	5	874	279	1153	230.6	+3
WICHITA	19 (4)	4462	1655	6117	321.95	+18
SCCO Wichita	5	508	311	819	163.8	+1
GARDEN CITY	2	475	159	634	317	+3
CHANUTE	3	554	332	886	295.33	+3
INDEPENDENCE	2	343	135	478	239	+2
TOTAL	**81 (7)**	**14,044**	**5,161**	**19,205**	**237.1**	**+45**

Keeping in mind those NAC standards of 150 cases per attorney, per year, these numbers show us that in a more "normal" (non-pandemic) year, none of our offices would likely be able to comply with those maximum NAC standards.

Take, for instance those Sedgwick County Public Defender Office (Wichita) numbers. If an attorney is, on average, handling 322 cases per year, that means that attorney has only 6.5 hours per case per year.[50] With client visits, discovery review, additional investigation, plea negotiation time, and court appearances, there is no way that 6.5 hours per case per year is anywhere near sufficient for even low level cases, let alone high severity level or off grid criminal cases.

Based on these numbers, we would need to fill all seven of our currently open public defender positions of our open positions, plus add an additional 45 more attorneys.

Assuming that the request for 26 additional public defenders is granted as part of our Phase 1, FY 2022 budget request, that would leave us with still needing an additional 19 more trial level public defenders

Additionally, in Phase I we did not adjust our appellate public defender caseload staffing needs, nor our capital public defender needs.

The NAC standards call for a limit of 25 appeals per attorney, per year. In FY 2020, our Appellate Defender Office completed 981 cases. There are 18 attorneys in that office. That means that each attorney in that office completed an average of 54.5 appeals. That would be over two times those outdated NAC maximum caseload standards for appeals. That works out to an average of one week per appeal to read an entire appellate record, research all necessary issues, and write a full appellate brief, let alone prepare and appear for oral arguments, write motions, correspond with clients, etc.[51]

Based on these calculations, our Appellate Defender Office would need a total of 40 appellate attorneys to be at or below those NAC caseload standards.

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[50] At 40 hours per week, 52 weeks per year, an attorney would have 2,080 hours per year to dedicate to 322 cases, or 6.5 hours per case, per year.

[51] At 40 hours per week, 52 weeks per year, an appellate attorney would have 2,080 hours per year to dedicate to 54.5 appeals, or 38 hours per case per year.

To attain those sorts of staffing levels, we would need to add an additional 22 appellate attorneys.

Finally, in FY 2020, our Death Penalty Defense Unit, the trial level capital defender office, added an additional six new capital cases as a result of a number of new capital case filing from around the state. Because of the substantial amount of time and effort that preparing and defending a capital case requires, if the legislature continues to support the continuation of capital punishment in Kansas, additional investments in our capital defender program will need to be made to handle the ongoing caseloads there.

As a result of the increase in new capital case filings and the number of capital cases we frequently have to contract out to private counsel due to co-defendant conflicts, BIDS intends to create an in-house conflicts trial level capital defender office. This office would help alleviate some of our DPDU's caseload issues and would provide in-house affordable alternatives for co-defendant cases in order to avoid so many additional capital contract counsel.

To create a conflict capital trial unit, BIDS would need four additional capital trial defenders.

Altogether then, our attorney staffing needs for Phase II would include:

19 Trial Level Public Defenders

22 Appellate Public Defenders

4 Capital Trial Public Defenders

Total new attorney positions for Phase II : 45

The cost breakdown for 45 new public defender positions would be:

Additional PD's based on Normal 2019 caseload numbers		Agency Cost
Public Defender III*	$80,000 + 35% ($28,000) + (8074)= (Base) + (Fringe) + (Overhead)	$116,074.00
	# Needed to meet NAC 150 standards	X 45
	Phase II Public Def Sub Total =	**$5,223,330.00**

And, just as in Phase I, using NAPD's staffing recommendations for public defender offices, those additional 45 public defenders would also require additional support staff.[52] Those staffing recommendations include the following ratios of support staff to attorneys:

- One investigator for every three attorneys in an office.
- One legal assistant or paralegal for every four attorneys in an office.
- One administrative assistant for every four lawyers in an office.
- One social worker for every three lawyers in an office.

Based on adding an additional 45 public defender positions, we anticipate needing to add the following support staff:

Additional Legal Assistants based on normal caseloads	Agency Cost
Legal Assistants $50,000 + 35% ($17,500) + (8074)= (Base) + (Fringe) + (Overhead)	$75,574.00
# Needed to meet NAPD standards 1:4 atty	
Based on Phase I additions: 149.5 PDs, 38 Legal Asst.	
Add 45 PDs =194.5 PD/ 4= 49 Legal Asst.-38= 11	x11
Legal Asst. Sub Total =	**$831,314.00**

Additional investigators based on normal caseloads	Agency Cost
Investigators $45,000 + 35% ($15,750) + (8074)= (Base) + (Fringe) + (Overhead)	$ 68,824.00
# Needed to meet NAPD standards 1:3 atty	
Based on Phase I additions: 149.5 PDs, 51 Investigators	
Add 45 PDs =194.5 PD/3 = 65 Invest -51=	x 14
Investigator Sub Total =	**$963,536.00**

[52] https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf

Additional support staff based on normal caseloads		Agency Cost
Administrative Asst.	$35,000 + 35% ($12,250) + (8074)= (Base) + (Fringe) + (Overhead)	$ 55,324.00
# Needed to meet NAPD standards 1:4 atty		
Based on Phase I additions: 149.5 PDs, 38 Admin Asst.		
Add 45 PDs =194.5 PD/4 = 49-38= 12		x11
	Admin Asst. Sub Total =	**$608,564.00**

One of the key components towards moving towards a cost-efficient, client-centered holistic defense model is the addition of staff support such as social workers in order to better serve both the client and the client's needs in their particular criminal case. As a result, we've included in this phase, the key staffing for adding these positions to our public defender offices based on the NAPD staffing recommendations.

Additional Social Workers based on normal caseloads and holistic defense model		Agency Cost
Social Worker	$60,000 + 35% ($21,000) + (8074)= (Base) + (Fringe) + (Overhead)	$89,074.00
# Needed to meet NAPD standards 1:3 atty		
Based on Phase 1 additions: 149.5 PDs, 1 Social Worker		
Add 45 PDs=194.5 PD/3 =65 -1 = 64		x64
	Social Worker Sub Total=	**$5,700,736.00**

Finally, as in Phase I, Phase II includes some key administrative staffing positions that we've identified a particular need for based on our administrative workload and the needs of both the public defenders and our assigned counsel.

Additional Admin Staffing (Base salary + Fringe + Overhead)		Agency Cost
Information Officer	$70,000 + 35% ($24,500) + (8,074)=	$102,574.00
Legislative Dir	$90,000 + 35% ($31,500) + (8074) =	$ 129,574.00
Human Resource Dir	$70,000 + 35% ($24,500) + (8074)=	$ 102,574.00
Training Asst. Dir	$75,000 + 35% ($26,250) + (8074)=	$109,324.00
Training Admin Staff	$50,000 + 35% ($17,500) + (8074)=	$ 75,574.00
Tech Support Consult	$50,000 + 35% ($17,500) + (8074)=	$ 75,574.00
	Admin Staff Sub Total =	**$595,194.00**

The total cost breakdown of these additional FTEs (base salary, + fringe, +overhead) breaks down as follows:

Total Phase II Staffing Request:

+45	**Public Def Sub Total =**	**$5,223,330.00**
+11	**Legal Asst. Sub Total =**	**$ 831,314.00**
+14	**Investigator Sub Total =**	**$ 963,536.00**
+11	**Admin Asst. Sub Total =**	**$ 608,564.00**
+64	**Social Worker Sub Total=**	**$5,700,736.00**
+6	**Admin Staff Sub Total =**	**$ 595,194.00**
	Grand Total for Phase II Staffing: +151	**$13,922,674.00**

Phase 2.2 : Phase II Employee Compensation Plan

One of the most frequently cited reasons for employees leaving our agency is dissatisfaction with their current position's is compensation. Within that complaint, it has been the long standing practice of haphazard, miniscule raises that fail to keep up with basic cost of living increases, rising healthcare costs, failure to account for rising competitive salaries from prosecutor's offices, and failure to account for an employee's increasing years of experience as employees stay with our agency.

To that end, it is our intent to make proactive, regular funding requests to address our employee's compensation needs. Based on our projected number of employees, and accounting for employees qualifying for the next step in our pay scale based on either years of service or merit raises, we anticipate a potential FY 2023 compensation plan budget request that could cost as much as approximately $1,500,000.[53]

Total possible cost of the Phase II Compensation Plan: $1,500,000.00

Phase 2.3 : Recruitment and Retention Programs

During our extensive internal agency discussions about our historic and chronic recruitment and retention problems, several themes began to emerge beyond the consistent drum beats of overwhelming caseloads and inadequate compensation issues. Those themes involved other smaller, more targeted, but nonetheless effective ideas aimed at addressing our difficulties recruiting new attorneys into our agency and maintaining those who are already here.

[53] At approximately 300 FTEs, that averages out to approximately $5,000 per employee (including additional fringe and benefits costs), although the actual distribution of those salary adjustments will be made on an individual basis based on our approved FY 2023 pay scales and merit raise program. This estimate will likely be substantially modified closer to our actual budget request based on more specific projections. This suggested amount is really meant to act as a placeholder for our intent to continue to seek funding for compensation adjustments based on our progressive pay scales in future years.

Public Defender Loan Payback Program

One of the particular issues that we've had recruiting attorneys into public defense or keeping those that we have there, is the pressure our attorneys face from their law school and undergraduate degree student loan debt. After all, no matter how dedicated you are to public service or specifically to public defense, if your low salary prevents you from paying for your basic necessities and keeping your student loans in good standing, you won't be able to work for our agency for long. While national student loan repayment programs have proved extremely popular, and have benefited our employees over recent years, those programs require extensive time commitments and have frequently been threatened by lack of funding or difficulties with the administration of those programs.

We are interested in the development of a local incentive program, funded by the state, specifically aimed at the recruitment and retention of public defenders that would offer to pay off a certain amount of BIDS employee's student loans in exchange for an agreement to work a certain number of years for our agency.

For example, the legislature could create a fund that would allow us to offer $10,000 for each year worked for BIDS in student loan pay offs with a minimum of a three year commitment to work for the agency. Even if fully half of our employees took advantage of the program, it would cost the state $4.5 million over the course of the initial three year commitment.[54]

But by paying off a portion of the employee's student loans with that money rather than using those funds to further boost starting salaries to help attract new graduates to our agency, the state would be saving the extra costs of fringe benefits and retirement liabilities on that money. And in exchange, our employee would have some of the pressure to pay down their loans lifted from their shoulders, while BIDS enjoyed the increased longevity of a now experienced defender staying with our agency longer to continue receiving the student loan benefits.

[54] If 150 employees took advantage of the program for $10,000 a year for the full initial proposed three year commitment, which would cost $4,500,000.00, or $1,500,000.00 a year.

Even if BIDS had to hire additional staff to help administer the program, the benefit that such a locally run program would have on our recruitment and retention problems would be huge.

Obviously the details of such a program would have to be worked out by looking a similar comparable programs in other states and legislation to support such a program would have to be proposed separate and apart from any funding requests. But such a program would be well worth the legislature's time to consider.

Proposed projected cost of a state-run public defender student loan repayment program for three years: $4,500,000.00, or $1,500,000.00 per year.

Establishment of a BIDS Special Litigation Unit

Another one of the common refrains that we've heard while discussing recruitment and retention issues is the lack of opportunities for promotions and professional advancement. Currently, there are 15 Chief public defenders in our agency and 11 Deputy public defender positions. Frequently, Chiefs and Deputies hold their positions for five or more years at a time. The lack of additional supervisory positions along with the infrequent turnover of those positions means that there are very few opportunities for promotion or advancement.

If the additional staffing requests are funded in Phases I and II, we do anticipate converting several of those additional defender positions into additional supervisory positions in order to sufficiently accommodate the increased numbers of employees in each office. However, that is unlikely to be enough, in and of itself, to solve this particular complaint.

Furthermore, promoting experienced defenders into more management and supervisory positions might not be the advancement that those particular defenders want or that is best for their office. As a result, we need other opportunities for promotions and professional advancement apart from deputy and chief defender positions.

Separately, our agency is increasingly finding itself in need of a more coordinated effort amongst all of our offices to respond to systemic issues in the

criminal legal system. Issues such as offender registration litigation, racial justice issues in policing and prosecution, bail reform, and civil rights issues surrounding COVID-19 in prisons are all issues that BIDS as an agency should be preparing better, more uniform responses to. But we lack the centralized litigation focus to create, distribute, and train our defenders on a uniform, consistent response to some of these issues.

The establishment of a BIDS Special Litigation Unit would solve both these problems. It would provide the agency with a centralized group of designated highly experienced quality defenders with caseload reductions sufficient to make room in their workloads for this special work. If established with a competitive application process available only to current experienced defenders, it would provide another opportunity for promotions and professional advancement and provide another avenue for some increased compensation.

The proposed unit would consist of ten highly skilled, experienced already employed BIDS public defender litigators. Once selected, the special litigators would continue to work in their individual offices on regular cases, but would also work on agency-wide special projects in exchange for mitigated regular caseloads and an additional $20,000 a year compensation package (including fringe).

Total Proposed Cost for the establishment of a special litigation unit: $200,000.

Establishment of a BIDS Second Chair Program

Similarly to the proposed special litigation unit, this program aims to address the concerns that there are not enough opportunities for promotions or professional advancement within our public defense system. This program also would address another agency need that we have identified: additional intensive training opportunities for our assigned counsel program attorneys.

This program would be heavily modeled after the Federal Defender of Kansas' second chair program. [55] At its heart, the program would be an intensive training and shadowing program for our private attorney partners who apply to participate in the mentoring program. It would also be an opportunity for a

[55] https://ks.fd.org/content/second-chair

number of our highly qualified and experienced defenders to participate in a program that performs a special service to the bar and serves as a form of professional advancement.

Our proposal would be to hold a competitive and thoroughly vetted application process, both for the attorneys looking to be mentored from the private bar and for the defenders who apply to be the mentors. Defenders who are chosen to act as mentors would receive workload reductions from their regular caseloads to make room for their mentorship and training responsibilities. They would also receive additional compensation, similar to the special litigation unit described in the second above. With an additional $20,000 a year compensation package (plus fringe), and starting off with 10 public defense mentors, the program would cost approximately $200,000.

The total proposed cost to initially establish a BIDS second chair program is: $200,000.

Paid Legal Internships

One of the very best recruiting tools that we have is the opportunity for law students who are interested in public defense to participate in a legal internship in one of our public defender offices. Large numbers of our long-time employees got their start in public defense while still in law school by participating in an internship position within the agency or through one of our sister partnerships through the Paul E. Wilson Innocence Project at the University of Kansas School of Law or the law clinic or appellate practice programs at Washburn Law School.

While informal or temporary summer internships are helpful to our recruitment efforts, a longer term, more formal internship program would really help us solidify our recruitment of new graduates into our agency. However, with the increasing costs of law school, rising student loan debt, and general demands of their school work, we are likely missing out on a certain number of economically diverse law students who would like to work with our public defender offices but who need to spend their time working to make ends meet while in law school.

To that end, we are proposing the establishment of a BIDS paid internship program. The program would be administered by an internship coordinator who

would oversee the application process, find appropriate placements for the interns, supervise the interns, and continue to mentor and recruit highly skilled interns as they graduate from law school and pass the bar exam. To start with, we'd propose an initial class of 10 interns working up to 20 hours a week at $20 an hour for up to one year.

Not only would this program provide another solid avenue for recruitment of good future public defender candidates, but it also would provide our public defender offices with additional staffing and advocates to help handle their caseloads.

The total proposed cost of this program to pay 10 interns and one intern coordinator would cost approximately $297,075.00.[56]

The Cost Breakdown of Phase II Recruitment and Retention Proposed Programs

Public Defender Loan Payback Program	$1,500,000.00
BIDS Special Litigation Unit	$ 200,000.00
BIDS 2nd Chair Program	$ 200,000.00
BIDS Paid Legal Internship Program	$ 297,075.00
Total Cost:	$2,197,075.00

The total proposed cost of the Phase II Recruitment and Retention programs would cost $2,197,075.00

Phase 2.4 : Assigned Counsel Hourly Rate Adjustment to $120 per Hour

As discussed in our earlier report, even if our assigned counsel rate is raised to $100 per hour, that rate would still be substantially below the going market rate for private legal services while still not allowing our private appointed counsel to

[56] 10 interns working up to 20 hours a week, up to 52 weeks a year, at $20 per hour would cost up to $208,000. An internship coordinator supervising attorney, making $60,000 base salary, plus 35% fringe ($21,000), plus $8,075 in overhead costs would cost $89,075, or approximately $297,075 total.

cover most of their basic expenses when they take an appointment on one of our cases.

These low hourly rates discourage well qualified counsel from volunteering to serve on our assigned counsel appointment panels. Our increasingly heavy reliance on those panel attorneys due to our public defender heavy caseloads and the resulting refusals of those offices to continue accepting new cases means that it is more important than ever that we maintain robust assigned counsel panels. An increase to the hourly rate is an integral part of the plan to continue supporting those robust panels.

The cost breakdown for an additional $20 per hour raise to our assigned counsel hourly rate breaks down as follows:

Projected assigned counsel hours:	178,458 hours of assigned counsel time.
At the $100 per hour rate:	$17,845,800
At the $120 per hour rate:	$21,414,960
The difference:	**$3,569,160**

The cost of an additional raise from $100 to $120 per hour of our assigned counsel rate would cost $3,569,160.

Phase 2.5 : Ongoing Agency Infrastructure Needs

Building on the progress made in Phase I, Phase II of our agency infrastructure programs continue to aim towards addressing some fundamental needs of our agency.

Electronic Attorney/Expert Voucher Payment Conversion

Our agency still processes paper vouchers for every single assigned counsel claim form we receive and every single expert voucher and court reporter invoice we pay. It is an inefficient process that frustrates our staff, our assigned counsel, and our experts and court reporters. We need to convert this paper process to an electronic voucher payment system.

We have not yet priced out the cost of such a large-scale conversion of our payment system, but even if the project were to be relatively expensive to allow us to license an electronic voucher payment system and to cover the staff time needed to retrain our administrative office personnel and our assigned counsel and experts on the conversion and to convert our historical data into the program, it would, in the long run, likely pay for itself with increased efficiencies in our administrative office.

Total cost for proposed conversion to an electronic voucher program: TBD

Expansion of Public Defender Program

It has been over ten years since the last time our agency undertook any serious consideration of expanding our public defender program to establish additional regional defender offices. Judging from our caseload numbers there appear to be several areas of the state where it would likely make financial sense to expand our public defender program to handle cases in local and surrounding jurisdictions.

Although the expansion of public defender offices into new areas is a process that requires Board of Indigents' Services approval and public hearings, it is likely that BIDS will be seriously looking at areas where we might need to provide an expansion of our services.

Based on a very rough estimate of startup costs, salaries and wages, as well as overhead operating costs, we have estimated that the initial startup investment for a new regional public defender office might cost around

$1,000,000.00 each.[57] Based on a preliminary review of our assigned counsel caseloads across the state, there is likely to be a need for as many as three new regional public defender offices in Phases II and III of our BIDS plan.

In anticipation that the Board will want to seriously consider expanding our public defender offices and that those proposed expansions would be determined to be cost effective and beneficial to our clients after public hearings are held, we are including the additional estimated costs of three potential new regional public defender offices as part of the rough estimated costs of this plan.

The total estimated costs of a proposed expansion of our public defense program would be $3,000,000.00.

Total Estimated Cost of Phase II Infrastructure Programs

Conversion of Assigned Counsel Voucher System	$ TBD
Expansion of Public Defender Program	$3,000,000.00
Total Cost of Phase II Infrastructure Program	**$3,000,000.00**

[57] We estimate that the actual cost to operate these offices after the initial outlay of startup costs, will be closer to $700,000 to $850,000 a year, depending on their relative size and local rents.

Phase 2.6 : Phase II Cost Breakdown

2.1	Phase II Caseloads Staffing Adjustment	$13,922,674.00
2.2	Phase II Recruitment & Retention Compensation Adjustment	$ 1,500,000.00
1.3	Phase II Agency Recruitment & Retention Programs	$ 2,197,075.00
1.4	Increase Assigned Counsel Rate to $120 an hour	$3,569,160.00
1.5	Ongoing Infrastructure Needs	$ 3,000,000.00[58]
	Total Cost Phase II:	**$24,188,909.00**

[58] Cost of conversation to an electronic voucher payment system TBD.

Phase III

BIDS Plan for Public Defense Reform in Kansas

Phase III Introduction

Phase III of the BIDS Phased Plan for Public Defense Reform in Kansas is intended to build upon the progress made in Phases I and II. Phase III is focused on continuing to provide staffing adjustments for projected yearly caseloads and ethical caseload considerations, funding for cost of living, experience, and merit raises, and a number of programs that will help our agency move fully into a holistic defense model.

For this reason, Phase III focuses on four primary areas:

- Providing adequate staffing for our public defender offices based on internal BIDS caseload standards.
- A plan to continue addressing our compensation concerns to help hold down our turnover rate and improve our current employee retention as well as improve new employee recruitment,
- The development of a pilot managed regional assigned counsel program to improve the availability and quality of assigned counsel in an underserved areas of our state,
- The third phase of increasing our assigned counsel hourly rate to address increasing overhead issues and cost of services in an effort to address recruitment and retention issues among our assigned counsel,

Below is the breakdown of those specific plans. The intent of these targeted measures is to address our ongoing ethical caseload concerns, to improve our services for our clients, and to continue addressing some of the identified factors that are contributing to our recruitment and retention problems while continuing to move our system into a holistic defense model.

As you read through the various sections of Phase III of our Plan to Reform Public Defense in Kansas, keep in mind that all programs in Phase III and their associated budget requests would require specific approval by our Board in advance of the FY 2024 or FY 2025 Budgets in order to provide the necessary funding for most of these programs. Since our FY 2024 and FY 2025 Budgets will not be submitted until September 2023 and 2024 respectively, Board votes on these specific programs and their associated funding needs will not be held until closer to those budget requests.

Phase 3.1 : Caseload Staffing Adjustment to Internal BIDS Caseload Standards

Phase I of our Caseload staffing adjustment addressed our most immediate and emergency staffing needs based on our usually low FY 2020 caseloads. Phase II caseload staffing adjustments addressed our appellate and capital staffing needs as well as continuing to adjust our staffing for more normal caseload projections. But, both of those staffing adjustments were based on the admittedly outdated 1970's era NAC standards of no more than 150 felonies per attorney per year.

As stated during the initial discussion in this report, the type of defense that modern criminal cases today need looks very little like what a 1970's era criminal defense did. The onset of extensive forensic evidence, large amounts of police body camera and other security camera footage, far more complicated criminal laws, and the advancements in what we now know about social behavioral sciences all make those NAC standards wildly out of date.

For this reason, the third phase of our staffing and caseloads adjustments is intended to address the far more complicated nature of modern criminal defense by instituting internal caseload standards that combine a weighted caseload system (to be further developed through a Delphi study) with internal agency caseload caps. However, until we have those evidence-based Delphi study workload estimates, our staffing projections for phase III utilize an estimated caseload cap based on comparisons with other states' outer limit caseload caps. Accordingly, the following caseload staffing adjustments have been calculated out using an internal caseload cap of not more than 70 cases per trial attorney, per year.[59]

The goal would be to use this number as the upper limit in conjunction with a weighted caseload standard that weights higher severity level crimes more heavily than comparably more simple cases like probation revocations. So an individual attorney may actually be capped at an individually lower caseload based on their weighed caseload numbers, but would also be prevented from

[59] It is highly likely, based on a review of Delphi study models from other states, that a Kansas evidence based Delphi study will actually result in workloads that are considerably lower than this 70 cases cap.

going beyond this upper limit on cases even if their weighted cases are all individually lower level cases.

At an upper limit of 70 cases per attorney per year, that would average out to approximately 30 hours of time on each case per year. The staffing breakdown based on this 70 cases internal limit is as follows:

Attorney Projections Based on FY 2019 Caseloads and BIDS Internal Limits

TRIAL OFFICE	NUMBER OF ACTIVE ATTORNEYS (# of Open Positions)	ACTUAL FY 2019 TOTAL CASES CLOSED	CASES STILL ACTIVE 7/1/2020	TOTAL Cases Closed & Cases Active Projected	TOTAL AVG CASES HANDLED PER ATTY Projected	ADDTL ATTY NEEDED BIDS Standards (70 felonies/yr)
TOPEKA	9	1180	390	1570	174	+14
NEKSCO Topeka	5	598	236	834	167	+7
SALINA	4 (3)	1019	292	1311	328	+12
JUNCTION CITY	11	1253	420	1673	152	+13
OLATHE	16	2778	952	3730	233	+38
HUTCHINSON	5	874	279	1153	231	+12
WICHITA	19 (4)	4462	1655	6117	322	+65
SCCO Wichita	5	508	311	819	164	+7
GARDEN CITY	2	475	159	634	317	+7
CHANUTE	3	554	332	886	295	+10
INDEPENDENCE	2	343	135	478	239	+5
TOTAL	**81 (7)**	**14,044**	**5,161**	**19,205**	**237**	**+190**

Assuming that the staffing adjustments requested in Phases I (+26) and Phase II (+19) for our trial level offices have been made by this point, we would already have 45 of the projected 190 needed trial attorneys. This would then leave 145 additional attorney positions needed to address these caseloads at this internal BIDS cap of no more than 70 cases per attorney per year.

At this point, not all of these positions would have to be brought in at an experienced defender level. As a result, we've broken up these positions into a variety of salary ranges.

The cost breakdown for 145 new trial public defender positions would be:

Additional PD's based on Normal 2019 caseload numbers		Agency Cost
Public Defender I	$60,000 + 35% ($21,000) + (8,074)= (Base) + (Fringe) + (Overhead)	$ 89,074.00
	# Needed to meet BIDS standards	X 50
	Phase II Public Def Sub Total =	**$4,453,700.00**
Public Defender II	$70,000 + 35% ($24,500) + (8074)= (Base) + (Fringe) + (Overhead)	$102,574.00
	# Needed to meet BIDS standards	X 50
	Phase II Public Def Sub Total =	**$5,128,700.00**
Public Defender III	$80,000 + 35% ($28,000) + (8074)= (Base) + (Fringe) + (Overhead)	$116,074.00
	# Needed to meet BIDS standards	X 45
	Phase II Public Def Sub Total =	**$5,223,330.00**
Subtotal for 145 additional trial level Public Defenders=		**$14,805,730.00**

And, just as in Phase I and Phase II, using NAPD's staffing recommendations for public defender offices, those additional 145 public defenders would also require additional support staff.[60] Those staffing recommendations include the following ratios of support staff to attorneys:

- One investigator for every three attorneys in an office.
- One legal assistant or paralegal for every four attorneys in an office.
- One administrative assistant for every four lawyers in an office.
- One social worker for every three lawyers in an office.

Based on adding an additional 145 public defender positions, we anticipate needing to add the following support staff:

Additional Legal Assistants based on normal caseloads	Agency Cost
Legal Assistants $50,000 + 35% ($17,500) + (8074)= (Base) + (Fringe) + (Overhead)	$75,574.00
# Needed to meet NAPD standards 1:4 atty	
Based on Phase II additions: 194.5 PDs, 49 Legal Asst.	
Add 145 PDs =339.5 PD/ 4= 85 Legal Asst.-49= 36	x36
Legal Asst. Sub Total =	**$2,720,664.00**

Additional investigators based on normal caseloads	Agency Cost
Investigators $45,000 + 35% ($15,750) + (8074)= (Base) + (Fringe) + (Overhead)	$ 68,824.00
# Needed to meet NAPD standards 1:3 atty	
Based on Phase II additions: 194.5 PDs, 65 Investigators	
Add 145 PDs =339.5 PD/3 = 114 Invest -65=	x 49
Investigator Sub Total =	**$3,372,376.00**

[60] https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf

Additional support staff based on normal caseloads		Agency Cost
Administrative Asst.	$35,000 + 35% ($12,250) + (8074)= (Base) + (Fringe) + (Overhead)	$ 55,324.00
# Needed to meet NAPD standards 1:4 atty		
Based on Phase II additions: 194.5 PDs, 49 Admin Asst.		
Add 145 PDs =339.5 PD/4 = 85-49=		x36
	Admin Asst. Sub Total =	**$1,991,664.00**

Additional Social Workers based on normal caseloads and holistic defense model		Agency Cost
Social Worker	$60,000 + 35% ($21,000) + (8074)= (Base) + (Fringe) + (Overhead)	$89,074.00
# Needed to meet NAPD standards 1:3 atty		
Based on Phase II additions: 194.5 PDs, 65 Social Workers		
Add 145 PDs=339.5 PD/3 =114 -65 = 49		x49
	Social Worker Sub Total=	**$4,364,626.00**

Additional Admin Staffing (Base salary + Fringe + Overhead)	Agency Cost
Assigned Counsel Coord $90,000 + 35% ($31,500) + (8074) =	$ 129,574.00
Tech Support Consult $50,000 + 35% ($17,500) + (8074)=	$ 75,574.00
Admin Staff Sub Total =	**$205,148.00**

The total cost breakdown of these additional FTEs (base salary, + fringe, +overhead) breaks down as follows:

Total Phase II Staffing Request:

+145	**Public Def Sub Total =**	**$14,805,730.00**
+36	**Legal Asst. Sub Total =**	**$ 2,720,664.00**
+49	**Investigator Sub Total =**	**$ 3,372,376.00**
+36	**Admin Asst. Sub Total =**	**$ 1,991,664.00**
+49	**Social Worker Sub Total=**	**$ 5,700,736.00**
+2	**Admin Staff Sub Total =**	**$ 205,148.00**
	Grand Total for Phase III Staffing: +317	**$28,796,318.00**[61]

Phase 3.2 : Recruitment and Retention Compensation Plan

Just as discussed in Phase 2.2, one of the most frequently cited reasons for employees leaving our agency or for dissatisfaction with their current positions is compensation. Within that complaint specifically, it has been the long standing practice of haphazard, miniscule raises that fail to keep up with basic cost of living increases, rising healthcare costs, fail to account for rising competitive salaries from prosecutor's offices, and fail to account for an employee's increasing years of experience as employees stay with our agency.

To that end, it is our intent to make proactive, regular funding requests to address our employee's compensation needs. Based on our projected number of employees, and accounting for employees qualifying for the next step in our pay

[61] With this Phase III staffing adjustment, BIDS would have 339.5 public defenders including 279.5 trial attorneys, 40 appellate attorneys, 4 capital appeals attorneys, 10 trial capital attorneys, and 6 capital habeas attorneys.

scale based on either years of service or merit raises, we anticipate a potential FY 2024 compensation plan budget request of approximately $1,750,000.[62]

Total possible cost of the Phase II Compensation Plan: $1,750,000.00

Phase 3.3 : Pilot Managed Assigned Counsel Program

One of the ongoing struggles that we've experienced with our assigned counsel program is the lack of sufficient numbers of quality experienced attorneys on some of our panels. In order to provide sufficient coverage for our clients in those underserved judicial districts, we will likely consider the establishment of a pilot managed assigned counsel program focused on recruiting, qualifying, and maintaining assigned counsel on a local panel list. Our hope is that this program would help fill the gaps where a panel might otherwise be lacking in sufficient numbers of attorneys to handle the influx of local cases. If this program is initially successful, we could then consider expanding it out to other underserved areas of the state.

As currently imagined, this managed assigned counsel pilot program would be supervised by the Assigned Counsel Coordinator and would consist of one deputy level managing attorney, 2 staff investigators, 2 paralegals, and 2 administrative support staff. The Deputy level managing attorney would assist the court with the recruitment, qualification, and training of attorneys to serve on the appointments panels in the judicial districts in the region they serve and act as the local supervisor for the support staff. The investigators, paralegals, and social workers would provide services to those private assigned counsel attorneys on the panel.

The benefits of this pilot program is that it would help create a model of a managed assigned counsel program before expanding the model to other underserved areas of the state. The managed assigned counsel program would

[62] At approximately 350 FTEs, that averages out to approximately $5,000 per employee (including additional fringe and benefits costs), although the actual distribution of those salary adjustments will be made on an individual basis based on our approved FY 2024 pay scales and merit raise program. This estimate will likely be substantially modified closer to our actual budget request based on more specific projections. This suggested amount is really meant to act as a placeholder for our intent to continue to seek funding for compensation adjustments based on our progressive pay scales in future years.

provide more consistent, quality coverage for many of our judicial districts that struggle with keeping a sufficient number of qualified assigned counsel on their appointments lists. It would also cut down on those assigned counsel costs by internally housing many of the services that BIDS typically must contract out for in those assigned counsel cases. But it would also save the agency from the costs of establishing additional public defender offices in judicial districts where it really might not be cost effective to maintain full individual public defender offices.

The estimated cost of this proposed pilot managed assigned counsel program would be as follows:

Pilot Regional Managed Assigned Counsel Program Staffing (Base salary + Fringe + Overhead)		Agency Cost
Assign Counsel Deputy	$ 70,000.00 + 35% (24,500) + (8,074)=	$ 102,574.00
Assigned Counsel Staff	$35,000 + 35% ($12,250) + (8074)=	$ 55,324.00
Assigned Counsel Staff	$35,000 + 35% ($12,250) + (8074)=	$ 55,324.00
Legal Assistant	$50,000 + 35% ($17,500) + ($8,074)=	$ 75,574.00
Legal Assistant	$50,000 + 35% ($17,500) + ($8,074)=	$ 75,574.00
Investigator	$45,000 + 35% ($15,750) + ($8,074)=	$ 68,824.00
Investigator	$45,000 + 35% ($15,750) + ($8,074)=	$ 68,824.00
Pilot Program Managed Assigned Counsel Sub Total =		**$502,018.00**

Phase 3.4 : Assigned Counsel Hourly Rate Adjustment to $140 per Hour

As discussed in our earlier report, even if our assigned counsel rate is raised to $120 per hour, that rate would still be substantially below the going market rate for private legal services in Kansas while still not allowing our private appointed counsel to cover most of their basic expenses when they take an appointment on one of our cases.

These low hourly rates discourage well qualified counsel from volunteering to serve on our assigned counsel appointment panels. Our increasingly heavy reliance on those panel attorneys due to our public defender heavy caseloads and the resulting refusals of those offices to continue accepting new cases means that it is more important than ever that we maintain robust assigned counsel panels. An increase to the hourly rate is an integral part of the plan to continue supporting those robust panels.

The cost breakdown for an additional $20 per hour raise up to $140 per hour to our assigned counsel hourly rate breaks down as follows:

Projected assigned counsel hours:	178,458 hours of assigned counsel time.
At the $120 per hour rate:	$21,414,960
At the $140 per hour rate:	$24,984,120
The difference:	**$3,569,160**

The cost of an additional raise from $120 to $140 per hour of our assigned counsel rate would cost $3,569,160.

Phase 3.5 : Cost breakdown of Phase III Programs

Caseload Staffing Adjustment to BIDS Caseload Standards	$28,796,318.00
Recruitment and Retention Compensation Plan	$ 1,750,000.00
Pilot Managed Assigned Counsel Programs	$ 502,018.00
Assigned Counsel Hourly Rate Adjustment to $140 per Hour	$ 3,569,160.00
Total Phase III Costs:	$34,617,496.00

Discussion of Relative Costs

This plan involves a significant investment in our public defense system. It's natural then, to wonder what benefits the state will be getting for these increased expenditures.

One of the most immediate benefits to investing in our public defense system is that these targeted programs and investments will address some of our most immediate problems: our recruitment and retention issues and our untenable caseloads. By addressing our recruitment and retention issues our agency will become more cost efficient by being able to maintain experienced employees longer, rather than training employees only to have them turn around and leave as soon as they are trained up to handle cases. Our cost efficiencies will also be improved by addressing our overwhelming caseload issues because by proactively ending those large caseloads, we will be able to reduce our downline costs associated with the natural fallout from an attorney having too many cases: ineffective assistance of counsel claims, ethics complaints, and malpractice litigation.

That, coupled with additional investments in our administrative office and our infrastructure, as well as our public defender staffing should help us be able to keep our trial public defender office doors open to new cases, which means more cost efficient public defenders and less offloading of cases to our assigned counsel program.

But it's not just BIDS that will benefit from these investments. As the Rand study on the Bronx holistic defense models showed, these investments in a client-centered, holistic defense model reap long term benefits for the state without affecting public safety. Specifically, we would anticipate being able to impact the overall lengths of sentences, thereby potentially saving the Department of Corrections and local county jails bed space costs and other corrections cost savings with better overall outcomes.

By fully staffing our public defense program and investing more in the quality of representation of our assigned counsel program, we would also anticipate seeing some cost savings for the judiciary, as the more effective and efficient processing of roughly eighty-five percent (85%) of the judiciary's criminal caseload would likely have a significant impact on the district and appellate court

systems through more efficient case processing, fewer continuances, and more effective motions practices.

We also believe that these investments will produce some measurable benefits in the area of claims against the state based on wrongful convictions. There are a lot of factors that can contribute to a person's wrongful conviction. But one of the most common is the failure of defense counsel to perform their adversarial role effectively. By addressing caseloads, staffing, and funding issues throughout the agency, we believe these investments will help the state avoid some future liabilities for those claims as well.

Finally, overwhelming caseloads and the severe underfunding of public defense are the hallmarks of a public defense system ripe for litigation over the state's refusal to live up to its obligation to provide effective counsel under the Sixth Amendment. The costs to the state to defend itself against protracted litigation over the constitutional adequacy of the public defense system over the course of even a relatively short case can quickly reach into multiple millions of dollars. Investing that money upfront in the public defense system may help the state avoid costly litigation down the line.

And, at the end of the day, even with significant investments in public defense like the ones outlined in this proposed plan, the cost of public defense is still substantially more affordable than litigating these cases at the going criminal defense attorney market rates.

We have a limited window within which we can turn what is legitimately a crisis in our public defense system into an opportunity to rebuild public defense in Kansas and, in the process, create a system with better outcomes for both our clients and for the state itself.

We look forward to working with all of you to transform our Kansas public defense system and to fulfil our constitutional and statutory commitments to the effective assistance of counsel in Kansas.

Acknowledgements

This report and our Three Phase Plan came together with a lot of help from a variety of different places.

Our administrative support staff including Kim Mason, Chief Financial Officer and Assistant Director, Beth Child, Human Resources Professional, Michael Troxell and Mike Adams, IT Consultants, along with the rest of our administrative office support staff have worked hard to develop pay plan conversion calculations, projected assigned counsel costs, employee fringe estimates, IT project cost projections, employee agency overhead calculations, and numerous other details that went in to all of the fundamental parts of this report and this plan.

Additionally, our employee recruitment and retention plan was largely influenced from discussions started by our public defenders and support staff who are serving on the BIDS Well-Being Committee and the Well-Being Survey Report itself that was compiled by the Committee Co-Chairs, Meryl Carver Allmond, Capital Appellate Defender, and Jessica Glendening, Assistant Public Defender, Third Judicial District Public Defender Office.

The actual drafting and layout of this report was done with the honest feedback and helpful wordsmithing assistance of Clayton Perkins, Capital Appellate Defender. The cover photo is thanks to Meryl Carver-Allmond.

Of course, our efforts to develop long term solutions to our agency's problems would not have gotten off the ground without the support for our initial Phase I budget request by our active, interested, and supportive Board members: Ronald Wurtz, Braden Perry, Richard Ney, Patricia Hudgins, Dr. Michael Birzer, Jeffrey Leiker, Erica Andrade, and Laurel Michel.

But most importantly, we have to acknowledge the incredible perseverance and dedication that our BIDS employees and assigned counsel have shown day-in and day-out as they continue to work towards providing the best defense possible to our clients under truly difficult circumstances.

Thank you to all of you. The work that you do is valued, the support you provide each other and to us is inspiring, and we could not continue to provide our core mission without you.

Appendix

TIPPING THE SCALES TOWARD JUSTICE

PUBLIC DEFENDERS: JUSTICE SYSTEMS' FIRST RESPONDERS FOR PEOPLE
OPEN LETTER TO AMERICA

May 7, 2020

The pandemic caused by COVID is having an impact on every part of our lives. Most Americans are staying at home and focusing on trying to stay safe. However, some have been called to a different life. These people we recognize as heroes: nurses, doctors, EMTs, police officers, social workers, grocery clerks, postal workers and others whose professions have required them to stay at work, despite the risk of personal harm.

There is a group of people who have been left out of this conversation who are deserving of our recognition. Tens of thousands of public defenders and other public defense professionals daily deliver the promise of rights enumerated in the Constitution, a function that has grown all the more critical in these dark times. As courts have closed their doors, access to justice for low-income people facing criminal charges has been severely curtailed. Jurisdictions across the country have limited the ability to challenge pre-trial detention, litigate evidentiary issues, or conduct trials. Rather than scale back our own efforts, public defenders have stepped up, put ourselves at risk in crowded courtrooms, unsafe jails, and public spaces to ensure that low-income people's rights are not cast aside and their legal needs ignored.

Immediately after the beginning of this pandemic, public defenders worked to identify the most vulnerable people in our jails and prisons, people who will die if they remain incarcerated. We filed emergency motions on our clients' behalf resulting in the release of and saving the lives of thousands of incarcerated people. This advocacy has also saved the lives of jail personnel and reduced the risk of mass spread among prisoners. Public defenders also fought to protect due process rights, ensuring that low-income people could still access the courts for essential matters, connected clients with resources, counseling, and online programming to help them meet their most pressing needs and stay in compliance with court mandates, and worked tirelessly to resolve cases when in their clients' interest thus helping more people secure their freedom and reducing the growing backlog of cases. Likewise, we continue to work with concerned family members to keep them apprised of their loved one's case or release status when the courts are slow or difficult to access. The duty of the public defenders to our clients does not stop for COVID or anything else.

There is now the specter of enormous budget cuts that threaten the right to counsel. Every jurisdiction in the country will be grappling with insufficient resources for critical social services. Already, in Louisiana, defenders are being furloughed because the public defense system has run out of money. In Virginia, 59 needed new positions have been taken away along with a freeze on discretionary spending. In

Georgia, the Governor has announced cuts of 14% for next year. In New Mexico, 15-20% budget reductions are being threatened. Ohio faces 20% reductions this year. In most states, the reality of significant budget reductions in state and local government funding draws closer every day.

Now is not the time to reduce funding for public defense. Public defenders are appointed to represent poor people. The relationship between poverty and contact with the criminal justice system is well-documented and well-accepted. At the same time that an economic depression will reduce government revenues, the resources needed for public defense will likely increase as millions of people become unemployed and are thrown into poverty. Public defenders already suffer under crushing and unethical workloads. We have no control over workload, or ability to resist new cases created by the policies of police and prosecution. People arrested by the police and charged by prosecutors have a constitutional right to counsel, which the state must provide if they cannot afford to procure it for themselves. As a result of the economic fallout of COVID, people who formerly would have been able to hire counsel will now seek the services of a public defender. Now is no time to reduce the resources needed to defend a burgeoning number of people needing counsel. Further, public defender offices typically lag far behind their criminal justice partners when it comes to technology (both software and qualified staff). Public defender offices will need support to adapt to changes in creating client relationships, performing investigations in the field, participating in proceedings, and maintaining staff contact during quarantine. These upgrades will cost money and without them public defender offices will not be able to ethically or effectively provide defense services.

Providing adequate funding for public defense is also a smart investment. Public defenders have been at the forefront of systemic reforms that use tax dollars wisely and implement data-driven policies. Public defenders have led the movement for bail reform, for less draconian sentences, and for a smaller parole and probation system. By securing the release of vulnerable people while at the same time advocating for these reforms, public defenders are saving governments millions of dollars in unnecessary jail, prison, and supervision costs.

Instead of cutting funding to these essential workers, today presents an opportunity to do even more to address our bloated and ineffective system of mass-incarceration. We can radically limit arrests and prosecutions to actual public safety threats, drastically reduce the number of people held in pre-trial detention, and significantly reduce the use of probation and parole to supervise people who don't need supervision. Mass incarceration developed in part because of our nation's failure to fund adequately the public defense function. We will not be able to reduce mass incarceration and the significant harm being done to families and communities if resources are now taken away.

Most importantly, public defenders must be funded sufficiently to protect the constitutional rights of the accused. In a nation dedicated to the rule of law, our court system, including prosecutors and public defenders, are equally essential to protect our communities and deliver the promise of justice for all.

The National Association for Public Defense (NAPD), an association of over 22,000 public defenders and public defense professionals, calls upon the nation to recognize the immense contribution of public defenders, particularly during this time of crisis. Until there is a massive restructuring of the criminal justice system and a significant

reduction in national incarceration rates, NAPD demands that funding for public defense services remain at least at its present level, that anticipated increases in public defender workload be closely monitored, and that public defender offices have access to funds required to adapt to new justice system operation. NAPD believes that the imminent economic reality will require reducing our massive criminal justice system. We believe that can – and must – be done safely. We look forward to participating as a partner in the process to create new criminal justice policies that reflect commitments to fairness, justice, public safety and community health.

Sincerely,

Derwyn Bunton, Chair
NAPD Steering Committee

Ernie Lewis, Executive Director
NAPD

ON BEHALF OF THE NAPD STEERING COMMITTEE

DERWYN BUNTON, CHAIR
District Defender, Orleans Public Defenders, New Orleans, LA

CARLOS J. MARTINEZ, VICE-CHAIR
Public Defender, Miami-Dade Public Defender, Miami, FL

ANTHONY J. BENNEDETTI
Chief Counsel, Committee for Public Counsel Services, Boston, MA

NANCY BENNETT
(Retired) Deputy Chief Counsel for the Private Counsel Division of CPCS, Boston, MA

KEIR BRADFORD-GREY
Chief Defender, Philadelphia Defender's Association, Philadelphia, PA

GEOFF BURKHART
Executive Director, Texas Indigent Defense Commission, Austin, TX

AMY P. CAMPANELLI
Chief Defender, Cook County Office of the Public Defender, Chicago, IL

DAWN DEANER
Executive Director, Choosing Justice Initiative, Nashville, TN

PAUL B. DEWOLFE
State Public Defender, Office of the Public Defender, Baltimore, MD

HERBERT DUZANT
Investigator, Federal Defender, District of Nevada, Las Vegas, NV

PATRICE FULCHER
Training Director, Office of the Public Defender, Baltimore, MD

EMILY HUGHES
Professor, University of Iowa College of Law, Iowa City, IA

MARTESHA L. JOHNSON
Chief Defender, Metropolitan Public Defender, Nashville, TN

JUSTINE M. LUONGO
Attorney-in Charge of the Criminal Practice, Legal Aid Society of New York, New York, NY

KATE MASON
Circuit Public Defender, Augusta Circuit, Georgia Public Defender Council, Augusta, GA

AISHA MCWEAY
Executive Director, Still She Rises, Tulsa, OK

ED MONAHAN
(Retired) Public Advocate, Department of Public Advocacy, Frankfort, KY

ELIZABETH MILLER
Assistant Director, Office of the Ohio Public Defender, Columbus, OH

JUSTINE OLDERMAN
Executive Director, Bronx Defenders, Bronx, NY

CHANTÁ PARKER
Managing Director, Neighborhood Defender Service of Detroit, Detroit, MI

CHRIS RAPILLO
State Public Defender, Connecticut Division of Public Defender Services, Hartford, CT

MARK STEPHENS
(Retired) District Defender, Knox County Public Defender 's Community Law Office, Knoxville, TN

STEPHANNE C. THORNTON, LICSW
Criminal Justice Specialist, Public Defender Services, Charleston, WV

WILLIAM WARD
State Public Defender, Minnesota Board of Public Defense, Minneapolis, MN

DOUG WILSON
City Public Defender, Aurora City Municipal Public Defender, Aurora, CO

TIM YOUNG
Director, Office of the Ohio Public Defender, Columbus, OH

LORINDA MEIER YOUNGCOURT
Trial Attorney, Federal Defender, District of Eastern Washington & Idaho, Spokane, WA

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

BIDS Well-Being Survey Report

Compiled by Meryl Carver-Allmond

In mid-July 2020, the BIDS Well-Being Committee sent a survey link by email to every employee in the agency (about 189 people). There were 20 questions on the survey, all directed at well-being and retention issues. Employees were given about a week to complete the survey.

Employees answered the survey anonymously. The questions were largely multiple choice, but, where logical, questions gave employees an "other" choice to write in an answer if the pre-selected choices did not fit with their experiences. The multiple choice answers were largely taken from narrative answers to a smaller survey that was given just to the BIDS Well-Being Committee earlier in the summer.

For some questions, employees were allowed to pick as many selections as applied, but for others they were only allowed to pick three selections or one selection in an attempt to identify which issues should be prioritized. One question allowed for narrative answers.

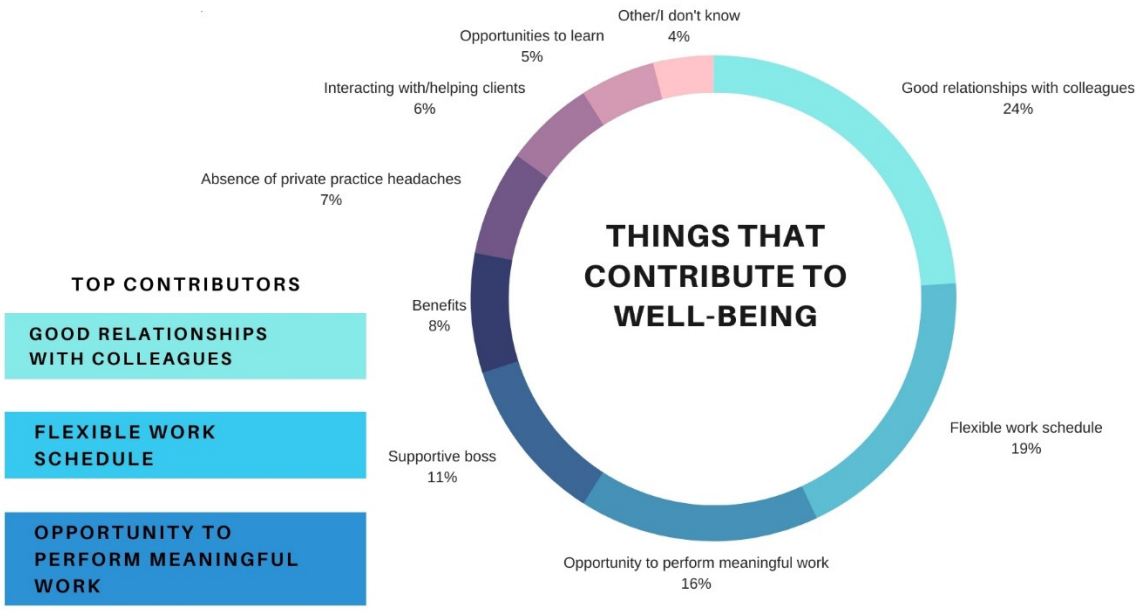
There were 128 responses (about 68% of the agency), including 80 attorneys (62.5% of responses) and 48 support staff (37.5% of responses). This report is a summary of the answers and a few general conclusions that can be drawn from the answers.

POSITIVE IMPACTS ON WELL-BEING

Positive impacts were discussed in two questions. One question was focused on the employee's personal well-being, and one was focused on impacts on colleagues' well-being that the employee had observed.

Employees were allowed to choose the three top contributors, which resulted in 755 answers total. The percentages below are percentages of those 755 answers.

Overall, good relationships with colleagues, a flexible work schedule, and the opportunity to perform meaningful work were the top contributors to BIDS employees' well-being.



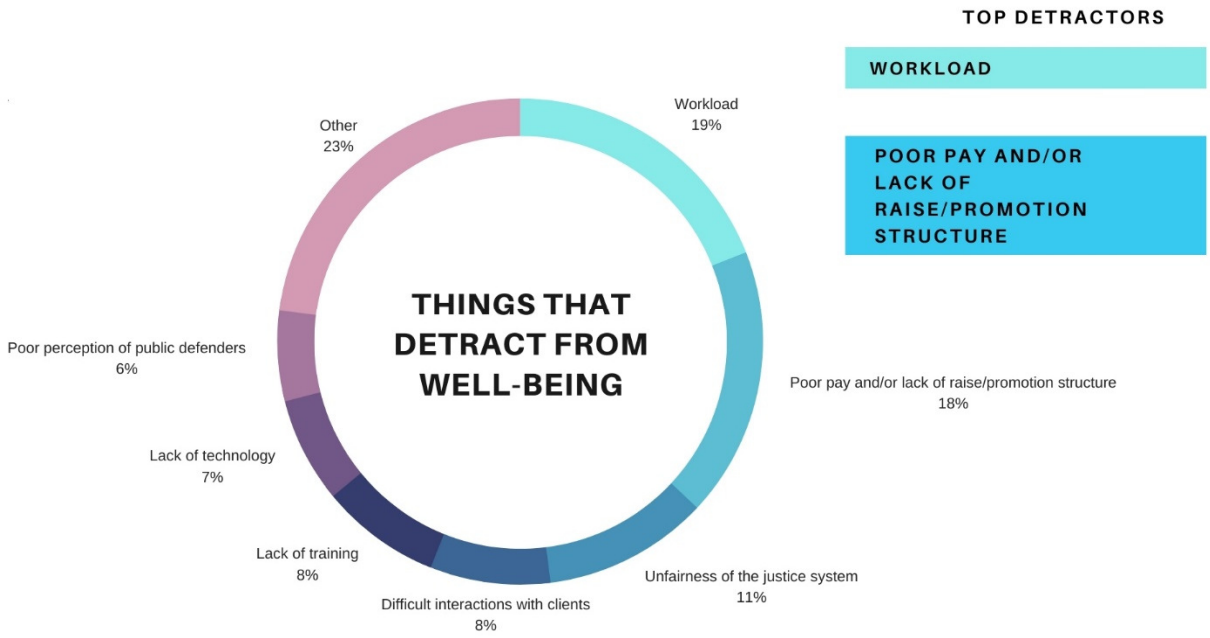
(Note: The question gave "health insurance and retirement" as examples of benefits. It gave "recruiting clients and billing hours" as examples of headaches that private attorneys have that BIDS attorneys do not.)

NEGATIVE IMPACTS ON WELL-BEING

Negative impacts were also discussed in two questions. One question was focused on the employee's personal well-being, and one was focused on impacts on colleagues' well-being that the employee had observed. It was specified that employees should set aside any recent changes due to Covid-19 in answering these questions.

Employees were allowed to choose the three top contributors, which resulted in 736 answers total. The percentages below are percentages of those 736 answers.

Overall, workload and "poor pay and/or lack of a raise/promotion structure" were the top two things that survey responders could agree are detracting from BIDS employees' well-being. However, other than those two categories, there was less agreement on the answers to these two questions, as is detailed below.



The "other" category above comprises listed answers that received less than 5% of the total answers, as well as employees who selected "other" and provided their own answers. The breakdown of the listed answers is as follows:

- An unsupportive boss. (4%)
- Dirty or unmaintained office space. (3%)
- Poor support from staff (if you're an attorney). (3%)
- Disturbing case subject matter. (2%)
- Poor relationships with colleagues. (2%)
- Poor support from attorneys (if you are support staff). (2%)
- Discrimination or mistreatment. (2%)
- Lack of flexible schedule. (1%)
- Other. (3%)

The "other" answers included things like:

- Complaints about specific co-workers.
- Lack of investigators and other basic tools.
- Unclear expectations and lack of teamwork.
- Inability to adapt to changing technology.
- Bureaucracy in purchasing supplies, reimbursing out of pocket expenses, and hiring new help.

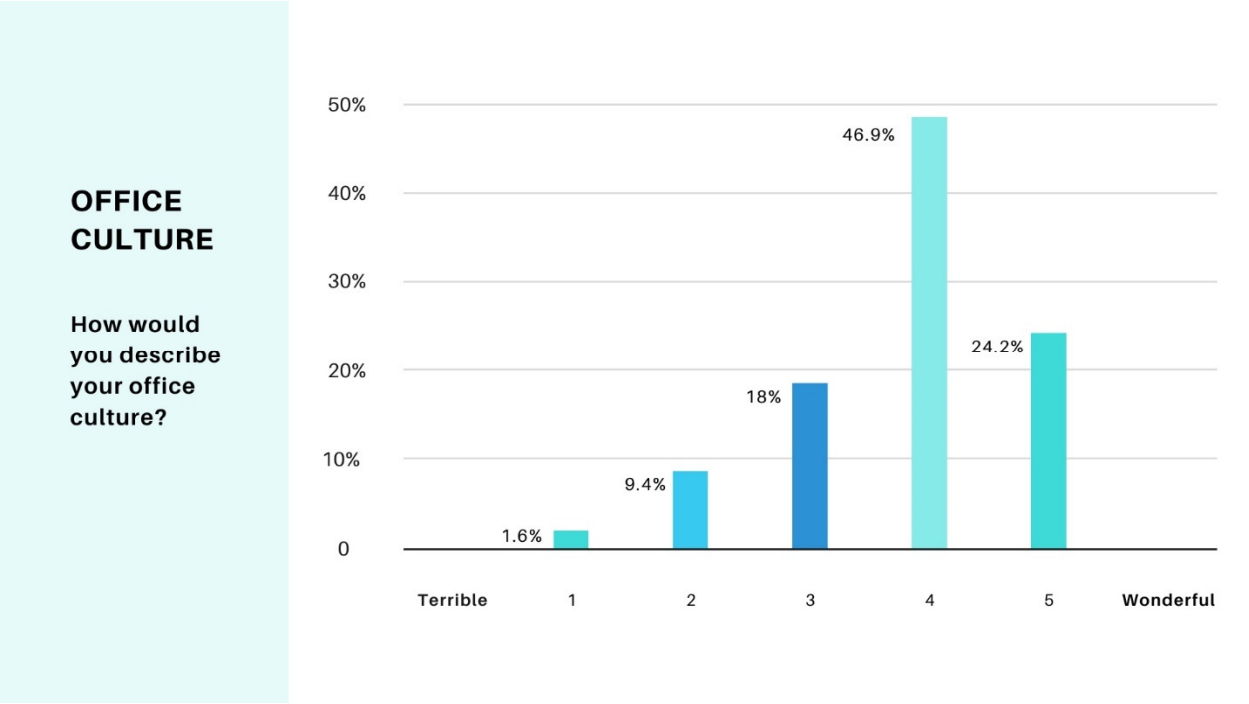
- Lack of storage space or basic amenities like a sink to wash lunch dishes in.
- "Obviously, our schedule is flexible as to when we can come and go. It is inflexible in that the workload is crushing and cannot be amended if one is not feeling well or needs a break. Death march!"

OFFICE CULTURE

Two questions were asked about office culture.

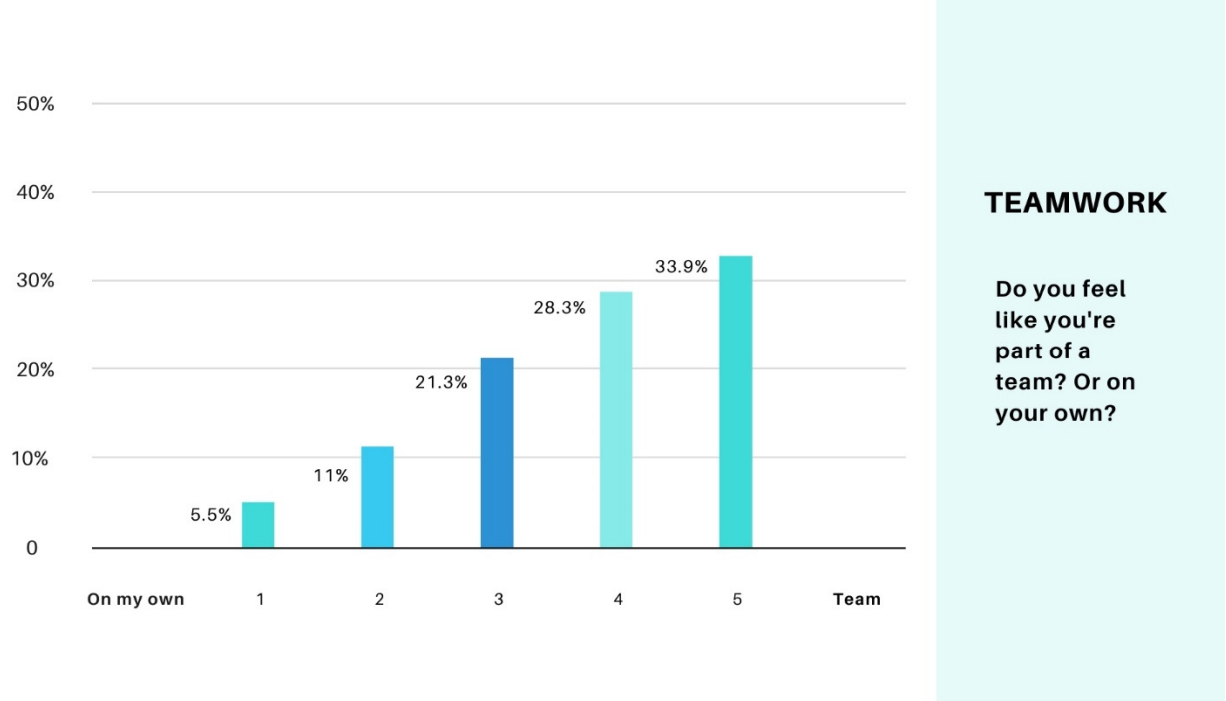
The first asked employees to rate their office culture on a scale of 1-5 (with 1 being "terrible" and 5 being "wonderful").

Overall, about 71% of BIDS employees scored their office culture positively (as a 4 or 5), while 11% scored their office culture negatively (as a 1 or 2).



The second question asked employees to rate on a scale of 1-5 whether they felt like they were part of a team or on their own (with 1 being "on my own" and 5 being "part of a team").

On teamwork, about 62% of employees scored their office positively (as a 4 or 5), while almost 17% scored their office negatively (as a 1 or 2).



SUPPORT FROM LEADERSHIP

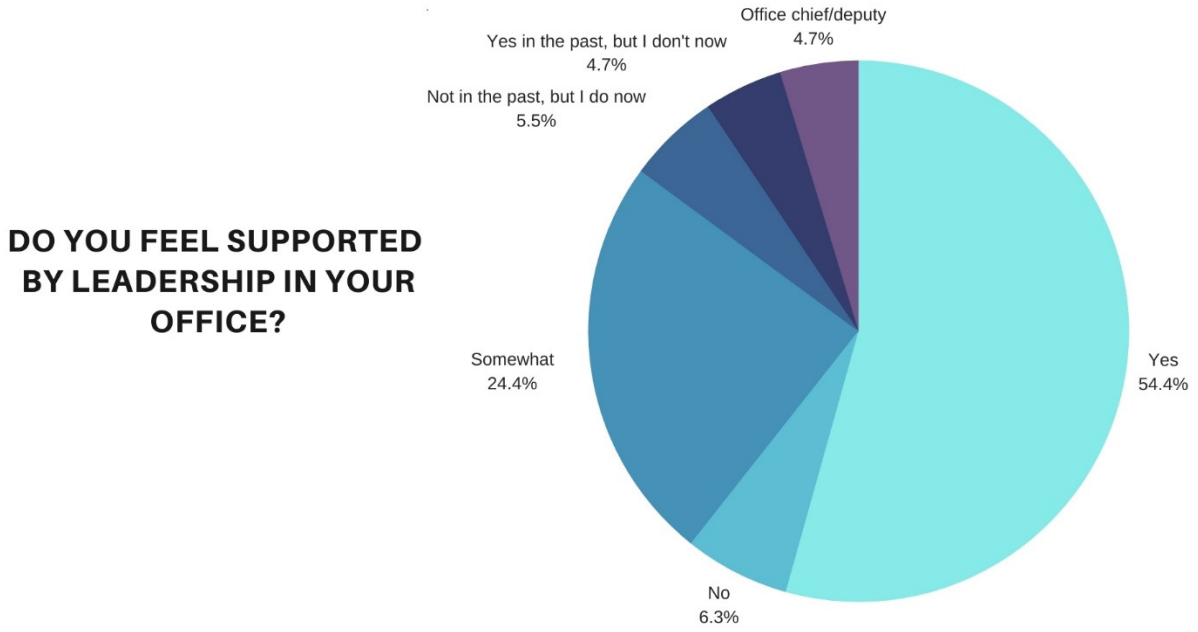
Two questions were asked about whether employees felt supported by leadership.

The first question asked employees if they felt supported by their specific office leaders.

Overall, about 59% of employees currently feel supported by their office leadership, about 24% feel "somewhat" supported, and 11% do not currently feel supported.

Notably, about 10% of employees have felt their level of support from leadership change over their career with BIDS. (No specific time period was specified in the question, nor did the question ask whether the change was due to a change in leadership). About half of that group (5.5%) reported a positive change (i.e., they did not feel supported in the past, but they do now)

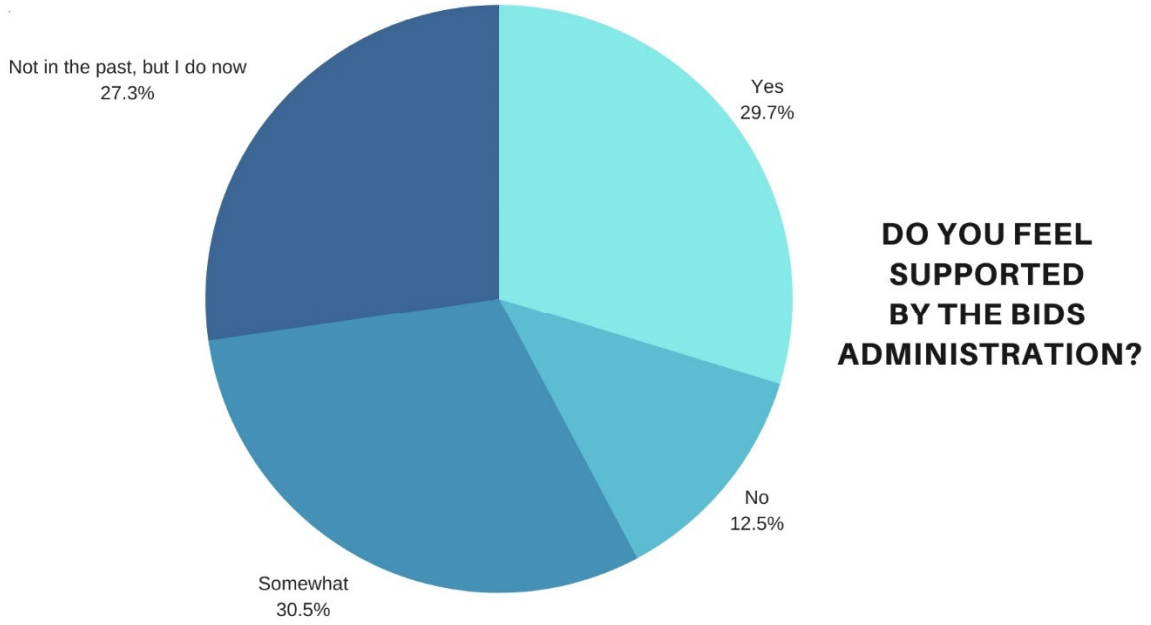
and about half (4.7%) reported a negative change (i.e. they felt supported in the past, but they don't now).



The second question asked employees if they felt supported by the BIDS administration.

Overall, 57% of employees currently feel supported by BIDS administration, about 31% feel "somewhat" supported, and 13% do not currently feel supported.

Notably, about 27% of employees have felt their level of support from BIDS administration change over their career with BIDS. (Again, no specific time period was specified in the question, nor did the question ask whether the change was due to a change in leadership). All of that group reported a positive change (i.e., they did not feel supported in the past, but they do now) and no one reported a negative change.



GENERAL OFFICE SUPPORTS

Two questions were asked about general supports within the employee's office.

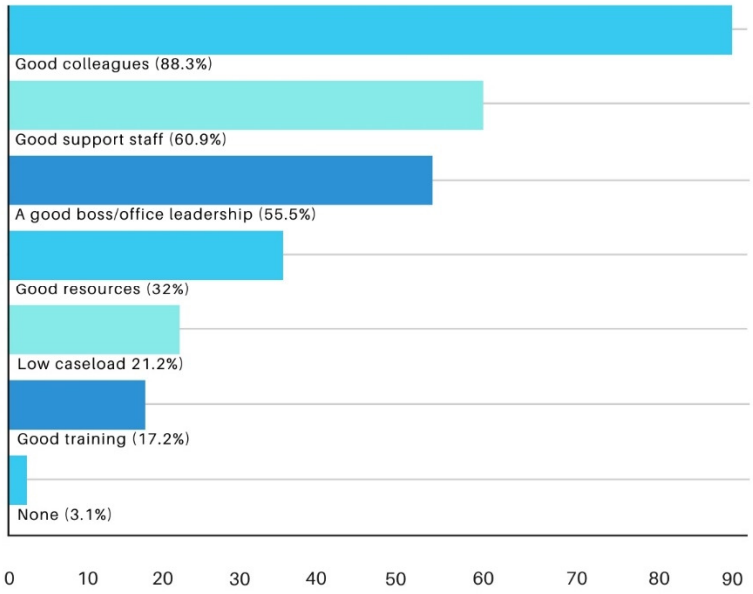
The first question asked employees what supports are present now.

For this question, employees were allowed to check each answer that applied. Percentages reflected are a percentage of the 128 answering employees who selected a given answer.

Overall, about 88% reported having good colleagues, about 61% have good support staff, and about 56% have a good boss or other office leadership.

Current Office Supports

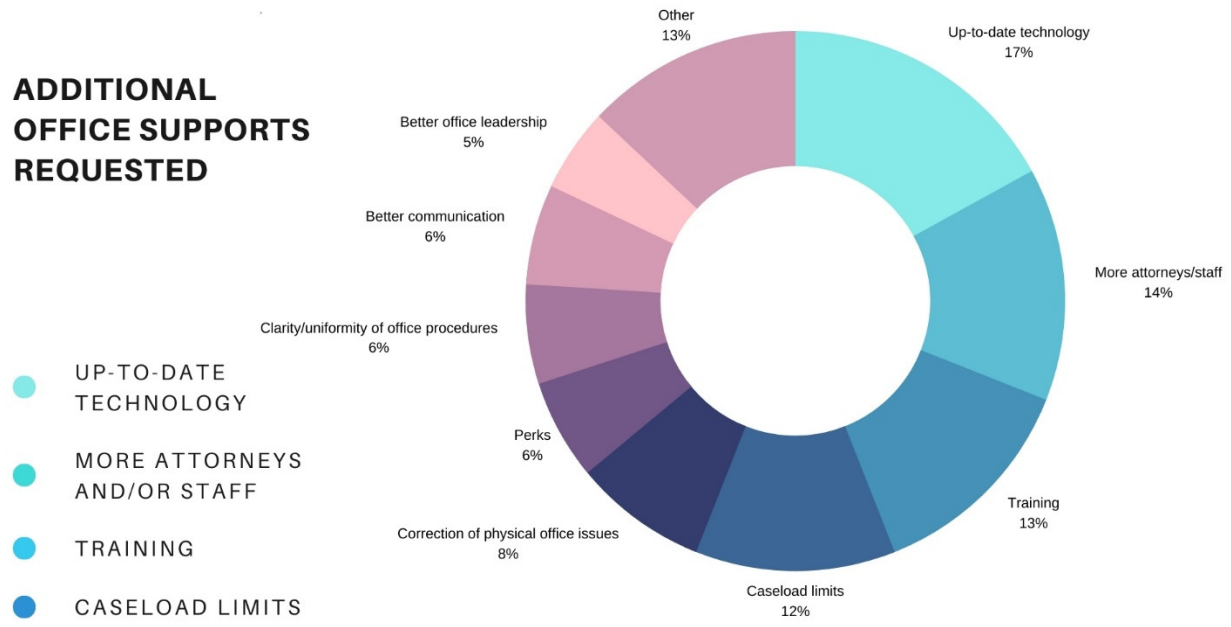
What general supports do you have in your office now?



(Note: "Supplies, access to experts, technology, etc." were listed as examples of good resources. Low caseload specified that it meant "a caseload that is low compared to other offices". "None" does not reflect answers that were left blank; the employee affirmatively answered "none". In addition to these answers, 4 people wrote their own answers in the "other" spot, but the answers were too variable to combine them in any logical way.)

The second question in this category asked employees what additional supports they would like to have.

For this question, employees were allowed to choose the three top contributors, which resulted in 362 answers total. The percentages below are percentages of those 362 answers. This question specifically asked employees to set aside concerns related to Covid-19.



(Note: Training included training on "substantive legal issues and/or trauma and stress". "Gym memberships and massages" were listed as examples of perks. "Poor office furniture or dirty office" were given as examples of correction of physical office issues.)

IMPACT OF COVID-19 ON WELL-BEING

Two questions were asked about impacts on well-being specifically related to Covid-19.

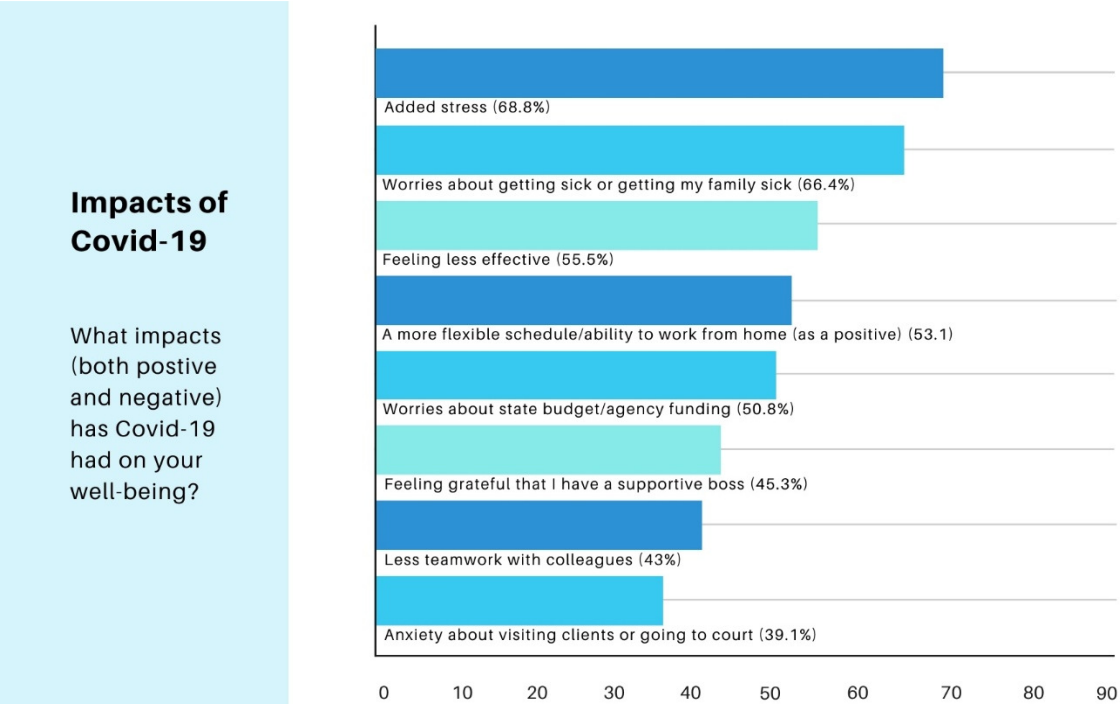
The first asked employees what impact Covid-19 has had on the employee's well-being.

For this question, employees were allowed to check each answer that applied. Percentages reflected are a percentage of the 128 answering employees who selected a given answer.

Notably, not all impacts of Covid-19 have been negative. For example, some employees reported enjoying a more flexible schedule and the ability to work from home.

The chart below sets out impacts reported by about 40% of responding employees or more. But there were other impacts reported by about 20-30% of

responding employees that also seemed significant. Those are listed below the chart.



Other concerns:

- Worries about an underlying health condition that makes me more prone to Covid-19. (29.7%)
- Worries about clients getting sick. (28.1%)
- More administrative tasks. (23.4%)
- Working more from home (as a negative). (22.7%)
- Childcare issues. (20.3%)
- Higher caseloads. (18%)

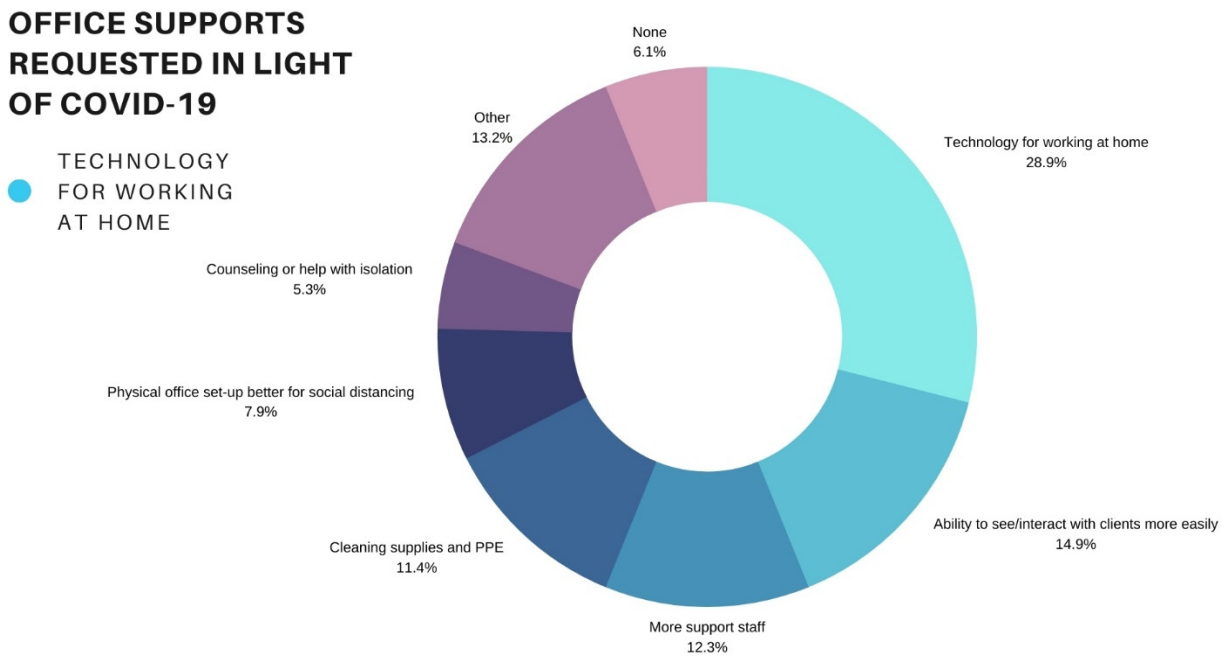
The second question in this category asked employees what additional supports they would like to have, specifically in light of Covid-19.

For this question, employees were allowed to choose the three top supports they would like to see, which resulted in 291 answers total. The percentages below are percentages of those 291 answers.

Technology for working at home was listed significantly more than anything else as a support people would like to have in light of Covid-19. It

was requested in about 29% of the answers. (Almost double the next most popular answer, which was better access to clients, at about 15%).

This question also had a significant group of people who wrote in their own requested supports under "other", as explained below.



(Note: Again, "none" does not reflect answers that were left blank; the employee affirmatively answered "none".)

The "other" answers for this question included things like:

- WiFi, cell phones, and technology to manage calendars remotely.
- More ability to work from home.
- Clarity of expectations and fairness about who gets to work from home. For example, one person said they would like "compensation for being at the office when no one else has to be here".
- Regular, professional office cleaning.
- Requiring that everyone abide by health guidelines.
- Support for attorneys who don't feel like courts are protecting them or their clients, rather than making attorneys address issues with courts individually.
- Going office-less, with office space only for support staff and meeting rooms for attorney/client contact.

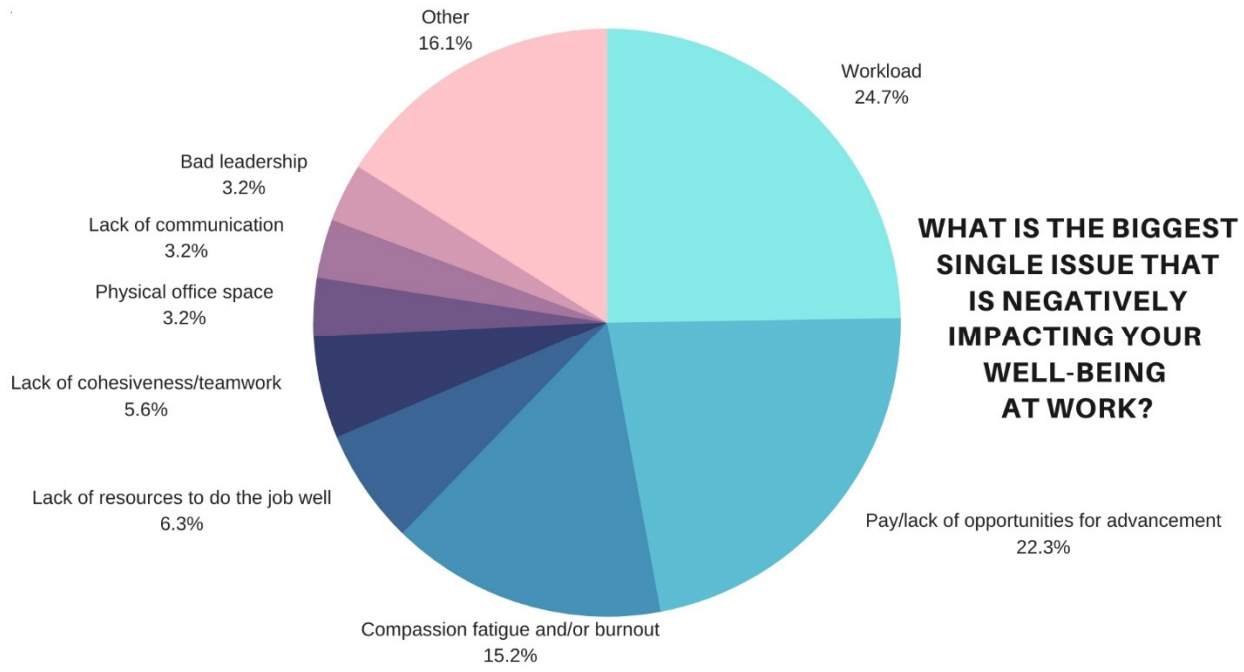
- More CLE's conducted by webinar.
- Coaching and counseling on how to be effective and boost morale with "COVID brain"; help dealing with stress.

SETTING WELL-BEING PRIORITIES

In an attempt to ask employees to help focus agency priorities, employees were asked two final questions with regard to well-being.

First, they were asked "What is the biggest single issue that is negatively impacting your well-being at work?" They were required to pick only one answer.

Overall, workload (about 25%) and "pay/lack of opportunities for advancement" (about 22%) were employees' biggest priorities by a significant margin. Only "compassion fatigue and/or burnout" (about 15%) came close. This question also had a significant group of people who wrote in their own biggest issue under "other", as explained below.



(Note: Lack of resources to do the job well included examples of "office supplies, experts, etc.".)

The "other" answers for this question included things like:

- Personal procrastination and disorganization.
- Stress about doing the job right and undesirable outcomes.
- Issues with others shirking work.
- Issues with clients.
- Lack of office WiFi.
- Technology.
- Lack of trust in the court system.
- Miscommunication.
- Unfairness about attorneys working from home while support staff can't.
- Lack of flexibility and appreciation for support staff.

Second, employees were asked "What is one low or no-cost thing that could be done immediately that would improve moral in your office?" Employees were allowed to give a narrative answer. Because the answers were voluminous and not easy to categorize, they have been attached to this report as Appendix A.

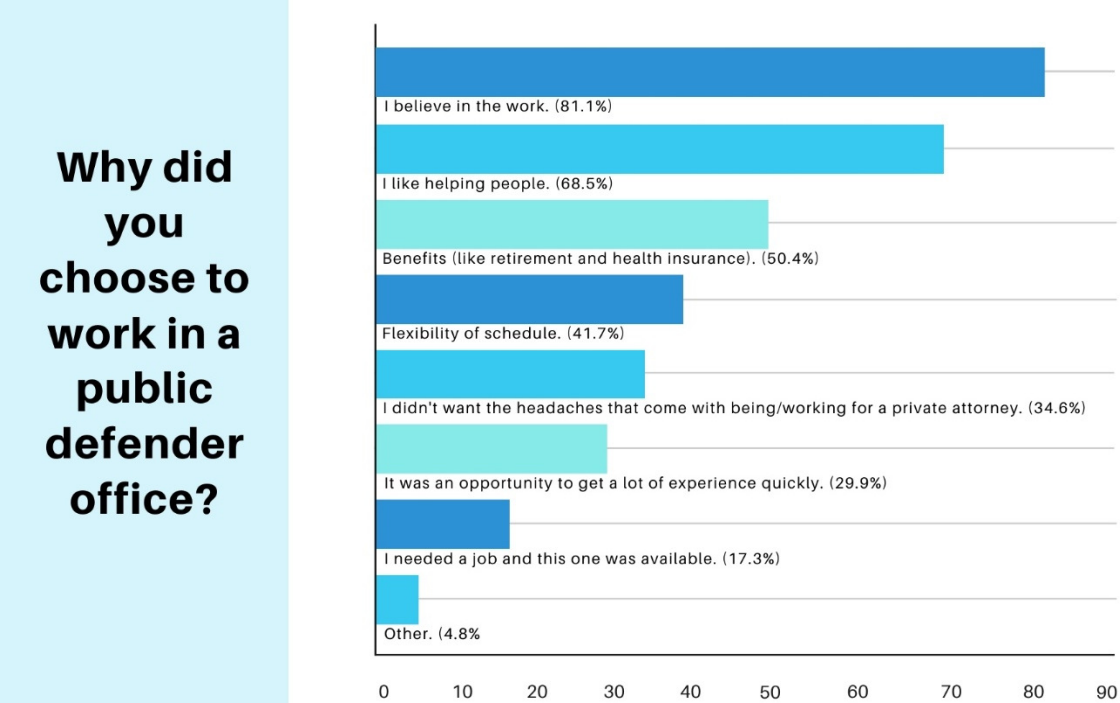
EMPLOYEE RETENTION

Five questions were asked regarding employee retention issues.

The first question asked why the employee chose to work in a public defender office.

For this question, employees were allowed to check each answer that applied. Percentages reflected are a percentage of the 127 answering employees who selected a given answer.

A large percentage of employees listed either "I believe in the work" or "I like helping people" as reasons they began work in a public defender office (about 80% and 69% respectively). The next most popular answers were benefits like health insurance and retirement (about 50%) and flexibility of schedule (about 42%).



(Note: "Billing hours and recruiting clients" were given as examples of headaches that come with being a private attorney or working for a private attorney.)

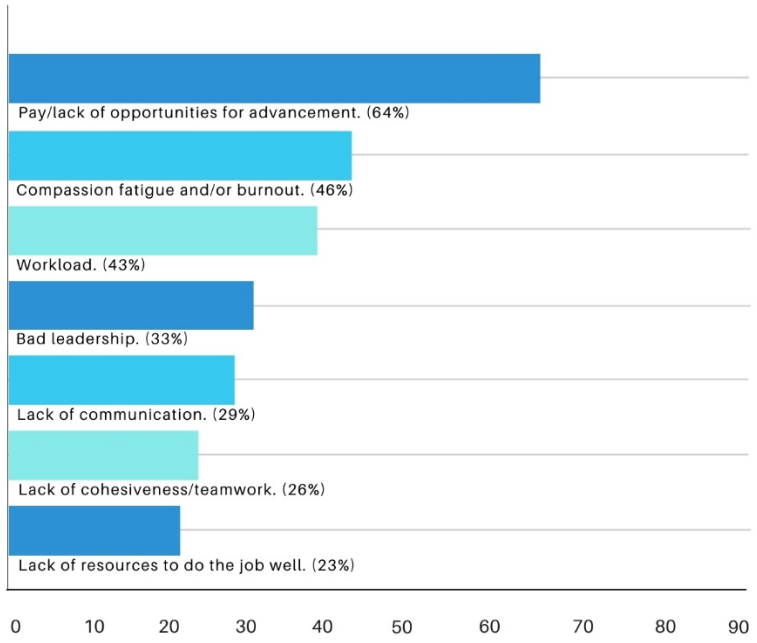
The second and third questions in this category asked employees if they've thought about leaving the public defender office in the last year, and, if so, why.

There were 127 responses to this question. *Fifty-five percent* of employees who responded (about 70 employees) reported that they *have* considered leaving the public defender office in the past year. *Forty-five percent* of the employees who responded (about 57 employees) reported that they *have not* considered leaving the public defender office in the past year.

The 70 employees who reported that they had considered leaving were asked the follow-up question: "Why were you considering leaving?" There were 70 responses to this question.

Employees were allowed to check each answer that applied. Percentages reflected are a percentage of the 70 answering employees who selected a given answer. This chart only lists answers that were given by more than 20% of this group. Because the answers that did not meet that threshold seemed significant, as well, they are listed below the chart.

Overall, pay and lack of opportunities for advancement were the biggest factor (64%). Compassion fatigue and/or burnout (46%) and workload (43%) came in a somewhat close second and third.



Why were you thinking about leaving the public defender office?

(Note: "Office supplies, experts, etc." were listed as examples of lack of resources to do the job well.)

The answers that were given by less than 20% of the answering 70 employees included the following:

- Lack of support from staff (for attorneys). (17%)
- Discrimination or mistreatment. (17%)
- I have other life goals than being a PD. (16%)
- Physical office space. (11%)
- Lack of support from attorneys (for staff). (10%)
- Dissatisfaction with the type of work you are doing or with clients. (3%)
- Retirement. (3%)
- Lack of training. (1%)
- Lack of flexibility and appreciation. (1%)
- "Negative interactions." (1%)
- Long commute. (1%)
- Other job offers. (1%)

- "The chief is unwilling to address the lack of procedures in place by the court to protect us against Covid." (1%)

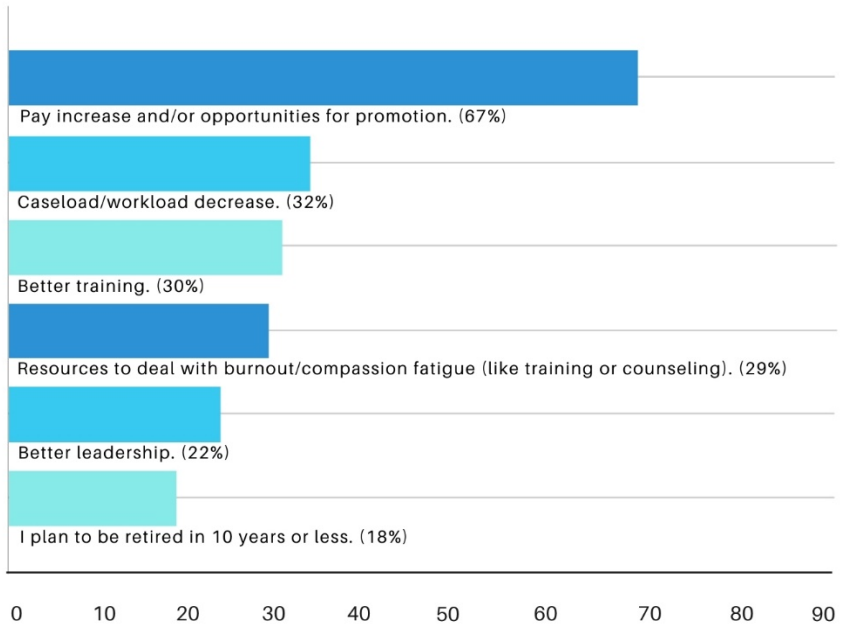
The fourth and fifth questions in this category asked employees if they see themselves working in a Kansas public defender office in 10 years, and, if not, why.

There were 128 responses to this question. *Twenty percent* of employees who responded (about 26 employees) reported that they *do not* see themselves working in a Kansas public defender office in 10 years. *Twenty percent* of employees who responded (about 26 employees) reported that they *do* see themselves working in a Kansas public defender office in 10 years. *Fifty-nine percent* of employees who responded (about 76 employees) reported that they were *unsure* if they see themselves working in a Kansas public defender office in 10 years.

The 102 employees who reported either that they could not see themselves working at a Kansas public defender office in 10 years, or they were unsure, were asked the follow-up question: "What would have to change to make you want to stay?" There were 101 responses to this question.

Employees were allowed to check each answer that applied. Percentages reflected are a percentage of the 101 answering employees who selected a given answer. This chart only lists answers that were given by more than 15% of this group. Because the answers that did not meet that threshold seemed significant, as well, they are listed below the chart.

Overall, "pay increases and/or opportunities for promotion" (67%) was far ahead of anything else in factors that would make employees want to stay. One employee emphasized the point in the "other" section of this question, saying, "I cannot stress this enough: I will stay if there are tangible opportunities for advancement. If not, I'm gone." Caseload/work decrease (32%), better training (30%), and resources to deal with burnout/compassion fatigue (29%) were all roughly tied for second place.



What would have to change to make you want to stay?

The answers that were given by less than 15% of the answering 101 employees included the following:

- Addressing problems like discrimination and mistreatment. (14%)
- There is nothing that would make be able to stay/I have different life goals than being a PD. (8%)
- Better physical office space. (7%)
- Better support/systems for dealing with Covid-19 (in office and with the courts). (2%)
- Availability of part-time attorney positions. (> 1%)
- Ability to move to a different office/type of work (like moving from trial to appellate work). (> 1%)
- Flexibility, perks, and recognition for staff. (> 1%)

CONCLUSIONS

In looking at this report as a whole, several trends and repeated themes come through.

As positives, BIDS employees generally seem to like their colleagues and most feel at least somewhat supported by their leadership. Further,

about *eighty percent* of employees are with the agency because they believe in the work that public defenders do.

Nonetheless, given BIDS retention problems[1], the negative issues cannot be ignored. *Fifty-nine percent* of the employees who responded to this survey are unsure if they will be with BIDS in 10 years; *twenty percent* are sure they won't be. And in the last year alone, *fifty-five percent* of employees who responded to this survey have considered leaving.

These employees are concerned about poor pay. They're concerned about opportunities for personal advancement and training. They're concerned about having the tools and support they need to do their jobs well and safely, particularly in light of Covid-19. None of these concerns are unreasonable.

As one employee said, "I want to do high-quality work. I have too many cases to meet that goal in every case." The Director, the Board of Indigents' Defense Services, and the Legislature should work to address these problems quickly in order to ensure that citizens of Kansas who are accused of crimes receive the quality of defense they are entitled to under our state and federal constitutions.

[1] See, *e.g.*, *One In Four Kansas Public Defenders Quit Last Year, Leaving Agency 'In Crisis'*, KCUR, April 8, 2019 (available at https://www.kcur.org/post/one-four-kansas-public-defenders-quit-last-year-leaving-agency-crisis).

***

APPENDIX A

Narrative answers to the question: "What is one low or no-cost thing that could be done immediately that would improve morale in your office?"

(Redacted slightly where employees were readily identifiable, but otherwise reprinted as direct quotes with all original language and punctuation.)

***

We are not safe at the court house. We need support from BIDS administration or our chief in dealing with the lack of safety measures in place at the court house. No one is speaking up for us and we have been told that if we don't feel safe to bring it up on our own individually. The judges don't wear masks and tell our clients that they can take their masks off even when they are sitting right by us at counsel table. One idea would be for BIDS to work with the court on finding a place for clients to participate in zoom hearings at the office or court house. Our clients don't have the ability often to conduct zoom hearings at home, if they have a home. Because of this, we are going to court on a daily basis and constantly in fear of exposure to COVID.

***

I think PDs should develop relationships with PDs in other offices. We are a big, smart group and could expand our reach and brain power if we were talking to each other more regularly and casually. If we ever have in person CLE again, I wonder if scheduling a happy hour afterward would get any interest. I also wonder if we could have a BIDS listserv/forum/slack/discord to talk and brainstorm ideas, without flooding our inboxes. I hope a broader sense of PD community would help morale.

***

Limiting the amount of high-level cases, OR, rebranding our office to remove "Public" from our titles. For example, Assistant State Defender. It's free. Finally, create some senior level attorney positions in title, even if they

won't receive a raise. We just lost one great attorney because he couldn't even get a title change. That stuff costs no money whatsoever, but was important to him. And I agree.

***

bringing [NAME] and [NAME] back. I dont know about others but they are always there for me. I also have off grid cases with [NAME] that will be extremely difficult to do my myself. That adds to my personal stress that he is not here to guide on those cases. I know others are as experienced but we have both put a lot of work into those cases.

***

Not just in our office but in general, if people would not mistake unintended consequences for malicious intent, we would all be better off. Don't jump to being outraged or offended so fast. Calm down and try to see the other side as well as yours before your emotions make you blind to reason.

***

Better communication and support. Morale is really low between battles with the courts over COVID issues/jail-being unable to visit clients/and no air conditioning but still being expected to work in the office when it is 80-90 degrees in our actual offices.

***

Communication. When things are shaken up at the office, we shouldn't be learning information from the competing agency. Loop us in on whatever means they are getting information from. This keeps happening. For years. It craters office morale every time.

***

I'm blessed to work in an office where we all go out of our way, at our own expense, to provide things that make our office an attractive, comfortable environment. This includes furnishings, art, decorations, coffee maker, etc.

***

Have meetings (or emails) with ALL staff in individual offices that have some sort of morale boosting message. A confidence builder. Not corny "motivational speaker" messages. Just something with some sort of information.

***

Just having a change in mindset amongst the leadership in the office to progress and support the rest of us, especially during difficult times. Things have improved, but there's always room for more change and support.

***

fire that one employee. Everyone in the office knows who I am talking about even without a name. She is so bad that when I was hired I was warned about her by the chief. That is how bad she is, yet nothing is ever done.

***

Too many serious cases affects attorney morale. One serious case going to trial would ordinarily justify an defender's annual salary but frequently they have multiples of these type of cases at any time.

***

Support staff doing more, especially in basic client communication, answering calls when attorneys are busy or out of the office and providing regular basic updates to clients

***

Make the landlord follow through on maintenance and care of the building. We are constantly finding mouse and bat feces and the smell of the overall office is horrible.

***

I don't know how expensive paint is, or hiring painters. But people went absolutely crazy when they were able to choose their own colors for their offices.

***

Knowing the exact duties assigned to support staff - they are unclear in my office, so I don't know what I can get help with and who to go to for help.

***

Some compassion fatigue for burnout due to workload and COVID concerns, plus lack of seeing co-workers in the office as often as we used to.

***

Maybe BIDS could tell us WTF is going on? Perhaps that "communication from the top" and "transperency" we were promised could happen?

***

Leadership actually setting an example and working on CASEWORK instead of pushing the actual casework onto other (lower) attorneys.

***

Increased communication for all people in office, instead of piecemeal discussions with individuals or small subsets of people.

***

Having updated and consistent office procedures (ie how support staff and attorneys interact, who does what, how, when, etc)

***

Food. A box of cookies or a simple lunch (Pizza, Subway) as a thank you for the job our office does day in and out.

***

Leadership that is present and will speak with/listen to the attorneys that are not in leadership.

***

Being able to wear jeans when we have a lot of filing and crawling around on a dirty carpet/floor

***

Reimbursement for out of pocket expenses; less negative treatment from clerical staff in Topeka.

***

Hard caps on caseload per attorney/mandatory shifting or sharing of cases based on experience.

***

I want to do high-quality work. I have too many cases to meet that goal in every case.

***

Every attorney should have a work laptop so that we can more effectively work from home

***

Agency standardization between offices in regards to staff/attorneys and procedures.

***

Treat employees as if they are one of your organization's most significant resources

***

If my chief attorney would do his job for the benefit of his clients and his staff.

***

shared resources between the offices - motion banks, information on experts, etc.

***

Opportunities for us to get together as an office and spend some time together

***

Give more than 1 hour per week flexible time to make up. Preferably 4 hours.

***

the legal assistant do her job FULL time instead of when she feels like it

***

The ability to see each other again face to face and in a social setting.

***

Investigators get no training, when I asked previously I was denied

***

much better lighting to see without the glare or to see at all !

***

some sort of virtual water cooler thing -- or an office handbook

***

Continued contact with Heather Cessna. She is very supportive

***

Eliminate the delay of getting purchase orders approved.

***

Better communication/training about office procedures

***

Compensatory leave for working over 40 hours per week

***

specific encouragement for each person in the office

***

besides air conditioning? snacks. lots of snacks.

***

More reassurance and support from immediate leader.

***

Leadership giving more feedback about performance

***

working hours for all employees to be the same

***

the ability to work remotely more frequently

***

I think morale is good in the office I am in

***

Pretty happy with the morale in our office.

***

Increase PTO earned for the first 1-5 years

***

more recognition of small accomplishments

***

more agency-wide recognition of good work

***

Change to effective leadership and staff.

***

Better communication with other offices.

***

Recognition for hard work/ small wins

***

Office wellness "retreats" / days out

***

More appreciation for those working.

***

Change the way cases are assigned

***

Add flexibility to work from home

***

Annual costs of living increase.

***

Being told I am doing a good job

***

required in-office hours reduced

***

Caseload caps for DPDU attorneys

***

More work schedule flexibility.

***

Do something with management

***

Have group office meetings.

***

Sing along to Disney tunes!

***

legal assistant do her job

***

monthly office staff lunch

***

Move to a larger office.

***

Cleaning of the office

***

Stronger leadership

***

An intern or extern

***

extra vacation time

***

Decrease workload.

***

Decrease caseload.

***

Have my own space

***

voicemail to text

***

New investigator

***

caseload limits

***

CASELOAD LIMIT!

***

Webcams for all

***

Cordless phones

***

higher salaries

***

Communication

***

I don't know.

***

transparency

***

i don't know

***

I don't know

***

More color

***

A day off.

***

Don't know

***

A printer

***

not sure

***

Not sure

***

Nothing.

***

Pizza

***

Wifi

***

WIFI

***

WiFi

***

?

***

I've had numerous lawyers mention to me how they wish they could work towards becoming CJA Second Chair Program certified while working as a public defender, even if that meant using vacation time to do so. I think the logic of a lot of PDs is that if they were able to become CJA certified, they'd feel much better about the prospect of going out and opening up their own office knowing that they could have a steady flow of federal appointments coming in.

***

NAPD STATEMENT ON THE NECESSITY OF MEANINGFUL WORKLOAD STANDARDS FOR PUBLIC DEFENSE DELIVERY SYSTEMS

This statement was approved by the NAPD Steering Committee on March 19, 2015.

Excessive workloads in public defense delivery systems are an ethical issue.[1] Where they exist, public defense providers have a duty to remedy them; where they do not exist, public defense providers have a duty to avoid them. While this premise sounds simple, public defense providers, with rare exceptions, have been historically unsuccessful in maintaining reasonable workloads. Our most significant impediments to meeting this obligation have been our inability to: 1) define convincingly what constitutes an excessive public defense workload; and 2) demonstrate effectively how and when it exists. Without this information, public defense providers have been unable to persuade funders to provide necessary resources, or alternatively, to prove to judges their need for reduced caseloads. Generally speaking, the result has been a long-standing and widespread epidemic of excessive public defense workloads in jurisdictions across the United States.

With this historical perspective in mind, and in the interest of our clients, ourselves, and justice, NAPD believes the time has come for every public defense provider to develop, adopt, and institutionalize meaningful workload standards in its jurisdiction. In some systems, caseload standards (or a variation thereof) may already exist, courtesy of the National Advisory Commission (NAC) on Criminal Justice Standards, which published maximum annual caseloads for public defense providers in 1973. The American Council of Chief Defenders affirmed the continued viability of the NAC Standards in 2007 while recommending that jurisdictions develop local caseload standards that do not exceed NAC limits.[2] NAPD applauds every jurisdiction that at some point over the past 40 years has recognized the NAC standards as the best available measure of reasonable public defense workloads, and implemented them with rigor and commitment during that time. They are truly pioneers and visionaries in the effort to insure a meaningful Sixth Amendment right to counsel for everyone.

As good as the NAC standards have been, however, our country has seen significant changes in criminal defense practice since 1973, including: 1) scores of new criminal offenses that did not previously exist; 2) ever-increasing complexity in criminal practice, procedure and sentencing laws; 3) an explosion in the number of people charged each year with criminal offenses; and 4) a ballooning

[1] *See* American Bar Association Formal Ethics Opinion 06-441 ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation").
[2] American Council of Chief Defenders on Caseloads and Workloads (August 2007)

system of "collateral consequences" of criminal convictions. Undoubtedly, these changes have drastically increased the amount of time it takes a lawyer to provide effective representation to a client.

For this reason alone, NAPD strongly believes that while the NAC standards remain useful, they must today be considered the "absolute maximums" of acceptable public defense workload standards. Additionally, NAPD believes that any jurisdiction currently using the NAC standards as its public defense workload standard should also have, or implement, an evidence-based method of assessing whether they remain a reliable measure. Finally, NAPD believes that a lawyer's well-spent time is the single most important factor in a client receiving effective and meaningful representation, and as such, NAPD believes meaningful evidence-based standards for public defense workloads can best be derived and institutionalized through ongoing, contemporaneous timekeeping by public defense providers.

Contemporaneous, conscientious, and ongoing timekeeping allows public defense providers to demonstrate concretely what they have (or have not) done for their clients. It also provides public defense providers with the data necessary to assess whether what they *are* doing for clients comports with what they *should be* doing for clients based on professional performance standards. Finally, and perhaps most significantly, it allows public defense providers, funders, judges, and anyone else interested to examine for themselves whether any deficiencies in performance are related to an excessive workload. In this regard, timekeeping provides a cogent, transparent, adaptable, long-term, and data-driven methodology to: 1) develop reasonable public defense workload standards; and 2) modify them when necessary to meet the changing demands of the public defense system. Stated another way, it allows us to "define convincingly what constitutes an excessive public defense workload and demonstrate effectively how and when it exists" – the very impediments that have historically prevented us from achieving reasonable workloads.

Evidence-based standards are the hallmark of 21st century policymakers. Recent history shows us that timekeeping, along with analysis of the data it produces, has led to workload controls, increased funding, and judicial relief from caseloads in jurisdictions where it has been used. While these are not guaranteed results of timekeeping, NAPD believes the practice professionalizes public defense systems, and produces clear and measurable benefits to individual lawyers and clients. Whether a lawyer has worked a sufficient amount of time to provide competent and effective representation to his or her clients is a relevant question to ask, and the answer is something clients are entitled to have. Producing data that helps us manage our workloads and better understand our practices makes us better lawyers. Public defense providers should be committed to professional practices that help the client.

For far too long, public defense providers have accepted crushing workloads that rob clients of their constitutional right to assistance of counsel, and erode the morale of lawyers who cannot possibly meet the demands placed on them. We can no longer operate in a system without meaningful workload standards, and with this statement, we encourage public defense providers in every jurisdiction to develop, adopt, and institutionalize meaningful, evidence-based workload standards in their jurisdictions.

THE UNWAVERING VOICE FOR PUBLIC DEFENSE

ON BEHALF OF THE NAPD STEERING COMMITTEE:

TIM YOUNG, CHAIR, NAPD
Director, Ohio Public Defender
Columbus, OH

MARK STEPHENS, VICE-CHAIR, NAPD
District Defender, Knox County
Community Law Office, Knoxville, TN

JEFF ADACHI
San Francisco City and County Public
Defender, San Francisco, CA

ALEX BASSOS
Director of Training and Outreach,
Metropolitan Public Defender, Portland, OR

NANCY BENNETT
Deputy Chief Counsel for the Private
Counsel Division of the Committee for
Public Counsel Services, Boston, MA

DERWYN BUNTON
District Defender, Orleans Public Defenders,
New Orleans, LA

BOB BURKE
Training Branch Director, Administrative
Office of US Courts, Washington, DC

ANNE DALY
Division Director, Society of Counsel
Representing Accused Persons,
King County, WA

STEPHEN HANLON
Adjunct Professor, St. Louis
University School of Law,
St. Louis, MO

RICK JONES
Executive Director,
Neighborhood Defender Service of
Harlem, New York, NY

JUSTINE M. LUONGO
Attorney-in-Charge of the Criminal
Practice, New York Legal Aid,
New York, NY

ED MONAHAN
Kentucky Public Advocate,
Frankfort, KY

JANET MOORE
Assistant Professor of Law,
University of Cincinnati Law School,
Cincinnati, OH

TERI MOORE
Investigator, Federal Public Defender's
Office, District of New Jersey,
Trenton, NJ

MELANIE OBERLANDER
Administrative Supervisor, King County
Department of Public Defense,
Seattle, WA

NDUME OLATUSHANI
Children's Defense Fund,
death row exoneree (wrongfully
convicted to serve 28 years),
Nashville, TN

TAMARA STECKLER
Attorney-in-Charge, Juvenile Rights
Division, Legal Aid Society of New York,
New York, NY

SARA THOMAS
State Appellate Public Defender,
Boise, ID

PAUL DEWOLFE
State Public Defender,
Baltimore, MD

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

TIPPING THE SCALES TOWARD JUSTICE

NAPD Policy Statement on Public Defense Staffing[1] (May 2020)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] Standard 5-1.4. Supporting services, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services." Found at: https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Written%20Submissions/General/ABA%20Standards%20for%20Criminal%20Justice%20Providing%20Defense%20Services%201992.pdf

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

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

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

For sentencing, defense counsel must address both direct and collateral consequences[12] and with the assistance of sentencing specialists present an individualized sentencing plan with information about the defendant's background and circumstances of the offense that are mitigating and favorable to the defendant.[13] These defense generated plans require investigation and assistance

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

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

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

[12] ABA Standards for Criminal Justice, Defense Function 4-8.3 Sentencing; National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.2(b) Sentencing Options, Consequences and Procedures, "(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
(1) credit for pre-trial detention;
(2) parole eligibility and applicable parole release ranges;
(3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
(4) place of confinement and level of security and classification;
(5) self-surrender to place of custody;
(6) eligibility for correctional programs and furloughs;
(7) available drug rehabilitation programs, psychiatric treatment, and health care;
(8) deportation;
(9) use of the conviction for sentence enhancement in future proceedings;
(10) loss of civil rights;
(11) impact of a fine or restitution and any resulting civil liability;
(12) restrictions on or loss of license.

[13] See, National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline8.1 Obligations of Counsel in Sentencing; 8.2 Sentencing Options, Consequences and Procedures; 8.3 Preparation for Sentencing; the Defense Sentencing Memorandum; 8.7 The Sentencing Process; American Bar Association *Standards for Criminal Justice: Prosecution and Defense Function* (4th ed. 2015), Standard 4-8.3 Sentencing, "…(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by

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

Investigators

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

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

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

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

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

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

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

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

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

Investigation

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

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

(1) *charging documents*

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

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

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

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

(2) *the accused*

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

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

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

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

"The lack of adequate investigation is the most frequent reason that courts find ineffective assistance of counsel."[18]

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

(B) explore the existence of other potential sources of information relating to the offense;
(C) collect information relevant to sentencing.
(3) *potential witnesses*
Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.
(4) *the police and prosecution*
Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.
(5) *physical evidence*
Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.
(6) *the scene*
Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
(7) *expert assistance*
Counsel should secure the assistance of experts where it is necessary or appropriate to:
(A) the preparation of the defense;
(B) adequate understanding of the prosecution's case;
(C) rebut the prosecution's case.

[16] ABA Model Rule of Professional Conduct Rule 3.7 Lawyer As Witness, states:
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[17] Found at:
https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

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

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

Mental health professionals

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

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

Paralegals, administrative assistants

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

Supervision

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

[20] The scientific support for motivational interviewing is substantial:

- Baer, J.S., & Peterson, P.L. (2002). Motivational interviewing with adolescents and young adults. In W.R. Miller & S. Rollnick (Eds), Motivational Interviewing: Second Edition. New York, NY: Guilford Press, 320-332.
- Carroll, K.M, Ball, S.A., Nich, C., Martino, S., Frankforter, T.L., Farentino, C., Kunkel, L.E., Mikulich-Gilbertson, S.K., Morgenstern, J., Obert, J.L., Polcin, D., Snead, N., & Woody, G.E. (2006). Motivational interviewing to improve treatment engagement and outcome in individuals seeking treatment for substance abuse: A multisite effectiveness study. *Drug and Alcohol Dependence, 81,* 301-312.
- Ginsburg, J.D.I., Mann, R.E., Rotgers, F., & Weekes, J.R. (2002). Motivational interviewing with criminal justice populations.
- W.R. Miller & S. Rollnick (Eds), Motivational Interviewing: Second Edition. New York, NY: Guilford Press, 320-332.
- Lundahl, B. & Burke, B.L. (2009). The effectiveness and applicability of motivational interviewing: a practice-friendly review of four meta-analyses. *Journal of Clinical Psychology, 65*, (11) 1232-1245.
- Miller, W.R. & Rollnick, S. (1991). Motivational Interviewing: Preparing People to Change Addictive Behavior. New York, NY: Guilford Press.
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[21] "In addition to access to experts and investigators, defenders need the full complement of support services and technology that a modern law office would require. Secretaries and paralegals can assist with clerical and administrative tasks, client communication, and case preparation and free up time for legal work only the attorney can handle." Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1101 (2006).

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

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

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

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

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

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

Essential organizational specialists

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

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

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

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

IT

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

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[23] The National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) address the essential nature of professional business staff:
4.1 Task Allocation in the Trial Function: Specialists and Supporting Services
"….Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis……" Found at:
http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

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

[25] See generally, a 2003 survey indicated that "IT staffing levels can vary significantly by the size of the company. For example, the typical IT staffing ratio (the number of employees supported by each IT worker) is 1:27 among all companies included in the survey. However, companies with 500 or fewer employees typically have an IT staffing ratio of about 1:18, while companies with 10,000 or more employees have a ratio of about 1:40." Organizing for Results: IT Structures and Staffing Survey by people3, Mercer Human Resource Consulting, and ITAA, found at:
https://www.workforce.com/news/ratio-of-it-staff-to-employees The Gartner 2013 Key IT Metrics Report shows that the Cross-Industry average of IT Full Time Employees as a percentage of Total Employees is 5%. https://www.gartner.com/en/documents/2324316 Note that these survey and studies are not public defense specific and do not account for IT assistance and analysis of digital evidence in a legal context.

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

HR

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

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

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

Promotes reduced costs

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

Promotes timely, competent resolution of cases

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

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

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

Minimum staffing

Cases are becoming more complex across the range of cases. Recent changes in police and prosecution practices, including the widespread use of police video camera recordings, have increased the need for investigator and paralegal assistance for defender lawyers. Whether a lawyer has 150 felony cases a year or 400 misdemeanor[28] cases a year, many of those cases will require significant investment of time by non-lawyer professionals. Particularly complex cases, such as sex abuse felony cases or juvenile transfer of jurisdiction cases, or misdemeanor driving while intoxicated cases that have newly introduced scientific evidence, can increase the need for non-lawyer assistance.[29]

Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide, one investigator for every three lawyers, one mental health professional, often a social worker, for every three lawyers, and one supervisor for every 10 litigators. Additionally, there should be one paralegal and one administrative assistant for every 4[30] lawyers.[31] Public defense organizations must have adequate staff or have

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[27] Affidavit of Robert C. Boruchowitz on the adequacy of the public defense system throughout the state of Louisiana *Bob Josh Allen Et Al v. LA State Governor Et Al*, Case Number C655079(May 2017) p. 35, found at:
https://www.splcenter.org/sites/default/files/documents/2017.05.04_boruchowitz_report.pdf

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

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

[30] See Sixth Amendment Center, *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* (September 2018), p. 123; found at:
http://sixthamendment.org/6AC/6AC_NV_report_2018.pdf (Support staff necessary for effective representation "includes one supervisor for every ten attorneys; one investigator for every three attorneys; one social service caseworker for every three attorneys; one paralegal for every four felony attorneys; and one secretary for every four felony attorneys."; Bureau of Justice Assistance, United States Department of Justice's *Keeping Defender Workloads Manageable* (2001), p.10, found at:
https://www.ncjrs.gov/pdffiles1/bja/185632.pdf.

[31] See 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services, the National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) found at:
http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf
4.1 Task Allocation in the Trial Function: Specialists and Supporting Services
Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through

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

Conclusion: Meaningful Representation Requires Proper Staff Assistance

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

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

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

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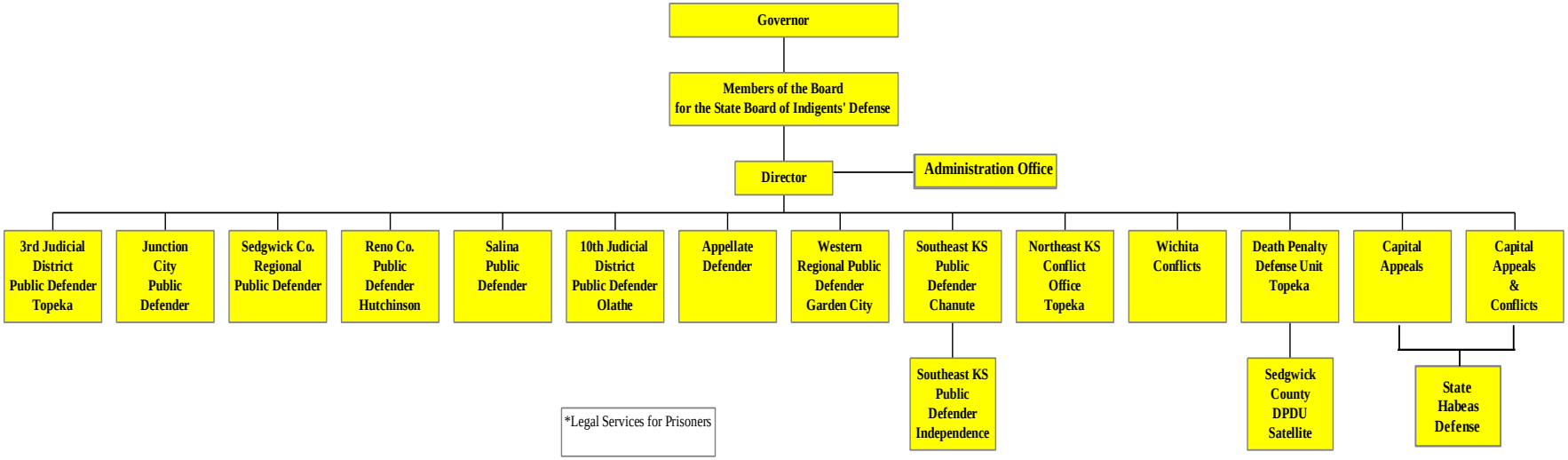
specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that, attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.
Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.
Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.
Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.
Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.
The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.
Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.
Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.
The attorney investigator and supervisor ratios are confirmed in Footnote 23 of Principle 8 of the ABA *Ten Principles of a Public Defense Delivery System* (2002): "See NSC, supra note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office)."

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

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

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



*Legal Services for Prisoners

*K.S.A. 22-4514a provides for the submission of LSP, Inc. budget toBIDS for approval and submission