How to Improve Your Public Defense Office

BY GEOFF BURKHART

As I’ve written here, public defense is in bad shape in much of the country. (See Geoff Burkhart, Public Defense: The New York Story, 30 CRIM. JUST., no. 3, Fall 2015, at 22, 23; Geoff Burkhart, The Slow Justice Movement, 30 CRIM. JUST., no. 4, Winter 2016, at 38.) But no matter how deep in the muck we may be, we can make it better. Here are eight ways to improve your office. (Note: The ABA does not endorse any of the organizations mentioned in this article.)

1. Get a Checkup

No one knows your body better than you. You can map every bump, lump, and scar. But when something goes wrong, you see a doctor. The same holds true for public defense. You know every judge, prosecutor, and statute. But when funding is down and workloads are up, you should be evaluated by an expert.

The ABA Ten Principles of a Public Defense Delivery System are an excellent tool for evaluating indigent defense systems. (See http://tinyurl.com/7ejhguij.) Several organizations, including the Sixth Amendment Center (SAC) (www.sixthamendment.org), the National Legal Aid and Defender Association (NLADA) (www.nlada.org), and the Spangenberg Center (now defunct), have used the Ten Principles to measure public defense systems. Most recently, SAC evaluated systems in Nevada, Delaware, Utah, and Mississippi. These studies have driven a great deal of public defense improvement in this nation, including Mississippi. These studies have driven a great deal of public defense improvement in this nation, including Mississippi. They provide a simple tool to track the dozens or hundreds of tasks attorneys must perform in each case. Checklists can be impetus for and record of quality representation. Adachi is now spreading his message to defense offices across the country. If philosophers (and surgeons, pilots, and engineers) are right, checklists may be our path to excellence.

2. Use Checklists

Excellence, philosophers say, is not an act, but a habit. (See Will Durant, The Story of Philosophy 76 (1926).) If this is true, how do public defenders make excellence a habit?

Attorneys juggle a lot: court appearances, client communication, legal research, investigation. And the stakes are high—a mistake could lead to a longer sentence, collateral consequences, or wrongful conviction. Yet we’re not the only profession saddled with many tasks and high stakes. Surgeons, pilots, and engineers face similar difficulties and have adopted a simple tool to ensure quality. That tool has now made its way into the public defense arena.

Inspired by Dr. Atul Gawande’s The Checklist Manifesto, San Francisco Public Defender Jeff Adachi wondered if checklists could work for public defenders. Adachi has developed dozens of checklists for his office. (See Jeff Adachi, Using Checklists to Improve Case Outcomes, CHAMPION, Jan.–Feb. 2015, at 30.) They provide a simple tool to track the dozens or hundreds of tasks attorneys must perform in each case. Checklists can be impetus for and record of quality representation. Adachi is now spreading his message to defense offices across the country. If philosophers (and surgeons, pilots, and engineers) are right, checklists may be our path to excellence.

3. Meet and Train

Public defense tends to attract rebels—folks who want to fight for the underdog. That spirit often serves us well. But we also tend to dismiss organizations and associations, even though these groups can make a big difference in our practices.

If you’re a chief defender, there’s no better place to start than the ABA Summit on Public Defense. (See http://tinyurl.com/7don2.) Held in conjunction with the ABA Midyear Meeting, the Summit is the premier daylong conference on public defense provision, structure, and innovation. The audience comprises chief defenders, professors, and researchers from across the country, and shines a light on the most current thinking on public defense.

But the ABA is not alone. Several agencies offer high-quality indigent defense training. For comprehensive defender training and support aimed at changing defense culture, Gideon’s Promise (www.gideonspromise.org) is unparalleled. NLADA’s Appellate Defense Training is excellent. The National Association of Criminal Defense Lawyers (www.nacdl.org) offers some of the best forensic training you’ll find. And the National Association for Public Defense (www.publicdefenders.us) can help your line defender to become an effective supervisor and your supervisor to become an effective chief. Visit these organizations’ websites, as this is just a sliver of what’s offered.

4. Track Time

Few of us want more work. But what if additional work could improve our practice? For the past two years, I’ve helped public defender offices implement time-tracking. When an office adopts time-tracking, defenders are often skeptical: “I don’t have time to complete my work as is, and now you want me to track my time?” “This is just a way for management...
to keep tabs on us.” “I didn’t become a public defender to track my time.”

As a former line defender, I can empathize. In fact, I likely would have joined the chorus. Learning new software and carving 10 or 15 minutes out of a busy day seems daunting.

But the benefits of time-tracking far outweigh the drawbacks. Defenders often have excessive workloads, but no data to back it up. Time-tracking can show just how much time—or how little time—defenders are able to devote to core tasks, like client communication, legal research, and investigation. We can learn how much time is spent on a case, how that time is spent, and whether there are any patterns for an attorney or division. Defenders can use that information to improve their practice, supervisors can use that information to advise their attorneys or redistribute caseloads, and chief defenders can use that information to push for greater funding through education or litigation.

Tracking time won’t cure all that ails your public defense office. But without it, you may be practicing, supervising, or managing in the dark. You can learn more about ABA workload studies at www.indigentdefense.org.

5. Work with Your Community
Like hospitals, courtrooms can be scary for the uninitiated. Surrounded by jargon and an air of expertise, laypersons often feel acted upon rather than like empowered actors. While formal training is a prerequisite for many legal tasks, clients and their families and friends need not be passive. Just as patients recognize they are not doctors, but take an active role in their health care, defendants and their families—the communities we serve—recognize they are not lawyers, but want to take an active role in their defense. Thus was born participatory defense.

After years of community organizing, Raj Jayadev and his organization, Silicon Valley De-Bug’s Albert Cobarrubias Justice Project (http://acjusticeproject.org/), realized that their community was quick to march or lobby, but wasn’t present where they were most needed: the courtroom. Jayadev writes, “there was an unspoken belief that if you weren’t a lawyer or a judge, you couldn’t effect change.” When Jayadev and others entered California courtrooms, they discovered that public defenders were a natural ally.

At first, some public defenders, worried that Silicon Valley De-Bug was merely a watchdog group, were wary. But this evolving concept of participatory defense has strengthened the relationship between defenders and the community they represent. De-Bug hosts community meetings, fosters closer relationships between defenders and the community, and serves as an extension of the defense team, often assisting with investigation or mitigation. De-Bug’s model is now spreading to jurisdictions across the country.

6. Cap Caseloads
Public defense improvement can seem like a Gordian knot of high workloads, insufficient funding, and a lack of independence. But if your office is lucky enough to have the independence to set caseload or workload limits, you should.

The problems associated with excessive defender workloads—including increasing the number of guilty pleas, limiting time with clients, and depriving clients of basic quality representation—are well documented. (See Norman Lefstein, Securing Reasonable Caseloads: Ethics and Law in Public Defense (ABA 2011)). Increasingly, we have evidence that caseload caps are an effective solution to this problem.

New York City imposed caseload caps in 2010: 400 misdemeanors or 150 felonies, with felonies counted as 2.66 misdemeanors in mixed caseloads. (Still quite high caseloads, but considerably lower than they were.) Now, five years in, a study by the Center for Court Innovation has shown that caseload caps have had “highly positive” results, including more time spent with clients and more time spent on immigration, mental health, and veterans’ cases.

7. Start a Commission
With the recent additions of Idaho and Michigan, approximately 23 states have statewide public defense commissions. (See David Carroll, Idaho Governor Signs Public Defense Commission Bill into Law, 6AC (Apr. 1, 2014), http://tinyurl.com/jyck93l.) The ability of commissions to fund, oversee, and set standards for county-level indigent defense offices varies. However, some, like the Texas Indigent Defense Commission (www.tidc.texas.gov) and New York’s Office of Indigent Legal Services (www.ils.ny.gov), have had a tremendous effect on county-level operations. Strong, well-structured commissions can safeguard independence, increase funding, and decrease caseloads, helping to ensure ethical and constitutional defense provision.

8. Litigate
When all else fails, litigation is an increasingly effective tool for public defense improvement. Systemic public defense litigation is not new. (See Lefstein, supra, at ch. 7.) But it is improved. In particular, amicus briefs from the ABA and statements of interest from the Department of Justice have had a tremendous effect on impact litigation. Additionally, the political climate for litigation is quite favorable, as criminal justice reform, including indigent defense improvement, is one of the few things liberals and conservatives agree on.

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Justice’s (DOJ’s) continued efforts to investigate and prosecute white collar crime, including the DOJ-wide enhanced efforts to pursue individual accountability in cases of corporate wrongdoing; the Criminal Division’s continued efforts to provide greater transparency regarding its corporate resolutions, especially in FCPA cases, in conjunction with the DOJ’s increased resources devoted to fighting international corruption; and the Criminal Division’s recent retention of an experienced compliance counsel.

**Update on Clemency Project 2014**
President Obama granted 95 clemency petitions in mid-December 2015, 27 of which were supported by Clemency Project 2014. This was a historic day, and the CJS is very proud of the progress made thus far. The project seeks to assist prisoners who are serving a sentence that, if imposed today, would be substantially shorter than their original sentence. These individuals are nonviolent offenders with no significant criminal histories who have demonstrated good conduct in prison.

Now that the White House has cemented its commitment to correcting excessive sentences for nonviolent offenders, the project needs CJS members for assistance. Currently, 4,864 applications are under attorney review to ascertain whether they meet the above criteria, and criminal law practitioners are in the best position to help those selected. The Clemency Project 2014 has now streamlined many of its procedures, making it easier than ever to take a case. Clemency Project staff attorneys have prescreened cases, including a review of the presentence report, so that cases that appear to meet the criteria can be assigned for review.

For more information and to volunteer for Clemency Project 2014, visit www.clemencyproject2014.org.

**More Video Highlights of CJS Voices and Activities**
The Section added new videos to the CJS Voices playlist on YouTube. Newly added Section members include: Keely Rankin, lawyer at Davis Wright Tremaine LLP in Seattle; Judith Friedman, senior trial attorney of the DOJ Criminal Division Office of International Affairs; Tifiani Smith, a public defender in Atlanta, Georgia; Sidney Butcher, lawyer at Whiteford Taylor Preston LLP in Baltimore; Pauline Weaver of the Law Office of Pauline Weaver; Nina Marino, white collar crime defense attorney of Kaplin Marino in Beverly Hills; and Michael Dean, chief deputy prosecutor for Union County, Indiana.

Over the past year, the Section has also increased its efforts to engage with Section membership through consistent coverage of panel discussions at CJS meetings and conferences. Visit our channel and subscribe for new posts, available at the CJS website, www.americanbar.org/crimjust.

**Staff News**
Kevin Scruggs is the new staff director (the Section is looking for a new standards project director). Lauren Beebe is the new staff attorney. Rafiat Adetona is the new marketing program assistant.

**INDIGENT DEFENSE (continued from page 57)**

Following recent success in New York and Washington State, the American Civil Liberties Union and its affiliates have impact litigation suits pending in Pennsylvania, Idaho, and California. Built in part on the *ABA Ten Principles of a Public Defense Delivery System*, these suits confront systemic challenges, such as excessive attorney workloads, dwindling resources, and a lack of independence.

**Conclusion**
These are just a few of the indigent defense improvement initiatives underway today. Feel free to contact the organizations listed above for more information, or contact me directly: geoffrey.burkhart@americanbar.org.

**MENTAL HEALTH (continued from page 58)**

Case. The outcome of this case—confidently assumed by both sides to be headed for trial—will largely hinge on the credibility of the prosecution’s sole complaining witness. When defense counsel offhandedly mentions the identity of that witness during a pretrial case conference, the psychologist realizes to his horror that this is someone he previously treated clinically for a psychotic disorder. What needs to happen next?

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A blessing as well as a curse of the quarterly magazine column is the responsibility—and opportunity—to develop material at intervals measured in weeks, for a resource made available electronically as well as in the traditional “hard copy” format. In order to keep pace with the needs of our *Criminal Justice* magazine readership, we are actively soliciting your input as to what particular topics you would like to see us cover . . . and will also be pleased to direct you to existing resources on matters that this column may not be in a position to address in an upcoming issue. Please feel encouraged to contact Dr. Drogin at edrogin@bidmc.harvard.edu for such guidance.