

# REGULATING THE PUBLIC DEFENDER IDENTITY

Irene Oritseweyinmi Joe\*

*The public defender institution has trouble meeting its mission. This is partly because, despite the specific and clear purpose of representing indigent defendants in criminal proceedings, public defender offices rely on various centering principles to meet this objective. The institution falters if it chooses a centering principle that unwittingly complicates its ability to meet the institution's central mission. For public defender leaders tasked with developing and maintaining an institutional identity for a particular office, neither legal nor professional regulations supply the type of considerations that guarantee that an adopted identity will comply with core institutional responsibilities. This project seeks to identify the role that the legal profession's governing body should play in filling that void. It articulates three popular centering principles for public defender offices, identifies potential failures in systemic integrity and mission fulfillment that can result from each type of centering principle, and posits how professional rules and more stringent governance by the legal profession could help safeguard against such failures.*

INTRODUCTION.....	1336
I. THE CALL TO ACTION FOR SYSTEM ACTORS.....	1339
A. <i>The Prosecutor Response</i> .....	1340
B. <i>The Policing Response</i> .....	1340
C. <i>The Public Defender Response</i> .....	1341
II. THE PROFESSION'S INADEQUATE GUIDANCE FOR PUBLIC DEFENDERS .....	1343
A. <i>Missions Unguided by Standards</i> .....	1344

---

\* The author extends sincerest thanks to Deborah Rhode (in memoriam), Chaz Arnett, and Judge Angel Harris for the conversations about public defender leadership that led to the question centered in this piece. The author is also thankful to Kay Levine, the students and faculty participants at the Emory Law School colloquium, and the other contributors to this Colloquium for the insightful words and feedback on the early drafts of this project. Thank you also to the journal editors, my research assistants (primarily Bri Perez-Brennan and Isabella Lyons), and Jennifer Allison for their helpful edits. This Essay was prepared for the Colloquium entitled *The Legal Profession's Response to Social Change*, hosted by the *Fordham Law Review* and co-organized by the Stein Center for Law and Ethics on October 20, 2023, at Fordham University School of Law.

B. <i>Missing Mandates from the ABA</i> .....	1346
III. THE ABA RESPONSE TO THE CALL TO ACTION.....	1348
A. <i>Establishing Oversight</i> .....	1349
B. <i>Collecting Data</i> .....	1350
CONCLUSION.....	1352

## INTRODUCTION

In recent years, there has been a significant rise in public recognition of problems in the criminal process and the routinized attorney role in perpetuating injustice. Several themes have emerged from this heightened discourse: the term “progressive prosecution” entered into the nation’s lexicon,<sup>1</sup> questions about the role of police and the necessity of policing as an institution undergirding the criminal process became a more central part of the national debate,<sup>2</sup> and the chronic underfunding of public defenders led to public campaigns for additional resources.<sup>3</sup> Together, these recognitions have contributed to a more modernized understanding of the impact that the criminal process has on the lives of the nation’s citizenry. The question now is whether this impact is unnecessarily limiting the legal profession’s systemic integrity by failing to consider the importance of the public defender identity.

Despite this updated understanding and current concern about the criminal process, the American Bar Association (ABA) has remained relatively stagnant in its regulation of the legal actors responsible for the system’s functioning. The ABA exists to provide professional and ethical guidance

---

1. Compare David A. Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017), with Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018). See also Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 475 (2021).

2. See, e.g., RICH MORIN, KIM PARKER, RENEE STEPLER & ANDREW MERCER, PEW RSCH. CTR., *BEHIND THE BADGE* (2017), <https://www.pewresearch.org/social-trends/2017/01/11/police-views-public-views/> [<https://perma.cc/T3G3-J6N2>]. Compare Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer> [<https://perma.cc/3UYX-KMUB>], with *Role of Police in America*, STAND TOGETHER TR. (Jan. 18, 2019), <https://standtogethertrust.org/stories/role-of-police-in-america/> [<https://perma.cc/LDX8-NCEN>].

3. See *Inadequately Funded Public Defender Services Threaten Criminal Justice System*, ACLU Testifies, ACLU (Mar. 26, 2009, 12:00 AM), <https://www.aclu.org/press-releases/inadequately-funded-public-defender-services-threaten-criminal-justice-system-aclu> [<https://perma.cc/34UT-UAGH>]; see also *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 83–96 (2009) (statement of Robin L. Dahlberg, Senior Staff Attorney, ACLU); BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY* (2019), <https://www.brennancenter.org/our-work/research-reports/fair-fight> [<https://perma.cc/YEX4-EJUM>].

for those attorneys seeking to practice law.<sup>4</sup> However, the ABA has only advanced a few rules specifically addressing criminal legal practice—in particular, amendments to the ABA Model Rules of Professional Conduct, Rules 1.8, 3.8, and 8.4.<sup>5</sup> The ABA’s Criminal Justice Standards, although more detailed in their description of the proper method for practicing criminal law, remain merely advisory and do not require specific behavior by those practicing law.<sup>6</sup> Even the turmoil of this moment in our nation’s history has failed to spark meaningful additions or statements that expand on the professional behavior required of all attorneys involved in the criminal process. One could interpret the ABA’s deafening silence about the professional actors in the criminal process as a stamp of approval for any decisions a system actor might make in the practice of criminal law and acceptance of any changes those actors might adopt to respond to this moment of national unrest.

Such blanket approval, however, would be unwise. The ABA may not have authority over the decisions that policing institutions make about their daily or general practice. Still, the ABA should respond to changes in prosecutor offices—comprised of attorneys who work closely with police—that could negatively influence law practice and undermine the integrity of the legal system. Similarly, the ABA would be expected to exercise judgment on any decisions that a public defender office—comprised of attorneys who represent indigent defendants—might make about its provision of services or rules that judges might adopt as the primary decision-makers in most criminal cases.

Perhaps unsurprisingly, the ABA has taken more recent, small, concrete steps to mandate behaviors for those attorneys who work or have worked as prosecutors.<sup>7</sup> Prosecutors are, in large part, the initiators of the criminal

---

4. See *ABA Mission and Goals*, ABA, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [https://perma.cc/9MTW-225Y] (last visited Feb. 9, 2024).

5. MODEL RULES OF PRO. CONDUCT r. 1.8, 3.8, 8.4 (AM. BAR ASS’N 2020); *Most Recent Changes to the Model Rules*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [https://perma.cc/AAD6-BAGY] (last visited Feb. 9, 2024). Model Rule 1.8(e) was amended to make it easier for pro bono defense counsel to provide modest gifts for clients, and Model Rule 8.4 was amended to include certain types of harassment and discrimination as grounds for attorney misconduct. See *Most Recent Changes to the Model Rules*, *supra*. Model Rule 3.8 was amended in 2008 to add 3.8(g) and 3.8(h), which extend a prosecutor’s obligations regarding exculpatory evidence to that which arises after a guilty verdict in an effort to combat wrongful convictions. See Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 317–18 (2010) (providing a historical overview of these amendments to Model Rule 3.8).

6. See CRIMINAL JUST. STANDARDS (AM. BAR ASS’N 2023); *Criminal Justice Standards*, AM. BAR ASS’N, [https://www.americanbar.org/groups/criminal\\_justice/standards/](https://www.americanbar.org/groups/criminal_justice/standards/) [https://perma.cc/E9LC-K8PL] (last visited Feb. 9, 2024). See generally Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10.

7. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2020).

process.<sup>8</sup> They also control the general pace of the proceedings by choosing when and what charges to bring against a defendant and whether to extend or accept a plea offer.<sup>9</sup> More than judges and public defenders, the prosecutor seems to have control over the criminal process for individual defendants and the truth of whether that process meets public expectations about fairness and justice.

Similarly to the prosecutor, the public defender has a strong constitutional obligation to protect those facing the most severe consequences in an unjust criminal process.<sup>10</sup> They also face less oversight and are subject to less condemnation from outside sources in the limited instances of public defender leaders being elected by popular vote.<sup>11</sup> This means that they, like prosecutors, have control over the criminal legal process but are less likely to be publicly called to task for improper professional actions than their opposition. This should be something of particular concern to a professional association like the ABA that is tasked with protecting the public from deficient behavior by its professionals.

Much like crime victims, indigent defendants do not, in the true sense of the word, “choose” to participate in criminal proceedings.<sup>12</sup> They also do not get to choose their attorneys.<sup>13</sup> Yet, by the very nature of the charges, defendants face a more forward-looking potential loss of life, liberty, and the general pursuit of happiness—three important rights that are enshrined as unalienable in the nation’s founding document and that cannot be taken without due process.<sup>14</sup> This means that indigent defendants are often in an environment they did not choose to be in, represented by people they did not choose to represent them, all while facing some of the harshest punishments available by law in a process fully dictated by law. There is fertile ground in

---

8. See, e.g., *The Power of Prosecutors*, CTR. FOR JUST. INNOVATION (Jan. 9, 2023), <https://www.innovatingjustice.org/about/announcements/power-prosecutors> [https://perma.cc/4856-LZUA].

9. See Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1677 (describing how Virginia and Missouri allow the sheriff or police chief to refer cases directly to the attorney general for prosecution in order to circumvent the wide discretion of local prosecutors).

10. The Sixth Amendment mandates that defense attorneys, including public defenders, provide effective assistance of counsel. U.S. CONST. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

11. See Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 124–25 (2017). To the extent that the threat of elections hold leadership accountable, this is particularly true for those offices with unelected leadership. Of course, this is not to say that public defenders are immune from all public accusations and complaints.

12. Indeed, this is why they are referred to as “defendants.” The Government brings charges against an unwilling person and the person defends themselves against the charges.

13. Compare *United States v. Gonzales-Lopez*, 548 U.S. 140, 146 (2006) (explaining that the Sixth Amendment guarantees “the right to counsel of choice” when a defendant chooses and hires an attorney), and *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”), with *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (holding that indigent defendants do not have a right to choose their appointed counsel).

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. XIV.

this scenario for the legal profession to provide more substantial guidance for institutional changes that could impact the behaviors of those attorneys representing indigent defendants and the latter's experience of that representation.

This Essay proceeds in three parts. Part I provides, in comparative detail, how institutional reforms are implemented in some major entities that comprise the American criminal justice system: the district attorney's office, the police department, and the public defender's office. Part II explains how ABA-promulgated rules and standards for the practice of law in the United States fail to provide adequate support and guidance to public defender leaders in the administration and running of their offices. Finally, Part III details how the legal profession could better regulate public defender institutional identities and provides suggestions about how these rules and standards could be imposed on the institution.

### I. THE CALL TO ACTION FOR SYSTEM ACTORS

Changes are rampant in the nation's criminal process. States and localities have responded to news stories and public protests indicating systemic injustice by pursuing fundamental overhauls of longstanding institutional endeavors in prosecution, policing, and indigent defense. For every institution that has implemented changes in response to modern frustrations with the criminal legal system, leadership has played a central role. Some of these institutions did so by adopting a particular office identity; such identities focused on a specific mission that reflected a more modern understanding of the role the institution should play in a functioning criminal process.

Although some public defender offices have been able to implement key reforms over the past few years, the dearth of guiding principles for these reforms is of great cause for concern—greater even than for changes occurring in prosecutor and police institutions. This is because, for the most part, prosecutors are elected and face recall elections if they fail to meet public expectations.<sup>15</sup> Similarly, law enforcement is beholden to publicly elected officials—usually the mayor or another elected leader of the locality—who can also terminate their employment for perceived and actual shortcomings.<sup>16</sup> Public defenders do not have a similar leader subject to such public outcry. This absence might be inevitable given the potential anger at, and lack of regard for, those marginalized persons whom public defenders are often tasked with representing. Additionally, this absence highlights a

---

15. See generally *CARISSA BYRNE HESSICK, UNC SCH. OF L., THE PROSECUTORS AND POLITICS PROJECT* (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/39ES-EEP7>]. See, e.g., Janie Har, *San Francisco Recalls Progressive Prosecutor Chesa Boudin*, PBS (June 8, 2022, 12:15 PM), <https://www.pbs.org/newshour/politics/san-francisco-recalls-progressive-prosecutor-chesa-boudin> [<https://perma.cc/6VSA-C98M>].

16. See, e.g., Olga R. Rodriguez, *Oakland Fires Police Chief for Alleged Misconduct Cover-Up*, AP (Feb. 15, 2023, 9:52 PM), <https://apnews.com/article/politics-oakland-b4c06e7d0bce29a4635ad2d3c40a04cc> [<https://perma.cc/FU8W-3PDF>].

need that suggests that the legal profession should take a more substantial role in overseeing the public defender. The following part details some of the changes that have recently taken place in prosecution, policing, and public defense, as well as the varying roles that supervisory structures can play in ensuring they are appropriate changes or additions.

### A. *The Prosecutor Response*

For prosecutor offices, recent reforms have generally included a commitment to refraining from prosecuting certain cases and/or interacting with law enforcement or the community in different, less harmful ways. Such changes also often followed popular elections in which the affected citizenry had some say in the leader's anticipated design.

There are several examples of this from around the country in recent years. In Bexar County, Texas, District Attorney Joe Gonzales was elected in 2018 on the strength of promises to reform the office.<sup>17</sup> After implementing significant changes to how criminal prosecutions were handled there—including increasing the Family Violence Division staff, requiring grand jury review for police use-of-force cases, and implementing a “cite and release” program for low-level, nonviolent offenses<sup>18</sup>—Gonzales won reelection in 2022.<sup>19</sup>

In 2022, Hennepin County, Minnesota<sup>20</sup> elected Mary Moriarty, a former public defender, to the office of Hennepin County Attorney.<sup>21</sup> During her campaign, Moriarty promised to bring changes to the prosecutor's office, including ending the practice of “overcharging” cases, focusing on seeking non-carceral sentencing alternatives, and encouraging better cooperation with the public defender's office.<sup>22</sup>

### B. *The Policing Response*

For policing units, police chiefs who adopted new hiring or training practices or disbanded entire enforcement units obtained their authority via

---

17. See *Bexar County District Attorney Joe Gonzales*, BEXAR CNTY., <https://www.bexar.org/1384/District-Attorney> [<https://perma.cc/9LMA-YA2H>] (last visited Feb. 9, 2024).

18. *Meet the District Attorney*, BEXAR CNTY., <https://www.bexar.org/3439/Meet-the-District-Attorney> [<https://perma.cc/75Z8-VR7T>] (last visited Feb. 9, 2024).

19. Gonzales's reelection likely also hinged on the fact that he promised that his office would not prosecute abortion providers. See Paul Flahive, *With Abortion on the Ballot, Bexar DA's Race Goes to Democrat*, TEX. PUB. RADIO (Nov. 8, 2022, 9:42 PM), <https://www.tpr.org/government-politics/2022-11-08/with-abortion-on-the-ballot-bexar-das-race-goes-to-democrat> [<https://perma.cc/4JDN-HGJ4>].

20. Hennepin County includes Minneapolis, the site of the killing of George Floyd and the prosecution of the police officer who committed that murder. See generally *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/E4LE-8AQX>].

21. See *Welcome*, HENNEPIN CNTY. ATT'Y'S OFF., <https://www.hennepinattorney.org/about/welcome/welcome> [<https://perma.cc/GLF9-7RTG>] (last visited Feb. 9, 2024).

22. See Max Nesterak, *How Mary Moriarty Would Prosecute*, MINN. REFORMER (Oct. 1, 2021), <https://minnesotareformer.com/podcasts/how-mary-moriarty-would-prosecute/> [<https://perma.cc/UPG2-PCHA>].

appointment by a mayor or other popularly elected city official. In a recent example of this, Boston Mayor Michelle Wu appointed Michael Cox as commissioner of the Boston Police Department in the summer of 2022.<sup>23</sup> Within six months of taking office, Cox implemented reforms related to recruiting, hiring, and retaining diverse officers; training officers in active bystandership “to prepare [them] to successfully intervene to prevent harm and to create a law enforcement culture that supports peer intervention”; and updating internal affairs procedures to improve accountability and transparency in how the department handles public complaints.<sup>24</sup>

Similar appointments have taken place recently in other U.S. cities. Appointed by Mayor Jacob Frey to head the Minneapolis Police Department in November 2022,<sup>25</sup> Chief Brian O’Hara announced a complete restructuring of the department in August 2023, including the creation of a separate Community Trust Division with three bureaus—Constitutional Policing, Internal Affairs, and Professional Standards—focused on officer training and accountability.<sup>26</sup> Meanwhile, in Louisville, Kentucky, Mayor Craig Greenberg appointed Jacquelyn Gwinn-Villaroel to serve as the city’s interim police chief in January 2023.<sup>27</sup> During her first six months on the job, she “created new initiatives including, but not limited to, the following: continuous work of implementing police reforms, establishing the Non-Fatal Shooting Squad, implementing the Stop-the-Violence Community Outreach Program, and the expansion of the Louisville Metro Police Activities League.”<sup>28</sup> In June 2023, Gwinn-Villaroel’s role was changed from interim to permanent.<sup>29</sup>

### C. *The Public Defender Response*

Attorneys who lead public defender offices have attempted to change their practice in similarly large and significant ways. Examples include adopting caseload standards, pursuing different office organizational schemes,

---

23. *See Michael Cox Named New Boston Police Commissioner: ‘We’re Going to Do Some Things in a Different Way’*, WBZ NEWS (July 13, 2022, 12:21 PM), <https://www.cbsnews.com/boston/news/michael-cox-boston-police-commissioner-announcement-mayor-michelle-wu/> [<https://perma.cc/F4ZZ-WXUY>].

24. *Boston Police Department Update on Police Reform*, CITY BOS. (Aug. 17, 2023), <https://www.boston.gov/news/boston-police-department-update-police-reform-0> [<https://perma.cc/8GYA-HB4M>].

25. *Minneapolis Council Approves Changemaker as New Police Chief*, AP (Nov. 3, 2022, 1:22 PM), <https://apnews.com/article/death-of-george-floyd-police-minneapolis-new-jersey-newark-83bc649767dc3e425383e162d1396759> [<https://perma.cc/7XBA-9RM4>].

26. Deena Winter, *MPD Chief Restructures, Adds Chiefs, Acknowledges Not All Officers Are Behind Him*, MINN. REFORMER (Aug. 7, 2023), <https://minnesotareformer.com/briefs/mpd-restructures-adds-chiefs-says-not-all-officers-are-behind-him/> [<https://perma.cc/MDY5-X8UZ>].

27. *Our Command Staff: Meet Chief Jacquelyn Gwinn-Villaroel*, LOUISVILLE POLICE DEP’T, <https://www.louisville-police.org/868/Our-Command-Staff> [<https://perma.cc/L2BL-8DBY>] (last visited Feb. 9, 2024).

28. *Id.*

29. *Id.*

crowdfunding for additional financial resources for specific projects, and encouraging attorneys to attend certain training programs.

However, unlike in district attorneys' offices and police departments, there are not necessarily accountability measures in place for the hiring or appointment of the leaders of public defenders' offices.<sup>30</sup> Although some public defender leaders assume their positions after a popular election, most do not.<sup>31</sup> Many are appointed by state boards, judges, or political organizations,<sup>32</sup> which may not be an ideal alternative, as boards tasked with appointing and hiring public defender leaders have been reported to have problems related to their composition and the behavior of their members.<sup>33</sup>

---

30. Some nonprofits—such as Gideon's Promise, formerly known as the Southern Public Defender Training Center—exist to ensure adequate training is provided to public defenders in under-resourced communities. *See, e.g., Our History*, GIDEON'S PROMISE, <https://gideonspromise.org/justice-system-reform/> [<https://perma.cc/QPG5-HD4M>] (last visited Feb. 9, 2024).

31. *See* Andrew Howard, *The Public's Defender: Analyzing the Impact of Electing Public Defenders*, 4 COLUM. HUM. RTS. L. REV. ONLINE 173, 176–77 (2020). Although “the Public Defender was first envisioned as an elected position when the concept was first proposed at the turn of the twentieth century,” as of 2020 only four states permit public defender elections: California, Florida, Nebraska, and Tennessee. *Id.*

32. *See generally* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113 (2020). As of 2023, it is still the case that, in some states, government boards, either at a state level or county level, are authorized by statute to create an office of public defense and appoint its leader. *See, e.g.,* ALA. CODE § 15-12-40 (2023); IDAHO CODE § 19-860 (2024); MINN. STAT. § 611.26 (2023); N.Y. COUNTY LAW § 716 (McKinney 2023); WASH. REV. CODE § 36.26.030 (2023). Elsewhere, this is done by a court; for example, in the federal system, “[t]he chief public defender is appointed to a four-year term by the court of appeals in the circuit in which the [public defender's] office is located.” *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/UF4U-P6GE>] (last visited Feb. 9, 2024). Since 2012, the New Mexico Law Offices of the Public Defender have been under the management of the judiciary, which created the Public Defender Commission to appoint the office's Chief Public Defender. *See Public Defender Commission*, N.M. L. OFFS. PUB. DEFENDER, <https://www.lodnm.us/pd-commission/> [<https://perma.cc/84EC-MKZG>] (last visited Feb. 9, 2024). In Illinois, the party responsible for appointing the chief public defender is either a panel of circuit court judges or the county board of commissioners, depending on the size of the population in the county. 55 ILL. COMP. STAT. § 5/3-4004 to 4004.1 (2023).

33. *See* Joe, *supra* note 32; *see also* Irene Oritseweyinmi Joe, *Defend the Public Defenders*, ATLANTIC (Mar. 13, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/defend-public-defenders/618001/> [<https://perma.cc/WCA6-EMAE>]. For specific examples of such occurrences, *see* Howard, *supra* note 31, at 176 (describing the Los Angeles County Board of Supervisors' 2018 appointment of “someone who had never tried a criminal case and had previously worked on behalf of the County Sheriff” to lead the public defender's office in that city); Max Nesterak, *Minnesota's Top Public Defender Reappointed over Objections from Rank-and-File*, MINN. REFORMER (Sept. 13, 2022 7:16 PM), <https://minnesotareformer.com/2022/09/13/minnesotas-top-public-defender-reappointed-over-objections-from-rank-and-file/> [<https://perma.cc/9NF5-E8A5>] (describing the Minnesota Board of Public Defense's reappointment of Minnesota State Public Defender Bill Ward “over the objections of a significant number of rank-and-file public defenders, who sa[id] he ha[d] failed to advocate for more funding for the state's beleaguered public defense system”); Joshua Vaughn, *Pennsylvania Public Defenders Not Reinstated Despite Public Outcry over Firing*, APPEAL (Mar. 6, 2020), <https://theappeal.org/pennsylvania-public-defenders-not-reinstated-despite-public-outcry-over-firing/> [<https://perma.cc/6EB4-NQVW>] (explaining how “[d]espite hours of testimony from roughly 50 residents and stakeholders, the Montgomery County Commissioners did not . . . reinstate its two top public defenders,” whom they had



As former Montgomery County Chief Public Defender Dean Beer—who was fired by the county’s board of commissioners for publicly protesting Philadelphia’s bail-setting practices—explained, “being employed at the will of the commissioners can create a chilling effect on public defender offices wishing to advocate for reforms to the system.”<sup>34</sup>

These appointment decisions can be opaque amid sometimes unclear requirements for those seeking to fulfill those positions. Indeed, such decisions can be based on statements that the public defender leader makes to the appointing authorities about the mission that will be adopted at the public defender’s office if they are appointed. The decisions, however, may also be based on whatever the appointing authorities personally believe might be best for the institution. Regardless, the public defender leaders are then able to make their decisions away from direct public oversight.

This is not to say that all attempts at reform have failed in the public defender context. For example, during his time with the Orleans Public Defender’s Office as the Chief District Defender between 2009 and 2022, Derwyn Bunton instituted several reforms, the most significant of which was shifting the office “from being run by exclusively part-time, private lawyers appointed by the court to a full-time, dedicated staff of public defense lawyers, advocates, and administrators.”<sup>35</sup> He described the changes he made to this office as having several significant effects: “We went from this organization folks could forget and neglect to one that was pushing criminal legal system policy, fighting for bail reform, fighting for a smaller jail, [as well as] litigating and attacking unjust and illegal practices in the courts.”<sup>36</sup> Notably, Bunton’s position was via appointment by a board—which was in turn appointed by the governor, the chief justice of the Louisiana Supreme Court, the president of the Louisiana Senate, or the speaker of the Louisiana House of Representatives. Of particular note, this type of appointment scheme facilitates a bit of a disconnect between the decision-maker and public oversight.<sup>37</sup> This kind of disconnect does not exist so clearly in cases of institutional reforms to prosecution or policing.

## II. THE PROFESSION’S INADEQUATE GUIDANCE FOR PUBLIC DEFENDERS

Although the Supreme Court’s unanimous ruling in the 1963 case of *Gideon v. Wainwright*<sup>38</sup> solidified the role of the public defender in the

---

fired after the public defender’s office “filed an amicus brief in support of a lawsuit challenging bail setting practices in Philadelphia”).

34. Vaughn, *supra* note 33.

35. See *Career Public Defender Derwyn Bunton ‘98 Takes New Role as Chief Legal Officer of the Southern Poverty Law Center*, N.Y.U. L. NEWS (Feb. 22, 2023), <https://www.law.nyu.edu/news/derwyn-bunton-public-defender-new-orleans-southern-poverty-law-center> [<https://perma.cc/H34N-X9AS>].

36. See *id.*

37. See LA. STAT. ANN. §§ 15:146, 15:147 (2018).

38. 372 U.S. 335 (1963).

criminal process,<sup>39</sup> the Court did not issue formal rules on how public defender offices should look or operate. In public defender offices, which are generally led by a “lead” or “chief” defender, leadership decisions about how to approach the practice can heavily shape the methods by which line defenders provide effective and competent representation.<sup>40</sup> Without clear rules for how a public defender office must be structured or operated to meet existing constitutional, statutory, and professional guidelines, enterprising public defender leaders choose their own methods.

The leader of a public defender office could decide, for example, that the available resources are best used to represent individual clients in a way that is solely focused on current pending charges. They could also use those resources more holistically and focus on pending charges while expanding their work to other areas of a client’s life that could be impacted by interaction with the criminal process. Another option for public defender leaders is to focus resources on addressing current pending charges while working strategically to improve the larger law or legal environment in which an office’s client base exists.

Although each of these options may be perfectly acceptable within existing constitutional, statutory, and professional frameworks, they may be employed in ways that risk an office’s ability to both maintain the integrity of the legal process and provide competent, effective assistance of counsel. This is where ABA rules and standards should enter to prevent such a collapse. This part details three potential focuses (or missions) employed by a public defender office leader and the consequences of failing to undergird or overlay them with professional guidance.

#### A. Missions Unguided by Standards

Public defender offices can meet their constitutional and professional obligations—including the Sixth Amendment’s requirement that they provide effective assistance to criminal defendants, as clarified by the Supreme Court’s *Strickland v. Washington*<sup>41</sup> standard, while focusing on different missions or methods for delivery of their services. Some might argue that adopting an overarching mission is critical to fulfilling those obligations. Although these missions can be similar among different public defender offices, they can also diverge depending on the particular needs of

---

39. *See id.* at 344 (ruling that the Sixth Amendment requires states to provide defense counsel to indigent defendants).

40. Approximately 67 percent of state- and county-administered public defender services are provided by attorneys who are part of a public defender office. *See* SUZANNE M. STRONG, BUREAU OF JUST. STATS., STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 at 3 (2016), <https://bjs.ojp.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/T7X5-7VKK>]. This is in contrast to public defender services that are provided by individual, private attorneys who contract with state or county entities to assume responsibility of representing indigent clients. *See id.* at 2. These private attorney appointment systems can either subsume a large portion of the indigent defense caseload—as through contract systems or nongovernmental public defender offices—or can just exist as individual appointments that judges make to address discrete issues like conflicts with the structured public defender office. *See id.*

41. 466 U.S. 668 (1984).

the community that a specific public defender office represents. In other words, the determination of an appropriate mission might depend on not only the public defender's available resources but also its client base.<sup>42</sup> The Training Director of the National Association for Public Defense, Jeff Sherr, has devised a simple way of understanding three possible centralizing missions for a public defender office to adopt.<sup>43</sup> This model uses three popular quotes to describe three potential motivations for choosing to represent poor people charged with criminal offenses.<sup>44</sup>

The first quote is by Friedrich Nietzsche: "Distrust all in whom the impulse to punish is powerful."<sup>45</sup> Sherr characterizes this first motivation as the "warrior," meaning that a person wants to work as a public defender to challenge the power of the state apparatus seeking to convict and punish less powerful citizens.<sup>46</sup>

The second quote is by Sister Helen Prejean: "Every human being is worth more than the worst thing they've ever done."<sup>47</sup> Sherr describes this motivation for public defense work as the "social worker." It arises from a two-fold desire: (1) to recognize that life can be complicated, particularly for those who struggle for various societal reasons and (2) to help those who would ordinarily sit in judgment see the entirety of the person.<sup>48</sup> This motivation can also lead a public defender to consider how best to help their clients improve their entire lives beyond just the criminal court representation at hand.

The third quote is popularly attributed to Margaret Mead: "Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has."<sup>49</sup> Sherr refers to this motivation as the "movement builder," as it captures those who become public defenders

---

42. The author is currently working on additional scholarship exploring the role of a central mission in the long-term stability of public defender offices. This project does not provide a specific answer on whether an office must have a mission. Instead, it examines what role professional licensing mechanisms should play for those offices which have adopted central missions.

43. See OFF. OF PUB. INT. PROGRAMS, UCLA SCH. OF L., CAREERS IN PUBLIC DEFENSE 20 (2017), <https://law.ucla.edu/sites/default/files/PDFs/Careers/Careers%20in%20Public%20Defense%20Guide%20UCLA%20School%20of%20Law%209517%20v2.pdf> [https://perma.cc/24S5-5NDB]. Some public defender offices may choose not to adopt a mission, especially if they do not consider it to be central to their office's purpose. However, those that do may find a device like the motivational triangle to be helpful in clarifying the office's priorities given all the variables at play, including political realities, financial realities, staffing realities, and the goals and objectives of the office's leadership.

44. See JONATHAN RAPPING, GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE 117–18 (2020); see also Irene Oritseweyinmi Joe, *When the Public Defender Falls Short*, 54 U.C. DAVIS L. REV. 1763, 1772 (2021).

45. See RAPPING, *supra* note 44, at 117; Joe, *supra* note 44, at 1172.

46. See OFF. OF PUB. INT. PROGRAMS, *supra* note 43, at 20; RAPPING, *supra* note 44, at 118.

47. See RAPPING, *supra* note 44, at 117; Joe, *supra* note 44, at 1172.

48. See OFF. OF PUB. INT. PROGRAMS, *supra* note 43, at 20; RAPPING, *supra* note 44, at 118.

49. See RAPPING, *supra* note 44, at 117; Joe, *supra* note 44, at 1172.

because they seek larger systemic or societal change.<sup>50</sup> By representing the most marginalized individuals in the criminal process, the “movement builder” feels that they may help shape the world into something stronger and better.<sup>51</sup>

If a public defender office were to pursue any of these centralizing missions, leadership decisions on how to structure and resource the office would depend heavily on which mission, or combined mission, its leader chooses. This is especially evident in hiring decisions. Regardless of the mission, the public defender office must hire attorneys who are well-versed and skilled in legal practice and are fully equipped to provide the competent representation that is required not only by applicable professional rules, but also under the U.S. Constitution. Hiring the right people from a philosophical perspective will also be important, as different attorneys may seek to pursue public defense work that more closely follows one mission or another.

An office’s support staff, although not necessarily required for the attorneys to be able to fulfill their professional and constitutional requirements, will also likely reflect which overarching mission the office chooses. For example, in pursuing the “warrior” mission, a public defender leader will need to focus on hiring investigators who are heavily focused on gathering the type and amount of information needed to challenge the State’s evidence, not only to support an effort to poke holes in the system’s process but also to further efforts to shake down the system as a whole. The “social worker” model, on the other hand, would require hiring more support staff who are well-versed in ascertaining and gathering the necessary information about social services that their clients will need to improve their stationing. The “movement-builder” office, conversely, may concentrate its attention on special litigation units or policy experts who can pursue large-scale issues and present them to the community or legal decision-makers in a format that would achieve significant change.

Public defender system leaders could use guidance on how a particular mission’s impact on hiring implicates their compliance with professional and constitutional obligations. Some of the requirements regarding best practices for hiring and promotion will mirror those present in the literature for other organizations, but such literature is unlikely to emphasize the constitutional and statutory requirements of the public defender. This is why the legal profession should provide guidance or guidelines to ensure that a public defender leader’s chosen mission ensures that the lawyers working within the office operate consistently with their duties.

### *B. Missing Mandates from the ABA*

Given that the public defender is an integral part of the criminal process and that representation of defendants is subject to many of the same concerns

---

50. See OFF. OF PUB. INT. PROGRAMS, *supra* note 43, at 20; RAPPING, *supra* note 44, at 117.

51. See RAPPING, *supra* note 44, at 117.

that led to the development of the special rule for prosecutors, it is surprising that the ABA has not yet adopted a rule that speaks specifically to the responsibilities of the public defender. This may be because the public defender's core responsibility—to provide competent representation—exists for all attorneys, whether they are public defenders, volunteers, or private attorneys.<sup>52</sup> The available rules, however, leave problematic guidance gaps for public defender institutional leaders making necessary decisions about their office structures. This section details the insufficiency of the current rules and the resulting lack of regulation.

The Model Rules of Professional Conduct apply to all attorneys equally. This means that rules prohibiting certain actions and requiring a certain degree of expertise apply to both line public defenders and their leadership. Much has been written about the other professional rules that guide public defense work.<sup>53</sup> In fact, the duties of loyalty, confidentiality, and competent representation have served as the basis for theories about how to better support public defenders, especially given their sometimes insufficient resources and large caseloads.<sup>54</sup> The rules prove insufficient for guiding decisions that public defender leaders must make about office design.

For example, Model Rule 8.4's prohibition against attorney misconduct also serves as a blanket guideline for public defender behavior in legal practice.<sup>55</sup> This rule, although it may provide guidance for the everyday representative work of those practicing as public defenders, does not impose responsibilities or considerations for how a public defender leader should make decisions that help maintain the integrity of the criminal process.<sup>56</sup>

The Model Rules also describe how an attorney is responsible for those who support their practice of law, which presumably includes both investigators and support staff.<sup>57</sup> However, the Model Rules do not impose requirements that public defender leaders ensure that there is adequate support for the attorneys who represent indigent defendants in court. There is not even a mandate for necessary support staff. It may be enough for a public defender to provide competent representation without an investigator, social worker, or any other support staff that some types of public defender

52. See MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

53. See generally Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175 (2020); Rayza B. Goldsmith, *Is It Possible to Be an Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13 (2019); Tigran W. Eldred, *Moral Courage in Indigent Defense*, 51 NEW ENG. L. REV. 97 (2016); Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System Is Unjust*, 44 HOFSTRA L. REV. 1207 (2016).

54. See, e.g., Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59, 61–62 (2018) (“[G]iven the kinds of grossly excessive caseloads that the vast majority of public defenders in this country carry every day, they simply cannot provide reasonably effective assistance of counsel to all of their clients.”).

55. See MODEL RULES OF PRO. CONDUCT r. 8.4.

56. See Yaroshefsky, *supra* note 53, at 1225.

57. See MODEL RULES OF PRO. CONDUCT r. 5.3.

offices might deem necessary to provide holistic representation. The Model Rules do not provide any specific guidance on this type of decision.

Perhaps most notably, the Model Rules do not include caseload guidelines.<sup>58</sup> In addition to the primary responsibility that public defender leadership has to guide the office and supervise more junior attorneys, supervisors also must ensure that the practice of law by line defenders is compliant with professional rules.<sup>59</sup> This is both a professional responsibility of supervisors and a critical step toward protecting the integrity of the criminal process. Caseload requirements for public defender leadership would allow these actors to better manage these requirements. The drafters of the Model Rules, however, have yet to issue formal guidance on whether—and to what degree—public defender leadership and supervisors should also be permitted to carry a client caseload.

This oversight in the Model Rules, and those listed above, create space for adopted public defender office missions to undermine the integrity of the criminal process because they allow attorneys to provide representation that falls short of the standard necessary to protect this integrity.<sup>60</sup> The ABA Standards for Criminal Defense also provide little help. These standards are aspirational and, instead of directing specific behavior from defenders or defender leaders, exist as material for criminal defense practitioners to consider when making decisions. There is no requirement that they must consider these standards and no consequence for acting counter to them.<sup>61</sup>

### III. THE ABA RESPONSE TO THE CALL TO ACTION

The problems with the criminal process have been heavily researched and articulated. The unique problems caused or facilitated by the prosecution have contributed to the desire and imposition of a special rule for prosecutors.

---

58. For a review of public defense workloads and new recommended standards, see NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, RAND CORP., NATIONAL PUBLIC DEFENSE WORKLOAD STUDY (2023), [https://www.rand.org/pubs/research\\_reports/RRA2559-1.html](https://www.rand.org/pubs/research_reports/RRA2559-1.html), [<https://perma.cc/LM48-5FXE>]. See also Debra Cassens Weiss, In 'Watershed Moment,' Report Recommends New Guidelines for Public Defender Caseloads, AM. BAR ASS'N J. (Sept. 13, 2023, 2:24 PM), <https://www.abajournal.com/news/article/in-watershed-moment-report-recommends-new-guidelines-for-public-defender-caseloads> [<https://perma.cc/B5HY-626H>].

59. See MODEL RULES OF PRO. CONDUCT r. 5.1 (explaining that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct” and providing that the supervisory lawyer may be responsible for violations made by a subordinate in certain circumstances).

60. This is particularly problematic since not all defendants are in a position to appeal a conviction that resulted from ineffective assistance of counsel, sue a public defender office for inadequate representation, or notify the requisite state bar association that a public defender has failed to comply with professional rules. See Randy S. Parlee, *Civil Rights—Attorney Malpractice—Public Defenders Not Liable Under 42 U.S.C. Sec. 1983*. Polk County v. Dodson, 102 S. Ct. 445 (1981), 65 MARQ. L. REV. 709, 710 (1982).

61. Some of the Criminal Justice Standards contemplate rules set forth in federal and state constitutions and various state statutes, but they do not on their own serve as tools for addressing inadequate representation by the public defender.

Public defenders represent approximately 80 percent of defendants in the criminal processes.<sup>62</sup> This number alone calls into question why there is no similarly detailed, unique rule for the public defender. The fact that clients do not get to choose the public defender who represents them should encourage more oversight of the public defender institution by the profession's governing body. Also, the ABA recently amended several of its Model Rules of Professional Conduct in recognition of the risk of biased and discriminatory legal practice by its lawyers.<sup>63</sup> The clients of public defenders likely mirror the characteristics of defendants throughout the larger criminal process; that is, they are disproportionately people of color.<sup>64</sup> It is only fitting that there should be more explicit guidance for the public defender practice since it is so integrally tied to the ABA's concerns about racial bias and discrimination. This part details several ways in which the ABA may consider pursuing a more stringent role in directing public defender behavior and mission adoption.

#### A. Establishing Oversight

Much like the Model Rules require prosecutors to perform specific acts when they are informed that a defendant may have been wrongfully convicted, they should also provide for a system of oversight and redress for public defenders who may have represented a wrongfully convicted person.<sup>65</sup> Such a system could be particularly helpful given that it could coincide with any of the three above-mentioned centralizing missions that a public defender leader could choose for their office.<sup>66</sup>

This system of oversight could simply be a requirement that public defender offices take certain steps when they learn of a wrongfully convicted prior client, or it could be a professional obligation for any institutional leader

---

62. See Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/4QMW-PXYE>] (“Roughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers.”).

63. See *supra* note 5 and accompanying text.

64. See ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1 (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/5LKX-G9AU>] (“The over-representation of [B]lack Americans in the nation’s justice system is well documented.”). As these authors point out, “[b]ias by decision makers at all stages of the justice process disadvantages [B]lack people. Studies have found that they are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than white people.” *Id.* The research backs up this contention. For example, according to Bureau of Justice Statistics data on the racial makeup of criminal offenders, Black people, although they only represent 12.5 percent of the U.S. resident population, made up 33.6 percent of the total number of people arrested for violent offenses in 2018. ALLEN J. BECK, BUREAU OF JUST. STATS., RACE AND ETHNICITY OF VIOLENT CRIME OFFENDERS AND ARRESTEES, 2018 at 5, 10 (2021), <https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf> [<https://perma.cc/HN3D-EAUM>].

65. See generally Irene Oritseweyinmi Joe, *Learning From Mistakes*, 80 WASH. & LEE L. REV. 297 (2023).

66. See *supra* Part II.A.

to adopt some sort of neutral supervisory review for public defenders. The type of review could differ by office, case representative, case-assignment structure, or case type. Sentinel event reviews occur in other occupations that deal with human life but have yet to gain a foothold in the criminal process.<sup>67</sup> The ABA's introduction of such a practice in the public defender system could exist side-by-side with its requirement for prosecutorial reflection in wrongful conviction cases. It could also help meet the demands of the moment to improve the public defender's role in combatting injustice.<sup>68</sup>

In fact, Model Rule 3.8 could be expanded to mandate a sentinel event review process by the prosecutor that also includes the public defender assigned to the case. Although Model Rule 3.8 requires prosecutors to act in a certain way when they learn that a convicted defendant may have been wrongfully convicted,<sup>69</sup> it does not lay out a specific responsibility to review cases for such failures. It seems to hold prosecutors solely responsible for remedying such miscarriages of justice—a seemingly one-sided obligation not also born by public defenders. Although this rule is meant to complement the existing statutory and constitutional rules that circumscribe prosecutorial conduct, it elevates the professional obligations that should exist at the center of prosecutors' practice of law.<sup>70</sup> Professional obligations should rightly fall on both representative pieces of the criminal process. Interpretations of the Sixth Amendment render public defenders as unique but critical components of a fair and just criminal process.<sup>71</sup> Therefore, it makes sense that the public defender should be a part of the process to review wrongful convictions. The Sixth Amendment can be interpreted as having etched out a space for the public defender in wrongful conviction cases, and that space should be respected and further enforced by the legal profession.

### B. Collecting Data

The range of indigent client experiences in criminal defense is undoubtedly large and diverse. This means that there must be enough attorneys with diverse skills who are available to represent them. It also means that clients will have various experiences interacting with those

---

67. See Edmund F. McGarrell, Natalie Kroovand Hipple & Mallory O'Brien, *Sentinel Event Reviews: Applications in Criminal Justice Settings*, 46 J. CRIME & JUST. 563, 565 (2023) (“[S]entinel event reviews in criminal justice settings are rare. Where they exist, they have often built upon existing review processes. These include after-action reviews or critical incident reviews, homicide and nonfatal shooting reviews, and forensic science laboratory reviews.”).

68. See Joe, *supra* note 65, at 342–44 (reasoning that sentinel event reviews may bolster competent public defense).

69. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).

70. Cf. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 37.02 (4th ed. 2015) (explaining that Model Rule 3.8 ensures that prosecutors meet their primary duty of bringing justice).

71. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that public defenders are “fundamental and essential to fair trials” and therefore the Sixth Amendment mandates their appointment to all poor defendants).



attorneys. Some clients may be experiencing their first and only interaction with the criminal court process. They might be fearful or anxious and fully rely on their public defender at every stage of the proceedings. Conversely, a client may have had multiple criminal court cases or have family and friends with whom they have gone through the process.<sup>72</sup> These clients might not require as much daily assistance to understand what is happening or as much emotional care to withstand the process as those with less criminal court experience. That said, these types of clients might, in fact, need more care if they have already experienced the collateral consequences of a loved one's involvement in the criminal legal system and are exceedingly fearful about the possible consequences. The diversity of the client base means that, even if a public defender office is pursuing a particular mission, it must ensure that its available attorney pool is well-positioned to represent a wide array of clients.<sup>73</sup>

The recruitment and retention of the professionals tasked with completing assigned work should be a matter for any professional licensing body. Another way the ABA could participate more fully in this moment of reform for the public defender is to better understand why people become public defenders, what their experiences as public defenders are like, and why they leave.<sup>74</sup> This could be as simple as requiring public defender leaders to maintain data on who applies to be public defenders, who is hired, who leaves work as a public defender, and how much time was allotted for each stage of the recruitment and retention project. That kind of data would go a long way toward ensuring that the profession fosters and supports those attorneys who desire to do the work. It would also enable the profession to better understand motivations at each stage of a public defender's tenure. That information would bolster the ABA's suggestion in its Criminal Justice Standards that the bar encourage and support individuals to be public defenders.<sup>75</sup>

In the end, whether an attorney will stay with a particular office or be more naturally adept at providing a particular type of representation depends not only on which attorneys are hired, but also how that office was developed and is managed. In other words, there is a discretionary component that public defender leaders can make in hiring and organizing their offices that

---

72. See Lauren Gill, *The Positive Impact of Public Defenders*, ADVANCING PRETRIAL POL'Y & RSCH. (May 2022), <https://advancingpretrial.org/story/the-positive-impact-of-public-defenders/> [https://perma.cc/Q5TE-KW56] (illustrating how public defenders can show up and advocate for defendants who might have personal or familial involvement with the system).

73. For example, there is a growing acknowledgement of the need for bilingual and multilingual public defenders, counsel with cultural competence, and trauma-informed training opportunities. See generally Williamson B.C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CALIF. L. REV. 801 (1975); Susan Bryant, *The Five Habits: Building Cross-cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359 (2016).

74. Author and Professor Swethaa S. Ballakrishnen of the University of California, Irvine School of Law and Department of Sociology is currently engaged in a sociological study aimed at answering this question.

75. See CRIMINAL JUSTICE STANDARDS § 4-1.13 (AM. BAR ASS'N 2023).

permits them to prioritize certain hires. These decisions can differ depending on the office's central mission. The legal profession's governing body could greatly help by providing guidance or guidelines to public defender leaders who are making these decisions.

#### CONCLUSION

This Essay highlights the various legitimate missions that a public defender leader could adopt and pursue in shaping and managing their office. It also details how the ABA could better protect against the possible pitfalls or failures that could occur under any central mission. The licensing body could limit what a public defender leader could do when adopting a particular mission, or require that when choosing a mission, leaders examine certain capabilities of the office that they are leading, as well as, perhaps, the general needs of its client community. This could be done by establishing formal supervision mechanisms and collecting personnel data about who becomes a public defender and who leaves.

Such amendments and additions to the ABA's professional guidelines could reify the shift in attitudes about the criminal legal process that this moment of national reckoning has brought about. They could facilitate a balance whereby, on one side, the public defender leader sees and listens to their community to ensure that the ideal mission for the office is adopted while, on the other side, holding its attorneys to applicable professional rules. By doing so, they could guarantee that clients receive effective constitutional representation and that public defender offices operate in a way that maintains the utmost integrity of the legal profession.