

**DEPARTMENT OF ADMINISTRATION**

**Oversight and Review Unit**



**Review of the Efficiency and Effectiveness  
of the Public Defender Agency**

**November 4, 2019**



# Executive Summary

## *Review of the Efficiency and Effectiveness of the Public Defender Agency*

### RESULTS IN BRIEF

We found it difficult to accurately determine the PDA's attorneys' caseloads because of numerous inconsistent reports from the PDA. However, we found the range of 145-154 weighted cases between FYs18-19 to be the most accurate. These weighted caseload numbers are within professional standards and those of other states across the nation. The PDA, therefore, is fulfilling its ethical and constitutional obligations within prevailing professional standards.

We found a substantial increase in cases being conflicted over to the Office of Public Advocacy (OPA), from 2,813 in FY17 to 4,224 in FY19. Between the Thunderbird Falls and Grunwald homicide cases, OPA represents 9 of the 10 defendants. If the PDA cannot find ways to substantially reduce the conflict rate, it risks undermining its core mission of being the primary agency providing constitutionally mandated, court-appointed legal representation for indigent clients.

We found the PDA counts cases differently than OPA or the Alaska Court System. For example, the PDA counted more than 16,080 petitions to revoke probation and parole violations as new cases from FYs17-19, but OPA does not count these as cases. The PDA also uses a weighting system for its cases, but OPA does not. The PDA takes 25% credit for all cases conflicted out to OPA. It is hard to tell whether the PDA over-weights cases; it is equally hard to tell whether the PDA underweights cases. It is difficult to use the PDA's workload numbers in a way that's effective for budgeting purposes.

The PDA has been budgeted for a sufficient number of attorneys for its caseload under prevailing professional standards, but faces significant recruitment and retention challenges. The PDA has experienced higher caseloads in offices where it has had staffing difficulties, particularly in regions outside

of Anchorage.

However, the PDA has been intentionally holding open 4-7 vacancies for several years, drawing from its personal services funds to pay for other expenses, like contractor services. This has intensified its staffing challenges, particularly in regional offices.

In the past 2 fiscal years, the PDA has received \$3,253,900 in additional appropriations, including 18 positions, most of which was funded under Governor Dunleavy. The PDA also has had a fairly consistent >8% vacancy rate, which is extra resource capacity it could use to handle cases in regional offices or to provide additional support staff to its attorneys. The PDA has been resourced with more budget and staff positions than it is using effectively.

The PDA would operate more efficiently if it hired more support staff to assist its attorneys and provided better training for those staff. This would reduce the felt-caseload burden on the PDA's current attorneys by leveraging more effectively the skill of the paralegals and other support staff.

One way to improve the PDA's effectiveness and reduce costs and conflicts sent to OPA is to create a silo within the PDA to handle conflict cases. We examine the way that would work, as well as arguments against this model. It also is possible the PDA may be representing clients who do not qualify as indigent due to the court system failing to properly inquire into the eligibility of defendants to receive PDA services.

Finally, we did not find evidence of anyone hampering public defenders' efforts, or any undue interference with the independence of the PDA's defense functions.

We made 17 recommendations to improve the efficiency and effectiveness of the PDA. We will issue a Supplemental to this report once the analysis of our time study of the PDA is completed.

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## INTRODUCTION

The State of Alaska is committed to both adequately fulfilling its obligation to provide public defense and making its Public Defender Agency (PDA) the primary defense agency in the State. The Department of Administration (DOA) Oversight & Review Unit (O&R) initiated this review with the former Public Defender, Quinlan Steiner. The objective of this review is to evaluate the efficiency and effectiveness of the PDA's management practices and operations by:

- Evaluating procedures to determine, manage, and track caseloads and operational costs;
- Identifying opportunities for increased efficiency and effectiveness in staffing cases and managing operations; and
- Assessing current PDA practices to determine what recommendations or changes can be suggested to improve the PDA's case management and operations.

The findings and recommendations in this review may assist the Governor, Alaska Legislature, DOA Commissioner, and Public Defender in determining funding decisions for the PDA, creating a more efficient PDA, and ensuring the PDA is best serving the indigent defendants of Alaska.

### Background

The State of Alaska has a duty to provide representation for defendants in criminal cases when they are unable to afford counsel. That duty derives from the Sixth Amendment to the United States Constitution. The U.S. Supreme Court held in *Gideon v. Wainwright* that defendants charged with a felony in state court were entitled to a lawyer at state expense if they were unable to afford counsel.<sup>1</sup> Similarly, the Court held in *Argersinger v. Hamlin*, that indigent defendants have a right to counsel in misdemeanor cases resulting in a defendant's loss of liberty.<sup>2</sup> In Alaska, the right to counsel applies to defendants in misdemeanor cases if imprisonment is possible.

In 1984, the U.S. Supreme Court held that the Sixth Amendment's requirement of counsel means the right to "reasonably effective assistance of counsel pursuant to prevailing professional norms of practice."<sup>3</sup>

The PDA was created in 1969, by Alaska Statute 18.85, to fulfill the State of Alaska's constitutional responsibility to guarantee assistance of counsel in an indigent individual's defense against criminal prosecution. Indigent defense is also required by the Alaska Rules of Court. Through the PDA, Alaska provides legal services to indigent citizens. The PDA is a unique State agency – while it is under the general supervision of the Commissioner of the DOA, it operates largely independently under the autonomous leadership

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

of the Public Defender, who is appointed by the Governor and can be removed by the Governor only for good cause.<sup>4</sup>

By statute, the Alaska Court System (ACS) is responsible for determining an individual’s eligibility for public defense services.<sup>5</sup> After eligibility criteria have been met, an attorney is appointed either from the PDA or, when conflicts arise, from the Office of Public Advocacy (OPA). Since ACS determines eligibility, neither the PDA nor OPA have control over the number of cases each agency will be assigned.

In Fiscal Year (FY) 2020, the PDA has 13 offices statewide: Juneau, Ketchikan, Sitka, Utqiagvik, Kotzebue, Nome, Anchorage, Dillingham, Kenai, Kodiak, Palmer, Bethel and Fairbanks.<sup>6</sup> In FY19, the PDA reported it was assigned 23,902 new indigent cases, while OPA received 4,522 cases from the PDA. State expenditures totaled approximately \$27 million for the PDA and \$28 million for OPA.

In FY19, the PDA had an authorized staff count of 181 professionals, consisting of 106 attorney positions and the rest being support staff. This represented approximately 15% of DOA’s FY19 authorized employees. Of its 106 attorneys, 65% of them were higher paid attorney positions: 3 were classified as Attorney VI positions (salary range: \$143,592-\$157,580); 18 were classified as Attorney V (salary range: \$114,420-\$182,976),<sup>7</sup> and 48 were classified as Attorney IV: (salary range: \$99,660-\$114,221). The PDA’s budget breakdown for FY19 was as follows:

**Figure 1. The PDA’s FY19 Expenditures**

Expenditure by Object	Budget Expenditure
Personal Services	\$22,667,100
Travel	\$389,600
Contractual	\$3,701,700
Commodities	\$219,700
<b>Total Expenditures</b>	<b>\$26,978,100</b>

<sup>4</sup> AS 18.85.010-040.

<sup>5</sup> AS 18.85.120.

<sup>6</sup> <http://doa.alaska.gov/pda/Offices.html>.

<sup>7</sup> An Attorney V can make more than an Attorney VI if they have accrued many years working for the State of Alaska, or if they have a cost of living differential for working in a remote location.

## Standards for Public Defense

Public defense attorneys must have adequate time and resources to assure competent representation for their clients. The Alaska Rules of Professional Conduct require:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>8</sup>

The fulfillment of Alaska’s legal requirements is heavily dependent on the PDA having adequate resources to provide “competent representation.” Although Alaska’s Supreme Court has been protective of defendants’ rights and of the rights of parents involved in child-in-need-of-aid (CINA) cases, no standard has been established in Alaska’s courts, or elsewhere in the United States (U.S.), to measure definitively when the overall funding provided to defense agencies fails to meet constitutional obligations.

### *National Advisory Commission on Criminal Justice Standards and Goals*

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) established numeric caseload standards for public defense agencies. The NAC recommended the following caseload limits per attorney:

**Figure 2. National Advisory Commission on Criminal Justice Standards and Goals (1973)**

Type of Case	Number of Unweighted Cases per Attorney
Felonies	150
Misdemeanors (excluding traffic)	400
Juvenile court cases	200
Mental health cases	200
Appeal cases	25

<sup>8</sup> Alaska R. of Professional Conduct 1.1 The Alaska Rules of Professional Conduct are based on the American Bar Association’s (ABA) Model Rules of Professional Conduct. Model Rules of Prof’l Conduct R. 1.1 (2009). *See also*, ABA, Eight Guidelines of Public Defense Related to Excessive Workloads (2009).



While the NAC's quantitative recommendations for public defender attorneys are useful, they were based solely on the opinions of participants, and not on empirical data.<sup>9</sup> There is value to using experienced professionals to develop caseload standards, but a best practice is to use professional opinion to inform and provide context to empirical data that was previously collected. Additionally, the NAC recommendations were developed over 40 years ago, making them outdated in a complex and rapidly changing criminal defense environment. Regardless, the former Public Defender often referred to the NAC standards when evaluating the PDA's attorneys' caseloads.<sup>10</sup>

For FY19, the PDA worked on 23,902 cases. The PDA reported that this resulted in an average of 244 unweighted cases per attorney for FY19, with an average of 59 felonies per attorney and the other cases being less complex (e.g., parole revocation; petition to revoke probation (PTR), misdemeanors, etc.). This caseload is acceptable by the NAC standards.

### *Common Practice and Legal Standards in Other States*

Across the United States, public defender offices take on more cases than the NAC standards. For example, in 2007, the Department of Justice (DOJ) Bureau of Justice Statistics (BJS) found that public defenders handled a median of more than 200 cases (70 felonies *and* 139 misdemeanors) in various states.<sup>11</sup> In a 2007 report of State Public Defender Programs, BJS found 80% of reporting state programs exceeded the maximum recommended limit of felony or misdemeanor cases per attorney.<sup>12</sup> BJS found that Rhode Island (391 cases per attorney) and Hawaii (384 cases per attorney) had two of the highest combined felony and misdemeanor caseloads per attorney in 2007.

While the NAC developed recommendations for caseloads for public defenders, the practice is that public defenders in the majority of state programs carry far greater caseloads than these recommended levels.

Several states have developed workload standards for public defenders. Figure 3 shows the standards used in 15 selected states, as reported by the DOJ Bureau of Justice Assistance (BJA).<sup>13</sup> These standards represent the maximum annual number of cases an attorney should handle if that attorney handles only that type of case. For example, an attorney in Arizona should handle no more than 300 misdemeanors in a single year, if misdemeanors are the only type of case the attorney has.

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<sup>9</sup> Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, 44-45, ABA (2011).

<sup>10</sup> See Quinlan Steiner's recorded testimony and accompanying PowerPoint presentation before the Senate Finance Subcommittee, March 19, 2019, <http://www.akleg.gov/basis/Meeting/Detail?Meeting=SADM 2019-03-19 11:15:00>

<sup>11</sup> [http://www.jrsa.org/events/conference/presentations-10/Donald\\_Farole.pdf](http://www.jrsa.org/events/conference/presentations-10/Donald_Farole.pdf)

<sup>12</sup> <https://www.bjs.gov/content/pub/pdf/spdp07.pdf>

<sup>13</sup> Data reported in the Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, pp. 11-12 (2001).

**Figure 3. Case Standards in Selected States**

State	Felony	Misdemeanor	Juvenile	Appeals
Arizona	150	300	200	25
Colorado	80-241	310-598	305-310	-
Florida	200	400	250	50
Georgia	150	400	200	25
Indiana	200	400	250	25
Louisiana	200	450	200	50
Massachusetts	200	400	300	-
Minnesota	100-120	250-400	175	-
Missouri	40-180	450	280	28
Nebraska	50	-	-	40
New York (City)	150	400	-	25
Oregon	240	400	480	-
Tennessee	55-302	500	273	-
Vermont	150	400	200	25
Washington	150	300	250	25

*American Legislative Exchange Council (ALEC) Resolution in Support of Public Defense*

ALEC is the U.S.’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism. Comprised of nearly one-quarter of the country’s state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United States. On September 13, 2019, ALEC issued a Resolution in Support of Public Defense, resolving:



#### Access to Public Defense Services:

- That every person accused of a crime be afforded counsel in all cases in which incarceration can occur. States should strive to make counsel available as early as possible.

#### Effective Public Defense Delivery Systems:

- That whenever a jurisdiction's population, needs, and caseload warrant it, a public defense delivery system includes a public defender office as well as meaningful participation of the private bar and provides representation consistent with the best practices in the legal community;
- That public defense delivery systems be adequately funded to ensure attorneys have reasonable workloads so as to allow them to provide ethical and competent representation pursuant to prevailing professional norms;
- That public defense providers regularly receive relevant training;
- That public defense providers have access to appropriate support services such as investigators, social workers, and experts; and
- That compensation for public defense providers is sufficient to ensure the recruitment and retention of qualified and skilled advocates taking into consideration for public defenders the rates being paid to other government employees performing similar functions, and for court-appointed counsel the overhead costs and prevailing attorneys' fees for the jurisdiction.

#### Independence and Equality:

- That to ensure the defense may fulfil its role in the adversarial system, the defense should be insulated from undue influence, involvement, and control by actors whose interests are directly or indirectly adverse to the attorney-client relationship. Supervision of the public defense system by the judiciary should be no greater than that which is exercised over the private bar; and
- That in order to maintain a vibrant, healthy, and robust adversarial process the defense function be included as an equal and valued partner in the criminal justice system.

These standards are intended to apply uniformly to every public defense office/agency, such as the PDA. We used these standards to evaluate the PDA's funding, staffing, recruitment and retention, and independence.

#### **Office of Public Advocacy**

The Alaska Legislature founded the Office of Public Advocacy (OPA) in 1984.<sup>14</sup> One of OPA's primary functions is to serve as *Guardian Ad Litem* (GAL) for children in court cases. OPA

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<sup>14</sup> AS 13.26.005-13.26.410.

screens and trains staff and contract GALs before they are assigned cases.<sup>15</sup> Before OPA was founded, the court system provided GAL services to children in the state.

OPA has staff offices in Anchorage, Juneau, Kenai, Bethel, Palmer, and Fairbanks. OPA has GALs in Anchorage, Fairbanks, Palmer, and Juneau. In areas of the state where there are no staff offices, OPA retains contract GALs to represent children.

OPA will also take criminal cases from the PDA when a conflict arises in the case. “Conflict of interest” rules ensure attorneys zealously advocate for their clients by preventing the attorney and anyone with whom they work from representing a client who has an interest adverse to a client they already have represented. For example, in a criminal defense case involving multiple co-defendants, the co-defendants will have adverse interests and so the same attorney cannot represent them. Similarly, in CINA proceedings, each parent is assigned different counsel because they have interests adverse to one another.

Attorneys working for the same law firm or public agency are generally considered to be a single unit for conflict purposes, although there are some limited exceptions for government lawyers. Conflict rules can also keep a lawyer from representing a person when the lawyer represents a co-defendant, co-parent or important witness in an entirely different proceeding. Because a client may provide a lawyer with confidential information that could later be used against them, conflict rules can keep a lawyer from representing a person when the lawyer has in the past represented a co-defendant, co-parent or important witness.

Currently, the PDA’s practice is to send any cases in which it has a conflict over to OPA. OPA is able to represent multiple co-defendants referred over from the PDA because of how it has structured its agency: OPA has created physical barriers between its sections and, as a result, implemented a “wall” that ethically separates OPA attorneys from each other, enabling multiple OPA attorneys to represent defendants in the same criminal case. For example, at the time of this report, four defendants in the Thunderbird Falls murder case are being represented by OPA. If a conflict arises in the OPA office, those cases must be contracted to private defense attorneys at either an hourly rate or a flat fee.

One of DOA’s concerns is that the conflict process has spilled too many cases (especially, too many complex, expensive cases) onto OPA and private counsel. Both the PDA and OPA estimate that currently, about 25% of the PDA’s most serious felony cases are sent to OPA, and about 18-20% of the PDA’s total cases are sent to OPA. The PDA informed us that historically, about 13-14% of its total cases were sent to OPA.

OPA employs a staff of 149 professionals consisting of 57 attorneys, and the rest being support staff. In addition, OPA has 29 staff positions that are on-call or non-permanent positions. OPA’s budget breakdown for FY19 is as follows:

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<sup>15</sup> [http://doa.alaska.gov/opa/gal/gal\\_about\\_us.html](http://doa.alaska.gov/opa/gal/gal_about_us.html).

**Figure 4. OPA’s FY19 Expenditures**

<b>Expenditure by Object</b>	<b>Budget Expenditure</b>
Personal Services	\$18,288,600
Travel	\$191,100
Contract Attorneys	\$9,303,300
Commodities	\$165,600
<b>Total Expenditures</b>	<b>\$27,948,600</b>

### **1998 Legislative Audit of the Alaska Public Defender Agency**

The last review of the PDA was conducted in 1998 at the request of the Alaska State Legislature.<sup>16</sup> The audit examined whether the PDA management and operations were efficient and effective in providing representation of clients. The audit’s key findings included:

- The PDA would operate more efficiently with additional staff support, such as investigators, paralegals, and administrative assistants;
- Attorneys are performing tasks that should be done by paraprofessionals or clerical staff;
- Modernization of the PDA technology would improve its efficiency;
- The PDA operations would be improved by capturing data on workloads; and
- The PDA had insufficient manpower to handle increasing caseloads.

The audit recommendations included:

- The PDA should develop its budget requests, in part, using caseload data;
- The PDA should address inefficiencies related to technological equipment and staff configuration;
- The PDA management should implement a process to confirm and maintain the integrity of its attorney time estimates; and
- The Alaska Court System (ACS) should record its appointments of the PDA and OPA as public defense counsel in its case management information system and ensure its transmittal to the integrated criminal justice information system.

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<sup>16</sup> Department of Administration Public Defender Agency Case Management Time Study and Performance Review (1998).

Considering the 1998 Legislative Audit of the PDA was conducted over 20 years ago, it has little applicability to this review. However, it is important to note that in 2008, the PDA adopted a new case management system for tracking and evaluating workloads in order to make budgetary recommendations. The PDA upgraded its case management system in 2019.

Similar to the 1998 Audit, in this review, we found the PDA's budget requests could be better supported with caseload data that has greater transparency and clarity. We also found the PDA would operate more efficiently with some changes to its technology and staffing strategy. In addition, we found the PDA would be improved by attorneys using timekeeping software to capture actual time worked on cases. This will confirm and maintain the integrity of attorney time estimates. Finally, we found continued inconsistencies in case recording between ACS and the PDA's systems. We explore these findings and others in further detail, below.

### **Scope and Methodology**

This review examines the PDA's workload, case management process, and operations. We conducted interviews with attorneys and staff at the PDA and OPA, with former PDA attorneys, and with judges and staff in ACS. We compared the PDA's workload and practices to those of OPA, which defends the exact same cases when the PDA conflicts out of them. In addition, we reviewed statutes, national standards, best practices, and comparative information from other state programs. We also examined the PDA's standard operating procedures, financial data, and documentation. We reviewed ACS policies, procedures and charging documents.

In addition, we conducted a limited scope time survey of the PDA and OPA staff as well, gathering data on the number and types of cases worked by these attorneys to collect empirical support to determine adequate workload standards. However, we received results from the PDA late in the project timeline and were unable to include the results in this report. We will issue a Supplemental to this report once the analysis of the time study is completed.

We initiated this review in March 2019 at the direction of DOA Commissioner Kelly Tshibaka and in coordination with the former Public Defender, Quinlan Steiner. On April 2, 2019, Mr. Steiner resigned and an Interim Public Defender, Beth Goldstein, was appointed. In September 2019, Samantha (Sam) Cherot was appointed to be the next Public Defender.

The PDA is in the DOA.<sup>17</sup> O&R's authority derives from a February 26, 2019 memorandum from Governor Dunleavy to Commissioner Tshibaka stating his "intent and expectation that [her] expertise be utilized to review, investigate, and provide policy direction, not only as it relates to the Department of Administration, but as it applies statewide in the areas of management, audit, and government efficiency, as directed, on my behalf." (Appendix A) Commissioner Tshibaka established O&R to promote efficiency and effectiveness in the programs and operations of the State of Alaska, and to detect and deter waste, fraud, and abuse.

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<sup>17</sup> AS 18.85.010.

This review was conducted in accordance with the Quality Standards for Inspection and Evaluation established by the federal Council of the Inspectors General on Integrity and Efficiency.

This report provides findings about the PDA's imprecise caseload, referral of too many conflict cases to OPA, recruitment and retention challenges, and representation of non-indigent clients. It also includes findings that do not substantiate allegations of undue interference with the PDA's independence. It includes recommendations for policy, process, or procedural revisions that will increase the efficiency of PDA operations and the efficacy of PDA services.

We are grateful for the cooperation of the PDA and OPA in accomplishing this review.

## FINDINGS OF THE REVIEW

### Caseload Assessment Issues and Inconsistencies

The DOA has been particularly concerned about assertions from the former Public Defender and others that the PDA has such a heavy workload that it cannot provide its indigent Alaskan clients with the representation required by the Constitution and professional ethics rules. DOA initiated this audit in large part to identify the extent of the PDA's workload and what solutions were necessary to address any case overload.

#### *Public Defender Gave Multiple Conflicting Statements Regarding the PDA's Caseload*

On January 14, 2019, the former Public Defender provided a draft *Original Application for Writ of Prohibition* to the DOA Commissioner stating the PDA lacked the capacity necessary to fulfill its ethical and constitutional obligations to its current clients if it were appointed to represent any additional indigent individuals. The draft writ requested permission from the Alaska Supreme Court to refuse new appointments in the PDA in order to ensure its current clients receive the representation to which they are entitled.

In the draft writ, the former Public Defender represented that in FY18, the PDA "had an average, unweighted caseload of 278 cases." However, in the PDA's FY18 end-of-year report, the PDA reported an average, unweighted caseload of 243 cases per attorney. In the draft writ, the former Public Defender also projected an average unweighted caseload of 271 cases in FY19.

The former Public Defender also made several presentations, using PowerPoint slides to legislators and committees in the 2019 Legislative session, testifying that:<sup>18</sup>

- "Under more modern [caseload] standards that show how much work is associated with any given case type...by those standards we are short anywhere from 22 attorneys up to 61 attorneys just for our criminal trial division."<sup>19</sup>
- "For FY20, we're going to need 11 additional attorney positions with support staff to handle the projected workload. Without those additional resources, we'll simply be in a situation where we are not meeting our constitutional obligations. There will be a constitutional violation unless we get either the positions or a reduction in cases, essentially. ... When I request attorney positions, I also include the funding for the necessary support for that

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<sup>18</sup> See, e.g., testimony before the Senate Finance Subcommittee, March 19, 2019, <http://www.akleg.gov/basis/Meeting/Detail?Meeting=SADM 2019-03-19 11:15:00>

<sup>19</sup> The former Public Defender assumed 150 felony cases per attorney is the maximum standard caseload.



attorney... So really, what I'm saying by needing 11 attorneys—I ultimately need 22 positions and the associated funding for that.”<sup>20</sup>

**THE PDA'S AVERAGE CASELOAD:  
145-154 CASES**  
**The former Public Defender provided data to the DOA Commissioner that trial attorneys had been assigned an average weighted caseload of 145 cases in FY19 and 154 cases in FY18.**

In response to a request for data to support the former Public Defender's representations regarding attorneys' caseloads, on February 7, 2019, the former Public Defender reported to the DOA Commissioner via e-mail that trial attorneys had been assigned an average unweighted caseload of 121 cases at that time. This came with an attachment showing the current open caseload broken down by case type. The number of open cases (11,899) divided by the number of PDA attorneys (98) at the time equaled 121 cases.

In a February 19, 2019 e-mail to the DOA Commissioner, in response to a list of cases worked by the PDA in FY18, the former Public Defender represented that the PDA worked 22,826 cases in FY18, staffed by 106 attorneys, which is an average of 215 unweighted cases per attorney. In a March 11, 2019 e-mail to the DOA Commissioner, the former Public Defender stated that the PDA's projected weighted average trial caseload for FY19 was 166, and trial attorneys had been assigned 160 cases between March 2018 to March 2019.

Separately, the former Public Defender provided the Commissioner with an end-of-FY18 and end-of-FY19 report, showing that attorneys had a weighted average of 154 cases in FY18, and of 145 cases in FY19.

In analyzing the 23,902 total open cases reported in FY19, we found these included cases conflicted out to OPA, as well as all other cases/case-related actions that do not take the same time or effort as a full felony case, like routine PTRs, cases that were filed but then dismissed by the prosecution, parole violations, misdemeanors, etc. The PDA assigns a lower weight to these cases to reflect that they take less time and effort than full felony cases. Therefore, we found the weighted case numbers were a more accurate representation of the actual caseload PDA attorneys were handling than taking the total number of cases/case-related actions and dividing it by the total number of attorneys.

The figure below shows the different representations the former Public Defender or the PDA has made about PDA's caseload in FY18 and FY19:

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<sup>20</sup> This means the former Public Defender believed there would be 1,650 more felony cases in FY20.

**Figure 5. The PDA’s Representations of Its Caseload in Various Communications**

Communications from the PDA to DOA Commissioner, Legislators, and Others								
	Unweighted Caseload Numbers					Weighted Caseload Numbers		
	Draft Writ	2/7/19 Analysis	2/19/19 E-mail	FY18 PDA Report	FY19 PDA Report	FY18 PDA Report	3/11/19 E-mail	FY19 PDA Report
FY18 represented caseload	278	-	215	243	-	154	-	-
FY19 represented caseload	≈271	121	-	-	244	-	160	145

While it is difficult to determine which caseload number is accurate, we found the range of 145-154 cases between FY18 and FY19 to be accurate because that range of numbers came with data evidence to support them and they represented weighted caseloads. Using that range, the PDA’s caseload falls within constitutional and ethical limits under the NAC standards. Moreover, when examining the caseload standards across 15 states and BJA’s finding that public defenders nation-wide handle a median of more than 200 felony and misdemeanor cases, a mix of 145-154 cases is within the standards and practices of other state public defender offices (see Figure 3 above).

We also found that the PDA should confirm and maintain the integrity of its attorney caseloads by reporting numbers that are consistent. Capturing and reporting consistently accurate data on PDA workloads would strengthen the efficiency and effective management of PDA operations.

*The PDA’s Weighting System is Imprecise*

The former Public Defender said the PDA developed a weighting standard approximately 10 years ago to assign different levels of effort and complexity to different cases and tasks in the agency.<sup>21</sup> He said the system was premised on standards adopted by the American Bar Association (ABA): an attorney should handle no more than 400 misdemeanors or 150 felonies in a given year.<sup>22</sup>

<sup>21</sup> Former Public Defender Quinlan Steiner Memorandum to Deputy Commissioner Dave Donley, Data Metric Reporting Information Request, February 26, 2019.

<sup>22</sup> Interview of Quinlan Steiner, April 1, 2019, minute 23.

BJA compared two methods for developing caseload standards: the Case-Weighting and Delphi methods. BJA noted that of the two, the “time record-based case-weighting method,” is “most reliable.”<sup>23</sup> According to BJA, the case-weighting method uses detailed time records kept by public defender attorneys over a timeframe of typically 7-13 weeks. The time records are used to translate the caseload (the number of cases) to the workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload). Weights can then be given to the total annual caseload of a public defender’s office to compare to next year’s anticipated number of cases.

In contrast to the case-weighting method, the former Public Defender described the PDA’s caseload weighting system as “based loosely” on the Delphi method. The Delphi Method was introduced in 1962 by researchers at the Rand Corporation to gather expert opinion and generate a reliable consensus for determining standards.<sup>24</sup> In determining public defender workloads, it uses a sample of attorneys across the community and gives them a variety of scenarios designed to reflect cases and clients regularly represented in public defenders’ workloads. The attorneys are asked to estimate the time involved in handling the various scenarios.<sup>25</sup> The sample group goes through multiple rounds of evaluating the scenarios until they are refined down to a consensus about the relative time required to complete the tasks associated with each case.<sup>26</sup>

The former Public Defender said the PDA developed its weighted case system by applying a multiplier to each case type to estimate the difficulty and reflect the amount of work, and thus time, the PDA expects it will have to expend on a case of that type. However, the PDA did not use a sample of attorneys across the community to arrive at the consensus; the former Public Defender said the PDA just developed the weights internally by convening a small committee to compare the relative casework against a felony to estimate how much work went into an average case.

According to the former Public Defender, the committee set the weights based on their estimation of the time to disposition of the case versus time to disposition of the cases the PDA kept.<sup>27</sup> So, a weight of “5” means the case takes five times as long to complete as a standard

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<sup>23</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, pp. 8-9 (2001). The PDA noted the timekeeping method reflects what the attorneys have done on cases, but the Delphi method determines what should be done on the cases. However, BJA described the Delphi method as estimating the “time involved in handling the various scenarios,” resulting in “strong educated guesses about the relative time required to complete various tasks”—not a method that determines what should be done on cases.

<sup>24</sup> Norman Dalkey & Olaf Helmer, RM-727, *An Experimental Application of the Delphi Method to the use of Experts 1* (1962), available at [http://www.rand.org/content/dam/rand/pubs/research\\_memoranda/2009/RM727.1.pdf](http://www.rand.org/content/dam/rand/pubs/research_memoranda/2009/RM727.1.pdf).

<sup>25</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, p. 8 (2001).

<sup>26</sup> <https://www.betterevaluation.org/en/evaluation-options/delphitechnique>; Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, p. 9 (2001).

<sup>27</sup> In reviewing this report, the PDA added that it had some lawyers keep time and used those results to inform and adjust estimates and weights, but the former Public Defender did not include this in describing to us the process he used for developing the PDA’s case weighting system.

felony case. Conversely, a weight of “.25” means the case takes 25% as long to complete as a standard felony case.<sup>28</sup>

Because the PDA’s weighting system only approximates the Delphi estimation method, the weights do not compare case level of efforts to similar agencies elsewhere, nor do they generate consensus for the level of effort among a broad professional group.<sup>29</sup> The Delphi method itself only provides estimates that do not fully reflect or explain the effort and cost required to manage caseloads.

In FY20, the PDA gives the following weights (credits towards a “full case”) for these tasks:

**Figure 6. Sample of the PDA’s FY20 Weights for Activities/Cases**

Activity/Case	Weight towards Full Case
A/U Felony	5
Felony	1
Misdemeanor	.375
Juvenile	.75
Child in Need of Aid (CINA)	2.5
Felony or Misdemeanor Merit	10
Conflict to OPA: Unclassified/A Felony	1.25
Conflict to OPA: B/C Felony	.25
Conflict to OPA: CINA	.625
Conflict to OPA: PCR	.5
Transfer to Private Counsel	.25

<sup>28</sup> Interview of Quinlan Steiner, April 1, 2019, at hour 1:20. The former Public Defender also said he consulted a book that he described as “the gold standard” for determining how to develop a weighting methodology for cases O&R made several requests for the book, but he never provided a copy of it or its name.

<sup>29</sup>Because the PDA’s weighting system only approximates the Delphi estimation method, the statistics allow only a rough comparison to similar agencies elsewhere. The Delphi method itself only provides estimates that do not fully reflect or explain the effort and cost required to manage caseloads, or the ability of staff to juggle matters. For example, even within categories of open cases, many individual matters do not require significant attention for long periods of time.

Until around April 2019, the PDA weighted any case it transferred to private counsel as a full point (the same as a felony case). After this review began, the former Public Defender changed the weight for these referrals to “.25.”<sup>30</sup> The PDA explained it transfers cases to private counsel when clients hire private attorneys for the case, ending the public defender’s representation. This can happen at any stage of the case, sometimes long after the case has begun. The PDA periodically evaluates the weight on cases, and it said it discounted the weight of these cases by 75% after comparing their average age-to-disposition against other cases.

The chart below provides the number of cases the PDA counted at full felony case credit that were transferred out to private counsel before their weight was changed to “.25.”

**Figure 7. PDA Cases 2017-2019 Transferred to Private Counsel that Were Counted as Full Case Credit**

Calendar Year	Number of Cases Transferred to Private Counsel
2017	267
2018	257
2019 (Jan-Mar)	77
<b>TOTAL</b>	<b>601</b>

With respect to weighting cases referred to OPA and counting them towards the PDA’s caseload, the former Public Defender explained there is a substantial amount of work that goes into determining whether there is a case conflict. It takes attorney and support staff time to look at all the materials, determine who the PDA has represented before, and assess whether the PDA has adversity/a conflict with a person and which person it can keep without conflict. Some weight is appropriate because the PDA works on the cases until they conflict out. The PDA makes every effort to keep a case rather than refer it over to OPA because of a conflict.

The PDA also noted that in cases where no conflict is identified at the outset of the case, but much later due to new discovery, and the information contained within, PDA attorneys must treat these cases like any other case. Their representation in these cases involves client meetings, court appearances, discovery review, investigation, and may involve motion work, evidentiary hearings, and trial preparation.

However, conflict review for B and C felonies does not uniformly take 25% of the case time. Sometimes it takes significantly more time, and sometimes it takes less. The same is true for all of the PDA’s conflict weights, which is why they are intended to represent the average time of

<sup>30</sup> Interview with Quinlan Steiner, April 1, 2019, hour 1:08.

## WEIGHTING CASES CONFLICTED TO OPA

For Unclassified and A felony cases conflicted out to OPA, the PDA's system assumes the conflict review process will take 25% of the total time that will be spent on the case, whether a conflict in the case is complex or easy to determine. Since Unclassified and A felony cases are weighted at 5 points, when cases are conflicted to OPA, the PDA discounts them 75% and weights them at 1.25 of a B/C felony.

Take the notorious Thunderbird Falls homicide case involving 6 co-defendants, 5 of whom are represented by the PDA and OPA at the time of this report. The PDA represents 1 defendant and conflicted out of representing the other 4 as co-defendants, sending them to OPA at the start of the case. The PDA's weighted system adds 5 B/C felony "cases" to the PDA's numbers for referring 4 Thunderbird Falls co-defendants to OPA (1.25% credit x 4 defendants = 5 felony cases under the weighted system).

When presenting caseloads to the Governor and Legislature, OPA would represent its Thunderbird Falls caseload as 4 cases. If the PDA were to use the same definition as OPA, it would represent its Thunderbird Falls caseload as 1 case. But the PDA often uses a weighted caseload in its reporting. In that scenario, it would represent its Thunderbird Falls weighted caseload as 10 cases: 5 points for its case, and 5 points for the cases referred to OPA.

disposition for the case compared to a felony case defended by the PDA. For example, the PDA does not assign any weight to felony appeals sent to OPA (in FY19 it sent 3 felony appeals to OPA). The PDA assigns 1.25 weight for Unclassified and A felonies; these crimes are weighted as "5" when kept within the PDA, so the PDA discounts them 75% when referring them to OPA. The PDA's weighting system is intended to be tied to the average age of disposition for the case.

OPA Director James Stinson told us that some PDA cases are conflicted out with very little review (co-defendants in a felony charge), while other PDA cases are referred over to OPA because of a conflict 1-3 years into a case. Sometimes conflicts are not revealed until later when witnesses who create the conflict are identified. Late discovery of a conflict can cause case delays, which can add considerable expense on both the defense and the prosecutorial side. The bigger the case (for example, a murder case with multiple defendants and many witnesses), the bigger potential for discovering conflicts.

That is why, in contrast to the PDA, OPA does not use a case weighting system; OPA's Director James Stinson believes it is difficult to assign a standard amount of work for any given case type. For example, Mr. Stinson pointed out that the PDA's reasoning for giving a 25% credit to cases that are transferred to OPA is that sometimes *some* or *substantial* work can be done before it goes to OPA. While that could be true in certain instances, in other cases, little to no work is done by the PDA before it is transferred to OPA. In either case, the PDA gets 25% credit for the case.



Instead, OPA gets accurate individual case counts from attorneys to confirm whether a specific attorney, or unit, is overburdened. According to Mr. Stinson, this is a more intensive method, but it is more accurate and also necessary to maintain OPA's "conflict walls."

As currently applied, the PDA's weighting system reports its workload statistics in a way that makes them difficult to use for effective budgeting and workload analysis purposes. It is hard to tell whether the PDA overweighted cases; it is equally hard to tell whether the PDA underweighted some cases. Since PDA and OPA both represent indigent clients in criminal defense cases, both report to the same Commissioner and same legislative finance committees, both are funded from the same source, and since both report their caseload numbers differently, this further contributes to the difficulty in using PDA's workload numbers in a way that's effective for budgeting purposes.

#### *The PDA Counted Some Cases by Counting Them as One Case Before Judgment and Another Case After Judgment*

An indigent criminal defendant is assigned a public defender attorney before trial. Rule 81(e)(1) of the Rules of Civil Procedure states that an "attorney who has appeared for a party in an action or proceeding may be permitted to withdraw as counsel for such party only as follows:<sup>31</sup>

- a) Where the party has other counsel ready to be substituted for the attorney who wishes to withdraw;
- b) Where the party expressly consents in open court or in writing to the withdrawal of the party's attorney...;
- c) Where the party's consent has not been obtained, the court may grant a motion to withdraw for good cause...; and
- d) In accordance with the limitations set forth in any limited entry of appearance filed pursuant to Civil Rule 81(d)...

Rule 81(e)(2) then states, "an attorney shall be considered to have properly withdrawn as counsel for a party in an action or proceeding in which a period of one year has elapsed since the filing of any paper or the issuance of any process in the action or proceeding..." (emphasis added).

In sum, under the rules, a public defender attorney can only withdraw from representing a client if s/he shows "good cause" or the client consents to the substitute in open court.

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<sup>31</sup> Rule 50 of the Rules of Criminal Procedure states that: "...The Rules of Civil Procedure relating to the withdrawal of an attorney for the party shall apply with equal force with respect to any attorney retained to represent the accused in criminal actions."

Otherwise, the attorney functionally represents the client for 1 year after the final judgment has been entered and the time for filing an appeal has expired, or an appeal has been taken.

However, one Anchorage area judge, who asked to have his/her identity remain confidential, informed us that around 2006, the former Public Defender, Mr. Steiner, sought and received permission from a judge in Alaska's Third Judicial District (the Anchorage area) to have representation of PDA clients terminate upon issuance of the judgment. If the client needed assistance with any issues related to the case post-judgment (restitution proceedings, etc.), the client was told the court could appoint a public defender again for the rest of the case. The judge explained that this practice of having the PDA end representation upon judgment and then have another attorney appointed post-judgment would result in having only one case, but two PDA appointments. In these cases, the case appeared as one case in the ACS system but as two cases in PDA records.

The judge also told us it was not clear whether the PDA had this exception in all four Judicial Districts, or if it was observed in all courthouses in the Districts. For example, the judge told us that by April 2008, the Palmer court refused to let the PDA terminate representation upon issuance of judgment; the PDA attorneys had to represent their clients for 1 year after the final judgment had been entered.

The judge also said some of the Anchorage-area judges and the court clerks thought it was wrong for the PDA to withdraw from representing clients without their consent. The judge indicated this practice was controversial because:

- 1) It created more work for the courts by making them go through the appointment process and indigency determination again;
- 2) Mr. Steiner was "campaigning for this venue by venue" (i.e., with each courthouse); and
- 3) "It was clear to many that this was being done to increase the statistics concerning the [PDA's] caseload so that their funding would be increased."

According to the judge, "if the Legislature gives the PDA funding based on its caseload, then this practice would have 'statistically' increased the caseload, even though there had been no actual increase in the caseload."

O&R reviewed a letter drafted by former Palmer Superior Court judge Eric Smith to former Public Defender Quinlan Steiner that corroborated the notion that judges did not support the PDA withdrawing from representation before 1 year. The letter said, in part:

The judges believed that the appointment remains for one year after the case is closed pursuant to Civil Rule 8 (*sic*) unless a motion to withdraw is granted, there being no different Criminal Rule. When it became clear you, as head Public Defender, and we, the judges here in Palmer, would not be able to agree on the legal merits, we decided to go ahead and treat the appointment as having ended when the cases is closed anyway, even though we did not think we should.

In an interview with O&R, the former Public Defender confirmed that the practice of counting some cases as one case before judgment as and as a second case after judgment occurs at the discretion of judges. He said generally that the public defenders close cases subsequent to the disposition of trial once they receive a judgment or order. He said the PDA started this practice of closing the files right away to reduce the conflicts—as long as a file stays open, the risk of conflict is higher.<sup>32</sup> He also said follow-up motions and post-trial relief motions generally are handled as the same case, *unless the PDA receives a new appointment from the court*, then the PDA will open it as a new case.<sup>33</sup> He also stated that PTRs and parole violations are opened as separate cases (which is different from how these actions are handled in OPA).<sup>34</sup>

The former Public Defender also indicated that PDA attorneys do not consistently observe the same practices in closing a case, when they treat the case as a same case or close it and start a new case, or how long they keep it open to continue assisting a client. We found that this, too, will lead to inconsistencies and inaccuracies in PDA case reporting data.

When we asked the PDA about this practice of closing the case at judgment, the PDA also explained that because closed criminal cases are “secured,” this means that they are less likely to create a conflict in a new case. If, however, the PDA remains in cases for a year after they close, then some portion of those clients will become involved in other clients’ cases, creating conflicts.

#### *The PDA’s Case Numbers Do Not Match OPA’s or ACS’s*

The former Public Defender reported opening 23,902 cases in FY19. However, the number of cases between the agencies do not match – such as the number of cases received from the PDA by OPA because of conflicts and the number of cases the court system assigned to the PDA.

The PDA did not have the same number as ACS for the number of PDA cases. That may be in part because of the practice of the PDA counting cases by representation post-judgment (two representations) (described above).

#### COUNTING CASES THE ALASKA COURTS AND OPA DO NOT COUNT

Between FY17-FY19, the PDA reported 16,080 PTR and parole revocations as cases that neither OPA nor ACS would have counted as separate cases. Instead, OPA and ACS would treat these actions as part of other ongoing cases.

It also may be because of another way that the PDA counts cases. According to the PDA, it counts all “petitions to revoke probation” (PTR) as new cases,<sup>35</sup> even though they are handled

<sup>32</sup> Interview with Quinlan Steiner, April 1, 2019, hour 1:10.

<sup>33</sup> *Id.* at 30.

<sup>34</sup> *Id.* The PDA only counts PTRs and parole matters as new cases; other routine post-judgment motions are not handled as additional cases.

<sup>35</sup> Interview with Quinlan Steiner, April 1, 2019, minute 30.

within the same case, given the same case number, and treated as the same case by ACS.<sup>36</sup> Between FY17-FY19, the PDA reported 14,203 PTRs as new cases. OPA and ACS would have counted these PTR cases as part of ongoing cases, not as new cases. The PDA also counts all parole violations as new cases,<sup>37</sup> but OPA does not. OPA opens PTRs and parole violations as a separate matter in its case management system to track the activity, but if it is related to an ongoing case, then OPA reports it all as one case to the Legislature, Office of Management and Budget (OMB), etc. OPA said it does not count PTRs as cases because PTRs have a lower standard of proof in court, require less trial preparation, and involve less evidence.<sup>38</sup>

The table below captures all of the cases between FY17-FY19 that the PDA counted as new cases that would have been counted as part of the original, underlying case by ACS or OPA.

**Figure 8. FY17-FY19 Cases the PDA Counted as New Cases that Would Have Been Counted as Part of the Original Case by ACS or OPA**

PDA Activity	FY17	FY18	FY19
Felony PTR	3930	3444	2843
Misdemeanor PTR	1673	1118	800
Juvenile PTR	106	121	170
Parole Revocation	568	836	471
<b>TOTAL</b>	<b>6,277</b>	<b>5,519</b>	<b>4,284</b>

Adding together all actions from FY17-FY19, the PDA counted a combined 16,080 cases that neither ACS nor OPA would have counted as separate cases.

When the PDA was asked why it treats parole and PTR revocations as separate cases, the PDA explained that although they may share case numbers with the trial cases, these violations are based on alternate fact patterns and rarely have substantive relation to the conduct alleged in the original case; they can occur immediately after the conclusion of a case, but can also occur years after a trial case is concluded and prison term served; and they can include appointment to cases where the PDA did not handle the underlying trial case.

In an interview with a former PDA attorney, he told us PTRs take a short time to complete—they are a quick hearing with little preparation time, and 90% of them take less than 75 minutes of total work. The Director of OPA, Mr. Stinson, also said PTRs were very little work and never

<sup>36</sup> ACS tracks PTRs in its annual report under superior court activity.

<sup>37</sup> Interview with Quinlan Steiner, April 1, 2019, minute 30.

<sup>38</sup> See, e.g., *McDaniels v. State*, A-12614: neither the Alaska Rules of Evidence nor the Confrontation Clause apply to probation revocation proceedings, but due process does.

amounted to one quarter the time of a B/C felony case. In our analysis of actual time the PDA attorneys spent on 97 PTRs started and completed during the time of this review, the average length of time spent on a PTR was 68 minutes.<sup>39</sup> The PDA told us it tracks PTRs separately because it makes a statistical impact on attorneys' workloads; they estimate PDA criminal attorneys have 25-30 felony PTRs to handle.<sup>40</sup>

The PDA also did not have the same number as OPA for the number of cases the PDA conflicted over to OPA for OPA representation. O&R gathered FY19 data on cases that were sent from the PDA over to OPA for representation. As illustrated in the graph below, there is a difference between what OPA reports was received from the PDA and what the PDA reports was sent to OPA.

**Figure 9. Difference in FY19 Case Counts of PDA Referrals to OPA**

Case Type	PDA-Reported Number of Cases Transferred	OPA-Reported Number of Cases Received	Difference
A Felony	86	98	12
B Felony	389	393	4
C Felony	912	868	44
Unclassified	68	77	9
Misdemeanors	1844	2019	175

After examining and resolving each case discrepancy with the PDA and OPA, O&R found the difference between the PDA's and OPA's case count numbers were attributed to the following reasons:<sup>41</sup>

- 1) Closing codes at the PDA may account for some cases being closed as a conflict when they really were just closed at the PDA and not sent to OPA;
- 2) Cases closed or opened around the beginning and end of a fiscal year were not accurately captured because the PDA could close a case before July 1, but OPA opens the case after or on July 1, or the PDA closes it after the new FY year although it was sent over to OPA during the prior fiscal year; or

<sup>39</sup> We will complete the analysis of all PTRs worked on by attorneys during the time study and submit the results in a supplemental report.

<sup>40</sup> Under previous criminal laws, technical PTRs were disposed under caps of 3 days for a 1<sup>st</sup> violation, 5 days for a 2<sup>nd</sup> violation and 10 days for a 3<sup>rd</sup> violation. The new criminal reform law, HB 49, did away with these caps. A defendant can now have all suspended time imposed for a first technical violation. For PDA attorneys, this means more litigation will ensue, including more bail hearings and more procedural hearings.

<sup>41</sup> It should be noted, O&R did not track every discrepancy in the numbers, but an internal review of the tracking systems between the PDA and OPA should be conducted to make improvements.

- 3) Cases leaving the PDA classified at a lower level, but then being indicted at a higher level when they are in OPA.

The NAC has defined a case as “a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding.” The BJA has noted that:

Whereas it is important for the indigent defense system (including public defenders, court-appointed attorneys, and contract defenders) in a given jurisdiction to count cases using a uniform definition, it is optimal when the courts and prosecution in the jurisdiction also use the same definition. This affords the greatest opportunity to develop and approve budget requests for the adjudication component of the criminal justice system accordingly on a systematic and balanced basis.<sup>42</sup>

*Using Caseloads to Develop Budget Requests*

The former Public Defender made annual requests for additional resources from the Legislature to address the PDA’s workload. For example, in FY19, the former Public Defender requested from the Senate Finance Subcommittee for DOA an additional 11 attorneys and 11 support staff positions in FY20 to handle the PDA’s expected caseload.<sup>43</sup> The chart below shows how many attorneys for which the PDA received funding in its budget by Fiscal Year, according to the OMB budget reports:

**Figure 10. Number of Attorneys for which the PDA Received Funding**

Fiscal Year	Number of Attorneys
FY 2018	102
FY 2019	106
FY 2020	110

In FY18, the PDA received a total budget of \$26,433,100, including supplementals. In FY19, the PDA received a total budget of \$27,222,800, including supplementals. In FY20, the PDA has received a total budget of \$28,387,000 (5.2% increase over FY19 budget). In July 2019 (FY20), the Governor signed HB49, which included an additional \$1.3 million for PDA (4.8% increase). In 2 fiscal years, the PDA has received \$3,253,900 in additional appropriations, most of which was funded under Governor Dunleavy.

<sup>42</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, p. 4 (2001).

<sup>43</sup> Testimony before the Senate Finance Subcommittee, March 19, 2019, <http://www.akleg.gov/basis/Meeting/Detail?Meeting=SADM 2019-03-19 11:15:00>



## The PDA's Referrals of Conflict Cases to OPA Has Significantly Increased

According to the PDA Conflicts of Interest Policy, issued April 2012, Alaska Rule of Professional Conduct 1.7 prohibits the PDA from representing a client if:

- 1) The representation of one client will be directly adverse to another client, or
- 2) There is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

**In 2 fiscal years, the PDA has received \$3,253,900 in additional appropriations, most of which was funded under Governor Dunleavy.**

Determining whether the PDA can represent a client generally requires a case-by-case analysis. Nevertheless, the PDA does not concurrently represent two clients in the following circumstances due to the inherent adversity:

- 1) Co-defendants.
- 2) A client and the informant who provided information against the client.
- 3) A client and a witness in the client's case who is asserting a Fifth Amendment claim.
- 4) A client and a potential witness in the client's case if the client and potential witness have adverse interests.
- 5) A client who proposes to provide information to the state and a person implicated by that information.

Alaska Rule of Professional Conduct 1.9 prohibits the PDA from representing a client:

- 1) In the same or substantially related matter as a former client if the current client's interests are materially adverse to the former client's unless the former client provides informed consent in writing, or
- 2) If representing the client would require the attorney to:
  - a. Use confidences or secrets to the disadvantage of a former client except as the RPC would permit or require, or when the information has become generally known.
  - b. Reveal confidences and secrets except as the RPC would permit or require.

Determining whether the PDA can represent a client generally requires a case-by-case analysis.

According to PDA, its conflict rate has noticeably increased in the past 3 years, from 2,813 cases in FY17 to 4,224 cases in FY19.

Based on a review of memos supporting sending 3,528 cases to OPA in FY18 for conflicts, the PDA found that approximately 50% of its criminal cases are conflicted out due to past and present CINA cases, juvenile cases, and mental commitment cases.<sup>44</sup> While the overall conflict

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<sup>44</sup> Memorandum from Acting Public Defender Beth Goldstein to DOA Commissioner Kelly Tshibaka, August 15, 2019.

rate has reached a high of 18%, the felony criminal rate has almost doubled in the last 9-10 years to 25%.<sup>45</sup>

For FY19, ACS appointed PDA counsel to approximately 80% of Alaska felony cases. Of those cases, the PDA determined that 4,224 (25%) had conflicts. By way of contrast, the Colorado State Public Defender averaged only a 7% conflict withdrawal rate from FY11 until FY18.<sup>46</sup>

Once a conflict is discovered, the PDA transfers the case to OPA which must conduct its own conflict review. If OPA cannot handle the case due to conflict or because it does not have the resources to handle it, the case must be transferred to private counsel and the State has to pay for the associated costs. OPA generally finds private counsel to be more expensive than agency counsel. Because OPA is a small agency that can be overwhelmed by an unexpected number of conflicts or from particularly large conflict cases, OPA has at times had to seek supplemental appropriations to the work of its private contract counsel. In FY19, OPA received a supplemental of \$900,000 to cover the costs of cases it contracted out as a result of the conflicts the PDA sent it.

The upward conflict trend within the PDA is concerning, considering the amount of cases being referred to OPA. The PDA continues to send cases to OPA because, according to the former Public Defender, “OPA was set up to handle all that. OPA is really the place for all that.”<sup>47</sup> However, the Director of OPA stated that OPA is not designed to receive such a large caseload of criminal defense work. To handle the increasing influx of PDA cases, OPA will be required to contract out more cases than they already do.

**Between the Thunderbird Falls and Grunwald homicide cases, OPA represents 9 of the 10 defendants. If the PDA cannot find ways to substantially reduce the conflict rate and keep more cases in-house, it risks undermining its core mission.**

The rise in conflicts also jeopardizes the PDA’s role as the primary defense agency in the State of Alaska. The more cases the PDA *can’t* do, the more cases OPA and contract attorneys *will* do. Alaska has a non-growing population; only a subset of those people will encounter the criminal justice system, and even a smaller portion interact with the PDA. As the PDA is conflicted out of more and more cases, OPA and others will start to take the place as the primary defense provider.

Take, for example, the Thunderbird Falls homicide case. Five of the defendants are receiving defense representation from the State; 1 from the PDA and 4 from OPA. Where the PDA is able to represent 1 defendant, OPA can represent 4. Similarly, in the Grunwald homicide case, the

<sup>45</sup> *Id.*

<sup>46</sup> Colorado State Public Defender FY18 Budget Request.

<sup>47</sup> O&R Interview of former Public Defender Quinlan Steiner and Public Advocate James Stinson, April 1, 2019. Minute 47.

PDA was unable to represent any of the 5 defendants; all of them were conflicted over to OPA. Because of the multiple layers of conflict OPA had in representing all co-defendants, OPA had to hire expensive contractors to defend some defendants in this case.

If the PDA cannot find ways to substantially reduce the conflict rate and keep more cases in-house, it risks undermining its core mission. As OPA takes on more and more cases, it will foreseeably become the primary criminal indigent defense service agency for the State of Alaska. Already, OPA is handling a disproportionate amount of the most serious homicide cases in the State of Alaska. Just by virtue of taking on fewer cases, the PDA will become the putative overflow agency.

### *Reasons for the Growth in Conflict Rate*

The growth in conflict rate appears to be attributable to several factors:

- Improper conflict analysis at the PDA. During this review, the PDA evaluated memos supporting sending 3,528 cases to OPA in FY18 for conflicts and found some improper conflict analysis within the PDA that has caused some cases to be sent to OPA.<sup>48</sup> In his interview with O&R, the former Public Defender also said he had initiated a review of conflicts after this review began, and he found the PDA had conflicted out of too many cases.<sup>49</sup> The PDA has put measures in place over the last 5 months to improve conflict review. Conflicts for “A” felonies and “Unclassified” felonies are now reviewed by both the supervisor of the attorney assigned to the case and one of the Deputy Directors. Conflicts for “B” and “C” felonies are also randomly reviewed by the Deputy Directors.
- Lack of Siloes within the PDA. The PDA operates as one completely integrated agency, overseen by the Public Defender. None of its geographic offices or practice areas are “siloes off” from any others. While this integrated structure is not required by Alaska’s Public Defender Act, the former Public Defender explained he believed the PDA had to operate this way because, “we maintain oversight of the entire production of defense services...state-wide.”<sup>50</sup> He also stated in his interview that with siloes in the PDA, defendants would get compromised service.<sup>51</sup> However, this would mean that any defendants conflicted over to OPA would be receiving “compromised” defense service because OPA is siloes (defendants represented by OPA are not receiving compromised defense service). As a result of the PDA’s “un-siloes” structure, whenever any attorney in the PDA has represented someone, that client’s interests, and therefore conflicts, are imputed to all the attorneys in the rest of the agency, from Ketchikan to Utqiagvik, from Mental Commitments to Felonies.

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<sup>48</sup> Memorandum from Acting Public Defender Beth Goldstein to DOA Commissioner Kelly Tshibaka, August 15, 2019.

<sup>49</sup> Interview with Quinlan Steiner, April 1, 2019, minute 34-35.

<sup>50</sup> *Id.* at minute 45.

<sup>51</sup> *Id.* at 47.

- Conflicting Out of Post-Conviction Relief (PCR) Cases. In a PCR case, the client asserts that his/her PDA attorney provided ineffective assistance of counsel. Because the PDA is structured as one whole agency, a PCR filed against one attorney is usually imputed to the entire agency. Since it is a conflict of interest for an attorney to pursue an ineffective assistance of counsel case against themselves, it often is not possible for another PDA attorney to represent the client in a PCR case against the first PDA attorney. The PDA currently conflicts out of more than 50% of all PCR cases, hitting as high as 75% in FY16.
- Limited Population. As the number of new people relocating to the state reduces and the population becomes smaller or stagnant, more of the same people touch the criminal justice system in a myriad of ways. For instance, a parent in a current CINA case may now be the victim in a completely unrelated theft case assigned to the PDA. These instances may involve privileged or confidential information that the PDA holds, which would create a legitimate conflict under the Alaska Rules of Professional Conduct, preventing the PDA from remaining in the case. Without a large influx of population into the state, and the continued reduction or stagnation in the population, it is expected that the conflict rate for the PDA will continue to rise.
- 2-Parent CINA Cases. Any CINA case involving 2 parents will result in a conflict for the PDA, sending one parent over to OPA for representation. However, the PDA does not count these dual-appointment CINA cases in the PDA's weighting system when they conflict them over to OPA. The PDA represented 811 CINA cases in FY17; 732 CINA cases in FY18; and 806 CINA cases in FY19.
- CINA Case Conflicts. After the PDA represents one parent in a CINA case, a conflict may develop during the life of the case. In some cases, the PDA identifies the conflict early, but in other cases, the PDA spends significant resources before a conflict is identified due to new investigation or discovery produced later in a case, which is out of the PDA's control. In this scenario, conflicts are counted at 25% when they are referred to OPA.<sup>52</sup> Since CINA cases are weighted at 2.5 in PDA's system, when they are counted at 25%, the PDA's weighting system credits them at .625 of a felony case. There has been a 25% increase in CINA conflicts sent to OPA between FY17 and FY19.

It was the legislative intent in creating the PDA that it would be the primary indigent defense agency in the state. However, climbing conflict rates threaten to jeopardize that role for the PDA. The table below shows the number of conflict cases from the PDA to OPA from FY17-FY19:

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<sup>52</sup> In FY19, on average the PDA had CINA cases for 36% of the time of a full case's average days of disposition before they conflicted from them.

**Figure 11. Number of Conflict Cases the PDA Sent to OPA**

Year	# of Cases	# Conflicted to OPA	%
FY 17	21478	2813	13.1%
FY 18	22823	3548	15.5%
FY 19	23902	4224	17.6%

When we discussed the conflict rate with the former Public Defender, he said, “We’re taking steps to try to figure out...if we’ve been making mistakes in our conflict decisions. We’ve determined our documentation is insufficient to determine whether or not we’ve been making mistakes... I think the rate’s higher than it should be. ...I think the overall rate should be much lower...for properly done conflicts.”<sup>53</sup> The PDA’s intent is to bring its overall conflict rate down to 15%, thereby reducing by 10% its overall conflict rate for all cases.

In an effort to drive down the number of cases transferred to OPA and thus potentially to private counsel, the former Public Defender reported that the PDA recently convened a group of experienced public defenders to dig deeply into potential conflict cases to determine the likelihood that a conflict would really arise. This experienced group decided that conflicts were unlikely to derail many of the cases initially flagged for conflicts, and thus those cases could in fact be retained by the PDA. Establishing this type of deep review process as a regular business practice within the PDA may reduce the number of cases transferred to OPA and private counsel.

**It was the legislative intent in creating the PDA that it would be the primary indigent defense agency in the state. However, climbing conflict rates threaten to jeopardize that role for the PDA.**

The PDA further explained that there is no way to create a felony-specific conflict reduction plan. Conflicts are fact-specific and based on the percentage of conflicts compared to the number of case openings at the PDA. Conflicts are primarily caused by concurrent representation of clients (i.e., adverse clients), which the PDA cannot control. In these instances, the PDA strives to keep the most serious case requiring the greatest resources.

To the extent conflicts are caused by confidential information possessed by the PDA on current or former clients, the PDA cannot control when it possesses or the reason it possesses such confidential information. It can try to avoid conflicts of interest due to confidential information in its possession by modifying certain records retention and maintenance policies.

<sup>53</sup> Interview with Quinlan Steiner, April 1, 2019, minute 35.

The PDA said that it can and will strive to reduce the percentage of cases it conflicts to OPA through trainings and the methods by which it analyzes potential conflicts of interest. The PDA anticipates these tactics will reduce the margin of error and conflict rate time period. The PDA also said it will implement a better tracking system to identify the specific cause of each conflict of interest for cases it conflicts to OPA.

### **Silos Are a Potential Solution for Reducing Conflicts Sent to OPA**

DOA's Administrative Services Director (ASD) for approximately 9 years informed us that OPA once faced significant budget overruns; it regularly overspent on contractors, travel, and commodities and had to cover that spending by pulling from personal services (foregoing hiring) or getting supplemental appropriations. She said OPA substantially reduced its costs when it created silos within the agency to handle cases. This reduced the amount of money it had to spend on contractors.

OPA handles the same kind of cases as the PDA. In overseeing criminal defense cases, the Public Advocate (Director of OPA) functions parallel to the Public Defender. We examined the possibility of creating silos within the PDA to reduce conflicts sent to OPA, reduce expenses for OPA and the PDA, and improve the long-term effectiveness of the PDA.

#### *Creating Geographic Silos Between PDA Offices Would Not Be Efficient for PDA Operations or Effectively Reduce Conflicts*

We found that creating siloes between all 13 geographic PDA offices, like there are silos between OPA offices, would not provide significant cost savings for the PDA. Instead, the costs associated with the need for additional space, additional travel, moving, lack of centralized training, lack of centralized coverage capability, and lack of centralized support services would ultimately cost the state more than it would potentially save, and it would diminish the PDA's overall quality of representation.

For instance, it would cost the state more for the PDA to conflict out of a case in its Fairbanks office and re-assign it to its Anchorage office (with mechanisms in place to prevent a conflict) than it would be to send the case over to OPA. Here's why:

- Travel costs associated with attorneys and investigators would be increased because the Anchorage attorney and investigator would need to travel to Fairbanks for hearings, investigation, to meet with the client, meet with witnesses and co-counsel, etc.
- The Anchorage attorney also has no home office during trial because it would be a conflict for the PDA Fairbanks office space to be used. If there are lengthy trials, the PDA would be required to spend significant amounts on lodging for the Anchorage attorney and staff needed for the trial, as well as for putting the attorney/staff up over weekends or bringing them home if it is a 4-6 week+ trial.
- OPA has two offices in Fairbanks and sending the conflict case to one of those two offices would be much more cost effective and efficient.



Creating siloes between geographic PDA offices also creates challenges for effective training. The PDA has historically been a training ground for new lawyers and can do so because of both its size and ability to centrally train its lawyers. Hiring new lawyers allows the PDA to hire lower paid attorneys and then promote from within for retention. Good training not only saves the state money in retention dollars, but also in resolving cases appropriately and effectively so the state is not retrying overturned cases due to ineffective assistance of counsel.

Siloed geographic units would also preclude the PDA's current use of centralized coverage and support staffing, which is much more efficient and cost effective than the operation of siloed units. For example, the PDA currently experiences about an 8.5% vacancy rate and has multiple vacancies in rural areas. The ability to have attorneys from any geographical office handle large numbers of cases to cover these vacancies is only possible because the PDA is not geographically siloed. For OPA, on the other hand, it is very difficult to have one office cover for another for a vacancy because the offices are already handling conflict cases from each other by design. At best, OPA can manage some piecemeal coverage, but it cannot efficiently handle large amounts of cases or long vacancies with its siloed offices.

The PDA's central support staff also provide back up to handle staff shortage needs around the state. For instance, an investigator in Palmer can step in and help handle cases for Bethel or Anchorage because of the centralized nature of the agency. That could not happen if the offices were siloed because the Palmer office would be handling conflict cases from Anchorage or Bethel and therefore would be ethically prohibited from stepping in to help those offices, even on unrelated cases.

#### *Creating a Separate PDA Unit in Anchorage for Certain Cases Would Be Efficient and Effective for PDA Operations*

During this review, the PDA analyzed memos supporting sending 3,528 cases to OPA in FY18. In that analysis, the PDA found that "approximately 50% of the PDA criminal cases are conflicted out of due to past and present CINA cases, juvenile cases, and mental commitment cases. Additionally, the PDA currently conflicts out of approximately 50+% of all PCR cases, hitting a high of over a 70% conflict rate."<sup>54</sup>

Based upon that analysis, creating a separate Anchorage unit within the PDA that is walled off from the rest of the PDA (like the OPA model) that can handle Anchorage CINA, Anchorage Juvenile and Anchorage commitment cases (these are cases typically from all jurisdictions except Fairbanks and Ketchikan/Juneau) could significantly reduce conflicts sent to OPA. In addition, because of the high conflict rate for PCR cases due to the nature described above, it is proposed that this separate unit also house PCRs so that all PCRs statewide could be handled out of this unit. This would not need to be the only unit that handles CINA, Juvenile, and

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<sup>54</sup> Memorandum from Acting Public Defender Beth Goldstein to DOA Commissioner Kelly Tshibaka, August 15, 2019. If the memo explaining why the case was conflicted out gave multiple reasons for the conflict and any were current criminal matters, then the PDA did not count them as conflicted for CINA, juvenile, or commitment cases.



commitment cases; it could just be another option for handling cases rather than conflicting them out to OPA or to contract attorneys.

The Public Defender could oversee this unit, just as the Public Advocate oversees all the sections of OPA without there being an inherent conflict. However, the attorneys in this new Anchorage unit would be walled off from the other PDA attorneys in order to reduce the number of conflicts sent to OPA.

If this separate unit existed, CINA and Juvenile cases would be less likely to present a conflict for criminal cases. It is the knowledge of the existence of these statutorily confidential cases themselves, as well as confidential and privileged information received in those current cases, that serve as a basis for conflict with the criminal cases. This unit would alleviate the conflicts associated with representing current clients with adversarial interests between these cases and current criminal cases. The inclusion of the mental commitment cases in this unit should also reduce the number of conflicts related to the knowledge of confidential information associated with the commitment filing of individuals, such as witnesses in criminal cases.

The inclusion of PCRs in this unit would further reduce the PCR conflict rate. The PDA trial and appellate cases in which a PCR has been filed and where the trial/appellate attorney is a current PDA employee, would no longer be a conflict for the PDA to handle. Sending the PCR to this new unit would be the equivalent of sending it to OPA.

Current OPA data shows that OPA had to contract out more than 87% of its PCR cases in FY18 and more than 84% of its PCR cases in FY19. Pursuant to the caps on amounts of money OPA is allowed to pay for each case it contracts, each felony PCR is currently paid at \$5,000, unless the case cap is waived by the Director.<sup>55</sup> It is anticipated that with a separate PDA Anchorage unit, the PCR conflict rate could be cut 50-75%. At OPA's rate of contracting PCRs to contractors, the following savings, just for attorney time, could have been realized if the conflict rates had been reduced 50-75% by having a walled off Anchorage unit in place in the PDA to handle PCR cases.

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<sup>55</sup> OPA case cap rates are as follows: Unclassified \$16,250; A \$6875; B \$3750; C \$3125. Because of the significant time and work that must go into Unclassified and A felonies, OPA has moved away from the hourly/case cap model on these contracted cases and moved towards a flat fee per case model, which is typically above the cap because contractors were refusing to take the cases. OPA has been working to keep Unclassified and A felonies in-house and contract out more of the lower level B and C felonies over the last year.

**Figure 12. Estimated Savings in FY15-FY19 if the PDA Had a Siloed Anchorage Unit for Handling PCR Conflicts, Anticipating a 50-75% Possible Reduction in PCR Conflicts**

Year	50% Cut Conflict Rate Savings	75% Cut Conflict Rate Savings
FY 15*	If only 22 instead of 45 went and 17 were contracted out: \$85,000 instead of \$180,00 = \$95,000 savings	If only 12 went and 10 were contracted out: \$50,000 instead of \$180,000= \$130,000 savings
FY 16*	If 38 instead of 76 went: \$150,000 instead of \$305,000= \$155,000 savings	If 19 instead of 76 went: \$75,000 instead of \$305,000= \$230,000 savings
FY 17	If 35 instead of 69 went: \$140,000 instead of \$275,000 = \$131,000 savings	If 17 instead of 69 went: \$70,000 instead of \$275,000= \$205,000 savings
FY 18	If 23 instead of 46 went: \$100,000 instead of \$200,000= \$100,000 savings	If 12 instead of 46 went: \$55,000 instead of \$200,000= \$145,000 savings
FY 19	If 19 instead of 38 went: \$80,000 instead of \$160,000= \$80,000 savings	If 9 instead of 38 went: \$40,000 instead of \$160,000= \$120,000 savings

\*FY15 and FY16 and FY17 are calculated at a conservative 80% rate of contract, since the OPA actual rates are not known. FY18 and FY19 are calculated at the actual contract % rates known.

The savings listed above related to reducing the PCR conflict rate would ultimately reduce OPA’s contract expenditures. An additional attorney may be needed at the PDA to handle the additional caseload experienced in the new Anchorage unit; however, the ultimate savings long-term could be seen by reducing this conflict rate in conjunction with the overall felony conflict rate. OPA’s in-house attorneys can handle significantly more cases at a lower rate than contracting out the cases. Additionally, the PCR cap of \$5,000 has not been increased in decades, and it will likely be increased going forward, leading to additional savings downstream at OPA. All these factors, combined, mean that reducing the conflict rate will lead to substantial savings within OPA.

We interviewed an attorney who has worked both in OPA, where silos function well, and the PDA, where there are no silos. He supported implementing silos within the PDA:

*We often see co-defendant cases coming in where the PDA will have one and OPA will have the remainder, spread across their various sections. If the Anchorage PDA was divided into multiple sections, they would be more adept at dealing with this common scenario. Further, this would increase our ability to keep cases in-house, reducing the need for expensive contract attorneys.*

Neither the current nor former Public Defender support creating a walled off unit within the PDA for the following reasons:

- **The PDA:** The Public Defender Act does not allow the PDA to have silos because it is set up as one firm: “There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants. The agency is administered by the public defender... Each person appointed to a subordinate position established by the public defender is under the supervision and control of the public defender.” (AS 18.85.010, 020, 090)
  - **O&R:** However, the Act does not preclude the PDA from establishing silos. OPA also operates as a single agency administered by a single director, the Public Advocate, who supervises all subordinate positions. OPA functions effectively with many silos, handling criminal cases like the PDA. OPA’s structure is discussed further, below.
  - **O&R:** Montana, which has about 325,000 more people than Alaska, uses a siloed public defender system. In that model, the Chief Public Defender manages all the staff and silos; establishes processes and procedures for information technology and caseload management systems; ensures that public defenders are assigned cases according to experience, training, and manageable caseloads; establishes and supervises a training and performance evaluation program; establishes procedures to handle complaints about public defender performance; and actively seeks gifts, grants, and donations that may be available through the federal government or other sources to help fund the system. MCA 47-1-202. These duties, performed in a siloed structure, seem to adequately describe “administering” the agency, consistent with AS 18.85.020’s requirement for the Public Defender of the PDA.
  - **O&R:** We were unable to identify case law finding it unconstitutional for a public defender agency to function with silos.
  - **O&R:** Law firms operate as single entities with effective ethical walls, information barriers, and confidentiality management programs, software, and structures.<sup>56</sup>
  
- **The PDA:** The PDA is not convinced the data supports that it would be beneficial to create a walled off unit for Anchorage CINA, juvenile, or mental commitment cases. The PDA reviewed every conflict memorandum prepared in 2 months in 2019 and found that 15% were caused by CINA cases, 2% of which were in Anchorage. Another 2% of the

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<sup>56</sup> See, e.g., Abacus, Compliguard Protect 6.

conflicts resulted from a commitment case. Additionally, the PDA began tracking conflicts in its case management system in September 2019. From September to mid-October 2019, 10% of its conflicts were because of CINA, juvenile, or mental commitments.

- **O&R:** While an analysis of all of FY18 conflict memos is a more accurate and comprehensive assessment than an analysis of 3½ months in 2019, the new methodology the PDA has in place for tracking conflicts will provide valuable insight on where the conflicts are occurring and where silos would offer the greatest return on investment.
- **PDA:** Because the Public Defender oversees all of the work of the PDA attorneys, it is impractical to create a firewall between attorneys in the PDA if they all ultimately report to the Public Defender.
  - **O&R:** The Public Advocate is able to oversee all work of the OPA attorneys effectively, even when there are firewalls between them because they are performing criminal defense work for multiple co-defendants conflicted over to them from the PDA.
- **PDA:** Commitment cases arise all over the state. For example, a client might be taken into custody in Kotzebue and be held at the Manilaq Health Center. Or, a case could arise in Kenai and a respondent would be held at Central Peninsula Hospital. Many cases handled ultimately by the Anchorage Civil Division are cases originating in other communities. Sometimes Anchorage attorneys need to consult with, and obtain the assistance of, the local attorney. Creating a wall between the Civil Deputy and outlying offices would diminish the effectiveness of training, mentoring, and consultation.
  - **O&R:** As discussed in further detail, below, OPA accomplishes this by not disclosing confidential information or using case specifics. It is possible to have the Anchorage Civil Division and an additional separate siloed unit to handle overflow cases.
- **PDA:** The Civil Deputy organizes statewide meetings and trainings to share information and improve advocacy. These meetings necessarily involve communication about existing cases and clients. It would be far less effective to provide training and mentoring if actual cases could not be freely discussed.
  - **O&R:** As discussed further below, OPA has found a way to make these trainings and mentoring opportunities effective, while also gaining the benefit of having silos.
- **PDA:** Statewide coordination reduces costs due to improvements in the education and efficiency of attorneys. Also, attorneys share information about experts and other strategies that improve effectiveness.
  - **O&R:** The costs saved from statewide coordination in these areas are extraordinarily less than those incurred by: 1) threatening the PDA's core mission

of being the primary agency providing constitutionally mandated legal representation to indigent clients appointed by the court, and 2) outsourcing increasing amounts of casework to contract attorneys (OPA's supplemental in FY19 was \$900,000).

- **PDA:** Expert hiring is often coordinated among several offices which saves overall costs to the Agency. This would not be possible under the silo model.
  - **O&R:** OPA is able to coordinate many experts among its silos (see below), although some of it cannot because the experts would be conflicted out. The PDA would not face this issue, anyway, because it does not have any clients with interests adverse to one another, so its experts cannot have interests adverse to another client.
  
- **PDA:** Attorneys from Anchorage go to outlying offices to provide mentoring and assistance, particularly for new attorneys. For example, an attorney went to Juneau to assist a new attorney with a complex termination trial.
  - **O&R:** OPA is able to do this with attorneys between silos, as well.
  
- **PDA:** The Anchorage Civil Unit is currently handling many cases for communities outside of Anchorage. In particular, the Anchorage office has currently absorbed CINA cases from Kodiak and Kenai and continues to represent clients in Dillingham, Kotzebue, and Nome. The Civil Division also currently functions as a safety valve to relieve pressure in offices that find themselves short staffed. Many clients have contemporaneous criminal cases—sometimes in different jurisdictions. A silo model would create greater inefficiency in the delivery of legal services to these clients.
  - **O&R:** The PDA could creatively structure its silos to work for its unique needs (e.g., maintain the Civil Unit and create a separate internal unit for certain overflow cases).
  
- **PDA:** CINA parents often move around the state and venue of cases changes with some regularity. Transaction costs for the delivery of services would likely increase if cases had to be moved between offices. Because Anchorage is a medical hub, a CINA case may arise in Anchorage when a family is in town due to the birth of a child or for other medical care. A CINA case filed in Anchorage often transfers back out to the home community upon resolution of the immediate issues in the case. Costs would increase if cases were maintained in an Anchorage Civil silo due to the fact that people travel around the state.
  - **O&R:** The PDA could use an internal silo structure as a “1<sup>st</sup> stop” alternative to sending something to OPA. If it is more effective to keep a CINA case in the Civil Division, then the PDA should do so. But before conflicting a case to OPA, the PDA can send it to its siloed unit.

- **PDA:** The Civil Division operated for a time with essentially one designated appellate attorney. This model was abandoned in part due to workload issues (all CINA cases are on an expedited timeline). As with other functions, a centralized Appellate Unit provides the best quality and most cost-effective statewide delivery of services in appellate cases. A centralized appellate unit can more effectively triage and manage the overall workload of the Agency. Having one designated appellate attorney in a civil silo could result in a situation where an attorney is isolated and potentially either over-worked or under-worked. This attorney would also have no back-up.
  - **O&R:** This seems like a small problem to face, and resolve, compared to the larger problem currently faced by increasing numbers of conflicts going to OPA, several of the most serious criminal defense cases going to OPA, the PDA losing its relevance as the primary criminal defense agency, and the high costs incurred by the State of cases going to contractors.
  
- **PDA:** Currently, the Anchorage CINA and mental commitment attorneys consult regularly with PDA appellate attorneys so they cannot be siloed off from them.
  - **O&R:** To resolve this, there could be one or more designated appellate attorneys who exclusively handle cases exclusively for the new unit.
  
- **PDA:** The Anchorage CINA Deputy leads training statewide, and an argument could be made that placing the Deputy in a siloed unit would preclude him/her from leading that training.
  - **O&R:** However, the CINA Deputy's training duties are not supervisory in nature; they are consultative. Training and consultation could be done without the use of open, existing cases. To the extent there are conflict concerns, hypotheticals could be used to seek advice without using client names or case details. Moreover, the cost of not being able to use the Anchorage CINA Deputy at a more in-depth level for training does not outweigh the benefit of having a siloed Anchorage CINA/Juvenile/Mental commitments/PCR unit that would make PDA and OPA more efficient and cost effective.

If OPA can effectively and ethically provide criminal defense services to indigent Alaskans using a siloed structure, then so can the PDA. The Public Advocate (Director of OPA) oversees all of OPA just like the Public Defender oversees all of the PDA.

According to the Public Advocate, he regularly performs conflict analysis and discusses cases with various attorneys. However, he has no direct access to the case database system, so he cannot pull actual case information. In OPA, case-related expense requests are anonymized and sent without the defendant's name. In the event the Public Advocate is learning something that could be confidential, he does not share it with other units. In his words: "I'm an administrator. I'm not handling trial cases."

Moreover, the Public Advocate said OPA attorneys consult each other all the time. They just cannot cover conflicted cases or give out confidential client or case information to other units.



Attorneys also talk in hypotheticals to get case guidance. OPA also holds OPA-wide training; it does so without giving out confidential information. OPA attorneys talk to each other, discuss trial tactics, and collaborate on motions, and work across siloes.

The Public Advocate explained that he can have an attorney from one unit assist another attorney on a specific trial case as long as there is not an actual conflict. For example, Emma assisted Michael with a manslaughter trial and there was no ethical issue because Emma did not have any conflict with Michael's client. Neither Emma nor Michael have access to any information for each other's cases—they are walled off completely from each other in the case database. He clarified that what OPA attorneys cannot do is chat about confidential information given to them by co-defendants that they represent who are adverse to one another.

The Public Advocate also said he is able to coordinate experts across silos, unless an expert will render an opinion adverse to a co-defendant. In his experience, though, an expert can be used for different cases across multiple OPA units.

DOA's former ASD explained that OPA once faced the same budget challenges the PDA is facing: unable to staff fully because they chronically used funds for attorney positions to pay for other operating expenses (this is discussed further in the next section). However, OPA was able to solve the problem by creating silos.

While creating silos will not allow the PDA the same potential of transferring supervisors anywhere around the state, the model as implemented in OPA has demonstrated this would be a small cost compared to the benefits gained: 1) significantly less conflicts out to OPA, 2) reduced contract services expenses, 3) reduced costs within the PDA, and 4) the PDA maintains its role as the primary public defense agency in the state.

### **The PDA Has Been Budgeted for a Sufficient Number of Attorneys for Its Caseload Under Prevailing Professional Standards, but Faces Significant Recruitment and Retention Challenges**

As discussed above, between FY18-FY20, the PDA has had 102-110 budgeted attorney positions. In FYs18-19, the PDA reported the weighted average of caseload per attorney as 154 and 145, respectively. The PDA calculates the weighted average by taking the total number of each type of case (e.g., 81 B Felonies, 197 CINAs, etc.) and multiplying by its assigned weight (e.g., .25, .375, 1, 5, etc.), and then adding all the sums together.

If the PDA's annual weighted case numbers in FYs18-19 were adjusted to: 1) reflect .25 credit instead of full credit for those cases transferred to private counsel, and 2) remove the cases that would not be counted by ACS or OPA as separate cases, then the PDA's caseload per attorney in FY18-19 would be adjusted as follows:



**Figure 13. FY18-FY19 PDA Adjusted Case Counts Reflecting ¼ Credit for Cases Transferred to Private Counsel and Not Counting Those Cases that ACS and OPA Would Not Count**

	FY18	FY19
PDA Atty Weighted Avg in End of Year Report	154	145
- PTRs & Parole Revocations per Atty <sup>57</sup>	-15	- 11
- Cases Sent to Private Counsel <sup>58</sup>	-2	-1
<b>TOTAL ADJUSTED WEIGHTED CASES PER ATTY</b>	<b>137</b>	<b>133</b>

In October 2018, the former Public Defender provided O&R a Public Defender Caseload Fact Sheet that described developments in the application of caseload standards across the nation. It noted that the ABA standard for an attorney is a maximum caseload of 150 felonies or 400 misdemeanors per year (although a lesser/smaller caseload could still be excessive depending on the complexity of the cases). It also noted class action lawsuits in Washington that resulted in its supreme court adopting new standards in 2012, directing a maximum of 150 felony cases, with cases to be weighted based on complexity.

The Public Defender Caseload Fact Sheet also stated, “In 1998, the legislature’s Division of Legislative Audit conducted a workload study of the Alaska Public Defender Agency; the recommended maximum ethical caseload at 60 hours per week is a weighted average of 59 cases.” However, the 1998 Alaska Legislative Audit did not make any findings with respect to the PDA’s recommended caseload. Rather, the audit found the PDA is understaffed, but that its staffing shortage may be covered, in part, with the addition of lower paid positions, such as investigators, paralegals, legal secretaries, and other clerical positions. It also concluded that bringing the PDA up-to-date technologically would add efficiencies that would further address understaffing issues. We make similar recommendations at the end of this report.

<sup>57</sup> PTRs and Parole Revocations are weighted at .25. FY18 had 5,519 PTRs and Parole Revocations.  $(5,519)(.25)=1,379.25$ . FY19 had 4,284 PTRs and Parole Revocations.  $(4,284)(.25)=1,071$ . These totals were then divided by the same number of staffed attorney positions used in the PDAs reporting (94 for FY18 and 98 for FY19):  $1,379.25/94=14.67$ ;  $4,284/98=11$ .

<sup>58</sup> Cases sent to private counsel were weighted at full felony case credit until around April 2019, when the former Public Defender believed this was erroneously weighted high and corrected it to weight them at .25. Data for cases sent to private counsel were provided in calendar year form, not fiscal year, but 2017 and 2018 had 267 and 257 cases, respectively. So we used an average of 262 to represent FY18 (July 1 2017-June 30 2018). The PDA reported sending 187 cases to private counsel in FY19 between July 1, 2018 and March 31, 2019. These case numbers were multiplied by .75 and then divided by the same number of staffed attorney positions used in the PDA’s reporting. FY18:  $(262)(.75)/94=2$ . FY19:  $(187)(.75)/98=1$ .

Finally, the 1998 audit determined that the PDA needed to capture more reliable and accurate case statistics: “It is crucial that the estimated time it takes a PDA attorney to handle certain types of cases be accurate. To promote accuracy, time estimates should be periodically reviewed and updated. Doing so protects the integrity of the caseload statistics and promotes confidence in using such statistics as a basis for management and budgetary decisions.”<sup>59</sup> More than 20 years later, O&R found that the PDA still does not provide accurate case statistics (see Figure 5 above).

O&R analyzed the standards for caseloads provided in the BJA report *Keeping Defender Workloads Manageable* (2001), presented above in Figure 3. Using the lowest value given when a range was used for felony cases, the average maximum caseload standard was 141. So, a public defender could handle up to 141 felony cases per year (the most difficult cases). An attorney could handle many more cases if s/he were working a mix of cases. For example, the NAC standards say an attorney could handle up to 400 misdemeanor cases. Thus, the PDA’s FY19 weighted average of 145 cases per attorney, which include both felony and non-felony cases, are below the BJA, ABA, and NAC standards (BJA: 141 felony average; ABA: 150 felony average; NAC: 150 felony average). When we removed from the 145 cases those cases that would not be counted by the ACS or OPA, the PDA’s attorneys’ FY19 average caseloads (133 cases) were even farther below the BJA, ABA, and NAC standards.

Moreover, the PDA calculated its weighted averages using the number of attorneys on board rather than the number of attorneys it was authorized and budgeted to hire. For example, in FY19, it calculated its averages using 98 attorneys, but the PDA was authorized and budgeted to hire 8 more attorneys. Similarly, in FY18, the PDA calculated its averages using 94 attorneys, but it was authorized and budgeted to hire 8 more positions. If the PDA hired to its full complement, its attorneys’ average caseloads would be significantly less than 145, or 133, cases (depending on how you count the PDA’s FY19 caseload number).

Therefore, we found the PDA is adequately funded to ensure attorneys have reasonable workloads so as to allow them to provide ethical and competent representation pursuant to prevailing professional norms.

However, the PDA has experienced higher caseloads in offices where it has had staffing difficulties. For instance, in Bethel the office is normally staffed at six attorneys, but the PDA reported that it has been down approximately three attorneys on average (sometimes more). This requires the attorneys in that office to handle up to twice the normal caseload, when the PDA said this office already has one of the PDA’s highest caseloads in the state.

Similarly, one of the former PDA attorneys in Kenai told us that he left the PDA because: 1) his average unweighted caseload was around 180 cases, including about 160 felony cases per year, and 2) he worked an average of 9-10 hour days, Monday through Friday. While he was aware

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<sup>59</sup> Alaska State Legislature Division of Legislative Audit, Department of Administration Public Defender Agency Case Management Time Study and Performance Review, May 15, 1998, p.32.

that a public defender job would require this level of work when he accepted the position, he left for a job that offered more money and less hours. He also said he was frustrated that, in his opinion, the PDA had backed off on its recruiting efforts for the Kenai PDA office, which unnecessarily increased his workload burden. He said that, in the past, Kenai did not have staffing issues because the PDA was more focused on recruitment efforts. He said he was interested in returning to the PDA in a supervisor position in the future, if he were paid more.

Another former PDA regional office attorney described her workload as “crushing;” she said she worked 45-50 hours per week and handled over 200 misdemeanors per year (the NAC and ABA maximums are 400 misdemeanors).<sup>60</sup> Likewise, an attorney from another regional office told us he left because his heavy caseload required him to work 10-12 hours a day and every weekend. He had approximately 180 cases per year, 165 of which were felonies. He said in his opinion, his supervisors were unsupportive of recruitment efforts.

The PDA said it tries to relieve some of the workload burden from the attorneys in these regional offices by farming out cases to larger offices, like Anchorage. When that happens, the PDA must pay the travel costs for the Anchorage attorneys to fly out regularly to handle the regional office caseload. This also stretches the Anchorage office thin because its attorneys are handling cases in other regions.

It is important to note that the American Council of Chief Defenders (ACCD) has stated, “In many jurisdictions, maximum caseload levels should be lower than those suggested by the NAC.”<sup>61</sup> The ACCD goes on to explain that new practice areas have emerged for public defenders, which have “made even more clear that a ‘felony’ does not always simply require the work of one felony case.”<sup>62</sup> The ACCD also recommends, ““that defenders, contract and assigned counsel, and bar association leaders in each state review local practice conditions and consider developing standards that adjust attorney caseloads when the types and nature of the cases handled warrant it. The increased complexity of practice in many areas will require lower caseload ceilings.”<sup>63</sup> It is for that reason that the ACCD advocates public defender agencies use case weighting systems, like the one the PDA uses, to determine the number of cases an attorney can actually handle.<sup>64</sup>

While the PDA’s regional office resources are strained, the PDA’s weighted and non-weighted caseload numbers are within NAC standards and those of other states across the nation. It

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<sup>60</sup> By comparison, Florida’s 14<sup>th</sup> Judicial Circuit Public Defender’s Office reported an average of more than 800 cases assigned to each attorney in FY16, and the Miami-Dad public defender’s office reported that average assistant public defenders were handling 400 felony cases at a time, and experienced attorneys were juggling 50 third-degree felony trials a week. Zack McDonald, Panama City News Herald, *In Court, Majority Seek Public Defenders Regardless of Income*, March 4, 2018.

<sup>61</sup> American Council of Chief Defenders Statement on Caseloads and Workloads, Resolution, p. 6 (August 24, 2007)

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.* at 7.

therefore is fulfilling its ethical and constitutional obligations within prevailing professional standards.

*The PDA’s Consistent >8% Vacancy Rate*

That said, just because the PDA’s caseloads are within constitutional and ethical standards does not mean that the PDA attorneys are functioning under optimal workload conditions or that the PDA is operating as efficiently as possible with its resources. The PDA’s recruitment and retention problems present significant management challenges for the agency. The table below illustrates the number of PDA attorney hires and separations by Fiscal Year, as reported by the PDA:

**Figure 14. FY18-FY20 PDA Attorney Hires and Separations**

	FY18	FY19	FY20 (as of 10/16/19)
Atty Hires	15	23	9
Atty Separations	-12	-24	-11
<b>NET TOTAL</b>	<b>3</b>	<b>-1</b>	<b>-2</b>

The PDA has had a fairly consistent 8% vacancy rate, which is extra resource capacity it could use to handle cases in regional offices or to provide additional support staff to its attorneys. According to PDA reporting, it has operated at a more than 8% vacancy rate since FY17. In fact, in FY17, its vacancy rate was 11.5%.

The PDA stated it is required by OMB to account for 4-7% vacancy rate, so it holds 4-7 of its 110 attorney positions open. OMB’s guidelines for a division/component with more than 51 full-time employees is to account for a vacancy rate between 4% and 7% so it does not overspend its budget. However, that does not mean the PDA should never fill 4-7 attorney positions.

For an organization of the PDA’s size (193 employees), it should be assumed that the agency will experience at least 93 months (4%) of vacancy time across its positions just through normal turnover. In other words, an agency will experience about 3½ months of vacancy between the time someone departs a position and the time the new person starts. For the PDA, if 26 staff members (attorneys and support staff) transition in a year with an average of 3½ months between departure and new hire, that will achieve the targeted 4% vacancy rate. The PDA would not need to hold any attorney positions open; it could fill all its attorney vacancies.

A discussion with DOA’s current and former ASDs and a closer examination of the PDA’s budget shows that the PDA has been using funds from its personal services line (vacancies) to pay for other expenses like contractors (more than \$3.7 million FYs17-20), commodities, travel, and facilities).

For example, in FY20, the PDA has budgeted for a 4.44% vacancy rate. The PDA will experience this in the natural course of business, given its turnover rate; it does not need to intentionally sit on 4-7 attorney vacancies, needlessly raising the caseload burden on its other attorneys. However, the PDA spent \$677,600 more in non-personal services costs at the same time last year than what it has budgeted this year. If all costs remain the same from last year to this year, the PDA will need to raise its vacancy factor to 7% (intentionally keeping attorney positions vacant) so it can pull from its personal services funds to pay for travel, commodities and other service expenses like contractors.

Keeping vacancy rates high so the PDA can use personnel funds to pay for other expenses is not a sustainable or efficient use of the PDA's resources. The PDA either needs to request an increment in its budget to pay for its other expenses, or it needs to reduce its spending for these other expenses so that it can maximize use of the attorney positions that it has been authorized and budgeted to hire.

### *Recruitment Is Becoming More Difficult*

Historically, the PDA said it has been able to attract a significant number of new hire candidates, both experienced and entry-level—it had a stack of resumes from which to select. It has been able to do so by paying public defenders at the equivalent pay rates as state prosecutors, paying competitive salaries that have attracted more experienced practitioners to Alaska from other states, and offering a robust summer internship program.

The PDA's summer internship program recruits between 24-30 second-year law school students and places them in its 13 statewide offices. Under the Alaska Bar Rules, with proper supervision by a licensed attorney, these interns are permitted to participate in court proceedings. While the internships themselves are unpaid, the PDA has been able to compete with more prestigious, paid internship programs by offering both a robust, hands-on experience and paid roundtrip airfare for the students. Over 30% of the PDA's current attorneys started as interns in the internship program.

Over the last year however, the PDA said recruitment has become more difficult, and there are not as many resumes from which to select. According to the PDA, many factors have contributed to this difficulty, including:

- The economy has become stronger in other states, providing an abundance of legal jobs, including more public defender jobs.
- Many states have increased their public defender salaries over the last few years and those salaries are now comparable to Alaska salaries in areas of the country where the cost of living is significantly lower, making it much more difficult to attract skilled attorneys to the PDA.

- Currently, there is also a plethora of legal jobs in Alaska. A review of the Alaska Bar Association employment board lists an abundance of both state and private attorney positions. Many of these positions are for jobs that do not carry the caseload that the PDA carries, and many of the private jobs offer a compensation package that cannot be matched by the PDA. Many experienced PDA attorneys are leaving for these other positions because they either offer a better caseload/work-life balance, better compensation, or both.
- Finally, under a new Dunleavy Administration policy, all new hires above range 18 (including all attorneys) must receive additional approval from: 1) OMB and then 2) the Chief of Staff. Altogether, these 2 additional approvals were adding up to 2½ weeks onto the PDA’s standard hiring timeframe.<sup>65</sup> In that time, the PDA lost a couple highly qualified applicants who took other offers. This not only added to the PDA’s recruitment problems, but also ended up wasting the PDA’s time and resources conducting multiple interviews and reference checks only to start the recruitment process from the beginning.

The DOA Commissioner requested an analysis in the delay in approvals and found the requests had been delayed in OMB up to 2 weeks. So, in early September 2019, the DOA Commissioner received an exemption from OMB approval of PDA hires. Now the PDA hires only receive Chief of Staff approval. Since then, the turnaround time for Chief of Staff has added 2-9 days (including weekends). The approvals that took closer to 9 days occurred when the Chief of Staff was traveling. Since the exemption from OMB approval was obtained, only one of the PDA’s selected candidates has withdrawn from consideration.

The full process from the PDA selecting a candidate to making an offer to the candidate is as follows:

- The PDA selects a candidate, the request then
- Routes to DOA Department of Administrative Services
- Routes to Division of Personnel and Labor Relations
- Routes to Commissioner’s Office
- Routes to Chief of Staff
- Routes back to Commissioner’s Office
- Returns to the PDA to make official offer

Sometimes the whole process can move in a matter of days; other times it can take 3 weeks. While the PDA’s process is not different from other offices or agencies hiring staff above range 18, the length of time the process takes poses a significant risk to the PDA’s recruitment efforts, given the challenges the PDA is facing.

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<sup>65</sup> The standard timeframe includes coordination with Human Resources and the Division of Personnel and Labor Relations, and approval from the DOA Commissioner’s Office. That process existed prior to changes implemented by the Dunleavy Administration.



O&R also compared the salaries the PDA offered with comparable salaries at a public defender’s office in another location with a high cost of living: Los Angeles, California. The federal government has a standard pay schedule for its employees, and then offers a locality payment increase based on the assessed cost of living for different areas. Alaska’s cost of living increase is 28.89%; Los Angeles’s is 31.47%. Therefore, federal employees in the same grade and step in Los Angeles make more than those in Alaska.

During this study, the Los Angeles (LA) County Public Defender’s Office posted the salaries for its Public Defender positions.<sup>66</sup> The chart below shows how they compare to annual salaries currently earned at the PDA:

**Figure 15. LA County Public Defender and Alaska PDA Salary Comparisons**

	LA County	Alaska PDA
Entry Level Attorney	\$67,884-\$89,040 <sup>67</sup>	\$66,600-\$106,908 <sup>68</sup>
Mid-Level Attorney	\$92,404-\$135,075 <sup>69</sup>	\$78,492-119,088 <sup>70</sup>
Senior Attorney	\$132,108-\$193,128	\$114,420-\$182,976 <sup>71</sup>
Deputy Public Defender	\$174,972-\$264,840	\$118,524-\$157,580

The PDA is offering competitive salaries at entry level positions compared to a public defender office in an area with a 2.5% greater cost of living. However, the PDA’s salaries are not competitive for mid- and higher-level attorney positions.

We also compared the PDA’s salaries to an area with a much lower cost of living: Omaha, Nebraska. The federal government’s cost of living increase for Alaska employees is 28.89%; for Omaha it is 15.87%. In a 2016 report, attorneys in Omaha’s Douglas County Public Defender’s Office made between \$71,760-\$156,635; they likely are earning higher salaries now.<sup>72</sup> The PDA’s entry level salaries in urban offices (like Anchorage) were less than Omaha’s starting salaries.

<sup>66</sup> See <https://www.governmentjobs.com/careers/lacounty/classspecs?keywords=deputy%2Bpublic%2Bdefender>.

<sup>67</sup> Deputy Public Defender I

<sup>68</sup> During the time of this review, PDA offered entry level attorneys \$66,600-\$106,908, depending on whether they were located in urban offices or rural, hard-to-fill locations. PDA also offered \$2,500 towards moving expenses.

<sup>69</sup> Deputy Public Defender II. The PDA said Deputy Public Defender II positions handles cases of average difficulty, equivalent to an Attorney III in the PDA.

<sup>70</sup> The PDA said LA’s position is equivalent to an Attorney III position in the PDA.

<sup>71</sup> The PDA said LA’s position is equivalent to an Attorney V in the PDA.

<sup>72</sup> Douglas County Employee Salaries 2016, <https://dataomaha.com/salaries/2016/douglas-county/public-defender>



We believe the PDA is offering salaries competitive with other urban areas' public defender offices for entry level positions. However, Alaska salaries may struggle to compete for mid- and high-level attorneys, and they also may struggle to compete with legal positions in areas of the country where the cost of living is significantly lower. This may explain part of the reason the PDA experiences 12%-22% vacancy annually.

#### *The PDA's Recruitment Methods*

The PDA posts its job announcements as vacancies occur on its State website, in its mailing list, through the Alaska Bar Association, and through three national organizations. It also has recently started posting permanent attorney positions, rather than just summer internship positions, on individual law school websites. The PDA received approximately 77 applications in 2017, 119 applications in 2018, and 83 applications in 2019. Applications are often applied to multiple locations based on the applicant's preference.

For the past 17 years, the PDA also has attended the Equal Justice Works public interest career fair in the Washington, D.C.-area that is very effective at generating many high-quality recruits for the agency. The event attracts upwards of 1,400 law school students and offers a very high return on investment in the form of providing the ability to recruit, interview and hire both interns and entry level attorneys. Attendance at this event has been critical for the PDA's recruitment efforts.

The PDA also recruits heavily from its internship program. Approximately 31% of the PDA's current attorneys came through its internship program. In 2018, the PDA hired 22 of its student interns; in 2017, the PDA hired 16 of its student interns. Many of the internship offers are made at the Equal Justice Works annual career fair. The PDA recently made offers to at least 8 candidates interviewed at the fair this year.

#### *The PDA Struggles to Retain Attorneys*

The PDA lost 47 attorneys between July 1, 2017 and October 16, 2019. In FY19, PDA's attorney attrition rate was approximately 23%. The PDA has not historically conducted exit interviews, but it began conducting them in the summer of 2019. Attorneys leaving the PDA reported the following reasons contributed to their decisions to leave:

- The PDA caseloads are more demanding than in other legal positions;
- They can no longer handle the stress;
- They feel they cannot handle cases competently; and
- They feel completely overwhelmed.

O&R also conducted several interviews of attorneys who previously worked for the PDA and now work for OPA or the Department of Law. These attorneys reported the following reasons contributed to their decisions to leave:

- Worked 9-10 hour days in regional offices;
- Needed more family time;
- Supervisors did not support recruitment efforts;
- Caseload was too heavy;
- Supervisor resigned and was replaced with one who “did not care;”
- Supervisors were not supportive;
- Lack of recruitment;
- Needed more training and support; and
- Needed additional administrative staff.

As attorneys leave, it exacerbates the caseload burden for the rest of the attorneys in the PDA—they are left to assume the departing attorneys’ cases. Vacated positions are not filled right away. Even when they are, it takes a while for new attorneys to get up to speed and effectively able to assume a full caseload. The high turnover rate in the PDA creates a significant burden on the PDA’s attorneys.

The PDA faces more critical vacancy challenges in offices outside of Anchorage. In some situations, the PDA said it has had no applicants for advertised vacancies in these offices. As vacancies remain unfilled in these offices, more lawyers leave because the heightened caseloads drive them out, which creates even higher caseloads for the lawyers who stay. The cycle is then perpetuated, and attrition gets worse.

#### *Judge Threatened to Hold the PDA in Contempt and Fine the Agency*

In the summer of 2019, the PDA had a high-level attorney resign 3 weeks before her client was scheduled to be tried on murder charges. Her resignation was precipitated by the loss of 2 high-level attorneys in the Kenai office, one due to retirement and the other due to a high caseload and other office issues. The loss of those attorneys caused many of their cases to shift to the remaining high-level attorneys, while the vacancies remained. The PDA told O&R that the attorney who resigned became so overwhelmed and emotionally exhausted by her double-sized caseload that she felt she needed to resign before she committed ineffective assistance of counsel on her cases.

In July 2019, Judge MacDonald in Fairbanks threatened to hold the PDA in contempt and monetarily fine the agency for its failure to meet its constitutional obligations due to its inability to effectively represent clients. Judge MacDonald also initially considered ordering the PDA to pay the Department of Law’s costs associated with the last-minute continuance. Finally, the court asserted that the PDA should be required to have two high-level attorneys on each unclassified trial case to prevent issues like this from happening in the future. However, with an attorney vacancy rate of 8.49% and its attrition challenges, the PDA does not have enough attorneys to provide two high-level attorneys on each unclassified case.<sup>73</sup>

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<sup>73</sup> The PDA had 214 unclassified felonies in FY19.

If the PDA remains unable to improve its recruitment and retention going forward, in the future, it may face contempt citations and monetary fines from courts around the state.

### *Recruitment and Retention Challenges Threaten the PDA's Ability to Fulfill Its Constitutional Obligations to Its Clients*

The PDA has sufficient funding to hire attorneys to handle its total caseload. Under the NAC standards and standards set by other states, however, it does not have sufficient attorneys in several of its regional offices. The PDA's highest weighted average caseloads in FY19 were in 3 of those regional offices: Ketchikan (181), Kodiak (202), and Dillingham (264).

These regional recruitment and retention issues present critical management challenges for the PDA. The PDA's challenge in fully staffing its positions and retaining attorneys within the agency threaten its ability to fulfill its constitutional obligations to effectively represent indigent defendants. Although the PDA has had funding to hire 8%-11.5% more attorneys in the 4 years examined by O&R (FY17-FY20), it has not hired to full complement in that time.

Under AS 18.85.090, the Public Defender has independent authority to appoint and remove staff members as necessary to enable the PDA to carry out its responsibilities, subject to existing appropriations. We identified no interference with the Public Defender's ability to structure the PDA, recruit for positions, determine how to staff positions (attorneys or support staff), and hire candidates. The Public Defender has full authority to determine how to use appropriations to hire staff, when to hire staff, what positions they will fill, and what duties they will perform.

Resolving the recruitment and retention issues is a significant management challenge for the PDA to address. Below, we offer recommendations for the current Public Defender's consideration that could assist with ameliorating the PDA's retention and recruitment challenges.

### **The PDA Would Operate More Efficiently with Fully Utilized Support Staff and with Technology Upgrades**

The 1998 Legislative Audit of the PDA found that 56% of PDA attorneys responded that someone with less training could do more than 10% of the tasks they perform. The audit found the PDA's ratio of administrative support staff to total staff and attorneys was 1 to 15. Sample responses from PDA attorneys included:

- 1) *We are understaffed badly as to investigators and paralegals. Attorneys are ending up doing work that could be done more effectively by investigators and paralegals.*
- 2) *We have a legal secretary who is so intelligent and has so much ability; it is a shame we can't use her as a paralegal or litigation assistant. A position of that sort could take 20-25% of the workload from my weary shoulders.*
- 3) *My main complaint, and one that echoed throughout the smaller offices, was the lack of support staff (paralegal and investigators).*

- 4) *The 'legal secretary', obligated to serve four attorneys and an investigator, was simply buried in an avalanche of details and administrative tasks. The investigator worked half time for five attorneys. This is a very poor situation.*

The 1998 Legislative Audit recommended the PDA add paraprofessional and clerical positions to its staff to increase efficiencies in its office. The audit found the ratio of support staff to total staff in the PDA was 1 to 15, while the ratio of support staff to total staff of the Criminal Division in the Department of Law was 1 to 5.<sup>74</sup>

The BJA identified that the optimal ratio of support staff to attorneys should be as follows:<sup>75</sup>

- Paralegal
  - Felony, 1:4
  - Misdemeanor, 1:5
  - Juvenile, 1:4
  - Mental Health, 1:2
- Investigator
  - Felony, 1:4
  - Misdemeanor, 1:6
  - Juvenile, 1:6
- Law Clerk Appeal
  - 1:2
- Secretary
  - Felony, 1:4
  - Misdemeanor, 1:6
  - Juvenile, 1:5

The BJA also noted that public defender offices that do not maintain these support staff ratios will need to reduce attorneys' annual caseloads (e.g., a maximum of 100-150 felonies, 300 misdemeanors, etc.).<sup>76</sup>

The PDA does not divide its support staff by felony, misdemeanor, juvenile, and mental health cases. In FY19, the PDA had the following ratio of support staff to attorneys:<sup>77</sup>

- Paralegal
  - Anchorage Felony/Misdemeanor, 1:7
  - Southcentral Felony/Misdemeanor, 1:5
  - Southeast Felony/Misdemeanor, 1:5

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<sup>74</sup> The Department of Law Deputy Attorney General stated the ratio of support staff to total staff in the Criminal Division now is about 1 to 3. However, the Department of Law said it would operate at optimum efficiency if it could get that ratio down to 1 support staff for every 2 attorneys.

<sup>75</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, p. 10 (2001).

<sup>76</sup> *Id.*

<sup>77</sup> PDA FY19 Case Statistics Final (October 6, 2019). We received updated FY19 staff count numbers on Nov. 3, 2019 that showed 2.5 more staff members than the October 6 report had. It is not clear why the PDA did not have one consistent number for staff onboard as of June 30, 2019. This analysis uses the October 6, 2019 numbers.

- Southwest Felony/Misdemeanor, 1:5
- Northern Felony/Misdemeanor, 1:5
- Northwest Felony/Misdemeanor, 1:5
- Juvenile/Mental Health/CINA, 1:5
- Investigator
  - Anchorage Felony/Misdemeanor, 1:7
  - Southcentral Felony/Misdemeanor, 1:5
  - Southeast Felony/Misdemeanor, 1:5
  - Southwest Felony/Misdemeanor, 1:5
  - Northern Felony/Misdemeanor, 1:7
  - Northwest Felony/Misdemeanor, 1:5
  - Juvenile/Mental Health/CINA, 0
- Appellate Support
  - Paralegal, 1
  - LOA, 1
- Legal Office Assistant (LOA)
  - Anchorage Felony/Misdemeanor, 1:6
  - Southcentral Felony/Misdemeanor, 1:3
  - Southeast Felony/Misdemeanor, 1:5
  - Southwest Felony/Misdemeanor, 1:5
  - Northern Felony/Misdemeanor, 1:5
  - Northwest Felony/Misdemeanor, 1:3
  - Juvenile/Mental Health/CINA, 1:10
- The PDA also has: 1 Accounting Technician, 2 Administrative Assistants, 1 Administrative Officer, 1 Office Assistant, an Associate Attorney, paralegal, 3 LOAs, and 1 Protective Services Specialist. These staff do not support casework, but assist with functions like budget, accounting, procurement, hiring, travel, payroll, legislation, and records.

Using BJA’s optimal support staff ratios as a general guideline for the PDA staffing, it appears the PDA will operate more efficiently and reduce its caseload burdens on attorneys if the PDA uses its vacancies to hire more support staff rather than attorneys in the near-term, particularly in offices with higher staff to attorney ratios, like in Anchorage and in the Northern region.

*The PDA’s Support Staff are Not Sufficiently Trained or Utilized*

Our interviews with the PDA attorneys more than 20 years after the 1998 Legislative Audit have revealed that the same issues persist in the PDA attorneys’ experience as did during the 1998 audit. One attorney estimated he spends about 10-20% of his time performing administrative work. Other attorneys and staff said only attorneys review evidence for cases, perform legal research and prepare case exhibits, but that paralegals or LOAs could help perform these duties. All interviewees said training for paralegals and LOAs needs to be improved.

The PDA paralegal’s job description includes tasks that are currently only being performed by the PDA attorneys (Appendix B). Interviewees told us generally, paralegals are not trained or

given the opportunity to assist the attorneys beyond clerical functions. After reviewing actual job functions at the PDA, we found that paralegals are not performing all the of the job duties described in their job descriptions. Paralegals are being underutilized but have the capacity to significantly impact attorney workloads for the better.

Paralegals often perform work that, if performed without the supervision of an attorney, would constitute the unauthorized practice of law. According to the State of Alaska position description for paralegals (Appendix B) and the National Association of Legal Assistants' (NALA) Model Standards and Guidelines for Utilization of Paralegals,<sup>78</sup> these functions may include, but are not limited to the following:

- Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the paralegal, and the client contact is under the supervision of the attorney.
- Identification and investigation of potential defense expert witnesses, coordinating expert communications, contracts, and testimony.
- Conduct investigations and statistical and documentary research for review by the attorney.
- Conduct legal research and draft legal documents for review by the attorney.
- Draft correspondence and pleadings for review by and signature of the attorney.
- Summarize depositions, discovery responses and testimony for review by the attorney.
- Attend depositions, court or administrative hearings and trials with the attorney.
- Author and sign letters providing the paralegal's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

All the LOAs and paralegals we interviewed stated they believed their positions could be better utilized to assist attorneys in a more meaningful manner. Specifically, the paralegals believed they could help perform the substantive work (i.e., drafting motions, legal research, and summarizing depositions, etc.) and alleviate some of the workload on the attorneys. The Associate Attorney (Senior Paralegal) from the civil division, however, stated she performed these tasks. She also supervised one LOA and one paralegal.

We also found that the training for paralegals and support staff is sporadic and not as effective as it could be. One interviewee suggested the training include cross-training within a unit so that individuals can share institutional knowledge allowing the units to function cohesively, regardless of who leaves. Interviewees also believed that the training policy and procedures needed to be updated and refined to better assist administration of their job duties. The Associate Attorney, however, stated that she actively trains the staff that she supervises. If paralegals and assistants are trained consistently to perform more substantive duties, we believe this would help alleviate some of the demanding workload on the PDA attorneys.

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<sup>78</sup> <https://www.nala.org/sites/default/files/files/banner/Model%20Standards.pdf>.



With greater training and full utilization of LOAs and paralegals, attorney workload demands will be reduced so they can offer higher quality representation to their clients.

### *The PDA Would Operate More Efficiently with Technology Upgrades*

The 1998 Legislative Audit recommended that the PDA upgrade the computerization of its offices to increase efficiencies. In interviews with staff members, we also found areas in which the PDA could further advance the efficiency of its operation through upgraded technologies.

For example, PDA attorneys currently place a personal call to each client to remind them of upcoming court dates. Not only is this function not entrusted to support staff, but it could be handled by an automatic SMS notification system, which could increase case updates given to clients with while also reducing time burdens on attorneys.

In addition, we found that the PDA does not use voicemail transcription technology, which would allow public defenders to read their voicemail messages, enabling them to quickly respond to urgent situations in environments where they otherwise cannot listen to a voicemail.

Finally, we found that some public defenders do not have their own state-issued mobile phone, but only have a desk phone and their personal mobile phone. If all attorneys had a state-issued mobile phone, they would have the capability to transcribe voice messages into text built into the phone. They also would have other benefits that come from having a work-issued mobile device, such as being able to have communication with their clients over an office number while they are in-between meetings and court appointments.

### **The PDA May Be Representing Clients Who Do Not Qualify as Indigent**

Determining who can and who cannot afford private counsel is a critical step for ACS. Ensuring only the indigent receive services from the PDA raises the quality of defense services by limiting resources to those who truly need them. It also guards against criticism that public resources are used to represent wealthy defendants.<sup>79</sup>

### *The Law and Procedures for Establishing Indigency in Alaska*

In the state of Alaska, Alaska Administrative Rule 12, Procedure for Counsel and Guardian Ad Litem Appointments at Public Expense, and the Alaska Rules of Court Rules of Criminal Procedure govern the procedures for appointment of counsel at public expense. Alaska Administrative Rule 12 provides, in pertinent part:

The court shall appoint counsel or guardian *ad litem* only when the court specifically determines that the appointment is clearly authorized by law or rule,

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<sup>79</sup> <https://www.brennancenter.org/publication/eligible-justice-guidelines-appointing-defense-counsel>.



and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

For purposes of public defender appointments, Alaska Statute 18.85.170(4) defines an “indigent person” as a person who:

...at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party’s dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance.

The procedure for evaluating indigency is set forth in Rule 39 of the Alaska Rules of Criminal Procedure. In evaluating indigency, the Alaska state court or its designee (e.g. pretrial services) is required to calculate the defendant’s total financial resources by adding up his/her income, cash, assets readily convertible to cash (including property minus a Homestead Exception, which is currently \$72,900) and available credit. The court then subtracts allowable household expenses and then compares that final number to the likely cost of obtaining private representation. The court has discretion to adjust the expected cost of representation upward for complex cases, or if it determines the actual cost of hiring a local attorney in that area is higher.

The court may appoint counsel without further inquiry, if: (1) the defendant currently receives public assistance benefits through a state or federal program for indigent persons defined in Alaska Rule of Criminal Procedure 39.1; (2) counsel was appointed for the defendant within the past 12 months, based on an examination of the defendant’s financial circumstances, and the defendant’s financial condition has not significantly improved; or (3) the gross annual income available to the defendant is less than the adjusted federal poverty guidelines amount for the defendant’s household size, and other financial resources (cash, assets, and credit) available to the defendant are worth less than 50 percent of the likely cost of private representation through trial.

If the court does not find that the defendant is presumptively eligible, it must conduct an inquiry sufficient to determine whether the defendant is eligible for court-appointed counsel under the aforementioned standard.<sup>80</sup> The court may make this determination based on the information then-available or, when appropriate, may: 1) require the defendant to submit a completed financial resources affidavit, with supporting documentation of income; 2) require the defendant to submit information or documentation concerning particular assets or expenses; 3) require the defendant to appear at a representation hearing or a pretrial services

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<sup>80</sup> Exception: the court may determine that a defendant is ineligible for court-appointed counsel under AS 18.85.170(4) if the defendant has disposed of assets in order to qualify for appointed counsel

interview; or 4) require the defendant to make reasonable efforts to retain private counsel and to report these efforts to the court orally or in writing.

The court can review the defendant's finances at any point during the trial and may terminate the appointment of PDA counsel, if it determines the defendant is no longer indigent. The PDA attorneys also are responsible for advising the court if they learn of a change in the defendant's financial status that would render him/her financially ineligible for appointed counsel.<sup>81</sup>

The court also can enter a judgment for the cost of counsel from the date of appointment through the date of termination, if it is found that the defendant never was eligible in the first place.<sup>82</sup>

### *The Practice for Establishing Indigency and Appointing PDA Counsel in Alaska*

Alaska Pre-Trial Services (APS), located in the Anchorage courthouse, provides indigent screening of defendants for Alaska criminal court judges when indigency is deemed in question. Defendants are sent to APS for an additional screening and interview process. Defendants are required to prepare and submit the following documentation:

1. Request for Appointed Attorney. Defendants must agree to provide APS all requested financial information and are informed that they can be prosecuted for perjury under AS 11.56.200, if false information is provided. The request also authorizes anyone to release to ACS all information concerning assets, liabilities, account balances and income sources for the previous 3 years. This request includes, but is not limited to, all current and past employers, banks, credit and depository institutions, accountants, brokers and credit bureaus.
2. Financial Statement. This form requires a detailed disclosure of income, number of household members, monthly household expenses, adjustment to expenses, cash and assets. It also asks for a listing of all credit cards, including limits and balances owed. There is a warning on the form that states: "Making False Statements Under Oath is a Crime."

However, APS does not verify defendants' asset or income information, other than by conducting interviews of defendants and accepting the information they provide at face value. Even though APS has defendants' permission to access and verify all their financial information, it does not do so. Defendants are then appointed PDA counsel, based on their request for a court-appointed attorney and representations they make in their interview and on their financial statements.

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<sup>81</sup> Alaska Administrative Rule 12(f).

<sup>82</sup> *Id.*

The former Public Defender confirmed the court system often fails to do a proper inquiry into the eligibility of defendants to receive PDA services, but he stated that the PDA does not investigate its own clients.<sup>83</sup> We also interviewed several assistant public defenders who stated they had prior concerns about the indigency qualifications of some of their clients. For example, one PDA attorney said he has represented “a few [defendants] who quite clearly did not” qualify for court-appointed counsel, including a client who had a “\$600k plus Hillside home.”

The former Public Defender said he did not know if the PDA was getting more appointments than it was supposed to as a result of the court system’s failure to do proper inquiries.<sup>84</sup>

#### *Other Practices for Determining Indigency and Appointing Legal Counsel*

At the federal level, the Federal Poverty Guidelines are used to make determinations of eligibility for uncompensated services.<sup>85</sup> The majority of states use these guidelines, or a modified version of them, as a baseline for determining if someone will receive public defense

#### CASE STUDY

In conducting a review of the application of Alaska indigency standards, we found some concerning cases. In 2018, John Doe was charged with Operating While Under the Influence. He was not employed at the time the case was arraigned, but his spouse made approximately \$40,000/year. They own a house valued at approximately \$530,000. The mortgage on the house was \$456,000. They owned the house since 2013, and the equity in the house was over \$100,000. The full value of the property (\$530,000) would be considered an asset readily convertible to cash, minus the homestead exception (\$72,900). The minimum monthly payment on the loan would be considered an “allowable expense” which could be subtracted from their total resources.

John Doe was required to fill out a qualification form through Pre-Trial Services to disclose his income, assets and debts, although we were unable to obtain a copy of it. Subsequently, public records indicated that in January of 2019 John Doe obtained employment earning over \$100,000/year. Defendants are required to update the court if there is a material change in their financial condition, but we found no evidence to verify John Doe updated the court or the PDA regarding his new job. We also found no evidence his PDA attorney knew about the new job.

Following the Alaska Courts own estimates, the likely cost of private representation through trial for this misdemeanor case was \$2,000.

<sup>83</sup> Interview of Quinlan Steiner, April 1, 2019, hour 1:00.

<sup>84</sup> *Id.* at 1:01.

<sup>85</sup> <https://www.hrsa.gov/get-health-care/affordable/hill-burton/poverty-guidelines.html>.

representation in court.<sup>86</sup> Many states also consider public assistance as a qualifier for public defender assistance. As the cost of providing indigent defense services has risen, states have attempted to contain those costs by reducing the number of defendants who are financially eligible for court-appointed counsel.

For example, in early 2019, North Carolina implemented a 3-part plan to better screen and verify indigency.<sup>87</sup> Specifically, it:

- 1) Revised and simplified the affidavit of indigency to capture relevant information in a format that is understandable for defendants;
- 2) Created an informational bench card to provide a standard set of factors for judges to review as they make an indigency determination;<sup>88</sup> and
- 3) Provided training and technical assistance to court personnel to increase the entry of information related to appointed counsel into the court database system.

From 2001-2005 Lancaster County, Nebraska, piloted a screening and verifying program to establish indigency for defendants. Prior to the implementation of the program, it was left to a judge's discretion as to whether a defendant qualified as indigent and was eligible for a court-appointed attorney. The pilot program increased the efficiency in indigency appointments by collecting information outside of the hearing and reducing in-court time. However, the County found "no indication that the program was impacting (reducing) the number of defendants receiving court-appointed attorneys, and there was no indication of a cost savings from verification." Recommendations to improve the program included: a) establishing a small application fee to request a court appointed attorney, and b) staff a pretrial service position with an employee who has investigative skills and whose responsibility is solely to screen and verify financial information.<sup>89</sup>

According to the National Association of Criminal Defense Lawyers, in Florida, a "partially indigent" person is unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person's family. Ohio defines "marginally indigent" defendants as those with a "total monthly gross income that is less than 187.5 percent of the current federally established poverty levels, pursuant to the Federal Poverty Guidelines." In Kansas, a defendant is partially indigent "if the defendant's combined household income and liquid assets are greater than the defendant's reasonable and necessary living expenses but less than the sum of the defendant's reasonable

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<sup>86</sup> National Assn of Criminal Defense Lawyers, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, March 2014 (p. 8).

<sup>87</sup> 2018 Report on Indigency Standards (March 2018), [https://www.ncleg.gov/documentsites/committees/JLOCJPS/2017-18%20Interim/6-March%2015,%202018\\_NIC\\_AOC\\_IDS/06\\_AOC\\_Indigency\\_Standards-2018\\_03\\_15.pdf](https://www.ncleg.gov/documentsites/committees/JLOCJPS/2017-18%20Interim/6-March%2015,%202018_NIC_AOC_IDS/06_AOC_Indigency_Standards-2018_03_15.pdf).

<sup>88</sup> The factors include: 1) income and expenses, 2) assets and debts, 3) case factors and costs associated with securing an attorney, 4) current federal and poverty guidelines and county-based living wage information, 5) receipt of need-based government benefits, 6) has-or recently had-appointed counsel in another case, 7) resides in a corrections or mental health facility, and 8) is unable to post bail or bond.

<sup>89</sup> American Judges Assn Court Review: The Journal of the American Judges Assn, *Evaluating Court Processes for Determining Indigency*, Elizabeth Neeley and Alan Tomkins (2007).

and necessary living expenses plus the anticipated cost of private legal representation.” Massachusetts categorizes defendants who have an income greater than 125 percent but less than 250 percent of the Federal Poverty Guidelines as “indigent but able to contribute.”<sup>90</sup>

Eligibility screening programs appear to discourage applicants who are not eligible for court-appointed counsel from pursuing their requests any further. Also, other states’ experience suggests that eligibility screeners operating with a set of uniform guidelines applied in a systematic fashion will produce fewer and more accurate findings of indigency than when eligibility decisions are made based on defendants’ representations alone or a judge’s discretion.

The Brennan Center for Justice at New York University School of Law offers six guidelines for “best practices” in determining indigency:<sup>91</sup>

1. Screen people seeking the appointment of counsel to ensure that they are financially eligible.
2. Apply screening criteria and processes uniformly and commit them to writing.
3. Ensure that screening is performed by someone who does not have a conflict of interest.
4. Ensure that counsel is provided to those unable to afford it.
5. Streamline screening to speed up the process and save money.
6. Ensure that required procedural protections are in place.

While eligibility screening may result in public defense services representing fewer defendants, the use of uniform guidelines ensures those services will be available for clients who are truly indigent. Where clear guidelines are provided for making the eligibility determination (such as presumptive tests for defendants on public assistance), the cost of conducting screening should be minimal.

### **Allegations of Undue Interference with the Independence of the Defense Function**

In the course of this review, O&R received allegations from the Sixth Amendment Center (6AC) that it had been reported to 6AC that public defense providers in Alaska are experiencing “undue interference with the independence of the defense function.” 6AC did not provide further specificity regarding the allegations.

At the 2019 annual conference of the Alaska Federation of Natives (AFN), former Alaska Attorney General Jahna Lindemuth said Alaska’s public defenders are hampered by both rising

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<sup>90</sup> National Assn of Criminal Defense Lawyers, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, March 2014.

<sup>91</sup> Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, 2008.

violent crime and felony rates, as well as reduced funding.<sup>92</sup> She also said a large part of this can be laid at the feet of the Dunleavy administration.<sup>93</sup>

However, O&R found the PDA has received increased funding and financial support FYs17-20. We also did not find evidence of anyone hampering public defenders' efforts or any undue interference with the independence of their defense functions. Specifically, the evidence shows:

- The PDA received \$1.4 million more in the FY20 budget under Governor Dunleavy than it did in the FY19 budget under Governor Walker. This was more than a 5% increase in its budget;
- As stated above, the PDA has sufficient vacancies authorized and budgeted for its current caseload, but has not filled its vacancies, leaving a vacancy rate of 8% or more across the agency. PDA Deputy Public Defender commented at AFN that the PDA's criminal section is 20% vacant.<sup>94</sup> But these vacancies are not the fault of the Dunleavy administration, nor are they evidence of undue interference with the PDA. Rather, they are evidence that the PDA has been resourced with more budget and staff positions than it is using effectively;
- The Dunleavy administration and Alaska State Legislature passed a comprehensive criminal justice reform bill (HB49) signed into law on July 8, 2019. This bill included an additional \$1.3 million (4.8%) for the PDA for an additional 10 positions;
- By being located in DOA, the PDA has a Commissioner-advocate at the level of the Attorney General to insulate the PDA from undue influence, involvement, and control by those whose interests are directly or indirectly adverse to the PDA's attorney-client relationship;
- The DOA Commissioner has announced efforts to find funding to cover all PDA attorneys' \$660 annual bar dues (this will be the first time ever PDA attorneys' bar dues are covered);
- The circumstances surrounding the transition of the former Public Defender were in accordance with the process set forth in the Public Defender Act;<sup>95</sup>
- The person appointed Acting Public Defender was not politically affiliated with the Governor, and she had excellent qualifications for the position, including former experience as an assistant public defender;
- The DOA Commissioner has petitioned the judiciary at the request of PDA attorneys for policy changes at the courthouse;
- The Governor's office has approved an exemption from OMB approval for PDA hiring requests;
- The judiciary has no supervision of the PDA;

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<sup>92</sup> Michael Lockett, *As Alaska public defenders offices are foundering, Juneau holds steady*, Juneau Empire (October 27, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> AS 18.85.050



- Initially, the former Public Defender was held to the same travel limitations as all other state officials. Within those limitations, he was granted permission to travel in person to speak with legislators about the PDA's budget needs. He also was given permission to travel again when the judicial council funded his travel. Later, at the request of the Legislature, he was given an exception to the travel restriction and traveled in person again to meet with legislators about his budget; and
- The PDA is included as an equal and valued partner in the criminal justice system: the DOA Commissioner is considered a core member of the HB49 Crime Bill team, DOA is invited to the public safety events promoted by the Governor's office because it is the PDA's parent agency; and DOA is included in discussions about the public safety mission.

## RECOMMENDATIONS

To improve the efficiency of PDA operations and the efficacy of PDA services, we make the following recommendations:

1. **Improve Accuracy of Caseload Reporting.** The PDA should review and improve its methods for tracking cases so it can report consistently and accurately on its number of cases (weighted and unweighted), every case that is transferred to OPA for representation, how its weighted cases combine with OPA's cases to present an accurate picture of the agencies' combined workload, and what the average weighted caseload is compared to the PDA's authorized attorney complement. Protecting the integrity of caseload statistics promotes the confidence of using such statistics as the basis for management and budgeting decisions. The PDA's budget requests to the Governor and Legislature could be better supported with caseload data that has greater transparency and clarity.
2. **Develop a Uniform Definition of "Case."** Per the recommendation of the BJA, we recommend the PDA and OPA develop a uniform definition for counting cases. It would be optimal if the Department of Law Criminal Division used the same definition. This would afford the greatest clarity and transparency in understanding the comparative performance, operations, and budget needs of these agencies.
3. **Require Timekeeping for the PDA.** The PDA should begin regularly tracking attorneys' time on case matters using timekeeping software. Timekeeping software with a mobile app component would be particularly efficient for the PDA. Time keeping is the best way to discover true costs, and it is far more accurate than a case weighting or Delphi system for approximating time spent on cases. Tracking actual time spent on cases and other activities will allow the Legislature and any other interested party to see exactly how public defenders spend their time. This will protect the integrity of the PDA's data reporting and promote confidence about the PDA's caseloads and budgetary needs without the need for estimates or speculation.

The timekeeping aspect of this review revealed the PDA needs better software for timekeeping, adequate time for training and adaptation to timekeeping, and assistance from support staff to implement timekeeping statewide. Additional findings and recommendations regarding timekeeping will be included in the Supplemental report we will issue regarding the time study.

4. **The PDA Should Validate and Refine Its Weighting System.** After collecting consistent, accurate, and analyzable timekeeping data for at least one year, we recommend the PDA use the results of attorneys' timekeeping to adjust weights given to cases to reflect actual practice conditions and the time necessary to handle cases.

5. **Improve Quality Control on Review of Potential Conflicts Before Transferring Them to OPA or Private Counsel.** Conflicts increase expenses. The PDA must thoroughly evaluate each case for conflict before referring them to OPA. We recommend the PDA permanently institute a more robust quality control process for conflict review like it piloted in early 2019 to ensure that only properly conflicted cases are sent outside of the PDA to OPA. Given the Deputies' other duties and individual caseloads, this may best be accomplished by the creation of a separate, designated conflict attorney position. This position could supervise the conflict paralegals and review their work to ensure it is accurate and thorough. This position also could provide training to attorneys and staff throughout the PDA on conflicts of interest to ensure they are making appropriate referrals and closing conflicts timely for accurate reporting.
6. **Create a Separate Silo in PDA's Anchorage Office.** We recommend the PDA consider creating a separate unit in its Anchorage office, walled off from the other practice areas, to handle some CINA, juvenile, mental commitments, and PCR cases. With less cases being conflicted out to OPA, there may be a need for additional staff to deal with the anticipated additional caseload if the separate unit is created. Additionally, the PDA will need to budget for costs associated with creating the physical barriers required to create the walled off unit, as well as costs associated with some database reconfiguration to meet the ethical requirements of having this separate unit within the PDA. The upfront costs should be viewed in light of the long-term savings to the state for reducing the conflict rate.
7. **Charge a Small Fee to File a CINA Appeal.** A large percentage of parents appeal adverse CINA rulings, even though statistics show that a very small number of these rulings are overturned. These types of appeals are extremely time-consuming (and thus expensive) for the public appellate lawyers on both sides of the case. This is because these types of cases are very fact dependent and because the multitude of facts occur over many years of family life. Lawyers on both sides must comb through a huge number of records to prepare their cases. Several years ago, the agencies involved in the CINA process examined the possibility of charging parents a small fee to pursue an appeal. The charging of a fee would be constitutional if set at a reasonable sum. A small fee would encourage parents to evaluate whether they were just pursuing an appeal because it was free, or because they had a reasonable chance of winning. We recommend the PDA pursue the necessary legislative or court policy changes necessary to implement this change in the fee schedule.
8. **Automate and Synchronize Case Management Systems.** We recommend the PDA work to develop an interface between ACS's Court View and the PDA's case management to enable more automation for case information and court dates. We also recommend the PDA work to create an interface between the PDA's and the Department of Law's case management systems for seamless transfer of discovery information.

9. **Maximize Hiring to Full Complement.** We recommend the PDA either request an increment in its budget to pay for its other expenses or find ways to reduce its spending in other expense categories so it does not need to maintain a high vacancy rate to balance its budget. We also recommend the PDA plan to hire all positions, understanding that staff turnover will create a natural vacancy rate that meet's OMB's standards. The total months of vacancy should be assessed halfway through the fiscal year to determine whether any positions vacant at the time should be delayed before they are advertised and/or filled to in order to stay within the PDA's budget.
10. **Improve PDA Retention and Recruitment.** While there is nothing that can be done regarding the number of legal jobs available to potential PDA applicants, there are some things that could help PDA recruit and retain attorneys:
- a. The PDA benefits greatly from participation in the annual Equal Justice Works Career Fair. We recommend funding be included in the PDA's budget for 2 attorneys to attend this fair each year, as long as the PDA continues to successfully recruit significant numbers of interns or new hires from the fair.
  - b. The PDA's travel budget should include roundtrip airfare for up to 30 interns each year, as this is one of the strongest recruitment tools the agency has. Although the interns are unpaid, offering free roundtrip airfare incentivizes them to accept PDA internships, thereby providing the PDA valuable caseload assistance and the opportunity to screen candidates on-the-job for 8-10 weeks before deciding whether to make a hiring offer.
  - c. The PDA's budget should continue to include a stipend for moving expenses to new hires. While this amount covers only a portion of a new hire's moving expenses, it allows the PDA to offer a valuable incentive to candidates, which gives the PDA some competitive advantage over other public interest job opportunities.
  - d. The PDA should develop and implement a plan for managing its predictive vacancy cycle so the agency can be filled to 95%+ of its staffing complement at all times.
  - e. Improve Efficiency of Hiring Process. We recommend the DOA Commissioner, ASD, and Public Defender work together to find ways to make the selection-to-offer process more efficient for PDA candidates.
11. **Hire More Support Staff.** Using BJA's optimal support staff ratios as a general guideline for PDA staffing, it appears the PDA will operate more efficiently if the PDA uses its vacancies to hire more support staff rather than attorneys in the near-term, particularly in offices with higher staff to attorney ratios, like in Anchorage and in the Northern region. We recommend the PDA higher a greater percentage of support staff to attorneys for the next 2 years to increase the number of support staff available per attorney. This will improve the efficiency of the PDA and reduce the "felt caseload" of each attorney as more of the administrative work associated with their cases is handled by support staff rather than themselves.

12. **Improve Paralegal and Support Staff Recruitment and Training.** The PDA should implement a new strategy to recruit and hire more paralegals and support staff, improve their training, and engage them in more substantive duties. The PDA also should consider establishing a paralegal manager position who oversees training and manages all paralegals at the PDA. This position would ensure paralegals are operating according to their job descriptions and are able to substantively assist the attorneys. In addition, the PDA should consider recruiting paralegal interns from the University of Alaska (UA) system. The PDA would be able to use this internship program to recruit permanent top-quality paralegal hires. Increasing support staff positions would help attorneys handle their voluminous clerical work.
13. **Improve Training.** The PDA will benefit greatly from having an annual training conference to enable more effective utilization of current staff, both attorneys and support staff. The PDA also should develop specific training plans for employees as part of the annual performance evaluation system process. The PDA should provide formal orientation when employees start their jobs about their roles, responsibilities, expectations, and how to use the systems and technologies within the PDA.
14. **Improve Technology.** We recommend the PDA invest in purchasing State-issued mobile phones for all their attorneys. All attorneys would then be equipped with technology that transcribes their voice messages into text, and they could accomplish tasks while in the courtroom or at meetings outside the office.
15. **Establish a Pro Bono Program.** The PDA should consider establishing a pro bono program to enlist the assistance of attorneys from outside the agency. A program like this could help augment strained resources at the PDA, especially at a time when recruitment and retention remain a challenge.

Pro bono programs have been implemented by public defender and civil legal aid agencies across the country. At the Legal Aid Society, the largest provider of indigent defense services in New York City, the Criminal Defense Pro Bono Project provides opportunities for volunteer attorneys to serve as full-time externs or donate a third of their time over a 9-month period. These attorneys often handle misdemeanor cases and work arraignments, but they can also serve as co-counsel on complex felonies or assist with appellate work. Similarly, through the Ensuring Equal Justice Initiative, the Miami-Dade Public Defender has received pro bono assistance (usually direct representation in misdemeanor cases) from more than 100 private attorneys since the program's inception.

The Alaska Bar Association also could partner with the PDA in supporting this program by offering reduced bar fees for those who volunteer a certain number of pro bono hours with the PDA. Additionally, the PDA could develop partnerships with private firms that would count their attorneys' volunteer time against the billable hours expected of them by the firm.

- 16. Implement a Rigorous Indigent Screening Process.** We recommend ACS implement a detailed vetting process to ensure that public defenders are not being assigned to non-indigent persons. Alaska Pre-Trial Services could perform more rigorous screening of all criminal defendants appointed counsel from the list it receives from the courts daily. Defendants who claim to be indigent should be appointed provisional public counsel pending further screening and verification. Follow-up screening and asset verification could be performed by Pre-Trial Services once the information is submitted. APS could be allowed full access to online informational databases for verification purposes including the PFD, Department of Labor data (for current employment and income), Alaska Real Property, and DMV (for current vehicle/ boat registrations) before court appointed counsel is approved. A few minutes of screening and verification could save significant time for PDA attorneys and better ensure our limited public defender resources are reserved for those Alaskans who are truly in need.
- 17. Evaluate Crime Trends and Resource the PDA Accordingly.** As implementation of HB49 progresses, the effect on the PDA's caseload should be closely monitored. The PDA is a critical part of Alaska's public safety system, and its caseload could grow substantially with the State's intentional increase in law enforcement efforts. We recommend the Governor and Legislature consider current and comprehensive data regarding the PDA's caseload in making future PDA budget decisions to ensure the PDA is adequately funded to achieve its mission. As part of this data analysis, criminal cases conflicted over to OPA also must be considered so OPA is resourced adequately as well.



## APPENDIX A

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550 West Seventh Avenue, Suite 1700  
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907-269-7450

Governor Michael J. Dunleavy  
STATE OF ALASKA

### MEMORANDUM

TO: Commissioner Kelly Tshibaka

FROM: Michael J. Dunleavy   
Governor

DATE: February 26, 2019

SUBJECT: Mission and Direction

This memorandum provides direction, as we have previously discussed, that in addition to your role as the Commissioner of the Department of Administration, it is my intent and expectation that your expertise be utilized to review, investigate, and provide policy direction, not only as it relates to the Department of Administration, but as it applies statewide in the areas of management, audit, and government efficiency, as directed, on my behalf.

## APPENDIX B

### Public Defender Agency: Paralegal I/II Job Description

The duties of the position may include, but are not limited to the following:

- Identifying, investigating, researching, and analyzing potential conflicts of interest in Agency cases. Making recommendations for further investigation, interviews and actions based on their conflict of interest analyses.
- Advanced case management; to include identifying discovery to be requested, and preparation of documents, evidence and exhibits for trial and contested adjudications. Assisting in managing large caseloads using an internal case management system for reporting and ensuring accuracy in caseload data for individual attorneys or offices.
- Utilization of the internal case management system for drafting letters and pleadings.
- Provide support in the implementation and administration of the Agency case management system.
- Provide project management support for statewide Agency initiatives, management projects, and efficiency reviews.
- Identification and investigation of potential defense expert witnesses, coordinating expert communications, contracts, and testimony.
- Disposition mitigation by assisting clients with case plan compliance and accessing social services and treatment programs.
- Professional communications with the Court system, opposing counsel, clients, Department of Corrections, Office of Children's Services, Division of Juvenile Justice and local community resource organizations.
- Coordinate and conduct meetings with clients. Participate in administrative meetings with the Office of Children's Services and other case participants on behalf of clients in parent defense cases.
- Assist in the collection of information, documentation and evidence to be used in formal and informal post- conviction relief.